NO. 72728-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LELAND JORDAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER; THE HONORABLE JAMES ROGERS; THE HONORABLE PATRICK OISHI; THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Criminal defendants have a constitutional right to represent themselves, and trial courts are afforded discretion to determine whether a defendant has affirmatively waived the right to counsel. Once waiver has been determined, it generally continues throughout the proceedings and trial courts are not required to re-inquire as to the defendant's continuing desire for self-representation, even when charges are added. In Jordan's case for felony harassment and bail jumping, Jordan was granted pro se status after a thorough colloquy; then Jordan made it clear at every subsequent hearing that he wished to represent himself, understood the implications, and felt frustrated by perceived interference with his right. Did the trial court act within its discretion by not conducting a second formal colloquy about Jordan's desire to represent himself?

2. A factual basis for a guilty plea exists if the evidence presented by the State is sufficient for a jury to conclude that the defendant is guilty of the charge; the court can consider any reliable sources of information to determine whether sufficient evidence exists, and the court need not be convinced of guilt beyond a reasonable doubt. In Jordan's guilty plea to felony harassment, the

State presented a probable-cause certification that described accounts from numerous witnesses to the defendant's detailed threats to come back to a hospital to "shoot everybody" and "kill all of you," and the named victim said she felt threatened and believed Jordan could come back and carry out his plan. Given the entirety of the probable-cause document, did the court have sufficient facts to conclude that a jury could find that the victim reasonably feared that Jordan would carry out the threat?

3. In a challenge to the sufficiency of a charging document that is raised for the first time on appeal, the reviewing court liberally construes the document in favor of validity; if the necessary facts appear in any form or by fair construction, the defendant must show prejudice in that he actually lacked notice of the essential elements of the charge. The information charging Jordan with bail jumping mirrored the statute and contained the essential elements, including that Jordan had knowledge of a requirement to appear, and specified a date on which Jordan "failed to appear as required." A sworn prosecutor's factual summary attached to the information specified that Jordan had been given notice to appear on that date; that date was the only court date Jordan missed; and Jordan made it clear throughout the proceedings that he understood that the bail-

jumping charge was based on that singular failure to appear, and that he had known about his requirement to appear. Was the charging document sufficient to support Jordan's plea to the bail-jumping charge?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In September 2013, Defendant Leland Jordan was charged by Information with Felony Harassment, alleging that on or about September 19, 2013, in King County, Washington, Jordan knowingly and without lawful authority threatened to cause bodily harm immediately or in the future to Dr. Sachita Shah by threatening to kill Shah and four other people, and that Jordan's words or conduct placed Shah in reasonable fear that the threat would be carried out. CP 1. The State later amended the information to add a count of Bail Jumping, alleging that on or about January 17, 2014, Jordan knowingly failed to appear in King County Superior Court as required. CP 93.

On August 27, 2014, Jordan, appearing pro se, entered Alford[1] pleas to both counts. CP 79-107. On October 24, 2014, the

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970).

court sentenced Jordan to 51 months in prison, the low end of the standard range based on an offender score of 10. CP 156-69. Jordan timely appealed. CP 170.

2. SUBSTANTIVE FACTS

On September 19, 2013, Jordan went to Seattle's Harborview Medical Center to receive medical care. CP 4, 95.[2] When a nurse told Jordan that she needed to take a blood sample, Jordan yelled obscenities at the nurse and said he was sick of being judged. Id. Jordan threatened to strangle the nurse. Id. Jordan referred to two recent publicized shootings and said, "Those n---ers got it right ... bam, bam bam." Id. He added that he would "get a gun at a drug house and come back and there won't be a soul left standing." Id. A hospital technician heard the threats and recalled that Jordan was very specific about using an AK-47 assault rifle as he accused the hospital staff of racism. Id. Hospital security took scissors and a cell phone from Jordan and restrained him. Id.

Still, Jordan continued his threats, telling another nurse and other staff that he would come back and "shoot everybody." Id.

[2] Because there was no trial, the State is reciting the substantive facts from the Certification for Determination of Probable Cause filed with the initial Information and with Jordan's Alford plea.

Again referring to recent shootings, he said, "See, that is what happens if I don't get what I want." Id. To a third nurse, Jordan threatened to "beat your fucking ass," and said "I'm about to snap and I'm going to get a gun and come here and shoot everybody." Id.

Dr. Sachita Shah witnessed Jordan's threatening behavior and felt threatened when Jordan stated that he would get an AK-47 and come back to "kill all of you motherfuckers." Id. Shah later told police that she and her staff feared Jordan could do so. Id.

Additional substantive facts are provided as applicable below.

C. ARGUMENT

1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY CONTINUING TO HONOR JORDAN'S RIGHT TO SELF-REPRESENTATION.

After insisting on his right to self-representation at virtually every stage of his case, Jordan now claims that the trial court abused its discretion and violated his right to counsel by failing to conduct a second formal colloquy to reconfirm whether he wished to continue to represent himself. Despite Jordan's erroneous assertions, Washington courts are not required to reconfirm a pro se defendant's continuing wish to waive his right to counsel,

even when additional charges are filed, and the trial court acted well within its discretion in honoring Jordan's persistent insistence on representing himself in this case.

a. Additional Relevant Facts.

