71126-1

71126-1

NO. 71126-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

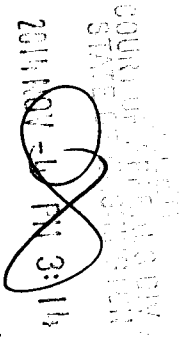
STATE OF WASHINGTON,

Respondent,

v.

PEDRO NAVARRO,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR
THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Before a trial court may accept a defendant's waiver of the right to counsel in favor of self-representation, the court must be satisfied that the defendant's waiver is knowing and intelligent. A colloquy on the record in which the court details, among other things, the risks inherent in self-representation, is the preferred method for determining the validity of a waiver. One risk of choosing self-representation is that the defendant may realize that he is ill-equipped to try his own case and yet be denied the reappointment of counsel. Where the trial court emphasized that Navarro would not be entitled to reappointment of counsel if he later changed his mind about acting pro se, did the colloquy meet constitutional standards?

2. A trial court may impose Sexual Assault Protection Orders when a defendant is convicted of a sex offense and is ordered as part of his sentence to have no contact with the victims. Such an order is effective for a period of two years following the expiration of "any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." Here, the defendant was sentenced to a total term of 132 months and the court imposed SAPOs with expiration dates twelve

years from the date of sentencing without accounting for time already served. The State concedes that a remand is necessary to account for credit for time served. Are the SAPOs otherwise valid?

3. A trial court has discretion to impose crime-related prohibitions as part of a sentence. No contact orders protecting witnesses are crime-related prohibitions. The trial court here imposed orders prohibiting contact with any of the alleged victims for the maximum term associated with Navarro's Class B felony convictions, even though Navarro was convicted of only Class C felonies against some of the victims and was acquitted of all charges against others. Is prohibiting contact with the children who testified against Navarro a reasonable prohibition related to his extortion convictions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Pedro Navarro with eleven counts of Communicating with a Minor for Immoral Purposes (CMIP) and two counts of Extortion with Sexual Motivation. CP 40-45. Less than two weeks before trial was to

begin, Navarro moved to proceed pro se. 1RP 4.[1] Following an extensive colloquy, Navarro withdrew his request. 1RP 11.

After trial, the jury acquitted Navarro of two of the CMIP charges but convicted him on all other counts, finding by special verdict that the two counts of extortion were committed with sexual motivation. 6RP 2-4; CP 55-69.

At sentencing, the State recommended a high-end standard-range sentence based upon an offender score of 30, which included three points for Navarro's prior sex offense from Idaho. 1RP 168-76; Supp. CP __ (Sub. No. 157). When the defense challenged the comparability of the Idaho conviction, the State chose not to litigate the matter, as the additional three points would make no difference to his sentence. 1RP 190.

The trial court imposed a high-end sentence of 60 months for each CMIP conviction, 96 months for each extortion conviction, and two 18-month sexual motivation enhancements. 1RP 191; CP 127-38. As a condition of the sentence, the court imposed 10-year no contact orders protecting all of the named victims (including

[1] The State adopts Navarro's citation convention for the twelve-volume report of proceedings: 1RP – January 23, June 11, July 17, and October 11, 2013; 2RP – five-volume consecutively paginated set for the dates of July 18, 22-25, 29-31, 2013; 3RP – July 30, 2013 (a.m.); 4RP – August 5, 2013; 5RP – August 6, 2013; and 6RP – August 8, 2013.

those associated with the counts on which the jury did not convict). 1RP 192; CP 131. Additionally, the court imposed sexual assault protection orders (SAPOs) prohibiting contact with those victims associated with the counts on which Navarro was convicted. 1RP 192; CP 179-84. The SAPOs were set to expire 12 years from the date of sentencing. 1RP 196; CP 179-84.

2. SUBSTANTIVE FACTS

In early 2012, then 13-year-old JB (10/8/98) was in seventh grade at McClure Middle School in Seattle. 2RP 81-82, 92. JB had a Facebook account. 2RP 82, 94. Although his parents had a rule against "friending" people he did not know, the Facebook site itself suggested that Navarro was someone JB might want to "friend." 2RP 98. JB thought that Navarro was a connection through a church group and sent him a friend request. 2RP 98. JB later worried that he would get in trouble for friending someone he did not know, so he "unfriended" Navarro. 2RP 100-01. Navarro then sent JB a message, and in the course of the ensuing conversation, Navarro told JB that his 15-year-old sister "Samantha" thought JB was cute and wanted to talk to him. 2RP 102. Navarro gave JB "Samantha's" number. 2RP 103.

