

71409-1

71409-1

NO. 71409-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YASIN MOHAMED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Should this Court decline to review Mohamed's claim that jail phone calls were inadmissible under ER 403, where he did not raise this objection in the trial court, failing to preserve it for review?

2. Were jail phone calls Mohamed made to the victim in this case properly admitted because they were probative of his guilt, as they contained admissions by Mohamed and his admonitions to the victim not to cooperate with police and not to identify him, explaining the victim's absence from trial?

3. Were jail phone calls Mohamed made to a bail bondsman properly admitted because they were probative of his guilt, as they were relevant to identification of the victim of this incident as Fahmo Ali, the person protected by the court order?

4. Where Mohamed represented himself at trial, did the trial court properly refuse Mohamed's request to act as co-counsel with newly appointed counsel after the verdict, for purposes of post-trial motions and sentencing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Yasin Mohamed, was charged with felony violation of a court order for the protection of Fahmo Ali, contrary to RCW 26.50.110, occurring on July 7, 2013. CP 1-5. The charge carried a special allegation that the crime was one of domestic violence as defined in RCW 10.99.020. CP 1.

At his arraignment hearing, Mohamed exercised his right to represent himself in this case. 1RP¹ 4, 8; Supp. CP __ (Sub no. 8, Waiver of Counsel, 8/13/13). The court granted that request and Mohamed's attorney was discharged. 1RP 12; CP 7.

The Honorable Catherine Shaffer presided over a jury trial that began on September 30, 2013. 3RP 1. The jury found Mohamed guilty as charged. CP 34-35.

Upon return of the guilty verdict on October 3, Mohamed requested counsel be appointed for purposes of sentencing. CP 52, Supp. CP __ at 10 (Sub no. 31C, Jury Trial – Clerk's Minutes, 9/30/13). Attorney Samuel Wolf was appointed; he filed a

¹ The Report of Proceedings is in eleven volumes, referred to in this brief as follows: 1RP (8/13/13); 2RP (9/19/13); 3RP (9/30/13); 4RP (10/1/13); 5RP (10/2/13); 6RP (10/3/13); 7RP (11/8/13); 8RP (11/25/13); 9RP (12/6/13); 10RP (12/16/13); and 11RP (12/20/13).

notice of appearance the following day. Supp. CP __ (Sub no. 36, Notice of Appearance, 10/4/13).

Mohamed attempted to file pro se motions after counsel had been appointed; at a hearing on November 8, 2013, the court addressed this issue. 7RP 3-4. Mohamed at first stated that he wanted to represent himself again, but then agreed to continue with counsel, who would screen any motions. 7RP 18-19.

At a hearing on November 25, 2013, the court heard Mohamed's motion to proceed pro se or act as co-counsel. 8RP 3-4; CP 50-51. The court denied the motion to allow Mohamed to act as co-counsel. 8RP 3-4. Given that ruling, Mohamed asked to return to pro se status for all purposes, including sentencing. 8RP 4-5. That request was granted. 8RP 5. Wolf was appointed as standby counsel. 8RP 5; CP 68.

At a hearing on December 6, 2013, Mohamed repeated his request to appear as co-counsel. 9RP 3-5. That request was again denied. 9RP 3-5. Based on that ruling, Mohamed stated that he did not want to be represented by counsel. 9RP 5.

On December 16, 2013, the court considered argument on post-trial motions filed by Mohamed. 10RP 3-17. The motions were denied. 10RP 17.

Sentencing occurred on December 20, 2013. 11RP 1. After Mohamed asserted that he needed treatment for a drinking problem, the court imposed a drug offender sentencing alternative. 12RP 17-18; CP 99-104.

