Supreme Court No. 98884-6
(COA No. 36552-2-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LANCE SMITH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Lance Smith asks this Court to review the opinion of the Court of Appeals in *State v. Smith*, 36522-2 (issued on July 9, 2020). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Article I, § 22 guarantees the right to self-representation where his request is timely, unequivocal, knowing, voluntary, and intelligent. Similarly, the Sixth Amendment implicitly affords such a right. A court may not deny a motion for self-representation merely because it would be detrimental or less efficient for the court. Moreover, if the defendant's competency is at issue, the court should order an evaluation. Here, the court first ruled Mr. Smith could represent himself, but later revoked his pro se status due to concerns about his mental health and the ability to pick a jury. The court did not order a competency evaluation. Did the trial court err by revoking Mr. Smith's pro se status under these circumstances?

C. STATEMENT OF THE CASE

1. **Mr. Smith suffered a head injury which drastically altered his behavior and mental health. Following his accident, he developed delusions regarding a coworker, resulting in the issuance of no-contact orders and violations of those orders.**

In 2010, Lance Smith worked as a server at a restaurant in Richland. 1/7/19 RP 238. There, he met Jennifer Bonneru, and they developed a friendly relationship but were never romantically involved. *Id.* at 238-39.

During this time, Mr. Smith had a snowboarding accident resulting in a traumatic head injury. *Id.* at 239. When he returned to work, his behavior was drastically different. *Id.* at 240. He began "acting strange, saying weird things," attempted to dig holes in concrete, and peeled off window decals at the restaurant. *Id.* The restaurant fired Mr. Smith. *Id.*

Mr. Smith began contacting Ms. Bonneru through text messages, letters, and online messages. 1/7/19 RP 241. The messages were lengthy and nonsensical, proclaiming love or expressing a desire for friendship. *Id.* at 241, 276-77. Ms. Bonneru asked him to stop and changed her contact information. *Id.* After an incident where Mr. Smith sent her approximately 200 texts, Ms. Bonneru obtained a no-contact order. *Id.* at 242-43. Additional orders were put in place after Mr. Smith violated the first one. *Id.* at 244.

In the fall of 2017, Mr. Smith sent Ms. Bonneru messages in violation of a valid no-contact order. 1/7/19 RP 250. In January 2018, he saw her through the window of a bar and waved at her. *Id.* at 284-85. Ms. Bonneru's friend asked him to leave and called the police. *Id.* at 285-86. Mr. Smith walked over to a parking lot where he was arrested. *Id.*; 1/8/19 RP 326.

At trial, Mr. Smith argued his capacity to form knowledge was diminished by his mental illnesses. 1/7/19 RP 236; 1/9/19 RP 507. Mr. Smith suffered from delusional disorder and schizotypal personality disorder. 1/8/19 RP 342, 344. He believed he had a romantic relationship with Ms.

Bonneru despite evidence to the contrary. *Id.* at 342. His schizotypal personality made it difficult to form close relationships because it resulted in "oddness" and "eccentricities." *Id.* at 344. As a result, Mr. Smith did not "knowingly, intelligently decide on those behaviors" which constituted violations of a no-contact order. *Id.* at 348. His mental illnesses were "a genuine psychological incapacity." *Id.*

Mr. Smith's mental health issues caused him to have "outbursts," and to have difficulty following the court's orders not to interrupt. *See, e.g.,* 1/7/19 RP 167-68; 3/14/18 RP 40; 3/12/18 RP 45-46. The jury convicted Mr. Smith of both counts of felony violation of a no-contact order. CP 67-68.

2. Mr. Smith exercised his right to self-representation, which the court granted and then revoked following a mistrial despite multiple competency findings.

The State charged Mr. Smith with two felony violations of a no-contact order under separate cause numbers, one in 2017 and one in 2018. CP 31-32, 91-92. The matters were eventually joined for trial. CP 16. Throughout the proceedings in both cases, Mr. Smith made repeated, unequivocal motions to represent himself.

The court appointed counsel at arraignment on the 2017 cause number. 12/14/17 RP 6-8. Three weeks later, Mr. Smith requested to represent himself. 1/4/18 RP 3. When the court asked why, he stated, "I am

innocent, and I believe that I will - - to make sure I get proved innocent I know that I'll have a bigger affect [sic] representing myself for my innocence." *Id.* at 5. Mr. Smith assured the court he had understood the applicable law. *Id.* at 5-6. The court denied the request, finding appointed counsel had "more experience and more legal knowledge" than Mr. Smith. *Id.* at 6. The court invited Mr. Smith to provide "a written basis" for why he should represent himself and "why that would be better . . . than being represented by experienced counsel." *Id.*

A week later during arraignment on the 2018 matter, Mr. Smith again explicitly requested to represent himself. 1/12/18 RP 9. The court conducted the following colloquy:

> THE COURT: Do you wish to be represented by an attorney?
>
> THE DEFENDANT: I wish to represent myself.
>
> THE COURT: Sir, have you ever represented yourself in a criminal proceeding?
>
> THE DEFENDANT: No. But I have had multiple trials. And I do understand enough to represent myself.
>
> THE COURT: Now, sir, those trials were not in -- criminal matters. Those were in civil; correct?
>
> THE DEFENDANT: Either way, I understand. I've looked into it -- asking questions from multiple attorneys and researching enough on the internet and asking people that I know. I one hundred percent have enough power in myself to represent myself.

