SUPREME COURT NO. 96663-0
COURT OF APPEALS NO. 76806-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEITH ADAIR DAVIS,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully asks this court to review the published decision of the Court of Appeals in State v. Davis, No. 76806-9, slip op., (Wash. Ct. App. Div. I, November 5, 2018). Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Under what circumstances does a pro se defendant voluntarily leave trial court proceedings, and what standard of review applies on appeal when the defendant claims his departure was not voluntary?

2. Under what circumstances may a trial court remove a pro se defendant from the courtroom against his will, and what standard of review applies to such a removal?

C. STATEMENT OF THE CASE

1. TRIAL COURT PROCEEDINGS.

On May 19, 2014, Keith Adair Davis was charged with two counts of possessing a stolen vehicle for crimes occurring on two separate dates, and a single count of possession of a controlled substance. The court attempted to engage him in the drug diversion court program but the attempt failed. He also committed

and was convicted of another crime in another county during that time.

On February 6, 2015, Davis was back in King County custody and he waived his right to counsel and invoked his right to represent himself. 1RP 1-13.[1] For the next year, through seven different hearings with almost as many judges, Davis brought motions and ostensibly prepared for trial—a repeated request was for stand-by counsel. 1RP 15-135. These requests were denied.[2]

In the opening days of his trial Davis appeared before two superior court judges and told each of them multiple times that he did not want to be in court, that he knew trial would continue without him if he departed, and that he did not care if that occurred.

Davis was first assigned to the courtroom of the Honorable Lori K. Smith on February 27, 2017. Davis had medical conditions that required periodic breaks. Together with counsel for the jail, Judge Smith entered an agreement with Davis whereby he would

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[1] The Verbatim Report of Proceedings are referenced as follows: "1RP" refers to the consecutively paginated transcripts produced by Ballard Transcription, and "2RP" refers to the consecutively paginated transcripts produced by Kevin Moll, CRR, CCP.

[2] Davis has at least twice before represented himself against a felony charge in superior courts in Washington. 1RP 18-19, 30 (Thurston County) and 1RP 9, 12 (King County). In at least one of those cases, Davis was disruptive at trial and then challenged on appeal the trial court's rulings on his pro se status. State v. Davis, 2016 WL 7217260 (December 13, 2016).

be allowed a break each hour to use the bathroom. He agreed that this would be sufficient to meet his needs. 1RP 155-57.

When Judge Smith denied Davis's motion to continue trial, he became frustrated and told the court that he would withdraw from the case and "You'll go to trial without me." 1RP 184-88. When the court tried to proceed, Davis said again, "You just go to trial without me." 1RP 189. When the court tried to clarify the comment, Davis repeated himself with even greater precision and emphasis: "I'm not -- I'm done. I -- I quit. I'm done representing myself. ... I'm not doing it anymore." 1RP 190. He continued,

> I'm done. I'm done. I quit. ... I'm not coming to trial. I've already said I'm not going to represent myself. I -- I can no longer continue. I -- my health. *Let's go the health route.* We'll do that route. I don't know. I'm not done preparing for trial. Of course I'm not going to -- I'm not -- I'm done. There's no -- there's no point in this. There's no point in this.

1RP 191 (emphasis added). Just to put a finer point on it and to make clear that he understood the consequences of leaving, he added,

> So, you guys can hold trial without me. Right? You do that? ... Because I'm not coming. ... It'll last for an hour and you guys can be done with it. And do what you do.

1RP 191-92.

He made the following five comments in the same vein to Judge Smith. 1RP 193 ("I quit."); 195 ("Yeah, well, we can call it what we want to call it. I'm done."); 196 ("No. I am ... not going to continue" and "You hold trial without me. ... That's what you do."); 197 ("I don't care. I'm done with it."); 198 ("I'm done with it. So you ... I'm not coming. So you're going to be doing your trial without me. ... That's what you do.").

Judge Smith recused herself from the case after a day because she realized she and Davis knew someone in common. 1RP 220. Judge Smith filed detailed written rulings to memorialize the decisions she had made that day. CP 77-80.

The case was re-assigned to the Honorable Julie Spector on February 28th. 1RP 225. Judge Spector had read Judge Smith's rulings. 1RP 234. Judge Spector had also dealt with Davis earlier in the case on pro se issues. 1RP 36-60.

From the outset of proceedings on February 28, Davis peppered the judge with motions related to his pro se status. 1RP 225. When cautioned about interrupting other lawyers, he remarked, "You going to hold me in contempt? I don't care. What is that? I was contemptive (sic) when they filed charges on me. So it doesn't matter to me." 1RP 237.

On the next court day, March 2nd, when continuances were denied again, Davis screamed at the judge about on-going investigations. 1RP 376. Davis also repeatedly made statements to Judge Spector indicating that he did not want to remain in court. In preparing for jury selection, Judge Spector warned Davis that he would be removed if he was disruptive. He replied, "You can remove me now. What have we been doing here? I don't even want to be here. So remove me. I don't care. I told you that. You can hold your trial without me. Who cares[?] ... You can hold your trial at Woodland Park Zoo. Do that." 1RP 380. When the court reminded him that it was his trial, he retorted, "It doesn't matter to me. It's not my trial. It's the state's trial. It's a trial full of crap." 1RP 381. When the court told him that jury selection would begin Monday morning at 9 a.m., Davis said, "With or without me...I'm not going to be here." 1RP 382.

On March 7th, the court noticed that Davis was drinking excessive water to force the court to call recesses, so the court restricted Davis's water intake as had been agreed. Davis was angry. When the court excused the jury after several interruptions, the defendant shouted out, "Thank you. You can hold your trial

without me. How's that?" 2RP 205. The court replied, "I'm going to do that." 2RP 205. Davis then said,

> Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court and your ridiculous charges, and your little games and that you do that. Load somebody else up in the prison system. Get your next victim lined up. I'm done with it. I could care less.

2RP 205-06.

The defendant then attempted to physically leave the courtroom and the judge directed that he be detained.

