Supreme Court No. 93518-1
COA No. 72812-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK WILLIAMS,

Petitioner.

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

The Honorable Ira J. Uhrig

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Williams seeks review of the decision affirming his conviction, where *inter alia* he did not validly waive his right to counsel, having been told he could change his mind. Appx A, B.

B. COURT OF APPEALS DECISION

The Court of Appeals did not address Mr. Williams' argument that his waiver of counsel was invalid, made without his eyes open to the disadvantages of self-representation, when he was told he could change his mind any time.

The Court did hold that Williams' request to represent himself had been unequivocal. See COA No. 72812-1-I.

C. ISSUES PRESENTED ON REVIEW

1. Considering all the circumstances, did Mr. Williams unequivocally demand to represent himself, where he was essentially told by the trial court that he would be guaranteed to be appointed his existing counsel as his standby counsel, and where it was clear he simply wanted trial counsel to defend the case differently?

2. Was Mr. Williams effectively, and unconstitutionally, allowed to **experiment** with representing himself for part of trial, or, was his waiver of his right to counsel knowing, voluntary and

intelligent, where the court said – before he waived – that he could change his mind later, resulting in Williams not making his grave decision to represent himself with his eyes wide open, i.e., without being made aware of the serious risks and disadvantages of foregoing representation, and the magnitude of that undertaking, under U.S. Const. amend. 6, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)?

3. Did the trial court violate U.S. Const. amend. 14 and U.S. Const. amend. 6, when it imposed a "two strikes" sentence of Life Without Possibility of Parole?

D. STATEMENT OF THE CASE

Frederick Williams was tried in October, 2014 in Whatcom County on charges of child molestation and rape of a child, allegedly committed against M.W., and E.W. CP 5, 13, 188-91 (amended informations). Prior to trial, on multiple occasions including in January and February of 2014, and again in April, Mr. Williams expressed upset with his appointed counsel Tom Fryer, and made motions to be appointed new counsel and to proceed pro se.

On January 23, 2014, he told the trial court that "the whole idea of doing this is to try to mostly get counsel other than Mr. Fryer." 1/23/14RP at 16.

On October 9, Mr. Fryer presented Mr. Williams and announced to the court that his client was moving "to proceed pro se with me [Mr. Fryer] as standby counsel." 10/9/14RP at 136. Mr. Fryer stated that Mr. Williams was not moving "to proceed straight up pro se." 10/9/14RP at 136.

During the court's Faretta colloquy, when asked "why" he wanted to represent himself, Mr. Williams again complained about his lawyer, and stated he wanted another lawyer if the court denied his pro se motion. 10/9/14RP at 142-46. When the court asked him if he still wanted to represent himself, considering the penalty, Williams said, "If I have standby counsel, I think I can do it, Your Honor." 10/9/14RP at 146.

The trial court agreed with Mr. Fryer to delay any pro se status or have it be on hold when Mr. Fryer could present argument on pending motions he had briefed, while Mr. Williams himself would handle jury selection. 10/9/14RP at 146, 148, 150.

Then, the court told Mr. Williams,

> All right. Well, I hope that you change your mind but you have the constitutional right to proceed as your own lawyer.

10/9/14RP at 151-52. The court stated it would direct Mr. Fryer to be standby counsel, and then ordered that it was finding Mr. Williams had knowingly and voluntarily waived his right to an attorney, although the court again told Mr. Williams it hoped he would change his mind. 10/9/14RP at 152.

During the subsequent pre-trial hearings, and trial with examination of witnesses, the court, several times, encouraged Mr. Williams to take back his pro se status. See, e.g., 10/9/14RP at 152; 10/21/14RP at 165-66. After several days of trial, when Mr. Williams became sick and stated he could not continue, the court again suggested this was the time to have Mr. Fryer re-appointed. 10/23/14RP at 315, 317, 324. Mr. Williams accepted counsel the next day. 10/24/14RP at 3-5. He was convicted, and he appeals. CP 24-41, 256-74.

