72904-7

NO. 72904-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JON AMADIO DEL DUCA

Appellant.

FILED
May 06, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY E. ROBERTS

BRIEF OF RESPONDENT

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A. INTRODUCTION

This case is not nearly as complicated as the lengthy record would suggest. Jon Del Duca did not trust his public defenders. He believed they were biased because they were paid by the government. He demanded that they do his bidding, regardless of whether his bidding included filing frivolous motions, like challenging a non-existent grand jury indictment, or seeking to sue various officials who he alleged had violated his rights. When numerous public defenders refused to follow Del Duca's unfounded legal strategies, he treated their refusal as a failure to defend him. He became frustrated and refused to work with them. He repeatedly asked the trial court to fire his lawyers. Several times the trial court granted his requests, and he was provided at public expense seven different lawyers to litigate his two pending cases. But when the trial court refused to discharge Del Duca's seventh lawyer – John Ewers – Del Duca chose to represent himself rather than continue with Ewers. Although Del Duca insisted he was doing so "involuntarily," the trial court properly allowed Del Duca to represent himself, since forcing a defendant to make an unwelcome choice does not make the choice "involuntary."

B. ISSUES

1) Did the trial court properly accept Del Duca's decision to represent himself when Del Duca had to choose between self-representation and the lawyer he had repeatedly refused to work with?

2) Did the trial court err by failing to enter a written order denying motions that had been litigated numerous times during the nearly three years that the case was pending?

3) Did the trial court properly give the jury an instruction on reasonable doubt that has been repeatedly approved by the Washington Supreme Court?

C. STATEMENT OF THE CASE

In 2011 and 2012, Jon Amadio Del Duca faced two prosecutions in King County Superior Court for unrelated sexual assaults against children. The cases generally proceeded on separate tracks, but in 2012 Del Duca was represented by the same lawyer – Brian Beattie – on both cases for about 11 months. Del Duca was dissatisfied with the public defenders appointed by the court in both cases, and the same superior court judge presided over multiple hearings where Del Duca attempted to discharge his

lawyers. The history of these cases and their path through the superior court is summarized below.[1]

1. PROCEDURAL FACTS.

a. Cause Number 11-1-02184-6 KNT.

In August, 2010, Del Duca was hired to perform manual labor at a residence. Two young neighbor children (siblings) watched him as he worked. At some point, Del Duca came over and spoke to the children and then reached over the fence and touched them on the chest and in the genital regions. The children reported the touching to their parents and, after a later confrontation with the children's father, Del Duca was arrested. CP 547-48. On March 9, 2011, he was charged with two counts of child molestation in the first degree. CP 544-45.[2] Trial occurred in August, 2012 and a jury convicted Del Duca on one count and acquitted him of the other. CP 567-68. On appeal, Del Duca alleged, inter alia, that trial counsel was ineffective. State v. Del Duca, No. 69508-8-I, 2014 1600498, *1 (filed 4/21/2014). He also

[1] Attached for the court's convenience is a table that chronicles the hearings and clerk's papers filed in both cases. Appendix A.

[2] The King County Superior Court clerk's office inadvertently numbered two documents as #544.

alleged in a statement of additional grounds that his right to a grand jury was violated. Id. at *9. This Court rejected those arguments and affirmed his conviction in an unpublished decision. Id.

b. Cause Number 12-1-00681-1 KNT.

Del Duca molested a young girl between 2001 and 2002 while he was living near the girl's mother. CP 1-6. He was originally charged in 2005 but the prosecution was dismissed without prejudice when the prosecutor lost contact with the victim and her mother. CP 3. After child molestation charges were filed in the '11 cause number, prosecutors contacted the victim and her mother and they were willing to proceed with the case. On February 12, 2012, charges of rape of a child and child molestation were refiled under cause number 12-1-00681-1 KNT. CP 1-5. Opening statements were given on October 13, 2014. 40RP 57-64.[3] The jury returned guilty verdicts as charged on November 5, 2014. The court sentenced Del Duca on December 29, 2014, to 162 months of confinement on count I, and 98 months of confinement on count II. CP 133. This appeal stems from conviction under the '12 cause number.

[3] The State will cite to the report of proceedings as Appellant did. As indicated below, the State has prepared two additional volumes of transcripts and they will be cited as RP(A) and RP(B).

2. FACTS REGARDING DEL DUCA'S DECISION TO REPRESENT HIMSELF.

As detailed below, fifteen pretrial hearings were held between April 3, 2012 and September 25, 2013, when Del Duca waived his right to counsel. Appendix A. Most of these hearings dealt with Del Duca's dissatisfaction with appointed counsel. Both cause numbers were discussed in several of the pretrial hearings. See e.g, 2RP 12, 3RP 55, 4RP 3, 5RP 3, 6RP 55.

The following lawyers represented Del Duca under the '11 cause number: Scott Schmidt, Catherine Elliott, Lois Trickey, and Brian Beattie. See CP 550-51, 556, 563. The following lawyers represented Del Duca under the '12 cause number: Brian Beattie, Rick Lichtenstadter, Carey Huffman, and John Ewers. See CP 543, 7RP 74, CP 208. Del Duca made no fewer than 20 motions to discharge counsel or to represent himself.

On March 9, 2011, Del Duca was charged under cause number 11-1-02184-6 with child molestation in the first degree. CP 544-45. On April 20, 2011, the first lawyers to appear on his behalf – Scott Schmidt and Catherine Elliott of the Society of Counsel Representing Accused Persons (SCRAP) – filed a notice of appearance. CP 550-51. On June 13, 2011, Del Duca moved to

discharge these lawyers but the Honorable Mary Roberts denied that motion. CP 552-53. On June 27, 2011, Del Duca again moved to discharge his lawyers but the Honorable Mary Roberts denied his motion. CP 554-55. On October 6, 2011, Ms. Elliott withdrew as counsel and Ms. Lois Trickey (also a lawyer with SCRAP) entered the case. CP 556.

On November 16, 2011, a competency hearing was held. After Del Duca was found competent, he told the trial court that he was dissatisfied with Mr. Schmidt and Ms. Trickey because they were not listening to him. RP(A) 7-8.[4] He complained that they had told him that the only decisions he could make concerned whether to proceed to trial or not. RP(A) 7. Defense counsel Trickey noted that they had also told him that he has the right to decide whether to testify, and said, "The advice was he does not have the decision as to which legal argument to bring in the case." Id. Schmidt reminded the court that "Mr. Del Duca is aware that ... he also has the option to ask the Court either to fire us or to go pro se." Id. at 9.

[4] The State arranged for transcription of verbatim reports of proceedings from five short hearings that relate to Del Duca's disputes with counsel under the '11 cause number. Those supplemental verbatim reports will be cited in this brief as follows: RP(A) = 11/16/11; RP(B) = 11/29/11, 12/5/11, 1/24/12, and 2/2/12.

The court urged Del Duca to discuss these issues with his lawyers and bring a motion if he wanted. Id.

On November 29, 2011, a hearing was held because Del Duca had indicated in a letter to the court that he wanted to discharge counsel. CP 558-60 (filed 11/21/11). Del Duca said "there's been a definite communications problem" and he said he did not know what counsel had planned for his case. RP(B) 3. Mr. Schmidt agreed that there had, indeed, been persistent communication issues with Del Duca and that the problem had not improved by substituting Ms. Trickey for Ms. Elliott. RP(B) 4. He noted that time spent on these issues with Del Duca was preventing counsel from preparing for trial. Id. The court allowed both Ms. Trickey and Mr. Schmidt to withdraw. Id. at 5; CP 561-62. However, the court noted that it did not expect Del Duca to fare better with different lawyers.

> I'm a little skeptical that you'll be able to communicate with the next attorney, but I'm going to, in case it's actually a problem between this group, among this group, I'm going to give you that opportunity, given that the case is still in the relatively early stages of trial preparation.

RP(B) 5. Del Duca complained that he had no way of evaluating any lawyer appointed by the court and he complained that the

public defender he had in 2005 (on the case that was refiled under the '12 cause number) had done a poor job. Id. at 6-7.

On December 2, 2011, Mr. Brian Beattie from Associated Counsel for the Accused (ACA) filed a notice of appearance. CP 563. On December 5, 2011, the parties appeared in court and potential conflicts of interest with Mr. Beattie were discussed. RP(B) 11-12. Beattie was to check with the Office of Public Defense to ensure conflict-free counsel. Id. at 12.

