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Supreme Court No. (to be set)
Court of Appeals No. 37924-8-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington
v.
Jon Gabriel Devon

Okanogan County Superior Court

Cause No. 20-1-00118-8

The Honorable Judge Brian Huber

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

Jon Devon exercised his right to "appear and defend in person." He repeatedly expressed his desire for the assistance of standby counsel at his trial. Under the state constitution, he was entitled to the appointment of standby counsel as a component of his right to self-representation. The court told him that he did not have this right, so Mr. Devon's waiver was not knowing, intelligent, and voluntary. He was denied his state constitutional right to standby counsel.

The Court of Appeals improperly refused to address this argument. The court instead created a new test for manifest error, that a constitutional right cannot be raised for the first time on appeal unless it has already been recognized in a prior case. This is incorrect.

The Supreme Court should accept review, reverse the Court of Appeals, and address Mr. Devon's constitutional claim on its merits.

In addition, before his waiver, Mr. Devon was denied the effective assistance of counsel. His attorney delayed a conflict check until just before trial; late withdrawal from the case left

the court unable to find standby counsel for Mr. Devon. Because his attorney's dilatory conduct deprived Mr. Devon of standby counsel, he was denied the effective assistance of counsel.

The Court of Appeals erroneously concluded that Mr. Devon could not show prejudice. The court insisted that Mr. Devon show an impact on the verdict. This is incorrect: Mr. Devon was prejudiced when his attorney's error forced him to either give up his right to standby counsel or to a speedy trial.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Jon Devon, the appellant below, asks this Court to review the Court of Appeals opinion entered on August 23, 2022.[1] This case presents two issues:

1. Does the state constitution guarantee the assistance of standby counsel for an accused person who chooses to "appear and defend in person"?
2. Did defense counsel's untimely conflict check prejudice Mr. Devon by forcing him either to go forward without standby counsel, or to delay trial so the court could find standby counsel to assist him?

[1] Attached.

STATEMENT OF THE CASE

On May 10, 2020, Jon Devon went to the home of Yvonne McDougall, his good friend's mother. RP 808. Mr. Devon talked with McDougall and his friend Shane. He seemed fine to McDougall. RP 808-811, 814. McDougall received a call from a neighbor indicating that there was talk over the police scanner that police were coming to arrest Mr. Devon. RP 814.

McDougall told Mr. Devon about the call. RP 809-812. This appeared to frighten Mr. Devon, who went into an outbuilding on the property. RP 811. McDougall went to speak with Mr. Devon, and he seemed to her to be in shock. RP 811, 815. Mr. Devon told her he did not want to leave the building. RP 811.

McDougall's son went to talk to Mr. Devon. RP 812. After some time, police crisis negotiators talked to Mr. Devon over the phone, and he came out. RP 811-813.

Police sought Mr. Devon based on a claim that days earlier, Mr. Devon had a shotgun and was possibly suicidal. RP 783, 805, 824. Police went to the McDougall property in force.

RP 783, 806. Multiple officers, believing that Mr. Devon was armed and refusing to come out, set up a fully armed perimeter. RP 785-786, 791, 796, 806. Mr. Devon was inside the outbuilding about three hours, and he came out peacefully. RP 778-782, 807, 828. He was not armed. RP 773.

In the week before, police were called multiple times about Mr. Devon, but officers had not made contact. RP 595, 677, 693, 710-714, 832-833. Dale Devon, Mr. Devon's uncle on whose property Mr. Devon had been staying, was concerned that Mr. Devon may be contemplating suicide. RP 432-433, 436, 579, 593, 597, 832-833. He contacted police and told dispatch that Mr. Devon had possibly "slipped a cog" and that he may have a shotgun. RP 436, 454-455, 595-596.

On another day that week, Dale Devon told police that Mr. Devon became very angry and had a shotgun but did not point it at him. RP 497, 500, 580-582, 595. Michael Zachman was with Mr. Devon during that incident. Zachman said that he had not seen Mr. Devon act this way before. RP 369, 375-378, 380, 386, 389, 877. Zachman claimed that Mr. Devon

threatened him, but Zachman did not contact police. RP 389-390, 396, 867.

At his property, Dale Devon cared for his former partner, Marsha Wright, who suffered from dementia. RP 608, 632. Dale Devon was aware that because Mr. Devon had been convicted of a felony, he could not be around guns. RP 430, 585. Years before, Dale Devon had given all his guns away so that Mr. Devon could stay at Dale Devon's home. RP 607-608.

