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SUMMARY
April 1, 2021

2021COA40

No. 18CA0284, *Peo v Zimmer* — Criminal Law — Mental Competency to Proceed — How and When Raised — Determination of Competency to Proceed

A division of the court of appeals considers whether defense counsel's post-trial, pre-sentencing competency motion met the requirements of section 16-8.5-102(2)(b), C.R.S. 2020, thereby triggering the competency procedures of section 16-8.5-103, C.R.S. 2020. The trial court ruled that the motion did not. The division applies *People v. Lindsey*, 2020 CO 21, and concludes that the motion did meet the statutory requirements and therefore should have triggered the competency procedures set out in section 16-8.5-103. The division therefore vacates the sentence and remands with directions.

Court of Appeals No. 18CA0284
El Paso County District Court No. 17CR2370
Honorable Gregory R. Werner, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Patrick Mitchell Zimmer,

Defendant-Appellant.

JUDGMENT AFFIRMED, SENTENCE VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE PAWAR
Richman and Lipinsky, JJ., concur

Announced April 1, 2021

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Appellant

¶ 1 Defendant, Patrick Mitchell Zimmer, appeals the judgment of conviction and sentence entered on a jury verdict finding him guilty of stalking. We affirm his conviction. But we conclude that the trial court's error of declining to order a competency evaluation between trial and sentencing created a reasonable possibility that Zimmer was sentenced while incompetent to proceed. We therefore vacate Zimmer's sentence and remand the case to the trial court with directions.

I. Background

¶ 2 Zimmer sought to initiate a romantic relationship with the victim, a woman he had known for years. After rebuffing his advances, the victim told Zimmer to stop contacting her or she would call the police. Zimmer did not stop and instead sent her dozens of text messages over the course of two days, some of which threatened that he would rape and kill her.

¶ 3 The next week, Zimmer came to the front door of the victim's house. When the victim cracked the door to see who was there, she saw Zimmer holding a bag. She immediately closed the door and locked it, and Zimmer left the bag hanging on the door. The bag

contained a knife and folder with the following words written on it:

“I came because you wished for it. The universe told me so.”

¶ 4 The prosecution charged Zimmer with stalking and another offense that was ultimately dismissed. At a pretrial readiness conference about a month before trial, when asked by the court if he was ready to proceed to trial, defense counsel informed the court that he had new concerns about Zimmer’s competency and wished to discuss those concerns with Zimmer before affirming that he was ready for trial. The court therefore scheduled another pretrial readiness conference for about two weeks before trial. At that next pretrial readiness conference, neither defense counsel nor the court raised Zimmer’s competency.

¶ 5 At trial, the evidence included the dozens of texts Zimmer sent the victim. The victim also testified. The jury found Zimmer guilty of stalking.

¶ 6 In between trial and sentencing, defense counsel filed a formal competency motion. In it, defense counsel stated that before and during trial, Zimmer seemed competent. But after trial, Zimmer began insisting that the person who testified as the victim at trial was an imposter. Based on this insistence, defense counsel’s

motion stated that he had a good faith doubt about Zimmer's competency.

¶ 7 The trial court denied the motion, finding that Zimmer was competent to proceed to sentencing. Defense counsel objected to the court's competency finding and argued that the objection triggered a mandatory competency evaluation under section 16-8.5-103(2), C.R.S. 2020. The trial court disagreed, ruling that section 16-8.5-103(2) did not apply because the motion "failed to establish, or even allege, that [Zimmer] was incompetent as that term is defined in [the relevant statute]." The court then sentenced Zimmer to four years' imprisonment followed by two years of mandatory parole.

¶ 8 Zimmer appeals. He argues that the trial court erred by failing to order a competency evaluation before trial or, alternatively, between trial and sentencing. He also challenges the trial court's ruling on a discovery violation. We first disagree with Zimmer's challenge to the discovery violation ruling. We then address his competency evaluation arguments. Although we find no error in the trial court's pretrial competency ruling, we conclude that the

trial court erred by not ordering a competency evaluation between trial and sentencing.

