

NO. 34291-0-II

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

STATE OF WASHINGTON, Respondent

v.

ROBERT ALLEN ANDERSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00493-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

BY 
DEPUTY

STATE OF WASHINGTON

06 AUG 25 PM 1:18

FILED
COURT OF APPEALS
DIVISION II

MM 8-23-06

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1
II. RESPONSE TO ASSIGNMENT OF ERROR #1 1
III. RESPONSE TO ASSIGNMENT OF ERROR #2 17
IV. CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases

<u>In Re Fleming</u> , 142 Wn.2d 853, 863, 16 P.3d 610 (2001).....	11, 12, 14, 15
<u>State v. Byrd</u> , 125 Wn.2d 707, 713, 887 P.2d 396 (1995).....	20
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	17
<u>State v. Eastmond</u> , 129 Wn.2d 497, 500, 919 P.2d 577 (1996).....	21
<u>State v. Hahn</u> , 106 Wn.2d 885, 894, 726 P.2d 25 (1986).....	14
<u>State v. Hernandez</u> , 85 Wn.App. 672, 675, 935 P.2d 623 (1997).....	17
<u>State v. Karp</u> , 69 Wn.App. 369, 374-375, 848 P.2d 1304 (1993).....	21
<u>State v. Lord</u> , 117 Wn.2d 829, 903, 822 P.2d 177 (1991).....	11
<u>State v. Marshall</u> , 144 Wn.2d 266, 279, 27 P.3d 192 (2001).....	11, 12
<u>State v. Maurer</u> , 34 Wn.App. 573, 580, 663 P.2d 152 (1983).....	21
<u>State v. Miller</u> , 71 Wn.2d 143, 146, 426 P.2d 986 (1967).....	21
<u>State v. Ortiz</u> , 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).....	12
<u>State v. Ortiz</u> , 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).....	13
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	17
<u>State v. Swain</u> , 93 Wn.App. 1, 968 P.2d 412 (1998).....	12

Statutes

RCW 10.77.060(1)(a).....	11
--------------------------	----

I. STATEMENT OF THE CASE

The State has no problem with the factual history provided by the appellant in his brief. The State does have concerns about the procedural history outlined by the appellant, and will outline those concerns in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR #1

The first assignment of error raised by the defendant deals with the question of his competency and the case proceeding to trial without a finding that the defendant was competent.

The original Information charging the defendant with multiple felonies was filed on February 25, 2005 (CP 1). On March 15, 2005, a Scheduling Order was entered setting the trial for the first time. The trial was set for July 18, 2005. The Scheduling Order also set the Omnibus hearing for April 12, 2005.

Omnibus Applications were entered by both sides on April 22, 2005. As part of the State's Omnibus Application (CP 28) under question no. 14 the defendant was asked if he was making a claim of incompetency. The response provided by his attorneys was "maybe". The Omnibus Applications also set over argument on various issues to May 9, 2005. On that date stipulated orders were entered concerning discovery. Up until

that time in May, there had been no mention of competency related to this defendant.

Two months later, the defense files a Motion for Continuance of Trial dated July 5, 2005 (CP 52). A copy of the Motion for Continuance of Trial is attached hereto and by this reference incorporated herein. The reason that the defense is requesting the continuance is to determine whether or not there is a tumor or other physical condition that existed at the time of the commission of the crimes that could either contribute to or have caused the defendant's behavior. Indication is that this may constitute a defense or mitigation to the charges. It is also at this time that the defense is raising, for the first time, a question of competency of the defendant. But even at that point, it is unclear exactly what they are claiming. The defense attorneys want him examined for purposes of determining whether or not there is a neurological disease, brain damage or other type of problem that "impacts his competency to stand trial". The trial judge was a little amazed that competency was first coming to light at this late date and just prior to a trial setting. The colloquy among the attorneys and the judge is as follows:

MR. SENESCU (Deputy Prosecuting Attorney): Well, I just received it not -- I'm not complaining of timeliness, and we're ready to go forward, but I -- in my brief review of the materials, it doesn't appear that there is an issue related to the medical condition of Mr. Anderson at the

time of the incident. The -- Mr. Anderson attempted suicide in the jail. He was on -- in ICU for a period of time. There may be some issues related to his brain at that point, from that.

But it's -- you know, we're ready to go. We don't think that there's any valid issue that's been raised in these -- in these pleadings.