But Dale Devon had apparently forgotten about one shotgun, which he said he kept under Wright's bed. RP 423-427, 430-431, 607. After Mr. Devon's arrest, a gun would be given to police: Dale Devon said that Wright retrieved the gun from Mr. Devon's bedroom, but the officer who took the gun into evidence said that he got it in the dining room. RP 609-610, 639-643, 665, 720. No one saw where Wright got the gun from. RP 610, 639-643.

The state charged Jon Devon with assault one, three counts of harassment/threats to kill, unlawful possession of a firearm one, and obstructing. CP 145-147.

The court assigned an attorney for Mr. Devon right away. RP 6. At his arraignment on May 18, 2020, Mr. Devon informed the court that he wanted to exercise his right to a speedy trial and would be objecting to any trial setting beyond 60 days. RP 32.

But Mr. Devon's attorney wasn't ready for trial as set, so he asked for a continuance, over Mr. Devon's objection. RP 43-45. The court granted it and set a new 60-day clock for speedy trial which started on September 1, 2020. RP 45.

By late July of 2020, Mr. Devon began to fear his court-appointed attorney was not working diligently on preparing his case. RP 48-76; CP 8-10, 64-75. He asked the trial judge to direct the attorney to pursue discovery and pre-trial motions at a hearing he noted up himself. CP 64-75; RP 48-76. Mr. Devon explained his distrust of his attorney, noting that the attorney had provided him with unredacted reports contrary to court rule, and that the attorney failed to respond to multiple calls and letters. RP 48-56. The attorney responded that Mr. Devon was effectively calling him a liar and that he could not represent him. RP 61.

Mr. Devon again confirmed he was not asking for a new attorney but simply asking the court to direct his attorney to work on the case. RP 67-73. After discussion, Mr. Devon said that he was willing to work with his attorney, who apparently agreed, and the court took no action. RP 71-76. Mr. Devon reaffirmed his desire to exercise his right to a speedy trial. RP 76.

On September 24, 2020, the defense attorney again asked for a continuance of the trial date. RP 112. Once again, Mr. Devon objected. RP 112. He explained that his attorney had plenty of time to complete the investigation, and that he did not want to have to choose between his constitutional rights to speedy trial and effective assistance of counsel. RP 124-128, 134. The prosecutor objected as well, but the court granted the continuance. RP 115-121.

After having been on the case since May, on October 30, 2020, the defense attorney realized that he had represented Michael Zachman, a claimed victim, in the past. RP 207. He told the court that he did not do a conflict check, but was

instead notified of the conflict by his former client Zachman at the witness interview. RP 207.

At that point, Mr. Devon sought to represent himself and requested a standby attorney. RP 210. The court allowed the appointed attorney to withdraw. RP 216. After reviewing the status of discovery motions at some length, Mr. Devon reaffirmed that he was ready for trial as set the next week and reiterated his request for a standby attorney. RP 219-226, 232, 237, 252. Mr. Devon reminded the court that he wished to have his trial as set without delay. RP 230-231.

The trial judge reviewed with Mr. Devon his right to counsel as well as his right to represent himself. RP 236-270. The court ruled that Mr. Devon could have a standby attorney, but noted that the court might not be able to find one available for a trial as set the next week. RP 252-253. Part of the colloquy included the court's claim that there was no right to standby representation. RP 262.

At the start of trial on November 2, an attorney was present but indicated that he could not step in as a standby attorney that day. RP 274, 287. Mr. Devon reaffirmed his desire

to have a speedy trial. RP 279. The court proceeded to hear and rule on motions in limine, with Mr. Devon representing himself without assistance. RP 280-293.

Mr. Devon was held in custody while his case was pending, and during trial as well. RP 130, 251, 348, 793, 1104. He sought to impeach witnesses with recordings, but struggled to obtain and use appropriate recording devices. RP 412-418, 552-554, 854-864, 899. While the parties argued during a break in witnesses about discovery problems and evidentiary issues, the trial judge noted to Mr. Devon that if he had a standby attorney, it would be much easier on Mr. Devon. RP 536.

The jury acquitted Mr. Devon of all the harassment charges as well as the assault count. RP 1102-1106. He was only convicted of unlawful possession of a firearm and obstructing. RP 1102-1106.

Mr. Devon requested an attorney be appointed to assist him at sentencing, which the court granted. RP 1114-1116. The court sentenced Mr. Devon within his standard range. RP 1133, 1143; CP 258-270. Mr. Devon timely appealed. CP 273-286. The Court of Appeals affirmed the convictions.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE TRIAL COURT VIOLATED MR. DEVON'S STATE CONSTITUTIONAL RIGHT TO STANDBY COUNSEL.

