

NO. 74708-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

JOHN KIRK,

Appellant.

FILED  
Oct 27, 2016  
Court of Appeals  
Division I  
State of Washington

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS  
THE HONORABLE BILL BOWMAN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

IAN ITH  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. FACTS OF THE CRIME .....	2
C. <u>ARGUMENT</u> .....	4
1. KIRK MAY NOT RAISE FOR THE FIRST TIME ON APPEAL HIS CLAIM THAT HIS RIGHT TO SELF-REPRESENTATION WAS VIOLATED; HE DID NOT REQUEST TO PROCEED PRO SE AND AFFIRMATIVELY REQUESTED LEGAL COUNSEL.....	4
a. Additional Relevant Facts.....	4
b. Kirk Never Requested To Proceed Pro Se On Remand; He Cannot Show Manifest Error .....	11
2. THE STATE DOES NOT INTEND TO SEEK A COST BILL.....	19
D. <u>CONCLUSION</u> .....	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Argersinger v. Hamlin, 407 U.S. 25,  
92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) ..... 11

Brewer v. Williams, 430 U.S. 387,  
97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) ..... 12

Faretta v. California, 422 U.S. 806,  
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) ..... 12

Washington State:

City of Bellevue v. Acrey, 103 Wn.2d 203,  
691 P.2d 957 (1984) ..... 11

In re Pers. Restraint of Turay, 139 Wn.2d 379,  
986 P.2d 790 (1999) ..... 12

State v. Coley, 180 Wn.2d 543,  
326 P.3d 702 (2014), cert. denied,  
135 S. Ct. 1444, 191 L. Ed. 2d 399 (2015) ..... 14, 15

State v. Hightower, 36 Wn. App. 536,  
676 P.2d 1016 (1984) ..... 13

State v. Kirk, No. 71865-7-I, 2015 WL 3766822  
(issued June 15, 2015) ..... 5

State v. Madsen, 168 Wn.2d 496,  
229 P.3d 714 (2010) ..... 12, 13, 14, 16

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995) ..... 17

State v. O'Hara, 167 Wn.2d 91,  
217 P.3d 756 (2009) ..... 17

<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	13
<u>State v. Silva</u> , 108 Wn. App. 536, 31 P.3d 729 (2001).....	5
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	12

Constitutional Provisions

Federal:

U.S. CONST. amend. VI.....	11, 12
----------------------------	--------

Washington State:

CONST. art. I, § 22 (amend. 10) .....	11, 12
---------------------------------------	--------

Rules and Regulations

Washington State:

RAP 2.5.....	17
RAP 14.2.....	19

**A. ISSUE PRESENTED**

A criminal defendant's right to proceed pro se must be unequivocal, and courts consider each motion to proceed pro se independently, indulging every reasonable presumption against a defendant's waiver of his right to counsel. Kirk's conviction for attempted rape of a child in the second degree was reversed on appeal after he successfully argued that his previous waiver of the right to counsel was invalid. On remand, Kirk never requested to proceed pro se; in fact, he asked *not* to proceed pro se and voiced satisfaction with his court-appointed attorney several times during the proceedings, which ended in a guilty plea. Has Kirk failed to show a manifest error that may be raised for the first time on appeal?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

In January 2011, John Lloyd Kirk was charged by information in King County Superior Court with attempted rape of a child in the second degree, alleging a substantial step toward having sexual intercourse with a fictitious 13-year-old prostitute. CP 1. In August 2011, Kirk pleaded guilty to an amended charge of attempted promoting commercial sex abuse of a minor, and was

sentenced to a standard range indeterminate sentence of 120 months. CP 6-11. In March 2013, this Court accepted the State's concession of error that Kirk's offender score had been miscalculated and remanded the case to the trial court for Kirk to withdraw his plea. CP 17-19.