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E. ARGUMENT

(1). MR. WILLIAMS REQUEST (A) WAS NOT UNEQUIVOCAL; (B) NOR DID HE "KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY" WAIVE COUNSEL, BECAUSE HE WAS TOLD HE COULD CHANGE HIS MIND LATER.

a. Review is warranted. The Court of Appeals decision is in conflict with decisions of this Court and involves a significant issue under the State and federal constitutions, as argued infra. RAP 13.5(a)(1), (2), (3). A valid waiver of the right to counsel requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that " 'he knows what he is doing and his choice is made with eyes open.' " City of Bellevue v. Acrey, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984) (quoting Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)); United States v. Balough, 820 F.2d 1485, 1487 (9th Cir.1987) (same). The trial court must apprise the defendant of the disadvantages of self-representation. United States v. Balough, 820 F.2d at 1489. This requires that the court convey to the defendant a sense of the "magnitude of the undertaking." (Emphasis added.) State v. Nordstrom, 89 Wn. App. 737, 744 n.

12, 950 P.2d 946 (1997) (quoting Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir.1976)).

b. Standard of Review. A decision on a defendant's request for self-representation will be reversed if the decision relies on unsupported facts, or applies an incorrect legal standard. State v. Madsen, 168 Wn. 2d 496, 504, 229 P.3d 714, 718-19 (2010); (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

c. The presumption against finding a waiver of the right counsel. The Sixth Amendment to the United States Constitution provides that criminal defendants have the right to be represented by a lawyer. Mempa v. Rhay, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733 (1963); U.S. Const. amend. 6; U.S. Const. amend. 14. At the same time, a defendant may waive that important right, and represent himself. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

However, because of the fundamental importance of the right to counsel, and the perceived detrimental result of relinquishing that right, trial courts are cautioned to "indulge in

every reasonable presumption" against finding a defendant has validly waived his right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

(i) Unequivocal. The request to proceed pro se must be "unequivocal." State v. Madsen, 168 Wn. 2d at 506-07; see also State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702 (2014).

(ii) Knowing voluntary and intelligent waiver. If a demand is unequivocal, the highly consequential waiver of the right to counsel is still valid only if it is knowing, voluntary, and intelligent. In re Personal Restraint of Rhome, 172 Wn.2d 654, 663, 260 P.3d 874 (2011); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Importantly, one of the risks of self-representation is that once a defendant has waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. State v. Silva, 107 Wn. App. 605, 626–27, 27 P.3d 663 (2001).

d. The question of validity of the waiver is based on the record as a whole. The question whether the defendant's request to represent himself is knowing and voluntary, is

assessed in light of the entire record. State v. Modica, 136 Wn. App. 434, 441, 149 P.2d 446 (2006) (the demand must be unequivocal in the context of the record as a whole) (citing State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995), aff'd, 164 Wn.2d 83,186 P.3d 1062 (2008)).

e. The defendant was not advised of the risks and disadvantages of self-representation. Applying the requirements of an unequivocal demand, the Supreme Court has stated:

> While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, Johnstone v. Kelly, 741 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal.

State v. Stenson, 132 Wn. 2d 668, 739-42, 940 P.2d 1239, 1275-76 (1997).

Looking at the entire record, but focusing particularly on the hearing of October 9, the facts of Mr. Williams' request to proceed pro se demonstrated neither a conditional request, only equivocality.

More importantly, he was not informed of the well-nigh irreversible nature of the decision to waive counsel – indeed, he

was told the opposite.

(i) January 23. On January 23, 2014 Mr. Williams asked to represent himself but revealed the true purpose of his motion, when he stated,

> Your honor, the whole idea of doing this is to try to mostly get counsel other than Fryer.

1/23/14RP at 14-16.

Mr. Williams was also told of the certain likelihood that representing himself would come with standby counsel. When Tom Fryer noted that any order allowing Mr. Williams to proceed pro se should also give him Mr. Fryer as standby counsel, the court cautioned that appointing standby counsel is not something that is universally done, "but very frequently done." 1/23/14RP at 19.

The court set a hearing, and stated, "I can think of pro se they are most frequently given standby counsel." 1/23/14RP at 19.

(ii) January 27. The trial court denied the motion. Mr. Williams asserted that his dissatisfactions with Mr. Fryer were legitimate, and made clear that he did not want Mr. Fryer as his lawyer, but instead wanted one Mr. Subin, but indicated that if he could not obtain that result, "if I have to take, either go

pro se or take a public defender, then I will." 1/27/14RP at 29-32. The court denied the motion, stating that Mr. Williams was not really asking to represent himself. 1/27/14RP at 32-33.

(iii) October 9. On October 9, Mr. Fryer indicated to the court that Mr. Williams was again moving

> [t]o the effect that, he would like to proceed, I don't think he would like to proceed straight up pro se, but I think he would like to proceed pro se with me acting in a standby capacity.