2. SUBSTANTIVE FACTS

A panicked woman called 911 stating that a man named Mohamed, who had been drinking, had come into her apartment; she was afraid of him and had fled for her life but her ten-month-old daughter was still inside the apartment with him and she was afraid that he would harm the child. Ex. 7; CP 86, 88-89, 91, 94.² The 911 call came in at 7:03 a.m. on July 7, 2013, and originated from phone number 206-272-0617. 4RP 23. When the police came to the building, a very frightened woman they identified as Fahmo Ali met them in the hallway. 4RP 30-33, 45-47; Ex. 2 (Ali's driver's license). She directed them to her apartment, which was the address listed on her driver's license.³ 4RP 31-32, 46; Ex. 2. When they knocked, Mohamed came to the door with the baby; he smelled of alcohol. 4RP 32-34, 46, 52. Officer Goodman arrested

² Ex. 7 is the recording of the 911 call. The citations to the Clerk's Papers are to a transcript of the 911 call, which was attached to a post-trial State pleading. The latter citations are for the convenience of the court.

³ It was the address given in the 911 call as well. Ex. 7; CP 85.

Mohamed because he had a no-contact order with Ali, and observed that Mohamed was clearly intoxicated. 4RP 33, 39.

A court order dated November 14, 2011, prohibited Mohamed from contact with Fahmo Ali or her residence. Ex. 3. That order had been served on Mohamed twice, on November 15, and again on November 16, 2011. 4RP 48-49; Ex. 3.

At trial, the State established that Mohamed had four prior convictions for felony violation of a court order. Ex. 4 (03-1-03482-3 KNT); Ex. 5 (03-1-00980-2 KNT); Ex. 6 (06-1-12492-4 KNT) (two counts).

Mohamed made a call from the booking area of the King County Jail on July 8, 2013, at 9:06 p.m. 4RP 64, 72-75; Ex. 14. The call was to phone number 206-466-1592, to Fahmo Ali. Ex. 14. A woman answered. 4RP 95, 100; Ex. 16.⁴ During that brief call, Mohamed repeatedly demanded to know, "Did you call the police on me last night?" 4RP 100. The three conversations Mohamed had with Ali that were admitted at trial were primarily in the Somali language, and were translated by witness Ismael Mohamed. 4RP 82, 93-99.

⁴ The recording is the first call in Exhibit 16. The transcript was admitted as an illustrative exhibit, Exhibit 21.

Mohamed called Fahmo Ali from the King County Jail twice on July 27, 2013, calling the same number as he called on July 8 (206-466-1592). Ex. 14, 16. During the first call, at 8:16 p.m., Mohamed told Ali that she should be aware that "I am in jail for your case." 4RP 101.⁵ He identified the incident: "They said there was a no-contact order between you and that woman not to go her home, and you are seen at her home, so we will jail you as long as we want." 4RP 101-02. He explained that he had been about to be released after a court hearing for drinking, but was brought to the King County Jail, and repeated that he was in jail for her case. 4RP 102.

Mohamed told Ali, "They said that they will bring files and reports you gave that night." 4RP 102. When Ali asked, "Why don't they call me?", Mohamed said "they will call you when they need you in a month and a half." 4RP 102. Mohamed asked Ali to arrange bail for him. 4RP 103. He complained, "Am I going to be held for six months for going to my sister's home?" 4RP 103.

During the second call to Ali on July 27, at 8:58 p.m., Mohamed opened the conversation with "Don't call the man, okay,

⁵ The recording is the second call in Exhibit 16. The transcript was admitted as an illustrative exhibit, Exhibit 22. Further references to this recording are to the reading of the transcript during the trial. 4RP 101-04.

sister?" 4RP 104.⁶ He said, "I am going to deal with them. Leave them alone for me." 4RP 104. He continued,

Just be silent to them for me. Don't answer their phone calls. Make it hard for them. Don't answer anything from them, and let me deal with them. You got it?

4RP 104. Mohamed said, "They would lock you out from your home and will bring you to court for me. Don't you know that?"

4RP 104-05. Mohamed told Ali, "when they say to you, do you recognize the man, they say I don't – say I don't know who he was."

4RP 105. Ali told him not to worry. 4RP 105.

On July 28, Mohamed called a bail bondsman, regarding posting bail. Ex. 14, 16.⁷ He told the bondsman that he needed to bail out, and to call his sister at 206-272-0617. Ex. 16. That phone number was the source of the 911 call in this case. 4RP 23.

