SUPREME COURT NO. 94584-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KEITH RATLIFF,

Petitioner.

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ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 48636-9-II
Thurston County No. 15-1-00848-3

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# PETITION FOR REVIEW

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CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. IDENTITY OF PETITIONER

Petitioner, KEITH RATLIFF, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Ratliff seeks review of the April 25, 2017, unpublished decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Where the trial court denied Ratliff's timely request to proceed pro se without engaging in a colloquy to determine if the request was knowing and voluntary, was Ratliff denied his constitutional right of self-representation?

2. During closing argument the prosecutor relied on speculation and stereotypes about drug use and knowledge among the homeless population to challenge Ratliff's unwitting possession defense. Where there is a substantial likelihood this improper argument affected the verdict, must Ratliff's convictions be reversed?

D. STATEMENT OF THE CASE

At 10:53 p.m. on June 18, 2015, Olympia Police Officer Paul Frailey observed Keith Ratliff lying on the sidewalk in downtown

Olympia. 7RP[1] 61-62. Frailey advised Ratliff that it was illegal to lie on the sidewalk between 7:00 a.m. and midnight. 7RP 63. Frailey asked Ratliff to identify himself, and then he relayed that information to dispatch requesting a warrants check. 7RP 64. Dispatch informed Frailey that there was a warrant for Ratliff, and once dispatch confirmed the warrant, Frailey placed Ratliff under arrest. 7RP 64-65. In a search incident to arrest, Frailey discovered a one-inch plastic baggie with a very small amount of crystalline powder and a plastic wrapped package containing two half-pills. 7RP 67. The baggie was later determined contain methamphetamine and one of the half-pills was determined to contain oxycodone. 7RP 115, 120. The Thurston County Prosecuting Attorney charged Ratliff with two counts of unlawful possession of a controlled substance. CP 23; RCW 69.50.4013(1).

**a. Ratliff's motion to waive the right to counsel**

Some of the pretrial hearings were conducted by video conference, to which Ratliff objected. 2RP 3-4; 3RP 3. After continuing the arraignment for a week when Ratliff objected, on July 14, 2015, the court accommodated his request to appear in person to be arraigned. 2RP 4; 3RP 3-5. At his arraignment, Ratliff told the court he wanted to challenge

[1] The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—6-22-15, 12-17-15, 2-25-16; 2RP—7-7-15; 3RP—7-14-15; 4RP—8-31-15; 5RP—12-30-15 (am); 6RP—12-30-15 (pm), 2-18-16; 7RP—1-5-16; 8RP—1-6-16, 1-7-16.

the warrant on which his arrest was based. When the court told him to discuss proposed motions with his attorney, Ratliff said he wanted access to the law library. The court reiterated that he should talk to his attorney. 3RP 7-8.

Defense counsel subsequently filed a motion to suppress evidence discovered in the search incident to Ratliff's arrest, arguing that the municipal ordinance under which the police contacted Ratliff was unconstitutional. CP 4-13. At the suppression hearing on August 31, 2015, Ratliff interjected, saying he had questions for the witnesses. The court told him to confer with his attorney. He did so, and counsel had no further questions. 4RP 18, 29. During counsel's argument on the suppression motion, Ratliff interjected that the court should consider the validity of the warrant as well as the constitutionality of the statute. 4RP 32. When counsel finished his argument, Ratliff told the court he also wanted to make a motion. The court told him he could not because he had an attorney, but Ratliff explained that he did not ask for an attorney. 4RP 42. When he tried to tell the court the basis for his motion, the court told him he needed to conduct himself appropriately, and he was not permitted to address the court because he was represented by counsel. 4RP 42-43.

On December 17, 2015, trial counsel informed the court that he had recently been appointed as substitute counsel, and Ratliff had a motion

to go pro se. 1RP 6. Counsel explained that Ratliff wanted access to the jail's law library, and pro se defendants are given top priority. Moreover, Ratliff had made it clear that if going pro se was necessary to get access, that was what he wanted to do. He was asking to waive the right to counsel. 1RP 7. The court responded that it needed a colloquy with Ratliff for him to waive counsel, and there was no time for a colloquy that day. A hearing was scheduled for consideration of Ratliff's request. 1RP 8.