THE COURT: Well, other than the fact that they think there might be a physical or mental condition. Right? That's what they're alleging, and based upon the information that's been disclosed to them.

MR. SENESCU: For the purpose of --

MR. DUNKERLY (Defense Attorney): Yes, Your Honor, and --

MR. SENESCU: -- sentencing.

MR. DUNKERLY: -- Mr. Senescu basically agrees that there are issues there, but he's -- this is a timely issue, when do they -- what do they arise from, and we don't know whether these may be something that existed prior to these charges and which contributed to his commission of the crimes and perhaps even his -- his attempted suicide attempt.

MR. YOSEPH (Defense Attorney): It's a little more complicated than that from -- from -- in my opinion, Your Honor, from my perspective, because early on in this case we talked about having Mr. Anderson committed to Western State Hospital, and we elected not to do that. Mr. Dunkerly and I met with him, were retrained, and we met with Mr. Anderson, and we thought he was competent to stand trial.

And then we went through a few weeks there where we were trying to get him -- he was on a suicide watch, and we got him put in -- in general population, and the first night

he's in general population he makes this severe suicide attempt, a serious suicide attempt, and he was hospitalized up at Southwest Western Hospital for five or six days.

The whole time I've been thinking, well, you know, he's doing okay, he's tracking with what we're saying, he's -- you know, once he got out of there, you know, he was tracking with what we're saying.

But now we go up and talk to him and it's like the last time we came to see him he doesn't remember anything we told him. If he doesn't have a piece of paper in front of him with it in writing, he says, Well, you guys never told me that, and, well, it's right there on the piece of paper. Well, you know --

THE COURT: Umm.

MR. YOSEPH: -- what about my story? Well, what about your story? Here's -- here's what your wife said in the police report, then he has to look at the police report. Oh, yeah, that's right, she did say I held a gun to her head, but I didn't really do that.

So now I'm wondering if he's even competent to stand trial. I mean, I think -- I think it does raise -- it's not just a defense issue in terms of did he have the capacity to commit the crime, but it's a -- it's a defense issue if he's got something organically wrong with his brain, be it a tumor, be it a brain -- be a neurological disease, be it brain damage from the suicide attempt, that impacts his competency to stand trial.

And that's -- that's the gist of our motion. I don't know that he's competent to stand trial at this point in time.

THE COURT: Okay. Mr. --

MR. YOSEPH: And that's one of the issues that's raised by -- by his father in the letter that he wrote to us. I don't know if you have the letter in front of you.

THE COURT: (Inaudible.)

MR. YOSEPH: But if you'd flip over to the back side, the last comment that he makes there is, you now, How do you do an evaluation of somebody who's in the hospital all doped up? You know, I don't -- I don't know that you can do a functional evaluation of somebody, particularly when they come out of the hospital and now they're having these seizures, and now they -- now they're on the seizure medication.

Nobody at the jail told us he was on seizure medication, nobody in the jail told us that there was a chart note in his medical chart up there saying, Rule out seizure disorder. That was all news to us on Saturday.

THE COURT: Okay. Mr. Anderson, are you objecting to the request for a continuance?

THE DEFENDANT: I don't really --

THE COURT: This thing is scheduled for trial on the 18th of July. Your attorneys are requesting that the trial be continued to a later date so that they can get a better understanding of your physical and mental condition. They think that's necessary, they think that is important and it could be the linchpin of the whole defense.

And I don't know what your position is on that or not.

THE DEFENDANT: I -- I -- guess, if -- if that's what they need to do. I -- I don't really know, understand.

THE COURT: Okay. Okay.

MR. YOSEPH: Your Honor, the waiver of speedy trial that was signed by Mr. Anderson, Mr. Senescu just pointed it out to me, does specify the date of the trial as the new commencement date, so the Court actually does have

ninety days from July 18th if you look at the waiver that's on file in the court file.

It says that Mr. Anderson is stipulating to a new commencement date of --

THE COURT: Oh.

MR. YOSEPH: -- July 18th, so there is --

THE COURT: Sixty days from that date.

MR. YOSEPH: Yeah, the --

MR. DUNKERLY: Sixty.

MR. YOSEPH: Yeah, correct.

THE COURT: Okay.

MR. SENESCU: It sounds like the Court's going to continue this matter now.

THE COURT: Well, I don't think I have a lot of a choice.