(Emphasis added.) 10/9/14RP at 136. When the court inquired, Mr. Williams confirmed that he was seeking "to go pro se with standby counsel." 10/9/14RP at 136.

At that point, although the court told Mr. Williams the legal authorities indicated no right to standby counsel, the court stated that the courts are generally in favor of appointing standby counsel. 10/9/14RP at 137. Additionally, the court confirmed that not only would Mr. Williams likely be given standby counsel if he went pro se, but that it would be Mr. Fryer.

> THE COURT ... In this case we already have quite capable counsel who is very familiar with the case who I assume was willing to act as standby counsel?
> MR. FRYER: I am, Judge.

10/9/14RP at 136-7.

- ***Option to Change His Mind.***

In addition, the court, throughout the colloquy that followed, also told Mr. Williams he could change his mind, and have standby counsel take over full representation. 10/9/14RP at 137.

The court next proceeded to a colloquy under Faretta regarding Williams' knowledge of the law and court rules, which he did not have. 10/9/14RP at 137. When the court asked Mr. Williams why he wanted to represent himself, Mr. Williams complained that Mr. Fryer was not "representing me in my best interest" and returned to his requests for substitute counsel. 10/9/14RP at 141-44. He added,

> If I have standby counsel, I think I can do it, Your Honor.

10/9/14RP at 146. Before ruling, the court said it agreed with counsel Fryer that the court would essentially place the pro se status on hold or delay it going "into affect," so Fryer could provide oral argument for various legal motions he had drafted. 10/9/14RP at 146-50.

> Then, the court told Mr. Williams
> All right. Well, I hope that you change your mind but you have the constitutional right to proceed as your own lawyer.

(Emphasis added.) 10/9/14RP at 151-52.

• ***During trial – Mr. Williams' experiment with self-representation ends and he now changes his mind as he was told he could.***

On October 22, 2014, opening statements were delivered and witnesses Officer John Landis, Theresa Williams, and Joan Gaasland-Smith were examined, and cross-examined by the defendant Mr. Williams. 10/22/14RP at 200 to 303.

> I hope that, um, also that maybe later today you and Mr. Fryer can get together and talk about some of the issues that need to be talked about, and I won't say another word.

10/23/14RP at 324. Mr. Williams appeared in court the next court day and accepted Mr. Fryer back, as counsel – an option he had been told he possessed since before he waived his right to counsel. 10/24/14RP at 3-5.

The whole record fails to show a valid waiver.[1]

(iv) Telling the defendant <u>before</u> the waiver that he can change his mind later and obtain counsel back, does not inform the defendant of the disadvantages of self-representation.

This was not a knowing, voluntary, or intelligent waiver.

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[1] For a time after the <u>Faretta</u> waiver, even as Mr. Williams was purportedly acting <u>pro se</u>, counsel Tom Fryer continued to act. On October 20, Mr. Fryer made arguments regarding the jury questionnaire, and discussed evidentiary issues regarding the prior trial. 10/20/14RP at 154-56. On October 21, the jury was selected. 10/21/14RP at 157. The trial court responded to concerns raised by the prosecutor by commenting, "I am not sure how he is acting right now. He is acting more like counsel." 10/21/14RP at 160.

Just like it is a disadvantage of self-representation that a defendant is not entitled to standby counsel, see also State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987), but more importantly, it is a further disadvantage that once the pro se right itself is invoked, there is no right to re-appointment of counsel – especially for a request made mid-trial. Silva, 107 Wn. App. at 626–27.

> Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.

(Emphasis added.) State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991); see also State v. Afeworki, No. 70762-1-I, 2015 WL 4724827, at *4-5, *12 (Wash. Ct. App. Div. 1, Aug. 10, 2015) (court properly ruled defendant waived counsel by his conduct in the courtroom; defendant was warned of the disadvantages of self-representation including that he would not be entitled to standby counsel) (and court properly denied defendant's subsequent request for counsel, stating, "[b]ut the constitution does not allow you to, once you are representing yourself, once you have made that request and you begin representing yourself, to change your mind in the middle of

trial.").

The trial court failed to apprise Mr. Williams of the disadvantages of self-representation when it told Mr. Williams he could change his mind and have his lawyer back. The trial court must apprise the defendant of the disadvantages of self-representation. United States v. Balough, 820 F.2d at 1489. This requires that the court convey to the defendant a sense of the "magnitude of the undertaking." (Emphasis added.) State v. Nordstrom, 89 Wn. App. 737, 744 n. 12, 950 P.2d 946 (1997) (quoting Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir.1976)).