> THE COURT: All right. *Wait a minute.* Mr. Davis, you have one more --
>
> THE DEFENDANT: What do you want? I need water. I'm done talking. What's there to talk about? You're playing a game. I'm done playing your games.
>
> THE COURT: All right. The record's going to reflect –
>
> THE DEFENDANT: All right. The record this – all right, for the record this. I said that, I mean that. I'm not going to continue to be a gentleman and polite. I could care less what you say. I'm done with it.
>
> THE COURT: I'm going to find that you are voluntarily absenting yourself –
>
> THE DEFENDANT: Whatever. Do whatever you want.
>
> THE COURT: -- from these proceedings.
>
> THE DEFENDANT: You're going to deny me water when I need water, whatever.

THE COURT: *I need him present* so I can make the record, so don't take him out yet.

THE DEFENDANT: I don't care about your record.

THE COURT: Well, I do.

THE DEFENDANT: I don't. And I know your buddies up at the appellate court ain't gonna give a shit either, so fuck the record.

[The Court attempts to review the sequence of events]

THE DEFENDANT: We gonna do this, we gonna play the kangaroo game. I don't care, either. *You can keep playing, play with yourself.* Stop playing with me. Who cares?

THE COURT: This is not about the –

THE DEFENDANT: I don't care.

2RP 206-07.

After Davis's water-related outburst, Judge Spector said, "I am going to find that you are voluntarily absenting yourself ... from these proceedings." 2RP 206. See also 2RP 208 ("I need to proceed with the trial, and I am finding that he is voluntarily absenting himself from the rest of these proceedings."). The court's written findings also provided that the defendant had voluntarily absented himself. CP 142 (finding #11). Davis did not assign error to these very specific oral and written findings of fact. Brief of Appellant, at 1. The court also prepared findings justifying removal

of Davis against his will, specifically finding that he had deliberately increased his water consumption as an excuse to take frequent breaks and thereby disrupt the proceedings at inopportune times. CP 140-43; 2RP 243-45.

The testimony of two witnesses was taken during Davis's absence. 2RP 208-36. The next day, he reappeared in court and remained through the rest of the trial, although he continued to interrupt and to make rude, sarcastic and inappropriate comments during the trial and closing arguments. 2RP 241-413.

2. COURT OF APPEALS DECISION.

The Court of Appeals first noted that the fundamental question in the case was whether the trial court had abused its discretion in finding that Davis had voluntarily absented himself from the proceedings. Slip op. at 10 (citing State v. Garza, 150 Wn.2d 360, 365-66, 77 P.3d 347 (2003)). The court appropriately recognized that the first and third factors in the three-factor Garza test were meant to analyze the intent of a defendant who had mysteriously vanished from trial, rather than one who vocally stated

a desire to leave and, thus, those factors were "not readily applicable to the facts in this case." Slip op. at 11.[3]

But, rather than tailor the voluntary absence principles to these circumstances, the Court of Appeals appears to have concluded that Washington law provided no guidance at all and that this was a question of first impression.

> Washington case law has not yet addressed whether and how a defendant may voluntary (sic) absent himself or herself by requesting to leave the courtroom. Our voluntary absence cases consider only scenarios in which the defendant either does not appear for court or does not return after removal.

Slip op. at 10. The court later noted that there was a "lack of Washington case law on the question" of voluntary departure during trial. Slip op. at 11.

Not finding any local law, the Court of Appeals compared this case to State v. Menefee, 268 Or. App. 154, 341 P.3d 229 (2014). The appellate court in Menefee reversed because a trial judge inappropriately excused the pro se defendant from court on the basis of voluntary departure when, in fact, Menefee had

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[3] When a defendant disappears during trial the trial court should: 1) inquire into the disappearance to determine if it was voluntary; 2) make a preliminary finding of voluntariness; and 3) give the defendant a chance to explain upon his return. Garza, 150 Wn.2d at 367.

changed his mind and insisted that he wanted to stay. Menefee, at 184-85.

The Court of Appeals here found the facts in Davis to "resemble" those in Menefee. The Court of Appeals concluded that Davis had been "removed" based on the trial court's *alternative* findings of removal. It ignored the fact that, unlike Menefee, Davis had never asked to stay. The court also failed to address the trial court's express oral and written findings that Davis's departure was voluntary. The court also examined only a single demand to leave, without considering the pattern of many similar statements Davis had made to Judges Smith and Spector over the preceding days. Slip op. at 11-12. Thus, based only on comparison with Menefee, the Court of Appeals reversed the trial court's express findings that Davis had voluntarily chosen to leave court. Slip op. at 10-12.

The appellate court next turned to the trial court's ruling that removal was appropriate. Slip op. at 12-14. The Court of Appeals affirmed the trial court's ruling that removed Davis against his will. Slip op. at 12-14. However, the Court of Appeals then held that, although Davis could be *removed*, the *trial should not have continued* unless additional steps were taken to ensure that Davis was defended in court. Slip op. at 14-20.

The Court of Appeals opined that "Washington cases have not yet addressed the propriety of going forward with trial after a court properly removes a self-represented defendant for disruptive behavior." Slip op. at 14-15. It rejected the State's reliance on State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991), which seemed to grant courts authority to remove obstructive defendants, and held instead that DeWeese was distinguishable because DeWeese had voluntarily remained away from court, rather than being removed against his will. Slip op. at 14 n.5. The court concluded that "proceeding with trial in Davis's absence violated his Sixth Amendment right to representation." Slip op. at 20.

The Court of Appeals expressed sympathy for the trial court "where there was no directly applicable Washington case law," but it offered only that trial courts might "explore a number of alternatives," without saying whether any of those alternatives would have fixed the alleged Sixth Amendment violation in Davis's case, or whether such measures would prevent future Sixth Amendment violations. Slip op. at 19 n.7.

The State moved for reconsideration but that motion was denied without comment. Appendix B. The State now files this Petition for Review.

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

This Court may review a decision of the Court of Appeals that conflicts with a decision of the Supreme Court or another appellate court, that involves a significant question of law under the Constitution of the State of Washington or the United States, or that involves an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(1) - (4). This case meets all those criteria.

The Court of Appeals decision conflicts with this Court's precedents granting wide discretion to trial courts to handle the very difficult circumstances of a pro se defendant departing court during trial. RAP 13.4(b)(1). The steps a trial court must take before granting a pro se defendant's wish to absent himself from trial and the steps a trial court may take to ban a pro se defendant from trial are plainly rooted in the fundamental constitutional rights of a defendant to counsel and to be present at trial. RAP 13.4(b)(3). And, of course, these are clearly matters of substantial public and judicial interest, as the fair administration of trials in our state's courts demands both that defendants be protected from ex parte

trials, but also that the courts not be burdened with litigants not beholden to the rules. RAP 13.4(b)(4).