The hearing on Ratliff's motion to waive counsel was set for December 30, 2015, but Ratliff was not brought to court for the hearing. The court indicated that it would not have Ratliff brought to court based on his prior interactions and pattern of disruptive behavior, and it asked the jail staff to have him available via video. 5RP 6. Defense counsel informed the court that Ratliff was requesting to appear in person and refusing to appear by video. The court denied his request. 6RP 3-4. The court explained that it was concerned for the safety and wellbeing of the individuals in the courtroom due to Ratliff's prior disruptive behavior and his assault of his previous attorney. 6RP 6-7. Ratliff asked if this ban from the courtroom would apply at trial as well, and the court responded that he would be permitted to attend the trial in person. When Ratliff asked why he then could not be in court for the present motion hearing,

the court said it would not engage in that conversation with Ratliff. 6RP 9. Ratliff asked if he could continue the pro se motion until the morning of trial so that he could be present in court, and the court denied his request. 6RP 10. Through counsel, Ratliff informed the court he did not want to proceed with the motion hearing if he could not be in the courtroom. 6RP 10. The court then gave the basis for its ruling, noting that CrR 3.4(d) permits certain hearings to be held by video conference, giving the court discretion. 6RP 10-12.

On the morning of trial, January 5, 2016, Ratliff told the court he had issues to bring up. Counsel explained that Ratliff wanted to file a motion but first wanted to know if he would be allowed to proceed pro se. 7RP 5-6. Counsel told the court Ratliff continued to want access to the law library and also wanted to go pro se so he could raise several other issues. 7RP 13-14. Ratliff said he still wanted to contest the validity of the warrant, and he explained that he did not want to appear by video to argue his motion because his argument could be cut off by someone with a control switch and he would not be heard. 7RP 16-17.

The court refused to consider Ratliff's request to waive his right to counsel. It noted that when trial is about to commence, whether a defendant may represent himself depends on the circumstances of the case, and the court has quite a bit of discretion. Given Ratliff's history of

disorderly conduct and his choice the previous week not to participate in the hearing scheduled on his motion, the court determined it was not appropriate for Ratliff to represent himself. 7RP 21. The case proceeded to trial at which Ratliff was represented by counsel.

When the State rested, Ratliff told the court he had complaints about defense counsel's representation and had no confidence in counsel's ability to try the case. 7RP 131. He again raised this issue at sentencing during his allocution, reminding the court he had not wanted a public defender and had wanted to go pro se. He said he did not feel counsel represented him properly at trial. 1RP 17-18.

**b. Unwitting possession defense**

At trial, Ratliff presented a defense of unwitting possession. He testified that, at the time of his arrest, he was wearing a jacket that he got while panhandling. The drugs were found in the pockets of the jacket, but he did not put them there and did not know they were there. He had found the one-inch baggie when he put his hands in the pockets, but he believed it was empty and only saved it because he planned to use it for marijuana. He never saw the two half-pills before the police removed them from the jacket. 7RP 140-42, 155-56, 158.

In cross examining Ratliff, the prosecutor questioned whether he had discovered the drugs in the jacket while looking for something to sell

and held onto the baggie because of its financial value. Ratliff agreed that he was panhandling because he had no income, and he was looking for things of value. 7RP 158-59. He commented that he put his hands in the pockets of the jacket hoping to find a $100 bill. 7RP 160. He said he was familiar with the street environment and had done a lot of panhandling. 7RP 160. He was also familiar with marijuana. He testified, however, that he did not use any other drugs and would not be able to identify methamphetamine. 7RP 161, 165-66, 170. He was familiar with how to obtain marijuana in Olympia, and he would be able to panhandle the money needed to purchase it. 7RP 173-76. He did not think it would be worth his time trying to trade something of value for money to buy marijuana, because he could panhandle the money easily. 7RP 177-78.

Officer Frailey testified in the State's rebuttal that he is familiar with the homeless population in Olympia, and he frequently comes across methamphetamine in his duties. 7RP 182. Most commonly he finds one-inch baggies with very small quantities of methamphetamine in them. 7RP 183. The contents of these "scraper bags" can be combined and used or sold, and thus the bags have value to addicts. 7RP 184. Half-pills are also commonly held and traded or sold among addicts. 7RP 185.

### c. Prosecutor's closing argument

The prosecutor argued in closing that Ratliff knew the baggie in his possession contained methamphetamine and he kept it because it had value. She argued that because he was homeless and lived on the streets for years, he knew about controlled substances and their value, and his testimony that he had never seen any drugs other than marijuana was not reasonable. 8RP 228-31. She argued it was not reasonable to think that Ratliff wouldn't know a scraper bag had value after living on the street for 40 years. 8RP 236. The prosecutor argued that even if the jury believed Ratliff's testimony about how he got the jacket, all the other things he said were not reasonable in light of his history and testimony about the drug culture on the street, especially among the homeless population. 8RP 240-41. In her rebuttal argument the prosecutor said that Ratliff lived on the streets through the 70s, 80s, and 90s, "the heyday for drugs in that population[,]" which informs his knowledge about substances, their value, and what to do with them. 8RP 252. She argued that Ratliff was aware the substances were there and he was aware what they were, and he retained them because they had value. 8RP 252-53. Defense counsel did not object to the prosecutor's arguments.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The unjustified denial of Ratliff's right to represent himself presents a significant question of constitutional law, and the Court of Appeals' holding to the contrary conflicts with a decision of this Court. RAP 13.4(b)(1), (3).