Mohamed called the bail bondsman again the next day, July 29, to arrange bail. Ex. 14, 16.⁸ He again told the bondsman to call his sister at 206-272-0617, then added her "home phone," 206-446-1592. Ex. 16. The home phone number that Mohamed gave was the phone number Mohamed used to call Ali from the jail.

⁶ The recording is the third call in Exhibit 16. The transcript was admitted as an illustrative exhibit, Exhibit 23. Further references to this recording are to the reading of the transcript during the trial. 4RP 104-06.

⁷ The recording is the fourth call in Exhibit 16.

⁸ The recording is the fifth call in Exhibit 16.

Ex. 14. The June 2013 Dex Phone Directory for Seattle listed that “home phone” as the number for Fahmo Ali. 4RP 69-70; Ex. 17.

Fahmo Ali did not cooperate with the prosecution of this case, did not respond to her subpoena, and did not testify at trial. 6RP 4-6; Supp. CP ___ at 3-4 (Sub no. 30, Trial Memorandum/ State, 9/30/13).

C. ARGUMENT

1. PHONE CALLS MOHAMED MADE FROM JAIL WERE PROPERLY ADMITTED.

Mohamed contends that the trial court abused its discretion in admitting recordings of five telephone calls that he made from jail, arguing the evidence was irrelevant and, if relevant, was more prejudicial than probative. This claim should be rejected. Neither of these objections was raised in the trial court, so any error has not been preserved. Even in light of these new arguments, the phone calls were properly admitted because their relevance far outweighed any unfair prejudice. Finally, any alleged evidentiary error was harmless.

a. Mohamed Has Not Preserved This Alleged Error.

In the trial court, Mohamed raised two specific objections to these calls, but did not make either objection that is raised in this appeal. His failure to object below on the grounds raised on appeal bars appellate review of these evidentiary claims.

In general, failure to timely object bars appellate review of non-constitutional claims, including evidentiary issues. State v. Davis, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000). A general objection may be sufficient to preserve an alleged error, if the basis for the objection is apparent from the context at trial. State v. Walker, 75 Wn. App. 101, 109, 879 P.2d 957 (1994). If grounds for the objection were specified, the claim of error on appeal may only be based on the specific ground stated below. State v. Mak, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986).

During pretrial hearings as to the admissibility of these calls, Mohamed raised one specific objection to all of the jail phone calls – that he believed that the State should not be permitted to record his calls. 3RP 21. He offered no legal theory to support that position. 3RP 21. He did not argue that the content of any of the calls was irrelevant or unfairly prejudicial. When the recordings

were offered at trial, Mohamed did not raise any additional grounds for his objection, stating only “defense would object.”⁹ 4RP 67.

As to the calls to the victim, Mohamed also argued that the State could not establish that the person he called was the victim. 3RP 21. The court explained the minimal information necessary to authenticate the identity of a person on the phone and ruled the calls admissible. 3RP 22-23.

The claim that these statements should have been excluded under ER 403 because their probative value was outweighed by unfair prejudicial effect was not raised in the trial court and cannot be raised for the first time on appeal. A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show both a constitutional error and actual prejudice to his rights. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

In this evidentiary challenge, Mohamed has alleged no constitutional error that would warrant consideration of the issue for

⁹ Mohamed later challenged the competency of the translator who provided the English translation of the phone conversations with the victim, which were mostly in Somali. 4RP 122-23. When transcripts of the calls to the victim were offered, which included the English translation, Mohamed objected that they were hearsay. 4RP 94. These objections to the translation are not raised on appeal.

the first time on appeal. Alleged error under ER 403 is evidentiary error only. State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). In the context of his argument regarding harmless error, Mohamed concedes that this claim is one of evidentiary error only. App. Br. at 19 (citing nonconstitutional error standard applied in State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). Thus, this claim may not be raised in this appeal.

- b. The Court Did Not Abuse Its Discretion In Admitting The Calls, Which Included Admissions By Mohamed, And Which Were Relevant To The Identity Of The Non-Testifying Victim And To Explain Her Absence.