JB sent a text message to "Samantha." 2RP 104. Navarro, acting as "Samantha," asked JB for a picture, which JB considered suspicious. 2RP 105. JB and "Samantha" exchanged text messages for a couple of weeks, at which point JB decided to stop. 2RP 109. He was annoyed that "Samantha" texted him so frequently and at odd hours. 2RP 109. When he stopped returning the messages, "Samantha" started asking why, became more "forceful," and started cursing and using harsh language. 2RP 109-10. JB did not respond. 2RP 110.

JB left town for a week without his phone. 2RP 110. When he returned, there were messages from "Samantha" offering him oral sex. 2RP 110. JB had told "Samantha" that he was only 13. 2RP 113. He said that he did not want oral sex. 2RP 111. "Samantha" kept offering oral sex, and JB kept saying no. 2RP 121.

JB's efforts to discourage the communications failed, and "Samantha" began sending JB threatening messages. 2RP 123. "Samantha" claimed that her father was in the FBI and would arrest JB or that her brother would beat him up. 2RP 124. JB offered to give "Samantha" some other friends' numbers in the hopes that she would leave him alone. 2RP 121, 131. JB provided the numbers of

several other boys, including AB, DW, AD1, and TH, but the texts did not stop. 2RP 132. "Samantha" told JB to show his penis to a person of "her" choosing, asked him to send her a naked picture of himself, and said she wanted to send her brother to "play around with [JB]" and record it. 2RP 143, 148. "Samantha" told JB that if he complied, the texts would stop. 2RP 147. JB provided a picture of his penis, but refused the other requests. 2RP 171. "Samantha" responded, "then I guess you want to be arrested and locked up until you are an adult, which will be five years." 2RP 148.

The texts continued, but JB stopped responding to them. 2RP 151-52. The last text from "Samantha" said, "my dad is going to hunt you down." 2RP 154. JB finally told his mother about the text messages. 2RP 155-57. After looking through the messages, JB's mother called the police and gave them JB's phone. 2RP 89-90. Counts I and II arise from Navarro's communications with JB. CP 40-41.

"Samantha" began texting the boys whose phone numbers JB had provided. 2RP 244 (DW), 268 (TH), 493 (AD1); 3RP 26-27 (AB). "Samantha" also texted other McClure students, some of whom had listed their phone numbers on their Facebook pages. 2RP 301-02 (EP), 324 (AD2), 548-50 (CG). The communication

with most of these students followed the same general trajectory: the messages started off friendly, then became sexual, then became threatening.

TH (8/31/97) testified that he agreed to let JB give his number to "Samantha," who texted him immediately. 2RP 267-68. "Samantha" said she was 16 years old; TH told her that he was 14. 2RP 269-70. The messages quickly became sexual, and "Samantha" offered oral sex, sent him a photo of a woman masturbating, asked for a picture, and suggested meeting up. 2RP 271-74. TH stopped responding to the messages, but continued to receive texts for a couple of weeks. 2RP 276, 279. Count III arose from these exchanges. CP 41.

CG (8/2/98) also received text messages from "Samantha." 2RP 548, 551. Early conversations were on "normal topics" like CG's age, where he attended school, and what he liked to do. 2RP 552. The person asked CG whether he liked to drink and use drugs. 2RP 554. "Samantha" told him that she liked "to fuck" and drink, and asked about the length of his penis and whether he liked to have sex. 2RP 555. "Samantha" asked where he lived, sent a picture, and asked CG to send a naked picture of himself. 2RP 558-59. CG stopped texting the person. 2RP 562. "Samantha"

responded by saying that her brother was a gang member and that if he stopped texting, her brother would hurt CG. 2RP 563. Count IV pertains to the messages to CG.

DW (4/10/99) testified that the messages got "weird" after just a few days, when "Samantha" started asking for a picture, sent him a suggestive picture, and offered DW oral sex. 2RP 248-54. "Samantha" said she was 17 years old, that her father was in the FBI, and that she was home-schooled. 2RP 246. DW falsely told her that he was 15 or 16 years old "just to keep it safe." 2RP 247. "Samantha" talked about meeting in person; DW refused. 2RP 254-55. He was not threatened. Count V, on which the jury acquitted Navarro, pertains to the messages to DW. CP 42.

