

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

STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 NOV 13 PM 4:35

FILED
COURT OF APPEALS
DIVISION II

07 NOV 15 PM 2:15
STATE OF WASHINGTON
BY [Signature]

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

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
Issues Pertaining to Assignment of Error	1
B. STATEMENT OF THE CASE.....	2
1. Procedural history	2
2. Substantive facts	2
3. In-chambers voir dire.....	4
4. Request to proceed <i>pro se</i>	5
C. ARGUMENT.....	6
1. THE TRIAL COURT VIOLATED PAUMIER’S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.....	6
2. THE TRIAL COURT VIOLATED PAUMIER’S CONSTITUTIONAL RIGHTS TO REPRESENT HIMSELF BY SUMMARILY DENYING HIS UNEQUIVOCAL REQUEST.	15
<i>a. Paumier’s request was unwavering.</i>	15
<i>b. Any ambiguity in whether Paumier knowingly sought to proceed pro see was solely attributable to the trial court.</i>	16
<i>c. Paumier’s request was sufficiently timely and not offered for dilatory purposes.</i>	20
D. CONCLUSION.....	24

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Allied Daily Newspapers of Wash. v. Eikenberry,
121 Wn.2d 205, 848 P.2d 1258 (1993).....9

City of Bellevue v. Acrey,
103 Wn.2d 203, 691 P.2d 957 (1984).....17

City of Tacoma v. Bishop,
82 Wn. App. 850, 920 P.2d 214 (1996).....17

In re Detention of J.S.,
138 Wn. App. 882, 159 P.3d 435 (2007).....15

In re Personal Restraint of Orange,
152 Wn.2d 795, 110 P.3d 291 (2004).....7, 8, 11, 12, 14

State v. Bolar,
118 Wn. App. 490, 78 P.3d 1012 (2003),
review denied, 151 Wn.2d 1027 (2004).....15

State v. Bone-Club,
128 Wn.2d 254, 906 P.2d 629 (1984)..... 1, 8, 9, 11-14

State v. Breedlove,
79 Wn. App. 101, 900 P.2d 586 (1995).....15, 21, 23

State v. Brightman,
155 Wn.2d 506, 122 P.3d 150 (2005)..... 7, 9, 12-14

State v. Easterling,
157 Wn.2d 167, 137 P.3d 825 (2006).....7, 8, 13, 14

State v. Frawley,
___ Wn. App. ___, ___, 167 P.3d 593 (2007).....7, 9, 10, 13

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<i>State v. Fritz</i> , 21 Wn. App. 354, 585 P.2d 173 (1978), <i>review denied</i> , 92 Wn.2d 1002 (1979).....	20, 22
<i>State v. Garcia</i> , 92 Wn.2d 647, 600 P.2d 1010 (1979).....	16, 19
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997), <i>review denied</i> , 136 Wn.2d 1002 (1998).....	19
<i>State v. Lillard</i> , 122 Wn. App. 422, 93 P.3d 969 (2004), <i>review denied</i> , 154 Wn.2d 1002 (2005).....	17
<i>State v. Modica</i> , 136 Wn. App. 434, 149 P.3d 446 (2006).....	16
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998).....	22
<i>State v. Vermillion</i> , 112 Wn. App. 844, 51 P.3d 188 (2002).....	19, 21, 22
<i>State v. Watt</i> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	7
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001), <i>cert denied</i> , 534 U.S. 964 (2001).....	16

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602,
16 L. Ed. 2d 694 (1966).....4

Press-Enterprise Co. v. Superior Court,
464 U.S. 501, 104 S. Ct. 819,
78 L. Ed. 2d 629 (1984).....7

United States v. Price,
474 F.2d 1223 (9th Cir. 1973)22

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210,
81 L. Ed. 2d 31 (1984).....7

OTHER JURISDICTIONS

Commonwealth v. Patry,
48 Mass. App. Ct. 470, 722 N.E.2d 979 (Mass. App. Ct. 2000),
review denied, 431 Mass. 1103 (2000)8, 13

People v. Windham,
19 Cal.3d 121, 560 P.2d 1187, 137 Cal.Rptr. 8,
cert. denied, 434 U.S. 848 (1977).....22

Storer Broadcasting Co. v. Circuit Court,
131 Wis.2d 342, 388 N.W. 633 (Wis. App. Ct. 1986).....10, 11, 13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
Const. art. I, § 22.....	6, 15
CrR 3.3.....	18
CrR 3.3(d)(3).....	18
U.S. Const. amend. I.....	7
U.S. Const. amend. VI.....	6, 8, 13, 15
U.S. Const. amend. XIV.....	15

A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional rights to a public trial.

