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No. 40526-1-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
RICHARD PLECHNER,
Appellant.

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

The Honorable Amber L. Finlay, Trial Court Judge
Cause No. 09-1-00109-0

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plechner his constitutional right to proceed pro se.
2. The trial court erred in allowing the State to present evidence that Plechner had told Det. Heldreth two months before the current incident that he would take matters into his own hands should anyone steal from him where this evidence was irrelevant under ER 403 in establishing any matter at issue inadmissible under 404(b) as it merely established propensity.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Count II (felony harassment).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it error for the court to deny Plechner's request to proceed pro se when he was equivocal and it was near the end the trial?
2. Did the court error when it admitted a prior statement Plechner made that was relevant evidence to his motive, intent, and lack of accident or mistake?
3. Was there sufficient evidence to convict Plechner of Felony Harassment (Count II) when the victim stated that she believed he would carry out the threat?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Plechner's recitation of the procedural history and facts except for the following distinctions and additional facts:

Toward the end of the State's case in chief Plechner inquired about representing himself. RP 289. Plechner stated that his lawyer made "some motions that appear to be, you know, lawyerish, whatever, but I'm-my stomach is in knots, Your Honor, I do not want to represent myself, but I feel I have no other choice." RP 290. The court responded that his lawyer had made successful motions and that the representation has been adequate and competent. RP 290. Further, the court indicates "that you (Plechner) feel you have no choice, which tells me-this is more of an equivocal request to represent yourself and not a request to represent yourself completely without the use of an attorney. RP 290.

The court was also concerned, that due to the stage of the trial, Plechner had not had the opportunity to prepare the case for himself. RP 291. The court also discussed the fact that the rules of evidence would apply to him as to anyone else in the courtroom. RP 292. The court stated, "you've not studied them (rules of evidence), would impair your ability to represent yourself, okay? I'm concerned with the fact that we're midway in the trial and all of the sudden, then, your attorney is not going to be seated next to you; that's a concern to the Court." RP 293

Plechner's attorney stated that his client wanted to go into things he believed to be irrelevant. RP 291. Again, Plechner considers counsel remaining on in assisting him. RP 293, 299.

E. ARGUMENT

1. It was not error for the court to deny Plechner to proceed pro se.

Criminal defendants have an explicit right to self-representation under the Washington Constitution Art 1, section 22 and an implicit right under the Sixth Amendment to the United States. A criminal defendant has a constitution right to waive assistance of counsel and proceed pro se at trial. *Faretta v. California*, 422 U.S. 806, 45 L. Ed 562, 95 S. Ct. 2525 (1975).

Both the United States Supreme Court and the Washington Supreme Court have held that courts are required to indulge in “every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *In re Det. Of Turay*, 139 Wash.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)). Appellate courts have regularly and properly reviewed denials of requests for pro se status under an abuse of discretion standard. *State v. Hemenway* 122 Wash.App. 787, 792, 95 P.3d 408 (2004). 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. *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003).

The right to proceed pro se is neither absolute nor self-executing. *State v. Woods*, 143 Wash.2d 561, 586, 23 P.3d 1046 (2001). In order to exercise the right, a defendant's request must be unequivocal, knowingly and intelligently made, and it must be timely. *State v. Vermillion*, 112 Wn.App. 844, 851, 51 P.3d 188 (2002). To determine the validity of a defendant's self-representation request, the trial court examines the facts and circumstances and the entire record. *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The appellate court reviews a trial court's decision denying a defendant's request to proceed pro se for an abuse of discretion that lies along a continuum, corresponding to the timeliness of the request"

(a) if made well before the trial...and is unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial...is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter, and (c) if made during the trial...the right to proceed pro se rests largely in the informed discretion of the trial court. *State v. Vermillion*, 112 Wn.App. at 855, citing *State v. Fritz*, 21 Wn. App. At 361.

In the present case the court had an extensive colloquy with Plechner regarding the issue of self-representation. RP 289-311. The court determined that Plechner's request was equivocal and not a request to represent himself completely without the use of an attorney. RP 290. Plechner remained equivocal in his decision-making when he believed that

he and counsel might be able to continue together throughout the trial. RP 293. Based on his waffling, Plechner's decision to proceed pro se was equivocal. PR 290-311.

Plechner's request to represent himself came toward the end of the State's case in chief. The trial was well under way at this point. As pointed out in *Vermillion*, if the request is made during the trial the right to proceed pro se rests largely in the informed discretion of the trial court. The trial court was extremely informed of the issues in this matter and properly denied his request to proceed pro se. RP 311. Appellate courts have regularly and properly reviewed denials of requests for pro se status under an abuse of discretion standard. *State v. Hemenway* 122 Wash.App. 787, 792, 95 P.3d 408 (2004). The trial court did not abuse its discretion when denying Plechner's request.

Plechner's decision to act pro se was equivocal and untimely. In its discretion, based on the facts contained in the record the trial court did not abuse its discretion when denying Plechner in his request.

2. The trial court did not error in allowing Detective Heldreth to testify about a prior conversation with Plechner.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay waste of time, or needless presentation of cumulative evidence. ER 403. The admission of other crimes, wrongs, or acts is governed by ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before evidence of prior crimes, wrongs, or acts can be admitted, it must be shown to be logically relevant to a material issue before the jury and its probative value must be shown to outweigh its potential for prejudice.

