

NO. 41926-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KIYOSHI HIGASHI,

Appellant.

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

The Honorable Rosanne Buckner, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying Appellant's demands to represent himself made at the conclusion of the prosecution's case-in-chief and again prior to the defense closing argument.

2. The trial court erred in entering findings of fact 7, 9, 10, 15, 16, 22<sup>1</sup> and 23, and conclusions of law 2 and 3, in its "Findings of Fact and Conclusions of Law Re: *Pro Se* Request." CP 110-116.

Issue Pertaining to Assignment of Error

Did the trial court err in denying Appellant's demands to represent himself when they were unequivocal, knowing, voluntary and intelligent, not intended to delay or disrupt the proceedings, and not dependent on the need for a continuance?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecutor charged appellant Kiyoshi Higashi with first degree murder, second degree assault, first degree burglary and two counts of first degree robbery, all with firearm enhancements and aggravating factors alleged. CP 17-21; RCW 9A.32.030(1)(C); RCW 9.94A.510, .530, .533, .535; RCW 9A.56.190, 200(1)(a)(i); RCW 9A.36.021(1)(a), (c); RCW 9A.56.020(1)(a), (b). The State claimed

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<sup>1</sup> There are two findings of fact labeled "22." CP 115. Appellant assigns error to both.

Higashi and others used a ruse to gain access to a home, where they assaulted the residents, stole various items, and killed one of the residents. CP 4-5.

A jury trial was held February 11, 2011 through March 8, 2011, before the Honorable Rosanne Buckner. 1RP-2RP.<sup>2</sup> Higashi was convicted as charged, including all the firearm enhancements and aggravating factors. CP 92-109. The court imposed an aggravated exceptional sentence of 1,486 months (123.83 years). CP 117-132, 195-203; 1RP 666-67. Higashi appeals. CP 178-94.

## 2. Substantive Facts

Higashi made three separate demands to represent himself at trial. The first was February 11, 2011, immediately after the defense lost a motion to suppress evidence. 1RP 13-16. The court postponed ruling, however, because the issue had not previously been noted. 1RP 16. Higashi withdrew the demand on February 17, 2011, stating he and his counsel had resolved their differences. 1RP 21.

The second was March 7, 2011, shortly after the prosecution rested its case-in-chief. 1RP 494, 496. Higashi explained he disagreed with his

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<sup>2</sup> There are six volume of verbatim report of proceedings referenced as follows: 1RP - five-volume consecutively paginated set for the dates of February 11, 17, 22-24, 28, 2011 and March 1-3, 7, 8, 11, 2011; and 2RP - single independently paginated volume for the initial morning trial session on March 3, 2011.

counsel on several matters, including whether he should testify, counsel's refusal to call any defense witnesses, and counsel's decision to waive cross examination of several of the State's key witnesses, including all of the complaining witnesses.<sup>3</sup> 1RP 496, 498-99. Higashi explained that if allowed to represent himself he intended to examine the complaining witnesses and other witnesses his attorney failed to cross-examine. 1RP 498-99.

The prosecutor noted Higashi "has an absolute right to be pro se[.]" and that there should be no timeliness concerns provided Higashi was not seeking a continuance. 1RP 496-500. The prosecutor argued, however, that if allowed to proceed pro se, Higashi should be precluded from recalling any witnesses absent an offer of proof he would elicit new testimony. 1RP 499-500. The prosecutor also suggested that if the court granted Higashi's demand, it should appoint stand-by counsel. 1RP 510.

The court told Higashi he could not recall any witnesses who had already testified because it "would not be timely because of the fact that that's in [defense counsel's] purview as the attorney to make those type of decisions." 1RP 500. In response, Higashi stated he would not recall any witnesses and would instead provide a list, within 10 minutes, of the witnesses he hoped to call. 1RP 500-03.

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<sup>3</sup> Higashi's counsel declined to cross examine nine of the State's 14 witness, including all of the complaining witnesses. 1RP 136, 154, 228, 243, 257, 291, 390, 394, 444.