The state and federal constitutions guarantee a criminal defendant the right to self-representation. U.S. Const., amend. VI and XIV; Const., art. I § 22. In fact, a defendant "may conduct his entire defense without counsel if he so chooses." State v. Estabrook, 68 Wn. App. 309, 317 n. 3, 842 P.2d 1001(quoting State v. Harding, 161 Wash. 379, 383, 297 P. 167 (1931)), review denied, 121 Wn.2d 1024 (1993). The criminal defendant's right to defend is necessarily personal because the defendant will bear the personal consequences of a conviction should the defense fail. Faretta v. California, 422 U.S. 806, 820, 45 L. Ed. 2d 562, 95 S. Ct. 25254 (1975).

In Faretta, the United States Supreme Court discussed the nature of the right of self-representation. The court pointed out that the right to assistance of counsel, guaranteed by the sixth amendment, is not the same as "compulsory counsel." Faretta, 422 U.S. at 833. Counsel should function as an assistant to a willing defendant,

> not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. . . . Unless the accused has acquiesced in such representation, the defense

> presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Faretta, 422 U.S. at 820-21. Thus, forcing a criminal defendant to accept, against his will, the services of a court appointed public defender, deprives the defendant of his constitutional right to conduct his own defense. Faretta, 422 U.S. at 836.

The constitutional right of self-representation is guaranteed despite the fact that exercise of that right "will almost surely result in detriment to both the defendant and the administration of justice." State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied 148 Wn.2d 1022 (2003). But the right is not absolute. The defendant must personally ask to exercise the right, and the request must be unequivocal, knowing and intelligent, and timely. Moreover, the right may not be exercised for the purpose of delaying the trial or obstructing justice. Id. The usual method a court uses to evaluate a pro se motion is colloquy with the defendant. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

The trial court never conducted a colloquy with Ratliff before denying his request to represent himself. When the request was first made on December 17, 2015, the court noted that a colloquy was required but there was no time for one that day. 1RP 8. A hearing was scheduled for December 30, 2015, to consider Ratliff's motion. If the court is

reasonably unprepared to immediately respond to the defendant's request, it may delay its ruling. Madsen, 168 Wn.2d at 504. It was not improper for the court to defer its consideration of Ratliff's motion at that point.

At the hearing scheduled for consideration of the motion, however, the court refused to allow Ratliff to appear in person. 6RP 3-4. The court ruled that it was exercising its discretion under CrR 3.4 to conduct a video proceeding due to Ratliff's previous disruptive behavior and his assault on former counsel. 6RP 10-12. While the court's duties of maintaining the courtroom and the orderly administration of justice are important, the right of self-representation is a fundamental right guaranteed by the state and federal constitutions. The value of respecting this right outweighs resulting difficulty in the administration of justice. Madsen, 168 Wn.2d at 509. Ratliff's previous behavior had been disruptive, but his disruptions were prompted by what he saw as counsel's failure to raise issues he wanted the court to decide. He did not ask for a continuance; he asked only to be permitted to represent himself and for access to the jail law library. There is no indication Ratliff's goal was merely to be disruptive and delay the proceedings. See Madsen, 168 Wn.2d at 509 (Defendant's disruptive behavior did not justify denial of pro se status where he was trying to address substantive issues he thought were unresolved by the court). Moreover, the court had made it clear that it did not consider

Ratliff's presence so disruptive or dangerous that it was necessary to exclude him from the courtroom for all purposes. It was allowing him to be present for trial. 6RP 9. Had the court given due importance to Ratliff's fundamental right to represent himself, it would have allowed Ratliff to present his motion in person, despite the concerns about disorder in the courtroom. Its unreasonable failure to do so was an abuse of discretion.

The next opportunity for Ratliff to appear in person was the day of trial, January 5, 2015, at which time he renewed his motion to proceed pro se. He told the court he still wanted access to the law library and he wanted to represent himself because he had a number of issues he wanted to raise. 7RP 13-17. The court denied the motion, again noting that Ratliff had previously been disruptive and stating that Ratliff had chosen not to participate in the scheduled hearing on his motion the previous week. 7RP 21.

While the court must indulge every reasonable presumption against waiver of the right to counsel, it may only deny a defendant's request for self-representation on a finding that the request is equivocal, untimely, involuntary, or made without general understanding of the consequences. Moreover, such finding must be based on identifiable fact. Madsen, 168 Wn.2d at 504-05. A court may not deny a motion for self-representation

based on concerns that the proceedings would be less orderly and efficient than if the defendant were represented by counsel. Madsen, 168 Wn.2d at 505.