Kirk proceeded pro se to a bench trial in March 2014 and was found guilty. CP 20-22. The trial court imposed a standard-range indeterminate sentence of 85.5 months. CP 26-27. In June 2015, this Court accepted the State's concession that "Kirk was misinformed of the maximum penalty for his offense and that he therefore did not knowingly waive his constitutional right to counsel." CP 35. This Court reversed the conviction and "remand[ed] for further proceedings." Id.

In January 2016, Kirk pleaded guilty, with the assistance of counsel, to attempted rape of a child in the second degree. CP 53-67. The trial court imposed a standard-range indeterminate sentence of 75 months. CP 90. Kirk timely appealed. CP 99.

## **2. FACTS OF THE CRIME**

In January 2011, Seattle Police Detective Tye Holand, working in the Crimes Against Children Unit, spotted a Craigslist ad

for a “Daddy Looking For His Little Girl.”<sup>1</sup> CP 69. The ad said a 70-year-old man was looking for sex with a young female. Id.

The detective emailed the person who placed the ad, who turned out to be John Kirk, and posed as the father of a 13-year-old girl named “Jen” who liked sex with older men. Id. Kirk and the detective exchanged emails in which Kirk made it clear he knew “Jen” was 13 but wanted to have sex with her anyway. Id. They arranged a lunch meeting at a Seattle fast-food restaurant, where Kirk and the detective discussed more details. CP 69; 1/5/16RP 146.<sup>2</sup> Less than an hour after the meeting, Kirk emailed the detective to reconfirm his interest in having sex with the girl. Id.

The detective and Kirk agreed to meet at a hotel on the Seattle waterfront on January 25. CP 69; 1/5/16RP 146-47, 150. When Kirk arrived at the room, detectives arrested him and found condoms, sex toys, a feather boa and a camera in his possession. CP 69. Kirk admitted he had come to the hotel for a “liaison” with a 13-year-old girl. Id.

---

<sup>1</sup> These facts are drawn mainly from the certification for determination of probable cause included with Kirk’s statement of defendant on plea of guilty. Kirk stipulated to the facts set forth in the certification as part of the plea agreement. Additional details are drawn from the pretrial hearings held prior to Kirk’s plea, in which the trial court made findings of fact. See 1/5/16RP 118-21, 145-48. None of the facts of the crime are disputed on appeal.

<sup>2</sup> The State adopts appellant’s numbering of the verbatim report of proceedings.

**C. ARGUMENT**

- 1. KIRK MAY NOT RAISE FOR THE FIRST TIME ON APPEAL HIS CLAIM THAT HIS RIGHT TO SELF-REPRESENTATION WAS VIOLATED; HE DID NOT REQUEST TO PROCEED PRO SE AND AFFIRMATIVELY REQUESTED LEGAL COUNSEL.**

In his previous appeal, Kirk successfully challenged his conviction by arguing that the trial court violated his right to counsel by allowing him to proceed pro se. On remand, with the advice of counsel, he pleaded guilty. Now Kirk challenges his conviction again, this time by arguing that the trial court violated his right to proceed pro se by affording him counsel. His argument is not supported by the record or any legal authority. To the contrary, the record here is clear not only that Kirk never asked to proceed pro se on remand, but that he affirmatively and repeatedly requested not to. Because Kirk never requested to proceed pro se after the remand, he may not raise this claim for the first time on appeal.

- a. Additional Relevant Facts.

The entire 2015 unpublished per curium opinion of the court of appeals, remanding Kirk's case to the trial court, said:

John Kirk appeals from the judgment and sentence entered following his conviction for attempted rape of a child in the second degree. The State concedes that Kirk was

misinformed of the maximum penalty for his offense and that he therefore did not knowingly waive his constitutional right to counsel. See State v. Silva, 108 Wn. App. 536, 540–41, 31 P.3d 729 (2001). We accept the State’s concession, reverse the conviction, and remand for further proceedings. Accordingly, we do not address Kirk’s motion to extend the time to file a statement of additional grounds for review.

Reversed and remanded.

