73261-7

FILED
Jun 15, 2016
Court of Appeals
Division I
State of Washington

NO. 73261-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

IBRAHIM ADAM,

Appellant.

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

The Honorable Dean S. Lum, Judge
The Honorable Patrick Oishi, Judge

AMENDED BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant competent to stand trial.

2. The trial court erred in entering findings of fact 1 and 2 regarding appellant's competency.[1] CP 70.

3. The trial court erred in entering conclusion of law 1 and 2 regarding appellant's competency. CP 70.

4. The jury instruction defining "prolonged period of time" constituted a judicial comment on the evidence. CP 124 (instruction 24).

Issues Pertaining to Assignments of Error

1. To be competent to stand trial, the accused must be able to understand the nature of the charges against him and assist in his own defense. Following a competency evaluation, a psychologist from Western State Hospital concluded appellant suffered from paranoia, delusions, unspecified schizophrenia, post traumatic stress disorder, and substance abuse disorder and was not competent to stand trial. As the only witness called during a subsequent competency hearing, the psychologist maintained appellant was not competent to stand trial. Nonetheless, the trial court found appellant competent, concluding that he understood the

[1] The trial court's written findings of fact and conclusions of law regarding defendant's competency are attached as an appendix.

nature of the charges and was capable of assisting in his defense. Where the evidence shows appellant was unable to rationally assist his attorney in his defense because of his mental deficiencies, did the trial court abuse its discretion in finding appellant competent to stand trial?

2. An exceptional sentence based on a pattern of abuse requires the State to prove multiple incidents occurring over a prolonged period of time. Where the judge instructed the jury that "prolonged period of time" meant "more than a few weeks," was the State relieved of its burden to prove this element of the aggravating factor beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural History.

The King county prosecutor charged appellant Ibrahim Adam with one count of felony stalking for incidents that occurred between September 30, 2013 and February 21, 2014. CP 26-27. The State further alleged four aggravating factors: (1) the offense was part of an ongoing pattern of abuse occurring over a prolonged period of time; (2) the offense was committed shortly after Adam was released from incarceration; (3) the offense was committed for Adam's sexual gratification; and (4) the

offense was committed within sight or sound of the complaining witnesses' minor child. CP 26-27; 2RP[2] 10.

Before trial, Adam brought a pro se motion requesting a competency evaluation. CP 29-34. The trial court granted his request. CP 35-40.

Dr. Robert Powers, a licensed psychologist, interviewed Adam in the King County Jail on November 7, 2014. CP 49-57; 1RP 64-65. Powers diagnosed Adam with a number of mental deficiencies including; unspecified schizophrenia spectrum and other psychotic disorder, post-traumatic stress disorder, poly-substance abuse disorder, delusions, and paranoia. CP 54-55; 1RP 67-69, 88-89. Powers concluded that due to his mental illness, Adam was not competent to stand trial because he lacked both the ability to understand the proceedings against him and to assist in his defense. CP 55; 1RP 67. Despite Powers' evaluation and his opinion, the trial court found Adam competent to stand trial following a competency hearing. 1RP 158-59; CP 69-71. The trial court entered written findings of fact and conclusions of law. CP 69-71.

---

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – April 15, 16, 30; May 16; September 29; November 19; and December 23, 2014; 2RP – January 20, 2015; 3RP – January 21, 2015; 4RP – January 22, 2015: 5RP – January 26, 2015; 6RP – January 27, 2015; 7RP – January 28, 2015; 8RP – January 29, 2015; 9RP – February 27, 2015.

A jury found Adam guilty as charged. CP 83; 7RP 110-13. The jury also returned special verdicts finding that Adam committed the offense for purposes of sexual gratification and within sight or sound of a minor child. CP 84-85; 7RP 110-13. The parties then proceeded to a bifurcated jury trial on the two remaining aggravating factors: prolonged pattern of abuse and rapid recidivism. 7RP 113-14. The jury found Adam guilty of both aggravating factors. CP 116; 8RP 46-48.

Based on the special verdicts, the trial court imposed an exceptional sentence of 84 months imprisonment. CP 129-41; 9RP 22-23. The trial court also imposed 36 months of community custody. CP 129-41. The trial court waived all non-mandatory legal financial obligations (LFOs). 9RP 23; CP 131. Adam timely appeals. CP 162-63.

2. Trial Testimony.

Adam immigrated to the United States from Eritrea in 2005. CP 50. His understanding of English is facilitated by use of Tigrinian language interpreters. CP 50; 1RP 46, 50, 58-59, 73. Sheila LaRose is a Seattle attorney. Between November 2012 and July 2013, she represented Adam in his prior criminal case involving a charge of stalking. 5RP 32, 36-38.