On January 24, 2012, Del Duca appeared in court with Mr. Beattie. The prosecutor said that she would "defer to counsel on defendant's motion." RP(B) 14.[5] The following exchange took place:

> Court: Mr. Beattie.
> Beattie: Yes. Good morning, Your Honor. Mr. Del Duca and I are having different ideas on how to proceed with his defense. And at this point, we're not, it seems like we're going sideways rather than forward. I'm going to defer to him and let him explain
> Court: Mr. Del Duca.
> Δ: Yeah, we're back again.
> Court: Yes, we are. This is the third time.
> Δ: I know. I've have (sic) the same issue actually, the exact same issue.
> Court: That's what I thought.
> Δ: And you mentioned it before, and I respect that. ...[6]

[5] It does not appear that a written motion was filed.

[6] This is likely a reference to the court's earlier prediction that Del Duca would not be satisfied with any lawyer. See RP(A) 5.

RP (1/24/12) 14. Del Duca explained that his lawyers would not file motions he wanted them to file and that their reluctance was limiting his ability to defend himself. The court explained that that was the lawyer's prerogative. Id. at 14-18. He also complained about his food allergies and his health care. Id. at 18-19. The hearing ended with the court suggesting that Beattie carefully review the matters Del Duca wanted to bring before the court; no order was entered because the court had not been asked to rule upon any formal motion. Id. at 20-21.

On February 2, 2012, the parties appeared before the court again. Beattie told the court that he had reviewed Del Duca's motions and that "we're still sideways." RP(B) 22. Del Duca said that he had been "consistently denied his civil rights" by public defenders and that Beattie refused to sue on his behalf. RP(B) 23. Beattie confirmed that he could "not sue agencies of the government as part of our providing criminal defense." Id. Del Duca denied that he wanted to sue anyone, but he continued to complain that important motions should be brought concerning the grand jury and his arrest. Id. at 24-25. He said that prior attorney Lois Trickey had told him to shut up because he had nothing to do

with his defense. Id. at 25. The court reminded Del Duca that lawyers could not bring unfounded motions. Id. at 27. The court said, "So I have no doubt in my mind the next attorney is going to tell you the same thing, which is why I am highly unlikely to give you another attorney." Id. Del Duca replied that he wanted permission to file the motions on his own; the trial court denied that request. Id. at 28-29. Del Duca replied, "So I'm being denied that too, okay. He does not represent me. I have no desire, nor do I trust anybody the State pays to get a plea bargain or do what they need to do to keep their job, okay." Id. at 29. He later said, "I don't trust the man." The court entered an order that simply said it had heard information from the defendant and that "no action [would] be taken at this time." CP 565.

On February 10, 2012, Del Duca was charged under the '12 cause number with rape of a child in the first degree and child molestation in the first degree. CP 1-2. Mr. Brian Beattie filed a notice of appearance under this new cause number. CP 543.

Approximately six weeks later on April 3, 2012, Del Duca moved to discharge Mr. Beattie under both cause numbers. 1RP 2-3. The court addressed a letter the defendant had filed with the court on February 21, 2012 under the '11 cause number. Supp. CP

___ (Sub No. 56). The court ruled: "I've read your materials and I certainly understand the frustration you're experiencing, but at this point I'm going to deny the motion to discharge Mr. Beattie." 1RP 4.

Del Duca immediately replied: "Then I have to go pro se." 1RP 4. The court instructed him to present a written motion if he wanted to represent himself. Id. at 5, 7. Del Duca explained that he had a bad experience with the courts in 2002, that he was arrested in this case without a proper warrant, that no grand jury indictment had been returned, and that Beattie was refusing to present evidence in his defense. Id. at 4-6. He said, "It pisses me off" and "Son of a bitch, I want to see him in prison doing the time, the time I've spent." Id. at 9. Del Duca was allowed to present a written motion to the court which he characterized as a "motion to get me out of here." Id. at 6-7 (Court: "The clerk will take it and we'll file it. We'll get it calendared."); CP 170-84 (Motion to Demand Protection and Relief From Pursicution (sic)...). The court reminded Del Duca that if he wanted to go pro se he would need to file a separate motion. Id. at 7. A written order was entered that said the motion to discharge counsel was denied. CP 8.

On April 27, 2012, the court considered the handwritten motion filed by Del Duca on April 3, 2012. The April 27th hearing opened with Del Duca arguing that he should be charged by indictment instead of information, 2RP 15, that his right to speedy trial had been violated, id. at 16-17, that his treatment by the jail personnel had been sub-standard, id. at 18-19, and that the statute of limitations had run. Id. at 20-21.

Del Duca eventually turned to his motion regarding public defenders. He described that motion as a "serious problem." 2RP 22. He explained that he was not comfortable with allowing his public defender to make strategic decisions about his case.

> [I]n the Washington State Constitution ... Article I, it states that you have a right to defend yourself or have an attorney do it for you. *Well, I'm not comfortable handing my life to somebody I don't know without me having any input or being told what's going on.* Now, Brian's been pretty good about keeping me appraised (sic) of what's going on so far, in this area, anyway. And I have no -- if we work together, then the onus is actually on me anyway, because I make the ultimate decisions. So I can't say he was a bad attorney as readily, unless he does, you know, something that's out of whack, and I don't think he would.
>
> *By having it to where the attorneys run all the defenses, that's scary*, because the state licenses them. And with the public defenders, the state and county pay them. I don't know exactly how that works, but I do know they work for the county, by contract. Now, he says, Well, no, we're independent. And I said, Well, no, you still get your paycheck from it, and they're licensed. The guidelines

> are handed down from the state on what you can and can't do.
>
> *And when every attorney has told me that they cannot make the motions I needed, I believe I needed, even explore it, then there's a problem there. Then they're not working for the defense, they're working for the state.*

2RP 23-24 (italics added). The remainder of the hearing was spent discussing jail conditions and Del Duca's medical problems and his diet. Id. at 27-51.

On May 4, 2012, the court granted a motion to continue the trial date due to continuing attempts to interview witnesses. 3RP 3-5. There was no discussion about Del Duca's relationship with counsel.

On June 21, 2012, Del Duca again came before the court with a motion to discharge counsel. He said that Mr. Beattie was "refusing to assist me in what I need to do for my defense." 4RP 6. The court confirmed with Del Duca that he wanted to discharge Mr. Beattie because they disagreed over whether a particular motion should be made. Id. Del Duca argued that he was not comfortable with the approach Beattie wanted to take. He said:

> The way I want to approach it is it's a tangible (sic) and it is my defense. Okay. It's not his defense. It's not the public defender's – I'm not even a member of the public. I'm a prisoner of the public. So why – you know, you can't

> represent the public and defend the public and try to say he's representing me. That's a fraud.

Id. at 7. When the court told Del Duca to focus on new information instead of arguments he had already made, he replied, "Well, he's not my attorney. Okay. I will have to go it alone with what we've got." Id. The court instructed Del Duca to set the matter for hearing next week if he wanted to represent himself, and denied the motion to discharge Beattie. Id. at 8. Del Duca replied that he was "demanding the assistance in my defense." Id. He also insisted that Beattie was not representing him. Id. at 9.

The parties returned to court on September 6, 2012. Trial in the 2011 case had been completed the week before and Del Duca had been convicted of one count and acquitted on the other count. 5RP 3; CP 567-68.

Beattie began the hearing by alerting the court that "Mr. Del Duca is unhappy with my services. At this point wants (sic) new counsel." 5RP 4. He said that Del Duca wanted Beattie removed as to both the '11 and '12 cause numbers. Id. Del Duca complained that Beattie had failed to bring motions and failed to protect him from the jail's cruel punishment, the manipulation of his diet, his health care, and his headaches. Id. at 6. When he alleged

that he needed a lawyer who would assist him and work with him, the trial court responded:

> What makes you think an attorney would be willing to do the things that you are wanting to have done, given that when I allowed you to do some of them, I denied your motions and Mr. Beattie has repeatedly indicated that the types of motions you want him to bring are not ones that he thinks are legally viable?

Id. Del Duca then insisted on berating Beattie, attempted to renew his "motions," and insisted that Beattie would not do what he wanted. Id. at 8. The court replied,

> Let me just suggest, Mr. Del Duca, that what you think is needed and what your attorney thinks is needed are two different things. And Mr. Beattie is making decisions based on his oath to uphold the law and not bring motions before the Court that he doesn't think are well grounded in the law. And that's what any other attorney is going to do as well.