The State respectfully asks this court to grant review in this case because the Court of Appeals failed to give proper deference to the trial court's voluntary absence finding and, to complicate matters, muddled the ordinary deferential standards of review that apply in these circumstances. Because the decision is published, it will confound rather than provide guidance to lower courts. Moreover, the appellate decision may embolden defendants like Davis who tactically use pro se status to create havoc.

1. THE DECISION BELOW CLOUDS THE STANDARD OF REVIEW REGARDING A TRIAL COURT'S FINDING THAT A DEFENDANT HAS VOLUNTARILY LEFT TRIAL.

The question is settled that a criminal defendant may voluntarily refuse to attend his own trial. State v. DeWeese, 117 Wn.2d 369, 375 816 P.2d 1 (1991). When he departs, the sole question is whether the departure was voluntary. State v. Thomson, 123 Wn.2d 877, 881, 872 P.2d 1097(1994).

The Court of Appeals never established or applied the correct standard of review on the voluntary absence question in this case. Instead, the court created confusion in the law where clarity

is needed. The Court of Appeals began by suggesting uncertainty where there is none.

> Washington case law has not yet addressed whether and how a defendant may voluntary (sic) absent himself or herself by requesting to leave the courtroom. Our voluntary absence cases consider only scenarios in which the defendant either does not appear for court or does not return after removal.

Slip op. at 10. No special standard is needed. This Court has unequivocally held that a defendant may voluntarily refuse to return to court after being removed. DeWeese, at 374. It is inconceivable that a different standard should apply depending on whether a defendant decides to leave court versus decides to stay away after having already been removed. The touchstone is always going to be whether the choice was voluntary. This is a factual assessment for the trial court.

The Court of Appeals also clouded the standard by requiring that a trial court "indulge every presumption against waiver." Slip op. at 10. This presumption was improperly imported from the inapposite analysis in State v. Garza, 150 Wn.2d 360, 362, 77 P.3d 347 (2003). The Court of Appeals recognized that a defendant who avowedly absents himself from court is different from one who simply vanishes, and the court correctly recognized that the Garza

factors were "most applicable to situations where a defendant does not appear for court or does not return to court after removal" and "are not readily applicable to the facts in this case." Slip op. at 11. It makes no sense that a trial court faced with a defendant shouting his intent to leave court would stop and inquire into the disappearance, make a preliminary finding of voluntariness, and give the defendant a chance to explain upon his return. Garza, 150 Wn.2d at 367.

The same should be true of the "presumption against waiver" language in Garza. Such a presumption makes sense in Garza-type situations, when a trial judge is attempting to deduce why a defendant vanished from trial without a trace. But the presumption is ill-suited to the circumstances here, where a defendant shouts his desire to leave, attempts to leave, and has been making similar statements for days. The trial court can see and hear the defendant as he makes his plans known. In such a case, the appellate court should give great deference to the trial court's judgment.

The Court of Appeals failed to properly apply the abuse of discretion standard, perhaps because it was looking at the question through the flawed standards discussed above. The court seemed

to recognize that the only question was "whether the defendant's absence was voluntary" and that it should consider the totality of the circumstances. Slip op. at 10. But the appellate court then ignored the trial court's express oral and written findings that the defendant's departure was voluntary. These findings were unchallenged on appeal and should have been verities.

The findings were supported by the multiple statements Davis had made to Judges Smith and Spector over the previous days, they were consistent with his efforts to physically leave the court, and they were consistent with his likely deteriorating mood, as the realization that the evidence against him was strong and that he had no defense to muster.

The appellate court's reliance on Menefee was also misplaced. The record in that case showed that Menefee had initially asked to leave, had changed his mind and insisted that he be allowed to stay, and had dared the judge to remove him. Menefee, at 159-63. Without question, the judge in that case erroneously ruled that Menefee's absence was voluntary when it was, in fact, forced. No such thing occurred in this case. Davis never insisted that he wanted to stay nor did he dare the court to force his departure. He simply shouted that he was finished with

participating, demanded to be allowed to leave, and tried to physically depart.[4]

By declaring that there is confusion in Washington law on whether a person can voluntarily depart their own trial and by adopting an unwarranted "all presumptions against waiver" standard, the Court of Appeals decision in this case has made a complex area even harder for trial judges. This Court should grant review to correct the standard of review and to illustrate how, under these facts, the trial court did not abuse its discretion when it concluded that Davis wanted to leave.

2. THE DECISION BELOW ADOPTS AN IMPROPER STANDARD OF REVIEW FOR WHEN A TRIAL COURT MAY BANISH A PRO SE DEFENDANT FROM COURT FOLLOWING DISRUPTIVE BEHAVIOR.

The Court of Appeals decision is also problematic with regard to the trial court's alternative ruling that Davis had disrupted the proceedings and could be forcibly removed.[5] On the one hand, the decision holds that the trial court need not have considered

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[4] The trial court's alternative findings – voluntary departure and a basis to remove Davis against his will – are consistent with each other. It can certainly be said from this record both that Davis wanted to leave and that the trial court believed he had become too disruptive to continue.

[5] If this Court were to reverse the Court of Appeals on the voluntary withdrawal question, then it would not need to address whether removal was appropriate.

measures less restrictive than removal before ordering Davis removed, because such measures are preferred but not mandated. Slip. op. at 14. But, the court then observed that

> Washington cases have not yet addressed the propriety of going forward with trial after a court properly removes a self-represented defendant for disruptive behavior. After review of cases from other jurisdictions, we conclude that, in this case, proceeding with trial in Davis's absence violated his Sixth Amendment right to representation.

Slip op. at 14-15. The court based its reasoning on a series of cases ostensibly holding that a pro se defendant who is removed from court does not automatically abandon his right to representation. Slip op. at 15-19. This reasoning seems to transform the so-called "preferred" measures into mandates, or at least preferences ignored at the risk of reversal.