CP 35 (footnote omitted).<sup>3</sup>

The case returned to the case-scheduling stage at King County Superior Court on July 28, 2015. CP 171. A public defender, Craig McDonald, appeared as Kirk’s attorney. CP 171. McDonald continued to represent Kirk through the rest of the summer and fall, and continuance orders reflect a cooperative relationship: Kirk and McDonald were arranging to meet in late July; McDonald was negotiating a plea on Kirk’s behalf in August; and Kirk was trying to find discovery to give to McDonald in September. CP 172-74. There is no record of Kirk ever requesting to proceed pro se following remand.

In October, McDonald told the trial court during an omnibus hearing that Kirk “may want hybrid representation.” CP 176. Kirk apparently had a medical problem affecting his vision, resulting in additional delay until December. CP 177-79. On December 18,

---

<sup>3</sup> See also State v. Kirk, No. 71865-7-I (issued June 15, 2015), 2015 WL 3766822.

2015, at another omnibus hearing, Kirk himself told the trial court that he wished for a trial continuance so his attorney could continue trying to negotiate a plea deal with the State. 12/18/15RP 5-8. Kirk was eager to resolve the case with a plea agreement in the next couple of days. 12/18/15RP 7-8. The trial court denied Kirk's motion to continue. 12/18/15RP 8.

On January 4, 2016, the parties appeared for pretrial hearings. 1/04/16RP 9. Kirk's attorney, McDonald, noted that Kirk had "previously appeared pro se," and "[a]t some point, I wanted to alert the court to, we may be asking for him to conduct some of the examination, but I think we can address that in due course." Id.

The trial court interjected to inquire more of McDonald:

THE COURT: All right. So let me make sure I understand exactly what your role is going to be then. You intend to argue the legal motions in this case?

MR. MCDONALD: I do intend to argue legal motions. I do intend to cross-examine witnesses. Mr. Kirk had asked for leave. This is — what I believe I understood him to ask for was leave to cross-examine Detective Holand. I am aware of the problem with case law on hybrid representation or the lack of hybrid representation, but I would at least make that request on his [behalf]. I believe that he wanted to do that. However, I'm certainly prepared at this point to do so. I have been acting as counsel, quite frankly, in terms of the discussions with [the prosecutor] and in terms of filing motions.

1/5/16RP 9-10.

The trial court then asked McDonald whether Kirk intended to participate in any other part of the trial, such as closing argument. 1/4/16RP 10. Kirk himself interjected:

*I am very confident in Mr. McDonald and the only thing that I am requesting is that, during either the cross-examination or the Defense's direct examination, I be allowed to question Mr. Holand, Detective Holand. And as Mr. McDonald suggested, if this is the inappropriate time to make that decision, we can bring it up later.*

1/4/16RP 11 (emphasis added).

The trial court tabled the matter to give the State time to research the issue. 1/4/16RP 12. After lunch, the State made a motion that if "hybrid representation" were allowed, Kirk should be prohibited from asking questions "that go to legal conclusions" or "would otherwise be inadmissible if Mr. McDonald were to ask them." 1/4/16RP 104-05. The trial court said it had not yet decided whether to allow hybrid representation. 1/4/16RP 105.

The next day, the trial court said it had researched the issue of hybrid representation but again wanted to make sure it understood Kirk's position. 1/5/16RP 168. The trial court noted that McDonald had been appointed as "standby counsel." *Id.* But, the trial court noted:

Mr. Kirk indicated yesterday that he's perfectly comfortable with Mr. McDonald and his representation and that he's

comfortable with letting Mr. McDonald represent him as his attorney [at] trial. However, there is one area that he wants to be able to participate essentially as co-counsel and that would be in the area of cross-examination of Detective Holand. Does that accurately reflect it, Mr. McDonald?

Id. McDonald answered, "Yes." Id.

The trial court then explained to Kirk that McDonald was appointed as standby counsel, "which generally means that an individual is representing themselves, okay, and that counsel is appointed simply to be there for advice, not to actively represent an individual throughout the course of a trial." 1/5/16RP 168-69. However, the court said its present understanding was that Kirk had been comfortable with McDonald "actively representing you throughout this trial," except that Kirk wished to have a "co-counsel role by asking questions of Detective Holand when Detective Holand was on the stand." 1/5/16RP 169.