Id. at 8-9. The court then considered what impact a change of counsel might have on the timing of trial on the '12 case. Ultimately, the court denied the request to fire Beattie

> [b]ecause it is clear to me that there is not a lawyer who could satisfy you. You have indicated that no one has ever represented your interests. Mr. Beattie has represented your interests in an excellent manner...

Id. at 12. Del Duca commented that he never had good representation because all of his lawyers had been public defenders. He concluded by saying, "I don't ever want to see this

man again." When the court replied, "Understood," Del Duca said, "Bitch." Id. at 13.

On September 20, 2012, the parties appeared in court. The prosecutor said, "We are here for Defendant's motion to discharge counsel and proceed pro se. I believe that we had previously, at least, started this type of motion and started to go over the waiver of counsel forms." 6RP 55. The motion applied to both the '11 and the '12 cause numbers. The judge initially indicated some willingness to change lawyers but Del Duca replied, "Well, number one, I can't have another public defender. ... Period." 6RP 56. He then complained again that counsel had not brought motions for demurrer and summary judgment. Id. at 58. He said, "If I have to go pro se, I still need someone to assist me." Id. at 59. The court reminded him that his choices were to accept an attorney or represent himself. Id. He replied, "So then I have to go pro se. I don't want to go pro se, I have to." Id. There followed even more back and forth as he complained that nobody would properly represent him and the judge told him that his criticisms of his lawyers were not "legally legitimate." Id. at 60. Del Duca said, "I want him gone [referring to Beattie]. If I do not get an attorney to assist me with my case and do it by the law, then I have no choice

but to go pro se." Id. at 62. The judge replied, "You have an attorney who is assisting you in your case who is doing it by the law. You disagree with that, but I've determined that that is the case." Id. at 62.

The judge then attempted to work through "the paperwork ... with regard to going pro se..." Id. at 64.[7] Del Duca confirmed he understood the contents of that paperwork but asserted it was unconstitutional. Id. The judge then attempted to engage in a pro se colloquy. The court told him that "it's not a very good idea," that the court and the prosecutor could not give him legal advice, and that nobody would explain court procedures. Id. at 67. The court told him that he would be required to follow the rules of evidence, to which Del Duca replied (referring to Beattie), "this piece of shit hasn't." Id. at 68. The court warned Del Duca that once he waived counsel she was very unlikely to appoint an attorney later. Id. at 69. Del Duca replied, "So you're basically saying that either he screws me or I screw myself." Id. When pressed as to how he was going to comply with the rules of procedure and evidence, Del Duca replied, "That's why I need

[7] This appears to be the form later modified by the court and recently filed in the court file. See Supp. CP ___ (Order on Defendant's Request to Represent Himself / Discharge Counsel / Forfeiture) (attached as Appendix B).

counsel to assist me.... So that I don't make the missteps." Id. at 70. The judge ruled that Del Duca had "not made an unequivocal request to represent himself, and so I'm going to deny his request to represent himself." Id. The court ruled, however, that Beattie would be permitted to withdraw from the '12 cause number and new counsel would be appointed. Id. at 70-71.

On September 25, 2012, the parties appeared in court to confirm new counsel, Mr. Lichtenstadter from The Defender Association (TDA). 7RP 74. Lichtenstadter indicated that they would likely request two lawyers to work on the case in light of the background and the length of time the case had been pending. Id. at 77. The request for two lawyers was granted. CP 12.

As far as the record is concerned, all was quiet for several months. On October 3, 2012, Lichtenstadter withdrew as counsel but there was no indication that was due to conflict with Del Duca. CP 207. On January 9, 2013, TDA lawyer Carey Huffman withdrew and TDA lawyer John Ewers substituted as counsel. CP 208.

On March 1, 2013, Del Duca filed a Motion to Sever From Counsel in which he alleged "conflict of interest, lack of communication and assistance needed for defense." CP 19. He

argued that ten public defenders had failed him and he demanded a private defense attorney. CP 20.

On May 7, 2013, Del Duca appeared in court to discharge Ewers. 8RP 4. Judge Cheryl Carey presided over the motion instead of Judge Roberts. Del Duca wanted his lawyer, Ewers, to pursue a violation of his rights but Ewers had told him that it had nothing to do with the pending charges. 8RP 6. Del Duca demanded "counsel to assist me with my defense, a full defense, not an abbreviated defense like the State has been doing." Id. at 8. He complained that "public attorneys....flat out refuse to do what I need to do." Id. at 9. Prosecutor Sergis, standing in for Ms. Miyamasu, indicated that Del Duca had been through several attorneys and he "is not going to be happy with any attorney he has." Id. at 10. The court ruled that Del Duca had "not provided this court with a legal basis to allow you new counsel." Id. at 11. Del Duca exclaimed, "Jesus fucking Christ." Id. The court explained that Del Duca could hire private counsel or represent himself, and that he would not be permitted stand-by counsel. Id. The court indicated that if Del Duca wanted to litigate additional issues he would have to set another motion since the court had a long calendar that day. Id. at 12.

On May 10, 2013, Del Duca appeared in court again with a motion to proceed pro se and for an omnibus hearing. 9RP 1. Judge Roberts presided, prosecutor Miyamasu was present, and John Ewers represented the defendant. Del Duca noted that he had already been through seven attorneys and the court replied that "you've had some of the best attorneys that I've ever seen in court ..." 9RP 5. She said again that "my concern is that there is not an attorney that could keep you happy, and so I'm at a little bit of a loss as to what to do next." Id. Del Duca again tried to claim that his rights to a grand jury had been violated and the court told him to focus on the matters at hand. Id. at 10-11.

The court then said, "When I denied a motion for discharge of I think it was Mr. Beattie, you discussed with me the possibility of representing yourself, and the conclusion that I reached, based on what you told me, was that you really didn't want to represent yourself, but you felt pushed into that because you didn't like the attorneys you received." 9RP 11. Del Duca replied, "That's exactly true." The court then asked whether he wanted to revisit that question. Id. Other than suggesting that the court was putting him in a "tenuous" position, Del Duca did not answer. The next ten pages of the transcript involve a rehashing of the same claims

Del Duca had been making and the judge had been refuting for over a year. Del Duca then suggested that the judge should recuse herself. 9RP 21. The motion was denied. Id.

Del Duca then said, "I'm demanding to have counsel to do what I need to do for my defense." 9RP 25. The court told him that Ewers was his lawyer and would defend him. Id. The hearing ended with Del Duca asking for an interlocutory appeal.

A hearing was held on June 14, 2013, at which Mr. Ewers indicated that Del Duca wanted to renew his motion for a new lawyer. 10RP 1. The court indicated that she was not going to entertain that motion at that time and suggested that it might be heard once Ewers returned from medical leave. 10RP 1. Del Duca seemed surprised that Judge Roberts was presiding over the hearing; she explained that she had been preassigned to his case. 10RP 4-5. He repeated his same complaints about counsel and the court provided the same answers. Id.

In June and July, 2013, the defendant filed five letters addressed to Judge Carey (who was now the presiding judge at the Maleng Regional Justice Center) complaining that Ewers was not performing as he should. He said that Ewers "works for the D.A. and I need someone to work for my defense." CP 216. He also

complained about Judge Roberts' handling of the case. See CP 213-18, 221-25, 229-31, 235-38, 242-44.

On July 26, 2013, Del Duca appeared in court again asking that Ewers – who had now returned from medical leave – be fired. 11RP 80-81. He listed a number of grievances including speedy trial, physical ailments, a lack of communication, failure to interview witnesses, and others. 11RP 80-90. The court replied, "I have heard a number of motions from you to discharge more than one attorney. And your concerns are, I know, deeply felt by you. They are pretty much the same concerns over and over again." Id. at 90. The court again pointed out that Del Duca would not be satisfied with any public defender. Id. at 91-92.

Del Duca said that Ewers' supervisor had told him his motions would not be heard, and the court said that was because they were not based in the law. Id. at 92-93. When the court refused to recuse or to change its ruling as to Ewers, Del Duca said, "I hate the son of a bitch, okay. I can't communicate with him." Id. at 95. Counsel and the court then discussed witness interviews and the timing of a trial. Id. at 96-97. The hearing ended with Del Duca repeating his complaints about Ewers, the court saying, "We're done," and Del Duca saying, "Okay. See you later.

Bye-bye. Have a nice life." 11RP 99. A written order denying the motion to discharge counsel was filed. CP 27.