As discussed above, Ratliff's previous disruptive behavior, in an attempt to address substantive issues he believed were unresolved, did not justify denial of his right of self-representation. And Ratliff's absence from the previous hearing on his motion was due to the court's unreasonable exclusion of him from the courtroom. Ratliff's motion on the day of trial was merely the renewal of his motion first raised three weeks earlier, which the court had not yet addressed. When the court is put on notice of a defendant's desire to proceed pro se but nevertheless delays ruling on the motion, fairness requires timeliness to be measured from the date of the initial request. Madsen, 168 Wn.2d at 508 (citing State v. Breedlove, 79 Wn. App. 101, 109, 900 P.2d 586 (1995)). Measured from the day the request was first made, rather than from when it was renewed on the day of trial, Ratliff's motion to proceed pro se could not properly be rejected as untimely. Ratliff unequivocally requested to represent himself, and the court never conducted a colloquy with Ratliff to determine if the request was knowing, intelligent, and voluntary. The court's ruling unjustly denied him his right of self-representation. The Court of Appeals' decision to the contrary conflicts with this Court's

decision in Madsen and presents a significant constitutional question, and review is appropriate. RAP 13.4(b)(1), (3).

2. The impact of prosecutorial misconduct in closing argument on Ratliff's right to a fair trial is a significant constitutional question. RAP 13.4(b)(3).

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

> A prosecutor serves two important functions: A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. The prosecutor owes a duty to criminal defendants to see that their rights to a constitutionally fair trial are not violated. Id. When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather

than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L.Ed.2d 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there was no objection to the argument at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. In general, arguments that have an inflammatory effect on the jury are not curable by instruction. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied, 175 Wn.2d 1025 (2012).

In Monday, the prosecutor argued that the reason witness after witness denied that the defendant was guilty was the existence of a "code" that "black folk don't testify against black folk." Monday, 171 Wn.2d at 674. The prosecutor returned to this theme throughout his argument. Id. This argument improperly injected racial prejudice into the proceedings in an attempt to discount unfavorable testimony, prejudicing the defendant's right to a fair trial. Id. at 678-80.

Similarly, in this case, the prosecutor relied on speculation and bias about the homeless population to discredit Ratliff's testimony. The prosecutor argued that Ratliff had to know that the plastic baggie found in his pocket contained methamphetamine, and that he retained it knowing the contents had value, because he was homeless. 8RP 236, 240-41. She argued that Ratliff's sworn testimony that he had never seen or used any drug except marijuana was unreasonable because, by his own admission, he had lived on the streets for over 40 years. 8RP 229-31. She told the jury that Ratliff lived on the streets through "the heyday for drugs in that population." 8RP 252.

The Court of Appeals acknowledged that the "heyday" comment was unsupported by the evidence and thus improper, but it concluded that the remaining comments were reasonable inferences from the testimony at trial. Opinion, at 11-12. Contrary to the Court of Appeals' conclusion, all of the prosecutor's comments were based on unsupported assumptions and stereotypes about the homeless population. Although the State presented testimony from a police officer that he frequently encounters scraper bags of methamphetamine among the homeless population, this testimony is a far cry from establishing that every homeless person would recognize and know the value of a scraper bag. There was no testimony to support the argument that a homeless person familiar with marijuana would

necessarily be familiar with and able to identify methamphetamine as well. A prosecutor's latitude in closing argument is limited to arguments "based on probative evidence and sound reason." Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Rather than arguing reasonable inferences from the evidence, the prosecutor here was speculating about what the homeless population must know. This argument appealed to the passions and prejudices of the jury and constituted misconduct.

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. Glasmann, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." Id. at 711. This misconduct here prejudiced Ratliff. Whether his possession of the substances was unwitting was the only issue at trial. The prosecutor's speculation and bias supplied the jury with the explanation that, because Ratliff was homeless and had lived on the street during the heyday of drugs in that population, he was necessarily exposed to all types of controlled substances; he therefore must have recognized that the baggie he found contained methamphetamine. Once implanted in the jurors' minds, a curative instruction could not likely dislodge this explanation. There is a substantial likelihood this misconduct affected the verdict, and

Ratliff's convictions must be reversed. This issue presents a significant constitutional question which this Court should review. RAP 13.4(b)(3).

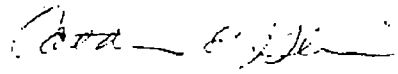
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Ratliff's convictions and sentence.