AD2 (3/29/99) testified that he posted his phone number and date of birth on his Facebook page and started receiving text messages from "Samantha" after he began attending McClure. 2RP 319-24. "Samantha" said she was into "sex and stuff," sent AD2 revealing pictures of a woman, and talked about having her brother perform oral sex on AD2. 2RP 326, 327, 333. When AD2 was not interested, "Samantha" kept insisting. 2RP 329. When he stopped responding, "Samantha" started sending texts constantly,

but did not threaten AD2. 2RP 332. Count VI arose from the communication with AD2. CP 42.

EP (8/5/98) testified that "Samantha" friended him on Facebook, where he had posted his phone number and date of birth. 2RP 301-02. About an hour after he accepted "Samantha's" friend request, he received the first text message. 2RP 304. The following day, "Samantha" asked him to send a picture of his penis. 2RP 308. When EP refused, "Samantha" said she would get her FBI father to arrest him. 2RP 308. "Samantha" pestered him for a picture of his penis every day, suggested meeting up, and offered him oral sex, which he refused. 2RP 310, 312-13. EP stopped responding to the messages. 2RP 312. Count IX pertains to the messages to EP. CP 43.

AD1 (4/3/99) also received text messages from "Samantha Hopkins." 2RP 494. She told him that her father was in the FBI and that her brother was Pedro Navarro. 2RP 499, 502, 514. AD1 told her his age and that he went to McClure. 2RP 499. "Samantha" offered AD1 numerous sexual favors over multiple texts. 2RP 515. He declined, and while the non-sexual texts continued, he received no threats. 2RP 515-16. Count X, on which

the jury acquitted Navarro, arose from the messages to AD1. CP 43-44.

AB (8/29/99) began receiving texts from "Samantha" in the middle of 7th grade. 3RP 21, 26-27, 29. AB told the person that he was 12 years old. 3RP 29. AB and "Samantha" exchanged text messages every day for one or two months. 3RP 30. "Samantha" told him about her father in the government. 3RP 31. The messages turned sexual, and "Samantha" suggested meeting up. 3RP 31-33. AB told his mother about the messages and stopped responding. 3RP 34. Count XI pertained to the communications with AB. CP 44.

Navarro's targets were not limited to McClure Middle School students. XC (8/15/98), who attended Sylvester Middle School, started receiving text messages from "Samantha" a couple of weeks after he met Navarro at a Burien skate park. 2RP 346, 348, 351. When XC did not respond to the messages, "Samantha" became angry and threatened to have her FBI agent father come break into XC's house. 2RP 357. "Samantha" repeatedly asked XC if he would ever get a "blow job" from a guy. 2RP 358. XC continued receiving "Samantha's" texts until his parents took his

phone away for unrelated reasons. 2RP 363. Count XII arose from the communication with XC. CP 44.

SS (10/30/97) also attended Sylvester Middle School. 2RP 384. SS had a public Facebook page on which he posted his phone number. 2RP 387. One day he received a text message from "Samantha Hopkins," who claimed to have obtained his number from a phone she found in White Center. 2RP 388, 390. Their conversation was friendly at first; SS disclosed his age and school and said he was interested in basketball. 2RP 391-93. "Samantha" said that she liked having sex with strangers and offered SS sexual favors several times a day for two weeks, even though he told her to stop bothering him. 2RP 392-93, 395. SS was not threatened. 2RP 396. Count XIII pertains to SS.[2] CP 45.

KP (10/20/97) had a Facebook page on which he posted his age and phone number. 2RP 187. He began receiving text messages from "Kimberly Nelson." 2RP 189. After a couple weeks, the messages became sexual. 2RP 191. "Kimberly" asked KP if he wanted a "pussy pic." 2RP 195. When KP declined, he received a picture of a topless woman. 2RP 195. KP threatened to

[2] The information identifies this victim as "S.M. (DOB 10/30/97)." CP 45. SS testified that the different last name was probably attached to him because his father's last name begins with M. 2RP 385.