On this record, the trial court unfortunately did the opposite of conveying the magnitude of the task. Ultimately, granting Mr. Williams' request for self-representation was an abuse of discretion where he could change his mind when he wished.

The trial court's statements to Mr. Williams reflected its expressly stated, real concern that Williams not make the mistake of representing himself in this case. But as a result of the circumstances of the whole record, this defendant never accepted, the actual burden of self-representation –relinquishing

any option to simply change his mind as a matter of right and have a lawyer re-appointed. The waiver was invalid.

f. Reversal and remand is required. Improper acceptance of a defendant's waiver request constitutes reversible error. State v. Madsen, 168 Wn.2d at 503; see also United States v. Arlt, 41 F.3d 516, 521 (9th Cir.1994). The right to counsel is so fundamental to the right to a fair trial that any improperly-secured deprivation of it cannot be treated as harmless error. State v. Silva, 108 Wn. App. at 542. P.3d 257 (2014).

(2). THE BENCH FINDINGS THAT MR. WILLIAMS HAD A PRIOR CONVICTION THAT MADE HIM A PERSISTENT OFFENDER VIOLATED HIS RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

a. Sentencing; bench finding only. At sentencing in this case, the trial court, without reliance on a jury finding of a prior qualifying conviction, deemed Mr. Williams a "two-strikes" persistent offender as a result of his prior conviction in 1991 for rape of a child. 12/11/14RP at 702, 708-09. The imposition of the sentence based on the bench finding was over the objection of defense counsel. 12/11/14RP at 702-03.

b. The sentence violated Mr. Williams' Due Process and jury trial rights. The objection was well-taken. The Due Process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A criminal defendant has the right to a jury trial and may only be convicted and punished if the government proves every element or fact necessary to that sanction beyond a reasonable doubt. Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 2160-62, 186 L.Ed.2d 314 (2013); Blakely v. Washington, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The Supreme Court has recognized that this principle applies to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant, or the mandatory minimum. Alleyne, 133 S.Ct. 2161-62; Blakely, 542 U.S. at 304; see Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 492-93, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Therefore, under Alleyne, Blakely, and Apprendi, the judicial finding of Mr. Williams' prior conviction and the finding

that he qualified as a persistent offender violated his right to Due Process and his right to a jury trial. His sentence under the POAA must be reversed.

F. CONCLUSION

For the reasons stated, Mr. Frederick Williams respectfully requests that this Court grant review.

DATED this 11th day of August, 2015.

Respectfully submitted,

S/ OLIVER DAVIS

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Appendix A

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

STATE OF WASHINGTON, Respondent, v. FREDERICK J. WILLIAMS, Appellant.	)	No. 72812-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Frederick Williams, having filed his motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 29th day of July, 2016.

Judge

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FREDERICK J. WILLIAMS, Appellant.	)	No. 72812-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2016

APPELWICK, J. — A jury found Williams guilty of multiple counts of rape of a child and child molestation, committed against his two nieces. He contends that the trial court erred in granting his request to represent himself for a brief period at the beginning of trial. He also argues that the trial court erred in refusing to sever the charges against each niece for trial, in denying his request to participate in an in camera review of school records, and in sentencing him as a persistent offender. We affirm.

FACTS

In 2009, the State charged Frederick Williams, a registered sex offender, with committing multiple counts of rape of a child and child molestation against his nieces M.W. and E.W. The charging period for the counts involving E.W. was 1999 to 2003;

the charging period for the counts involving M.W. was 2006 to 2008. The charges arose after M.W. disclosed the abuse to a friend.

The State's evidence established that Williams began abusing E.W. when she was eight or nine years old. Most of the abuse occurred in Williams's trailer, which was located near the girls' home. When E.W. wanted money or some other favor, Williams required her to "earn" it, sometimes by "flashing," i.e., lifting her shirt and exposing her breasts.

Williams used a Polaroid camera to take photographs of E.W. On one occasion, he removed E.W.'s clothes from below her waist, had her lie down and open her legs, and then photographed between her legs. During the photo session, Williams "cup[ped]" his hand around E.W.'s vagina and touched her breasts. Williams told E.W. that he was an artist and wanted to draw her vagina.

Williams touched and sucked on E.W.'s breasts on multiple occasions. He also repeatedly cupped his hand around her vagina while inserting his finger into her vagina.