II. Discovery Violation

¶ 9 Zimmer contends that the prosecution failed to disclose an exhibit to the defense before introducing it at trial. And he argues that the trial court erred by failing to find that the prosecution's failure to disclose it constituted a discovery violation. He further argues that this error violated his constitutional right to due process.

¶ 10 We review a trial court's discovery violation ruling for an abuse of discretion. *See People v. White*, 64 P.3d 864, 874 (Colo. App. 2002). If a trial court abused its discretion and that error violated a defendant's constitutional rights, we will reverse unless the error was harmless beyond a reasonable doubt. *See People v. Hagos*, 2012 CO 63, ¶ 11. An error is harmless beyond a reasonable doubt if the properly admitted evidence overwhelmingly establishes the defendant's guilt. *See People v. Phillips*, 2012 COA 176, ¶ 149.

¶ 11 Based on the record, it is unclear when or if the prosecution disclosed the contested exhibit to the defense. But even assuming that (1) the prosecution failed to disclose it, (2) the trial court erred

by failing to find that a discovery violation had taken place, and (3) that error violated Zimmer's constitutional right to due process, we conclude that any error was harmless beyond a reasonable doubt. The properly admitted evidence of Zimmer's guilt was overwhelming.

¶ 12 Zimmer was convicted of stalking under section 18-3-602(1)(c), C.R.S. 2020. This offense required the prosecution to establish that he (1) knowingly repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with the victim that would cause a reasonable person to suffer serious emotional distress; and (2) actually caused the victim to suffer serious emotional distress. *Id.*

¶ 13 The contested exhibit was a thirty-two-second video that Zimmer sent the victim. The video consisted of a closeup of Zimmer's face and head and an unintelligible statement. It was just one of many dozens of messages Zimmer sent the victim after she told him to stop contacting her. The contested video may have been threatening when considered in the context of the communication between Zimmer and victim. But other messages whose admission Zimmer does not challenge were undoubtedly and explicitly

threatening. One stated, “I’m coming for you next.

#YouJustCommittedSuicide.” Another, “I’m going to come in there and rape your fucking face.” And another, “I’m Fucking GOD you stupid little [N-word]! I’m going to cut your fucking head off with a rusty muslim Sabre dripping in shit and pissy cum! You’re gonna die young....”

¶ 14 The victim testified that she was terrified and upset by Zimmer’s messages. She also testified that these messages culminated with Zimmer showing up at her house and leaving a bag with a knife and a cryptic note hanging on her door.

¶ 15 The single contested video notwithstanding, the dozens of properly admitted messages and the victim’s testimony overwhelmingly established that Zimmer was guilty of stalking. We therefore conclude that any error in failing to rule that the prosecution had committed a discovery violation or impose sanctions for that violation was harmless beyond a reasonable doubt.

III. Competency Rulings

¶ 16 Zimmer also argues that the trial court erred by failing to stay the proceedings and order a competency evaluation before trial and

between trial and sentencing. We disagree that a competency evaluation was required before trial. But we agree with Zimmer that the trial court erred by failing to order one between trial and sentencing. And we conclude that this error requires us to vacate Zimmer's sentence and remand for further proceedings.

A. Governing Law and Standard of Review

¶ 17 Due process and Colorado statutory law prohibit trying or sentencing a defendant who is incompetent to proceed. *See People v. Kilgore*, 992 P.2d 661, 663 (Colo. App. 1999); § 16-8.5-102(1), C.R.S. 2020. A defendant is incompetent to proceed if,

as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or . . . , as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings.

§ 16-8.5-101(12), C.R.S. 2020.