Jordan was arraigned on the Felony Harassment charge on October 3, 2013, with appointed counsel. 1RP 6-8.[3] On October 16, 2013, Jordan announced his intention to proceed pro se, saying, "I've represented myself several times before, Your Honor." 1RP 10. The court[4] performed a complete colloquy with Jordan, which included the maximum penalty, and found that his waiver of counsel was "knowingly, intelligently, and voluntarily made." 1RP 10-15. Jordan signed a Waiver of Counsel attesting to his desire to represent himself. CP 7-8.

On November 4, 2013, Jordan appeared pro se for case setting, and the State informed the court that Jordan had been negotiating a plea. 3RP 11. Jordan agreed to a two-day continuance. Id. On November 6, 2013, however, the State told

[3] The verbatim reports of proceedings are divided into three volumes that do not follow sequentially through the proceedings, which spanned from October 3, 2013 through October 24, 2014. The State is referring to these reports as follows: 1RP (Vol. 1 – October 3, 2013; October 16, 2013; August 1, 11, 13, 21, 26 and 27, 2014; and October 2, 2014); 2RP (Vol. 2 – October 24, 2014); and 3RP (digitally recorded proceedings – October 17 and 30, 2013; November 4 and 6, 2013; December 6 and 11, 2013; January 17, 2014; June 26, 2014).

[4] The Honorable James Rogers.

the court[5] that a plea deal fell apart because Jordan disputed his offender score. 3RP 12. Jordan complained that the jail's refusal to give him paper and pencils and access to phones and legal resources was interfering with his ability to represent himself. 3RP 12, 16-21.

During this hearing, the court criticized Jordan's choice to represent himself. 3RP 12-13, 17. For example, when Jordan asked for "somebody willing" to help him with legal work, the judge said, "And that's called a lawyer ... But you didn't want one." 3RP 17. Jordan replied, "Yeah. Well, 'cause I'm the best lawyer between me and them people." Id. The judge replied, "Doesn't seem like it to me." Id. Undeterred, Jordan replied, "My offender score is zero because I'm the best lawyer," and he continued to complain of a lack of access to phones. 3RP 17-18.

On December 6, 2013, at an omnibus hearing, Jordan again complained at length that jail staff were interfering with his right to represent himself and causing him "undue hardship." 3RP 27-39. The court[6] granted some of Jordan's discovery motions. 3RP 39. The court, however, noted that Jordan had filed some motions

[5] The Honorable Ronald Kessler.

[6] The Honorable Ronald Kessler.

without bringing them to the court's attention. 3RP 40. "A lawyer would know what to do," the judge said. Id. The judge added:

> A lawyer would know that you give a-the judge a copy of the motions, that just sticking them in the file doesn't work. You were told when you decided to represent yourself that you didn't know what you were doing ... and you're going to be in trouble with it. You don't know what you're doing and you're stuck with it.

Id. Jordan instantly replied: "But, I do know what I'm doing." Id.

On December 11, 2013, the State moved for a lengthy trial continuance because victim Shah was on prenatal bedrest and could not testify until mid-February. 3RP 43-44. The court[7] said that it would seriously consider releasing Jordan from custody. 3RP 44. Jordan noted that granting pretrial release would better allow him to defend himself. Id. The court granted the continuance but released Jordan from jail. 3RP 53.

On January 17, 2014, Jordan failed to appear and a warrant was issued for his arrest. 3RP 55.

On June 26, 2014, Jordan appeared in custody after he had been arrested about a week earlier. 3RP 56. The first thing Jordan said to the court[8] was "Uh, you know – you know I'm representing myself." Id. Jordan renewed his complaints that a lack of access

[7] The Honorable James Rogers.

[8] The Honorable James Rogers.

to phones and to the law library was interfering with his self-representation. 3RP 61. The court printed previous orders granting him such access. Id. He complained that the jail had taken his discovery when he was released from jail in December. 3RP 63. The court ordered the State to give Jordan a new set of discovery. Id.

On August 1, 2014, at an omnibus hearing, the State noted that the jail had not replaced Jordan on the "pro se list," and proposed renewing the court's orders to the jail to permit Jordan access to legal resources. 1RP 25. The State presented a second waiver-of-counsel form. 1RP 25; CP 18-19.

The court[9] asked Jordan if he still wished to proceed pro se. 1RP 27. Jordan said that it "might be too late for me to defend myself pro se." 1RP 26. He explained that this was because the prosecutor and the jail were interfering with his ability to represent himself, making it "like it's going to be impossible for me to represent myself." 1RP 27. He felt "like I'm in a position where I just can't do it because it's just physically beyond my lack of ability to access certain things." Id.

[9] The Honorable Patrick Oishi.

The judge said that he was doing paperwork to help Jordan get access to what he needed, and again asked him if he wanted to represent himself. 1RP 28. Jordan replied, "I want to – yeah, I still want to do that. But I want to do it in such a way where I can access some legal materials where I can fight." Id. The judge replied, "So, are you saying you don't want to be pro se now?" 1RP 29. Jordan said, "I'm the best lawyer for me. And I'm going to want to defend myself," but he wanted access. Id. The judge said he was working on that, and asked Jordan yet again, "Are you still wanting to represent yourself?" 1RP 30. Jordan replied, "The will to represent myself is still there." Id. The judge signed a second waiver form, beneath this statement:

> I find the defendant's waiver of counsel to be knowingly, intelligently and voluntarily made. The defendant understands the charges and consequences of his/her waiver. The defendant is competent. The defendant is permitted to exercise his/her constitutional right to represent himself/herself.

CP 19; 1RP 30.