On July 31, 2013, Del Duca sent a 12-page letter to Judge Roberts lambasting her handling of the case and repeating the arguments he had made over the course of the previous years. CP 247-58. He ended the letter with this: "I am entitled to a private attorney that will assist me. ... John Ewers will be notified directly again that he is discharged for cause." CP 258.

On August 23, 2013 another hearing was held. The prosecutor noted at the outset that "[a]t the end of the last hearing when we were before the Court, it appeared that Defendant may renew his request to proceed pro se, so I will defer to the Defense on that issue." 12RP 102. After discussing scheduling, Mr. Ewers said, "Mr. Del Duca has some motions that he would like to make today in regards to having me removed as counsel or potentially representing himself." 12RP 104. Del Duca argued that his speedy trial rights had been violated, that defense counsel had failed to obtain discovery, that Beattie should have had the case thrown out of court, should have filed a personal restraint petition, should have sought demurrer, should have obtained summary judgment, and

should have pursued his grievances against the jail. 12RP 105-08. He complained that every one of his public defenders had

> said the only responsibilities and obligations and rights I have as far as a defense, my defense, is that I can choose whether I plead guilty or not at arraignment, whether I have a bench trial or a jury trial, or whether I testify. They said, That's all you do; you have nothing else to do. And Lois Trickey said that in front of you in your court ... in ... November.

12RP 109. He said the court was "denying me counsel." Id. at 110. He argued that the court's approach "takes my defense completely out of my hands." 12RP 116. He argued again that he was entitled to a grand jury. Id. at 119. He repeated that "I cannot have a public defender. I cannot trust them." Id. He said, "...I was saying that I wanted to go pro se, only an idiot wants to be, or if they have no other choice. That's a problem. I'm at that point now. I don't want to be there." Id. at 124. The court assured him that it was asking about his representation because he had an absolute right to counsel and to self-representation. Id. at 126.

Del Duca listed his many grievances, accused Ewers of doing nothing to resolve them, and then said, "He is not representing me. I cannot accept him. If the State denies me counsel to assist me, I'm going to have no choice, over my objection, to say I'm going to have to go pro se per the state's

rule....As it stands now, I'm demanding counsel. I'm demanding to be able to defend myself." Id. at 131. The court said, "You want him off the case. You just want him to do what you want him to do." Id. The court then asked, "So if I disagree with you as to whether [Ewers is] fulfilling that role, do you have a request of me?" Id. Del Duca answered, "Then I have no choice other than being forced into going pro se." Id.

At this point, the court told Del Duca that he did not have the right to fire the lawyer because he had not hired the lawyer, the lawyer had been appointed by the court. 12RP 134-35. This statement resonated with Del Duca, and he replied, "Okay. There we go. ... I needed that information. That creates a very serious problem. ... You just said only if I hire an attorney can I discharge them?" Id. at 135. When the court confirmed this, he again said that public defenders were tools of the court: "He worked – he's a county employee, which is reimbursed by the State. He's told by his license what he can and can't do in my defense. You're backing that up ... that's where my problem with the Bench has been, okay. Because it does not show – it gives the appearance of not being independent from the State." Id. at 136. He said, "I'm demanding the chance to have counsel that will represent my

issues, not the way I say I want it done, but the issues I say, this is what my problems are. ... I need counsel. And I'm begging you. I pray." Id. at 138. The court denied his request to have Ewers removed. Id. at 139.

Del Duca then said, "Then I have to go pro se." Id. He begged more for a private attorney but the court refused. Id. at 141 ("There's not an attorney who will make you happy."). The court asked again: "Okay. So what do you want now? You're stuck with Mr. Ewers. Do you want to represent yourself." Del Duca replied, "I have no choice." Id. at 144. The hearing was then recessed because there was not sufficient time to complete the pro se inquiry.

Del Duca was steadfast at the next hearing on September 6, 2013. The court asked him to choose between Ewers and self-representation but he would not. 13RP 157, 159, 161. Del Duca persisted in saying that any choice would be made under duress. 13RP 164. The court ruled, "I am making a finding that Mr. Del Duca is not making an unequivocal request to represent himself...and instead he is just expressing his ongoing unhappiness with his attorney." 13RP 165-66. A written order of continuance was prepared which included the finding that Del Duca

had not waived his right to counsel. 13RP 167; CP 259. Del Duca remarked, "She must be Italian, from what I hear of the way Italian courts work. Damn." 13RP 167.

A hearing was held on September 19, 2013, at which final preparations for trial were discussed. 14RP 1-6.[8] Del Duca told the court: "I cannot go to trial with [Ewers]. I will not go [to] trial with him, period. I mean there's no communications, I cannot trust him, I do not trust him. ... I'm going Pro Se, I will sign the paper." 14RP 7. He berated Ewers a bit longer. 14RP 7-14. The court then engaged in a colloquy to ensure that Del Duca knew what he was charged with, what the penalties were, and what plea offers had been made. Id. at 14-15. Despite saying he would be signing a waiver under protest, he agreed that "Whether it's by choice ... obviously, it's not the best choice, that's a fact. ... Usually in this circumstance is better (sic) than what I've been offered from what I can see." 14RP 17-18. When asked again whether he wanted to represent himself, Del Duca said, "I'm saying I am going to do it, I am representing myself, I am defending myself... If you're saying that that's what I have to do to get him out of here, then that's what I have to do. And I'm doing it under duress, that I am doing under

[8] It was noted that Ms. Angela Kaake was going to be taking over as counsel for the State. 14RP 5.

duress, because it's not even legal." Id. at 19. The court said, "Well, if you're doing it under duress, then I won't allow it to happen." Del Duca replied, "Okay, Now....he is done. He's done. I will not come to court...." 14RP 20. The court then made an alternative finding.

> I can certainly find that you have forfeited your right to have counsel, and given that no attorney has been able to satisfy you and you've had a number of excellent, hard-working, dedicated, intelligent attorneys ... assigned – let me finish – to your case, and you have essentially refused to work with them, because you disagree with their approach and it's been more than one attorney, and because of the course that this has taken over time, I'm going to talk to you about what it means to represent yourself. I'm also going to make a finding that you have forfeited your right to counsel based on the conduct so far in this case. And also because of my knowledge of the history over the last two years of your not finding a way to work with the attorneys.

14RP 20-21.

The court then reviewed the dangers of pro se status. Id. Del Duca was told he would have to abide by rules and procedures and that he would not be permitted to reinstate counsel Id. at 21-22. He replied that he "could not accept Mr. Ewers." Id. at 22. He confirmed that he had little legal training. Id. The court yet again attempted to confirm Del Duca's intent.

> Court: So, is it your desire at this point in time to represent yourself, Mr. Del Duca?

Δ: It is my desire to represent my – to defend myself per the constitution of the United States.

Court: And is it your desire to represent yourself?

Δ: It is my desire to represent my defense under the offices of the United States constitution.

Court: And is it your desire –

Δ: And the original Washington State constitution.

Court: And is it or is it not your desire to do that without a lawyer?

Δ: You can't make me do that. That's illegal.

Court: I can't make you do what?

Δ: You can't make me do something that is countered to (sic) the codes of conduct in the court.

Court: I don't – I'm not understanding you. I asked you a simple question, is it your – is it or is it not your desire to proceed without a lawyer? That's the question.

Δ: It is my desire … to defend myself per the Sixth Amendment of the United States Constitution, and it is similar to the original 1889 section 22, is what they list it as now. Nor --- not 22, but anyway – the right to have counsel to defend myself and with counsel.

Court: Okay. So you – let's just be really clear, you don't want to go forward without an attorney –

Δ: No, I did not say that. I said, I want the original law, I want – I'm trying to defend myself –

Court: Tell me what you want.

Δ: -- with the legal law. Okay. I have a right to defend myself.

Court: Yes, you do.

Δ: Okay. I have not been afforded that right, I haven't had it. I've been told to shut up. I have nothing to do with it. Now, this is a list –

Court: Okay, so Mr. Del Duca, we are not going to keep doing this all afternoon, so –

Δ: No.

Court: -- I am finding that Mr. Del Duca has forfeited his right to counsel, and I will allow him to go forward without an attorney even though he has indicated that to do so would be under duress. I am finding that he has not made a knowing, intelligent, and voluntary waiver of this right to counsel, but that he has forfeited it by his conduct and by his refusing to work with any attorney who has been appointed by the Court. So, having said that Mr. Del Duca will go forward representing himself, and are you going to be ready for trial next Thursday, Mr. Del Duca...[?]