¶ 18 The procedures courts must follow to determine a defendant's competency are set out in sections 16-8.5-102 and -103. A defendant's competency can be raised in only two ways. § 16-8.5-

102(2). First, it can be raised by the trial court. “If the judge has reason to believe that the defendant is incompetent to proceed, it is the judge’s duty to suspend the proceeding and determine the competency or incompetency of the defendant” § 16-8.5-102(2)(a). Second, either defense counsel or the prosecutor can file a motion if either has reason to believe the defendant is incompetent. § 16-8.5-102(2)(b). The motion must (1) be written; (2) “contain a certificate of counsel stating that the motion is based on a good faith doubt that the defendant is competent to proceed”; and (3) “set forth the specific facts that have formed the basis for the motion.” *Id.*

¶ 19 Once the defendant’s competency is raised in one of these two ways, the court may make a preliminary finding of competency or incompetency. § 16-8.5-103(1)(a). If the court determines that it has insufficient information to make a preliminary finding, it “shall” order a competency evaluation. § 16-8.5-103(2). Likewise, the court “shall” order a competency evaluation if the court makes a preliminary finding and either party objects to it within seven days. *Id.*

¶ 20 In *People v. Lindsey*, 2020 CO 21, our supreme court clarified the scope of the trial court’s discretion to determine whether a written competency motion validly raises the issue of a defendant’s competency. The court held that to raise a defendant’s competency, it is not enough that a written motion certify counsel’s good faith doubt about the defendant’s competency and set forth facts in purported support. *Id.* at ¶ 35. In addition, the facts set forth in the motion must *actually* support a good faith doubt about the defendant’s competency. *Id.* If the asserted facts do not, the trial court has discretion to reject the motion without making a preliminary finding, thereby not triggering any of the statutory procedures. *Id.*

¶ 21 The supreme court made clear that in evaluating whether a written competency motion triggers the statutory procedure, the trial court should neither evaluate the veracity of the facts set forth in the motion, nor evaluate whether those facts establish that the defendant is incompetent. Instead, the court’s task is limited to evaluating whether the proffered facts support *counsel’s good faith doubt* about the defendant’s competency. *Id.* at ¶ 4.

¶ 22 The supreme court also emphasized repeatedly that the standard courts should apply in making this determination is a lenient one. *Id.* at ¶ 34. A trial court’s discretion is limited to rejecting only “the rare competency motion that rests on counsel’s inadequate proffer.” *Id.* at ¶ 35.

¶ 23 With this law to guide us, we now turn to Zimmer’s allegations of error. We review de novo whether a trial court complied with the competency procedures laid out in sections 16-8.5-102 and -103. *See People v. Wingfield*, 2014 COA 173, ¶ 27. But we review a trial court’s determination that a competency motion failed to set forth facts that actually supported a good faith doubt about the defendant’s competency for an abuse of discretion. *See Lindsey*, ¶ 23. A trial court abuses its discretion when its ruling misapplies the law or is manifestly arbitrary, unreasonable, or unfair. *Id.*; *Margerum v. People*, 2019 CO 100, ¶ 9.

B. Pretrial

¶ 24 Zimmer argues that the trial court erred by failing to sua sponte order a competency evaluation before trial. He contends that the court had reason to believe he was incompetent and

therefore had a duty to suspend proceedings for a competency evaluation. We disagree.

¶ 25 Zimmer contends that the trial court had reason to believe he was incompetent based only on the following statement made by defense counsel at the first pretrial readiness conference:

I've met with Mr. Zimmer last week, and I met with him again yesterday. I'm asking if the Court would consider continuing this matter for that announcement until Wednesday. I'm going to meet with him again today. I have some concerns regarding competency based upon some new information I received yesterday. And I want to discuss those with Mr. Zimmer before making a formal motion. And it may be opposed at this point.

¶ 26 This statement did not give the trial court reason to believe that Zimmer was incompetent to proceed. All defense counsel said was that he had concerns about Zimmer's competency. Defense counsel did not explain what those concerns were. Nor did defense counsel ever file a motion based on those concerns. And we are unaware of anything else in the record that might have suggested to the trial court that Zimmer was incompetent to proceed before trial. Under these circumstances, we conclude that the trial court had no reason to believe that Zimmer was incompetent before trial. The

court therefore did not err by failing to order a competency evaluation at that time.