Jordan then pleaded not guilty to the State's amended information adding a Bail Jumping charge. 1RP 32. He rebuffed the State's proposal to set the omnibus hearing over a week so he could decide if he was ready to go to trial. 1RP 33. He announced

he intended to plead "temporary insanity," but when the prosecutor requested that he provide notice of his expert witness, Jordan announced that he wanted to plead guilty by Alford plea. 1RP 35-37. The Court directed the State to meet with Jordan. 1RP 37.

The State set a motion hearing for August 11, 2014, because during the plea meeting Jordan and the State had discussed "whether or not he might want an attorney, and he indicated that he did," the prosecutor reported. 1RP 40. However, from the outset of the motion hearing, Jordan said he did not want an attorney. 1RP 39. He said that "in the time since I made the motion I've been provided some access to some – to some legal access. And – and now I – just don't feel it'd be feasible under the circumstances ... for me to have an attorney." Id. He explained that he meant that an attorney would seek a continuance against his wishes. Id. He said he instead wanted to file "some motions." 1RP 40.

The court[10] noted that the trial court had conducted complete colloquies with Jordan to determine his waiver of counsel, and now

[10] The Honorable Patrick Oishi.

"he does not have a right to counsel at this point."[11] Id. Jordan replied, "I don't really need an attorney. What I need is somebody to make me copies and do a little running ... around things for me." 1RP 41. The court told Jordan he did not have a right to a paralegal. Id.

On August 13, 2014, the State asked for a one-week continuance so an essential eyewitness could be available. 1RP 43. Jordan objected and again alleged that a discovery delay was interfering with his self-representation. 1RP 46.

On August 21, 2014, Jordan presented a motion to dismiss for speedy-trial violations and a motion to withdraw his guilty pleas from all his previous convictions. 1RP 50. As to the motion to withdraw his guilty pleas, Jordan explained that "apparently the misdemeanors is going to ... stop my felony situation from washing," affecting his offender score in the present case. 1RP 54.

Jordan also complained anew that he was not provided access to legal resources and supplies so he could represent himself. 1RP 52. This time, the court[12] made a specific ruling that

[11] The record contains references to an assumption that Jordan had undergone two colloquies with two different judges, but there apparently was only one formal colloquy conducted on October 16, 2013, with Judge Rogers. 1RP 12-15.

[12] The Honorable Patrick Oishi.

there had been no "violations or denying Mr. Jordan access to discovery, to supplies, to the courts in general. It's just not the case." 1RP 62. In fact, the court said, "I've been very impressed with the Prosecutor's Office, and specifically (the deputy prosecutor), being very proactive in trying to assist Mr. Jordan in getting all the materials he needs." Id. Jordan also asked for phone access so he could get "a couple suits so I can ... be dressed for trial." 1RP 69. The court directed the State to try to coordinate that. Id.

On August 26, 2014, the case was assigned to the trial judge,[13] who, immediately upon calling the case, asked Jordan whether it was accurate that he was representing himself. 1RP 72. He said, "that is accurate," but asked for a continuance to work on additional motions, which was denied. Id. Jordan renewed his protestations that the jail was interfering with his self-representation. 1RP 77. The State noted for the trial court that the previous judge had found no basis for Jordan's claims. 1RP 77-78. At the end of the hearing, Jordan said he had not been able to call someone to get clothes for trial, and the court said it would see about getting a public-defense investigator to help. 1RP 154.

[13] The Honorable Monica Benton.

The next day, August 27, 2014, Jordan announced that he had decided to enter an Alford plea to both counts. 1RP 157. During the plea colloquy, the court asked Jordan whether he had chosen to represent himself, and Jordan said yes. 1RP 159. Jordan signed a plea statement that said "I have chosen to represent myself." CP 79. The plea statement also explained the State's asserted standard range, the maximum penalties, the State's sentence recommendation, and a paragraph explaining that the sentences could possibly run consecutively. CP 80-84.

On October 2, 2014, the trial court *sua sponte* appointed standby counsel to assist Jordan in evaluating the State's presentation of Jordan's voluminous criminal history. 1RP 183-86; CP 173-88, 189-415, 416-17. The court emphasized that standby counsel would not "interfere with your right to represent yourself," and Jordan replied, "Okay." 1RP 185-86.

Sentencing was set for October 24, 2014, where standby counsel was present. 2RP 197. The attorney introduced himself by specifying that Jordan "is still intending to proceed pro se." Id. The sentencing hearing proceeded without standby counsel interjecting in Jordan's arguments, even as they pertained to his offender score. 2RP 197-222.

b. The Court Acted Within Its Discretion To Continue To Permit Jordan To Exercise His Right To Represent Himself.

Article I, section 22 of the Washington Constitution explicitly guarantees criminal defendants the right to self-representation. Wash. Const. art. I, § 22; State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The Sixth Amendment to the United States Constitution implicitly guarantees this right. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Courts regard this right as "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen, 168 Wn.2d at 503. Improper denial of the right to represent oneself requires reversal regardless of whether prejudice results. Id.

The right to self-representation is not self-executing. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). Self-representation requires a factual determination on the record that the defendant has made a knowing and intelligent waiver of counsel with "eyes open," which includes an awareness of the dangers and disadvantages of the decision. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 663, 260 P.3d 874 (2011).

Washington courts are not required to follow "steadfast rules for determining whether a defendant's waiver of the right to assistance of counsel is validly made." Modica, 136 Wn. App. at 441. "There is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). Still, the "preferred procedure" is a colloquy with the defendant, conducted on the record, that includes "a discussion about 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." Id. Even so, "[t]he grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504-05.