Williams began abusing M.W., E.W.'s younger sister, while M.W. was in middle school. When M.W. was 11 or 12, Williams offered to obtain a movie for her from Netflix, but required her to go to his trailer. At the trailer, Williams began kissing M.W. He then removed her shirt and bra and started kissing her breasts. Williams eventually removed all of M.W.'s clothing, put his finger into her vagina, and "moved it around." Williams then unsuccessfully attempted to insert his penis into M.W.'s vagina. After putting on his pants, Williams licked M.W.'s vagina. At some point,

Williams used a surveillance camera connected to his computer to show M.W. what her vagina looked like. Williams told M.W. that the camera was not recording.

On another occasion, Williams went into the bathroom at M.W.'s house to help her give the dog a bath. Williams closed the door, removed M.W.'s top, and started touching her breasts. Williams gave M.W. $5 for washing the dog. Williams removed M.W.'s top and touched her breasts on several other occasions.

Williams told both girls not to tell anyone about the abuse.

Following a trial in 2011, the jury found Williams guilty of 10 counts of rape of a child and child molestation. The court found that Williams was a persistent offender under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW, and imposed a sentence of life without parole. On appeal, this court reversed, concluding that the trial court erred in admitting Williams's 1991 child rape conviction under RCW 10.58.090. State v. Williams, noted at 172 Wn. App. 1027, 2012 WL 6554786, at *1; see also State v. Gresham, 173 Wn.2d 405, 413-14, 269 P.3d 207 (2012).

The State retried Williams in October 2014. Prior to trial, Williams expressed dissatisfaction with his appointed attorney, who had represented him in the first trial, and asked to represent himself. Following an extensive colloquy, the trial court granted Williams's request and appointed Williams's current attorney to serve as standby counsel.

Shortly after trial began, Williams informed the trial court that he had a severe headache and a neck injury and asked for a continuance. On the following day, Williams agreed that standby counsel should resume full representation. At trial, the

defense called a forensic psychologist, who testified that the law enforcement interviews of E.W. and M.W. were improperly suggestive and could have "potentially contaminated" the girls' memories.

The jury found Williams guilty as charged. The trial court again found that he was a persistent offender and sentenced him to a term of life without the possibility of parole.

DISCUSSION

I. Self-Representation

Williams contends that his request to represent himself was merely an attempt to obtain the appointment of new counsel and was therefore not unequivocal. He also maintains that the trial court's willingness to provide standby counsel precluded a knowing, intelligent, and voluntary waiver of his right to counsel. Viewed in context, the record fails to support these contentions.

The State and federal constitutions guarantee a criminal defendant both a right to counsel and the right to self-representation. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). But, the right to self-representation is not self-executing. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd by, 164 Wn.2d 83, 186 P.3d 1062 (2008). "A criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole." Id. A court must indulge in " 'every reasonable presumption' " against a defendant's waiver of the right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)

(quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed.2d 424 (1977)). We review the trial court's decision to grant the defendant's motion to proceed pro se for an abuse of discretion. Modica, 136 Wn. App. at 442.

The record establishes that Williams's decision to represent himself was not undertaken hastily. Williams first raised the issue of representing himself during pretrial motions on January 23, 2014. He informed the court that he was not satisfied with Thomas Fryer, his current attorney and the attorney who represented him during the first trial. Williams explained that "the whole idea of doing this is to try to mostly get counsel other than Fryer" and that he really wanted a specific private attorney, Andrew Subin, to substitute for Fryer. Williams assumed that the court could simply replace Fryer with Subin.

At a hearing on January 27, Williams suggested that because he had filed a complaint about Fryer with the Washington State Bar Association, Fryer had a "conflict of interest" and needed to be replaced, preferably with Subin. The trial court informed Williams that he could not create a conflict of interest merely by filing a complaint. The court also explained that if Fryer were to withdraw, the public defender's office, not the court, would choose new counsel. When the court asked if he wanted to represent himself, Williams replied:

> Partly and partly not. To be honest, to be completely honest, Your Honor, I was hoping that, um, if, you know, you get Subin in in some way, the same way that I got Mr. Fryer, I didn't realize that the court can't do that but I mean. I know my case, but I am not --

The court concluded that Williams had not identified any basis for appointing new counsel and that his request to represent himself was not unequivocal, a decision that Williams does not challenge on appeal.