The court asked Kirk whether that was "the extent that you wish to be involved in the trial." Kirk replied, "That would be correct, sir." Id.

The trial court then ruled that Kirk had not shown a substantial necessity to act as co-counsel for the cross-examination of the detective at trial. 1/5/16RP 171. "It's clear that Mr. Kirk and

Mr. McDonald have a good working relationship and can communicate well,” the court noted. Id. “And Mr. Kirk is nodding his head, yes, that’s the case.” Id. Kirk said, “Uh-huh.” Id.

As a point of procedural order, though, the State sought to further clarify McDonald’s role because he had not entered a notice of appearance, though “for all practical purposes, Mr. McDonald has been acting as the attorney and there hasn’t been any motion ... to appear pro se with standby counsel.” 1/5/16RP 179.

McDonald then clarified that his assignment sheet from the Office of Public Defense said that Kirk previously had appeared pro se and had a week to decide whether to represent himself again. 1/5/16RP 179-80. “I have acted as attorney since then,” McDonald said. Id. “And I believe it was my client’s or Mr. Kirk’s decision for me to act as counsel.” 1/5/16RP 180.

The trial court again turned to Kirk and asked him whether that had been “your desire, for Mr. McDonald to act as your counsel?” Id. Kirk replied, “I have no objection to him acting as my counsel.” Id. “My only concern is the issue we raised earlier that there will be certain questions that I want to put before him to be sure they are asked.” Id.

The trial court once again asked Kirk directly how he wanted to be represented:

*Our concern here is, we want to make sure that your desire is to have counsel represent you and not that you act on your behalf pro se. And it looks like Mr. McDonald has been appointed to represent you as full counsel. And we want to make sure that, that was your desire.*

Id. (emphasis added).

Kirk replied, "It is." 1/5/16RP 181.

Kirk added that he had not known that McDonald was appointed as standby counsel, but nevertheless, "I have no objection to him being my lawyer." Id.

The trial court yet again asked Kirk to clarify:

THE COURT: Okay. So it was your belief that Mr. McDonald has been your counsel and he was not standby counsel. And that's what your desire was.

THE DEFENDANT: One more time, sir.

THE COURT: It was your belief that Mr. McDonald was counsel, not standby counsel.

THE DEFENDANT: Correct.

THE COURT: Okay. All right. And that's what your desire is. Okay. Then I think we're all on the same page. Mr. McDonald is your attorney. He's acting as your

attorney. That's what your desire is. And so I think we're all on the same page.

Id.

Court recessed for lunch; afterward, the parties announced a plea deal had been reached. 1/5/16RP 183. After another hour-long recess, Kirk pleaded guilty. 1/5/16RP 184-208. During the colloquy with the prosecutor, Kirk acknowledged that he had represented himself in the previous trial, but now he was represented by McDonald and had been since the case was remanded. 1/5/16RP 186-87. Kirk also said that he and McDonald would meet again "face to face" in jail after the plea hearing to "go over some other finer details." 1/5/16RP 205.

b. Kirk Never Requested To Proceed Pro Se On Remand; He Cannot Show Manifest Error.

A defendant in a criminal prosecution has a right to the assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (amend. 10). This right to counsel may be waived, but such a waiver must be "knowing, voluntary and intelligent." City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984) (citing Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)). "If counsel is properly waived, a criminal defendant has a right to self-representation." Acrey, 103 Wn.2d at 209 (citing

WASH. CONST. art. I, § 22 (amend. 10); U.S. CONST. amend. VI;  
Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562  
(1975)).

The right to proceed pro se, however, is neither absolute nor self-executing. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Id. It must be both unequivocal and timely. Id. It is axiomatic that, in order “[t]o protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant’s request to proceed pro se must be unequivocal.” State v. Stenson, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997)).