Mr. Devon exercised his right to "appear and defend in person." He asked the court to appoint standby counsel to help him effectuate this right. He had a state constitutional right to standby counsel as part of his right to appear and defend in person, but did not enter a valid waiver of this right. He represented himself at trial without the assistance of standby counsel.

This violated his state constitutional right to "appear and defend in person." The Court of Appeals improperly refused to address the violation.

A. The right to "appear and defend in person" includes a right to the assistance of standby counsel.

Our state constitution protects the right to "appear and defend in person." Wash. const. Art. I, §22. The right is broader than the federal constitutional right to self-representation. *State v. Rafay*, 167 Wn.2d 644, 648-654, 222 P.3d 86 (2009), *as*

corrected (Dec. 8, 2010); *State v. Silva*, 107 Wn.App. 605, 617-622, 27 P.3d 663 (2001).

But self-representation may be entirely useless if the accused person doesn't have help with the technical aspects of conducting a trial. Because of this, the right to "appear and defend in person" necessarily includes a right to standby counsel. This is confirmed by analysis under the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The text of the provision. The right to appear and defend in person "unequivocally guarantee[s] an accused the constitutional right to represent himself." *Silva*, 107 Wn. App. at 617–18; *see also Rafay*, 167 Wn.2d at 649. This language weighs in favor of an independent interpretation of Wash. Const. art. I, §22. *Silva*, 107 Wn. App. at 617–18; *Rafay*, 167 Wn.2d at 649.

Differences with the federal constitution. Unlike the state constitutional right, the federal right to self-representation is not explicit. Rather, it is implied from the language of the Sixth Amendment. *Silva*, 107 Wn. App. at 618. This difference has "great significance in determining what is required to

effectuate" each right. *Id.,* at 619. Thus, differences in the texts weigh in favor of a broader right under the state constitution.

State constitutional and common law history. The framers of our state constitution rejected language outlined in the federal constitution when drafting art. I, §22. Thus, state constitutional history "indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution." *Id.* Similarly, the common law reflects Washington's "important concerns surrounding autonomy and the personally held right to defend." *Rafay*, 167 Wn.2d at 652. This factor thus favors a broader interpretation of the state constitution than the federal constitution.

Preexisting state law. It does not appear that a review of preexisting state law helps determine the scope of the right to self-representation. *See Silva*, 107 Wn. App. at 621.

Differences in structure. It is "well established" that the differences in structure between the two constitutions "inherently support independent review of our state constitution." *Silva*, 107 Wn. App. at 621.

Matters of state interest or local concern. The implementation of the right to self-representation "is plainly of state interest and local concern." *Id.*

Summary. Five of the six *Gunwall* factors favor an independent interpretation of the right to self-representation. The sixth "is not helpful." *Id.,* at 621. Thus, art. I, §22 should be interpreted to include a right to the assistance of standby counsel when an accused person elects to proceed *pro se*.

At a minimum, the constitutional right to self-representation must include the right to technical assistance from conflict-free counsel. *See State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). A standby attorney must be "candid and forthcoming in providing technical information/advice" and "able to maintain attorney-client privilege."[2] *Id.,* at 512-513. Without standby counsel, pro se

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[2] Cases after *McDonald* make clear that standby counsel need not be "able to fully represent the accused on a moment's notice." *McDonald*, 143 Wn.2d at 512. A *pro se* defendant with appointed standby counsel may be convicted even where standby counsel is unable to immediately step in to resume representation. *See, e.g., State v. Fisher*, 188 Wn.App. 924, 355 P.3d 1188 (2015); *State v. Canedo-Astorga*, 79 Wn.App. 518, 903 P.2d 500 (1995).

litigants will always be at a disadvantage as to technical matters. The absence of standby counsel thus hampers the right to self-representation secured by the constitutional right to "appear and defend in person." Wash. Const. art. I, §22.

Mr. Devon did not have help from a standby attorney. Because he did not waive his right to standby counsel, he was deprived of his state constitutional right to "appear and defend in person." Wash. Const. art. I, §22.

B. Mr. Devon did not make a valid waiver of his state constitutional right to standby counsel.

A waiver "is an 'intentional relinquishment or abandonment of a known right or privilege.'" *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Courts must indulge every reasonable presumption against waiver of fundamental rights. *Id.* The prosecution bears the burden of establishing a valid waiver, which must be knowing, voluntary, and intelligent. *Id.*

A waiver isn't knowing, voluntary, and intelligent if premised on a right yet to be recognized. *State v. Robinson*, 171

Wn.2d 292, 306, 253 P.3d 84 (2011). In *Robinson,* the Supreme Court addressed an unpreserved error on its merits. The error became manifest (after trial) when the U.S. Supreme Court announced a new rule in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The *Robinson* court noted that the defendants could not validly waive rights established by *Gant* because that case had not been decided at the time of their trials.