On October 9, 2014, shortly before the second trial began, Williams informed the trial court that "I would like to go pro se with standby counsel." The court immediately told Williams that in Washington, "there is no right to standby counsel." Noting that the appointment of standby counsel is encouraged, however, the court ascertained that Fryer was willing to act as standby counsel. The court then explained that the role of standby counsel was limited to providing assistance, but that standby counsel could, under certain circumstances, "take over full representation" at the defendant's request.

During a detailed colloquy with Williams about the requirements for proceeding pro se, the court repeatedly advised Williams, who was facing a persistent offender sentence, that self-representation was a bad idea and that Fryer was an experienced and skilled attorney. When asked why he wanted to represent himself, Williams explained:

> Because I know my case, . . . I don't feel that Tom was representing me in the way that is beneficiary [sic] to me. I . . . feel that I can especially, with the dynamics of my case, defend myself properly.

After acknowledging that no one had threatened him or promised anything to persuade him to represent himself, Williams again stressed his dissatisfaction with Fryer:

> If you deny me pro se, I want another lawyer. I do not want Tom as my lawyer.

The court then summarized:

> THE COURT: In light of the penalty that you might suffer if you were found guilty, and, you know, the State has to prove you guilty beyond a reasonable doubt, there is no question about that, but in light of the penalty you might suffer if you are found guilty and in light of all of the difficulties you will be facing representing yourself, is it still your desire to represent yourself and give up your right to be fully represented by Mr. Fryer?
>
> THE DEFENDANT: If I have standby counsel, I think I can do it, Your Honor.
>
> THE COURT: Is this decision you made entirely voluntarily?
>
> THE DEFENDANT: Yes, sir.

The court interrupted the colloquy to address several scheduling issues, including a delay in the beginning of Williams's self-representation, to permit Fryer to argue certain motions. The court then found that Williams had knowingly, intelligently, and voluntarily waived his right to counsel and permitted him to represent himself with Fryer as standby counsel.

Williams contends that his request to represent himself was not unequivocal because he was merely seeking the appointment of another attorney. The record shows, however, that by the end of the January 2014 pretrial hearings, Williams understood the trial court could not simply replace Fryer with his preferred private attorney. Williams also expressed a reluctance to use the random procedure for the appointment of a new attorney.

During the October 9 hearing, in the face of the trial court's extensive efforts to dissuade him, Williams repeatedly and affirmatively expressed his desire to represent himself. Although Williams requested the appointment of standby counsel, the trial court immediately informed him that he had no right to standby counsel. Williams never demanded or insisted that the trial court appoint standby counsel. See State v. Mehrabian, 175 Wn. App. 678, 691-92, 308 P.3d 660 (2013) (defendant's request to proceed pro se with standby counsel was not equivocal where trial court informed defendant he had no right to standby counsel and defendant did not demand or insist on the appointment of standby counsel). Nor did Williams's repeatedly expressed dissatisfaction with Fryer render his request equivocal:

> [W]hen a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense.

Modica, 136 Wn. App. at 442; see also State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) (when indigent defendant fails to provide court with legitimate reasons for substitute counsel, court may require defendant to either continue with current counsel or proceed pro se).

When viewed in the context of the entire record, Williams's request to represent himself was unequivocal.

Williams's contention that the trial court's immediate willingness to appoint standby counsel rendered his waiver involuntary is also unpersuasive. After informing Williams that he had no right to standby counsel, the trial court explained that standby counsel was "not a glorified messenger" and "not [there] simply to do

everything that you want." During the following colloquy, Williams acknowledged that he had never studied law, that he had never represented himself before, that he was charged with multiple counts of child rape and child molestation, and that he was facing a two-strike persistent offender sentence. Williams also conceded that he was not familiar with the rules of evidence or criminal procedure or the procedure for jury selection. The court informed Williams that these rules would govern the trial and that even though he might have standby counsel:

> [Y]ou are on your own and the court will not tell you how to try your case or advise you how to proceed, you are held to the same standards as a practicing licensed attorney.

Throughout the colloquy, the trial court repeatedly advised Williams of the disadvantages of proceeding pro se, even with standby counsel, and urged him not to represent himself.