Such a finding must be based on an "identifiable fact." Id. at 505. Dissatisfaction with counsel does not constitute an equivocal request. State v. Mehrabian, 175 Wn. App. 678, 695, 308 P.3d 660, review denied, 178 Wn.2d 1022 (2013). See also Modica, 136 Wn. App. at 442 ("[W]hen a defendant makes a clear and knowing

request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense.").

The determination that a defendant has waived his right to counsel is reviewed for abuse of discretion. In re Rhome, 172 Wn.2d at 667. The "ad hoc," fact-specific analysis of waiver of counsel questions depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused, and is best assigned to the discretion of the trial court. State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986). The defendant bears the burden of proof that his waiver was not competent and intelligent. Id. A trial court abuses its discretion if its decision is manifestly unreasonable or rests on facts unsupported in the record or was reached by applying the wrong legal standard. Madsen, 168 Wn.2d at 504.

Once a defendant has validly waived the right to counsel, he has relinquished the right to demand assistance of counsel as a matter of entitlement. Modica, 136 Wn. App. at 443. If a defendant accurately understands the penalty he or she faces at the time the waiver is made, such waiver is knowingly made and, therefore, valid. Id. at 445. A valid waiver of the right to assistance of

counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was limited. Modica, 136 Wn. App. at 445. "Thus, it is not ordinarily incumbent upon a trial court to intervene at a later stage of the proceeding to inquire about a party's continuing desire to proceed pro se." Id. "Our Supreme Court has made clear that a defendant who elects to proceed pro se must bear the risks of so doing and is not entitled to special consideration." Id. (internal quotation removed).

Modica held that when an additional charge is filed by the State, the trial court is "not required to *sua sponte* engage in a second full colloquy in which it inform[s] him of a new charge's maximum penalty." Id. at 446. Where the trial court makes efforts to confirm the pro se defendant's "continuing desire for self-representation," his constitutional rights are preserved. Id.

Modica controls here, and in Jordan's case the trial court — and even the State — made herculean efforts to determine continually whether Jordan wished to exercise his self-representation right, and even to talk him out of it. But at every turn, Jordan made one thing crystal clear: "I'm the best lawyer for me." 1RP 29. For Jordan to argue now that the trial court violated his right to counsel, he has to rewrite the record.

Yet Jordan is arguing just that, by alleging that a substantial change in circumstances occurred because Jordan failed to appear for nearly six months and the State added a bail-jumping charge. His argument has no merit.

First, he contends that the self-imposed six-month pause in the proceedings, which caused him to fall off the jail's "pro se list," combined with what he portrays as "statements indicating he wanted assistance of counsel" upon his return, demonstrate this change in circumstances. Appellant's Opening Brief (AOB) at 14, 16. His assertions are not supported by the facts. At Jordan's first hearing after returning to custody, on June 26, 2014, the first thing he said was, "You know I'm representing myself." 3RP 56. That was anything but equivocal.

At the next hearing, on August 1, 2014, Jordan expressed pessimism and frustration about his ability to represent himself. 1RP 27. But those were not statements "indicating he wanted assistance of counsel," as Jordan now would have this Court believe. AOB at 16. Jordan was objecting to what he perceived as government obstruction of his right to serve as his own attorney. This is highlighted by the fact that when the judge immediately followed up by asking Jordan, over and over, whether he wanted to

represent himself, and promised to get Jordan access to legal resources, Jordan replied, "I'm the best lawyer for me. And I'm going to want to defend myself," and, "The will to represent myself is still there." 1RP 29-30. The court did not abuse its discretion by finding that Jordan was continuing to waive his right to counsel knowingly, intelligently and voluntarily. CP 19.

In support of his assertion that the lapse in proceedings affected his waiver, Jordan offers a 1970 federal case arising out of a juvenile court in Northern Illinois, where a 20-year-old man represented himself in a guilty plea to a car-theft charge. Schell v. United States, 423 F.2d 101, 101-02 (7th Cir. 1970). That case has nothing to do with Jordan's case. Notwithstanding that Schell is wholly nonbinding on this Court, the lapse in proceedings there was only one small part of the reason that the waiver was nullified. The others were Schell's "youth and experience," a significant change in Schell's predicament because he had violated probation while on release, and *the original waiver was completely deficient*. 423 F.2d at 102-03. None of those factors apply to Jordan's case.

So Jordan secondly claims that the addition of the bail-jumping charge significantly changed his situation such that the court abused its discretion by not conducting a second full

colloquy. First and foremost, this is virtually identical to the situation in Modica, where this Court found no requirement for a second colloquy after the State added a witness-tampering charge. 136 Wn. App. at 446. Jordan contends that his case is different because on August 1, 2014, the court again accepted Jordan's waiver *before* arraigning him on the bail-jumping charge. But that is a distinction without a difference. Jordan had been notified a month prior of the State's intention to add a bail-jumping charge. 3RP 62-64; CP 171-72. The arraignment came within seconds of the court's extended back-and-forth with Jordan in which he said repeatedly that he wanted to represent himself. 1RP 26-31. The trial court did not abuse its discretion by failing to redo the inquiry, because the result would have been the same.

Jordan further suggests that his case is different than Modica because Jordan could have faced consecutive sentences and the bail-jumping charge presented new factual and legal issues. But that is not different from Modica. In Modica, the defendant was initially charged with assault. 136 Wn. App. at 439. The State then added a witness-tampering count. Id. at 440. Modica, too, theoretically could have faced consecutive sentences, and witness tampering is factually and legally different from assault.

