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NO. 70124-0-1

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

REC'D
SEP 10 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JAMES LESTER,

Appellant.

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

The Honorable Theresa Doyle, Judge
The Honorable Mary Yu, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering Findings of Fact I and II. CP 75 (Findings of Fact And Conclusions of Law Regarding Defendant's Competency).

2. The court erred in entering Conclusion of Law I. CP 75.

3. The court erred in finding the appellant competent to stand trial.

Issue Pertaining to Assignments of Error

Where the evidence shows appellant was unable to 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?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

The King County Prosecutor charged James Lester by Fourth Amended Information with one count of second degree murder (Count I), and one count of first degree assault (Count II). CP 79-80. Luis Castillo was the named victim in both counts. Id.

¹ The citations to verbatim report of proceedings are as follows: 1RP June 20th, July 2nd and July 11th 2012 (sequentially paginated); 2RP November 5th, 7th, 13th, 14th, and 19th 2012 (sequentially paginated); 3RP January 7, 2013; 4RP January 9, 2013; 5RP January 10, 2013; 6RP January 14, 2013; 7RP January 15, 2013; 8RP January 16, 2013 ; 9RP March 15, 2013 (sentencing).

A jury acquitted Lester of the murder charge but found him guilty of the included offense of second degree assault. CP 188-189. He was also convicted of the first degree assault charge. CP 190. Lester was sentenced within the standard range to 93 month on the first degree assault conviction. CP 360. The second degree assault conviction was vacated and dismissed. CP 365-366.

2. Substantive Facts

James Lester and Luis Castillo were living at 1811 Eastlake, a housing facility for homeless chronic alcoholics operated by the Downtown Emergency Service Center (DESC). 4RP 14-17, 63, 66-67, 137. On February 4, 2011, at about 5:00 p.m., Lester and Castillo got into an altercation. During the altercation Lester threw Castillo to the floor and stomped on his head. 4RP 26-28, 35. The altercation was captured on the security camera in the facility. Ex. 1.

When police arrived medics were working on Castillo, who was bleeding and unconscious. 4RP 22, 84-85. Lester went to his bed after the altercation where police found him asleep fully clothed and arrested him. 4RP 33, 92-93, 99-100. Police described Lester's demeanor as "flat." 4RP 100.

As a result of the altercation Castillo received a skull fracture and damage to his brain and the upper part of his spine. 5RP 18-19, 23, 80;

6RP 23-27. He was eventually taken to a nursing home. 4RP 114, 165; 6RP 65. On December 24, 2011, Castillo died of health care facility pneumonia, related in part to the brain injury. 5RP 58, 127, 135; 6RP 77-78, 95; 7RP 43-45.

3. Facts Pertaining to Assignments of Error

Defense counsel averred that during the course of his representation he witnessed a significant decline in Lester's cognitive abilities and functioning. CP 31-33. In March, 2012, Nykia Johnson, a social worker at the King County Jail met with Lester. 1RP 70-71. Johnson said Lester was unable to identify the correct month, what month Christmas was celebrated, made statements unrelated to the questions she was asking him, and was disoriented. She emailed defense counsel's social worker with her concerns. 1RP 72-73. On January 24, 2012, the court ordered Lester to undergo a competency evaluation under RCW 10.77.060. CP 26-30.

A hearing was held to determine Lester's competency to stand trial. Dr. John Neer, a neuropsychologist and former forensic evaluator at Western State Hospital, examined Lester. 1RP 6-11. Dr. Neer reviewed Lester's mental health records, jail records, administered a number of tests, interviewed Lester on three occasions, and reviewed the report

written by Dr. Joanna Johnson a Western State Hospital forensic psychologist who also examined Lester. 1RP 11, 15, 20-36.

Dr. Neer interviewed Lester in the King County Jail on March 13, March 22, and April 11, 2012. 1RP 44; CP 132². Dr. Neer found that Lester had significant difficulty in focusing on conversations and tracking information. Dr. Neer had to frequently repeat questions, and Lester's responses to questions were often irrelevant. 1RP 17-19. Lester also rambled, his speech was slurred, and his mood was erratic. 1RP 19; CP 134.

One test Dr. Neer administered was an I.Q. test (WAIS-IV). 1RP 20-21. Lester scored a 68, which showed he fell in the low to borderline range of intellectual functioning indicating mild mental retardation. 1RP 21; CP 135-136.