LaRose continued to accept telephone calls from Adam even after her representation of him ended. 5RP 38-39, 128. LaRose explained the

calls did not relate to her representation of Adam, but rather, involved Adam professing her love for LaRose and desire to marry her. 5RP 39, 44. In response, LaRose began screening Adam's telephone calls. 5RP 39, 128. Adam continued to call several times each week and leave LaRose voicemail messages. 5RP 39, 42, 45.

In November 2013, LaRose saw Adam at a coffee shop close to her office. LaRose told Adam to stay away from her and stop calling. 5RP 45-46, 128. When he did not, LaRose asked her supervisor, Leo Hamaji, to get involved. 5RP 40. Hamaji spoke to Adam and told him that LaRose would get in trouble if he continued to call her. 5RP 40-42, 60-62. Hamaji acknowledged that what he told Adam was a lie. 5RP 62.

In February 2014, LaRose found a manila envelope in her mailbox. The envelope contained no postage. The envelope contained literature on how Caucasian women could convert to Islam. 5RP 47-48, 157-58, 160-61. LaRose gave the literature to police. 5RP 47-48.

The following day, LaRose received a voicemail from Adam in which he said that he had seen her daughter and their pets. 5RP 48-50. LaRose also received a voicemail message from Adam which indicated that he had been watching her bedroom, had seen LaRose naked, and wanted to touch her. 5RP 44-46, 63. LaRose filed several police reports and obtained a protection order. 5RP 99-100, 128-29.

Later, LaRose saw Adam's face pressed against her picket fence looking toward her house. LaRose's daughter grabbed a toy bow and arrow from her bedroom. 5RP 51-52. Adam did not say anything and did not try and come through the gate. He left when LaRose called police. 5RP 51-54.

LaRose saw Adam the next day after she left work. 5RP 55-56. Adam appeared from inside a stairwell as she walked toward her car. 5RP 56, 58, 93, 130-31. LaRose called police but Adam left before they arrived. 5RP 56-58, 61; 6RP 14-16, 21, 28-31. Police removed a bag attached to LaRose's car. The bag contained a note, several cards professing love for LaRose, and lingerie. 5RP 59, 62-53; 6RP 17-21, 23-24.

Early the next morning LaRose heard a knock on her bedroom door. She saw Adam's face and body outside her bedroom window. Adam left when LaRose called police. 5RP 100-02. Adam reappeared but once again left before police arrived. 5RP 102-03. LaRose asked her ex-husband to come stay at the house with her. 5RP 104-05. After her ex-husband arrived, LaRose heard an "angry knock," and then her bedroom shattered from a rock thrown through it. 5RP 106-08. When police arrived they found no one at the house. 5RP 108; 6RP 28-33, 40-44; 7RP 11-14.

LaRose received voicemail messages from Adam the next day. One stated that if LaRose was sleeping with her ex-husband, he would find him and shoot him. 5RP 108-09, 135. In another message Adam said he was sorry and noticed that LaRose's window had been boarded up. 5RP 110, 126-27.

LaRose decided to accept Adam's next telephone call so she could set up a meeting with him. LaRose intended to have police arrest Adam at the meeting. 5RP 111-12. LaRose recorded her call with Adam. Adam said he was sorry about the broken window and acknowledged that his behavior had scared LaRose. 5RP 114, 126.

LaRose agreed to meet Adam at a coffee shop. LaRose's colleagues called police when Adam arrived at the shop. 5RP 121-22. Police arrived and arrested Adam. 5RP 122-23; 6RP 50-52. Adam was cooperative. 6RP 54.

Police officer Randy Christiansen listened to several of the voicemail messages that Adam left on LaRose's work phone. 6RP 85-88, 107. Christiansen could not discern any threats or sexually suggestive comments in the messages. 6RP 108.

Christiansen also served a protection order on Adam at the King County Jail. 6RP 90. Adam told Christiansen that he was "out of my mind and drinking a lot." 6RP 90. Adam said he wanted to be convicted

so he would be deported to Eritrea where he could see his children. 6RP 91.

Christiansen had also spoken with Adam previously during an unrelated stalking investigation. 6RP 92. Christiansen told Adam that his behavior was causing the complaining witness fear. 6RP 92-94, 97-98, 110. Adam explained to Christiansen that his behavior was not taboo in his home country of Eritrea. 6RP 109.