DATED this 25th day of May, 2017.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

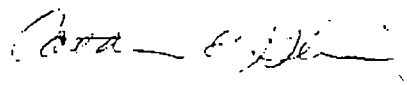


CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service

I am maintaining a copy of this Petition for Review in *State v. Keith Ratliff,* Court of Appeals Cause No. 48636-9-II, until I next hear from my client, Keith Ratliff.

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



Catherine E. Glinski
Done in Manchester, WA
May 25, 2017

## GLINSKI LAW FIRM PLLC

## May 25, 2017 - 11:16 AM

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Division Two

April 25, 2017

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>KEITH ALAN RATLIFF,<br><br>Appellant. | No. 48636-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

JOHANSON, P.J. — Keith A. Ratliff appeals the denial of his pretrial requests to proceed pro se and his jury trial convictions for two counts of unlawful possession of a controlled substance.[1] Ratliff argues that the trial court abused its discretion when it denied Ratliff's requests to proceed pro se and that prosecutorial misconduct necessitates the reversal of his convictions. We hold that the trial court properly denied Ratliff's requests to proceed pro se and that Ratliff fails to establish prosecutorial misconduct. Accordingly, we affirm Ratliff's convictions.

## FACTS

### I. ARREST

In 2015, police arrested Ratliff in downtown Olympia under an outstanding warrant. A search of Ratliff's jacket pockets revealed a one-inch plastic "baggie" containing a small amount

[1] RCW 69.50.4013(1).

of methamphetamine and two half pills wrapped in plastic, one of which was oxycodone. The State charged Ratliff with two counts of unlawful possession of a controlled substance for the methamphetamine and the oxycodone half pill.

## II. PRETRIAL HEARINGS

### A. SCHEDULING HEARING

At the hearing to set Ratliff's trial date, Ratliff asked his defense attorney, "How the hell did you come up with [the proposed trial date]?" and said he "want[ed] [his attorney] off [his] f*****g case." Report of Proceedings (RP) (Nov. 16, 2015) at 7. Ratliff then spat in his attorney's face and struggled with five corrections officers while yelling and threatening his attorney's life. The trial court granted Ratliff's attorney's request to withdraw and noted that Ratliff's future appearances would likely be by video.[2]

### B. INITIAL REQUEST TO PROCEED PRO SE

On December 15, three weeks before Ratliff's trial date, Ratliff's newly appointed attorney moved to allow Ratliff to proceed pro se. Ratliff sought priority access to the jail's law library as a pro se defendant and claimed that his previous attempts to access the law library had been frustrated. The trial court noted that Ratliff's request required conducting a lengthy colloquy; accordingly, it requested the parties to schedule a hearing, at which Ratliff would be required to appear by video due to his history of disruptive behavior.

[2] Ratliff had previously been required to appear by video at his preliminary appearance and arraignment, although he had refused to do so.

C. DECEMBER 30 HEARING ON MOTION TO PROCEED PRO SE

On December 30 (the week before trial), at the hearing on Ratliff's motion to proceed pro se, Ratliff requested to appear in person. The trial court denied the request, citing the court's "grave concern over the safety and wellbeing of individuals" in the courtroom. RP (Dec. 30, 2015 PM) at 6. In particular, the trial court noted that Ratliff had twice been removed from the courtroom because of "uncontrollable outbursts" that effectively "shut down" court and that Ratliff had consistently been "disrespectful," "aggressive," "extremely vile and offensive," and "very loud." RP (Dec. 30, 2015 PM) at 6-7. The trial court referenced its authority to require video appearances under CrR 3.4 and opined that there was no difference between a video and in-person appearance under the circumstances. The trial court further noted that its video capability fulfilled the requirements of CrR 3.4(d)(3), enabled the judge, counsel, all parties, and the public to see and hear each other, and allowed confidential attorney-client communications.

Ratliff requested to continue the hearing to the morning of trial so that he could personally appear. However, the trial court denied the request, stating, "We're going to [decide your motion] today." RP (Dec. 30, 2015 PM) at 10. The trial court noted that it was ready and willing to hear Ratliff's motion by video and had set aside three hours to conduct a colloquy; however, Ratliff continued to refuse to participate in a colloquy by video. The trial court ruled that "[Ratliff has] chosen not to appear, so the Court is not going to rule on any motion that's not before the Court." RP (Dec. 30, 2015 PM) at 12.

D. SECOND REQUEST TO PROCEED PRO SE

On the morning of trial, January 5, 2016, Ratliff appeared before a different judge and again requested to proceed pro se. The trial court noted that it was "disinclined" to consider the

request, given its untimeliness. 1 RP at 13. However, the trial court allowed Ratliff to explain why his motion to proceed pro se should be considered in light of his previous refusal to engage in a colloquy. It gave Ratliff "five minutes" to explain why it was appropriate for the trial court to consider "the motion that was filed and scheduled for hearing" on December 30. 1 RP at 7. In response, Ratliff stated that he refused to appear by video because "[w]hen you go in that video booth, somebody has control of that switch. . . . You could be sitting there talking, and you're not being heard." 1 RP at 17.