Here, the trial court erroneously told Mr. Devon that he had no right to standby counsel. RP 262; CP 291-295. His waiver was therefore not "an 'intentional relinquishment or abandonment of a known right.'" *Id.* Nor can it be said that his waiver was knowing, voluntary, and intelligent. *Id.*

Mr. Devon made clear that he wished to have standby counsel who could provide technical assistance. RP 210, 212, 226, 231, 232, 237, 252. The record shows that he could have used the help of standby counsel. For example, he struggled to impeach witnesses using prior recorded statements because he did not have transcripts or a way of playing the recordings. RP 412-418, 552-554, 854-864, 899. Indeed, even the court noted

that Mr. Devon would have benefitted from the appointment of standby counsel. RP 536.

Mr. Devon's purported waiver of his right to standby counsel was invalid. *Id.* It was not a knowing, voluntary, and intelligent relinquishment of a known right. *Id.* The Court of Appeals sidestepped the issue of waiver by declining to review Mr. Devon's argument. The Supreme Court should grant review and address the issue on its merits.

C. Mr. Devon's argument regarding standby counsel is a manifest error affecting his right to appear and defend in person.

The Court of Appeals erroneously declined to review Mr. Devon's constitutional claim. The court should have examined the argument as a manifest error affecting a constitutional right. In the alternative, the court should have exercised its discretion and engaged with Mr. Devon's arguments.

Mr. Devon's constitutional claim is a manifest error affecting his state constitutional right to "appear and defend in person." Wash. Const. art. I, §22. A party may raise such errors for the first time on appeal. RAP 2.5(a)(3). Error is manifest if

it "resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Despite this formulation, the determination does not rest on the *impact* of the error.[3] *State v. O'Hara,* 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Instead, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *Id.* This approach "ensure[s] [that] the actual prejudice and harmless error analyses are separate." *Id.*

An error is manifest if the facts necessary to adjudicate the error appear in the record. *Id.* The Supreme Court has settled on a standard that focuses on the information available to the trial court: an error is manifest if, "given what the trial court knew at that time, the court could have corrected the error." *Id.,* at 100.

Contrary to the Court of Appeals' interpretation of the standard, this formulation necessarily focuses on the *facts*

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[3] The standard "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Lamar,* 180 Wn.2d at 583.

known to the trial court. A trial judge's lack of awareness regarding the law should not bar review of a manifest error,

The error here is constitutional in scope: it affected Mr. Devon's right to "appear and defend in person." Wash. Const. art. I, §22. Constitutional claims are reviewed *de novo. Hester v. State*, 197 Wn.2d 623, 631, 483 P.3d 742 (2021).

The error is manifest because the necessary facts appear in the record. *O'Hara,* 167 Wn.2d at 100. The record includes Mr. Devon's numerous requests for standby counsel, the court's suggestion that the trial be delayed so Mr. Devon could have the assistance of standby counsel, and the court's recognition that standby counsel would have been helpful. RP 210, 212, 226, 231, 232, 237, 252-253, 536. No additional facts are required. *Id*. The court could have corrected the error, and it may be reviewed for the first time on appeal. *Id.;* RAP 2.5(a)(3).

The Court of Appeals erroneously concluded that the error was not manifest. Opinion, pp. 4-7. Four problems taint the court's analysis.

First, the court presumed that an error can never be reviewed under RAP 2.5(a)(3) if premised on a constitutional right that has yet to be recognized. This is incorrect. An error may be reviewed even if premised on authority not extant at the time the error was committed.[4] *Robinson*, 171 Wn.2d at 305.

Otherwise, an accused person could suffer a constitutional error yet have no remedy for the violation. This is so because defense counsel has no basis to argue an unrecognized constitutional error in the trial court. Nor would a trial judge have a basis to rule on such an argument. Accordingly, the Court of Appeals should have addressed the error, even though the right to standby counsel (as a component of the right to self-representation) has yet to be recognized.

Second, the Court of Appeals misinterpreted the Supreme Court's standard for manifest error. Instead of focusing on "what [facts] the trial court knew," the court apparently believed that "what the trial court knew" refers both to the factual record and to the legal landscape. This is incorrect. The

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[4] Indeed, under certain circumstances, there is no need to establish manifest error. *Id.*

test focuses on the facts known to the trial judge. Here, the record is sufficient for review. The error is manifest.