Such reasoning also raises a series of thorny questions that the opinion does not answer. For instance, why does the defendant's preexisting waiver of counsel not suffice as a waiver of representation, especially where, as with Davis, he clearly knew that leaving trial would mean that it would continue without him? Can a lawyer be appointed in violation of a defendant's Faretta[6] rights in order to supply a lawyer after the defendant has acted out?

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[6] Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Must a trial court then grant a lengthy continuance to the new lawyer so that the lawyer can prepare? Mustn't the jury be excused during that period of time? Isn't that tantamount to granting a mistrial? Doesn't granting a lawyer and a continuance and a mistrial simply grant the defendant exactly what he has sought, i.e., disruption of the trial, and thereby encourage such tactics?

Nor are the court's suggested alternative approaches particularly helpful. Slip op. at 19 n.7. A further colloquy on waiver would have been self-defeating because Davis had already waived counsel and he was acting out simply because he regretted his choice. A recess might have calmed matters, but it would not necessarily have done so, and how many days must the court try as the jury waits? Video conferences or restraints might also have been attempted, but again, are such measures mandated or simply suggested? Restraining a volatile defendant in the courtroom is fraught with peril, both physical and to the defendant's right to a fair trial. And, appointing a new lawyer simply rewards his misconduct and encourages pro se defendants to act out in the future. Such concerns show the wisdom of the "no one formula" approach that respects the discretion of the trial court judge. DeWeese, at 380

(quoting Illinois v. Allen, 397 U.S. 337, 343-44, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

E. CONCLUSION

This case, like DeWeese twenty seven years ago, "involves both the limits which must exist on the indigent defendant's choice of appointed counsel and the necessary consequences which adhere to a defendant's right of self-representation." State v. DeWeese, 117 Wn.2d 369, 375 816 P.2d 1 (1991). By altering the standard of review that applies to both the voluntariness and the removal rulings, the Court of Appeals decision has sown confusion in the law. Review is warranted under RAP 13.4(b)(1)-(4).

DATED this 20th day of December, 2018.

Respectfully submitted,

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APPENDIX A

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CASE #: 76806-9-I
State of Washington, Respondent vs. Keith Adair Davis, Appellant

King County, Cause No. 14-1-00794-5SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm in part, reverse in part, and remand for a new trial."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Honorable Julie Spector
Keith Adair Davis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEITH ADAIR DAVIS, Appellant.	No. 76806-9-I DIVISION ONE PUBLISHED OPINION FILED: November 5, 2018

CHUN, J. — Defendant appeals a judgment convicting him of two counts of possession of a stolen vehicle and one count of possession of a controlled substance. He assigns error to the trial court's decisions to (1) deny his motions for standby counsel, (2) remove him from the courtroom during trial, and (3) proceed with trial in his absence while he was self-represented.

The trial court did not abuse its discretion in denying Davis's requests for standby counsel. Nor did the trial court abuse its discretion in removing Davis from the courtroom during trial, after it warned him, due to his disruptive behavior. The court, however, allowed two material witnesses to testify in Davis's absence, with an empty defense table, and it did not afford him an opportunity to cross-examine either witness. For the reasons set forth below, we conclude this decision violated Davis's Sixth Amendment right to representation.

We affirm Davis's criminal judgment and sentence as to count 1 (possession of stolen vehicle). However, as the portion of the trial held in Davis's

absence included testimony to support counts 2 (possession of a stolen vehicle) and 3 (possession of a controlled substance), we reverse as to those counts and remand.

I.
BACKGROUND

On January 23, 2014, Sergeant Timothy Gillette of the King County Sherriff's Office arrested Davis for possession of a stolen Hyundai vehicle.

Two and a half weeks later, on February 11, 2014, Officer Danny Graf of the Federal Way Police Department observed a Buick parked near a park-and-ride and saw Davis standing outside the car, making furtive movements. As Davis got into the car to drive away, Officer Graf recorded the license plate. The owner had reported the vehicle as stolen. Officer Graf then initiated a traffic stop and arrested Davis for possession of a stolen vehicle – the Buick. Officer Justin Antholt, also of the Federal Way Police Department, arrived as backup and conducted a search incident to arrest. He discovered 2.18 grams of crack cocaine in Davis's shirt pocket.

On May 19, 2014, the State charged Davis with two counts of possession of a stolen vehicle, and one count of possession of a controlled substance. On February 6, 2015, Davis moved to proceed without legal counsel. The court granted the motion. During the trial court's colloquy to assure a proper waiver, Davis requested standby counsel. The court warned Davis it would likely not grant such a request, but told him he could file a motion.

Davis moved for standby counsel at a case setting hearing on January 28, 2016.[1] The court explained to Davis that he did not have a right to standby counsel and ordering such counsel could raise ethical and practical concerns. Davis then elaborated on his reasons for requesting standby counsel, namely access to office equipment, and unfamiliarity with the judicial process. The trial court denied Davis's motion.

At another case setting hearing on February 11, 2016, Davis again moved for standby counsel. Davis stated he needed standby counsel because "there aren't any resources available and they're limited to my health[2] as well. I may not be able to proceed." The trial court stated Washington law does not favor standby counsel. The court denied the motion.

On April 1, 2016, Davis renewed his motion for standby counsel. Citing State v. Romero, 95 Wn. App. 323, 975 P.2d 564 (1999), the trial court reiterated to Davis that he did not have a right to standby counsel. Davis claimed an "implied right" to standby counsel in the event he could not continue representing himself. The court declined to order standby counsel, and stated Davis must choose between having counsel and representing himself. Davis chose to proceed without a lawyer.

Davis made another motion for standby counsel on May 10, 2016. The trial court asked if Davis's circumstances had changed since his last motion for

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[1]The case was significantly delayed because the trial court originally transferred it to Drug Court. Additionally, during Davis's release in this matter, he was arrested in Thurston County, charged with assault, and convicted there.

[2] Davis suffers from several medical conditions, including active multiple sclerosis, a ruptured hernia, and an obstructed bowel. Davis used a wheelchair during the trial.

standby counsel. In response, Davis referenced "doctor appointments" and being a "layperson." Seeing no change in circumstances, the trial court denied Davis's motion.

On February 27, 2017, the parties appeared for pretrial hearings. Davis moved for a continuance. The trial court denied the request, as trial was set to begin the next day and the case had already been significantly delayed.[3] Davis then stated he wanted to "withdraw" as his counsel and that the court could go to trial without him. The court attempted to clarify Davis's statements and asked him if he was requesting counsel when he said he wanted to withdraw, but Davis just repeated he would not come to trial and cited health issues. The trial court denied Davis's motion to withdraw as counsel because it would unnecessarily delay trial. The court also declined to appoint standby counsel.