In order to demonstrate a valid waiver of the right to counsel, the record must show the defendant understood "the dangers and disadvantages of self-representation" and establish "his choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The record of the October 9 hearing, including the trial court's detailed explanation of the procedural requirements of self-representation, the dangers of proceeding pro se, the limits of standby counsel, and the fact that Williams was in charge of his own defense, establishes that Williams was well aware of the risks and disadvantages of self-representation. The trial court did not abuse its discretion in finding that Williams knowingly, intelligently, and voluntarily waived his right to counsel and allowing him to

represent himself. See State v. Sinclair, 46 Wn. App. 433, 438, 730 P.2d 742 (1986) ("when the trial court has correctly ruled that substitute counsel will not be appointed and the defendant insists that in the absence of substitute counsel he be permitted to defend pro se, his request must be deemed unequivocal").[1]

II. Motion to Sever

Williams contends that the trial court abused its discretion in denying his motion to sever the counts involving E.W. and M.W. In Williams's motion to sever, defense counsel maintained that a single trial would be unfairly prejudicial because the jury would likely "accumulate" the evidence. Counsel also argued that the evidence would not be cross-admissible under ER 404(b). The State maintained that the evidence of each count was strong and the counts were easily compartmentalized, that the jury would be instructed to consider each count separately, and that much of the evidence was cross-admissible. The court denied the motion to sever, stating that it was "adopting the State's analysis as set forth in its response."

Offenses properly joined under CrR 4.3.1(a) may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence." CrR 4.4(b). Defendants seeking severance have the burden of demonstrating that a trial involving all counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718,

[1] Because the trial court did not abuse its discretion in permitting Williams to represent himself, we need not address the State's contention that the invited error precludes Williams's challenge to the validity of his waiver of counsel.

790 P.2d 154 (1990). In determining whether the potential for prejudice requires severance, the court must consider

> (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). We will reverse the trial court's failure to sever counts only for a manifest abuse of discretion. Bythrow, 114 Wn.2d at 717.

Contrary to Williams's suggestions, the evidence of each count was relatively strong. Both girls generally described distinct incidents that the jury could readily distinguish. Williams's defenses to all charges were similar and not contradictory. Williams relied primarily on a general denial, arguing that both girls' accounts were unreliable and tainted by improper investigative techniques. In addition, the trial court instructed the jury to consider each count separately.

On appeal, Williams's primary contention is that denial of the severance motion was an abuse of discretion because the trial court failed to make a ruling on the record that the evidence would be cross-admissible under ER 404(b). Under ER 404(b), evidence of prior misconduct is not admissible "to show that it is likely the defendant committed the alleged crime, acted in conformity with the prior bad acts when committing the crime, or had a propensity to commit the crime." State v. Wilson, 144 Wn. App. 166, 175, 181 P.3d 887 (2008). Such evidence may, however, be admissible for other purposes, such as demonstrating a common scheme or plan. See State v. Lough, 125 Wn.2d 847, 8524-55, 889 P.2d 487 (1995).

Before admitting evidence of prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for admitting the evidence; (3) determine the relevance of the evidence to prove an element of the charged crime; and (4) weigh the probative value against its prejudicial effect. Gresham, 173 Wn.2d at 421. We review the trial court's decision to admit or exclude evidence under ER 404(b) for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Williams correctly contends that the trial court failed to carry out its ER 404(b) analysis on the record. See State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (trial court's balancing of the prejudicial nature of ER 404(b) evidence must take place on the record). Rather, the court merely adopted the State's written argument opposing severance, which maintained that the evidence involving E.W. and M.W. was cross-admissible. But, the trial court's failure to undertake ER 404(b) balancing on the record is harmless "if the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence." Id. at 686.

In order to constitute a common scheme or plan, the evidence of the prior misconduct and the charged crime " 'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.' " State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (quoting Lough, 125 Wn.2d at 860). Evidence admitted to

show a common scheme or plan need not be "distinct from common means of committing the charged crime." Gresham, 173 Wn.2d at 423.

Williams exploited his position as a family member and the close proximity of his trailer to begin abusing both E.W. and M.W. He told both girls not to tell anyone about the abuse. Williams also used the promise of gifts or favors to isolate and gain private access to the girls, where he removed their clothing, fondled and kissed their breasts, and digitally penetrated their vaginas. In separate incidents, Williams used a camera to record or view both girls' vaginas.