call the police. 2RP 218. About a week later, KP started receiving texts from "Haley Charnews" at a different number. 2RP 199. Based on similarities in the language of the messages, KP believed "Haley" and "Kimberly" were the same person. 2RP 202-03. When asked, the person admitted that was so. 2RP 203-04. The person asked KP for a picture of his penis. 2RP 204. When KP indicated that he would never do that, the messages became threatening. 2RP 205. The person knew KP's address and threatened to burn down his house, but implied that if he sent a picture of his penis, the person would leave him alone. 2RP 204, 206. KP was frightened and complied with the request, but the messages did not stop. 2RP 208. The person asked to meet in person and threatened to print out the pictures of KP's penis and post it around town if he refused. 2RP 208. KP continued to resist. 2RP 208. At that point, the person's "brother" sent a message threatening to beat KP up if he did not meet up with "Kimberly." 2RP 210. KP believed he was being watched because someone in a car drove by slowly and looked at him, and then he received a text message saying "that's you." 2RP 214. Another time, the same car drove by his house before he received a message saying, "I know you are home." 2RP 216. He also got a message saying "I saw your mom

come home" right after his mother arrived. 2RP 217. Eventually, KP's parents discovered the text messages, confronted KP, called the police and gave them KP's phone for examination. 2RP 178-79. Counts VII (CMIP) and VIII (extortion with sexual motivation) pertain to the communications with KP.[3]

King County Sheriff's Deputy Ben Miller took the report from KP's father in February 2012. 2RP 54. KP's father had searched the internet for the phone number from which the texts were sent and found a Craigslist ad for a used car, which he printed and gave to Miller. 2RP 56-57. Miller determined that the phone number belonged to Navarro, whom he had contacted two days before on an unrelated matter. 2RP 50-52, 57. Detective Chris Knudsen took over the investigation, learned that the Seattle Police Department was also investigating Navarro, and contacted SPD Detective Ian Polhemus. 4RP 99.

Polhemus, a member of the Internet Crimes Against Children Task Force (ICAC) began his investigation following a complaint by JB's mother in March 2012. 2RP 60, 68. After learning that JB had shared other boys' phone numbers with the

[3] The information identifies this victim as "K.J.T. (DOB 10/20/97)." CP 42, 43. KP testified that he goes by a last name beginning with P, but his legal last name begins with T. 2RP 184.

person who was texting him, Polhemus arranged to interview several of the boys at McClure. 2RP 74. Four of the boys provided their phones for the police to search. 2RP 79, 81-82.

Because they were investigating the same suspect, Detectives Polhemus and Knudsen decided to work together. 2RP 676. On the day that the detectives planned to contact Navarro by having an officer pose as someone responding to his Craigslist ad, Navarro serendipitously came to the precinct on his own. 2RP 680-82. Navarro gave a taped interview, in which he acknowledged exchanging inappropriate emails with kids, posing as "Samantha" and "Kimberly," and threatening to burn KP's house down. 1RP 61-87, 90-147; 2RP 686.[4] He gave consent for an examination of his phone and provided his password. 1RP 91, 124. He said, "I'm ashamed of all the messages and everything." 1RP 82. He explained that "if I had treatment, none of this would have happened." 1RP 115. He said that the people he texted were "all ... teenagers," and that they were "like, 13." 1RP 119, 120. He confirmed that he continued to communicate sexually with some of

[4] The videotaped interview was played during the CrR 3.5 hearing and transcribed as a part of that hearing. 1RP 61-87, 90-147. An audio version of the tape was played for the jury during trial, but was not transcribed. 2RP 686.

the boys after learning their ages. 1RP 121. He told the detectives that he needed sexual deviancy treatment. 1RP 137-38.

C. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE NAVARRO'S RIGHT TO SELF-REPRESENTATION.

Navarro contends that the trial court violated his right to self-representation by misinforming him of the consequences of asserting that right. Specifically, he argues that the court falsely advised him that he could not change his mind and have an attorney reappointed. Because a defendant who asserts the right to self-representation has no right to the reappointment of counsel, the colloquy accurately conveyed one of the risks of proceeding pro se. There was no error.

a. Relevant Facts.

On January 23, 2013, only two weeks before Navarro's trial was scheduled to begin, Navarro moved to proceed pro se. 1RP 4, 8. Judge Julie Spector warned Navarro that he was facing "some very serious charges" and asked why he wanted to represent himself. 1RP 4. Navarro indicated that he had been reading the law in jail and felt that he was in the best position to fight his case.