THE COURT: Sir, you understand that the charge is allegation of felony violation of a protection order?

THE DEFENDANT: Yes, I do.

THE COURT: Have you been charged with that offense in the past?

THE DEFENDANT: No, I have not. I got blackmailed into signing for two of them in those two counts. But I'd like you to know, Judge, that I was blackmailed.

THE COURT: All right. And again you understand that anything you do say that could relate to this charge could be used against you in a future prosecution?

THE DEFENDANT: One hundred percent.

THE COURT: All right. Do you know what the potential statutory maximums are for this charge, violation of a protection order, felony level?

THE DEFENDANT: No one has told me. No.

THE COURT: Those statutory maximums are up to five years in jail and a fine not to exceed $10,000. Do you have any formal training in the law?

THE DEFENDANT: Just from what I've received from what you guys have told me, what attorneys have told me, and what I have seen live in court.

And I have actually received some training over at the forensic ward in Eastern State Hospital. Every day I had to go to a class to become competent where a teacher actually showed us videos on law every single day. He showed us all the definitions. He showed us what everybody represents in the court, what we're allowed to say, and what we're allowed to do. I had that training for six months.

THE COURT: Are you familiar with the rules of evidence?

THE DEFENDANT: I'm not, like, greatly familiar with them; but I am familiar with them. But I have no evidence anyways. So I would -- that would seemed to be the last person's problem -- was that I needed to know the rules of evidence. But, I mean, no one has addressed me too much of those.

THE COURT: Are you familiar with the Revised Code of Washington which defines the charge here and determines what the necessary elements are?

THE DEFENDANT: Yes. I do understand that.

THE COURT: All right. So you've already reviewed RCW 26.50.110(5).

THE DEFENDANT: I believe I have reviewed it one time or two times.

THE COURT: Do you understand that, were you to represent yourself, the Court couldn't help you?

THE DEFENDANT: I heard someone -- my attorney that you guys gave me told me that the Court can give you an attorney at your side.

So that's wrong?

THE COURT: Well, as to my first question to you, you understand that the Court itself cannot help you?

THE DEFENDANT: I understand that, yes. Definitely.

. . .

THE COURT: Well, I'll treat your request in the alternative: So you indicate that you're not familiar with the rules of evidence or the statutes that would apply in this case?

THE DEFENDANT: The statutes to the evidence rule that you're bringing up?

THE COURT: Well, they are different things.

> THE DEFENDANT: Like I said, I believe I am a little bit relevant with the statutes, not so much the evidence.
>
> . . .
>
> THE COURT: Do you have prescribed medication that is prescribed for you to take?
>
> THE DEFENDANT: As of right now, from my Transitions stay that I just got out of, like, a week ago, my last psychological doctor told me I am not bipolar and there is no need for me to take any medications other than Ambien for sleep. That's what my last psychological doctor told me. And I have paperwork at my house stating that.

1/12/18 RP 8-15.

The court also discussed the concept of "standby counsel" with Mr. Smith, which he understood. *Id.* at 12-13. Mr. Smith also indicated he would pursue pro se status in the 2017 matter as well. *Id.* at 15. Despite this colloquy, the court denied the request to represent himself. *Id.* at 16. The court found it "was not persuaded today . . . that it is appropriate" and appointed counsel over Mr. Smith's objection. *Id.* at 16, 18.

On January 25, 2018, the court ordered a competency evaluation for Mr. Smith. 1/25/18 RP 2; CP 5-11. The evaluation determined he was competent to stand trial. CP 15. The same day, Mr. Smith again moved to represent himself on both matters. 2/15/18 RP 13. Per the court's instruction "to come up with a good enough basis" for his request, Mr. Smith provided a letter indicating he understood the legal process and that he had to follow the rules of evidence. *Id.* at 15. His then-assigned counsel was

also satisfied Mr. Smith understood his rights and the risks involved in self-representation. *Id.* at 14. The State also reiterated those risks and potential consequences to Mr. Smith, which he understood "100 percent." *Id.* at 16-17. The court granted the request to proceed pro se. *Id.*

Two weeks later, the court attempted to discourage Mr. Smith from proceeding pro se. 2/28/18 RP 51. Mr. Smith rejected the court's entreaties and declined to have counsel reappointed. *Id.* The matters proceeded to trial, but resulted in a mistrial. 3/12/18 RP 86-87. During jury selection, Mr. Smith's comments, questions, and gestures caused at least two potential jurors to openly question his competence and ability to represent himself. *Id.* at 81. After removing the venire, the court expressed concern Mr. Smith's behavior had "created a situation where this jury will not be fair to you," and found he was "presently unable to represent" himself and "that there is no reason for this court to believe that [he] could successfully pick a jury." *Id.* at 83. Mr. Smith did not believe the jury was irreparably tainted, stating, "I understand that, but I believe they will be fair to me, even if it looks that way." *Id.* Finding the venire "tainted beyond the point of recovery," the court declared a mistrial but did not order competency evaluation. *Id.* at 86-87.