14RP 23-25. The remainder of the hearing concerned discovery and scheduling in light of the fact that Del Duca was now representing himself. The court requested that Ewers appear at the next hearing to address the forfeiture issue and "until everything is sort of wrapped up." Id. at 31. The court asked counsel for the State and Del Duca to present any additional materials that might bear on her decision. Id. at 31 ("Ms. Miyamasu, please come prepared if there's anything you think I should add.").

On Monday, September 23, 2013, the prosecutor directed the court's attention to three appellate decisions analogous to Del Duca's case, where defendants claimed that the choice between an attorney they disliked and self-representation amounted to forcing them to go pro se. Supp. CP ___ (Sub No. ___filed 5/4/16) (Appendix B).

At the next hearing, on September 25, 2013, Ewers, Del Duca, and deputy prosecutors Miyamasu and Kaake appeared. 15RP 3. Ms. Miyamasu started the hearing by noting that "the parties have received from the Court the waiver of counsel form." The court then discussed the form with the defendant.

> Court: So, did you have an opportunity to look at the waiver of counsel for[m] that I know you've seen before and I added some language to?
>
> Δ: Yeah, he just handed it to me.
>
> Court: Okay. Do you want to take a minute to look at that? Because I'd like to know whether it's acceptable to you, assuming that it is still your desire to represent yourself, given that the only other choice at this point is to have Mr. Ewers as your counsel.
>
> Δ: Well, that's not much of a choice. It's the better of two evils, that['s] the way I see it unfortunately.[9]

[9] The transcript reads "He's" the better of two evils. However, after referring to the electronic recording of trial, counsel for Del Duca on appeal agrees that Del Duca said, "It's the better of two evils."

Court: Okay. So, could you take a minute to look at that piece of paper, and then let me know whether it is something that you're willing to sign? I think we've gone over everything in it, but I'd like to have you sign it if it's acceptable. So, can you take a minute to look at it?

Δ: Yeah, I looked at it.

Court: Okay. I [k]now you've seen it before without my hand-writing, I added a few things, do you see that?

Δ: Yeah, this is still a waiver of rights, correct?

Court: Correct.

Δ: Okay. I stated what I was ... my position last week, and I still stand by that. I want to expedite this – these matters, both of them. ... They're inextricably connected. Too many common people in each. As I said last week, I'm going to have to defend myself, that's a fact. ... Because the nature of public defenders and from what I've heard, attorneys in the State of Washington because they're licensed by the State, they answer to the State first. And that's a conflict of interest.

Court: So, Mr. Del Duca, I wonder if I could get you focused back on the actual waiver.

Δ: I am. ... I'm trying to – I am not an attorney, that's a definitive. I'm not a lawyer. ... Okay, I also have problems with access to legal information. ... They kept not letting me get to the computer and not have the books. I actually made a motion on that, that was a problem. I can't sign my rights away .... Because I stated last week that I'm demanding to be able to defend myself under the offices of the Sixth Amendment of the U.S. Constitution, okay. I cannot hand my rights to anybody, unless I see what they're going to be doing. The State's current definition of

> representation is having a State appointed attorney basically for 90 some percent of the people. Without any ... say as to how the defense goes. When I requested in both circumstances for certain evidence, that was in my favor to be sought, I was told no by the public defenders, which is contrary to my defense. It's in the State's favor, it's not in mine, so they – they're not working for me.

15RP 3-6. After some discussion regarding plea negotiations, Del Duca returned to the topic of the waiver of counsel, saying that "I'm still standing on my premise that I'm – I have to defend myself." 15RP 7. Del Duca then explained, in uncertain terms, his understanding of the constitutional history of this issue in Washington. Id. The court and Del Duca spent some more time talking about the written form that had been prepared. Id. at 10-11. The court asked Del Duca whether the form accurately represented everything that they had discussed and, if so, whether he was willing to sign it.

Δ: "Well, I can't sign a waiver of my right –

Court: That's why I changed the language.

Δ: Yeah. Because what I need, and what I've needed from the beginning is someone to assist me to address the issues.

Court: Right. So, I have denied your request to have a different lawyer, and –

Δ: He refuses to.

Court: -- and I understand that that is your belief. Given that, is it your desire to represent yourself?

Court: Okay.

Δ: Under the offices of the Sixth Amendment of the U.S. Constitution, yes. ... But now in signing this, it'll be under duress, because –

Court: Well, I can't have you sign it under duress, Mr. Del Duca.

Δ: Yeah, because like I don't believe in signing a waiver of a person's rights –

Court: Okay. We're not going to have you sign it then. Let me – hand it back up to me please, Ms. Miyamasu, and we'll add some additional language and I will sign it. Okay, hang on just a second. ...

So, I will be entering an order along this line. We'll provide you a copy, I'm going to change the language, because it says things like I understand this, I understand that, I've gone over all of this with you, I will enter an order indicating what I think happened. And send you a copy, and then you'll have an opportunity to address the Court if you disagree with what it says.

Okay. So having done that, **I am making a determination that Mr. Del Duca has knowingly, intelligently, and voluntarily chosen to represent himself,** given the choice of being represented by the Court appointed attorney, or representing himself. And that he's competent, and I'm going to permit him to exercise his constitutional right to do so, given that he won't work with the attorney that the Court has appointed.

And I have determined that the current attorney, Mr. Ewers, is appropriate and the reasons given from

> Mr. Del Duca to discharge him, I am rejecting. So, I am going to allow you to represent yourself, Mr. Del Duca. ...

15RP 11-13 (emphasis added).

The court told the parties that it would make some changes to the order and then file it. Unfortunately, the order does not appear to have been filed in the superior court file until below-signed counsel contacted the court this spring and asked the court to check whether it had the order. Supp. CP ___ (Sub No. 244A ORDER ON DEFENDANT'S REQUEST TO REPRESENT HIMSELF/DISCHARGE COUNSEL/FORFEITURE) (Appendix C).

D. ARGUMENT

A defendant who refuses to cooperate with appointed counsel, but who also refuses to unequivocally waive counsel, and who portrays himself as "forced" to "involuntarily" represent himself, presents trial courts with a dilemma. If the court too quickly allows the defendant to proceed without counsel when the defendant is dissatisfied with his appointed lawyer, it risks that an appellate court will deem the waiver equivocal. On the other hand, if the court forces the defendant (and his lawyer) to work together at trial, it risks a holding on appeal that the defendant was deprived of his

right to represent himself. This dilemma is more perceived than real, as the Washington Supreme Court held twenty-five years ago that a defendant who claims he is "forced" into a difficult choice to represent himself is not equivocating in the constitutional sense, and that such a waiver is voluntary.

The trial court in this case showed greater patience than Job as Del Duca repeatedly voiced the same complaints for two years about multiple appointed lawyers, until it became clear to Del Duca that he was not going to find a lawyer who would present the frivolous motions he wanted, and he asked to represent himself. Although the trial court was very reluctant to accept a waiver of counsel where Del Duca was professing the waiver to be "involuntary," the court eventually, and correctly, ruled that Del Duca's repeated failures to work with counsel, and his refusal to work with Ewers, constituted a waiver of his right to counsel.

1. DEL DUCA EXPRESSLY CHOSE TO REPRESENT HIMSELF AND THAT DECISION WAS MADE VOLUNTARILY.

Del Duca argues that the trial court erred by ruling that he had forfeited his right to counsel, because forfeiture can be shown only under extreme circumstances not present in this case. His

argument should be rejected. The trial court expressly ruled that Del Duca had knowingly, intelligently, and voluntarily waived his right to counsel, even if he did so reluctantly. Although the trial court also ruled that Del Duca had forfeited his rights, that ruling does not undercut the trial court's correct ruling that counsel had been voluntarily waived.

A defendant in a criminal prosecution has a constitutional right to the assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. This right is not an absolute right to any particular attorney. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991) (citing United States v. Wheat, 486 U.S. 153, 159 n.3, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). The right to counsel of choice does not extend to a defendant who requires appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing Wheat, 486 U.S. at 159). Whether an indigent defendant's dissatisfaction with court-appointed counsel justifies the appointment of new counsel is within the discretion of the trial court. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

A defendant also has a constitutional right to waive the assistance of counsel and represent himself. DeWeese, 117 Wn.2d

at 375 (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Such a waiver must be knowing, voluntary and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

Before he can execute a valid waiver, a defendant must be made aware of the dangers and disadvantages of self-representation. Acrey, 103 Wn.2d at 209 (citing Faretta, 422 U.S. at 835). A colloquy on the record is the preferred means of ensuring a valid waiver; the colloquy should inform the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist that will govern the presentation of the case. Acrey, 103 Wn.2d at 211. In the absence of a colloquy, the reviewing court can rely on evidence in the record that shows the defendant's actual awareness of the risks of self-representation. Id.; DeWeese, 117 Wn.2d at 378.