Even if this Court reaches the merits of this claim, it should be rejected. A trial court's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of the court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion occurs if the trial court relies on untenable grounds or exercises its discretion in a manner that is manifestly unreasonable. Id.

The trial court did not err in admitting the jail phone calls. All five of the recorded calls admitted were relevant to material issues at trial. While the court did not explicitly consider possible unfair

prejudice, the absence of that analysis is explained because there was no claim that there was any unfair prejudice.

Mohamed was charged with felony violation of a court order. The State had the burden to prove that there was a court order protecting Fahmo Ali, that Mohamed knew of that order, that he violated the terms of that order, and that he had at least two prior convictions for violation of a court order. RCW 26.50.110(1), (5); CP 29. That proof lay in a 911 call from a woman who was in a panic because a man named Mohamed, who had been drinking, was in her apartment with her 10-month old daughter; the caller had left the apartment in fear for her safety and was now afraid for the baby's safety. Ex. 7; CP 86, 88-89, 94.¹⁰ The caller provided her address. Ex. 7; CP 85. When the police arrived at her apartment building, they met the very frightened Fahmo Ali in the hallway. 4RP 30-33, 45-47. At Ali's apartment, Mohamed answered the door holding the baby. 4RP 31-34, 46. At that time, a court order prohibited Mohamed from contact with Ali or her residence, and Mohamed had been served with that order twice. 4RP 48-49; Ex. 3. Mohamed had four prior convictions for felony violation of a court order. Ex. 4-6.

¹⁰ Citations to the transcript of the call included in a post-trial State pleading are used for the convenience of the court.

“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Three of the calls were to the victim, and all included statements indicating knowledge of guilt by Mohamed. The third call also included his direction to the victim that she post his bail and that she not cooperate with police investigators. These calls were directly relevant to prove Mohamed’s commission of the crime and to explain why the victim did not testify at trial.

The relevant incriminating statements by Mohamed include the repeated question whether Ali had called the police and the accusation that Mohamed was in jail because of Ali; these statements indicated that Ali, the person protected by a court order, was the woman who called 911. 4RP 101-03. The direction to Ali that she should say that she did not know the man was an admission that if Ali spoke truthfully, she would identify the intruder as Mohamed. 4RP 105. The rhetorical question, “Am I going to be held in jail for six months for going to my sister’s home?”, was an admission that he had done just that, which was the core of the charged crime. 4RP 103. At trial Mohamed did not argue that the

contents of these calls were not relevant and incriminating, he argued that the English translation was unreliable.

Mohamed's direction to Ali to avoid the police and not answer their calls was evidence that he believed that her statements and testimony would establish his guilt. 4RP 104-05. The existence of the calls and Mohamed's direction to Ali that she post his bail corroborated their continuing contact despite the protection order. 4RP 103.

Mohamed's direction to Ali to avoid the police also was relevant to explain the absence of Ali at trial. 4RP 104-05; 6RP 4-6. Mohamed appears to claim that his statements telling Ali not to cooperate with the police or prosecution were unfairly prejudicial, but they were directly relevant to his guilt, and did not relate to any collateral matter.

The number Mohamed called to reach the victim, along with phone numbers Mohamed gave to the bail bondsman, and the number from which 911 was called during the charged incident, were evidence of the identity of the 911 caller as Fahmo Ali, the person protected by the court order. Mohamed gave two phone numbers for his sister to the bondsman: 206-272-0617, and the "home phone" of 206-446-1592. Ex. 16. The first number (ending

in 0617) was the source of the 911 call. 4RP 23. The second number (ending in 1592) was the number listed for Fahmo Ali in the current phone book. 4RP 69-70; Ex. 17. It was the same number Mohamed called to reach Ali from the booking area on July 8, the day after the incident, and twice on July 27, when he told her not to cooperate and not to identify him. Ex. 14.