C. Between Trial and Sentencing

¶ 27 Zimmer next argues that the trial court erred by rejecting defense counsel's written competency motion filed after trial and before sentencing. As mentioned above, the court ruled that the facts in the motion failed to allege, let alone establish, that Zimmer was incompetent between trial and sentencing. Although the trial court made this ruling before *Lindsey* was decided, we understand the trial court's ruling as exercising the kind of discretion at issue in that case. We therefore review the trial court's rejection of defense counsel's written motion for an abuse of discretion. See *Lindsey*, ¶ 23.

1. The Trial Court Abused its Discretion

¶ 28 There is no dispute that defense counsel's competency motion was written and certified that counsel had a good faith doubt about Zimmer's competency. The only question is whether the facts set forth in the motion, taken as true, supported defense counsel's good faith doubt about Zimmer's competency.

¶ 29 The motion set forth the following facts. Before and during trial, Zimmer “was tracking appropriately, was focused on the issues related to the trial, assisted in every aspect of the trial and . . . discussed [his right to testify] in appropriate and rational terms, ultimately making a rational decision not to testify.” At no time during the trial did Zimmer allege that the victim who testified was an imposter. Nevertheless, when defense counsel was preparing for sentencing after trial, Zimmer

adamantly and insistently argued that the alleged victim who testified at the trial was not, in fact, the alleged victim. Instead, the person who testified was a look-alike; probably her cousin. Mr. Zimmer insisted that the next course of action should be proceedings to raise this issue with the prosecution and the Court. Once it is revealed to the Court and prosecution that the person who testified was an imposter, then the matter would be properly resolved.

Defense counsel wrote that his

efforts to address this issue were genuinely and forcefully rejected by Mr. Zimmer demonstrating a firm and committed belief in the false identity of the alleged victim. Although the perception of the identity of the alleged victim is not directly relevant to the sentencing and further proceedings, it reveals such a dramatic departure from reality that counsel is concerned that this detachment is a

demonstration of Mr. Zimmer's inability to competently comprehend further proceedings.

¶ 30 The trial court held that these facts “failed to establish, or even allege, that [Zimmer] was incompetent.” The court referred to defense counsel’s burden in a competency motion as making a “threshold showing of incompetency.” In doing so, the trial court applied an incorrect legal standard. Section 16-8.5-102(2)(b) does not require a competency motion to establish, allege, or show incompetency. Instead, the facts in the motion must merely support counsel’s *good faith doubt* about the defendant’s competency. See § 16-8.5-102(2)(b); *Lindsey*, ¶ 35 (approving rejection of competency motion because it was “bereft of specific facts supporting a good-faith doubt regarding [the defendant’s] competency”). The trial court’s rejection of the competency motion because it failed to establish, allege, or show incompetency therefore misapplied the law and constituted an abuse of discretion.

¶ 31 To the extent that the trial court applied the correct legal standard and held that the facts in the motion did not support a good faith doubt about Zimmer’s competency, we conclude that this ruling was manifestly unreasonable. This case is distinguishable

from *Lindsey* — where the proffered facts were inadequate — in two important ways.

¶ 32 First, in *Lindsey*, the competency motion was consistent with the defendant’s well-established pattern of delay. At the time of the competency motion, the case was on its seventh trial setting, the defendant was on his fourth attorney, and the case had been pending for three years, “prompting [a] judge to remark that it was likely the oldest case pending in Jefferson County.” *Lindsey*, ¶ 1. Indeed, the first sentence of the supreme court’s opinion reads, “Any experienced attorney would have realized that the trial court was not going to grant another motion to continue in this case.” *Id.*

¶ 33 In contrast, there is no indication that Zimmer’s defense counsel engaged in a pattern of delay or filed the competency motion for that purpose. As discussed above, defense counsel expressed a general concern about Zimmer’s competency pretrial but ultimately did not file a competency motion at that time. We infer from this that unlike *Lindsey*, defense counsel filed a competency motion only based on a good faith doubt about Zimmer’s competency, not based on a desire to delay the proceedings.