MR. SENESCU: Well, has the Court seen enough information here to -- I mean, the word "competency" is the first time I've heard it was right now.

MR. YOSEPH: Yeah.

THE COURT: Okay, I heard it too.

MR. SENESCU: But --

THE COURT: That's -- that's the concern I have.

MR. SENESCU: Are we gonna be here in front of -- and I'm not blaming counsel for this at all, but it's just I need to be able to advise these people who --

THE COURT: Un-huh.

MR. SENESCU: -- were the subject of this act --

THE COURT: I know, I know.

MR. SENESCU: -- what we can anticipate a trial date to be, and this is our second one already. We agreed to the first continuance. And then we kicked it all the way out to July, and if -- if we set this over, how much time would the Court anticipate for what types of evaluations to be accomplished? Just so we can narrow -- tighten it down.

THE COURT: Uh-huh. Well, obviously it's going to be within sixty days of July 18.

MR. DUNKERLY: There's also that, Your Honor, that -- that since the competency issue has been raised, I believe proceedings related to competency are still --

MR. YOSEPH: I think they're excluded under the --

MR. DUNKERLY: -- excluded.

MR. YOSEPH: -- new rule, Your Honor.

MR. DUNKERLY: Right.

MR. SENESCU: For sure.

THE COURT: Yeah.

MR. DUNKERLY: But --

THE COURT: Well, I think that I don't have a lot of choice on these type of situations when they have raised this type of issues.

I agree that it's amazing that it be raised for the first time at this late date, and I wasn't involved in the first continuance, so --

I will grant the motion for a continuance. And then I'll -- I think I'll take a look at and see what we have available.

Well, how about -- how does September 12, what does that give us?

(RP 11, L.14 – 18, L.17)

On July 6 a second Scheduling Order was entered resetting the trial to September 12, 2005. At that time the defense also entered orders for the assistance of medical experts.

On July 19, 2005 the State prepared paperwork to send the defendant to Western State Hospital. At that time the State prepared an Order Appointing or Requesting Designation of Psychiatric Experts (CP 67). A copy of the order is attached hereto and by this reference incorporated herein. It is interesting to note in this document that the judge has added to the standard language "evaluation shall take place after the defense psychological or neuropsychological or neurological evaluations are completed". Nevertheless, the defendant was transported to Western State Hospital.

It is at that point that the defense begins to enter orders to transport the defendant for examinations by their experts. In the records and documentation there are at least eight examples of ex parte orders

transporting the defendant for purpose of evaluation by medical physicians (CP 73, 98, 99, 106, 75, 77, 93, 100, 108).

The evaluation was not completed at Western State Hospital, even though he was immediately transferred to the hospital because the defense wanted their evaluation first. They also took steps to have their evaluation done first. Yet, there is no indication in the record that the evaluations that the defense was requesting were ever done because they never submitted any reports to the court. In fact, the question of competency was never raised again by the defense.

At the time of trial, the defense attorneys were questioned concerning the nature of the defense and their belief that they could present a diminished capacity defense without the use of experts. The judge specifically asked them about questions of insanity and competency to stand trial. The defense team responded that no concerns were being raised. The colloquy with the court was as follows:

THE COURT: You don't have any medical experts that are going to testify as to diminished capacity, but you want to put on a family member who's going to say that the mental condition kind of went down hill?

MR. YOSEPH (Defense Attorney): Yeah, that he was – that he was depressed and suffering from depression, Your Honor. The wife's going to testify to that. If Mr. Anderson testifies, he'll testify to that, and his sister will testify to that.

THE COURT: Has this defense been raised before?

MR. YOSEPH: Yeah, we've talked about it with Mr. Senescu (the Prosecutor).

THE COURT: It's not – so its diminished capacity, not insanity or competence.

MR. YOSEPH: No.

MR. SENESCU (the Prosecutor): I don't – well, the only defense that I'm aware of is general denial. I'm aware that there was some proposals for some experts –

THE COURT: Uh-huh.

MR. SENESCU: -- to support a diminished capacity defense, but nothing – I've never received any report from anybody on anything.

(RP 23, L.14- 24, L.11)

The significance of this discussion is that the colloquy with the court was taking place on November 30, 2005. Prior to that on September 7, 2005 a third Scheduling Order was entered setting a third trial date setting of November 30, 2005. At that time the defense was also requesting a supervised release of the defendant and had filed a motion to continue. The Motion for Second Continuance of Trial (CP 95) is attached hereto and by this reference incorporated herein. At that time in September, the defense is claiming that the State was repeatedly violating the orders entered by the court relating to the defendant's evaluation and thus were not in a position to be prepared for trial. The only question of

competency raised in this document was that a waiver of speedy trial was not necessary because there was still competency proceedings taking place.