The calls made to the bail bondsman were not played to the jury in full. 4RP 69. It appears that the jury did not hear most of Mohamed's statements that he now argues were unfairly prejudicial. After the introduction, Call 4 was played beginning at 5:13, so the jury did not hear references to the amount of bail (at 3:42), the failure to appear and resulting warrant (at 3:50), and the violation of probation (at 4:15). 4RP 69 (time of references taken from App. Br. at 17). After the introduction, Call 5 was played beginning at 4:35, so the jury did not hear references to Mohamed's possible release and re-booking (at 2:48). 4RP 69 (time of reference from App. Br. at 17). The jury did not have the ability to listen to the recordings during deliberations unless they made a written request to do so, and they did not. 6RP 36; Supp. CP ___ at 9-10 (Sub no. 31C, Jury Trial – Clerk's Minutes, 9/30/13).

Even if the jury had heard the entire calls to the bondsman, there was no unfair prejudice in the information included in those calls. The jury was properly informed that Mohamed had four prior felony convictions for felony violation of a no contact order. Ex. 4-6. That he had previously bailed out of jail numerous times would be expected, and would appear favorable to Mohamed in that context. The jury also knew that the court order had been served on Mohamed while he was in the King County Jail on November 15, 2011. Ex. 3 (Return of Service by Deputy Hugo Esparza). Hearing that he was in custody for a probation violation and had failed to appear for court was not inflammatory under these circumstances. Further, the absence of an objection by Mohamed strongly suggests that as to whatever statements the jury heard, that evidence did not appear critically prejudicial to him in the context of trial. State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006), citing State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

When Mohamed told the bondsman that he was being held for failing to appear in court concerning a misdemeanor probation violation, he said he needed \$250 to bail out, that his bail was set at

“\$2,500 bondable” (so he needed 10 percent bond).¹¹ This minimal amount would suggest that the violation was minimal as well.

The last two references in the bondsman calls to which Mohamed now objects relate to his possible release a few days earlier, and re-arrest, and to the possibility that other charges were pending. App. Br. at 17. In context, and in light of his statements to Ali, it is apparent that Mohamed believed he was being held on a warrant (for failing to appear) that he already had resolved, but was not sure if he was also being held on a potential charge involving his contact with Fahmo Ali on July 7. Ex. 16. The only information not related to the charge was that Mohamed had failed to appear for court on some occasion and a warrant issued as a result. Based on the jury’s knowledge of Mohamed’s substantial criminal history, this added nothing unfairly prejudicial to the trial.

c. If There Was An Error, It Was Harmless.

Evidentiary error is reversible only if “within reasonable possibilities, the outcome of the trial would have been materially

¹¹ Mohamed asserts that the recordings include information that his bail was \$250,000. App. Br. at 17. The State has found no such statement in these recordings. Mohamed says his bail is “two hundred fifty dollars, two-thousand five hundred bondable.” Ex. 16. Mohamed had not yet appeared in court on the felony charge and believed that he was being held on a misdemeanor probation warrant. Ex. 16, tracks 4, 5. Mohamed’s bail on the felony charge later was set at \$100,000. Supp. CP __ (Sub no. 2, Order for Warrant, 7/31/13).

affected had the error not occurred.” State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Mohamed offers two ways in which he claims the verdict was materially affected. The first is the possibility that jury may have convicted based on other violations of the court order, evident in the phone calls to the victim. This argument assumes that these calls were from Mohamed to the victim; given that fact, the statements in the calls were very probative of his consciousness of his guilt.

Moreover, the jury was specifically directed to consider only the contact at Ali’s residence as the basis of conviction. The to-convict instruction required the jury find that the crime occurred on or about July 7, 2013. CP 29. The prosecutor specified that he was relying only on the incident at the victim’s residence on July 7 to support the conviction. The prosecutor argued only that Mohamed knowingly violated the court order by being in Ali’s residence. 6RP 10-12. When the court asked for clarification, the prosecutor said he was not relying on the phone calls, stating to the judge and the jury:

the charge ... is for the 7th of July, 2013. The defendant was arrested on July 7th of 2013, the calls were July 8th and July 27th.

6RP 12. The court then instructed the jury that it could not rely on a phone call to Ali to convict, and the prosecutor reaffirmed that:

THE COURT: So ladies and gentlemen, if you believe beyond a reasonable doubt that the defendant made a telephone call to the protected person, you may not convict based on that. You may only convict if you believe the State has proved the elements of the charged offense on the charged date, July 7th.