Trial started the next day and Davis moved for standby counsel and a continuance. The court denied both motions because it had already ruled on them. The case proceeded to trial.

After a CrR 3.5 hearing, Davis claimed he could not continue with the trial because of excessive pain. Davis again moved for a continuance and the trial court told him it had already denied the motion. Davis stated he was "unable to continue as [his] own counsel." The court reminded Davis it had denied that motion as well. In an attempt to advise Davis of what was expected at trial, the court warned Davis it would remove him if he acted disruptively. Davis said he

[3] The court had already continued the case considerably to allow Davis to hire an investigator and prepare for trial.

did not care and that the court could hold trial without him.

Davis appeared for trial on March 7, 2017. In the middle of the afternoon, during the State's examination of Officer Antholt, the court excused Davis for a restroom break. When Davis returned, he noticed the water had been removed from his table. He began banging his fists on the table, screaming he needed water. The court told Davis the water was removed because Davis took restroom breaks every twenty-five minutes. The court noted Davis had consumed twice as much water as the day before and that the proceeding would soon adjourn for the day. The court tried to proceed with trial. The State attempted to continue its examination of Officer Antholt, but Davis repeatedly interrupted to make comments about the water. The trial court temporarily retired the jury and the following exchange took place:

> THE COURT: I'm going to take the jury back now.
>
> THE DEFENDANT: Thank you. You can hold your trial without me. How's that?
>
> THE COURT: I'm going to do that.
>
> THE DEFENDANT: Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court and your ridiculous charges, and your little games and that you do that. Load somebody else up in the prison system. Get your next victim lined up. I'm done with it. I could care less.
>
> THE COURT: All right. Wait a minute. Mr. Davis, you have one more--
>
> THE DEFENDANT: What do you want? I need water. I'm done talking. What's there to talk about? You're playing a game. I'm done playing your games.
>
> THE COURT: All right. The record's going to reflect--
>
> THE DEFENDANT: All right. The record this -- all right, for the record this. I said that, I mean that. I'm not going to continue to be a gentleman and polite. I could care less what you say. I'm done with it.

THE COURT: I'm going to find that you are voluntarily absenting yourself--

THE DEFENDANT: Whatever. Do whatever you want.

THE COURT: --from these proceedings.

THE DEFENDANT: You're going to deny me water when I need water, whatever.

THE COURT: I need him present so I can make the record, so don't take him out yet.

THE DEFENDANT: I don't care about your record.

THE COURT: Well, I do.

THE DEFENDANT: I don't. And I know your buddies up at the appellate court ain't gonna give a shit either, so fuck the record.

THE COURT: So the record should reflect that Mr. Davis has been given twice as much water as he had yesterday and, therefore, he's--

THE DEFENDANT: So what?

THE COURT: Had to use the restroom twice as much.

THE DEFENDANT: I had to use the restroom because I had a digestive dysfunction. I piss a lot. Ask the god damn -- the officers. I piss.

THE COURT: Can you keep your voice down?

THE DEFENDANT: No, I'm not. Freedom of expression. You don't want to listen then shut your ears.

THE COURT: So at about -- ten after 3:00 he was brought back here and I've explained to him that--

THE DEFENDANT: We gonna do this, we gonna play the kangaroo game. I don't care, either. You can keep playing, play with yourself. Stop playing with me. Who cares?

THE COURT: This is not about the--

THE DEFENDANT: I don't care.

THE COURT: This is about you disrupting the trial, delaying the trial.

THE DEFENDANT: Doesn't matter what it's about. What it's really about, nothing.

THE COURT: Screaming at the top of his lungs, the jury--

THE DEFENDANT: And I'm going to continue to scream. Where's my fucking water?

(Defendant screaming simultaneously with court)

THE COURT: I need to proceed with the trial, and I am finding that he is voluntarily absenting himself from the rest of these proceedings under State v. Garza, G-A-R-Z-A, and the record

> should reflect that he continues to speak on top of his lungs, swearing, accusing me of all kinds of things.
>
> THE DEFENDANT: You're being an asshole, and I can be one, too.
>
> THE COURT: You're now removed from the court.
>
> THE DEFENDANT: Good. And fuck you very much, asshole. Fuck this kangaroo court shit.

At this point, it was after three o'clock in the afternoon. In Davis's absence, the State continued questioning Officer Antholt, who testified as to finding crack cocaine in Davis's pocket. The State then examined Officer Graf, who had identified the stolen Buick, initiated the traffic stop, and arrested Davis. Officer Graf also testified as to Davis's alleged statements about how he had obtained the Buick. The court did not give Davis an opportunity to cross-examine either officer.

Davis returned to court the next morning. The trial court noted Davis's outburst on March 7 amounted to one of the worst it had seen. The court again warned Davis it would remove him if he raised his voice or used profanity. In its findings, the court indicated Davis's outburst also disrupted trial in the courtroom down the hall. The court noted Davis "did not have any further behavior issues of significance," and he attended the remainder of the trial.

II. ANALYSIS

A. Standby Counsel

While Davis concedes he lacks a constitutional right to standby counsel, he claims the trial court abused its discretion by categorically denying his requests for such counsel. He mischaracterizes the record. The trial court properly considered Davis's requests for standby counsel.

An appellate court reviews a decision to deny standby counsel for an abuse of discretion. State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). A trial court abuses its discretion when its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

Defendants may waive their Sixth Amendment right to assistance of counsel and decide to represent themselves at trial. Romero, 95 Wn. App. at 326. If a defendant chooses self-representation, he or she does not have a right to standby counsel. DeWeese, 117 Wn.2d at 379. "The right to self-representation in a criminal matter . . . is an all-or-nothing process." Romero, 95 Wn. App. at 326.

Nevertheless, a defendant may request standby counsel, and the trial court must exercise its discretion in considering the request. See State v. Stearman, 187 Wn. App. 257, 265, 348 P.3d 394. A court abuses its discretion when it fails to exercise its discretion. State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

Davis contends that, because two judges told him obtaining standby counsel was unlikely, no judge meaningfully considered his requests for standby counsel. The record does not support this argument.