2. The trial court committed reversible error by failing to permit the appellant to represent himself at trial without first engaging in a colloquy.

Issues Pertaining to Assignment of Error

1. The trial court conducted part of the voir dire regarding four prospective jurors in chambers, with only the judge and parties present. Where the trial court did not analyze the "*Bone-Club*"¹ factors before ordering the private voir dire, did the trial court's exclusion of the public violate the appellant's constitutional rights to a public trial?

2. The appellant unequivocally informed the trial court he wished to represent himself at trial. His request came after the jury was impaneled but before opening statements. The appellant gave no indication he needed more time to prepare for trial. The trial court found his request untimely and dispensed with the customary colloquy to ensure the appellant knew the risks of proceeding pro se. Did the trial court

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 629 (1984).

commit reversible error by failing to permit the appellant to represent himself at trial without first engaging in a colloquy?

B. STATEMENT OF THE CASE

1. Procedural history

The state charged the appellant, Renee P. Paumier, with residential burglary and second degree theft. CP 53-54. A Mason County jury found Paumier guilty of residential burglary and the lesser offense of third degree theft. CP 23-25. The trial court sentenced Paumier to 25 months in prison for the residential burglary and 365 in jail for theft. CP 5-13. The court suspended the theft sentence upon compliance with a 24-month probation term. CP 12-13.

2. Substantive facts

Terry McClintic lived across the street from Jason Howland. RP1 13, 29-30.² McClintic was on his porch smoking when his attention was drawn to Howland's residence. RP1 30-31. He saw a red pickup truck he did not recognize pull up alongside Howland's residence. RP1 31.³

² "RP1" refers to the verbatim report of the pretrial and trial proceedings held May 8 and May 9, 2007. "RP2" refers to the verbatim report of the May 21, 2007, sentencing hearing. "RP3" is the verbatim report of the voir dire proceedings held May 8, 2007.

³ Howland's mother drove the red pickup truck to Howland's house. RP1 16, 25-26.

As soon as the truck pulled up, a man ran out the front doorway of Howland's residence. RP1 31. The man turned to his right to look toward the truck, then walked quickly down the street. RP1 32. McClintic testified he "believed" the man was Paumier, whom he had seen around town and spoken with in the past. RP1 32-35. The man wore a loose-fitting coat and was "slunched over," which heightened McClintic's suspicion. RP1 39. McClintic did not see the man carrying anything and could not say the man had items concealed under his coat. RP1 38-39.

Howland was staying at his girlfriend's parents' home that weekend. RP1 14. When he returned on Sunday, he observed the back door to his residence was broken open. RP1 15. He went into his bedroom and noticed belt buckles, baseball hats, two watches, sunglasses, three knives, and some clothing missing. RP1 17-18, 27.

Howland called police and officer Ohlson responded. RP1 18. The officer took photographs and attempted to lift fingerprints from several areas and items but was unsuccessful. RP1 20-25, 44-47. Ohlson also took a statement from McClintic several days later. RP1 47. Paumier became a "person of interest" based on information obtained from McClintic. RP1 47.

Five days after the suspicious incident, Officer Hinton contacted McClintic, who told him what he saw. This lead Hinton to suspect Paumier was the burglar, so he began looking for Paumier. RP1 52. Hinton found Paumier, advised him why he wanted to speak with him, read him Miranda⁴ warnings, and requested to search his person and backpack. RP1 52. Paumier consented to be searched. RP1 52. The officer found a belt buckle and knife that Howland identified as having come from his bedroom. RP1 54.