Go ahead.

MR. RYAN: As the Court has pointed out, the defendant is not charged with calling Ms. Ali.

6RP 13. Thus, there could be no confusion about the incident that was the basis of the charge.

The second effect suggested by Mohamed is prejudice based on reference to Mohamed's other contacts with the court system (he was on probation, had bailed out before, and had a "drinking" charge). The record indicates that the juror never heard most of the references complained of on appeal,¹² and there was no reference to the substance of the calls to the bondsman (except the phone numbers associated with the victim) at any point in the trial. Even if the entire calls had been heard, there was no unfair

¹² The details of the record on this point are explained in the previous subsection of this brief.

prejudice in the context of the other evidence at trial, as addressed in the previous section of this brief.

What Mohamed does not acknowledge is the strength of the evidence of the charged crime. In sum, a panicked woman called 911 stating that a man named Mohamed, who had been drinking, had come into her apartment; that she had fled but her baby was still inside the apartment with the man and she was worried that he would harm the child. Ex. 7; CP 86, 88-89, 94. When the police came to the building, a woman they identified as Fahmo Ali met them in the hallway. 4RP 30-33, 45-47. She directed them to her apartment, which was the address listed on her driver's license. 4RP 31-32, 46; Ex. 2. When they knocked, Mohamed came to the door with the baby; he smelled of alcohol. 4RP 32-34, 46, 52. None of these facts were contradicted. Mohamed did not dispute that a court order prohibited him from contact with Ali or her residence, or that he knew of the order; he did not dispute that he had four prior convictions for felony violation of a court order.

Thus, although the evidence relating to the jail calls was strong evidence of Mohamed's guilt, if it had not been admitted, there is no reasonable possibility that the verdict would have been different.

2. MOHAMED WAIVED HIS RIGHT TO COUNSEL AT SENTENCING.

Mohamed claims that his constitutional rights were violated because he was forced to choose between due process and his right to counsel. This argument should be rejected. The only restriction placed on Mohamed was that he was not permitted to act as co-counsel, and he had no constitutional right to that status.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, and the right to waive the assistance of counsel. U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A defendant who is competent to stand trial may waive the assistance of counsel if that waiver is knowing and intelligent. State v. Hahn, 106 Wn.2d 885, 893, 726 P.2d 25 (1986).

Courts are directed to apply a presumption against the waiver of counsel, but the improper rejection of the right to self-representation requires reversal. State v. Madsen, 168 Wn.2d 496, 503-04, 229 P.3d 714 (2010). A court is permitted to deny the right to self-representation if the request is equivocal or untimely. Id. at 504-05.

a. Mohamed Insisted Upon Self-Representation.

Mohamed voluntarily and intelligently exercised his right to self-representation before he was arraigned on this charge.

1RP 12; Supp. CP __ (Sub no. 8, Waiver of Counsel, 8/13/13).

Immediately after the guilty verdict, he said that he wanted counsel for sentencing. CP 52, Supp. CP __ at 10 (Sub no. 31C, Jury Trial – Clerk’s Minutes, 9/30/13). Attorney Samuel Wolf filed a notice of appearance the next day. Supp. CP __ (Sub no. 36, Notice of Appearance, 10/4/13).

After Wolf became his attorney, Mohamed tried to file pro se motions for a new trial. 7RP 3. On November 8, Mohamed told the court that he wanted to represent himself at sentencing. 7RP 4, 17-18. The court conducted a lengthy colloquy. 7RP 4-18. When Mohamed said he wanted to represent himself because he wanted the court to hear his motions, the court said a motion for new trial probably would not be timely if he did not have an attorney to bring it and that he could raise the issues on appeal; the court wondered out loud if he really wanted to give up his right to an attorney. 7RP 18. Mohamed responded: “I want him to represent me at the sentencing, but this motion is right now -- I want to represent myself.” 7RP 18. The court decided to leave counsel in place for

sentencing and consider a motion for self-representation after that.