Thus, by the time that this actually gets to trial in November, 2005 there have been multiple evaluations or examinations by defense experts and yet they are not raising any type of competency questions. In fact, they feel so confident with the competency of their client that they put him on the stand and he testifies in front of the jury. Further, questions of competency are not raised at any time during the trial or post trial.

A competency evaluation is required whenever there is reason to doubt the defendant's competency. RCW 10.77.060(1)(a). When the defense raises the issue, the defense bears the threshold burden of establishing a reason to doubt the defendant's competency. State v. Lord, 117 Wn.2d 829, 903, 822 P.2d 177 (1991). A motion to determine competency must be supported by facts and will not be granted merely because it was filed. Lord, 117 Wn.2d at 901. The question in our case, really, is whether "a legitimate question of competency" existed. State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001). The appellate system reviews a trial court's decision on whether to require a competency evaluation for abuse of discretion. In Re Fleming, 142 Wn.2d 853, 863,

16 P.3d 610 (2001); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

In our situation there were no medical or psychiatric evaluations or reports suggesting that there was a question about the defendant's competence. Nothing was ever shown to the court or to the prosecution that would indicate that this was a legitimate concern that was being made. This is unlike the situation in In Re Fleming, 142 Wn.2d 853 (supra), State v. Swain, 93 Wn.App. 1, 968 P.2d 412 (1998) and State v. Marshall, 144 Wn.2d 266 (supra) where the court had clear indications of mental concerns that dealt specifically with competency of the defendant. The appellate courts give great deference to the trial court because it has the opportunity to view the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. Fleming, 142 Wn.2d at 863. Here, the judge has made absolutely no comments anywhere in this record that would indicate to anyone that there is a serious concern about the competency of the defendant. In fact, it is not raised until the process has been in operation for over five months. From the time of the filing of the Information in February, 2005 to the first mention of competency in July, 2005, there are no indications of any concerns or problems being brought to the court's attention. Even at that time, the Judge expressed surprise

that this was being raised at such a late date for the very first time. Further, the State was expressing the same surprise in this matter coming forward in this fashion. What makes it even more astounding is that the court allows the defense to have the first opportunity of evaluation, continues the trial for another four months and yet, during this entire period, not a single report is provided to the trial court concerning the competency or mental stability of this defendant. The only conclusion that can be reached is that the evaluations were performed by the defense experts, the defense attorneys were told that the experts could not assist them, and the defense decided to drop this approach and approach it in a different fashion. Thus, the colloquy with the court on the day that the trial is ultimately set to go on November 30, 2005. No claim of competency being made and the only testimony concerning diminished capacity would be coming from friends and relatives of the defendant.

It is true that once a competency determination is made, the trial court is not required to revisit competency unless new information is presented that alters the status quo. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). However, that does not help us in a situation where the defense has thorted the attempts of the State to have him evaluated at Western State Hospital and wants their evaluations to be done first, and than they choose not to share the results with anyone or to even raise it at

the time of trial. The State submits that the trial court was being cautious in ordering an evaluation. The court was also being very obliging in allowing the defense to pursue it initially, but once the defense decided not to use this line of defense, the question of competency was no longer being put forth by the defense.

The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). The State submits that there has been no showing that the defendant didn't understand the nature of the charges or that he was incapable of assisting in his defense. The experienced defense attorneys utilized him at the time of trial and allowed him to testify. These experienced attorneys did not renew or press this issue with the trial court and in fact when asked specifically on November 30 indicated that competency was not an issue. The State submits that there has been no denial of due process shown by the defense in this case.

Our situation should be compared to that facing the judge in the case of In Re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) where the indication was as follows:

In this case, the trial court did not abuse its discretion because there was no information provided to the trial court judge regarding Fleming's competency. Further, there was no reason to doubt Fleming's competence. The trial judge did not see any irrational behavior in the courtroom, nor were there any psychiatric reports given to the trial court judge.

Even though the trial court judge granted the motion for expenditure of public funds for psychological evaluations, this was done with Fleming's counsel stating in the motion that these reports were to be used for the diminished capacity and insanity defense, which does not deal with competency during the trial.