1RP 4. Upon inquiry, Navarro stated that he had not "formally" studied the law, had never represented himself, did not know what the rules of evidence were and did not know what jury instructions were. 1RP 4-5. Navarro acknowledged that he was facing a sentence of 72-96 months and that it was possible that he could be acquitted of the charges but convicted of lesser offenses. 1RP 5-6. The colloquy continued:

> Court: Okay. And, do you know that if you represent yourself on your own, you have no right to standby counsel; you'd be completely on your own?
>
> Navarro: Yeah, I do know that.
>
> ...
>
> Court: Why would you want to take the risk of representing yourself when you're not even a licensed lawyer in the state? You don't even know what jury instructions are. You don't know what Evidence rules are. What makes you think you can do it better than she can?
>
> Navarro: I don't know if I can be better than she can.
>
> Court: So, why would you risk it? You're looking at so much time. I mean, she's really a terrific lawyer. You know, let's say you go to trial, right?
>
> Navarro: Yeah.
>
> Court: And you get to the point where you don't know what you're doing. You know, the Judge can't help you. The Judge can't say, hey, Mr. Navarro, this is what you need to do. You're your own lawyer. And,

you know, there's no right to standby counsel, so you're all on your own. And, you can't ask [the prosecutor].

Navarro: Yeah.

Court: So, why would you want to do this? This is a huge risk that you're taking. It's a big gamble.

Navarro: Because I think I'm in the best position right now to –

Court: Why?

Navarro: -- try my case.

Court: You don't know anything about the law. Do you know how to do jury selection?

Navarro: No.

Court: So, why do you think you're in the best position? Has somebody talked to you in the jail to get you to do this?

Navarro: No.

Court: Why – so, tell me why you think you're in the best position. You don't know how to do jury selection. You don't know what jury instructions are other than parroting back to me that they're instructions to the jury.

Navarro: 'Cause I'm going to trial anyways.

Court: So, you're going to trial, but you don't know the first thing about it. Do you know what the Rules of Criminal Procedure are?

Navarro: I can figure them out.

Court: Do you even have them?

Navarro: No.

Court: And, when is this case scheduled to go to trial?

Prosecutor: Currently set for February the 5th.

Court: So, you're going to learn all the Rules of Criminal Procedure between now and February 5th? Do you know people go to law school for three years, trying to learn all this stuff, and they still don't know what they're doing when they get out? It takes years of experience, and the woman standing just to your right has that experience. Why would you want to do this on your own? I don't understand.

Navarro: I don't know.

Court: You don't know? But, I have to know before I let you make this huge decision to represent yourself. And, you don't get to change your mind; once it's done, it's over. She steps away; she's off the case, and you're completely on your own. Do you know how to cross-examine a witness?

Navarro: You're saying that if I go pro se, I'm completely on my own.

Court: You're completely on your own. You have no right to standby counsel.

Navarro: And I can't recall my pro se status.

Court: No. This is not – this is not a game. It's done. I let her go here today; you're done. You don't get to say, hey, Judge Spector, you know, we had that very interesting discussion last week or tomorrow, it's over. It's a huge deal. I just need to know, is something going on here that I need to know about?

Ms. Pickering is really full of enthusiasm for representing her clients, or she wouldn't be in the position that she's in. She's done this for years. You've never done this at all. Would you be your own doctor because you're in the best position?

Navarro: No.

Court: So, why would you be your own lawyer? Listen, let me tell you this: If I were charged with something, and it's not to say judges can't be charged with things, I wouldn't represent myself, so why would you?

Navarro: I don't know.

Court: It doesn't sound like a very well thought-out idea. You know, telling me that you're going to learn it between now and February 5th, the trial doesn't get continued. ...

***

Court: All right. I—I have to tell you, based on our discussion, and I'm just being frank, that I think you'd be far better off with Ms. Pickering representing you than you representing yourself 'cause you don't know the first thing about criminal law or, frankly, any law from what I can understand. The case is going to go forward. It doesn't mean you get a continuance. It doesn't mean you get to stop the train. It's – it's done.

Navarro: Okay.

Court: All right. I'm going to – "okay" meaning you're going to let her represent you?

Navarro: Yes.