7RP 19. Mohamed agreed. 7RP 19.

The trial court told Mohamed that he could not file pro se pleadings while he was represented by counsel, and that his attorney would determine whether any post-trial motions should be filed. 7RP 20. The trial court ordered that the trial transcript be provided to counsel at public expense,¹³ so that counsel could make those decisions; sentencing was continued to give counsel time to review the record and obtain Mohamed's mental health records. 7RP 19; Supp. CP __ (Sub no. 49, Order of Continuance/Sentencing, 11/14/13).

Nevertheless, at two subsequent hearings, Mohamed insisted that he wanted to file pro se motions. 8RP 3-5; 9RP 3-4. On November 25, he told the court that he wanted to be co-counsel, handling the motions himself, with his attorney handling sentencing matters. 8RP 3-4. The court refused to allow Mohamed to be co-counsel with Wolf. 8RP 3-4.

¹³ Mohamed's assertion that the request for funds was never granted is incorrect. App. Br. at 7-8 n.2. The court's order for funding was followed by authorization by the Office of Public Defense. Supp. CP __ (Sub no. 44, Order Authorizing Public Funding for Trial Transcription, 11/8/13); Supp. CP __ (Sub no. 52, Order for Expert Services, 11/18/13).

Mohamed clearly stated that if he could not be co-counsel, he wanted to represent himself. 8RP 4-5; CP 51. The court permitted him to represent himself, appointing Wolf as standby counsel. 8RP 5. On December 6, Mohamed reiterated that he wanted to represent himself until the court ruled on his pro se motions, even if the court did not rule on them until the sentencing hearing. 9RP 4-5.

b. Mohamed Voluntarily Chose Self-Representation; He Had No Right To Act As Co-Counsel.

Mohamed chose to represent himself after his conviction, as he had during the trial. He voluntarily made that choice, understanding the consequences of that decision. His argument on appeal that his waiver of counsel was involuntary is without merit. Mohamed did not have a right to appear as co-counsel and the court made it clear that if he wished to continue to represent himself for some purposes, she would not again appoint counsel.

Mohamed argues that he had a “due process right to be heard on his post-verdict motions.” App. Br. at 9. He offers no authority in support of that assertion. The State has found no authority for the proposition that there is a due process right to be

heard on pro se post-verdict motions. This Court can assume that, after diligent search, counsel could find none. Roberts v. Atlantic Richfield, 88 Wn.2d 887, 895, 568 P.2d 764 (1977). The Supreme Court has endorsed the principle articulated by the Eighth Circuit: “naked castings into the constitutional sea are not sufficient to command judicial consideration or discussion.” In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)).

The cases on which Mohamed relies to argue that he was improperly compelled to choose between constitutional rights are inapposite. Those cases involve situations in which a court considered dismissal of charges because the State's failure to act with due diligence arguably forced the defendant to choose between two constitutional rights. State v. Woods, 143 Wn.2d 561, 582-85, 23 P.3d 1046 (2001) (State did not act diligently in obtaining DNA test results); State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980) (late amendment of charges by the State).

Here, it was solely Mohamed's decision whether to represent himself, understanding that he would not be permitted to change his mind again. This case is more like State v. Brown, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989), in which the court held

that permitting the State to use prior convictions to impeach a defendant does not present an impermissible choice, though it had an impact on the defendant's right to testify. The court in Brown noted that the criminal process is replete with situations requiring difficult judgments as to a course to follow, but the Constitution does not always forbid requiring him to choose. Id. at 539-40.

The trial court did not prohibit Mohamed from filing any motion. The court specifically told Mohamed that if he was represented by counsel, counsel could file post-trial motions on his behalf. 7RP 19. Wolf obtained funding for a transcript of the trial based on his representation that he needed to review it to determine whether a motion for new trial was appropriate. Supp. CP __ (Sub no. 51, Motion and Certification/Defense, 11/18/13), Supp. CP __ (Sub no. 52, Order for Expert Services, 11/18/13).

