

NO. 290557-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Lewis A. Lawrence,

Appellant.

Appeal From The Superior Court
Of Whitman County
Case No. 09-1-00041-1
The Honorable David Frazier and
The Honorable Bill Acey

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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TABLE OF AUTHORITIES

Table of Cases

Washington Cases

State v. Bashaw, 169 Wn.2d 133 (2010)12

State v. Benn, 120 Wn.2d 631 (1993)3

State v. Harris, 114 Wn.2d 419 (1990)3

State v. Madsen, 1168 Wn.2d 496 (2010).....10, 11

State v. McGill, 112 Wn.App. 95 (2002)13-14

State v. Ortiz, 104 Wn.2d 479 (1985).....4

Constitutional Provisions

WA Const. art. I, § 22.10,11

I. DEFENDANT / APPELLANT'S ASSIGNMENTS OF ERROR

Defendant argues the trial court abused its discretion in finding him competent to proceed to trial, and competent to decide to represent himself, which, he argues, involves a different analysis. Defendant also argues the conviction should be overturned when the trial judge did not affirmatively ask the prose defendant if he wanted a particular 'lesser-included' jury instruction to be given. Defendant also argues, correctly, that the jury instructions regarding firearms sentencing enhancements were faulty. Lastly, Defendant argues the trial judge may have imposed an exceptional sentence downward, had he only known that he could have.

With the exception of the jury instruction regarding the firearm enhancement, there was no error.

II. STATEMENT OF THE CASE

First, a note about citations to the record: References to Clerk's Papers will be designated 'CP' with the number of the particular clerk's paper following the CP, rather than a reference to the page numbers designated in the Index to Clerk's Papers.

FACTUAL HISTORY

The facts recited in Appellant's Brief are sufficient to give the court an outline of the conduct of the defendant, which resulted in the jury

convicting defendant of three counts of Attempted First Degree Murder, each with a special finding that he was armed with a firearm at the time of commission of the crime. Since defendant's allegations of error refer to alleged procedural errors, the State will not supplement the factual history recited by defendant.

PROCEDURAL HISTORY

Defendant's recitation of the procedural history of the case is fairly detailed. The State will add the following:

In addition to the detailed recitation of evaluations and competency/ incompetency findings and orders in Appellant's Brief, the following short summary may be useful:

3-17-09	Defendant Attempts to Murder Three People
3- 27-09	Ct. orders competency evaluation by Eastern State Hospital
5-15-09	Ct. holds competency hearing and finds defendant not competent and commits defendant to restore competency.
8- 20-09	Ct. holds competency hearing and finds defendant competent.
9-28-09	Ct. orders second competency evaluation by Eastern State Hospital doctors, and appoints defense expert evaluator (Dr. Wilson).
11- 6/12-09	Ct. finds defendant not competent and commits defendant to restore competency (2 nd time).
2-5-10	Ct. finds defendant competent.

III. ARGUMENT

1. The Trial Court properly exercised its discretion in finding defendant competent to stand trial.

Defendant claims that the trial court abused its discretion in finding that he was competent to stand trial. To the contrary, the trial court held a number of hearings to determine the defendant's competency, each time carefully considering the evidence available to it, including the court's observations, defense counsel's suggestions, and professional psychiatrists and psychologists, one of whom was specifically appointed at the defendant's request. In the end, all the experts agreed that defendant was competent to stand trial. This was not an abuse of discretion.

A defendant is competent to stand trial if he is able to understand the nature of the proceedings against him and to assist in his own defense. State v. Benn, 120 Wn.2d 631, 662 (1993); RCW 10.77.010(14). A defendant claiming to be incompetent must convince the court by a preponderance of the evidence that this is so. RCW 10.77.090(3); see State v. Harris, 114 Wn.2d 419, 431 (1990) (defendant claiming incompetency to be executed has burden of proof on that issue). A trial court has wide discretion in determining the

competency of a defendant to stand trial, and the court's decision will not be reversed on appeal absent an abuse of that discretion. State v. Ortiz, 104 Wn.2d 479, 482 (1985).

The trial court carefully exercised its discretion in this case, not once, but at every turn. The court's first concerns came up as a result of defense counsel's (and prosecutor's) stated concern about defendant's competency at the scheduled arraignment on 3-27-09. (RP 33-35) As a result of counsels' request, the court ordered a full competency evaluation, to be done by the professionals at Eastern State Hospital.