Washington cases have taken the position that a trial court does not abuse its discretion if competency issues are raised. (cites omitted)

Here, there is simply nothing in the record that would indicated that before Fleming entered a plea, a judge had read the experts reports and exercised his or her discretion. There is no transcript of a competency hearing, and not oral or written findings of fact or ruling on competency. Therefore, there is no abuse of discretion.

In Re Fleming, 142 Wn.2d at 863-864.

Finally, at the sentencing which took place in December 2005, it was clear from the comments by the experienced defense attorney that the issues that were discovered during the time of the evaluation were of a medical condition only. Mr. Yoseph discussed the defendant's condition with the court in this fashion:

The point of submitting the medical reports, Your Honor, is to establish that conclusively, beyond any doubt, that any prison sentence imposed upon Robert Anderson is

tantamount to a death sentence. He's been hospitalized three or four times since February pending trial. Mr. Senescu says, well, all that happened afterwards. The testimony from the witness stand was that his first heart attack in quintuple bypass surgery occurred in the spring, a year earlier than this, the spring of 2004. (RP 427, L.1-11)

...

But, yeah, you know, with the number of times that he's been in the hospital, not only here but when they sent him to Western – when we sent him to Western State Hospital, he was hospitalized up there in Tacoma. You know, that's – whether that's a drain on the county resources or the State's resources, it is a drain, a financial drain.

And so we need to pay some attention to what – Mr. Anderson's world consists of, and Mr. Anderson's world is shrinking every day, Your Honor. Every time I go up to see him, he tells me how much his world is shrinking, what – what he can or cannot do. As recent as last night he had another cardiac episode where his heart went into arrhythmia and was – was several hours totally incapacitated. Stopped short of actually having to be hospitalized, but – you know, you may want to inquire about that.

He's reduced to not even being able to – he tells me not even being able to police his own cell area in the jail without having to take a rest. (RP 432, L.4-24)

The court also had an opportunity to talk to the defendant. He spoke to the trial court about the fact that he was severally depressed and has been in counseling since the time he has been in jail (446-448). At no point during any of the discussions of either party, or the defendant himself, was the court being made aware of any concerns about the

competency of the defendant. The State submits that this Assignment of Error has no merit.

III. RESPONSE TO ASSIGNMENT OF ERROR #2

Second assignment of error raised by the defendant is a claim that there was insufficient evidence to support the count of Assault in the Second Degree as it relates to the home owner, Christopher Concannon. Specifically, the jury found the defendant guilty of Assault in the Second Degree with a firearm enhancement related to count four. The Assault in the Second Degree was based on an intentional act which constituted an assault with a deadly weapon.

Evidence is sufficient to support a conviction if, taking the evidence in a light most favorable to the State, it allows any rationale trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate court will draw all reasonable inferences in favor of the State. Salinas, 119 Wn.2d at 201. Finally, the appellate court will defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. State v. Hernandez, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

The evidence at the time of trial was that Mr. Concannon was at his residence on the date in question when the defendant's wife came to his residence in an upset state. (RP 87). She mentioned that she was not happy in the relationship with the defendant and Mr. Concannon just tried to calm her down. (RP 87).

While he was with her, the defendant walked into Mr. Concannon's residence. He told the defendant to leave and he called 911. (RP 88).

Mr. Concannon testified that after he called 911, the defendant seemed to mellow out and he talked to him out in the driveway area of the residence until the wife came out to talk to him. (RP 90). The defendant had accused him of having sexual activity with his wife and Mr. Concannon denied that. (RP 95).

After the wife went outside to talk to her husband, Mr. Concannon went back into his residence and watched TV for a while. The next thing he knows the wife is coming back in to his residence crying even harder than she had been previously. (RP 90). He was trying to calm her down when the door to his residence opened, the defendant came in, and shut the door behind him.

ANSWER (Concannon): Michelle came back in crying and even more than she was before.

I sat her down on the chair and was trying to calm her down. I stood behind her and started rubbing her shoulders trying to get her to mellow out.

And then the next thing was the door opened, Robert entered, shut the door behind him. And I was going to tell him, no, you cannot come into my house, when I took a step forward, he started to bring out a gun. And it got about right here (indicating) before I yelled, "he's got a gun," took off down the hallway, slammed my bedroom door and then jumped through the window.