Whether a defendant's dissatisfaction with court-appointed counsel justifies the appointment of new counsel is within the discretion of the trial court. DeWeese, at 376. The requirement of a knowing and voluntary waiver of the right to counsel extends to a defendant's choice to represent himself rather than remain with current appointed counsel. Id. at 377. When the defendant fails to

state legitimate reasons for the assignment of substitute counsel, the court may require him to either continue with current appointed counsel or represent himself. Id.

If the defendant refuses appointed counsel, requiring him to proceed pro se does not violate the constitutional right to counsel and may represent a valid waiver of that right. Id. The Washington Supreme Court made it very clear in DeWeese that a defendant's choice is not involuntary or equivocal simply because he is unhappy that he must choose.

> Mr. DeWeese's remarks that he had *no choice* but to represent himself rather than remain with appointed counsel, and his claims on the record that he was *forced* to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver. These disingenuous complaints ... mischaracterize the fact that Mr. DeWeese *did have a choice*, and he chose to reject the assistance of an experienced defense attorney who had been appointed. ... [A] defendant's right to counsel of choice is limited in the interest of both fairness and efficient judicial administration.

Id. at 378-79 (italics added). This rule is well-established in Washington. See State v. Staten, 60 Wn. App. 163, 167, 802 P.2d 1384 (1991) (defendant voluntarily chose self-representation over a public defender who was overworked, although the choice was "definitely against my wishes"); State v. Sinclair, 46 Wn. App. 433, 436-37, 730 P.2d 742 (1986) ("even when a defendant does not *want*

to appear pro se, if he fails to provide the court with legitimate reasons why he is entitled to reassignment of counsel, the court can require that he either waive or continue with appointed counsel") (italics added). The rule also exists in several federal circuit courts. United States v. Garey, 540 F.3d 1253 (11th Cir. 2008); King v. Bobby, 433 F.3d 483, 492 (6th Cir. 2006); United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005); United States v. Oreye, 263 F.3d 669, 670-71 (7th Cir. 2001); McKee v. Harris, 649 F.2d 927, 931 (2d Cir.1981). As the court explained in Garey:

> [D]efendants who lack the means to hire a private attorney must either accept the counsel appointed to represent them or represent themselves.
>
> Nevertheless, it is not uncommon for defendants to demand what they cannot have: substitute counsel. When confronted with defendants who, by their words and conduct, reject both appointed counsel and self-representation, several of our fellow circuits have concluded that a litigant may waive his right to court-appointed counsel not only by expressly invoking the right to self-representation, but also by engaging in conduct that evinces a knowing desire to reject the counsel to which he is entitled. ... These courts hold that a defendant who rejects appointed counsel but refuses to cooperate with the court by affirmatively expressing his desire to proceed pro se, effectively chooses self-representation by rejecting the only other choice to which he is constitutionally entitled.

Garey, 540 F.3d at 1263-64 (citations omitted). The rationale for the rule is clear and sensible.

> The question of waiver is one of inference from the facts. As a matter both of logic and of common sense ... if a person is offered a choice between three things and says "no" to the first and the second, he's chosen the third even if he stands mute when asked whether the third is indeed his choice.

Garey, 540 F.3d at 1264 (quoting Oreye, 263 F.3d at 670-71).

In Garey, the defendant repeatedly told the judge that his choice to proceed without counsel had been forced by the judge because the judge told him he must choose to retain existing counsel or to represent himself.[10] Still, the Garey court concluded that a voluntary waiver of counsel had been shown.

> [T]he problem with Garey's position is that it ignores the logical consequences of the denial of his substitution motion. Garey was presented with two constitutional options: accept representation by a competent, unconflicted lawyer or represent yourself. No less than four times, Garey rejected Huggins' representation outright, and several times more he expressed his intent to represent himself (albeit "involuntarily"). By rejecting appointed counsel, Garey voluntarily chose to proceed pro se as surely as if he had made an affirmative request to do so.

Garey, 540 F.3d at 1269.

The same is true in this case. Del Duca had multiple opportunities to accept a public defender to represent him or to

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[10] Garey's language was quite similar to Del Duca's. See, e.g., 540 F.3d at 1259 ("Your honor, I am not going to let Mr. Huggins represent me. And if the Court is giving me no other choice, I will have to go along with the choice of involuntarily waiving my right to counsel, involuntarily waive."); at 1262 ("Your honor, I'm not voluntarily waiving my Sixth Amendment rights, but I'm not going to allow Mr. Huggins to continue as representation.").

represent himself. The trial court repeatedly rejected his efforts to fire Ewers because Ewers was effectively and ethically representing his client. Del Duca's dissatisfaction was driven by his irrational distrust of public defenders, and by his desire to control strategic decisions generally left to the discretion of lawyers. Thus, the trial court properly refused to appoint yet another lawyer. At the same time, the trial court was very reluctant to accept a waiver of counsel where Del Duca was claiming the waiver was involuntary and where it seemed at times difficult to discern Del Duca's true objectives.

However, once it became clear that Del Duca was flat-out refusing to work with Ewers, and after the court was provided with DeWeese, the court clearly found a voluntary waiver. It ruled:

> So, I am making a determination that Mr. Del Duca has knowingly, intelligently, and voluntarily chosen to represent himself, given the choice of being represented by the Court appointed attorney, or representing himself.

15RP 12-13.

Trial courts are given wide discretion to decide these matters. DeWeese, at 379. As the court observed in Garey, the decision to permit self-representation will be fact-specific and the trial court's ruling should not be disturbed absent an abuse of discretion.

> In recognizing that a defendant may waive counsel by his uncooperative conduct as well as by his express request, we

> do not suggest that district courts are bound to interpret the uncooperative behavior of every defendant as a waiver of the right to counsel. Nor do we suggest a district court would err by requiring any particular defendant to make a clear statement of his intention to proceed pro se before agreeing to dismiss appointed counsel. In any given case, the proper course of action will turn on factors the district court is best positioned to assess. What we recognize today is that, in some instances, a defendant's conduct will reveal a voluntary decision to choose the path of self-representation over the continued assistance of counsel. In such cases, the district court may, in its discretion, conclude the defendant has voluntarily waived his right to counsel.

Garey, 540 F.3d at 1266.

Del Duca argues that the trial court erred because it applied a forfeiture theory instead of waiver. Br. of App. at 19-25. This argument should be rejected. Although it is true that Judge Roberts used improper nomenclature, it is also apparent from the record that her final ruling was that Del Duca had voluntarily waived counsel by refusing appointed counsel.[11] The court seems to have initially believed that it could find a waiver only if the defendant expressed an unwavering *desire* to go pro se. Once the court realized that this was not true, and once it became apparent that Del Duca was steadfast in his refusal to work with Ewers, the court entered the appropriate findings and allowed Del Duca to represent himself. 15RP 12-13.

[11] Del Duca argues on appeal that the waiver was involuntary; he does not argue that he did not know the risks of a waiver.

In any event, a trial court may be affirmed on any basis supported by the record and the law. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989); State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992). It is plain from the record here that the court found a knowing, intelligent and voluntary waiver so, even if the court also believed erroneously that the right had been "forfeited," that alternative ruling does not undermine the correct ruling.[12] And, the ruling is fully supported by the record.

Finally, Del Duca complains that the trial court refused to reappoint counsel despite repeated requests from Del Duca after September, 2013. Br. of App. at 14. This argument should be rejected. The trial court had no obligation to reappoint counsel. Once a defendant has unequivocally waived counsel, he may not later demand reappointment of counsel as a matter of right; rather, the matter is wholly within the discretion of the trial court. DeWeese, at 376-77. Given his strong antipathy towards public defenders, the trial court had good reason to suspect that any new lawyer would meet the same fate as Del Duca's previous lawyers.

[12] It should also be noted that neither Del Duca nor Ewers provided the court with authority showing the limits of the "forfeiture" doctrine, despite being invited by the court to do so. 14RP 31.