3. In-chambers voir dire

The trial judge during jury selection furnished cordless microphones to venire members to facilitate individual questioning. RP3 8-9. The microphones were part of a recording system that eliminated the need for a court reporter. RP3 8-9. When prospective jurors spoke into the microphones, their statements were recorded directly into a computer for later downloading to disk. RP3 8-9. The microphones were not used for amplification. RP3 8-9. There is no indication the microphones were connected to an amplification system inside the courtroom for enhanced listening by the general public. RP3 8-9.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The trial judge at the outset of voir dire stated potential jurors who wished to speak privately would be taken into the judge's chambers for individual questioning to avoid possible embarrassment. RP3 9-10. The judge and parties questioned three potential jurors individually in chambers, with the panelists again speaking into the cordless microphone. RP3 13-17. The court and parties later questioned two potential juror in chambers. RP3 49-52.

4. Request to proceed *pro se*

On May 8, 2007, the trial court conducted jury selection and a panel was sworn. RP1 4-5. On May 9, the court and parties briefly discussed, and the trial court granted, the state's motion for leave to file an amended information. RP1 5-8. Paumier's counsel entered a plea of not guilty on behalf of Paumier. RP 8. Defense counsel then brought to the court's attention Paumier's desire to represent himself at trial, which he expressed to counsel a day earlier. RP1 8-9. Counsel explained Paumier had a copy of discovery throughout the proceedings and was not satisfied with counsel. RP1 9.

Paumier agreed. He said he believed counsel "should have spoke up for me instead of getting pissed off at me in court." RP1 9. Paumier

also said, “I don’t feel it should have gotten this far, and I’d just rather present my . . . case myself.” RP1 9.

The trial court replied, “The Court will deny the request to allow Mr. Paumier to represent himself. I’m not even going to go through the normal colloquy because at this point the request comes too late. We have already picked our jury and we’re ready to begin trial at this point, and the Court will find that the request is untimely.” RP1 9.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED PAUMIER’S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial judge permitted questioning of four venire persons in chambers with only the judge and parties present. The judge did not weigh the right of a public trial against the prospective jurors’ privacy interests. Nor did the judge enter an order justifying the closure of a portion of voir dire. The trial court therefore violated Paumier’s constitutional rights to a public trial by prohibiting the public from observing this examination. The violation of these rights constitutes structural error and reversal and remand for a new trial are required.

Under both the Washington and United States constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Easterling*, 157 Wn.2d 167, 174,

137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. *Easterling*, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Prejudice is presumed where there is violation of the right to a public trial. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 110 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. *Orange*, 152 Wn.2d at 814. In other words, the violation of the right to open court proceedings is structural error. *State v. Watt*, 160 Wn.2d 626, 632, 160 P.3d 640 (2007). Whether a trial court has violated the defendant's right to a public trial is a question of law this Court reviews de novo. *Easterling*, 157 Wn.2d at 173-74.

The right to a public trial encompasses jury voir. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Even where, as in Paumier's case, only part of jury selection is improperly closed to the public, such closure can violate a defendant's constitutional right to a public trial. *See State v. Frawley*, __ Wn. App. __, __, 167 P.3d 593, 595-97 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated

right to public trial); *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 473-75, 722 N.E.2d 979 (Mass. App. Ct. 2000) (trial court's entry of jury room with counsel and a court reporter to answer juror's questions three times during deliberations violated Sixth Amendment right to public trial), *review denied*, 431 Mass. 1103 (2000).

The right to a public trial is not absolute. *State v. Bone-Club*, 128 Wn. 2d 254, 259, 906 P.2d 325 (1984). A trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in *Bone-Club*. *Orange*, 152 Wn.2d at 806-07, 809. The court must also enter specific findings that justify a closure order. *Easterling*, 157 Wn.2d at 175.