State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984).

Evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant’s connection to it. *State v. Tharp*, 96, Wn.2d 591, 594, 637 P.2d 961 (1981). Detective Heldreth testified that in December

of 2008 he investigated a case where Plechner was an alleged victim of a theft. RP 349. Heldreth also testified that Plechner told him on January 5, 2009 “the next time somebody steals money from him, he was not gonna call the cops and he was going to take matters into his own hands.”(Referred to as the prior statement) RP 355. In the present case Plechner believed that Sherri had stolen money from him. RP 172, 245-248, 315-317.

The prior statement to Detective Heldreth is relevant; its probative value is not outweighed by any prejudice, and is admissible to show his intent, motive, and absence of mistake. Again, the reason for the 2008 investigation by Heldreth was because Plechner was claiming he was a victim of a theft. He then told Heldreth “the next time somebody steals money from him, he was not gonna call the cops and he was going to take matters into his own hands.” In the present case, Plechner is claiming he again, was the victim of a theft. The scenarios are identical.

Evidence of a defendant’s financial situation was admissible to show motive for robbery. Among other things, the evidence included defendant’s employment status and low level of income and a recent petition for bankruptcy. *State v. Mathews*, 75 Wn.App. 278, 877 P.2d 252 (1994). Like *Mathews*, Plechner’s prior statement of goes to his motive to

“take matters into his own hands.” That is what exactly what he did, he assaulted Sherri and threatened to kill her for allegedly stealing from him. The State was correct in its argument that this prior statement is admissible under rule 404(b) to show the defendant’s state of mind, with his intent, with his motive, and with the absence of any mistakes. RP 284.

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). This statement was relevant, its probative value was not outweighed by prejudice, and it was admissible under 404(b), as noted above.

The State in no way concedes this issue, however, if this court determines that the evidence was inadmissible, it was harmless error. Under the circumstances in this case error would not be prejudicial unless, within the reasonable probabilities, had the error occurred, the outcome of the trial would have been materially affected. *State v. Rogers*, 83 Wash.2d 553, 520 P.2d 159 (1974). Despite the prior statement made by Plechner being admitted into evidence, there was substantial evidence to convict Plechner of both counts beyond a reasonable doubt. The admission of the prior statement would not have been materially affected the outcome.

3. There was sufficient evidence to convict Plechner of Felony Harassment (Count II)

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Plechner claims that the State did not sustain its burden-whether Plechner's threat to kill Sherri placed her in reasonable fear that the threat to kill would be carried out. AB 15. It appears that this is the only element that Plechner takes issues regarding Count II Felony Harassment, and in turn, the analysis will focus on this element solely.

Sherri testified that when she returned from her sisters home on March 17, 2009 Plechner physically attacked her asking about money. RP

172. He then shoved her down and put his hands on her throat and choked her. RP 173. Sherri testified that she was barely able to speak or breathe. RP 174. When Plechner's hands were around Sherri's neck he told her he was going to kill her, put her through a chipper and take her out to Hanks Lake and bury her. RP 174. While this was going on Sherri was very scared. RP 175. Sherri stated when asked if she was afraid of Plechner carrying out the threat she responded with: "Very possibly, yes." RP 175.

Sherri's fear of Plechner's threat was compounded by her testimony regarding hearing Plechner making threats about another woman who stole money from him. Sherri testified "several times-he repeated himself saying, Sherri, you just don't know how bad I wanted to kill her. I just wanted to wring her neck, I wanted to kill her, you know, I just wanted to kill her." RP 188. After the police were called and before he left, Sherri testified that Plechner, whispered in her ear "you better get a good attorney or I'm going to kill you and bury you at Hanks Lake."

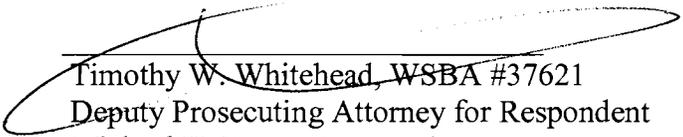
The victim in this case Sherri Wurzbzcher when asked if she thought Plechner would carry out the threat to kill she stated: "Very possible yes." RP 175. That statement, coupled with the other aforementioned evidence regarding her reasonable fear that the threat to kill would be carried out was proven by the State beyond a reasonable doubt.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 5 day of January, ²⁰¹¹~~2010~~

Respectfully submitted by:



~~Timothy W. Whitehead, WSBA #37621~~
Deputy Prosecuting Attorney for Respondent
Michael K. Dorcy, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 40526-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
RICHARD PLECHNER,)	
)	
Appellant,)	
_____)	

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U.S. MAIL
SHELTON, WA 98584

I, MARGIE OLINGER, declare and state as follows:

On WEDNESDAY, JANUARY 5, 2010, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause

number and to which this declaration is attached, BRIEF OF

RESPONDENT, to:

Patricia A. Pethick
P.O. Box 7269
Tacoma, WA 98417

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 5TH day of JANUARY 2011, at Shelton, Washington.


MARGIE OLINGER