QUESTION (Prosecutor): And when you say jumped through the window, was there a screen, or glass, or - ?

ANSWER: There was two panes of glass and blinds.

QUESTION: And you went right through them.

ANSWER: I went right through them.

QUESTION: Mr. Concannon, what prompted you to run out of the room into another room and through the window?

ANSWER: The total stare that he was giving to me, and then seeing the gun being pulled out to me (indicating).

QUESTION: Were you in apprehension of any fear that he might do something with that?

ANSWER: I was in complete fear.

(RP 90, L.17 – 91, L.16)

The jury also heard testimony from Michelle Anderson, the wife of the defendant and one of the victim's of the assaultive behavior. After she had left the defendant outside and gone back into Mr. Concannon's home,

she thought that the defendant had left. She didn't know that he had come back in until she heard Mr. Concannon say something about not coming into his house and then she heard Mr. Concannon say that the defendant had a gun, Mr. Concannon went past her and when she looked around she saw that the defendant did have a gun and that he had pulled it from somewhere on his person. (RP 113). She also noted that the defendant was going down the hallway in the direction that Mr. Concannon had run. She was attempting to get between Mr. Concannon and the defendant and asking him to put the gun down. (RP 114). She heard glass break in the bedroom where Mr. Concannon had run to and she noted that the defendant continued to push her further down the hall and he kicked open the bedroom door. During that time he still had the gun in his hand. (RP 114-115).

The defendant maintains in his brief that the State cannot establish that the defendant intended to assault Mr. Concannon because the gun was not pointed at him. Common law assault requires proof that a defendant specifically intended to create reasonable fear and apprehension of bodily injury. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). A jury may infer specific intent to create fear if a defendant points a gun at a victim but usually will not be able to infer specific intent if the defendant merely displays a weapon and there is no further history between the

individuals. State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); State v. Karp, 69 Wn.App. 369, 374-375, 848 P.2d 1304 (1993). It has been held though that a defendant need not actually point a weapon at his victim to possess the requisite intent. State v. Maurer, 34 Wn.App. 573, 580, 663 P.2d 152 (1983). Much of this is fact driven and fact specific to the incident that the jury hears evidence about.

An overt act, or “violence begun” must, indeed, be shown in order to establish an “attempt” to injure as opposed to mere threats. (cite omitted) However, because the gravamen of this category of assault is the victim’s apprehension which can be induced by overt acts other than the classic thrusting of knife or pointing of a gun, the nature of a defendant’s physical behavior must be considered in light of the apprehension it reasonable can be expected to create. If there is physical conduct, as opposed to mere threats, which, in the unique circumstances of the incident, are sufficient to induce a reasonable apprehension by the victim that physical injury is eminent, the requirement of an “attempt” is satisfied.

- State v. Maurer, 34 Wn.App. at 580.

The State submits that this was an assault by an attempt to cause fear and apprehension of injury. It is true that it requires a specific intent to create reasonable fear and apprehension of bodily injury in the mind of the victim. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

The State submits that this was present in our case.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 22 day of August, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

MOTION: CONTINUANCE OF TRIAL

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
JUL 05 2005
JoAnne McBride, Clerk, Clark Co.

**THE SUPERIOR COURT OF WASHINGTON
CLARK COUNTY**

STATE OF WASHINGTON

Plaintiff

v.

N^o 05-1-00493-2

ROBERT ALLEN ANDERSON

MOTION: CONTINUANCE OF TRIAL

Defendant

Attorneys for Robert Anderson move the court to continue the trial herein so that they may investigate the cause of a recent "seizure" and other physical symptoms suffered by Mr. Anderson and only recently disclosed to the attorneys

This motion is based upon the record and file herein, CrR 3.3 (f)(2); State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984) (Counsel's may waive right to speedy trial over defendant's objection when necessary to ensure fair trial and effective assistance. 103 Wn.2d at 15.) and the following declaration of attorney for Mr. Anderson.

DATED THIS:

5 July 2005 *JR*

Edward Dunkerly
EDWARD DUNKERLY, WSBA# 8727
Attorney for Defendant.

J. R. YOSEPH, WSBA# 8627
Attorney for Defendant.

Edward LeRoy Dunkerly
1305 Main Street
Vancouver WA 98660-2918
(360) 607-9243

JR

1
2
3 DECLARATION OF EDWARD DUNKERLY.