On November 13, Mohamed filed a motion referring to his "request to proceed pro se." CP 51. In court, he specified that he wanted to act as co-counsel, so he could have his own motions be heard. 8RP 3-4. Mohamed asserted that allowing him to act as co-counsel was within the court's discretion. 8RP 3-4; CP 51. But a defendant does not have a right to act as co-counsel.

State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (citing State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987)).

On appeal, Mohamed disavows his request below – he claims that he was not requesting to act as co-counsel, that he “wished to represent himself until the sentencing hearing, at which point he wished to have counsel represent him.” App. Br. at 11. However, as Wolf made clear, he needed to investigate the case and Mohamed’s personal circumstances to prepare for sentencing. 7RP 19; Supp. CP __ (Sub no. 49, Order of Continuance/ Sentencing, 11/14/13). The court ordered production of a trial transcript for that purpose and allowed a continuance of the sentencing hearing so counsel could obtain the transcript and mental health records. Supp. CP __ (Sub no. 44, Order Authorizing Public Funding for Trial Transcription, 11/8/13), Supp. CP __ (Sub no. 49, Order of Continuance/ Sentencing, 11/14/13).

The trial court was not required to delay the sentencing hearing again so that, once the post-trial motions were heard, Mohamed could request counsel again and Wolf would have an opportunity to prepare for sentencing. Once a defendant has validly waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. DeWeese, 117 Wn.2d at

379; State v. Canedo-Astorga, 79 Wn. App. 518, 525, 903 P.2d 500 (1995). “A defendant does not have a constitutional right to choreograph special appearances by counsel.” McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

As in DeWeese, the defendant here had a choice and chose to reject the assistance of a defense attorney. The consequences of self-representation often work to the defendant’s detriment, but must nevertheless be borne by the defendant who chooses that option. DeWeese, 117 Wn.2d at 379. The defendant who chooses self-representation is not entitled to special consideration. Id.

The possibility that the court could have reappointed counsel after Mohamed’s motions were heard does not establish that Mohamed had a constitutional right to that special treatment.¹⁴ Sentencing already had been continued to allow defense counsel over a month to prepare. Supp. CP __ (Sub no. 49, Order of Continuance/Sentencing, 11/14/13). The court originally planned to

¹⁴ State v. Bandura, on which Mohamed relies for the proposition that he had a right to counsel at sentencing, affirms that the trial court is not required to postpone proceedings to accommodate a defendant’s request for new counsel. 85 Wn. App. 87, 97, 931 P.2d 174 (1997). The trial court in Bandura improperly allowed the original attorney to withdraw, forcing Bandura to sentencing without counsel. Here, Mohamed was acting as counsel after a proper waiver of his right to counsel, so under the holding of Bandura, the trial court properly could compel Mohamed to proceed as counsel.

hear the motions at the same time as the sentencing hearing, but in the end heard Mohamed's motions four days before sentencing. 9RP 5; 10RP 3. The court was not required to delay sentencing to permit counsel to investigate potential sentencing issues and to investigate Mohamed's personal circumstances, such as the mental health history referred to in Wolf's original motion to continue. Mohamed's suggested choreography contemplates that Wolf would investigate and prepare for sentencing, and presumably consult with Mohamed about sentencing strategy, during a time period when Wolf did not actually represent Mohamed; there is no constitutional mandate that the court adopt such a dubious procedure.

c. If There Was An Error, The Remedy Is Resentencing.

Mohamed alleges that he was improperly deprived of counsel at sentencing, but argues that the remedy for that error is vacation of his conviction. There is no justification offered for that remedy and it defies reason.

If this Court concludes that there was an error, it did not occur until after the verdict. It could not possibly have affected the

conviction. If there was an error, the proper remedy is to remand for resentencing.

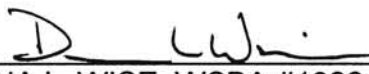
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Mohamed's conviction and sentence.

DATED this 20th day of November, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney


By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kathleen A. Shea; kate@washapp.org; the attorney for the appellant, containing a copy of the Brief of Respondent, in State v. Yasin Ali Mohamed, Cause No. 71409-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 29 day of November, 2014.


Name:
Done in Seattle, Washington