At a hearing on March 14, the court questioned Mr. Smith's ability to continue pro se. 3/14/18 RP 32-33. The court did not find Smith had made a mistake or broken a law during his trial, and had not held him in contempt.

Id. Mr. Smith asked for another opportunity to conduct the trial, stating, "If you give me another chance to represent myself . . . [y]ou'll see one hundred percent law and order. I'll follow all the rules. I'll make no mistakes." *Id.* at 36. He reiterated to the court, "I understand your rules. I understand what I'm allowed to do . . . I know it enough to pick a jury. I know enough to question witnesses." *Id.* at 37.

The court found Mr. Smith "unable to keep from acting out. And that makes it impossible for [him] to discharge the role of representing [him]self." 3/14/18 RP 40. The court further found he was disruptive, and "there's no reasonable likelihood that [he] can effectively represent [him]self." *Id.* at 40-41. Additionally, the court found Mr. Smith had "waived by conduct" his right to self-representation, and that "mental health not rising to the level of capacity . . . while not an issue originally, through later conduct has changed the calculus properly considered. It means that it would deny Mr. Smith substantial rights to allow him to continue to represent himself." *Id.* at 44, 50. The court reappointed counsel. 3/14/18 RP 43.

3. Mr. Smith subsequently made repeated requests to regain his pro se status.

Mr. Smith made several additional requests reasserting his right to self-representation. On April 11, 2018, defense counsel moved to obtain an independent competency evaluation. CP 21-25. Dr. Jameson Lontz, the defense's independent evaluator, found Mr. Smith competent and the court

entered an order to that effect on July 25. CP 28; 7/25/18 RP 4-5. That day, the court acknowledged Mr. Smith had sent the court letters intended as a "motion . . . to gain my rights back to represent myself as my own attorney." 7/25/18 RP 6. The court stayed the motions pending a second evaluation for insanity and diminished capacity defenses. *Id.*

As part of the second evaluation, the evaluators again found Mr. Smith was fit to stand trial on October 24, 2018. 10/24/18 RP 90. Mr. Smith declared he had a "civil liberty" to represent himself and asked the court to confirm that information. *Id.* at 92-93. The court did not address the inquiry and ended the hearing. *Id.* at 93. On November 5, 2018, Mr. Smith again stated, "Self-representation is a civil liberty and not a privilege granted from a judge." 11/5/18 RP 20-21. He further correctly stated, "It's my civil liberty to represent myself." *Id.* Similarly, on December 19, Mr. Smith asserted, "For the record of the court, attorney Shelley Ajax does not represent me, I represent myself." 12/19/18 RP 50.

On the first day of Mr. Smith's second trial, he informed the court, "I believe it is a civil liberty for me to represent myself as my own attorney." 1/7/19 RP 99. The court construed this as a request to proceed pro se, which it denied outright. *Id.* at 99-100. Mr. Smith reiterated, "I want my rights," to no avail. *Id.* at 101. The court found he had abused his right to self-representation, and that to allow him to continue would "seriously affect

and/or prevent the administration of justice." *Id.* at 119. During jury selection, Mr. Smith announced he wanted to fire his attorney, and he was a pro se defendant. *Id.* at 161. The court found Mr. Smith's exclamations were not "a volitional choice on [his] part." *Id.* at 164.

On the last day of trial and sentencing respectively, Mr. Smith again reiterated his desire to proceed pro se and his dismay that the court had repeatedly refused his requests. 1/9/19 RP 517; 1/10/19 RP 531.

4. The Court of Appeals found no error.

On appeal, the Court of Appeals found no error. Slip Op. at 13. The court relied on *State v. Rhome*, 172 Wn.2d 654, 260 P.3d 874 (2011) almost exclusively, and ruled the trial court had not improperly denied Mr. Smith his right to self-representation. Slip Op. at 8-13. The court did not address whether the trial court should have ordered another competency evaluation to determine if Mr. Smith could represent himself. Slip Op. at 8-13.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The court erred when it terminated Mr. Smith's pro se status and when it failed to consider his subsequent repeated requests to reinstate his pro se status.