4 EDWARD DUNKERLY, declares and says:

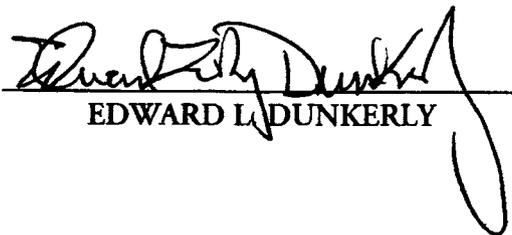
5 1. The Ex Parte Motion for Expert Services, pursuant to CrR 3.1(f), is incorporated herein
6 by reference.

7
8 2. The symptoms or conditions Mr. Anderson has related could have been caused by the
9 existence of a tumor or other physical condition that existed at the time of the commission of the
10 charges brought by the State against Mr. Anderson. If the physical condition contributed to and/or
11 was a cause of Mr. Anderson's behavior it may constitute a defense or mitigation, to the charges
12 herein. Additional time is needed to investigate the cause of the symptoms exhibited by Mr.
13 Anderson, the time remaining before trial is insufficient.

14
15 3. Mr. Anderson may refuse to waive his right to a speedy trial if he does not believe
16 that a continuance over his objection is appropriate to allow counsel to investigate this possible
17 defense. It is necessary to ensure effective assistance of counsel and a fair trial.

18
19 I certify or declare under penalty of perjury under the laws of the State of Washington that the
20 foregoing is true and correct.

21 *Sb* July 2005 at Vancouver WA

22
23 
24 EDWARD L. DUNKERLY

25
26
27
28
Edward LeRoy Dunkerly
1305 Main Street
Vancouver WA 98660-2918
(360) 607-9243

APPENDIX "B"

**ORDER APPOINTING OR REQUESTING DESIGNATION OF
PSYCHIATRIC EXPERTS**

3

FILED

JUL 19 2005

JoAnne McBride, Clark, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

No. 05-1-00493-2

Plaintiff,

ORDER APPOINTING OR
REQUESTING DESIGNATION OF
PSYCHIATRIC EXPERTS

v.

ROBERT ALLEN ANDERSON,

Defendant.

THIS MATTER having come before the Court on the Motion filed in the above-entitled matter for the appointment of psychiatric experts, the expense of which to be consistent with statutes, to examine and report upon the mental condition of the defendant for the purpose of determining ~~whether the defendant was sane at the time of the act charged and~~ whether he/she lacks the capacity to understand the nature of the proceedings against him/her or to assist in his/her own defense as a result of mental disease or defect, ~~or if the defendant lacked capacity to form required intent for commission of crime,~~ now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be transported to Western State Hospital located at Fort Steilacoom, Washington, for a period of time sufficient to complete said examination, but not to exceed fifteen (15) days pursuant to RCW 10.77.060(1), unless the Secretary or his designated representative at Western State Hospital determines that the Defendant should not be transported to Western State Hospital and that the examination can be conducted in

ORDER APPOINTING PSYCHIATRIC EXPERT - 1

PMW

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 or (360)397-2183

33A

1 the Clark County Jail, in which event the Defendant shall be examined in the Clark
2 County Jail; and,

3
4 IT IS FURTHER ORDERED that upon entry of this Order the Prosecuting
5 Attorney shall forthwith send a copy of this Order together with any other information
6 deemed necessary, to the Secretary's designated representative at Western State
7 Hospital, and said representative shall promptly notify the Clark County Sheriff, the
8 Court and the Prosecuting Attorney whether the defendant should be transported to
9 Western State Hospital or whether said examination should be conducted in the Clark
10 County Jail; and,

11 IT IS FURTHER ORDERED that:

12 X the Secretary or his designated representative at Western State Hospital shall
13 designate at least two qualified experts to examine and report to the Court on the
14 mental condition of the Defendant as herein ordered; and

15 ~~X~~ ~~counsel for both parties have stipulated that said examination may be conducted~~
16 ~~by one such expert, if said examination is to be conducted at the Clark County Jail; and~~