The court heard Davis's motions for standby counsel in at least six separate hearings before five different judges. Initially, the trial court engaged in a colloquy with Davis to ensure he made a knowing and voluntary waiver of his right to counsel. Indeed, Davis does not challenge the validity of his waiver. The

court told Davis he could submit a motion for standby counsel, but warned it would not likely grant it.

At the next hearing, Davis presented his reasons for requesting standby counsel. He referenced issues such as lack of access to office equipment, and unfamiliarity with legal processes. The trial court explained at some length its view as to why Washington courts disfavor standby counsel. The court also told Davis that, though he could request standby counsel, such requests were rarely granted. The record shows the court considered his motion and denied it because, in its view, the appointment of standby counsel could give rise to ethical and practical concerns, and Davis failed to demonstrate his need for standby counsel overcame these concerns.

Davis moved for standby counsel several more times. Each time the trial court allowed him to be heard. The court also explained to Davis the reasons it denied his requests. The court afforded Davis opportunities to argue whether his circumstances had changed since the court denied his original motion. Concluding Davis's responses did not justify granting standby counsel, the court denied his motions.

The court considered each of Davis's numerous requests for standby counsel. Nothing in the record suggests the court believed it did not need to exercise its discretion. The record also does not suggest the court refused to exercise its discretion in denying the motions. The trial court adequately considered Davis's requests for standby counsel.

B. Voluntary Absence

Davis asserts the trial court removed him from trial for disruptive behavior. The State counters Davis voluntarily absented himself. We agree with Davis.

Appellate courts review a trial court's finding of voluntary absence for an abuse of discretion. Garza, 150 Wn.2d at 365–66.

The Sixth Amendment grants defendants the right to be present at their trial. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). However, a defendant may voluntarily absent himself or herself and thereby waive the right to be present. Thomson, 123 Wn.2d at 881. Notably, the court should "indulge[] every reasonable presumption against waiver." Garza, 150 Wn.2d at 367.

The State argues Davis's statement, "You can hold your trial without me," indicates he voluntarily absented himself. Washington case law has not yet addressed whether and how a defendant may voluntary absent himself or herself by requesting to leave the courtroom. Our voluntary absence cases consider only scenarios in which the defendant either does not appear for court or does not return after removal.

Under Washington law, "the court only need answer one question: whether the defendant's absence is voluntary." Thomson, 123 Wn.2d at 881. When deciding whether a defendant's absence qualifies as voluntary, courts consider the totality of the circumstances. Thomson, 123 Wn.2d at 881. Specifically, appellate courts look to whether the trial court "(1) [made] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) [made] a preliminary finding of

voluntariness, when justified, and (3) [gave] the defendant an adequate opportunity to explain his absence when he is returned to custody." Garza, 150 Wn.2d at 367. These factors are most applicable to situations where a defendant does not appear for court or does not return to court after a removal. As such, they are not readily applicable to the facts in this case. In particular, the first and third factors assume the defendant failed to appear without first explaining his or her absence to the court.

Given the lack of Washington case law on the question, we turn to decisions from other jurisdictions for guidance. The facts here resemble those of State v. Menefee, an Oregon case. In Menefee, a self-represented defendant made improper arguments during his opening statement and refused to confine the scope of his presentation. 268 Or. App. 154, 160–64, 341 P.3d 229 (2014). When the defendant began arguing with the court, it warned the defendant it would remove him if he did not behave properly. Menefee, 268 Or. App. at 163–68. When the defendant continued his unruly behavior, the court stated the defendant intentionally undermined the trial and concluded this constituted a voluntary absence. Menefee, 268 Or. App. at 166–68. Though the trial court characterized the defendant's departure as a voluntary absence, the Oregon Appellate Court concluded the record showed the trial court removed the defendant for misconduct. Menefee, 268 Or. App. at 182.

Similarly, here, the trial court found Davis intentionally undermined the trial, and stated he voluntarily absented himself and "was removed from the

courtroom due to his behavior."[4] Although Davis made the statement "You can hold your trial without me," he made it in an irate state, claiming he needed water for medical reasons. As mentioned above, Washington law requires the court indulge every reasonable presumption against waiver, which must be knowing and voluntary to be effective. Neither his statements nor his misconduct amounted to his voluntarily absenting himself. Thus, his absence from trial is more properly categorized as one due to removal rather than waiver. We next examine whether the court abused its discretion in removing Davis.

C. Removal

Davis contends the trial court erred by removing him from the courtroom without first considering less severe alternatives. The State argues the trial court was not required to do so. We agree with the State.

Trial judges facing disruptive defendants must be given sufficient discretion to maintain order in their court. DeWeese, 117 Wn.2d at 380. An appellate court reviews a trial court's decision to remove a defendant for an abuse of discretion. DeWeese, 117 Wn.2d at 380. A trial court abuses its discretion when its "decision is manifestly unreasonable, or is exercised on untenable reasons, or for untenable reasons." Garza, 150 Wn.2d at 366.

The Washington Supreme Court listed several guidelines to aid courts in deciding whether to remove a defendant. State v. Chapple, 145 Wn.2d 310, 320, 36 P.3d 576 (2001). First, a trial court should warn the defendant that continued

[4] The trial court did so in its May 26, 2017 Findings of Fact and Conclusions of Law Regarding Defendant Voluntarily Absenting Himself from Trial Due to His Disruptive Behavior.

disruptions could lead to removal. Chapple, 145 Wn.2d at 320. Second, the defendant's obstreperous behavior must be severe enough to justify removal. Chapple, 145 Wn.2d at 320. Third, the Court stated a *preference* for the least severe alternative that will prevent interferences with the trial. Chapple, 145 Wn.2d at 320. Finally, if the defendant assures the court his or her conduct will improve, he or she must be allowed to reclaim the right to be present. Chapple, 145 Wn.2d at 320. These instructions "are not meant to be constraints on trial court discretion, but rather to be relative to the exercise of that discretion such that the defendant will be afforded a fair trial while maintaining the safety and decorum of the proceedings." Chapple, 145 Wn.2d at 320.