1. Mr. Smith had an explicit, fundamental right to represent himself.

An accused has a fundamental right to self-representation under Article I, § 22 of the Washington Constitution. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); *State v. Madsen*,

168 Wn.2d 496, 503, 229 P.3d 714 (2010). Similarly, the Sixth Amendment implicitly provides defendants a right to proceed pro se. *Faretta v. California*, 522 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is afforded regardless of its "potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503 (citing *Faretta*, 422 U.S. at 834). An unjustified denial of an accused's right to self-representation "*requires* reversal." *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added). The denial of a request for pro se status is reviewed for abuse of discretion. *Id.* at 504

While trial courts must employ reasonable presumptions "against a defendant's waiver" of the right to counsel, the court does not have "carte blanche to deny a motion to proceed pro se." *Madsen*, 168 Wn.2d at 504 (citing *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P,2d 790 (1999)). Where a request is unequivocal, timely, voluntary, knowing, and intelligent, courts may not deny a defendant his right to self-representation. *See id.* at 504-05. "A court may not deny a motion for self-representation based on grounds that" it "would be detrimental to the defendant[ ]" or that "courtroom proceedings will be less efficient and orderly." *Madsen*, 168 Wn.2d at 505. Moreover, the court "may not deny pro se status merely because the defendant is unfamiliar with legal rules or . . . is obnoxious.

Courts *must not sacrifice constitutional rights on the altar of efficiency." Id.* at 509 (emphasis in original).

Likewise, the defendant's lack of "skill and judgment" does not preclude him from self-representation. *State v. Hahn*, 106 Wn.2d 885, 890 n.2, 726 P.2d 25 (1986). Technical legal knowledge is irrelevant "to an assessment of [a defendant's] knowing exercise of the right to defend himself." *Faretta*, 422 U.S. at 836. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. But, "it is the defendant" who bears "the personal consequences of a conviction." *Id.* Although self-representation may be "to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

Importantly, concern regarding an accused's competency alone is insufficient to deny a pro se request; if there are such concerns, "the necessary course is to order a competency review." *Madsen*, 168 Wn.2d at 505 (quoting *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)); RCW 10.77.060(1)(a);[1] *see also Rhome*, 172 Wn.2d at 665 ("[A] defendant's mental

[1] "Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

health status is but *one* factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel").

Here, the Court of Appeals relied exclusively on *Rhome* in rejecting Mr. Smith's arguments. The court found *Rhome* stood for the proposition that "the right of self-representation does not extend to persons who lack the mental capacity to represent themselves." Slip Op. at 10. On the contrary, *Rhome* announced no such rule. In *Rhome*, this Court considered whether a court must order a competency evaluation before accepting a waiver of counsel where a defendant's mental health is in question but he has nevertheless been found competent for trial. 172 Wn.2d at 663. The Court discussed *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), and acknowledged *Edwards* would permit a rule requiring an evaluation for competency to self-represent under these circumstances. *Id.* at 664-65. This court declined to adopt such a rule because Rhome could not benefit from a new rule for the first time in a PRP. *Id.* at 665-66.

Rhome left intact existing case law governing waivers of counsel by defendants with competency issues. Reading the cases together, this Court found "a defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel." *Id.* at 665.

2. Mr. Smith's requests to proceed pro se were timely, unequivocal, knowing, intelligent, and voluntary.

The court initially granted Mr. Smith's motion to proceed pro se in both matters. His requests were timely and unequivocal, occurring at least a month prior to trial. Mr. Smith wrote to the court explaining "very concise[ly]" "his understanding of the legal process." 2/15/18 RP 13-14. He never wavered from his desire to represent himself.

The record here demonstrates independent, identifiable facts showing Mr. Smith's request was voluntary, knowing, and intelligent, rendering a colloquy unnecessary. *See Madsen*, 168 Wn.2d at 515, n.2. Nevertheless, the court engaged in a colloquy to ensure the request was knowing, intelligent, and voluntary. Mr. Smith understood he was bound by the rules of evidence, the proper roles of the court and standby counsel, and the risks and consequences of his decision. 2/15/18 RP 14-15. With those considerations in mind, Mr. Smith stated he "100 percent" desired to represent himself. On this record, Mr. Smith's requests were clearly timely and unequivocal, as well as knowing, intelligent, and voluntary.

3. The court erred when it terminated Mr. Smith's pro se status based on concerns about the administration of justice and Mr. Smith's mental health.

A trial court may sanction a pro se defendant for improper behavior, and in some circumstances it may terminate pro se status if a defendant "deliberately engages in serious and obstructionist misconduct," or if delay

becomes the defendant's chief motive. *Faretta*, 422 U.S. 834-35 n. 46; *Madsen*, 168 Wn.2d at 515 n. 4. However, even persistent disruptions impairing the administration of justice are insufficient to justify terminating a defendant's constitutional right to self-representation. *Madsen*, 168 Wn.2d at 509.

Contrary to the Court of Appeals opinion, *Madsen* is directly on point. In *Madsen*, the court delayed ruling on the defendant's pro se motion for months. *Madsen*, 168 Wn.2d at 501-02. When the court finally denied the motion, it found Madsen had been "extremely disruptive," "repeatedly addressed the court at inopportune times," and "consistently showed an inability to follow or respect the court's directions." *Id.* at 502 (internal quotations omitted). The Court of Appeals affirmed the denial of the pro se motion, finding the "persistent disruptions impaired the orderly administration of justice." *Id.* at 509 (internal quotation marks omitted). This Court found that reasoning insufficient:

> Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The values of respecting this right outweighs any resulting difficultly in the administration of justice.