The results of that evaluation were carefully reviewed by the court at a hearing on 5-15-09. (RP 46-74) The doctors and attorneys agreed that defendant was not competent, based on the report. The court heard the testimony of Dr. Grant, a forensic psychiatrist, one of the evaluators. The doctor testified about the defendant's evaluation, his condition, and to the need for medication. (RP 48-60) The court stated its findings at RP 65-74. The court noted how highly it regarded the qualifications of Dr. Grant. (RP 65, 68, 71) The court committed defendant to Eastern State for restoration of competency.

On 8-20-09, the court held a hearing to review the defendant's competency (RP 76-84), followed by an arraignment (RP 84-94). The

only evidence before the court was the extensive report from the doctors at Eastern State Hospital, including Dr. Grant. (CP 18) Defense counsel did not dispute the report, nor dispute that defendant was competent at that time, but noted the experts' finding of competency was not expressed with overwhelming confidence. (RP 77-78) The court reviewed the report at length on the record, noting findings on the record. (RP 80-84) The court found it was significant that the doctors were able to observe the defendant closely for two months at the hospital, and administer medication, although also noting the defendant's lack of cooperation in some aspects of the evaluation. (Id.) The court found the defendant competent to proceed. (Id.)

Following the court's finding of competency, the case moved immediately to arraignment. During that hearing, defendant asked whether his "UCC-1 form" had been filed. (RP 85-92) This caused a stir between the court and defendant. The court was wondering what the defendant was talking about, and the defendant explained what he'd heard and read. The court expressed some reservations about competency. But defense counsel explained to the court that counsel had reason to believe that a cell mate of defendant may have been one of the sources of the misinformation about the applicability of the

UCC to a criminal case (RP 87-88), and also noted that counsel was in possession of a book which argued the position that the UCC applies to criminal cases (RP 90). The defendant apologized for his misunderstanding, accepting and recognizing the mistake. (RP 90).

A little over a month later, defense counsel had more concerns about competency. On 9-28-09, he brought the matter to the court again, stating that he was concerned again, and asked for an independent evaluator. (RP 95-97) The prosecutor also was concerned, and joined in the request, and asked for a further evaluation from the doctors at Eastern State Hospital. (RP 99-101) The court reviewed its reasoning and findings and ordered another evaluation by the doctors from Eastern State, as well as by an independent evaluator of defendant's choosing. (RP 105-112; CP 26) The independent evaluator (Dr. Wilson) was to conduct their own evaluation, and be allowed to observe the evaluation done by the doctors at Eastern State. (Id.) All of this shows a court carefully doing the job it must do. It appreciated counsels' concerns, and entered the appropriate orders to confirm defendant's competency.

The court held the next hearing on 11-6-09. At that time, the doctors had not completed their reports as to their competency evaluations, so the court set the matter over to 11-12-09, but then heard from defendant at length, primarily about the defendant's thoughts about

the competency evaluation process and the performance of his attorney.

(See RP 114-133)

On 11-12-09, the court heard the testimony of Dr. Wilson, the defendant's chosen expert. Doctor Wilson testified verbally, rather than submit a written report. (RP 134-137, 151-166) The doctors from Eastern State had reported that the defendant had refused to cooperate with their evaluation. (RP 134, 164) Before Dr. Wilson got into the substance of his testimony, the defendant went off at length about his opinions, and finally left the courtroom after insulting the judge. (RP 137-151) Dr. Wilson testified that defendant was not competent, based on his review of the materials in the case and on his interview with defendant. (RP 151-166) The court found defendant not competent to proceed, based on the court's observations of defendant and on Dr. Wilson's report, and committed him to Eastern State to try to restore competency. (RP 166-171) Again, this shows the court acting cautiously, to preserve defendant's rights.

On 2-5-10, the defendant was back before the court. The court held a hearing to determine defendant's competency. (RP 176-209) The court had an extensive report from the doctors at Eastern State, among them Dr. Grant. (CP 41) The doctors at Eastern State found the defendant to be competent. Dr. Wilson, the expert appointed at defendant's request, according to defense counsel, "[agreed] with Eastern

State's conclusion.” (RP 179) The court noted that Dr. Wilson was present for some evaluations and that Dr. Wilson could present his own evidence and opinion regarding competency. (RP 181) Defense counsel agreed with the finding of competency. (RP 179) The court specifically found defendant competent at RP 183, noting that was primarily based on the reports of the experts.