Another assessment tool Dr. Neer administered was the D-KEFS test. 1RP 22. The D-KEFS tests a person's executive functioning, which is the ability to sort information, plan, organize and make judgments. *Id.* Part of the test requires connecting numbers and letters in order. In addition to being slow in completing the tasks, Lester made two mistakes connecting numbers and three mistakes connecting letters, which is

² Dr. Neer's report and an addendum were admitted as Exhibits 1 and 2 respectively at the competency hearing. The reports were also filed with pleadings. They have been designated on appeal but for convenience citation to the reports is to the filed pleadings.

uncommon. CP 136. When he was asked to alternate between connecting numbers and letters Lester was unable to complete the task. Id.

The Wisconsin Card Scoring Test (WCST) given to Lester by Dr. Neer showed Lester was unable to solve problems and remain on task. 1RP 26; CP 136. Dr. Neer described Lester's performance as profoundly low compared to age-related peers. CP 136.

Lester was also given a number of memory tests. The CVLF-II SF test consisted of a list of nine words Lester was asked to repeat. 1RP 27. In the first trial Lester was only able to remember three of the words putting in the one percentile compared to others in his age group. After four trials his ability to repeat the words did not improve, indicating he could not learn information from repetition. 1RP 27; CP 137.

In another memory test Lester was given a story and then asked to repeat it. 1RP 24. He scored in the 4.5 percentile of the population based on his lack of ability to recall information in the story. 1RP 24; CP 137-138. On the WMS-IV test, a logical memory test, Lester was asked to remember information from two stories. When asked about one story Lester thought he was being accused of something. He was only able to recall a small part of one story and even less of the second story. 1RP 24-25; CP 137. Lester's scores showed his ability to learn new verbal

information and recall previously learned information was extremely low. CP 137-138.

Dr. Neer reported that during his March 13, 2012 interview Lester was unable to identify the difference between a bench trial and jury trial and did not know what evidence meant. CP140. When talking about the case Lester's statements "seemed to be nonsensical." CP 142. During Dr. Neer's March 22, 2012 interview Lester was unable to rationally discuss his case and plea bargaining. CP 142. In the April 11, 2012 interview when asked what his attorney needed to focus on to defend him Lester rambled in an uncontrollable manner that Dr. Neer was unable to follow. CP 143. Dr. Neer reported that after meeting with Lester on these three occasions Lester "was unable to discuss any substantial information regarding his case." CP 143.

In 2009 Lester was diagnosed with dementia not otherwise specified. 1RP 56. Dr. Neer also diagnosed Lester with cognitive disorder not otherwise specified. 1RP 32. Dr. Neer testified Lester is unable to think in the "here and now." 1RP 33. Lester only had a marginal understanding of the charges against him. 1RP 35. When he was asked to discuss issues that may be relevant to his attorney Lester was unable to provide meaningful information. 1RP 33-34; CP 140-143. Dr. Neer opined Lester was unable to assist counsel in his defense, and it was

unlikely his competency could ever be restored to a degree that he would be able assist counsel. 1RP 36; CP 143-144.

Dr. Joanna Johnson, the Western State Hospital forensic psychologist, met with Lester for a little less than two hours on February 14, 2012. In addition she reviewed some of the same records Dr. Neer reviewed. 1RP 108-109, 115; CP 231³. Jail records showed Lester had a history of emergency room visits for seizures and a history of depression and alcohol abuse. 1RP 23; CP 232-233.

During her interview with Lester, Dr. Johnson occasionally had to repeat questions. She stated Lester's long-term memory appeared intact but he showed a mild impairment in his recent memory. 1RP 120-122, 124; CP 232. Dr. Johnson said Lester was oriented to time, place and date, and although his articulation was difficult to follow at times he appeared able to track the conversation and provide relevant responses to her questions. 1RP 127-128.

According to Dr. Johnson, Lester indicated he was charged with murder and that was different than the initial assault charge. 1RP 139-140. Lester appeared to understand the difference between a jury trial and

³ Dr. Johnson's report was admitted as Exhibit 3 at the competency hearing. It was also filed with pleadings. The report has been designated on appeal but for convenience citation to the report is to the filed pleadings.

bench trial and the difference between pleading guilty and not guilty, however, Dr. Johnson admitted she explained to Lester the difference. IRP 143, 164. Lester did not appear to be delusional or irrational. IRP 144.