Third, the Court of Appeals erroneously focused on the impact of the error. According to the court, "even if the alleged error was obvious and foreseeable," the error is not manifest. Opinion, pp. 6-7. The court suggested that Mr. Devon would have proceeded without standby counsel even if he knew he had a right to standby counsel. But any waiver was invalid because it was not knowing, intelligent, and voluntary. *Robinson*, 171 Wn.2d at 306.

Finally, the Court of Appeals should have exercised its discretion to review the merits of Mr. Devon's claim. RAP 2.5(a) is permissive: an appellate court "*may* refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The rule does not say that the court *must* decline to review issues raised for the first time on review.

In other words, "the rule's use of the term 'may' indicates that it is a discretionary decision to refuse review." *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Thus "[n]othing in RAP 2.5(a) expressly prohibits an appellate

court from *accepting* review of an issue not raised in the trial court." *Id.* (emphasis in original).

Even if RAP 2.5(a)(3) does not apply, the Supreme Court should exercise its discretion to review Mr. Devon's argument on its merits. The right to standby counsel for *pro se* defendants is an issue that has the potential to impact the many cases where the defendant elects to proceed without an attorney. The arguments here warrant review.

D. The trial court committed structural error by denying Mr. Devon his right to standby counsel.

Structural defects are those that "defy analysis by harmless-error standards because they affec[t] the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (internal quotation marks and citations omitted) (alteration in original). They include such errors as the denial of the right to self-representation, the right to counsel, and the right to counsel of choice. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *Gideon v. Wainwright*, 372

U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Gonzalez-Lopez*, 548 U.S. at 150.

Infringing an accused person's right to "appear and defend in person" is structural error. *McKaskle*, 465 U.S. at 177 n. 8; *Matter of Salinas*, 189 Wn.2d 747, 761, 408 P.3d 344 (2018). Because it is a component of the right to self-representation, denial of the right to standby counsel is likewise structural error. The violation defies analysis by harmless-error standards: it is impossible to know how the assistance of standby counsel would have impacted the outcome.

Rather, the denial of standby counsel affects "the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 150 (internal quotation marks and citations omitted). Harmless error analysis "would be a speculative inquiry into what might have occurred in an alternate universe." *Id.*

Even if the error is not structural, reversal is required because constitutional violations are presumed prejudicial. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The State must show beyond a reasonable doubt that any reasonable

jury would have reached the same result without the error. *Id.* It cannot make that showing in this case.

II. APPOINTED COUNSEL'S LATE CONFLICT CHECK DEPRIVED MR. DEVON OF HIS CONSTITUTIONAL RIGHT TO STANDBY COUNSEL.

Defense counsel waited nearly five months to do a conflict check. A timely conflict check would have permitted counsel to withdraw before the eve of trial, allowing the court to grant Mr. Devon's repeated requests for standby counsel without continuing the trial.

Contrary to the appellate court's position, counsel's unreasonable failure to conduct a timely conflict check prejudiced Mr. Devon. The error may have impacted the verdict, but it certainly impacted Mr. Devon's ability to go forward with standby counsel's assistance. This denied the effective assistance of counsel.

A. An accused person has the right to the effective assistance of counsel.

The Sixth Amendment guarantees an accused person the effective assistance of counsel. U.S. Const. Amend. VI and

XIV; Wash. Const. art. I, §22; *State v. Classen*, 4 Wn.App.2d 520, 422 P.3d 489 (2018). A person claiming ineffective assistance must show deficient performance resulting in prejudice.[5] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Prejudice is established when "there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal quotation marks and citations omitted). This standard is less than a

[5] Ineffective assistance claims can always be reviewed for the first time on appeal. *State v. Salas*, 1 Wn.App.2d 931, 949, 408 P.3d 383 (2018). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018).

preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

The Sixth Amendment grants trial courts "the authority to appoint standby counsel (even over the defendant's objections) to explain court rulings and requirements to the defendant."[6] *McDonald*, 143 Wn.2d at 511; U.S. Const. Amend. VI. Standby counsel "serves the important interest a *pro se* defendant has in a fair opportunity to present his defense." *United States v. Bertoli*, 994 F.2d 1002, 1025 (3d Cir. 1993).

B. Defense counsel's errors denied Mr. Devon his right to the effective assistance of counsel.

In this case, Mr. Devon was deprived of the effective assistance of counsel. First, his attorney's conduct fell below an objective standard of reasonableness. Although the State listed Zachman as a witness in June of 2020, defense counsel did not perform a conflict check until October 29, 2020. CP 287. Counsel withdrew just one judicial day before trial started. RP

[6] As outlined above, the state constitution *requires* the appointment of standby counsel, in the absence of a valid waiver.