Id. at 509.

Mr. Smith's behavior mirrored that in *Madsen*. He spoke out of turn, interrupted people, and had difficultly following directions. *See, e.g.,* 1/7/19

RP 167-68; 3/14/18 RP 40; 3/12/18 RP 45-46. The court found he had "a consistent pattern in hearings and sessions in court of being unable to . . . keep from acting out." 3/14/18 RP 40. It also found "continued representation by Mr. Smith of himself on this matter has in the past and would likely continue into the future seriously affect and/or prevent the administration of justice." 1/7/19 RP 119.

As in *Madsen*, the trial court's concern was the efficiency of jury selection and the "orderly administration of justice." 168 Wn.2d at 509. However, the *Madsen* Court held that these concerns are not sufficient to deny a person his "enshrined" constitutional right to self-representation. *Id.* The *Madsen* Court understood a trial conducted with a pro se defendant would necessarily be less efficient, and the Court rejected these concerns as a basis for denying a request to self-represent. *Id.*

If denial of a defendant's right to self-representation may not be based on concerns about efficiency and the orderly administration of justice, then it defies logic that those same reasons could justify terminating a defendant's pro se status. "The value of respecting [the right to self-representation] outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509. Therefore, it was error for the court to terminate Mr. Smith's pro se status over concerns about the "orderly administration of justice."

Additionally, while Mr. Smith caused some potential jurors to be concerned about his mental health, he informed the court he did not share its concerns they might be unfair to him. 3/12/18 RP 83. The court did not conduct a colloquy to see if he understood why the venire might have been tainted by his behavior and the risks of going forward with such a jury. Nor did the court offer Mr. Smith a second chance to pick a jury after he assured the court he would follow its directions. The right to represent oneself always carries a risk of detriment to the defendant and loss of efficiency. *Madsen*, 168 Wn.2d at 503. The right is afforded regardless of these disadvantages.

Mr. Smith made a timely, unequivocal, and knowing request to proceed pro se. He assumed all the risks involved in such an endeavor. Though the court was concerned the jurors might be unfair and it would be difficult to pick a jury, these reasons are insufficient to deny him his right to self-representation, particularly where he acknowledged but disagreed that the venire was tainted. Indeed, jurors' concerns about Mr. Smith's mental health may well have been beneficial to his defense. Certainly, had appointed counsel generated such concerns about Mr. Smith's mental health during jury selection, or had he behaved similarly during trial with counsel, the court would not have declared a mistrial. Moreover, the court's professed concerns about Mr. Smith's competency should have been resolved with an additional competency evaluation, which it did not do. *Madsen*, 168 Wn.2d at 505. The

trial court erred by terminating Mr. Smith's pro se status due to concerns about competency, the potential detriment to Mr. Smith, and the orderly administration of justice. This Court should reverse.

4. The court failed to correctly apply the law when it refused to consider Mr. Smith's subsequent requests to represent himself.

Even where a court has denied or delayed ruling on a defendant's pro se motion, it must still consider any subsequent motions for self-representation. *See Madsen*, 168 Wn.2d at 506 (trial court delayed ruling on first motion to proceed pro se but considered second motion); *see also State v. Lawrence*, 166 Wn. App. 378, 271 P.3d 280 (2012) (trial court granted motion to proceed pro se, reappointed counsel at defendant's request, denied second pro se motion, then granted defendant's third motion).

After the court terminated Mr. Smith's pro se status, he made additional requests to represent himself throughout the proceedings. In July 2018, he sent the court letters intended as a "motion . . . to gain [his] rights back to represent [himself] as [his] own attorney." 7/25/18 RP 6. The court did not consider this motion or engage in any colloquy with Mr. Smith. On at least three other occasions, Mr. Smith asked about his "civil liberty," and asserted his right to represent himself. 10/24/18 RP 93; 11/5/18 RP 20-21; 12/19/18 RP 50. Likewise, the court failed to conduct a colloquy or apply the law. Each request occurred months before trial.

On the first day of trial, Mr. Smith again requested to proceed pro se, but the court refused to hear the motion. The court found it had "previously ruled that [the right] had been abused and that . . . continued representation by Mr. Smith of himself on this matter has in the past and would likely continue into the future seriously affect and/or prevent the administration of justice." 1/7/19 RP 119. The court failed to conduct a colloquy and refused to address the motion anew.

The court's failure to consider Mr. Smith's subsequent timely and unequivocal requests to proceed pro se is an abuse of discretion. This Court should reverse.

E. CONCLUSION

Based on the foregoing, Mr. Smith respectfully requests that review be granted. RAP 13.4(b).

DATED this 21st day of August 2019.