Davis bases his challenge on only the third factor, and argues the court erred in completely removing him from trial without considering less severe alternatives. Davis says that, because the record does not show he behaved severely enough to warrant complete removal, the court should have instead allowed him to watch the proceedings from a video monitor in another room, allowed him to return to the trial sooner than the following day, or provided him with transcripts of the proceedings for his closing argument.

Here, the trial court warned Davis he risked removal if he continued to interrupt the proceedings. Nevertheless, Davis continued to act disruptively and disregard court orders. The court tolerated much of Davis's inappropriate behavior and finally removed him following an outburst in which Davis repeatedly screamed, banged on the table, and used profanity in the courtroom. Davis

yelled so loudly that proceedings in the courtroom across the hall recessed. Such conduct warrants removal from the courtroom.

When considering the least severe alternative, the trial court can best assess both the technological limitations of its courthouse and the defendant's impending threat to disrupt the proceedings. Chapple, 145 Wn.2d at 324. Here, the record does not show the court considered having Davis attend trial in some other way, such as through video monitoring. But this is not mandated. Because there exists only a preference, as opposed to a requirement, for trial courts to use the least severe means, nothing in the record shows the trial court did not act within its discretion when removing Davis from the courtroom.

D. Right to Representation

Davis maintains, even if the trial court properly removed him, it violated his Sixth Amendment right to representation by allowing the State to examine two of its witnesses in his absence and not affording him an opportunity to cross-examine the witnesses. Relying on DeWeese, the State contends Davis had waived his right to counsel and the court had no obligation to reappoint counsel or obtain a waiver from Davis of his right to representation.[5] Washington cases

[5] The State points to DeWeese to argue the trial court did not need to obtain a waiver of the right to representation or appoint counsel after it removed the defendant. However, DeWeese does not apply on this issue, as it involved very different facts. In DeWeese, the defendant watched the State's examination of a witness from a television monitor in another room after the court removed him for violating its rulings. 117 Wn.2d at 373. The court then invited the defendant to return to cross-examine the witness, but the defendant declined. DeWeese, 117 Wn.2d at 374. The court warned the defendant of the consequences of absenting himself from court, but the defendant continued to refuse to participate and asked to return to jail. DeWeese, 117 Wn.2d at 374. The trial court allowed the State to present the remainder of its case in the defendant's absence and proceeded to closing arguments after the defendant chose not to return. DeWeese, 117 Wn.2d at 374. Because the defendant voluntarily absented himself, the Supreme Court upheld the trial court's decision not to appoint counsel for the defendant during his absence. DeWeese, 117 Wn.2d at 379.

have not yet addressed the propriety of going forward with trial after a court properly removes a self-represented defendant for disruptive behavior. After a review of cases from other jurisdictions, we conclude that, in this case, proceeding with trial in Davis's absence violated his Sixth Amendment right to representation.

Appellate courts review de novo whether a trial court violated a defendant's right to representation. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Several state appellate courts and the Ninth Circuit have addressed legal questions similar to the one before us.

In People v. Carroll, the defendant chose to represent himself, but later requested an attorney. 140 Cal.App.3d 135, 137–38, 189 Cal.Rptr. 327 (Ct. App. 1983). The court declined to appoint counsel and then removed the defendant several times during the trial for mentioning his lack of representation in front of the jury. Carroll, 140 Cal.App.3d at 138–39. Specifically, the court removed the defendant during portions of jury selection, his opening statement, and the testimony of three witnesses. Carroll, 140 Cal.App.3d at 139. For two of the witnesses, the court gave the defendant an opportunity to cross-examine, but he declined. Carroll, 140 Cal.App.3d at 139.

The California Court of Appeal held the court violated the defendant's Sixth Amendment right when it "deprived him not only of his own presence, but of legal representation." Carroll, 140 Cal.App.3d at 140. As an alternative to removal, the court noted the trial court could have appointed counsel, instituted contempt proceedings, or restrained the defendant. Carroll, 140 Cal.App.3d at

141. The California Court of Appeal has since reaffirmed Carroll's holding. See People v. Ramos, 5 Cal.App.5th 897, 907 n.5, 210 Cal.Rptr.3d 242 (Ct. App. 2016) (holding when a trial court removes a self-represented defendant, the defendant is necessarily deprived of the Sixth Amendment right to representation during the absence); People v. Soukomlane, 162 Cal.App.4th 214, 75 Cal.Rptr.3d 496 (Ct. App. 2008) (noting the court's removal of a defendant during the direct examination of a state's witness violated the Sixth Amendment to counsel). Other courts have come to the same conclusion. See People v. Cohn, 160 P.3d 336, 343 (Colo. App 2007) (determining the court violated the pro se defendant's right to counsel when it removed him during segments of his trial).

The Ninth Circuit addressed a similar issue in United States v. Mack, where the trial court warned a disruptive defendant it would remove him and not permit him to question witnesses if he continued his behavior. 362 F.3d 597, 599 (9th Cir. 2014). After the defendant's inappropriate behavior continued, the court removed the defendant during his case. Mack, 362 F.3d at 599. Once the defendant returned, the court did not allow him to continue to put on his defense. Mack, 362 F.3d at 601. Instead, it halted the questioning of any witnesses and did not allow closing argument by either side. Mack, 362 F.3d at 599. "In practical effect, [the defendant] had been removed as his own counsel and nobody stepped in to fill the gap." Mack, 362 F.3d at 601.

The Mack court acknowledged a trial court may properly remove a disruptive defendant. Mack, 362 F.3d at 600. The court held, however, that while a self-represented defendant's disorderly conduct may forfeit his or her

right to represent themselves and the right to be present, he or she does not forfeit the right to representation. Mack, 362 F.3d at 601.[6] Though a court may remove a defendant for disrupting trial, "leaving [a defendant] without representation is still far from appropriate." Mack, 362 F.3d at 601. The court stated a trial court commits structural error when it prevents a self-represented defendant from cross-examining witnesses, even if the defendant was contemptuous of the court. Mack, 362 F.3d at 601–603.