The Bone-Club requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In *Brightman*, the trial court told counsel it was barring all spectators from observing jury selection because of safety concerns. *Brightman*, 155 Wn.2d at 511. The court, however, failed to analyze the five *Bone-Club* factors. The *Brightman* Court held because the record indicated the trial court did not consider Brightman's public trial right as required by *Bone-Club*, it was unable to determine whether the closure was proper. *Brightman*, 155 Wn.2d at 518. The Court remanded for a new trial. *Brightman*, 155 Wn.2d at 518; see also *Frawley*, __ Wn. App. at __, 167 P.3d at 596-97 (declining state's invitation to apply *Bone-Club* factors for first time on appeal because review is of trial court's consideration of factors as found in record and because trial court record was inadequate to apply factors).

The state argued *Brightman* failed to prove the trial court in fact closed the courtroom during jury selection and if it was closed, the closure was de minimis. *Brightman*, 155 Wn.2d at 515-17. The Court rejected both arguments. The Court first ruled when the plain language of a trial judge's ruling calls for closure, the state bears the heavy burden to overcome the strong presumption the courtroom was closed. *Brightman*,

155 Wn.2d at 516. Second, the Court held where jury selection or a part of the selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517.

In Paumier's case, the trial court conducted individual voir dire of four panel members who requested privacy in chambers, with only the judge and parties present. Private questioning of individual jurors violates the right to an open trial. *Frawley*, 167 P.3d at 596; *Storer Broadcasting Co. v. Circuit Court*, 131 Wis.2d 342, 388 N.W. 633 (Wis. App. Ct. 1986).

The trial court's conduct found to be improper in *Storer* is remarkably similar to that of Paumier's trial judge. The judge in *Storer* allowed private questioning, limited to three subjects, of those prospective jurors who requested such examination in open court. *Storer*, 131 Wis.2d at 345-46. The court held no formal hearing and entered no factual findings. *Storer*, 131 Wis.2d at 346. As in Washington, the Wisconsin Supreme Court required trial courts to follow a particular procedure before closing jury voir dire, which included the court to recite on the record the factors compelling closure and why those factors override the presumptive value of a public trial. *Storer*, 131 Wis.2d at 348.

The *Storer* court held the trial court abused its discretion by failing to follow the Supreme Court's procedure. *Storer*, 131 Wis.2d at 349-350. The reviewing court found the trial court based its closure decision on its unsupported belief the defendant could not receive a fair trial without partially private voir dire. *Storer*, 131 Wis.2d at 350. The appellate court held instead of the private examination of certain jurors, the trial court could simply have moved the rest of the venire panel out of the courtroom and questioned individual prospective jurors in open court. *Storer*, 131 Wis.2d at 350. Using that easy method, the reviewing court held, would have obviated the risk of contaminating the entire panel without trampling on the public's right to know what was happening during trial. *Storer*, 131 Wis.2d at 350.

This same alternative to private jury voir was available to Paumier's trial judge. Rather than questioning the potential jurors in chambers, the trial court could have removed the rest of the venire panel and conducted individual questioning in open court. By not considering this alternative, or applying the *Bone-Club* factors before barring the entire public from viewing voir dire, the trial judge violated Paumier's right to a public trial. *Orange*, 152 Wn.2d at 812.

Even were it proper for this Court to independently analyze the *Bone-Club* factors, the jury voir dire closure was illegal. The record fails to show a compelling interest for the private jury voir dire. Nor did the trial court give anyone present in the courtroom a chance to object to being barred from observing an important part of the trial proceedings. Further, the record fails to establish the trial court's chosen method was the least restrictive means available for protecting any perceived threatened interests or was no broader in its application or duration than necessary to serve its purpose.

Because the trial court failed to analyze the *Bone-Club* factors before excluding the public from a portion of jury voir dire, Paumier's constitutional right to a public trial was violated. Moreover, on the existing record, analysis of the *Bone-Club* factors leads to the same conclusion.