C. ARGUMENT

1. ADAM WAS NOT CAPABLE OF ASSISTING IN HIS DEFENSE AND THEREFORE WAS NOT COMPETENT TO STAND TRIAL

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The conviction of an accused while legally incompetent violates the due process right to a fair trial. U.S. Const. amend. 14; Const. art. 1, § 3; Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966); State v. Minnix, 63 Wn. App. 494, 497, 820 P.2d 956 (1991).

The constitutional standard for competence to stand trial is whether the accused 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.'" In re Personal Restraint of Fleming, 142 Wn.2d 853, 861- 62, 16 P.3d 610 (2001) (quoting Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). "A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001) (citing State v. Harris, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990)), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012); RCW 10.77.010(15); Lafferty v. Cook, 949 F.2d 1546, 1551 (10th Cir. 1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 548 (1992).

a. The Trial Court Erred in Finding Adam Competent.

"Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Marshall, 144 Wn.2d at 277 (citing Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)). "[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).

"[T]he consequences of an erroneous determination of competence are dire. Because he [the accused] lacks the ability to communicate effectively with counsel, he [the accused] may be unable to exercise other 'rights deemed essential to a fair trial.'" Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). A trial court's decision on competency is reviewed under the abuse of discretion standard. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). The trial judge may make a competency determination based on a number of factors, including the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302, cert. denied, 387 U.S. 948, 87 S. Ct. 2086, 18 L. Ed. 2d 1338 (1967). Counsel's representation concerning the competence of his client is a factor that is entitled to considerable weight. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978),

Where a trial court weighs the evidence, its findings of fact must be supported by substantial evidence. See, State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (to withstand review, findings must be supported by substantial evidence). Substantial evidence is that character of evidence

which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. Bland v. Mentor, 63 Wn.2d 150, 385 P.2d 727 (1963).

Here, the court found "the defendant understands the nature of the criminal proceedings against him/her and the defendant is able to effectively assist counsel in the defense of his/her case." CP 70 (Finding of Fact 1). The court also found "the defendant has the ability to understand the nature and consequences of a change of plea." CP 70 (Finding of Fact 2). Based on these findings the court concluded "the defendant is competent to stand trial." CP 70 (Conclusion of Law 1). Contrary to the trial court's cursory findings, the evidence shows that Adam was not competent to stand trial.

Powers is a trained psychologist and has conducted over 1,500 competency evaluations while working at Western State Hospital. 1RP 61-63. He interviewed Adam at the King County Jail, reviewed Adam's jail and Western State Hospital medical records, including prior competency evaluations conducted by the hospital, and reviewed discovery material provided by the prosecutor's office. CP 51-53; 1RP 66-67. Based on this information, Powers diagnosed Adam with a number of mental deficiencies including; unspecified schizophrenia spectrum and other psychotic disorder, post-traumatic stress disorder, poly-substance abuse disorder, delusions, and paranoia. CP 54-55; 1RP 67-69, 88-89. Powers concluded that due to his

mental illness, Adam was not competent to stand trial because he lacked both the ability to understand the proceedings against him and to assist in his defense. CP 55; 1RP 67.

The trial court's written findings do not indicate that it found Powers' report, testimony, or diagnosis not credible. Rather, the trial court's questions and oral findings make clear that it found Adam competent because of an unsupported belief that it would be inappropriate to find "a whole category" of people charged with stalking incompetent based on their individual fixation of a particular person. 1RP 75-76, 126-27, 149-50, 159. The trial court explained its reasoning as follows:

> I don't think that it's appropriate to basically determine that simply a whole category of clients who simply have a – a fixation on somebody become incapacitated and unable to – to assist their counsel simply because whenever you ask them about that subject they tend to digress into various conspiracy theories, as long as they are genuinely capable of answering the questions, even if there are long digressions in between, and I think they are capable of assisting their attorney and meet – meet the basic standards of competency

1RP 159.

This finding is not supported by the record however. Powers' testimony made clear that it was not Adam's diagnosis of delusions that made him incompetent "per se." 1RP 128. As Powers explained, "there are people with erotomatic delusion who would be assessed as

competent." 1RP 128. Rather, in Adam's case, it was "an interplay of a lot of factors," that rendered him incompetent. 1RP 118, 122, 125-29, 135. For example, Powers explained that Adam was "much more" paranoid and delusional then when he previously found him competent to stand trial after a June 2012 evaluation. 1RP 68, 72, 81-82. Powers opined Adam's mental health had regressed during his time in jail. 1RP 140-41. Powers observed Adam communicate with his defense counsel and noted that Adam was "not able to stay focused." 1RP 106, 124. Because of Adam's "rigid" belief that the criminal charges were the result of a government conspiracy, Adam was unable to help his attorney develop a logical defense strategy. 1RP 122-23. Based on Powers' personal observations of Adam, he concluded that Adam was not able to set aside the delusions and listen to defense counsel's legal advice. 1RP 129.