Perhaps because Jordan's situation fits so squarely with Modica, he turns to the Supreme Court of Minnesota for help from State v. Rhoads. 813 N.W.2d 880 (Minn. 2012). But that case is not applicable here for a number of reasons.

The Supreme Court of Minnesota has no authority over this Court. Moreover, that court's holding in Rhoads conspicuously departed from Washington law by formulating a bright-line rule that is directly at odds with Modica. 813 N.W.2d at 889-90 (after discussing Modica, holding that "when the State doubles the maximum possible punishment by filing an amended charge at a subsequent hearing ... the defendant must renew his waiver of counsel," including a colloquy on the maximum punishment). Contra Modica, 136 Wn. App. at 453 ("trial court was not required to *sua sponte* engage Modica in a second full colloquy in which it informed him of the new charge's maximum penalty"). For this Court to follow Jordan to Rhoads, it would have to ignore Modica.

Furthermore, Minnesota courts review trial courts' waiver-of-counsel decisions with entirely different standards of review: At a minimum, the appellate courts there use a "clearly erroneous" standard in which the trial court's decision can be overturned "when there is no reasonable evidence to support the finding or when an

appellate court is left with the definite and firm conviction that a mistake occurred." Rhoads, 813 N.W.2d at 885. But when the "facts are undisputed," as in Rhoads, the "question of whether a waiver of counsel was knowing and intelligent is a constitutional one we review de novo." Id. That is unquestionably much more intrusive upon trial-court decisions than Washington's abuse-of-discretion standard, where a trial court's decision "will not be disturbed on appeal unless no reasonable person would take the position adopted by the trial court." State v. Stenson, 132 Wn.2d 668, 756, 940 P.2d 1239 (1997). Rhoads is of no use to Jordan because this Court does not employ the kinds of rigid, bright-line rules that Minnesota courts do, and instead should afford the trial court great deference in determining Jordan's waiver.

Still, there is another distinction between Jordan's situation and Rhoads: In Rhoads, the defendant renewed his waiver *on the day of trial* and was *never arraigned* on the added charge. 813 N.W.2d at 889. There was nothing in the record to suggest that Rhoads *ever* comprehended that his jeopardy had increased until after he was convicted. Id. at 890 ("the facts and circumstances ... do not support a conclusion that Rhoads understood the increased possible punishment"). Here, Jordan was arraigned on the new

charge and then demonstrated his comprehension of the depth of his peril on several occasions afterward: For example, he moved to withdraw every prior guilty plea he had ever made because they affected his offender score. 1RP 50. And he signed a plea form that spelled out the maximum penalties, the standard ranges, and the unlikely possibility of consecutive sentences and also said, "I choose to represent myself." 1RP 50; CP 80-84.

After being adamant throughout his case that he wanted nothing but to enjoy the right to represent himself, Jordan cannot complain now that the trial court abused its discretion by honoring his wish. In fact, if the trial court had rejected that wish, Jordan surely — and rightly — would be demanding reversal for a violation of his right to self-representation. This Court should reject his arguments.

2. JORDAN'S ALFORD PLEA TO FELONY HARASSMENT WAS SUPPORTED BY A FACTUAL BASIS AND IS CONSTITUTIONAL.

Jordan next complains that his Alford plea to felony harassment was not factually supported because the victim did not recount her fear of Jordan's threats with words that mirror the statute. Jordan also summarily avers that this Court and our Supreme Court are wrong on the constitutionality of the state's

harassment statute. But a factual basis for an Alford plea does not require the court to be convinced beyond a reasonable doubt, only that the evidence, which can include any reliable source of information, is sufficient for a jury to conclude the defendant is guilty. In this case, the totality of the information in the probable-cause document was more than sufficient for a rational jury to conclude the victim had a reasonable fear that Jordan would carry out his threats. And this Court already has disposed of the same constitutional claim Jordan appears to be raising. His arguments fail.

a. Additional Relevant Facts.

Jordan's Alford plea included a statement of facts that said, "I agree that the court can review the probable cause certification and prosecutor's supplemental summary to find a factual basis for this plea and for sentencing." CP 91. The judge signed the plea statement under a paragraph that included, "There is a factual basis for the plea." CP 92.

Attached to the plea was a Certification for Determination of Probable Cause that fully recounted not only victim Shah's statements but statements of the numerous other witnesses to

Jordan's words and actions during the incident. CP 95-96. These are summarized in the Substantive Facts section, *supra*.

Specific to victim Shah, the probable cause statement said:

> Doctor Sachita Shah also witnessed Mr. Jordan's threatening behavior. Dr. Shah felt threatened when Mr. Jordan stated, "I'm going to get an AK47 and come back and kill all of you motherfuckers ... just like the navy yard." Doctor Shah stated she and her staff feared that Mr. Jordan could actually carry out his plan.

CP 95.

b. The Court Had Ample Factual Basis For The Plea.

In an Alford plea, the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction. In re Pers. Restraint of Cross, 178 Wn.2d 519, 521, 309 P.3d 1186 (2013), cert. denied sub nom. Cross v. Washington, 135 S. Ct. 1701, 191 L. Ed. 2d 679 (2015). A judge may accept such a plea only if it is made voluntarily, competently, with an understanding of the nature of the charge and the consequences of the plea, and when the judge is satisfied that there is a factual basis for the plea. Id.