2. THE TRIAL COURT'S FAILURE TO ISSUE A WRITTEN ORDER ON THE MOTIONS FOR NEW TRIAL IS NOT REVERSIBLE ERROR.

Del Duca argues that the trial court should have entered a written order on his motions for new trial. This argument should be rejected. A written order would have been an exercise in futility. As is clear from reviewing Del Duca's 23-page handwritten motion, the issues he raised were frivolous, and had been litigated numerous times over the nearly three years that this case was pending in the trial court. The trial court repeatedly advised Del Duca at oral argument on his motion for new trial to focus on new information or arguments, since all the motions had previously been litigated. See, e.g., 51RP 10 ("you are making motions that I have heard several times before"), 20 ("I think we've probably beat that issue [motion for default] to death"), 20-21 ("Most of these – most everything you've said today I've heard before several times"), 36 ("...I've heard you make this argument [lack of probable cause to charge] probably 25 times."). The arguments were all legal arguments that did not require the court to make credibility determinations or to exercise some judgment that could not be exercised by an appellate court. In addition, the motions to arrest judgment and for a new trial must be filed within 10 days. CrR 7.4,

7.5. Del Duca was convicted on November 5, 2014, but did not file his motions until December 12 and 15, 2015. The motions were plainly untimely. Under these circumstances, it was not prejudicial error for the trial court to fail to enter a written order.

3. THE REASONABLE DOUBT INSTRUCTION WAS CORRECT.

Del Duca claims that the trial court erred by submitting a jury instruction on reasonable doubt identical to WPIC 4.01, because the instruction requires jurors to articulate a reason to doubt. Br. of App. at 29-49. This argument must be rejected. WPIC 4.01 does not require jurors to articulate anything. The Washington Supreme Court has repeatedly approved instructions similar to WPIC 4.01, precisely because the language does not require jurors to articulate their thoughts or their doubts.

Del Duca's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 104. Del Duca constructs a strained and convoluted argument based on a purported distinction in dictionary definitions between the words "reasonable" and "a reason." However, he makes no effort, whatsoever, to examine the verb " to

articulate." Any derivation of this verb includes the notion of vocalization or speech. Webster's Third New Int'l Dictionary 124 (1993). A reason can exist regardless of whether any juror ever articulates the reason. Nothing in WPIC 4.01 requires a juror to speak. Del Duca's argument fails as a matter of simple language and logic.

It also fails because it is contrary to authority. Most recently, in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), the Washington Supreme Court held that a prosecutor had committed misconduct because he argued as follows:

> [I]n order for you to find the defendant not guilty, you have to ask yourselves or *you'd have to say*, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, *you must fill in that blank.* ...
>
> ... The Latin term "verdictum" I'm told is the Latin root for the English word "verdict." The literal translation of "verdictum" into the English language is to *speak* the truth. Your verdict should *speak* the truth.

Emery, 174 Wn.2d 750-51 (italics added). This argument is flawed because it plainly tells the jury that it is required to "say" or "speak" or "fill in a blank" in order to find a reasonable doubt. The court contrasted the prosecutor's argument with the language of WPIC 4.01 – a reasonable doubt is a "doubt for which a reason exists" –

and concluded that the instruction was perfectly acceptable because it did not require a juror to articulate or to fill in any blanks. Emery, at 759-60, 764 n.14.

As this Court recently observed, the Washington Supreme Court has often held that WPIC 4.01 properly states the burden of proof.

> Lizarraga challenges the jury instruction defining "reasonable doubt" in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008) (WPIC). Specifically, the language that states, "A reasonable doubt is one for which a reason exists." Lizarraga claims the language undermines the presumption of innocence and the burden of proof. But in State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court expressly approves the WPIC as a correct statement of the law and directs courts to use WPIC 4.01 to instruct on the burden of proof and the definition of reasonable doubt. See also State v. Pirtle, 127 Wn.2d 628, 656–58, 904 P.2d 245 (1995) (concluding WPIC 4.01 adequately permits both the government and the accused to argue their theories of the case).

State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), as amended (Dec. 9, 2015), review denied, ___ Wn.2d ___, No. 92624-7 (Apr. 26, 2016).

The doctrine of stare decisis requires a "clear showing that an established rule is incorrect and harmful" before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). Del Duca's strained arguments based on dictionary

definitions of "reasonable" and "a reason" do not demonstrate that binding supreme court precedent is "clearly incorrect," much less that it is "harmful." "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). WPIC 4.01 does not require the jury to articulate anything. It is difficult to imagine a jury becoming confused along the lines of reasoning set forth in Del Duca's 20 pages of rumination. His arguments should be rejected.

E. CONCLUSION

For the foregoing reasons, Del Duca's convictions should be affirmed.

DATED this 6th day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

Chronology of Hearings and Clerk's Papers

RP Vol.	Date / Judge	Lawyers*	Clerk's Papers	Summary of Hearing
3/9/11 – Case filed – Cause Number 11-1-02184-6 (CP 544-49)				
	4/11/11		CP 550-51 Notice of Appearance for Scott Schmitt and Catherine Elliott	
A	6/13/11	Pros: RA Δ: SS	CP 552 Order CP 553 Minute entry	Δ Motion to Discharge Counsel is denied
B	6/27/11 Roberts	Pros: CS Δ: SS and CE	CP 554 Order CP 555 Minute entry	Δ Motion to Discharge Counsel is denied
	10/6/11		CP 556	Notice of Appearance and Substitution: Δ atty Elliott withdraws, Lois Trickey substitutes.
B	11/16/11 Roberts	Pros: CS Δ: SS + LT		Order is entered finding Δ competent. Δ addresses the court, indicates that counsel not assisting him with defense, and asks to discharge counsel. Court tells him that he can bring such a motion or represent himself after he has spoken to lawyers.
B	11/29/11 Roberts	Pros: RW Δ LT / SS	CP 561	Δ Motion to Discharge Counsel (L. Trickey and Schmitt) granted.
	12/2/11		CP 563	BB enters a notice of appearance
B	1/24/12 Roberts	Pros: CM Δ: BB		Δ wants to discharge Beattie. Beattie says "we're going sideways." Court explains lawyer's role, asks Beattie to review motions with Δ.
B	2/2/12 Roberts	Pros: CM Δ: BB	CP 565 Order (indeterminate)	'11 cause # Δ complains that Beattie will not file motions on his behalf. The court explains that the lawyer decides whether the motion has merit.
2/10/12 – Case filed – Cause No. 12-1-00681-1				
	2/15/12	Pros: CM Δ: BB	CP 543 Notice of Appearance (Brian Beattie)	
	2/21/12		CP ___ (Letter from Δ '11 cause #)	
1	4/3/12 Roberts	Pros: CM Δ: BB	CP 8 (order denying motion to discharge)	Motion to discharge counsel denied.
2	4/27/12 Roberts	Pros: CM Δ: BB Jail: NB	CP 170-84 Motion to Demand Protection and Relief From Persicution (sic), Handwritten, filed 4/3/12	Court considers pleading filed by Δ. Δ says that it is "scary as hell" to allow Δ atty to make decisions.
3	5/4/12 Roberts	Pros: CM Δ: BB		Scheduling – continuance, Δ objects. No discussion about counsel.
4	6/21/12 Roberts	Pros: CM Δ: BB		Motion to Discharge counsel denied. Δ says he may have to "go it alone" but also is "demanding the assistance in my defense." Δ told to set hearing if wants to proceed pro se b/c CM was at Chelan Conference.
	8/30/12		CP 567-68 Verdict Forms in '11 cause number	Δ convicted under 11-1-02184-6 cause number of Child Molestation