Defense counsel also represented that based on his on observations and conversations with Adam, he did not believe Adam was able to assist counsel. 1RP 145-48. As an example counsel explained that because of his delusional government conspiracy beliefs, Adam was unable to focus, appreciate his peril, and develop a logical defense strategy.[3] 1RP 145-49; CP 60-65.

[3] At one point during trial, against the advice of his attorney, Adam rolled up his pant legs to make them appear like shorts. 5RP 91-92.

The State presented no evidence which would refute Powers' conclusion that Adam was not competent to stand trial. The trial court's findings do not indicate that it considered any evidence other than Dr. Powers report, testimony, or diagnosis, or the representations of counsel, all of which concluded that Adam was not competent to stand trial. Based on that evidence the trial court's findings are unsupported and its conclusion that Adam was competent to stand trial was an abuse of discretion.

b. Rationality is a Basic Requirement of Competency.

The State may argue, as it did below, that Powers' applied an incorrect legal standard in concluding that Adam was incompetent to stand trial. 1RP 153-54; Supp. CP ___ (sub no. 106, State's Memorandum in Support of a Competency Finding, dated 12/3/14) at 12-14. Such an argument should be rejected for several reasons.

First, the trial court did not find that Powers applied an incorrect legal standard. Second, Powers' conclusion as to Adam's incompetence clearly applied the correct legal standard: "It is my opinion that due to the symptoms of his mental illness, Mr. Adam lacks the capacity to understand the nature of the proceedings against him and he lacks the capacity to assist in his defense." CP 54; 1RP 67; Fleming, 142 Wn.2d at 861- 62.

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

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

Tate, 1 Wn. App. at 3-4 (emphasis added).

The Tate court recognized this rule was consistent with recent decisions of the United States Supreme Court. It cited Dusky v. United States, for the relevant "test": whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Tate, 1 Wn. App. at 4.

Prior to enactment of the competence statute, Washington courts continued to apply this test. See, e.g., State v. Gwaltney, 77 Wn.2d 906, 907, 468 P.2d 433 (1970) ("In this state, and in many others, a person accused of a crime is held to be legally competent to stand trial if he is capable of properly understanding the nature of the proceedings against him and if he is capable of rationally assisting his legal counsel in the defense of his cause."); State v. Mahaffey, 3 Wn. App. 988, 993, 478 P.2d 787 (1970) ("A defendant's competency to stand trial is to be pragmatically tested by evaluating his capacity to understand his peril and to rationally assist his counsel in his defense."), rev. denied, 78 Wn.2d 997 (1971); State v. Nabors, 8 Wn. App. 199, 201, 505 P.2d 162 (1973) (quoting Gwaltney).

RCW 10.77.010 was adopted in 1973. In Israel, this Court stated the statute "codified the common law language set forth in State v. Gwaltney," which required a defendant to be capable of rationally assisting his legal counsel in the defense of his cause. 19 Wn. App. at 776. Indeed, Washington courts continued to read into the statute a requirement that a defendant be able to assist rationally in order to be found competent. See State v. Swanson, 28 Wn. App. 759, 760, 626 P.2d 527 (1981) ("The standard for competency to stand trial is if the accused is 'capable of properly understanding the nature of the proceedings against

him and if he is capable of rationally assisting his legal counsel in the defense of his cause'"); State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982) (test is whether defendant is capable of rationally assisting his legal counsel); State v. Hicks, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985) (citing RCW 10.77.010 and Wicklund, supra, for the proposition that accused must be capable of rationally assisting); Harris, 114 Wn.2d at 427-28 (although ability to assist is a "minimal requirement," what is required is that a defendant be able to "communicate rationally with counsel"); Marshall, 144 Wn.2d at 281 (holding a person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense).