The trial court cut off Ratliff's explanation after Ratliff said that public defenders "don't give a s***t," described his prior lawyer as "a piece of trash," and interrupted the trial court. 1 RP at 18. The trial court noted that because Ratliff's request was made at the commencement of trial, it had quite a bit of discretion. The trial court then determined that it would not grant Ratliff's request to proceed pro se, in light of the history of the proceeding, Ratliff's pattern of "disorderly conduct," and his decision not to participate in a colloquy by video at his prior hearing. 1 RP at 21.

## III. TRIAL

### A. STATE TESTIMONY

Officer Paul Frailey, who arrested Ratliff, testified that he found the baggie containing a white crystalline powder and two half pills in Ratliff's jacket pockets. Officer Frailey immediately believed the powder inside the baggie to be methamphetamine because he found "similar baggies very frequently working downtown," and a field test confirmed his suspicions. 1 RP at 68-69. Testing later revealed that one of the half pills found on Ratliff contained oxycodone and that the baggie held less than one-tenth of a gram of methamphetamine.

Officer Frailey testified that part of his duties involved patrolling the downtown area and getting to know people who lived on the street. Officer Frailey was personally familiar with the local homeless population, and he "[v]ery frequently" encountered controlled substances, particularly methamphetamine, during his downtown patrols. 1 RP at 182. Most commonly, Officer Frailey found "scraper bag[s]"—one-inch bags with very small amounts of methamphetamine. 1 RP at 183. Nonaddicts would retain scraper bags because combining residue from several bags would result in a saleable quantity of methamphetamine. A bag with even a tenth of a gram of methamphetamine "absolutely h[ad] value"—approximately $10. 1 RP at 188. In Officer Frailey's experience, baggies were almost exclusively used for methamphetamine and only rarely for marijuana. Half pills were also "really common" because a pill split in half could be sold for "a little bit more" than a whole pill. 1 RP at 185. Officer Eric Henrichsen, who assisted in Ratliff's arrest, confirmed that it was not uncommon to encounter half pills downtown.

B. DEFENSE TESTIMONY

Ratliff testified that someone had given him the jacket while he was panhandling on the day of his arrest. Ratliff searched the pockets for valuables, but he claimed that he found only the small baggie and not the package with the half pills. Ratliff testified that he did not know what the baggie was or see anything inside it and that he saved the baggie so that he could use it to store marijuana. Ratliff, who was 60 years old, testified also that he had "done a lot of panhandling" and had lived on the street for most of his life. 1 RP at 160. Ratliff said that he had never personally seen drugs other than marijuana, although he knew that other drugs "look like powder." 1 RP at 165.

### C. PROSECUTOR'S CLOSING ARGUMENT

In closing, the prosecutor argued that Ratliff's homelessness was relevant to whether he knew that he possessed methamphetamine and oxycodone. The prosecutor referenced the officers' testimony about "drug culture on the street, especially amongst the homeless population." 2 RP at 240-41. And she claimed that in light of Ratliff's 40 years of living on the streets, it was unreasonable for Ratliff to say that he had never seen any drug other than marijuana.

The prosecutor noted Ratliff's admission that he searched the jacket pockets for valuables and contended that Ratliff would have recognized a scraper bag and that such a bag had value in light of his history of homelessness. Similarly, Ratliff would have found the package containing the pills, known that a half pill, which "gets traded all the time," had value, and retained the pill. 2 RP at 240. Finally, in rebuttal closing argument, the prosecutor argued that Ratliff knew about illicit substances and their values because Ratliff had been on the streets from the late 1970s to the 1990s, "the heyday for drugs in that population." 2 RP at 252. Ratliff did not object to these arguments.

### D. VERDICT AND SENTENCING

The jury found Ratliff guilty of both unlawful possession counts. Ratliff was sentenced to 18 months in prison and a year of community custody. He appeals his convictions.

## ANALYSIS

### I. RIGHT TO PROCEED PRO SE

Ratliff argues that on December 30 and January 5, the trial court unjustifiably and erroneously denied him his right to proceed pro se.[3] We disagree.

#### A. PRINCIPLES OF LAW

We review a trial court's denial of a request to proceed pro se for an abuse of discretion. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or rests upon facts unsupported by the record. *Madsen*, 168 Wn.2d at 504 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A trial court's discretion "'lies along a continuum, corresponding to the timeliness of the request.'" *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004) (quoting *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002)). If made at the commencement of trial or shortly before, then "'the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter.'" *Vermillion*, 112 Wn. App. at 855 (quoting *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)). The unjustified denial of the pro se right is never harmless error. *Madsen*, 168 Wn.2d at 503 (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)).