The State may argue because there is no showing Paumier's counsel objected to the closed jury voir dire, the issue is waived. That argument fails. Defense counsel in both *Orange* and *Brightman* also failed to object to the closed jury voir dire. *Orange*, 152 Wn.2d at 801-02; *Brightman*, 155 Wn.2d at 517. The Court in *Brightman* held failure to object did not waive the right to a public trial." *Brightman*, 155 Wn.2d at

517 (citing *Bone-Club*, 128 Wn.2d at 257). Further, it is the trial judge's obligation to seek the defendant's objection to any closure. *Easterling*, 157 Wn.2d at 175-76 n.7. Finally, the waiver of a constitutional right must be knowing and voluntary. *Frawley*, __ Wn. App. at __, 167 P.3d at 596.

The state may also attempt to distinguish Paumier's case from *Brightman* because only a portion of jury voir dire was private. Such an argument is also unavailing. The *Brightman* Court ruled where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517. The *Frawley* court also found the defendant's right to a public trial violated where the trial court questioned individual venire members privately only as to their answers to a questionnaire. *Frawley*, __ Wn. App. at __, 167 P.3d at 595-97; *see also*, *Patry*, 48 Mass. App. Ct. at 474-76 (trial court violated Sixth Amendment right to public trial by instructing jurors three separate times in jury room); *Storer*, 131 Wis. 2d at 345-50 (trial court abused its discretion by permitting limited questioning of selected jurors in chambers without first conducting a hearing or making factual findings to support partial closure).

The state may also contend Paumier's case is distinguishable because in *Brightman* and *Orange* the trial courts court closed the courtrooms rather than conducting partial voir dire in chambers. Such a claim would be baseless. The constitutional public trial right is the right to have a trial open to the public. *Orange*, 152 Wn.2d at 804-05. This right is for the benefit of the accused because it guarantees the electorate may observe he is dealt with fairly and emphasizes to the court, prosecutors and jurors the importance of their responsibility and duties. *Bone-Club*, 128 Wn.2d at 259.

Whether jury voir dire is conducted in a closed courtroom, a jury room, or a judge's chambers is a distinction without a difference. The point of the constitutional rights to a public and open trial is to guarantee access to the public, which the trial court failed to do when it conducted questioning of Paumier's potential triers in chambers.

The trial court violated Paumier's constitutional right to a public trial. His convictions should be reversed and the cause remanded for a new trial. *Easterling*, 157 Wn.2d at 182.

2. THE TRIAL COURT VIOLATED PAUMIER'S CONSTITUTIONAL RIGHTS TO REPRESENT HIMSELF BY SUMMARILY DENYING HIS UNEQUIVOCAL REQUEST.

The Washington and United States constitutions guarantee a criminal defendant the right to self-representation. Wash. Const., art. I § 22; U.S. Const. amend. VI and XIV. *State v. Bolar*, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), *review denied*, 151 Wn.2d 1027 (2004). The state constitutional right is absolute and its violation is reversible error. *In re Detention of J.S.*, 138 Wn. App. 882, 890-891, 159 P.3d 435 (2007). The trial court in Paumier's case committed reversible error by denying Paumier's request to represent himself because (1) Paumier's request was not designed to delay trial and (2) the court summarily denied the motion without first exercising its discretion.

The controlling factors in deciding a defendant's motion to represent himself are whether the motion is knowing, unequivocal, and timely, that is, not exercised merely for a dilatory purpose. *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

a. Paumier's request was unwavering.

Paumier's request was unequivocal. Paumier expressed his dissatisfaction with counsel and at no point requested appointment of new counsel. Instead, he simply said he would rather present his case himself.

That Paumier may have been motivated to represent himself by dissatisfaction with counsel makes his request no less unequivocal. A clear request to proceed *pro se* does not become equivocal simply because the defendant is motivated by more than the single desire to present his own defense. *State v. Modica*, 136 Wn. App. 434, 442, 149 P.3d 446 (2006). Paumier's statements are distinguishable from cases in which defendants were found to have been equivocal in their alleged *pro se* motions. *See, e.g., State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001) (telling a trial judge he "will be prepared to proceed without counsel" in frustration with counsel's request for an eight-month trial continuance found to be mere expression of displeasure with his lawyer's request for a lengthy continuance), *cert denied*, 534 U.S. 964 (2001); *State v. Garcia*, 92 Wn.2d 647, 653, 600 P.2d 1010 (1979) (defendant who complained about attorney's performance and stated he did "not wish to have this attorney with me" was found to have asked for a new lawyer, not to proceed *pro se*).

b. Any ambiguity in whether Paumier knowingly sought to proceed pro se was solely attributable to the trial court.