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

2. THE TRIAL JUDGE IMPERMISSIBLY COMMENTED ON THE EVIDENCE BY INSTRUCTING JURORS THAT A "PROLONGED PERIOD OF TIME" MEANT MORE THAN A FEW WEEKS

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes improper judicial comment on the evidence if it resolves a

disputed factual issue. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002), rev. denied, 149 Wn.2d 1003 (2003). When a judge comments on the evidence in a jury instruction, prejudice is presumed. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State bears the burden of showing no prejudice. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Before an exceptional sentence can be imposed under RCW 9.94A.535(3)(h)(i), the State must prove beyond a reasonable doubt that the offense was part of an "ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims," consisting of multiple incidents "over a prolonged period of time." What constitutes a "prolonged period of time" is not defined by statute – it is a question of fact for the jury. State v. Epefanio, 156 Wn. App. 378, 392, 234 P.3d 253, rev. denied, 170 Wn.2d 1011 (2010).

However, the court instructed the jury, as a matter of law, "The term 'prolonged period of time' means more than a few weeks.'" CP 124 (instruction 24); 8RP 30; WPIC 300.17. Because there was evidence that the alleged pattern of abuse lasted more than a few weeks, the instruction resolved any factual dispute about whether it occurred over a prolonged period of time. The instruction relieved the State of its burden to prove this element of the aggravating factor beyond a reasonable doubt.

This issue is controlled by the Washington Supreme Court's recent decision in State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015). The court held the instruction "constituted an improper comment on the evidence because it resolved a contested factual issue for the jury. The instruction essentially stated that if the abuse occurred over a time period that was longer than a few weeks, it met the definition of a 'prolonged period of time.'" Id. at 559.

In Brush, the alleged abuse occurred over two months, so "a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" 183 Wn.2d at 559. The court concluded the State did not meet the "high burden" of showing no prejudice. Id. at 559-60.

The same is true here. Rational jurors could have doubted whether five months constituted a *prolonged* period time, except for the fact they were instructed it did. And, even if there is sufficient evidence, as a matter of law, the instruction still erroneously prevented the jury from making an ultimate factual determination on whether five months constituted a prolonged period of time. Adam's exceptional sentence therefore cannot be sustained under this aggravating factor.

Based on the jury's finding of four aggravating factors, the court imposed an exceptional 85 month sentence. CP 129-41; 9RP 23. In its written findings and conclusions, the court stated, "In the event that an appellate court affirms at least one of the substantial and compelling reasons [for an exceptional sentence], the length of the sentence should remain the same." Supp. CP __ (sub no. 152, Findings of Fact and Conclusions of Law for Exceptional Sentence, dated 7/16/15) at 2.

Typically courts will not remand for resentencing where it is clear the trial court would impose the same sentence based on other valid aggravating factors. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). However, in State v. Smith, the court invalidated two of the four reasons given for the exceptional sentence. 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), overruled on other grounds, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d. 466 (2006). The trial court's written findings included boilerplate language similar to that used here. Id. at 58 n.8. The court nonetheless remanded, finding it could not conclude, with requisite certainty, that the trial court would impose the same sentence on remand. Id. at 58 n.8.

Like in Smith, one of the four aggravators imposed here is invalid. This Court should accordingly vacate Adam's exceptional sentence and

remand for resentencing without consideration of RCW 9.94A.535 (3)(h)(i). State v. Becker, 132 Wn.2d 54, 65-66, 935 P.2d 1321 (1997). Additionally, this Court should remand for correction of the judgment and sentence regarding this invalid aggravating factor. CrR 7.8(a); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

3. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Adam was entitled to seek review at public expense, "by reason of poverty," and therefore appointed appellate counsel at public expense. Supp. CP ___ (sub no. 139, Order Authorizing Appeal in Forma Pauperis, Appointment of Counsel and Preparation of Record, dated 3/7/15). If Adam does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by

conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Adam's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. 9RP 23; CP 131.

Without a basis to determine that Adam has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

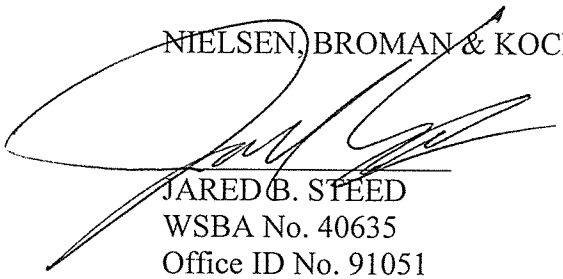
D. CONCLUSION

For the reasons discussed above, this Court should reverse Adam's conviction and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 15th day of June, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Ibrahim Adam

No. 73261-7-I

Certificate of Service

On June 15, 2016, I e-filed, served and or mailed directed to:

Ibrahim Adam, 381810
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Containing a copy of the amended opening brief, re Ibrahim Adam
Cause No. 73261-7-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.

John Sloane
Office Manager
Nielsen, Broman & Koch

06-15-2016
Date
Done in Seattle, Washington