The trial court carefully exercised its discretion in this case. The court held numerous hearings, at which it heard from counsel as well as experts, including the defendant's own expert. The defendant's demeanor was changeable. That obviously caused the court some concern, but a review of the court's comments clearly shows a court that took every factor into careful consideration and then ruled the defendant competent. Based on a preponderance of the evidence standard, the court did not abuse its discretion.

Defendant suggests that he has Fetal Alcohol Syndrome, and further, that because the doctors at Eastern State Hospital did not mention that in their report, that the trial court's decision of competence was therefore an abuse of discretion. This position is not correct.

In the defendant's brief, it is noted that defense counsel advised the court that defendant had been diagnosed with Fetal Alcohol Syndrome, and it is suggested that counsel for the State joined in a request for an

evaluation by someone specializing in developmental disabilities.

(Appellant's Brief at 9) That somewhat overstates things. The record does show that counsel made the statement, in regards to the second evaluation (ordered 9-28-09), that "the family has raised the possibility that there may be fetal alcohol, which I assume would qualify as developmental disability. I think I will try to alert them [referring to the doctors at Eastern State] and see what they would suggest we do next – with regard to that. I've tried to alert Dr. Wilson to that and I think Dr. Wilson has the requisite skills" (RP 112) That is the extent of the reference to Fetal Alcohol Syndrome in the record.

But even if there were more evidence that defendant has such a problem, he had his own expert, with ample awareness of the issue (according to defense counsel's statement above) to address it if it really would have impacted competency. Dr. Wilson apparently did not find it to be a cause of incompetency by the time of the court's final determination on 2-5-10. There was ample evidence before the court of the defendant's condition on 2-5-10, and the court made a reasoned decision. Defendant has not shown an abuse of discretion.

2. The trial court did not abuse its discretion in granting defendant's request to proceed pro se.

As noted in Appellant's brief, once defendant was ruled competent on 2-5-10, he waivered back and forth between wanting to proceed prose, to realizing it was harder than the thought and asking for reappointment of counsel, to deciding to go it alone again (but with standby counsel). Significantly, each time the defendant waived counsel, the court went through an extensive colloquy. (At one point even an extensive written advisement. See CP 46) Counsel on appeal does not argue the waiver was invalid due to insufficient advisements from the trial court. Instead, the argument is that even though the defendant may have been competent to stand trial, he was not competent enough to stand trial prose.

The State first notes that a review of the defendant's conduct during trial showed none of the outbursts that defendant had engaged in during pre-trial hearings. He had a theory of the case and he stuck to his theory. In fact, although the jury disagreed with his theory, it did account for much of the physical evidence.

As noted in State v. Madsen, 168 Wn.2d 496, 503 (2010)
"Criminal defendants have an explicit right to self-representation under the Washington Constitution and implicit right under the Sixth Amendment to the United States Constitution....This right is so

fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” The case goes on to note:

“The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant’s request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact... Were it otherwise, the presumption could make the right itself illusory.

A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant’s ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant’s competency alone is insufficient; if the court doubts the defendant’s competency, the necessary course is to order a competency review.” *Id.* at 504 to 505.

Appellant’s brief argues that there should be some new level of competency in Washington State, one level for being competent to be tried for a crime, and a separate, higher level of competency for being able to exercise the constitutional right “to appear and defend in person” as guaranteed in the Washington Constitution. Wash. Const. art. I, sec. 22. The State has found no support for this position and urges this court to reject the argument. Madsen means what it says. The defendant was validly found competent to proceed with trial, and so was competent to proceed with waiver of counsel.

3. The court did not commit error when it did not take it upon itself to instruct the jury on possible lesser-included offenses.

Appellant's brief cites to no precedent for the idea that a trial court must take it upon itself to ask a prose defendant whether they would like the court to give a "lesser-included" jury instruction, in a case where the defense is not: "I didn't mean to kill him, only to hurt him", but the defense is rather: "I wasn't even there." Guarding a defendant's rights is one thing, but actively engaging in strategizing with a defendant would be something different altogether. There being no support for defendant's position, the State asks that this grounds for appeal be denied.

4. The court **did** err when it instructed the jury that a "not guilty" special verdict must be unanimous.

In a case that was decided after the trial in the case at bar, the State Supreme Court decided that the WPIC was in error, and it is improper to instruct juries that they should deliberate until they reach a unanimous decision regarding enhancements for which there are special verdict forms. State v. Bashaw, 169 Wn.2d 133 (2010). Therefore, the jury instructions given in the case at bar were in error, as the defense argues on appeal. Given the defendant's comments during the trial, the State has

decided that it is satisfied that he preserved this issue for appeal.