A valid waiver of the constitutional right to counsel must be made knowingly, voluntarily, and intelligently. *City of Tacoma v. Bishop*, 82

Wn. App. 850, 855, 920 P.2d 214 (1996). The favored method for determining whether a defendant validly waives the right to counsel is for the trial judge to question the defendant on the record to ensure he knows the risks of self-representation, the seriousness of the charges, the rules to be applied to the presentation of evidence and argument, and the maximum possible punishment upon conviction. *State v. Lillard*, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005).

Absent such a colloquy, the record must otherwise show the defendant appreciated the seriousness of the charges, knew the possible maximum penalty, and was made aware of the technical rules governing the presentation of evidence and argument at trial. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). “[O]nly rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation.” *Acrey*, 103 Wn.2d at 211.

Paumier’s case is rare because he first pleaded guilty to residential burglary and third degree theft, then was permitted to withdraw his guilty pleas because the plea form set forth an incorrect offender score (four instead of the correct score of five). CP 62-69 (guilty plea statement); CP

61 (order authorizing plea withdrawal). Although the state incorrectly notified Paumier of a lower offender score and consequent standard range sentence with respect to the residential burglary charge, it correctly notified him of the possible sentence for third degree theft as well as the maximum possible punishment for each offense. CP 62. The statement also set forth the possible community custody terms as well as other consequences of a guilty finding, such as the prohibition on possession of a firearm and the ability to vote. CP 63-64. The trial court presumably found Paumier understood these consequences because it accepted his plea. The record thus sufficiently shows Paumier understood the seriousness of the charges and possible punishment.

Less clear is whether Paumier recognized the need to know technical rules for the conduct of a trial. It may be reasonably inferred Paumier was generally aware of the justice system in Washington given his criminal history. Further, at an earlier point in the proceedings, Paumier filed pleadings objecting to the trial court's continuance beyond his speedy trial expiration date and moving to dismiss for a violation of CrR 3.3. CP 55-60. Paumier filed his pleadings within 10 days of the trial court's continuance as required by CrR 3.3(d)(3), requested his motion to dismiss be set for hearing, and cited applicable subsections of CrR 3.3.

CP 55-60. Although Paumier did not prevail, his pleadings indicated an understanding of the rules and how to apply them to the facts of his case. It may therefore be reasonably inferred from Paumier's experience and proven ability to file pro se pleadings he was also aware of the technical requirements for presenting his case at trial.

Even if this Court is unwilling to draw this inference, Paumier should not be punished because the absence of a proper record is attributable solely to the trial court's refusal to engage Paumier in a colloquy. The trial judge immediately concluded Paumier's request was untimely and dispensed with the requirement of an on-the-record colloquy. Furthermore, a defendant who desires to proceed pro se "need not demonstrate technical knowledge of the law and the rules of evidence." *State v. Vermillion*, 112 Wn. App. 844, 851, 51 P.3d 188 (2002).

The trial court's snap judgment was erroneous. This Court reviews a trial court's denial of a request to proceed pro se for an abuse of discretion. *Vermillion*, 112 Wn. App. at 855. The failure to exercise discretion is itself an abuse of discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

Here the trial court refused to exercise its discretion and instead categorically refused to consider Paumier's request by concluding it was not timely. As the following section shows, this was not the proper procedure.

c. *Paumier's request was sufficiently timely and not offered for dilatory purposes.*

In addition to being unequivocal, knowing, and voluntary, motions to proceed pro se must be timely made. In determining whether a request is timely, the trial court's discretion lies along a continuum corresponding to the time between the request and the start of trial and is expressed as follows.