To determine that a factual basis exists for a plea, the judge need not be convinced beyond a reasonable doubt that the defendant is in fact guilty. State v. Saas, 118 Wn.2d 37, 43, 820

P.2d 505 (1991) (citing State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976)). Instead, a factual basis exists if the evidence is sufficient for a jury to conclude that the defendant is guilty. Newton, at 370, 552 P.2d 682. The court may consider any reliable source of information to determine whether sufficient evidence exists to support the plea, as long as it is made part of the record at the time of the plea. State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

The crime of harassment requires that the "person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). In evaluating the sufficiency of the evidence for that element, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt that the victim had subjective fear, and using an objective standard, that the victim's fear in each case was reasonable. State v. Alvarez, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995). The facts must be examined assuming their truth and drawing all reasonable inferences from them. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Our courts do not require a victim of harassment to speak the magic words that the defendant placed her in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(b). Instead, courts consider the totality of the evidence to determine whether any rational jury could conclude that she was reasonably afraid. Circumstantial evidence is as reliable as direct evidence, and the State may prove its case with *only* circumstantial evidence. See, e.g., State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In Alvarez, this Court considered two distinct threats by the same defendant. 74 Wn. App. at 252-55. In the first case, Alvarez decapitated a pigeon and then threatened a neighbor by referring to the carcass and saying, "Shut up, bitch, or I'll take you out, too." Id. at 253. The victim testified that she was extremely fearful and emotionally shaken, and that she "was not convinced that he wasn't capable of killing me." But there was distance and a fence separating her from Alvarez, and the trial court did not specifically find that her fear was reasonable. Id. Nonetheless, this Court held

that the evidence was sufficient for the trial court to infer a subjective and objectively reasonable fear.[14] Id. at 262.

In Alvarez's second case, Alvarez threatened a teacher at his high school by mentioning dynamite and burning down the teacher's house. Id. at 254. The teacher testified that he was "agitated and concerned," so he locked up his lawnmower gas and reported the incident to a principal. Id. Alvarez contended that the teacher's statement of being "agitated and concerned" was insufficient to show even subjective fear. Id. at 262. This Court roundly rejected that, saying that the teacher's words should be considered along with all the other circumstances, and the totality was sufficient for a rational trier of fact to find Alvarez guilty beyond a reasonable doubt. Id. at 263.

Even more on point is State v. E.J.Y. 113 Wn. App. 940, 55 P.3d 673 (2002). There, middle-school staff members heard E.J.Y. say that he "should go get my gun and do like Columbine," and warn, "You're going to have another Columbine around here, you guys better watch out. It's not just white boys that go off. I might

[14] Our Supreme Court, in reviewing this Court's decision in Alvarez, also agreed that the "State met its burden of proof" in this harassment charge, "because there was sufficient evidence in the record for a rational trier of fact to find the necessary element of reasonable fear." State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

do it, too." Id. at 944. At trial, one victim testified that "I was *concerned* that [E.J.Y.] was making a threat that he *could* come back in and cause violence whether he was going to come back and shoot up the place...." Id. at 953 (emphasis added). The other victim testified that she felt "a little frightened" and believed E.J.Y. had meant what he said. Id. This Court found both victim statements, in the context of the words of the threats themselves and all the other circumstances, were sufficient for a rational trier of fact to find that both victims were subjectively and objectively afraid that the threat would be carried out. Id.

Turning to Jordan's case, the probable-cause document presented more than enough facts for a rational jury to find that Dr. Shah was subjectively and objectively afraid that Jordan would carry out his threat.

Jordan contends that Shah's statement was insufficient to conclude that Shah was even a target of the threat. But the probable-cause document states that Shah "witnessed Mr. Jordan's threatening behavior," which implies that she was present and witnessed all of it. CP 95. Jordan said he was going to "shoot everybody," and "there won't be a soul left standing." Id. And Shah specifically said she "felt threatened" when Jordan said he would

get a gun and "kill all of you motherfuckers." Id. Any jury could conclude that "all of you" included Shah.

Even taking in isolation the single paragraph pertaining to Shah, there were plenty of facts for a rational jury to conclude Shah was subjectively and objectively afraid. For one, the doctor said she "felt threatened" by Jordan's words. See, e.g., Alvarez, 74 Wn. App. at 262 ("agitated and concerned"); E.J.Y., 113 Wn. App. at 953 (one victim "concerned"; the other "a little frightened"). Shah also said she "feared that Mr. Jordan could actually carry out his plan." See, e.g., E.J.Y., 113 Wn. App. at 953 (one victim "concerned" that "he *could* come back in and cause violence"; the other believed he "meant what he said"); Alvarez, 74 Wn. App. at 253 ("was not convinced that he wasn't capable"). The standard is whether any jury could find Jordan guilty, and in this single paragraph, there were more than enough facts to do so.

Jordan's discussion of the semantical differences between "could," and "would" — with an analogy to thermonuclear annihilation — is quite interesting. AOB at 24-25. But it is irrelevant to the standard that applies to an Alford plea. This Court should consider Shah's statement along with the entire document, which portrays a series of very specific, violent threats that scared

not only Shah but everyone within earshot. For the factual basis to be insufficient for this Alford plea, it would have to be *impossible* for any rational jury to conclude that Shah was subjectively and objectively fearful that Jordan would carry out his threats to kill "all of you." That cannot be said here. In fact, it would be practically impossible for any rational jury to conclude that the doctor was *not* reasonably afraid.

Therefore, Jordan's Alford plea to felony harassment was supported by a sufficient factual basis.

c. The Felony Harassment Statute Is Constitutional.

i. Jordan's constitutional claim should not be considered because his bare, conclusory briefing is insufficient.