207. A reasonable attorney would not have waited months to perform a conflict check and would not have waited to withdraw until the day before trial.

Second, counsel's error prejudiced Mr. Devon. From the date of his arraignment onwards, Mr. Devon repeatedly insisted on the importance of his right to a speedy trial. RP 32, 69-70, 76, 85, 113, 124-125, 132, 135, 215. When he asked to represent himself, he told the court repeatedly that he wished to have help from standby counsel. RP 210, 212, 226, 231, 232, 237, 252-253.

However, because his attorney withdrew the day before trial, no one was available to act as standby counsel. A timely conflict check would give the trial court ample time to secure standby counsel without continuing the trial. RP 536. Mr. Devon would not have been forced to proceed without the technical assistance an attorney could provide.

The Court of Appeals erroneously concluded that Mr. Devon could not show prejudice.[7] Opinion, p. 9. According to the court, only an impact on the outcome of *trial* satisfies the

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[7] The court did not address the deficient performance prong.

prejudice prong of the test for ineffective assistance. Opinion, p. 9.

But that is incorrect. Mr. Devon was prejudiced by counsel's error. His attorney's dilatory conduct forced him to choose between his right to a speedy trial and his right to proceed with standby counsel. Requiring him to make this choice was itself prejudicial, regardless of any impact on the outcome of his trial.

Even if the claim requires an impact on the outcome of trial, Mr. Devon is entitled to relief. Although Mr. Devon performed admirably representing himself, there were times when he struggled. Even the court noted that he'd have had an easier time with the assistance of standby counsel. RP 536. Accordingly, there is a probability sufficient to undermine confidence in the outcome of the trial. *Lopez*, 190 Wn.2d at 116.

Mr. Devon was deprived of the effective assistance of counsel. *Id.* His convictions must be reversed, and the case remanded for a new trial. *Id.*

III. THE SUPREME COURT SHOULD GRANT REVIEW TO DECIDE SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW.

The Supreme Court has never addressed whether the state constitution guarantees a right to standby counsel when an accused person chooses to "appear and defend in person." Wash. Const. art. I, §22. This is a significant question of constitutional law. It has the potential to impact every case in which a defendant exercises the right to proceed *pro se.*

Nor has the Supreme Court addressed the ineffective assistance claim presented here. The Supreme Court has never determined if deficient performance forcing a choice between speedy trial and the assistance of standby counsel amounts to ineffective assistance. This, too, is a significant question of constitutional law.

The Supreme Court should accept review under RAP 13.4(b)(3).

CONCLUSION

The state constitutional right to "appear and defend in person" includes a right to the appointment of standby counsel. Mr. Devon asked the court to appoint standby counsel. He was

erroneously told that he had no right to standby counsel, and he went to trial on his own. This violated his right to "appear and defend in person."

The court would have had the opportunity to appoint standby counsel if Mr. Devon's lawyer had performed a timely conflict check. Instead, counsel waited months to check for conflicts and withdrew on the eve of trial. When Mr. Devon exercised his right to represent himself, the court was unable to secure standby counsel to help him. Counsel's dilatory conduct prejudiced Mr. Devon and deprived him of his Sixth Amendment right to the effective assistance of counsel.

The Supreme Court should accept review and reverse Mr. Devon's convictions. On remand, the court must appoint standby counsel unless Mr. Devon executes a valid waiver.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4996 words, as calculated by our word processing software.

Respectfully submitted September 6, 2022.

BACKLUND AND MISTRY

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Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to Jon Devon at a private address at his request.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this 6th day of September, 2022.

Jodi R. Backlund, No. 22917
Attorney for the Appellant

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CASE # 379248
State of Washington v. Jon Gabriel Devon
OKANOGAN COUNTY SUPERIOR COURT No. 2010011824

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at https://www.courts.wa.gov/wordcount, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Brian C. Huber

c: Jon Gabriel Devon, #772952
Coyote Ridge Corrections Center
PO Box 769
Connell, WA

FILED
AUGUST 23, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 37924-8-III
Respondent,	)	
	)	
v.	)	
	)	
JON GABRIEL DEVON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

STAAB, J. — Jon Devon was arrested and charged with several felonies. Less than one week before trial, Devon's defense attorney withdrew after discovering a conflict of interest. The trial court advised Devon of his rights, including his right to an attorney and his right to self-representation. When Devon expressed a desire to represent himself with the assistance of standby counsel, the court noted that it might be challenging to find standby counsel on such short notice. Devon made it clear that he wanted to proceed to trial as scheduled. Ultimately, Devon represented himself at trial without the assistance of standby counsel. The jury acquitted him of three counts of harassment, threats to kill, and one count of first degree assault but found him guilty of unlawful possession of a firearm and obstructing a law enforcement officer.

