

No. 20180116-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff / Appellee,

v.

PATRICK BOBBY JR. GALINDO,
Defendant / Appellant.

Reply Brief—PUBLIC/PRIVATE

On appeal from the Second Judicial District Court, Weber County,
Honorable Ernie Jones, District Court No. 161901398

Mr. Galindo is incarcerated

CHRISTOPHER BALLARD (8497)
Assistant Solicitor General
SEAN REYES (7969)
Utah Attorney General
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114
(801) 366-0180

CHERISE BACALSKI (15084)
Bacalski Legal PLLC
51 W. Center Street, #315
Orem, UT 84057
cherisebacalski@gmail.com
(858) 215-1388

EMILY ADAMS (14937)
Adams Legal LLC
P.O. Box 1564
Bountiful, UT 84011
eadams@adamslegalllc.com
(801) 309-9625

Counsel for Appellee

Counsel for Appellant

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Introduction

The State charged Appellant Patrick Galindo with attempted murder and possession of a firearm by a restricted person. Before trial, his counsel raised the question of his competency. The trial court ordered two psychological evaluations of Mr. Galindo to assess his competency.

One of the psychological evaluations listed Mr. Galindo's IQ at 54, plus or minus 5—well below the mental retardation threshold score of 70. R.56, 60. This psychologist also explained that trial counsel for Mr. Galindo was unavailable to discuss Mr. Galindo's ability to counsel with him and to rationally participate in the proceedings before the evaluation was filed. R.65.

The other psychologist used another test, the WASI test, to assess Mr. Galindo's mental capacity. R.45. He reported that Mr. Galindo's score of T=33 placed him in the fifth percentile. R.45. This psychologist also admitted that Mr. Galindo's intellectual disability impacted his ability to understand what was going on in court. R.48.

At the competency hearing, trial counsel for Mr. Galindo stipulated to Mr. Galindo's competency. The trial court relied on trial counsel's stipulation when it found Mr. Galindo competent to stand trial. A jury later found Mr. Galindo guilty of attempted murder. Mr. Galindo then pleaded guilty to possessing a firearm as a restricted person for handling the gun the night of the shooting.

On appeal, Mr. Galindo raised three issues. **First**, he argued that trial counsel provided ineffective assistance when he stipulated to Mr. Galindo's competency. **Second**, he argued that trial counsel provided ineffective assistance when he failed to talk with one of the court-appointed psychologists to discuss Mr. Galindo's ability to counsel with him and to participate at trial. Mr. Galindo concurrently filed a 23B motion with an affidavit from trial counsel detailing what he would have told the psychologist had he spoken with him. And **third**, he argued that the above errors cumulated to warrant reversal on appeal because together they raised sufficient doubt as to whether Mr. Galindo should have been found competent to stand trial.

In response to Mr. Galindo's Opening Brief, the State responded with the following arguments. **First**, the State argued that there was no evidence that Mr. Galindo was incompetent. In so arguing, the State asserts that it was objectively reasonable for counsel to stipulate to Mr. Galindo's competency. **Second**, the State correctly argued that absent a grant of Mr. Galindo's rule 23B motion to remand, Mr. Galindo cannot show that trial counsel was ineffective when he failed to talk to Dr. Hawks. The State addressed the merits of that argument in its response to the Rule 23B motion. ¹ And **third**, the State argued that the

¹ In that response, the State argued that this court should not remand to consider whether counsel was ineffective for failing to speak with the court-appointed psychologist about his observations because Mr. Galindo cannot show (1) how talking to Dr. Hawkes would have changed the doctor's assessment and (2) *all* reasonable trial counsel would have spoken with Dr. Hawkes.

cumulative error doctrine is inapplicable here because (1) there was no error to cumulate and (2) a showing of incompetence does not require prejudice.

But the State is mostly wrong. **First**, there is ample evidence that Mr. Galindo was incompetent to stand trial. (*See, infra*, argument 1.) **Second**, of course this court would need to grant Mr. Galindo’s motion to remand in order to consider extra-record evidence supporting his second argument. And **third**, Mr. Galindo relies on his opening brief and 23B remand motion to show the error that the State claims doesn’t exist.

Arguments

1. There was evidence that Mr. Galindo was incompetent to stand trial

The State claims that there was “no evidence” that Mr. Galindo “was incompetent.” (R.br.10, 13.) But that is not true.

The Utah Code provides that a person is incompetent to stand trial if he was “suffering from . . . mental retardation resulting . . . in . . . his ability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.” Utah Code § 77-15-2. Evidence that Mr. Galindo was incompetent to stand trial is dependent on both the psychologists reports—which offer evidence of mental retardation—and trial counsel’s affidavit—which offers evidence of inability to consult with trial counsel and to participate in the proceedings against him with a reasonable degree of understanding.