Respectfully submitted,

/s Tiffinie B. Ma

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APPENDIX A

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. LANCE THEOPOLIS SMITH, Appellant.	)))))))))	No. 36552-2-III (consolidated with No. 36553-1-III) PUBLISHED OPINION

LAWRENCE-BERREY, J. — Lance Smith appeals after a jury found him guilty of two counts of felony violation of a no-contact order. Smith contends the trial court committed constitutional error when it revoked his self-represented status, appointed counsel, and later refused to allow him to represent himself. Because Smith lacked the mental capacity to represent himself, we affirm.

FACTS

Lance Smith was a server at a restaurant in Richland. Jennifer Bonneru also worked there. Smith and Bonneru became friends, but were never romantically involved. They worked together for about six months. During this time, Smith sustained a head injury from a snowboarding accident.

When Smith returned to work, Bonneru noticed a change in his behavior. Smith acted strange, said weird things, began peeling decals from the restaurant's windows, and tried to plant trees in concrete outside the restaurant. The restaurant asked Smith not to come back to work.

After Smith left the restaurant, he began contacting Bonneru. He sent Bonneru lengthy messages that did not make sense. She asked him to stop. She blocked him on social media and changed her telephone number. Smith sent messages to her through Facebook, sent letters to her place of employment, contacted her sister and mother, and threatened her ex-boyfriends. At one point, Bonneru's cell phone was rendered temporarily inoperable because Smith had sent over 200 texts within a short period of time.

Bonneru contacted police and obtained a no-contact order. Additional orders were placed after misdemeanor violations by Smith.

In the fall of 2017, Smith sent Bonneru a message through Facebook in violation of an existing no-contact order. In January 2018, Smith saw Bonneru through the front window of a bar and waved at her. Bonneru's friend asked Smith to leave and called the police.

Procedural History

The State charged Smith with two felony violations of a no-contact order under separate cause numbers for the 2017 and 2018 incidents. The trial court consolidated Smith's two cases. At his initial appearance, the court appointed public counsel for Smith.

At Smith's omnibus hearing, he requested to represent himself. Smith told the trial court he self-studied the law, was relatively familiar with the rules of evidence, wanted to represent himself because he was innocent, and believed he would have a bigger effect representing himself and proving his innocence. The court denied Smith's oral motion but allowed Smith to make a written motion.

Smith filed a written motion to represent himself and the trial court granted it. Smith argued for release on his own recognizance. The court denied Smith's request, but lowered his bail amount. Smith continued to dispute the court's decision.

Throughout pretrial proceedings, Smith continued to argue with, berate, and ask unusual questions to the trial court. *See* Report of Proceedings (RP) (Jan. 25, 2018) at 3-5; RP (Feb. 28, 2018) at 42-45, 47-51, 53; RP (Mar. 7, 2018) at 9-13, 39, 41-46, 67, 71, 74-77, 80, 91-93, 98-104, 106-07, 113-14, 121-24, 161-64, 166-68; RP (Mar. 12, 2018) at 10; RP (Mar. 14, 2018) at 31-39, 42-43, 46; RP (Apr. 11, 2018) at 54; RP (July 25, 2018)

at 6-10; RP (Nov. 5, 2018) at 17-18, 20-25, 36-41, 44-45; RP (Dec. 19, 2018) at 48-52. The court ordered a competency evaluation. Smith's evaluator found Smith competent to stand trial.

Smith's case proceeded to trial. During voir dire, Smith repeatedly asked the jurors which of them did not want to be there. A few minutes in, four jurors said they could not be fair because Smith made a bad decision to represent himself, and he made a negative impact on them. The trial court excused those jurors.

Smith then began making an opening argument to the venire jury; the court re-directed him to ask the jurors questions. Smith then asked a juror who was the most famous attorney he knew. At that point, a different juror addressed the court and said, "I am concerned whether the defendant is of a sound mind the way this is proceeding and I just wanted to bring that to your attention." RP (Mar. 12, 2018) at 69. Smith responded to the juror by saying he comes off as a genius to some people or really irritating and completely mental to others. Smith and the juror then began to argue.

Smith asked a different juror if he was excited for St. Patrick's Day. Smith asked another, "[D]o you like the way our government is being ran right now?" RP (Mar. 12, 2018) at 71. Smith asked another, "[D]o you think it's cool or not cool that the Bible is no longer in our courtroom?" RP (Mar. 12, 2018) at 72. Smith stated he had been locked

up for two months and asked another juror if it was springtime. He asked two more jurors if they appreciated the way the government is being run. A juror then addressed Smith directly: "Mr. Smith, I am concerned about your ability to represent yourself. You are off topic. You're—you don't seem to be aware of what time of the year it is, and I don't think I can be fair because I don't think you have the capability to represent yourself." RP (Mar. 12, 2018) at 73.

At that point, the trial court excused the venire jury and spoke to the parties about the jurors' concerns. Those concerns, coupled with the fact that Smith asked repetitive questions, referred to being locked up, and said he hoped he would be out in the new year, led the court to declare a mistrial. The court set a hearing date to determine whether Smith could continue to represent himself.