Amendments VI and XIV of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to appear pro se. *Hemenway*, 122 Wn. App. at 791. This is so regardless of the fact that the defendant's exercise of the right

[3] Ratliff concedes that the trial court properly deferred consideration of his December 15 request.

"will almost surely result in detriment to both the defendant and the administration of justice." *Vermillion*, 112 Wn. App. at 850-51. The right to proceed pro se is not absolute or self-executing, however, and a request to proceed pro se must be both unequivocal and timely. *Madsen*, 168 Wn.2d at 504.

A request to proceed pro se is a waiver of the right to counsel. *Madsen*, 168 Wn.2d at 504. Thus, the trial court must determine whether the request is voluntary, knowing, and intelligent, generally by engaging in a colloquy with the defendant. *Madsen*, 168 Wn.2d at 504. Although a colloquy on the record is preferable, a colloquy is not necessary if the record otherwise indicates that the defendant was aware of the risks entailed by self-representation, which will only rarely be the case. *City of Tacoma v. Bishop*, 82 Wn. App. 850, 856, 920 P.2d 214 (1996); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

B. DECEMBER 30 HEARING ON MOTION TO PROCEED PRO SE

First, Ratliff argues that the trial court abused its discretion at the December 30 hearing when it denied[4] Ratliff's request to proceed pro se because Ratliff refused to participate in a colloquy by video. We disagree.

A trial court cannot "stack the deck against a defendant by not conducting a proper colloquy" and then denying the defendant's request to proceed pro se. *Madsen*, 168 Wn.2d at 506. The trial court required that Ratliff appear by video for the December 30 hearing because of Ratliff's prior assaultive and disruptive behavior. The trial court noted that it had set aside three

[4] Ratliff characterizes the trial court's ruling on December 30 as not "address[ing]" his request to proceed pro se. Br. of Appellant at 13. But the record shows that the trial court effectively denied Ratliff's request: the trial court stated that it was going to consider the request on December 30 and not at a later date, and the trial court explicitly denied Ratliff's request to defer its ruling.

hours in which to conduct a colloquy and repeatedly stated that it was ready and willing to engage in a full colloquy with Ratliff. Ratliff, however, refused to appear by video to engage in a colloquy, and thus the trial court denied Ratliff's motion to proceed pro se.

By refusing to appear by video, Ratliff prevented the trial court from engaging in the required colloquy with him. Unlike in *Madsen*, where the court held that it is error for a trial court to conduct an insufficient colloquy and then deny a request to proceed pro se, here it was Ratliff, not the trial court, who sabotaged the colloquy. *See* 168 Wn.2d at 506. Accordingly, we hold that the trial court did not abuse its discretion when it denied Ratliff's request to proceed pro se because Ratliff refused to appear by video for the colloquy hearing.

### C. JANUARY 5 REQUEST TO PROCEED PRO SE

Next, Ratliff contends that the trial court abused its discretion on the morning of trial when it determined it would not grant his "renewed" request to proceed pro se. Br. of Appellant at 12. Ratliff argues that his request was timely, with its timeliness measured from the date of his initial request—December 15. Again, we disagree.

Where a trial court delays ruling on a motion to proceed pro se, fairness dictates that the timeliness of the request must be measured from the date of the initial request. *Madsen*, 168 Wn.2d at 508. On December 15, Ratliff made his first request to proceed pro se. The trial court set a hearing for December 30 to conduct the required colloquy and ordered Ratliff to appear by video. At the December 30 hearing, the trial court told Ratliff that it would rule on his motion that day and refused Ratliff's request to postpone its ruling so that Ratliff could appear in person. Thus, at the December 30 hearing, the trial court denied Ratliff's request to proceed pro se. This is not a situation in which the trial court "delayed" its ruling on the request to proceed pro se so that

timeliness is measured from the date of the initial request. *See Madsen*, 168 Wn.2d at 508. Rather, Ratliff's request on the morning of trial was a *second* request to proceed pro se, and we measure that request's timeliness from the morning of trial, when it was made.

On the morning of trial, the trial court allowed Ratliff "five minutes" to explain why it should consider his request to proceed pro se. 1 RP at 13. The trial court noted in particular that it sought an explanation of why Ratliff had chosen not to engage in a colloquy with the trial court on December 30. Finding Ratliff's explanations unsatisfactory, the trial court determined that it was unable to grant his request to proceed pro se. The trial court noted that because Ratliff's request was made at the commencement of trial, it had quite a bit of discretion. Then, the trial court determined that it would not grant Ratliff's request to proceed pro se, in light of the history of the proceeding, Ratliff's pattern of "disorderly conduct," and his decision not to participate in a colloquy by video at his prior hearing. 1 RP at 21. Given the lateness of Ratliff's request and the other factors noted, the trial court's denial of Ratliff's request to proceed pro se was manifestly reasonable. *See Vermillion*, 112 Wn. App. at 855. Accordingly, we hold that the trial court did not abuse its discretion.