On appeal, Devon contends for the first time that the right to represent oneself under the Washington Constitution includes the constitutional right to standby counsel. He also contends that his trial attorney was constitutionally ineffective for failing to conduct a conflict check earlier in the case. We decline to address the first issue because Devon fails to demonstrate that the alleged error was manifest. We also hold that Devon's ineffective assistance of counsel claim fails because he does not demonstrate prejudice. We affirm Devon's convictions for unlawful possession of a firearm and obstructing a law enforcement officer.

BACKGROUND

After being arrested and charged with several felonies, Devon was appointed a defense attorney. At the arraignment on May 18, 2020, trial was scheduled for July 7. Devon's attorney made it clear that Devon would object to any extensions of his speedy trial rights past the 60-day time limit, which he argued would expire on July 17. The trial court noted the Supreme Court order extending speedy trial due to the COVID-19 health emergency and calculated Devon's outside speedy trial date as August 6.

At the readiness hearing on July 6, Devon's attorney indicated he needed more time to prepare and requested a continuance of the trial over Devon's objection. The court granted defense counsel's request and recalculated the speedy trial expiration as November 2.

On July 20, the court held a hearing to address a letter Devon filed with the court expressing dissatisfaction with his attorney. During the hearing, defense counsel outlined the work he had performed and his communications with Devon. Devon was also advised that disqualification of counsel would result in the speedy trial period being reset. Devon reasserted that he did not wish to waive or reset his speedy trial and ultimately withdrew his motion to disqualify counsel. At the end of the hearing, both Devon and his assigned counsel agreed to continue to work together on the case.

On August 3, Devon agreed to move his case from the trial track to the status track and set three status dates, which had the effect of waiving speedy trial. However, at the first status hearing on August 17, Devon requested the matter be put back on the trial track. At this hearing, the court calculated the outside date for speedy trial as November 28.

On September 24, the court considered defense counsel's request to continue the trial. Over objections by Devon and the State, the court continued the trial to November 3.

On October 30, the week before trial, the court heard a motion to withdraw by Devon's defense attorney. Defense counsel advised the court that he had not conducted a conflict check. Instead, during an interview, counsel realized that he had previously represented one of the alleged victims. Based on this representation, the court allowed defense counsel to withdraw.

Even before the court allowed Devon's attorney to withdraw, Devon requested to proceed pro se. As he explained to the court, Devon felt that representing himself was advantageous and strategic.

Devon also indicated his desire for standby counsel, and the court expressed its desire to appoint standby counsel if it could find one on short notice. Devon made it clear that if standby counsel was unavailable, he would prefer to move forward with the scheduled trial rather than continue the trial date to find standby counsel. The trial court conducted a thorough colloquy on the record and Devon signed a written waiver of his right to counsel.

The following week, the court indicated that standby counsel was not available and Devon chose to go to trial as scheduled, representing himself without the assistance of standby counsel. At the end of the trial, the jury acquitted Devon of three counts of harassment, threats to kill, and one count of first degree assault. The jury found Devon guilty of unlawful possession of a firearm and obstructing a law enforcement officer.

ANALYSIS

A. STANDBY COUNSEL

Washington courts have never recognized a state constitutional right to standby counsel. *See State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (no federal constitution Sixth Amendment right to standby counsel or hybrid representation). Nevertheless, Devon argues for the first time on appeal that the Washington

Constitution's right to self-representation is broader than the federal right and includes the right to standby counsel. He continues that this right was violated when the trial court did not provide Devon with standby counsel at trial. The State responds that the trial court did not deny Devon's request for standby counsel. Instead, Devon waived any right to standby counsel when he insisted on starting trial rather than postponing it to find available standby counsel. Devon responds that he did not make a knowing and intelligent waiver of his right to standby counsel because the trial court advised him that he did not have a right to standby counsel. We decline to address this issue because Devon raises it for the first time on appeal and fails to establish that the alleged error is manifest.

Devon acknowledges that he did not argue below that he had a constitutional right to standby counsel. The general rule is that errors not raised at the trial court level are not preserved for review on appeal. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing RAP 2.5(a)). Devon contends he is raising a manifest error affecting a constitutional right, an exception recognized by RAP 2.5(a)(3).