At that hearing, the trial court ultimately determined that Smith could not continue to represent himself and receive a fair trial. The court explained to Smith:

> You have a consistent pattern in hearings and sessions in court of being unable to, either through the passage of time or through results that you disagree with, that you're simply unable to keep from acting out. And that makes it impossible for you to discharge the role of representing yourself.
>
> As I indicated to you, the problem with that is that your failure to comply would have the disastrous result that not only would you be unable to represent yourself, but, if I had to remove you from the courtroom for your behavior, you would then be left in a position without anyone present to be able to vindicate your interests.

> Here, using the analogy of State v. Thompson, [169 Wn. App. 436, 290 P.3d 996 (2012)] which deals with it in the context of appointing successor counsel, I find that it's appropriate to deny you pro se status because you're not merely disruptive but you're sufficiently disruptive that it means that we can't pick a jury.
>
> *The Court in* [*State v.*] Kolocotronis[, 73 Wn.2d 92, 436 P.2d 774 (1968)] *indicates that mental health is an issue that the Court can consider. Mental health issues that don't rise to the level of incompetency are still properly considered by the Court.*
>
> *. . . But your behavior, during our attempt to pick a jury, has shown that those things about you, which I've described, mean that there's no reasonable likelihood that you can effectively represent yourself. . . .*

RP (Mar. 14, 2018) at 40-41 (emphasis added). Smith then began to argue, interrupt, and speak out, and the court removed him from the courtroom.

At the next hearing, Smith spoke out of turn and asked the trial court if it was familiar with mutual combat and said, "[Y]ou may be subpoenaed to mutual combat with me by the State of Washington." RP (Apr. 11, 2018) at 54. The court ordered a second competency evaluation. The evaluator again found Smith competent to stand trial.

Smith continued to argue to the trial court that he wanted to represent himself. At defense counsel's request, the court ordered a mental health evaluation to determine

Smith's sanity or diminished capacity.[1] With respect to whether Smith had the mens rea to commit the charged offenses, the evaluator concluded: "'[I]t is . . . likely that Mr. Smith experienced reduced mental status due to symptoms of delusional disorder which overshadowed his rational thinking and impulse control abilities.'" Clerk's Papers (CP) at 34. Smith, with counsel, proceeded to trial under a theory of diminished capacity due to mental defect.

During voir dire of Smith's second jury, Smith exclaimed, "For the record, Attorney Ajax, you are fired because you don't listen to me and you are jeopardizing my innocence." RP (Mar. 7, 2018) at 161. The court excused the venire jury and Smith continued, "Keep that in mind, jurors. Thank you. . . . As you are leaving, she does not represent me." RP (Mar. 7, 2018) at 161. After continued argument and outbursts with the court, the court removed Smith to a media room. Smith remained in the media room for the first day of trial, but returned to the courtroom the second day of trial.

[1] The trial court's findings in support of its order state in part: "The defendant is competent to proceed to trial. The defense notified the prosecution that it intends to rely upon the defense of . . . insanity . . . and/or [lack of] capacity to have a particular state of mind . . . . Independent evaluator, Dr. Jameson Lontz, previously evaluated the defendant and supports that affirmative defense." Clerk's Papers (CP) at 26.

The jury found Smith guilty of both counts. The court convicted Smith and sentenced him to 13 months on each count, to run concurrently, with credit for time served.

Smith timely appealed.

ANALYSIS

Smith contends the trial court committed two errors. He claims the court erred by revoking his right to proceed pro se and the court erred by not adequately considering his subsequent requests to proceed pro se.

We review a trial court's denial of the right to self-representation for an abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). 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.'" *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

The Washington Constitution expressly guarantees criminal defendants the right to self-representation. WASH. CONST. art. I, § 22. 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, and no showing of prejudice is required. *Id.*

Smith emphasizes that he has a constitutional right to represent himself and repeatedly cites *Madsen* for the proposition that a trial court must honor this constitutional right even though self-representation might be detrimental to the defendant or a burden on the efficient administration of justice.

In *Madsen*, the defendant requested three times to proceed pro se. The first time, the trial court appointed new counsel and deferred ruling on the motion. *Id.* at 501. The second time, the trial court expressed concerns about Madsen's competency, stated its desire for someone to find out if Madsen was competent, appointed new counsel, and denied the motion. *Id.* at 501-02. The third time, the trial court denied the motion because it was made on the eve of trial and granting it would obstruct the orderly administration of justice. *Id.* at 502-03. The trial court entered a written order that stated that Madsen, during the third hearing, had been "'extremely disruptive,'" "'repeatedly addressed the court at inopportune times,'" and "'consistently showed an inability to follow or respect the court's directions.'" *Id.* Madsen was convicted, and the Supreme

Court accepted his petition for review to determine whether the trial court erred in denying his motion to proceed pro se.