RP Vol.	Date / Judge	Lawyers*	Clerk's Papers	Summary of Hearing
5	9/6/12	Pros: CM Δ: BB	CP 10	'11 cause # trial just ended and Δ is unhappy with atty Beattie. Court denies motion to substitute counsel b/c Δ would not be satisfied with any lawyer. Δ says, "Bitch" as the hearing concludes. p.6 "I need new counsel to assist me with what I need to do, so someone who's willing to work with me."
6	9/20/12	Pros: CM Δ: BB	CP 11 Order	Long discussion about attorney situation. Δ says if cannot change lawyers he will have to go pro se. Δ told that he can't change him mind and go back. Court ultimately rules that Δ is equivocal, denies motion to go pro se, but allows Δ to discharge Beattie on '12 cause number.
7	9/25/12	Pros: CM Δ: RL	CP 12 Order grant 2nd atty CP 14-18 Request for 2nd atty and to seal	Rich Lichtenstader appears as counsel, discussion about trial date, notes that might request two attorneys due to past difficulties with counsel.
	10/3/12		CP 206 Notice of Withdrawal (Lichtenstader)	
	11/26/12		CP 207 Notice of Withdrawal (Beattie)	Beattie formally withdraws
			2013	
	1/9/13		CP 208 Notice of Withdrawal and Subst. of Counsel: Carey Huffman out / John Ewers in.	
	3/1/13		CP 19-20 Motion to Sever Counsel Conflict of interest, lack of communication and assistance. "I have had ten public defense attorneys, they have all refused to assist me in my defense. I am demanding a private defense attorney. 02/24/13"	
	3/1/13		CP 209-11 Motion to Compel Compel production of discovery and jail records	
8	5/7/13 Carey	Pros: CS Δ: JE	No written order	Δ Motion to Discharge counsel JE denied. Δ can hire own lawyer, accept JE as lawyer, or represent self
	5/8/13		CP 212 Order of Pre-assignment Judge Roberts preassigned to the trial	
9	5/10/13	Pros: CM Δ: JE		Δ Motion to Discharge Counsel JE denied.
10	6/14/13	Pros: CM Δ: JE		Δ moves to discharge JE – denied
	6/12/13		CP 213-18 Δ Letter to Judge Carey	

RP Vol.	Date / Judge	Lawyers*	Clerk's Papers	Summary of Hearing
	6/25/13		CP 229-31 Letter to Judge Carey	
	6/27/13		CP 235-38 Letter to Judge Carey	
	7/18/13		CP 242-44 Letter to Judge Carey	
	7/31/13		CP 247-58 Letter to Judge Roberts	
11	7/26/13	Pros: CM Δ: JE		Δ moves to discharge JE – denied
12	8/23/13	Pros: AK Δ: JE		Δ moves to discharge JE – denied, Δ moves to go pro se
13	9/6/13	Pros: CM Δ: JE	CP 259 Order Continuing Trial with Notation that Dissatisfaction with Counsel not sufficient to be unequivocal request to waive counsel.	Judge rules no unequivocal right to pro se
14	9/19/13	Pros: CM Δ: JE	CP 260 Order: Defendant forfeited Right to Counsel	Δ says has no choice but to represent himself – Judge says she believes Δ has forfeited his right to counsel – Δ says he going pro se "under duress"
15	9/25/13	Pros: CM, AK Δ: JE		Review waiver form, Δ confirms that does not want JE but refuses to sign form; Judge confirms that Δ is knowingly intelligently and voluntarily choosing to represent himself in spite of his statements to the contrary.

* Key to Lawyer initials:

Prosecutors: RA = Rich Anderson, CM = Christina Miyamasu, RW = Risa Woo, CS = Chuck Sergis NB = Nancy Balin (KC Jail)

Defense counsel: BB = Brian Beattie, LT = Lois Trickey, SS = Scott Schmitt, RL: Rich Lichtenstader,

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JON AMADIO DEL DUCA, Defendant.	No. 12-1-00681-1 KNT ORDER FILING DOCUMENT CONSIDERED BY THE COURT AND RELEVANT TO APPEAL

The attached electronic mail message was received by this Court on Monday, September 23, 2013, and it was inadvertently not filed in the Superior Court file. It is being filed on today's date for purposes of settling the record for the appeal.

Dated this 31st day of May, 2016.

HONORABLE MARY ROBERTS

Miyamasu, Christina

From: Miyamasu, Christina
Sent: Monday, September 23, 2013 12:21 PM
To: Court, Roberts
Cc: Kaake, Angela; Ewers, John (John.Ewers@defender.org)
Subject: State v. Del Duca 12-1-00681-1 KNT

Court and Counsel,

We have located several cases that appear analogous to the Mr. Del Duca's case. The citations are listed below.

State v. Deweese, 117 Wn.2d 369, 816 P.2d (1991)
State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991)
State v. Sinclair, 46 Wn. App. 433, 730 P.2d 742 (1986)

I am having a copy of this email as well as copies of the cases themselves dropped off at the jail for Mr. Del Duca's review.

Please let me know if there is anything else I can do.

Christina Miyamasu
Senior Deputy Prosecuting Attorney
Special Assault Unit - MRJC
King County Prosecuting Attorney's Office

APPENDIX C

JUDGE MARY E. ROBERTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. JON DEL DUCA, Defendant.	NO. 12-1-00681-1 KNT

Attached is a copy of a copy of an order the court signed on September 25, 2013. It does not appear in the court record, but a copy was retained in the court's chambers file. Counsel requested the court to search its chambers files because the record of the hearing on September 25, 2013 indicated such an order had been prepared. It is being filed on today's date for purposes of the appellate record.

DATED this 3rd day of May, 2016.

JUDGE MARY E. ROBERTS

Judge Mary E. Roberts
King County Superior Court
Courtroom W905, King County Courthouse
516 Third Avenue
Seattle, WA 98104-2318
(206) 477-1348

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JON DEL DUCA, Defendants.	No. 12-1-00681-1 KNT ~~WAIVER OF COUNSEL~~ ORDER ON DEFENDANT'S REQUEST TO REPRESENT HIMSELF / DISCHARGE COUNSEL / FORFEITURE

This matter came before the court on Mr Del Duca's request to discharge counsel or represent himself. The court began the pro se colloquy as follows

1. My true name is Jon Del Duca.
2. I understand that I have the right to be represented by a lawyer and if I cannot afford to pay for a lawyer, to have one provided at public expense.
3. I understand that I also have a constitutional right to represent myself.
4. I understand that I am charged with these crimes, which are described in the Information:

   Count 1, the crime of Rape of a Child in the First Degree.

   Count 2, the crime of Child Molestation in the First Degree.

   Count 3, the crime of _____.

   Additional counts: _____.

5. I understand that the maximum penalty for each charged crime is:

   Count(s) I and II: life imprisonment and a $50,000 fine

   Count(s) _____: 10 years in prison and a $20,000 fine

   Count(s) _____: 5 years in prison and a $10,000 fine

   Count(s) _____: _____ years in jail or prison and a $___ fine

6. I understand that an attorney would:

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

- Represent me and speak on my behalf in court.
- Advise me about my legal rights and options.
- Explain and assist me with legal and court procedures.
- Investigate and explore possible defenses to the charges against me that may or may not be readily apparent to me.
- Prepare and conduct my defense at any motion hearing or trial.

7. I understand that if I represent myself:
   - The judge cannot be my attorney and cannot give me any legal advice.
   - The prosecuting attorney cannot be my attorney and cannot give me any legal advice.
   - The judge, prosecuting attorney and court personnel are not required to explain court procedures or the law.
   - I will be required to follow all legal rules and procedures, including the rules of evidence.
   - I have the right to remain silent, but if I decide to testify on my own behalf, I may be required to present my testimony by asking questions of myself.
   - It may be difficult for me to do a good job as my own attorney.
   - If I represent myself, the judge is not required to provide me with an attorney as a legal advisor or standby counsel.
   - If I later change my mind and decide that I want an attorney to represent me, the judge may require me to continue to represent myself without the assistance of a lawyer.

8. I have the following legal training and experience (including prior experience representing myself or others in court): research while in custody

9. I am making this decision to represent myself knowingly and voluntarily. No one has made any promises or threats to me, and no one has used any influence, pressure or force of any kind to get me to waive my right to an attorney. Judge Roberts has denied my request for new counsel. Given the choice between continuing with

10. I have read, or have had read to me, this entire document. I want to give up my right to an attorney. I want to represent myself in this case.

Dated: 09/25/2013

Refuse to sign as to above
JON DEL DUCA

ATTORNEY FOR DEFENDANT

current counsel, and representing myself, I choose to represent myself

COURT'S FINDING

By refusing to accept any attorney appointed by the court defendant

I find the defendant's waiver of counsel to be knowingly, intelligently and voluntarily made. The defendant understands the charges and consequences of his/her waiver. The defendant is competent. The defendant is permitted to exercise his/her constitutional right to represent himself/herself. I find that the defendant has not provided a legitimate reason to

DATED: 09/25/2013

JUDGE

JUDGE MARY E. ROBERTS

*has forfeited his right to appointed counsel

discharge his attorney Mr Ewers, and accept that the defendant therefore prefers to represent himself.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Koch, the attorney for the appellant, at Kochd@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Jon Amadio Delduca, Cause No. 72904-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 6TH day of May, 2016.

Name:
Done in Seattle, Washington