## II. PROSECUTORIAL MISCONDUCT

Ratliff requests that his convictions be reversed because the prosecutor's comments about the homeless population amounted to prosecutorial misconduct. We reject Ratliff's prosecutorial misconduct claim.

### A. PRINCIPLES OF LAW

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudicial in the context of the entire trial. *State v.*

*Walker*, 182 Wn.2d 463, 477, 341 P.3d 976, *cert. denied*, 135 S. Ct. 2844 (2015). Where, as here, the issue is first raised on appeal, the defendant must further show "'that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.'" *Walker*, 182 Wn.2d at 477-78 (quoting *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)).

B. PROPER

Ratliff contends that portions of the prosecutor's argument improperly relied upon speculation and stereotypes about the homeless population and went beyond reasonable inferences from State testimony. We disagree because, except for one comment, the prosecutor's remarks were proper.

We review the prosecutor's conduct in its full context. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 58, 296 P.3d 872 (2013). A prosecutor has wide latitude to make arguments to the jury and may draw reasonable inferences from the admitted evidence. *Yates*, 177 Wn.2d at 58 (quoting *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). However, it is improper for a prosecutor to make closing arguments that are unsupported by the evidence. *Yates*, 177 Wn.2d at 58. Arguments that are based upon common sense and do not purport to quote from unadmitted evidence are not necessarily prosecutorial misconduct. *State v. Barrow*, 60 Wn. App. 869, 873-74, 809 P.2d 209 (1991).

Here, Officer Frailey testified at trial that he often found controlled substances downtown and noted that he frequently encountered scraper baggies and half pills, which had value and could be traded. The prosecutor argued in closing that because he was homeless, Ratliff knew that the plastic baggie had value and retained it to trade and that Ratliff's testimony that he had never seen

any drug other than marijuana was unreasonable in light of his 40 years on the streets. These comments were reasonable inferences from trial testimony and accordingly were not improper.

The prosecutor also argued in closing—without evidentiary support—that Ratliff had lived through the "heyday for drugs in that population," the late 1970s through 1990s. 2 RP at 252. It is not clear, as the State contends, that an adult resident of Thurston County would know that the County's history included a "heyday" of drug use in the homeless community between the late 1970s and 1990s. Accordingly, this "heyday" comment was too specific to fall within the exception for arguments based upon common sense. *See Barrow*, 60 Wn. App. at 873-74. Thus, we hold that the prosecutor's closing argument was proper, with the exception of the "heyday" comment.

### C. NOT PREJUDICIAL

Ratliff points out that whether he knew he possessed a controlled substance was the only issue at trial, so that the alleged prosecutorial misconduct was necessarily prejudicial. As discussed, we hold that the prosecutor's comments were primarily proper, so we need not reach the issue of whether these comments were prejudicial. Further, we hold that the improper "heyday" comment was not prejudicial.

To prevail on a claim of prosecutorial misconduct, the defendant must show prejudice, a "substantial likelihood that the misconduct affected the jury verdict," "in the context of the record and all of the circumstances of the trial." *Glasmann*, 175 Wn.2d at 704.

Here, the prosecutor's unsupported "heyday" comment created an inference that Ratliff recognized and retained the baggie and the packaged half pills because he knew that those items had value, based upon Ratliff's living on the streets through the alleged "heyday" of drug use. But the same inference resulted from the prosecutor's arguments that Ratliff would have been familiar with drugs based upon the pervasiveness of drugs in the downtown area and the fact that he was 60 years old and homeless for most of his life. As discussed, these arguments were proper. Further, the same inference also resulted from the officers' testimony, which established that controlled substances, particularly methamphetamine and half pills, were "[v]ery frequently" encountered downtown. 1 RP at 182. Thus, viewing the "heyday" comment in light of the entire record and the circumstances of trial, it is not substantially likely that the "heyday" comment affected the jury verdict. *See Glasmann*, 175 Wn.2d at 704. Accordingly, we hold that Ratliff's prosecutorial misconduct arguments lack merit.

## III. APPELLATE COSTS

Ratliff requests that should the State substantially prevail on appeal, this court deny a cost bill. The State represents to this court that it will not request appellate costs because such a request would be futile. We accept the State's representation, and thus we deny an award of appellate costs to the State.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, P.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.