The *Madsen* court determined that Madsen's second request to proceed pro se was unequivocal, timely, voluntary, knowing, and intelligent. *Id.* at 506. It explained, if the trial court had concerns about Madsen's competency, the trial court should have ordered a competency hearing. *Id.* at 510. The *Madsen* court concluded that the trial court erred in denying Madsen's second request to proceed pro se. *Id.*

We contrast *Madsen* with *Rhome*. In *Rhome*, our Supreme Court explained that the right of self-representation does not extend to persons who lack the mental capacity to represent themselves. *Rhome*, 172 Wn.2d at 661-62; *see also State v. Englund*, 186 Wn. App. 444, 457, 345 P.3d 859 (2015). We quote *Rhome* at length because it squarely addresses all of Smith's arguments raised on appeal:

> [T]he *Edwards*[2] Court . . . held that it is constitutionally permissible for a state to deny a defendant pro se status "on the ground that [he] lacks the mental capacity to conduct his trial defense" even though he was found competent to stand trial. *Id.* at 174.
>
> The *Edwards* Court observed that the standard to determine whether a defendant is competent to stand trial assumes he will *assist* in his defense, not conduct his defense, and therefore competency to stand trial does not automatically equate to a right to self-representation. *Id.* at 174-75. In addition, while the dignity and autonomy of an individual underscore the right to self-representation, in the *Edwards* Court's view,

[2] *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

> a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.
>
> *Id.* at 176 (citation omitted) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Furthermore, "insofar as a defendant's lack of capacity [for self-representation] threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77. Finally, in addition to a concern that the proceeding be fair, the *Edwards* Court also worried that self-representation in this context might damage the appearance of fairness observers expect from our justice system. *Id.* at 177.

Rhome, 172 Wn.2d at 659-60 (some alterations in original).

The *Rhome* court discussed *Kolocotronis*, 73 Wn.2d 92, and confirmed

> *Kolocotronis* . . . allows a trial court to limit the right to self-representation when there is a question about a defendant's competency . . . to act as his own counsel, even if the defendant has been found competent to stand trial. This reflects concern for a defendant's right to a fair trial and due process of law.

Rhome, 172 Wn.2d at 661-62.

If there are sufficient facts in the record, we defer to the trial court's finding that a defendant lacks the mental capacity for self-representation. This is because the trial court communicates with and observes the defendant's nonverbal behavior. *Englund*, 186 Wn.

App. at 454 n.5. Nonverbal behavior is often inadequately reflected in the written record on review.

Here, the trial court did not make any express finding why it revoked Smith's self-represented status. Nevertheless, an appellate court may examine the trial court's oral comments to determine the basis for its decision. *State v. Kronich*, 131 Wn. App. 537, 543, 128 P.3d 119 (2006), *aff'd*, 160 Wn.2d 893, 161 P.3d 982 (2007). After the trial court declared a mistrial, it scheduled a hearing. In that hearing, the court explained to Smith its reasons for revoking his self-represented status and appointing counsel. The court explained to Smith that his mental health issues caused him to engage in such a high degree of disruptive behavior that "there's no reasonable likelihood that you can effectively represent yourself." RP (Mar. 14, 2018) at 41. We construe this comment as a finding that Smith lacked the mental capacity to represent himself. Such a finding is well supported by the record.

We distinguish this case from *Madsen*. Here, the trial court twice ordered a competency evaluation. Although both evaluations concluded that Smith was competent to assist trial counsel, they did not conclude that Smith had the mental capacity to conduct his own defense. As noted in *Rhome*, one may be competent to assist trial counsel but lack the mental capacity to conduct one's own defense. 172 Wn.2d at 659. A medical

evaluation later concluded that Smith's mental capacity was sufficiently impaired that he lacked the impulse control to comply with the no-contact order. Impulse control was an important consideration in the trial court's finding that Smith lacked the mental capacity to represent himself. The trial court's finding, supported by a medical opinion, combine to distinguish this case from *Madsen.*[3] The facts here fit squarely within the rule announced in *Rhome*.

Consistent with *Rhome*, the trial court properly revoked Smith's self-represented status and appointed counsel. This was necessary to protect Smith's constitutional rights to a fair trial and due process of law. We conclude the trial court did not abuse its discretion in doing this. Because there is no evidence that Smith's mental capacity improved, we also conclude the trial court did not err in denying Smith's later requests to represent himself.

[3] A medical opinion is not required for a trial court to find that a defendant lacks the mental capacity for self-representation. But such an opinion will likely avoid a successful appeal of the issue. In *Englund*, the majority and the dissent disagreed whether the defendant's lack of capacity to represent himself was due to a lack of skill and education or due to a mental impairment. An expert opinion can be helpful in making this important distinction. A lack of skill or education is an improper basis to deny a defendant's request for self-representation.

Affirmed.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36552-2-III
	)	
LANCE SMITH,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF AUGUST, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	TERRY BLOOR, DPA [prosecuting@co.benton.wa.us] [terry.bloor@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	( ) U.S. MAIL ( ) HAND DELIVERY (X) E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF AUGUST, 2020.

X_____

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WASHINGTON APPELLATE PROJECT

August 11, 2020 - 4:33 PM

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Appellate Court Case Title:	State of Washington v. Lance Theopolis Smith
Superior Court Case Number:	17-1-01370-0

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