In Menefee, the Oregon Court of Appeals followed Mack. 268 Or. App. at 183. As discussed above, the trial court in Menefee characterized the removal of the defendant as a voluntary absence because it found the defendant intentionally acted disruptively to undermine the trial. See Menefee, 268 Or. App. at 168. In the defendant's absence the State examined two witnesses. Menefee, 268 Or. App. at 169. The Oregon Court reversed the defendant's conviction, concluding the trial court violated the Sixth Amendment by failing to

[6] We note proceeding with trial in Davis's absence would not have been error if he had voluntarily absented himself. See DeWeese, 117 Wn.2d at 379. Though DeWeese does not address the effect of a voluntary absence on the right to representation, the issue was recently before the Rhode Island Supreme Court. In State v. Eddy, a defendant dismissed his attorney and chose to represent himself. 68 A.3d 1089, 1092 (R.I. 2013). After the defendant then dismissed two more attorneys whom the court appointed as standby counsel, the court denied the defendant's request for appointed counsel on the morning of trial. Eddy, 68 A.3d at 1092–96. In response, the defendant told the court, "I don't want to be in the courtroom so the trial may proceed in my absence. . . . I ask I be allowed to be removed from the courtroom during this process because I don't want to cause a situation of a forced removal." Eddy, 68 A.3d at 1096. The court explained to the defendant he had a Sixth Amendment right to be present and, if he waived that right, he would not be represented by counsel and would also be waiving his right to cross-examination. Eddy, 68 A.3d at 1097. The court allowed the defendant to leave after he stated he understood the consequences and still did not want to attend. Eddy, 68 A.3d at 1096–97. The Rhode Island Supreme Court agreed the defendant knowingly and voluntarily waived both his right to be present and right to representation, because he insisted on leaving trial after the trial court explained all the rights he would be abandoning. Eddy, 68 A.3d at 1103–04.

appoint counsel or have the defendant waive his right to representation before continuing without him. Menefee, 268 Or. App. at 185.

Shortly after Menefee, the Oregon Court of Appeals reaffirmed its holding that removing a self-represented defendant from a courtroom without first appointing an attorney violates the right to representation. See State v. Lacey, 282 Or. App. 123, 127, 385 P.3d 1151 (2016). There, the trial court warned the defendant that, if he disrupted the trial, it would proceed in his absence. Lacey, 282 Or. App. at 125. The appellate court rejected the argument that disruptive conduct, in light of such a warning, led to a proper waiver of the right to representation. Lacey, 282 Or. App. at 130. It held instead that, to find a valid waiver, the court should have informed the defendant of his ongoing right to representation, even if removed for misconduct. Lacey, 282 Or. App. at 130. Additionally, it ruled the trial court should have advised the defendant he could have an attorney appointed to represent him during his absence. Lacey, 282 Or. App. at 130. The court stated that, if the trial court cannot obtain a valid waiver, "the court may have to appoint counsel for a defendant who previously elected to proceed pro se, notwithstanding the awkwardness of doing so mid-trial." Lacey, 282 Or. App. at 126–27. The court explained its approach as one to protect the structural integrity of the criminal justice system. Lacey, 282 Or. App. at 126. "Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who . . . work the hardest to undermine it." Lacey, 282 Or. App. at 126.

Earlier this year, the Superior Court of Pennsylvania concluded a defendant cannot forfeit his right to representation through misconduct. Commonwealth v. Tejada, 188 A.3d 1288, 1290–92, 2018 PA Super 145 (2018). In Tejada, the trial court removed a self-represented defendant from trial after he acted disruptively during jury selection. Tejada, 188 A.3d at 1291. Following the line of cases from California, the Ninth Circuit, and Oregon, the appellate court held "the issue of removal is distinct from the right of representation by counsel, and the related right of self-representation." Tejada, 188 A.3d at 1293. Concluding the defendant did not waive his right to representation, the court reversed the conviction and remanded for a new trial. Tejada, 188 A.3d at 1300.

In this case, Davis chose to represent himself and then behaved obstreperously throughout the court proceedings. The court finally removed him and allowed the State to examine Officers Antholt and Graf before recessing for the day.[7] Davis went unrepresented during these testimonies and was not given the opportunity to cross-examine the two officers. He did not knowingly and voluntarily waive his right to representation and agree to have an empty defense table while the State questioned two critical witnesses. This remains the case despite his decision to represent himself. As reflected above, cases from other

[7] We are mindful of the difficult situation posed by Davis's conduct, especially where there was no directly applicable Washington case law. We note that trial courts can explore a number of alternatives in such situations, including the following: engaging in a colloquy regarding the right to representation, as the court did in Eddy, to see whether there is a waiver of the right to representation; recessing, to give the defendant time to calm down (suggested in Menefee, 268 Or. App. at 185–86); having the defendant attend trial via video conference or providing the defendant with a recording or transcript of the missed testimony and allowing the defendant the opportunity to cross-examine the witnesses (proposed in Lacey, 282 Or. App. at 137 (citing Cohn, 160 P.3d 343)); restraining defendant in the courtroom (allowed under Chapple, 145 Wn.2d 310 at 315); or appointing the defendant counsel (advanced in Carroll, 140 Cal.App.3d at 141).

jurisdictions support this conclusion. We are unaware of authority supporting a contrary result.

Accordingly, we conclude leaving Davis without representation at trial violated his Sixth Amendment right to representation. Because this error is structural, we remand for a new trial on counts 2 and 3. See Mack, 362 F.3d at 601–603; State v. Wise, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012) ("Structural error . . . is not subject to harmlessness analysis.").[8]

Davis missed the testimony of Officers Antholt and Graf, who arrested and searched Davis in relation to his February 11, 2014 arrest for possessing a stolen Buick vehicle and crack cocaine (counts 2 and 3). These officers, however, did not participate in Davis's January 23, 2014 arrest for possessing a stolen Hyundai vehicle (count 1). Since Davis was only absent for testimony pertaining to counts 2 and 3, we see no error and affirm as to count 1.

We affirm in part, reverse in part, and remand for a new trial.

Chun, J.

WE CONCUR:

Mann, A.C.J.

[8] Because we find the trial court committed only a single error, we reject Davis's cumulative error argument.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

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of the
State of Washington

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November 20, 2018

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CASE #: 76806-9-I
State of Washington, Respondent vs. Keith Adair Davis, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Julie Spector

JIM WHISMAN

RAUL MARTINEZ

FILED
11/20/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH ADAIR DAVIS,

Appellant.

No. 76806-9-I

ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, State of Washington, has filed a motion for reconsideration. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Chun, J.

Judge

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

December 20, 2018 - 3:03 PM

Filing Petition for Review

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