***

> Court: So, I want to make sure we're clear. So, you're—you're comfortable going forward with Ms. Pickering, and you're no longer asking the Court to represent yourself.
>
> Navarro: Yes.

1RP 6-11.

b. The Trial Court Did Not Misinform Navarro.

The state and federal constitutions afford criminal defendants both the right to the assistance of counsel and the right to reject that assistance and represent themselves. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Kolocotronis, 73 Wn. App. 92, 97, 436 P.2d 774 (1968). There is a tension between the two rights, and the trial court is to "indulge every presumption against a valid waiver." State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). "To protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation, we require a defendant's request to proceed *in propria persona*, or pro se, to be unequivocal." State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). "Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right

since reappointment is wholly within the discretion of the trial court." Id. at 376-77. The "preferred method" for determining whether a defendant has validly waived his right to counsel is "a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense." Silva, 108 Wn. App. at 539 (citing City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)).

Navarro argues that the trial court failed to undertake an effective colloquy in this case because the court informed him that he would not be permitted to change his mind and have counsel reappointed, when in reality, the trial court could have allowed that. Brief of Appellant at 6. Navarro contends that this "affirmative misinformation" invalidates his decision not to assert his right to self-representation whether or not it actually affected his decision. Brief of Appellant at 8 (citing State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006) (invalidating guilty plea because of affirmative misinformation about the consequences of pleading guilty).

The trial court did not misinform Navarro. The court accurately conveyed to him that he could not count on being able to regain the assistance of counsel after waiving that right. Although Navarro is correct that trial courts have discretion to reappoint counsel, he had no right to reappointment and the court here strongly indicated that it would not entertain such a request in this case. Refusing to reappoint counsel was within the trial court's discretion, DeWeese, 117 Wn.2d at 376-77, and the court's position was reasonable given that trial was scheduled to begin in only two weeks.

Navarro provides no authority for his position that a court misinforms a defendant by stating that counsel would not be reappointed. Instead, he relies on Silva, which did not involve misinformation at all. In that case, the trial court granted Silva's motion to proceed to trial pro se in one case based upon a colloquy conducted in a post-trial hearing in a separate criminal case. 108 Wn. App. at 538. That colloquy did not touch upon "the risks associated with preparing for a trial by jury," and failed to inform Silva of "the nature of the charges, and the maximum possible penalties Silva faced in this case." 108 Wn. App. at 540. Reversing, this Court held that without that "critical information,"

Silva was unable to make a knowing waiver of his right to counsel in the case that was proceeding to trial. Id. at 541.

Silva does not support Navarro's position. Navarro contends that the trial court should have advised him about the possibility that counsel would be reappointed, but the Silva court did not include that possibility among the "critical information" that must be conveyed to a defendant before he may effect a valid waiver. Rather, Silva holds that a defendant must be informed of the nature of the charges, potential penalties, and the risks associated with trying a case pro se. The trial court's colloquy in this case provided that information.

Judge Spector's colloquy with Navarro properly conveyed the critical information that he needed in order to exercise his rights, including the fact that Navarro was not entitled to reappointment of counsel if he later regretted his decision to proceed pro se. There was no error. This Court should affirm.

2. THE SAPOS FAIL TO ACCOUNT FOR TIME SERVED AND MUST BE CORRECTED ON REMAND.

Navarro contends that the Sexual Assault Protection Orders (SAPOs) entered in this case are erroneous because they each purport to be effective until October 10, 2025, failing to take into

account time served before sentencing. Because the SAPO expiration dates depend on the expiration of Navarro's sentence, which in turn depends upon how much credit he received for time served, the State concedes that this Court should remand to the trial court to obtain that information and correct the SAPOs.[5]

But Navarro also asserts that the lawful expiration date of the SAPOs protecting each victim depends on the statutory maximum sentence for the crime committed against that victim. This Court should reject that proposition, which finds no support in the law.

When a defendant is found guilty of a sex offense and a condition of the sentence restricts his ability to have contact with the victim, the sentencing court must record the condition as a SAPO. RCW 7.90.150(6)(a). Such orders "*shall* remain in effect for a period of two years following the expiration of *any sentence* of imprisonment and subsequent period of community supervision, conditional release, probation or parole." RCW 7.90.150(6)(c) (emphasis added). The statute makes no reference to the statutory maximum sentence for the offense related to that particular victim.