Therefore, the State requests that this court enter an order vacating the sentence enhancement to each count.

5. The trial court would not have imposed an exceptional sentence below the standard range, even if it knew it could have.

The trial court stated that it had to run sentences on the three counts of Attempted Murder consecutive to each other, and had no choice in the matter. (RP 1644) As the defendant points out, that is not a correct statement of law. If the judge chose to impose an exceptional sentence below the standard range, he could run the counts concurrent to each other (or any other lesser sentence). It seems likely the judge knew that and was stating the obvious fact that, in the absence of an exceptional sentence, he had to run the sentences consecutive.

However, this court can review a court's decision to impose a standard range sentence in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. McGill, 112 Wn.App. 95, 100 (2002) (citation omitted).

"When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling....

Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law....

Remand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid factors." Id. at 100.

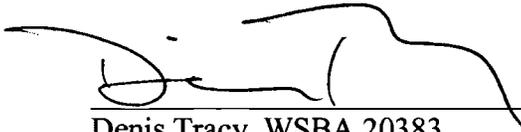
In the case at bar, when this court reviews RP 1644-1648, this court will see the trial court decided to give the defendant as long a sentence as he possibly could. "But I am convinced that you are still so angry about this, and hold so much vile hatred in your heart...that I have no choice but to sentence you to the maximum under the law....I cannot trust you out on the streets, sir. So I'm giving you what I hope will be a life sentence to you. Because that's the only thing safe for society." RP 1647.

The State believes that this court can be confident that Judge Acey would not impose a different sentence if the case is remanded.

IV. CONCLUSION

For all of the above reasons, this court is respectfully requested to uphold the defendant's conviction and deny his appeal, but vacate the portion of the sentence regarding the sentencing enhancement for being armed with a firearm at the time of the commission of the three counts of Attempted Murder.

Respectfully submitted this 3 day of May, 2011.

A handwritten signature in black ink, appearing to read "Denis Tracy", written over a horizontal line.

Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

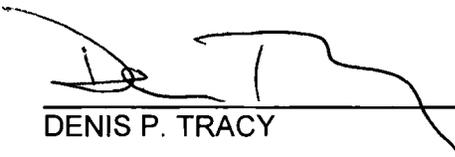
STATE OF WASHINGTON, Plaintiff, v. LEWIS A. LAWRENCE, Appellant,	Court of Appeals No. 290557-III No. 09-1-00041-1 AFFIDAVIT OF DELIVERY
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STATE OF WASHINGTON)
COUNTY OF SPOKANE)

DENIS P. TRACY, being first duly sworn, deposes and says as follows: That on **the 3rd day of May, 2011**, I delivered to Court of Appeals, Division III, by way of personal delivery, true and correct copy(ies) of the original **BRIEF** on file herein to the following location:

Court of Appeals, Division III
500 N Cedar St
Spokane, WA

DATED this 3rd day of May, 2011.



DENIS P. TRACY

SIGNED before me this 3rd day of May, 2011, by DENIS P. TRACY.



NOTARY PUBLIC in and for the State
of Washington, residing at: Colfax
Appointment Expires: 06-09-2014



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7 IN THE COURT OF APPEALS, DIVISION III
8 IN AND FOR THE STATE OF WASHINGTON

9 STATE OF WASHINGTON,
10 Plaintiff,

Court of Appeals No. 290557-III
No. 09-1-00041-1

11 v.

AFFIDAVIT OF MAILING

12 LEWIS A. LAWRENCE,
13 Appellant,

14 STATE OF WASHINGTON)
15 COUNTY OF SPOKANE)

16
17 JENNIFER GRIFFIN, being first duly sworn, deposes and says as follows: That on **the 3rd**
18 **day of May, 2011** I caused to be mailed in the United States Post Office at Colfax, Washington,
19 with postage fully prepaid thereon, a full, true and correct copy(ies) of the original **BRIEF** on file
20 herein to the following named person(s) at the following address(es):

21
22 Thomas C. Sand
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23 Portland, OR 97204

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Lewis A Lawrence
#340476
1313 N 13th Ave
Walla Walla, WA 99362

24
25
26
27 DATED this 3rd day of May, 2011

Jennifer Griffin

JENNIFER GRIFFIN

28
29
30 SIGNED before me this 3rd day of May, 2011, by JENNIFER GRIFFIN.



Kristina A Cooper

NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2015

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