¶ 34 Second, the facts proffered in the *Lindsey* competency motion “had *no bearing* on [the defendant’s] competency.” *Id.* at ¶ 25 (emphasis added). Instead, they were the same facts that counsel had relied on ten days earlier in seeking leave to withdraw. *Id.* at ¶ 2. They included, representatively, that the defendant avoided contact with counsel, promised to furnish counsel with information but never did so, and lied about his whereabouts in telling counsel that he was unable to meet. *Id.* at ¶ 24. The proffered facts demonstrated that the defendant was refusing to work with and assist counsel. *Id.* They had nothing to do with the defendant’s competency or relationship with reality.

¶ 35 This case is markedly different. Zimmer’s “adamant,” “firm,” and “committed” belief that the person who testified was not the victim called into question his grasp on reality. This behavior was a significant departure from Zimmer’s rational assistance in his defense up until that time. And because Zimmer insisted that the next step the defense should have taken was bringing the issue of the imposter to the court’s attention, it was reasonable for defense counsel to doubt that Zimmer had the rational understanding of the proceedings necessary to consult with counsel and assist in the

defense. See § 16-8.5-101(12). As defense counsel wrote in the motion, Zimmer’s insistence that the witness was an imposter “reveals such a dramatic departure from reality that counsel is concerned that this detachment is a demonstration of Mr. Zimmer’s inability to competently comprehend further proceedings.”

¶ 36 We are mindful of *Lindsey*’s repeated admonitions that trial courts have limited discretion to determine that the facts proffered in a competency motion do not actually support a good faith doubt about the defendant’s competency:

- “We caution trial courts, though, to resist the temptation to second-guess competency motions that are in writing and contain specific facts that support a good-faith doubt about a defendant’s competency. Nothing in this opinion should be understood as imposing a demanding standard” *Lindsey*, ¶ 34.
- “Trial courts should be mindful that, in general, defense counsel are in the best position to assess whether there is a competency concern with a defendant.” *Id.*

- “[T]rial courts retain sufficient discretion to reject the *rare* competency motion that rests on counsel’s inadequate proffer.” *Id.* at ¶ 35 (emphasis added).
- “[W]hile trial courts must guard against second-guessing a competency motion . . . that satisfies the threshold requirements in [the competency procedure statutes,] they retain sufficient discretion to reject the *rare* competency motion grounded in an attorney’s inadequate proffer.” *Id.* at ¶ 4 (emphasis added).

¶ 37 We conclude that defense counsel’s motion here was not the “rare competency motion grounded in an attorney’s inadequate proffer.” *Id.* Instead, the facts supported a good faith doubt about Zimmer’s competency and the trial court improperly ignored or second-guessed these proffered facts.

¶ 38 We therefore conclude that the trial court abused its discretion either by applying an incorrect legal standard (requiring that the motion establish, allege, or show incompetency) or by coming to the manifestly unreasonable conclusion that the facts did not support a good faith doubt about Zimmer’s competency. Rather than reject the motion, the trial court should have made a preliminary

competency finding. At that point, defense counsel's timely objection would have triggered a mandatory competency evaluation.

2. The Error was Not Harmless Beyond a Reasonable Doubt

¶ 39 Having concluded that the trial court erred, we must now determine whether that error requires reversal. We recognize that the error identified above is a statutory violation — the trial court did not comply with the procedures set out in sections 16-8.5-102 and -103. But a defendant's due process rights are violated “when a trial court does not afford an accused an adequate hearing on his or her claimed incompetency.” *People v. Matthews*, 662 P.2d 1108, 1111 (Colo. App. 1983). Because defense counsel raised a “sufficient doubt” about Zimmer's competency and the trial court failed to make the required competency determination, the court's error was of constitutional dimension. *See Kilgore*, 992 P.2d at 663 (“[I]f a ‘sufficient doubt’ of competency has been raised, a trial court's failure to make a competency determination violates due process requirements.” (quoting *People v. Morino*, 743 P.2d 49, 51 (Colo. App. 1987))). We therefore apply the constitutional harmless error test described above. *See Wingfield*, ¶ 28; *Matthews*, 662 P.2d at 1111. Under that test, we must reverse unless the prosecution

meets its burden of proving that there is no reasonable possibility that the error prejudiced the defendant. *See Hagos*, ¶ 11. Put differently, we may overlook the trial court’s error here if the prosecution is able to demonstrate that there was no reasonable possibility that Zimmer was incompetent to proceed. *Id.* The prosecution has not done so here.