[5] The appellate record is not sufficient to determine precisely the amount of credit Navarro should receive. See Brief of Appellant at 5 n.6, concluding that "it appears" that Navarro "should have received credit for almost two years of time served."

Rather, the plain language directs that these civil protection orders be effective for two years following whatever sentence the court actually imposes.

In this case, the trial court imposed a sentence of 96 months plus an 18-month sexual motivation enhancement for each of the two extortion convictions. CP 130. The court imposed a sentence of 60 months on each of the eight CMIP convictions. CP 130. These base sentences are concurrent, but the two sexual motivation enhancements run consecutive with each other and with the base terms. CP 131. Accordingly, the total of all terms imposed is 132 months (11 years) (96 months base sentence, plus 18 months for one enhancement, plus another 18 months for the other enhancement).[6] Because the statute directs the court to impose SAPOs effective until two years (24 months) following the expiration of "any sentence" imposed in a criminal case, the SAPOs in this case should have been set to expire 156 months after

[6] The judgment and sentence contains a mathematical error. It appears that one of the mandatory consecutive 18-month enhancements was omitted from its calculation of the total of all terms imposed. CP 131. This error should be corrected on remand.

sentencing (less time served).[7] In fact, all of the SAPOs were set to expire on October 10, 2025, or 144 months (12 years) after the date of sentencing.[8] CP 179-84.

Navarro argues that "the statutory maximum sentence Navarro faced for the communication convictions was five years, and therefore the longest term for a SAPO associated with those offenses is seven years." Brief of Appellant at 10. Likewise, Navarro argues that the longest lawful term for SAPOs associated with his extortion convictions is two years beyond the 10-year statutory maximum for that offense. Brief of Appellant at 10-11. Subtracting the two years he contends that he served before sentencing, Navarro argues that "the court's authority to impose a SAPO therefore required an expiration date about two years shorter for those associated with the extortion convictions, and about seven

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[7] This leaves aside the question of potential earned early release time, which may be up to one-third of Navarro's base sentence. RCW 9.94A.729(3)(e). While no published decisions have stated how to account for the possibility of earned early release in setting SAPO expiration dates, a reasonable course of action would be to adopt the statutory language and set the termination at "two years following expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole," with a proviso that the SAPO will expire no later than, in this case, 156 months after the date of sentencing.

[8] It appears that this date was calculated based upon the 10-year statutory maximum for extortion, a class B felony, plus the two years authorized by RCW 7.90.150(6)(c).

years shorter for the communication convictions." Brief of Appellant at 11.

Navarro provides no authority or meaningful argument to support his assumption that SAPOs must be limited to the statutory maximum for the crime plus two years, regardless of the actual sentence imposed. He also cites no authority for his assumption that the SAPO may only protect a victim for two years following the statutory maximum for the offense against *that victim*, rather than for two years following the defendant's release from "*any sentence*" imposed in that case. This Court should reject these unsupported propositions because they are inconsistent with the language of the statute and the intent of the legislature.

The legislature's intent in creating SAPOs is reflected in its "legislative declaration," codified at RCW 7.90.005. In that declaration, the legislature noted that sexual assaults are heinous crimes that are underreported and sometimes go unprosecuted. RCW 7.90.005. In enacting a civil remedy requiring that the offender stay away from the victim, the legislature created a way to protect victims from offenders who are not otherwise restrained. Id. The intent to protect victims from unrestrained offenders is also manifest in the provision at issue here, because a SAPO

associated with a conviction remains effective for two years *after* the defendant is released from "imprisonment and subsequent period of community supervision, conditional release, probation or parole." RCW 7.90.150(6)(c).

In this case, Navarro will be imprisoned for 11 years (less time served and any earned early release time) on the two extortion convictions. If the SAPOs protecting the eight CMIP victims must expire after only seven years, then these victims receive no protection at all following Navarro's release. Likewise, if the SAPOs associated with his extortion convictions must be limited to two years beyond the 10-year statutory maximum for that crime, rather than the enhanced 11-year sentence actually imposed, those victims receive less protection than the legislature mandated in RCW 7.90.150(6)(c).