Although Lester suffers from dementia, Dr. Johnson admitted she had conducted less than ten dementia related competency evaluations. IRP 151. Dr. Johnson was aware that Lester was seen by psychology staff at the jail on at least two occasions after she completed her evaluation but she did not know why he was seen. IRP 152-154. Dr. Johnson said she knew Lester has been placed in the jail's psych housing after she conducted her evaluation. IRP 168-169. Dr. Johnson said she did not know how the results from the tests given to Lester by Dr. Neer related to Lester's competency because she was not present when those tests were administered. IRP 166.

Ultimately Dr. Johnson opined Lester was competent to understand the proceedings against him and to assist counsel. IRP 148; CP 236.

Lester argued that Dr. Neer had more experience evaluating persons with the same diagnosis as Lester, and his evaluation was more extensive and comprehensive than Dr. Johnson's evaluation. IRP 185-187. Based on Dr. Neer's evaluation Lester was incompetent to stand trial. IRP 190.

Despite Dr. Neer's evaluation and his opinion, the court found Lester competent to stand trial. CP 74-75. It entered written findings of fact and conclusions of law. Id.

C. ARGUMENT

LESTER WAS INCOMPETENT TO STAND TRIAL BECAUSE HE WAS UNABLE TO ASSIST TRIAL COUNSEL WITH HIS DEFENSE

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). "The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause." 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 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. Lafferty v. Cook, 949 F.2d 1546, 1551 (10th Cir. 1991).

Under Washington statutes, an accused is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010 (15); Fleming, 142 Wn.2d at 862. "[N]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." RCW 10.77.050; State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982).

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).

The issue of whether a person is competent, however, is a mixed question of law and fact. Drope v. Missouri, 420 U.S. 162, at 174-75 n.10. 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 “by a preponderance of the evidence that the defendant understands the nature of the proceedings against him and is able to effectively assist counsel in the defense of his case.” CP 75 (Finding of Fact I). The court also found “by a preponderance of the evidence that the defendant has the ability to understand the nature of the charges and consequences of a change of plea.” CP 75 (Finding of Fact II). Based on these findings the court found “by a preponderance of the evidence that the defendant is competent to stand trial.” CP 75 (Conclusion of Law I).

The trial court’s findings do not identify the evidence it relied on in making those findings. The evidence, however, shows that Lester was not competent to stand trial.

Dr. Neer is a trained neuropsychologist and conducted over 400 competency evaluations while working at Western State Hospital. IRP 8-9. He met with Lester on three occasions and administered a battery of tests. Those tests showed Lester had an I.Q. of 68, had extreme difficulty remembering events and tracking information, providing relevant responses to simple questions, and was unable to process information. Dr. Neer diagnosed Lester with dementia, consistent with a previous 2009 diagnosis, and with a cognitive disorder, which renders him unable to think in what Dr. Neer described as the “here and now” or conduct a rational conversation. IRP 32-34, 56. In three interviews Lester was unable to discuss any substantial information about his case.

Dr. Neer is familiar with the legal standard for determining competency, which he aptly described as a “low” standard. IRP 36. Despite that standard, Dr. Neer concluded Lester did not have the capacity to assist his attorney due to his “severe cognitive impairments.” CP 144.

Defense counsel also represented that based on his conversations with Lester counsel did not believe Lester was able to assist counsel. As an example counsel explained Lester was unable to grasp the meaning of a plea offer counsel presented. CP 176. Lester also was unable to remember discussions with counsel from one meeting to the next. Id.

Although Dr. Johnson opined Lester had the ability to assist counsel, she only met with Lester on one occasion for less than two hours, did not administer any of the tests Dr. Neer administered, and did not explore Lester's ability to recall or articulate anything about the incident that led to the charges against him, and which would be critical to Lester's ability to assist counsel with his defense.

The trial court's written findings do not indicate the court found Dr. Johnson more credible than Dr. Neer. The findings do not indicate the court based its decision on Lester's demeanor or any factors other than Dr. Neer and Dr. Johnson's reports, the representations of counsel, and the testimony at the competency hearing. CP 74. Based on that evidence the trial court's findings are unsupported and its conclusion that Lester was competent to stand was an abuse of discretion.

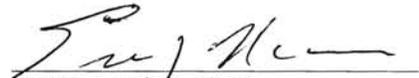
D. CONCLUSION

Lester was incompetent to stand trial. His conviction should be reversed.

DATED this 10 day of September 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70124-0-1
)	
JAMES LESTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES LESTER
DOC NO. 365659
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF SEPTEMBER 2013.

x Patrick Mayovsky

2013 SEP 10 11:19:19
CLERK OF COURT
STATE OF WASHINGTON
JAMES LESTER