This means that the request must be unequivocal “in the context of the record as a whole.” Id. at 741-42. Moreover, courts are required to “‘indulge in every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” In re Pers. Restraint of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). Each motion to proceed pro se is reviewed independently. Madsen, 168 Wn.2d at 505.

Had the trial court here denied a request for pro se status, this Court would review it under an abuse of discretion standard

because “a request for pro se status is a waiver of the constitutional right to counsel.” Madsen, 168 Wn.2d at 504. “Discretion is abused if a decision is manifestly unreasonable or ‘rests on facts unsupported in the record or was reached by applying the wrong legal standard.’” Madsen, 168 Wn.2d at 504 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

But the trial court here did not deny Kirk’s request for pro se status — because he did not make one. A trial court presumes a defendant is exercising the right to counsel unless and until the defendant initiates an unequivocal, timely, knowing, voluntary and intelligent request to waive it. But here, Kirk was not simply silent on the issue; he was repeatedly asked by the trial court whether he wanted to be represented by an attorney, and Kirk repeatedly affirmed that he did. The only right Kirk asked to exercise here was the one our courts presume — the right to counsel.<sup>4</sup>

Kirk’s arguments all rely on a false premise: that his earlier request to proceed pro se in the previous proceeding — the one Kirk successfully challenged on appeal as invalid — somehow survived after his conviction was reversed, requiring the trial court

---

<sup>4</sup> There is no constitutional right to hybrid representation, i.e., to participate as co-counsel at trial. State v. Hightower, 36 Wn. App. 536, 540, 676 P.2d 1016 (1984).

to indulge it again with a colloquy. This argument is not supported by any authority or the record here.

Kirk argues that the “law of the case” required the trial court to presume he was requesting to waive counsel on remand because that was the position he was in “at the time he waived counsel.” Appellant’s Opening Brief (AOB) at 12. He offers no authority for this non sequitur. “A request for pro se status is a waiver,”<sup>5</sup> and Kirk himself had challenged his earlier waiver of counsel as invalid, and this Court agreed and reversed his conviction. Kirk’s previous request to proceed pro se was pronounced null and void at Kirk’s own insistence. The reversal of Kirk’s conviction returned Kirk to his previous position: with no conviction, no waiver of his right to counsel, and a presumption that he was exercising the right to counsel.

The trial court here, then, had no outstanding requests to waive counsel to consider because invalid requests do not persist. For example, in State v. Coley, the trial court deferred a request for pro se status because the defendant’s competency was in doubt at the time. 180 Wn.2d 543, 561, 326 P.3d 702 (2014), cert. denied, 135 S. Ct. 1444, 191 L. Ed. 2d 399 (2015). After the trial court held

---

<sup>5</sup> Madsen, 168 Wn.2d at 504.

a hearing and determined Coley was competent, Coley made no unequivocal requests to waive counsel, and in fact agreed he should have a lawyer. Id. The trial court “did not leave outstanding any unequivocal and timely requests for self-representation” and “acted well within its discretion when it declined to engage in any inquiry into whether he wished to proceed pro se.” Id.

Kirk’s case is no different, and in fact should be a non-issue in light of Coley: Kirk’s previous waiver of counsel was not only questionable, it was held to be invalid by this Court after Kirk’s own claim of error. Thus, it was not an outstanding request for the trial court to consider on remand.

And, similar to Coley, Kirk’s subsequent actions indicated he had abandoned any intent to proceed pro se after the appeal. A court-appointed attorney represented Kirk for some six months — to Kirk’s later-articulated satisfaction. And the trial court did, in fact, ask Kirk directly whether he wished to proceed pro se or to have a lawyer, and he said over and over that he wanted a lawyer.

Kirk now suggests that the trial court should have disbelieved him, or presumed he did not know better. Kirk even suggests that the trial court should have nudged Kirk toward waiving counsel by initiating a colloquy about proceeding pro se

even though Kirk had made no mention of it. That would flip the strong presumption against waiving the right to counsel to a presumption in favor of waiver. That argument fails. The trial court here had no duty to perform *sua sponte* a formal colloquy about the previously invalidated waiver.