Statutes are presumed to be constitutional, and a party challenging the constitutionality of a statute has the heavy burden of proving its unconstitutionality beyond a reasonable doubt. State v. Blank, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). This Court will overrule precedent only when the party seeking to have the decision overruled meets its burden of demonstrating that the precedent is both incorrect and harmful. State v. Stalker, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009). Furthermore, an appellate

court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made." State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

This Court should decline to consider Jordan's constitutional challenge to the felony harassment statute because he has inadequately briefed the issue and provides only passing treatment. Jordan baldly declares that the state statute is unconstitutional, and makes a conclusory assertion that our Supreme Court is wrong. But he makes no effort to explain why, except for a cursory proclamation that Virginia v. Black overrules our Supreme Court. 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 525 (2003). Even if he might be right, which he is not, he cannot meet his high burdens of proof with conclusory declarations and unexplained citations. This Court should not address this argument.

ii. Our courts have specifically rejected Jordan's apparent argument.

In harassment cases, Washington uses an objective true threat test based upon how a reasonable person would foresee that the statement would be interpreted. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). True threats are unprotected speech under the First Amendment. Id. The objective true-threat test

comports with the First Amendment because it "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." State v. Schaler, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

Jordan's argument appears to be based on a single passage in Black:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

538 U.S. at 359-60 (internal quotation marks and citations removed).

Our Supreme Court specifically addressed Black, a case about a Virginia cross-burning law, when it decided Schaler, and concluded that Black is distinguishable because the statute at issue there required the speaker to intimidate the listener, which necessitates a greater mens rea than simply putting the listener in fear. Schaler, 169 Wn.2d at 287 n.4.

Two years later, this Court took head on the argument that Black requires a "subjective, speaker-based true threat analysis," as Jordan apparently would parrot. State v. Ballew, 167 Wn. App. 359, 369, 272 P.3d 925, review denied, 175 Wn.2d 1019 (2012). This Court dismissed this argument by citing Schaler's rejection of Black's applicability to Washington statutes. Id. at 368-69 ("because the State was not required to prove that Ballew meant to intimidate the listeners, Black does not support Ballew's argument").

Jordan also echoes Ballew's argument that some federal courts have held that a subjective test is required. But Ballew addressed this, too:

> We also note that the federal circuit courts are split regarding the effect of Black's true threat definition. We are not bound by these circuit courts, and the U.S. Supreme Court has not chosen to resolve this conflict within the circuits. Therefore, we continue to follow the law, as stated by the state supreme court.

Id. at 369.[15]

[15] The Ballew court surveyed 14 federal circuit-court cases in considering this argument, including the two 9th Circuit cases Jordan now cites. 167 Wn. App. at 369 n.34. The two Jordan cites, United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) and United States v. Bagdasarian, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011), are the only two surveyed that specifically held that a subjective test is required. Ballew, 167 Wn. App. at 369 n.34.

This Court has already fully and fairly considered and rejected the same constitutional argument that Jordan is making.[16] He has failed to meet his burden of showing that Ballew, Schaler and Kilburn are incorrect and harmful, and he certainly has failed to prove beyond a reasonable doubt that the statute is unconstitutional. His argument fails.

3. JORDAN'S BAIL-JUMPING CONVICTION WAS VALID.

Jordan lastly contends that his bail-jumping conviction is invalid because the charging document was constitutionally deficient in that it did not specify the date of his required court appearance. To the contrary, the charging document mirrored the statute, contained all the essential elements, and even specified the required court date. Jordan can show no prejudice. This claim also fails.

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[16] The U.S. Supreme Court this past summer decided Elonis v. United States, which had been expected to resolve, or at least address, the mens rea requirement under the First Amendment. 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). However, Elonis held only that the mens rea required under a particular federal threat statute was greater than negligence, and the Supreme Court said "it is not necessary to consider any First Amendment issues." Id. at 2012. State courts already have noted this distinction. See People v. Murillo, 238 Cal. App. 4th 1122, 1129, 190 Cal. Rptr. 3d 119, 124 (2015), reh'g denied (Aug. 6, 2015), review denied (Oct. 14, 2015) (the state supreme court's approval of the negligence mens rea, practically identical to Washington's, still controls in light of the limited holding in Elonis).

a. Additional Relevant Facts.

Jordan was in custody from arraignment on October 2, 2013 until December 11, 2013. 3RP 51. As the court ordered his release to the Community Center for Alternative Programs (CCAP), it told Jordan that his next court date would be January 17, and Jordan replied, "Okay." 3RP 53. He failed to appear on January 17, 2014. 3RP 55. After he was arrested on the warrant in June 2014, he remained in custody through sentencing. 3RP 55; 2RP 197. The January 17, 2014, hearing was his only failure to appear.

When Jordan reappeared in court on June 26, 2014, the court discussed with Jordan his previous release and said, "you failed to appear on January 17." 3RP 57. The State notified him that it intended to add a bail-jumping charge. 3RP 62. The court explained that "bail jumping means you didn't show up for court." 3RP 63. Jordan immediately replied, "You knew where I was at, didn't you? 111 Cedar Street is where I live." Id. The court went on to remind Jordan that "in December ... I decided that the fair thing to do was to let you out to be in public and—on your promise to reappear because the trial was taking a while to get started." 3RP 64. Jordan replied, "It certainly was."