The trial court received two psychological reports regarding Mr. Galindo's mental health. **The Hawks Report** reported that Mr. Galindo's IQ "fell within the mental retardation/intellectual impairment range of intellectual functioning"—it reported his IQ as 54, plus or minus 5. R.56; R.60. Mental retardation "is clearly defined by the American Psychiatric Association" as having a measured IQ of 70 and below. R.60. The Hawks Report also stated that Dr. Hawks had not been able to speak with Mr. Galindo's trial counsel before making his ultimate conclusion regarding Mr. Galindo's competence, despite an attempt to contact him during the course of the evaluation. R.65.

The Wilkinson Report used the WASI test (Weschler Abbreviated Scale of Intelligence) to conclude that Mr. Galindo's IQ score of T=33, placing him in the fifth percentile. R.45. The Wilkinson Report also initially stated that Mr. Galindo "is not able to consult with his attorney and participate in the proceedings against him with a reasonable degree of rational understanding," but concluded that Mr. Galindo was competent to proceed to trial anyway. R.41. The Wilkinson Report further acknowledged that Mr. Galindo was "confused by what is being discussed in court," but stated that if he was confused he could "ask his attorney to explain matters to him." R.48.

And **Mr. Galindo's trial counsel's affidavit** details what he would have told Dr. Hawks had he communicated with Dr. Hawks while Dr. Hawks was

writing his report. (See Randy Richards Aff. Add D 23B Motion.) Trial counsel's affidavit explained:

- It was abundantly clear that Mr. Galindo was intellectually disabled;
- Mr. Galindo was unable to assist with preparation for trial;
- Mr. Galindo could not give his trial counsel information about the incident, making it impossible to get adequate witnesses for the defense;
- Mr. Galindo did not appear to be able to understand the proceedings;
- Mr. Galindo would agree with anything trial counsel suggested;
- Trial counsel tested Mr. Galindo's ability to counsel with him at trial by asking him two questions in a row, both suggesting totally opposite answers;
- Mr. Galindo would respond in the affirmative to two totally opposing questions in a row;
- Mr. Galindo was conversant and happy and did not understand the gravity of the offenses and did not understand there was a possibility he could lose at trial;
- Had counsel connected with Dr. Hawks, counsel would have been able to give him information as to his frustrations trying to prepare a

defense for Mr. Galindo due to his inability to understand the gravity of the charges;

- Mr. Galindo could not adequately testify at trial;
- Under normal circumstances, trial counsel would have put Mr. Galindo on the stand to explain where he was at the time of the shooting, but it was impossible due to Mr. Galindo's intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination.

(Randy Richards Aff. Add. D.).

The State's claim that there is "no evidence that Defendant was incompetent" (R.br.13.) is simply untrue. ²

² Mr. Galindo concedes that he may only contest his conviction as to attempted murder.

2. This court must grant Mr. Galindo's Rule 23B remand to find his trial counsel ineffective for not speaking with Dr. Hawks

Mr. Galindo agrees with the State that for this court to find trial counsel ineffective for failing to discuss his observations with Dr. Hawks, it must grant Mr. Galindo's Rule 23B remand motion. In an affidavit supporting his motion, Mr. Galindo has proffered "nonspeculative" facts which "could support a determination" that counsel's performance was ineffective. Utah R. App. P. 23B. The State responds to the merits of this argument in its separate response to Mr. Galindo's motion to remand. Mr. Galindo will reply separately to the State's response on the merits.

Nevertheless, this court should remand to enter those facts on the record.

3. Mr. Galindo has shown error, and cumulative error demands reversal

The State admits that "a single prejudicial error" would entitle defendant to relief here but argues in a single page that Mr. Galindo had shown no error at all, and therefore "there are no errors to cumulate." (R.br.36.) Mr. Galindo relies on his Opening Brief and 23B remand motion to refute the State's claim that he has shown no error.

DATED this 18th day of February, 2019.

/s/ Cherise Bacalski

Cherise Bacalski (15084)
BACALSKI LEGAL PLLC
51 W. Center Street, #315
Orem, UT 84057
cherisebacalski@gmail.com
(858) 215-1388

/s/ Emily Adams

Emily Adams (14937)
ADAMS LEGAL LLC
PO Box 1564
Bountiful, UT 84011
eadams@adamslegalllc.com
(801) 309-9625

***Appointed Attorneys for
Defendant/Appellant
Patrick Galindo***