¶ 40 We recognize that the trial court found nothing in the pre-sentence investigation report (PSIR) indicating that Zimmer did not understand the nature of the proceedings. The court found that based on the PSIR, it was clear that Zimmer “understands the sentencing option and the sentencing possibilities in this case.” Indeed, in the PSIR, Zimmer was asked about the possible sentences he faced and stated that he did not care because “they won, I lost.” He added, “I am not doing probation, it’s a waste of my time I will do the little bit of prison time, I will get credit for the time in [jail], that’s why I stayed here, then I will get out, move to Denver, and be happy again.”

¶ 41 But the PSIR also indicated that days before the events giving rise to the charges here, Zimmer was released from a behavioral health center where he had been, in his words, “involuntarily

committed for reasons still unknown to me.” And in the PSIR, Zimmer continued to insist that the witness who testified as the victim was an imposter.

¶ 42 Based on this record, we cannot say that there was no reasonable possibility that Zimmer was incompetent to proceed to sentencing. Although the PSIR seemed to indicate that he understood the sentence he faced and was able to engage rationally with those facts, it also indicated that he had recently been involuntarily committed to a behavioral health center. This, coupled with his continued insistence in the PSIR that the witness who testified as the victim was an imposter, raises the reasonable possibility that Zimmer’s tenuous relationship with reality prevented him from rationally assisting in his defense at sentencing. See § 16-8.5-101(12) (A defendant is incompetent if he cannot consult with his attorney “with a reasonable degree of rational understanding in order to assist in the defense.”). We therefore cannot say that the trial court’s error was harmless beyond a reasonable doubt. See *People v. Presson*, 2013 COA 120M, ¶ 22 (failing to order statutorily required competency evaluation was not harmless beyond a reasonable doubt because

evidence that defendant was competent was not overwhelming).

Consequently, we vacate Zimmer's sentence and remand for further proceedings. *See People v. Lindsey*, 2018 COA 96M, ¶ 18, *rev'd on other grounds*, 2020 CO 21; *Presson*, ¶ 25.

¶ 43 If on remand defense counsel wishes to withdraw the competency motion, the trial court shall reinstate the sentence. But if defense counsel wishes to pursue the competency motion, the trial court shall determine whether it is feasible to retrospectively evaluate Zimmer's competency at the time of sentencing. *See Lindsey*, 2018 COA 96M, ¶ 20. In making this determination, the trial court should consider

(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) defendant's statements in the trial record, and (4) the availability of individuals and witnesses who interacted with the defendant before and during trial [and sentencing], including the trial judge, both counsel, and jail officials.

Id. at ¶ 22 (quoting *People v. Corichi*, 18 P.3d 807, 811 (Colo. App. 2000)).

¶ 44 If a retrospective competency determination is feasible, the trial court shall order a retrospective competency evaluation. If,

based on the retrospective evaluation and any other evidence presented, the trial court determines that Zimmer was incompetent at the time he was sentenced, the court shall resentence him in a manner consistent with the competency procedure statutes and this opinion. *Id.* at ¶ 23.

¶ 45 If, however, the trial court determines that either (1) a retrospective competency determination is not feasible or (2) a retrospective determination shows that Zimmer was competent at the time of sentencing, the court shall reinstate the original sentence subject to Zimmer's right to appeal. *Id.* at ¶ 24.

IV. Conclusion

¶ 46 The judgment of conviction is affirmed. The sentence is vacated and the case is remanded to the trial court with directions to first determine whether defense counsel wishes to pursue the competency motion. If defense counsel does not, the court shall reinstate the sentence. If defense counsel wishes to pursue the competency motion, the trial court shall determine whether a retrospective competency determination is feasible and proceed as described above.

JUDGE RICHMAN and JUDGE LIPINSKY concur.