The State filed a Second Amended Information in the trial court on August 26, 2014. As to the Bail Jumping charge, the information said:

> That the defendant, Leland Alfred Jordan in King County, Washington, on or about January 17, 2014, being charged with Felony Harassment, a Class C felony, and having been released by court order with knowledge of the requirement of a subsequent personal appearance before King County Superior Court, a court of the state of Washington, did fail to appear as required.

CP 93.[17]

Jordan responded to the amendment by explaining at length that after the State had been granted a "two month more continuance," the court had "sentenced me to go to the streets to some kind of program," and he did not feel that the court had the "lawful authority to give me the two months." 1RP 150-51. He added that the court had "violated all the rules, that he had lost jurisdiction on me ... and so I missed a court date." 1RP 151.

b. The Second Amended Information Was Not Deficient.

A charging document must allege facts that support every element of the offense charged and must adequately identify the

[17] This amendment merely corrected the date of the offense. Jordan had previously been charged with bail jumping by First Amended Information on August 1, 2014, and was arraigned the same day. 1RP 32; CP 16-17.

crime charged. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007) (penalty classification of bail jumping not an essential element). A charging document satisfies these requirements when it states all the essential elements of the crime charged. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). It is sufficient to charge in the language of the statute if the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 99.

A challenge to the sufficiency of the charging document is reviewed de novo. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). Where, as here, the defendant challenges the sufficiency of the information for the first time on appeal, this Court liberally construes the information in favor of validity and asks: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

i. The essential elements and the relevant date appear in the charging document.

A person commits bail jumping when, having been released by court order or admitted to bail with knowledge of the requirement

of a subsequent personal appearance before a court, he fails to appear. RCW 9A.76.170(1). Thus, the three essential elements of bail jumping are (1) the defendant was held for, charged with, or convicted of a particular crime; (2) the defendant was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and (3) the defendant knowingly failed to appear as required. Williams, 162 Wn.2d at 183-84.

Contrary to Jordan's assertions, the Second Amended Information in his case contained all the essential elements, including the knowledge element, and mirrored the statute, so it was not deficient. And *the document specified the hearing date Jordan knew about*: It stated that Jordan had "knowledge of *the requirement* of a subsequent personal appearance," and that on January 17, 2014, he "did fail to appear *as required*." CP 93. The phrase "*as required*" clearly connects the date of failure to appear with the knowledge of *the requirement*. This Court should liberally construe this document in favor of validity and find it sufficient.

Still, Jordan claims that the specific hearing date is an essential part of the knowledge element that must be stated separately in the information. This is baseless. He offers no authority stating his proposition, and the State can find none. So

he instead argues that because *at trial* the State would have to prove he knew of the specific date he missed, then this must be spelled out separately in the charging document. That is simply not supported by the case law.

The case he cites, State v. Cardwell, was about *sufficiency of the evidence* for bail jumping, and held that because the State had not proven that the defendant was given notice of the specific court date, then the evidence was insufficient to convict. 155 Wn. App. 41, 47, 226 P.3d 243 (2010) (defendant had been released pre-charging with no specific future court date, and no evidence showed he personally received notice of arraignment). This cannot be conflated into an essential element as it applies to the charging document.

At worst, the information in Jordan's case might be described as vague, because even though it clearly contained the essential knowledge element, it did not spell out the specific court date with excruciating particularity. Courts distinguish between charging documents that are constitutionally insufficient and those that are merely vague. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). Vagueness is what bills of particulars are for. See id. at 687 (charging document that states statutory elements

but is vague in some other significant matter may be corrected by bill of particulars). But Jordan did not ask for one; thus he is not entitled to challenge the information now. See State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) ("defendant is not entitled to challenge the information on appeal if he failed to request the bill of particulars at an earlier time").

ii. There was no prejudice.

When a charging document contains the essential elements, the conviction must be upheld unless the defendant shows prejudice. Kjorsvik, 117 Wn.2d at 105-06. Jordan must show that he actually lacked notice of all the essential elements, but he cannot do so.

Jordan missed only one court date, so there was no question about which date the State had to prove he knew about. See State v. Greathouse, 113 Wn. App. 889, 906, 56 P.3d 569 (2002) (in embezzlement case, no prejudice as to notice of victim because "[o]nly one entity placed fuel under defendant's custody, possession or control in a position of trust: his employer"). Second, the sworn Prosecutor's Supplemental Statement attached to the information, which formed the factual basis for the bail-jumping

charge, very clearly stated that the date in question was January 17, 2014, and that Jordan had been given notice. CP 97. See also Greathouse, 113 Wn. App. at 906 (no prejudice because "the State's theory of the case was spelled out in detail in the declaration of probable cause."); Kjorsvik, 117 Wn.2d at 111 (court looked to certificate of probable cause to find sufficient notice).

Additionally, on Jordan's first day back in court after his months-long absence, the court explained what bail jumping meant and discussed with Jordan his December release and subsequent failure to appear. 3RP 63. And in the moments after the State filed the Second Amended Information, Jordan immediately admitted that he knew of the court date but failed to appear because he rejected the court's authority. 1RP 151. When he pleaded guilty, he signed a plea statement that agreed the elements of bail jumping were set forth in the second amended information, and during his plea colloquy he said he understood the second amended information and had no questions. CP 79; 1RP 160.

Even if the information was vague, Jordan cannot show he was prejudiced. His bail-jumping conviction is valid.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Jordan's judgment and sentence.

DATED this 10TH day of November, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at richard@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Leland Alfred Jordan, Cause No. 72728-1, 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 10th day of November, 2015.

Name:
Done in Seattle, Washington