Despite some differences, the similarities here were sufficient to support a reasonable determination that the charged incidents were "individual manifestations" of the same plan. Gresham, 173 Wn.2d at 423. When the defense is a general denial and credibility a crucial issue, the trial court can reasonably determine that the probative value of evidence of other sex offenses outweighs the potential prejudice. State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

Moreover, at the time it ruled on the motion to sever, the trial court was thoroughly familiar with the facts of the case and E.W. and M.W.'s testimony, having presided at Williams's first trial. Under the circumstances, including the substantial evidence of a common scheme or plan and the court's expressed reliance on the State's written arguments, we are confident that the court would have reached the same decision had it conducted the ER 404(b) balancing analysis on the record. The trial court did not abuse its discretion in refusing to sever the counts for trial.

III. *In Camera* Review

Williams contends the trial court erred when it denied defense counsel's request to be present and participate in an in camera review of E.W. and M.W.'s school records. He argues that the court's ruling violated his constitutional right to due process.

Prior to trial, Williams moved for a subpoena duces tecum of E.W. and M.W.'s school records. Williams alleged that school officials were present when law enforcement personnel contacted the girls and that school documents pertaining to those contacts likely contained exculpatory evidence about E.W. and M.W.'s credibility. The trial court granted the subpoena duces tecum, subject to the in camera review of the records for discoverable materials.

After the school released the records to the court, counsel for Williams moved for leave to be present and participate in the in camera review. At a hearing on May 6, 2014, the court reported that it had already reviewed all of the documents and found nothing discoverable or helpful to the defense. After describing the materials in detail, the court offered to review them again, but denied defense counsel's request to be present.

On appeal, Williams first contends that the State lacked standing to object to his request for the school records and failed to adequately demonstrate that any particular privilege applied to the school records. He argues that he was therefore entitled to full discovery.

But, Williams fails to provide any references to the record indicating that he raised these issues in the trial court. Nor does he identify the legal arguments that he presented to the trial court or the trial court's rulings on those arguments. We therefore decline to address these contentions for the first time on appeal. See RAP 2.5(a); State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

Williams also contends the trial court violated his right to due process when it denied his request to be present during the in camera review. The record indicates that Williams did not object to the trial court's decision to review the records in camera. We review the trial court's decision to conduct in camera review for an abuse of discretion. See State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996).

Williams's argument in the trial court rested primarily on Zaal v. State, 326 Md. 54, 602 A.2d 1247 (1992). But, Zaal does not require the trial court to permit counsel to be present during the in camera review of school records. Rather, Zaal held that the trial court "may elect to review the records alone, to conduct the review in the presence of counsel, or to permit review by counsel alone." Id. at 87.

Here, after reviewing the records, the trial court informed the parties in some detail about the nature of the documents. Among other things, the trial court stated that the documents involved evaluations of hearing, vision, phonics, math skills, writing skills, interests, and various standardized assessment forms. After summarizing the materials, the court offered to review them again, but explained

> I saw nothing that I thought was discoverable that would be helpful to defense in the presentation of their case, nor did I see anything that I

> thought would lead to anything that would be discoverable or helpful. I didn't see anything that related to anything other than educational assessments and there was a strong focus on speech, phonics and articulation. And that was about it.

The trial court then agreed with defense counsel's assessment that "it sounds like we have, in essence, generic school records" and that "[t]here was a series of events that took place in the school that looked as if school personnel was present and if the court saw anything it would have jumped right out."

Given the trial court's detailed summary of the materials it reviewed and defense counsel's acknowledgement of the nature of the materials, Williams fails to demonstrate that the trial court abused its discretion in denying Williams's request to be present during the in camera review.

IV. Persistent Offender Sentence

Williams contends that the imposition of a sentence under the POAA based on the trial court's finding of a prior qualifying conviction violated his due process and jury trial rights. He contends that the State had to prove prior strike offenses beyond a reasonable doubt to a jury before the court could sentence him as a persistent offender.

Our Supreme Court has repeatedly rejected essentially identical arguments. See, e.g., State v. Witherspoon, 180 Wn.2d 875, 893, 329 P.3d 888 (2014). These decisions are binding on us. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

V. Statement of Additional Grounds for Review

In his statement of additional grounds for review, Williams appears to challenge the testimony of his brother, who died between the first and second trial. Portions of the brother's testimony were read into the record at the second trial. Although a statement of additional grounds for review need not include references to the record or citations to authority, this court will not consider the defendant's allegations unless they "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Williams's allegations regarding the challenged testimony are too conclusory to permit appellate review.

Williams also appears to contend that the trial court erroneously excluded the exculpatory testimony of a witness. But, Williams's arguments rest on allegations that are outside the record and therefore cannot be considered on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72812-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas
Whatcom County Prosecutor's Office
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Date: August 11, 2016