Statutory constructions that lead to unlikely, strange, or absurd results are to be avoided. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Navarro's interpretation of RCW 7.90.150(6)(c) renders the provision largely superfluous and ineffective for any offender sentenced at or near the statutory maximum, surely an absurd result. This Court should reject Navarro's unsupported assumptions about how the SAPO statute

works, hold that the orders must be set to expire two years after the expiration of the total term imposed at sentencing, and remand for the trial court to make the necessary corrections.

3. THE NO CONTACT ORDER WAS A PROPER CRIME-RELATED PROHIBITION.

As a condition of Navarro's sentence, the trial court ordered Navarro to have no contact with any of the 11 named victims in this case for "the maximum term of 10 years." CP 131. Navarro contends that the court erred with respect to nine of the victims because he only committed a Class C felony (CMIP) against them. Brief of Appellant at 12. Because the statutory maximum sentence for CMIP is only five years, Navarro argues that the no contact order may keep him from contacting the victims of that crime for only five years. Id. He is mistaken.

"As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions[.]" RCW 9.94A.505(8). A "crime-related prohibition" must "directly relate[] to the circumstances of the crime." RCW 9.94A.030(10). But "[n]o causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." State v. Llamas-Villa, 67 Wn.

App. 448, 456, 836 P.2d 239 (1992). Crime-related prohibitions can include no contact orders. State v. Armendariz, 160 Wn.2d 106, 118, 156 P.3d 201 (2007). No contact orders need not be limited to the direct victims of the crime. State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

The primary concern in reviewing crime-related prohibitions is the prevention of coerced rehabilitation. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Otherwise, crime-related prohibitions are within the sentencing judge's discretion and will be reversed only if manifestly unreasonable, such that no reasonable person would take the view of the trial court. Id. at 37.

A court does not abuse its discretion by entering no contact orders to protect witnesses to a crime. In Warren, our supreme court upheld an order prohibiting the defendant from having contact with his wife and mother of the children against whom he sexually offended, even though she was not a victim of the crimes. 165 Wn.2d at 34. The court held that prohibiting contact with the wife was reasonably crime-related because, among other things, she "testified against Warren resulting in his conviction of the crime." Id. Similarly, in State v. Ancira, a defendant convicted of domestic

violence against his wife was ordered to have no contact with his children, who witnessed the violence. 107 Wn. App. 650, 652-53, 27 P.3d 1246 (2001). Although this Court concluded that the order unconstitutionally violated Ancira's fundamental right to parent his children, this Court acknowledged that the "children, as witnesses, were directly connected to the circumstances of the crime." Id. at 656.

Although Navarro was convicted of class B felonies against only two of the children, the record demonstrates that he threatened and intimidated most of them, that most of the boys knew each other, and that Navarro gained access to several of the boys by threatening and intimidating extortion victim JB. Moreover, all of the children protected by the no contact order were witnesses against Navarro, resulting in his conviction. Navarro implicitly agrees that witnesses can be included in a no contact order, because he does not challenge the court's authority to prohibit his contact with DW and AD1 even though he was acquitted of the crimes against them. Under Warren and Ancira, the trial court did not abuse its discretion by prohibiting Navarro's contact with all of the boys for the maximum term of 10 years.

4. UPON REMAND, THE TRIAL COURT SHOULD CORRECT CLERICAL ERRORS IN THE JUDGMENT AND SENTENCE.

The judgment and sentence contains two clerical errors. It incorrectly states Navarro's offender score as 30, even though the State agreed at sentencing to reduce the score by three points rather than litigate the comparability of Navarro's Idaho conviction. 1RP 190; CP 128. The correct offender score is 27. 1RP 190. This change does not affect Navarro's sentence. The judgment and sentence also erroneously states that Navarro's total term is 114 months. CP 131. It appears that one of the mandatory consecutive 18-month enhancements was mistakenly omitted from that calculation. The correct total term is 132 months. CP 130-31. This Court should instruct the trial court to correct these errors on remand.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Navarro's convictions and the no contact provision in his judgment and sentence. Because there are clerical errors in the judgment and sentence and because the SAPOs fail to take Navarro's time served into account in setting the expiration date,

this Court should remand for the trial court to correct those documents.

DATED this 4th day of November, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson (gibsonc@nwattorney.net), the attorney for the appellant, Pedro Navarro, containing a copy of the Brief of Respondent, in State v. Navarro, Cause No. 71126-I, 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.

CBrame
Name

11/4/14
Date

Done in Seattle, Washington