17 IT IS FURTHER ORDERED that upon completion of said examination, in
18 accordance with RCW 10.77.060(3)(d), a report of the examination shall be directed to
19 the Court, the Prosecuting Attorney and the defense attorney, said report to include the
20 following: a description of the nature of the examination; a diagnosis of the mental
21 condition of the defendant; if the defendant suffers from a mental disease or defect, an
22 opinion as to his/her competency; ~~an opinion whether the defendant was sane at the~~
23 ~~time of the acts charged; an opinion as to the capacity of the defendant to have the~~
24 ~~particular state of mind which is an element of the offense charged; and an opinion as~~
25 ~~to whether the defendant is a substantial danger to other persons or presents a~~
26 ~~substantial likelihood of committing criminal acts jeopardizing public safety or security,~~
27 ~~unless kept under further control by the Court or other persons or institutions; and,~~

28 IT IS FURTHER ORDERED that if said defendant is transported to Western
29 State Hospital pursuant to this Order, said defendant shall be transported to the Clark

1
2 County Jail after the completion of said examination for further proceedings in said
3 cause. *Evaluation shall take place after the defense evaluations*
4 *are completed.* DONE in Open Court this 19 day of July, 2005. *psychological or*
5 *neuropsychological*
6 *neurological*

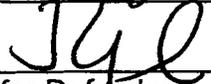
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29


THE HONORABLE JOHN F. NICHOLS
Judge Of The Superior Court

Presented by:


JAMES D. SENESCU, WSBA #27137
Deputy Prosecuting Attorney

Approved as to form this 19
day of July, 2005.


Attorney for Defendant

Δ Object & excepts
to entry of this
order.

★ ~~It~~ It is further a finding of the Court that
competency has been put in issue and that speedy trial
time will toll.



APPENDIX "C"

MOTION FOR SECOND CONTINUANCE OF TRIAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
SEP 07 2005
JoAnne McBride, Clerk, Clark Co.

**THE SUPERIOR COURT OF WASHINGTON
CLARK COUNTY**

STATE OF WASHINGTON

Plaintiff

N^o 05-1-00493-2

v.

**MOTION FOR SECOND
CONTINUANCE OF TRIAL**

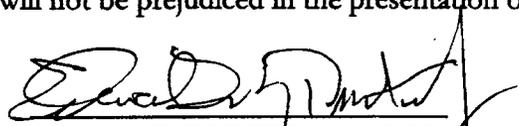
ROBERT ALLEN ANDERSON

Defendant

ROBERT ALLEN ANDERSON, through counsel, moves the court to continue the trial.

This motion is based upon the records and file herein, the Sixth and Fourteenth Amendments to the United States Constitution, Art. 1 § 22 Amendment 10, CrR 3.3, cases interpreting the forgoing, and the following declaration of EDWARD DUNKERLY. The continuance is required in the administration of justice and Mr. Anderson will not be prejudiced in the presentation of his defense.

This 6 September 2005.



EDWARD DUNKERLY, WSBA# 8727
Attorney for Defendant.

DECLARATION

47B

1
2 EDWARD DUNKERLY, declares and says:

- 3 1. A continuance is needed because Mr. Anderson has not been examined by a defense expert.
4 2. Three (3) Orders have been made relating to Mr. Anderson being examined by a defense expert.
5 3. The first order was for an examination on 8 August 2005. That examination did not occur
6 because Mr. Anderson had been taken to the hospital for treatment.
7 4. The second Order was made on 8 August 2005 directing his transportation on 22 August 2005 for
8 examination by Dr. Herzberg. That Order was served on the Clark County Sheriff's Office on 8
9 August 2005.
10 5. Mr. Anderson was transported to Western State Hospital in violation of the court's Order that his
11 evaluation by the State's expert was to occur after the defense evaluation. The third Order was made
12 on 18 August 2005 and I served it on the Sheriff's office the next morning 19 August 2005. That
13 Order directed the Clark County Sheriff to immediately go to Western State Hospital and pick up
14 Mr. Anderson so that he could be transported to the 22 August 2005 appointment as previously
15 Ordered by the court.
16 6. Another appointment has been scheduled with the defense expert for 15 September 2005. That
17 appointment is the subject of another transport motion and order. The trial is scheduled to start on
18 the 12th before the defense evaluation.
19 7. A continuance is needed due to the State's repeated violation of Orders entered by the court and
so that the defense can have Mr. Anderson evaluated and be prepared for trial. A waiver of speedy
trial will not be necessary as the court has excluded the time passing as relating to competency
proceedings.

20 I certify (or declare) under penalty of perjury under the laws of the State of Washington that
21 the foregoing is true and correct:

22 ^{2th} September 2005 at Vancouver WA.