The cases that have considered the timeliness of a motion to proceed *pro se* have generally held: (a) if made well before the trial or hearing and without an accompanying request to continue, the right of self-representation stands as a matter of law; (b) if made as the trial or hearing is about to begin or shortly before, the trial court retains a measure of discretion to be exercised after considering the particular circumstances of the case; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court. *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), *review denied*, 92 Wn.2d 1002 (1979).

Furthermore, the timeliness analysis is tied to the question of whether the defendant sought to exercise his right for the purpose of delaying the court proceedings. The right to proceed pro se may not be used for the purposes of delay or obstructing justice. *Vermillion*, 112 Wn. App. at 851.

If a request for self-representation is made “shortly before trial, at the beginning of trial, or mid-trial,” a trial court properly exercises its discretion by “balancing the important interests implicated by the decision: the defendant's interest in self-representation and society's interest in the orderly administration of justice.” *Breedlove*, 79 Wn. App. at 107.

Paumier made his request after the jury was selected but before it was sworn. RP1 9. The following therefore applies:

When such a midtrial request for self-representation is presented the trial court shall inquire sua sponte into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request.

Fritz, 21 Wn. App. at 363 (quoting *People v. Windham*, 19 Cal.3d 121, 128-29, 560 P.2d 1187, 1191-92, 137 Cal.Rptr. 8, *cert denied*, 434 U.S. 848 (1977)).

Fritz was decided nearly 30 years ago and remains good law. The trial court nevertheless applied none of the factors set forth in that case. Nor did it sua sponte or otherwise ensure a “meaningful record” would be preserved in the event of appellate review. Appellate review is upon us and there is no record, much less a “meaningful” one, to assist this Court in reviewing the trial court’s ruling.

Furthermore, an important question in determining timeliness is whether the defendant requests more time to prepare for trial. *See Vermillion*, 112 Wn. App. at 856 (in reversing trial court’s denial of defendant’s request to present his own case, appellate court noted defendant “did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial.”); *State v. Stenson*, 132 Wn.2d 668, 770, 940 P.2d 1239 (1997) (strong evidence request to proceed pro se is made for dilatory purposes when it is accompanied by a motion to continue), *cert. denied*, 523 U.S. 1008 (1998); *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973) (trial court

abused discretion by refusing to permit defendant to proceed *pro se* where the “motion was made before the jury was sworn. The record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion.”)

Paumier requested no additional time to prepare for trial. He had copies of the discovery throughout the proceedings. RP1 9. His attorney waited one day to bring his desire to proceed *pro se* to the trial judge’s attention. RP1 8-9. His request came after the jury was selected but before it was sworn. RP1 9. Paumier simply said he would rather present his case himself. RP1 9. The case was not complex. The state called four witness, the defense none, and the trial was over in about four hours. Supp. CP __ (sub. no. 50, Log of Proceedings, 5/9/2007).

“Washington courts have recognized that the timeliness requirement should not operate as a bar to a defendant's right to defend *pro se*.” *Breedlove*, 79 Wn. App. at 109. The unusual circumstances in Paumier’s case indicate his request was timely. The trial court failed to consider Paumier’s request because it immediately found it was untimely. This was an abuse of discretion, because there were no tenable grounds for the court’s ruling and the court refused to exercise its discretion. The trial court’s error requires reversal.

D. CONCLUSION

The trial court violated Paumier's constitutional rights to a public trial by conducting portions of voir dire in chambers. The court also violated Paumier's constitutional rights to self-representation by summarily denying Paumier's request to proceed *pro se*. Each error is reversible without a showing of prejudice. This Court should reverse Paumier's convictions and remand for a new trial.

DATED this 13 day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZIMMER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36346-1-II
)	
RENE P. PAUMIER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF NOVEMBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] MONTY DALE COBB
MASON COUNTY PROSECUTOR'S OFFICE
521 N. 4TH AVENUE
SUITE A
P.O. BOX 639
SHELTON, WA 98584

- [X] RENE PAUMIER
DOC NO. 869193
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTATINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF NOVEMBER 2007.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II
2007 NOV 13 PM 4:35
07 NOV 15 PM 2:15
BY *[Signature]*
STATE OF WASHINGTON
DEPUTY