Nevertheless, Kirk proffers a nonexistent legal rule that when a conviction is overturned because of an invalid waiver of counsel, “[t]he remedy for this error is to conduct a valid pro se colloquy.” AOB at 9. But Kirk provides no authority for this. He cites to Madsen, but Madsen does not say this.<sup>6</sup> In Madsen, as here, the court simply reversed the conviction and “remand[ed] for further proceedings.” 168 Wn.2d at 510.

Furthermore, Kirk’s comparisons of his case to Madsen are inapt. There, the defendant made repeated unequivocal requests to proceed pro se, and the trial court abused its discretion by failing to grant pro se status because at least one of them was “unequivocal, timely, voluntary, knowing, and intelligent.” Madsen, 168 Wn.2d at 506. Kirk’s case is the opposite of Madsen. Here, the trial court went to near-excruciating lengths to make sure Kirk

---

<sup>6</sup> The page of Madsen that Kirk cites discusses a trial court’s obligation to inquire further each time a defendant makes an unequivocal request to proceed pro se. It does not address procedures on remand. 168 Wn.2d at 506.

wanted a lawyer, and Kirk time and again said he did. Had the trial court then ordered Kirk to proceed pro se, Kirk now would be here seeking another reversal for another violation of his right to counsel. And the State would be making another concession of error.

RAP 2.5(a) precludes Kirk from raising this issue for the first time on appeal unless he can show that the court's failure to conduct a formal colloquy on self-representation was a "manifest error affecting a constitutional right." RAP 2.5(a)(3). See also State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (appellate courts will not sanction failure to point out an error which trial court might have been able to correct to avoid appeal and consequent new trial). In assessing whether a claimed error is "manifest," the trial record must be sufficiently complete for this court to determine whether the asserted error "actual[ly] prejudice[d]" the appellant by having "practical and identifiable consequences [at] trial." Id. at 98-99 (citations omitted). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, Kirk cannot show a manifest error because he (1) cannot show that a request to proceed pro se was made following remand and (2) cannot show that a formal colloquy would have had any practical or identifiable consequences in his case. The most Kirk offers is that he was "denied the opportunity to negotiate or challenge the State's case as his own advocate," but he does not show how the outcome would have changed in any way. The trial court asked him many times whether he wanted to be his own advocate, and he repeatedly declined. The record shows he had been eager all along to reach a plea agreement, which is what he did. He cannot show manifest error, so he may not raise this claim here.

Kirk's additional claim that his due-process rights were violated because the trial court failed "to strictly comply with the mandate" of this Court by not conducting a new formal colloquy is equally baseless. The order of this Court was simply to "reverse the conviction, and remand for further proceedings." CP 35. There was no instruction to perform a second colloquy. Again, Kirk himself had argued that his earlier waiver was a legal nullity, and this Court agreed. In doing so, this Court did not "mandate" that it should be reopened.

In the end, this case is not complicated: Kirk claims that the trial court erred by not giving him the opportunity to request to proceed pro se. The record plainly shows that it did so, repeatedly. Kirk was clear that he did not wish to proceed pro se, and made no request to proceed pro se. Kirk's claim should be rejected.

**2. THE STATE DOES NOT INTEND TO SEEK A COST BILL.**

The State does not intend to seek a cost bill in this case, should it be the substantially prevailing party. See RAP 14.2.

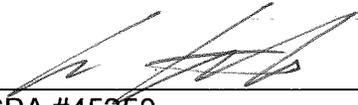
**D. CONCLUSION**

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

DATED this 27<sup>TH</sup> day of October, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

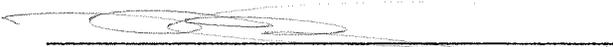
By:   
IAN ITH, WSBA #45250  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. John Lloyd Kirk, Cause No. 74708-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 27 day of October, 2016.

  
Name:  
Done in Seattle, Washington