Even if Devon's argument raises a constitutional issue, he fails to demonstrate that the issue is manifest. The requirement to demonstrate manifest error recognizes that exceptions to the general rule of waiver are to be construed narrowly. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). A manifest error requires a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99. Actual prejudice requires a "'plausible showing by

the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *Kirkman*, 159 Wn.2d at 935 (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). Actual prejudice focuses on "whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100.

> It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. at 100.

Arguably, a novel claim that the Washington Constitution provides more expansive protections than the federal constitution is not manifest because it is not an error that is obvious or foreseeable to the trial court. *See State v. Ramirez*, 5 Wn. App. 2d 118, 134, 425 P.3d 534 (2018). In *Ramirez*, the defendant argued for the first time on appeal that article 1, section 3 of the Washington Constitution provides greater protection than the federal constitution. This court held that the error was not manifest because the independent state constitutional issue was neither obvious nor foreseeable to the trial court. *Id*. at 133-34.

But even if the alleged error was obvious and foreseeable, Devon fails to point to any practical and identifiable consequences. Even assuming our state constitution

protects a right to standby counsel, such right would not be greater than the right to have an attorney or to represent oneself. Both of these rights are waivable. See *State v. Burns*, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019). Indeed, Devon does not claim his alleged right to standby counsel cannot be waived. In this case, the trial court did not deny Devon standby counsel. The court told Devon that if it could not find standby counsel on short notice, the trial would need to be continued. Faced with this choice, Devon chose to go without standby counsel.

On appeal, Devon fails to articulate how this scenario would be different were we to hold that there is a constitutional right to standby counsel. Even if it were a right, standby counsel was still unavailable on the day of trial. Because Devon fails to demonstrate that this alleged error had any practical and identifiable consequences, it is not manifest. Because the alleged error is not manifest, it does not fall within the exception to the general rule that errors not raised below will not be considered for the first time on appeal. RAP 2.5(a).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Devon contends that his trial attorney was constitutionally ineffective for failing to conduct a conflict check at the beginning of his representation and forcing Devon to choose between going to trial as scheduled or continuing the trial to find standby counsel. Five months after he was appointed to represent Devon, and the week before trial, Devon's attorney moved to withdraw, claiming a newly discovered conflict

of interest. Trial counsel advised the court that he did not conduct a conflict check on being appointed to represent Devon and recently discovered that he had previously represented one of the witnesses.

After his attorney withdrew, Devon chose to represent himself. On appeal, Devon claims that his attorney's failure to conduct a conflict check and late withdrawal constituted ineffective assistance of counsel. Assuming without deciding that counsel's performance was deficient, Devon fails to show that the deficient performance prejudiced him.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not

satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). If a defendant fails to satisfy either prong, a court need not inquire further. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant demonstrates prejudice by demonstrating that the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337.

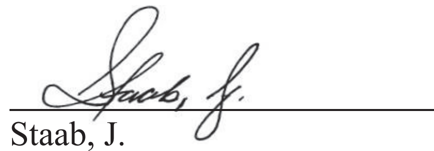
Devon argues that counsel's withdrawal shortly before trial caused him to choose between proceeding to trial alone or continuing the trial to secure standby counsel. Devon cannot show that the counsel's alleged deficiency impacted the outcome of the trial because Devon chose to proceed without standby counsel. Devon was not put in a position where he was forced to choose between competing constitutional rights. Although his attorney withdrew the week before trial, there were several weeks remaining on the speedy trial clock even without restarting the clock under CrR 3.3(c)(2)(vii). Faced with the tactical choice of moving forward with the scheduled trial or waiting to obtain standby counsel, Devon chose to go to trial.

Moreover, Devon does not point to any specific decision he made during trial where standby counsel would likely have had an impact. Instead, Devon simply generalizes that having standby counsel would likely have changed the trial outcome.

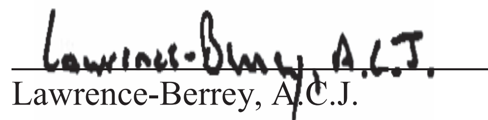
Devon fails to show prejudice from his attorney's performance and therefore fails to demonstrate that his attorney was ineffective.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Staab, J.

WE CONCUR: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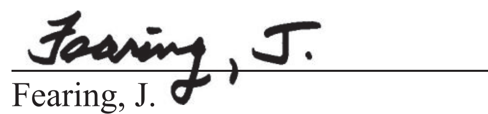
Fearing, J.

BACKLUND & MISTRY

September 06, 2022 - 1:04 PM

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