The court then engaged Higashi in a colloquy regarding his knowledge of the law, the crimes he was charged with, and the potential sentences he faced if convicted. 1RP 503-09. The court also asked what witnesses Higashi wanted to call, polled the those in the courtroom to see if any of them were present, which they were not, and then asked how Higashi intended to contact his proposed witnesses. 1RP 511-13. Higashi explained he would either call them himself, or have someone else do it for him. 1RP 513-14.

The court asked how much time Higashi needed to contact his witnesses and expressed concern it would cause delay. 1RP 513-14. Higashi disagreed, stating he could testify for the remainder of the day, and the following day he would only call those witnesses who actually appeared, such that no delay would occur. 1RP 514.

In its oral ruling denying Higashi's demand, the court stated:

because the request is untimely and would result in the necessity for a recess so you could call your witnesses to see if they are willing to come to court and that you do not have any knowledge about the rules of evidence could result in the prosecutor being able to get into evidence items that can be used against you, then I am going to be denying your request to represent yourself at this time.

1RP 514.

Following a break, the prosecutor asked for clarification. 1RP 535.

The prosecutor said she understood the basis to be that in light of the mid-

trial nature of the demand, the "orderly administration of justice" outweighed Higashi's right to self-representation. 1RP 535-36. The trial court did not confirm this, but agreed to "revisit the issue later." 1RP 536. The remainder of the trial day was consumed by Higashi's testimony (1RP 516-543), and a colloquy on jury instructions (1RP 544-569).

The following day, after the prosecutor initial closing remarks to the jury, Higashi made his third demand, presumably so he could make the defense closing argument. The demand was summarily denied. 1RP 605.

In subsequently entered written findings and conclusion, the court stated Higashi's mid-trial demand to represent himself was "somewhat equivocal as it was based primarily on his desire to testify as he wished and to answer the questions he wished to be asked." CP 112 (finding of fact 9). The court also wrote Higashi was unable to "tell the court how he would contact witnesses" and that his intent to call witnesses at trial "would have caused significant delay and disrupted the orderly administration of justice." CP 112-13 (findings of fact 7 & 10); see also CP 116 (conclusion of law 2; "Allowing the defendant to proceed *pro se* would have caused significant delay in these proceedings and disrupted the orderly administration of justice.").

The court also stated Higashi's history of disruptive behavior in and out of court "cause the court [to] believe his third request to proceed

*pro se* was designed for the purpose of delay or disruption[,]” and might require declaring a mistrial in the future. CP 115 (findings of fact 22 (both)). These findings directly conflict with the trial court’s comments the previous week noting: "This is, I believe, the eighth day of trial, and Mr. Higashi has been present every day during trial and has not been disruptive of any of the proceedings." 2RP 13.

C. ARGUMENT

HIGASHI WAS DENIED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant, however, also has a right to self-representation under both state and federal law. Wash. Const. art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). 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).

Because there exists an inherent tension between the right to counsel and the right to self-representation, a defendant wishing to proceed *pro se* must make an unequivocal demand to do so, and the trial court must ensure that the waiver of counsel is “knowing, voluntary, and

intelligent.” State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991). Self-representation is a grave undertaking, one not to be encouraged, and courts indulge in every reasonable presumption against waiver. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982). However,

This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. . . .

A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. . . .

State v. Madsen, 168 Wn.2d 496, 504-05, 229 P.3d 714 (2010) (citations omitted).

The trial court is responsible for assuring decisions regarding self-representation are made with at least a minimal understanding of what pro se representation requires of the defendant. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this determination is by a colloquy on the record that establishes the defendant understands the risks of self-representation, including the nature

and classification of charges, the maximum penalty upon conviction, and the existence of technical and procedural rules that would bind the defendant at trial. DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001).

Here, the trial court engaged Higashi in the appropriate colloquy following conclusion of the prosecution's case-in-chief. 1RP 503-09. It denied Higashi's demand at that point, however, findings it was "somewhat equivocal", "would have caused significant delay and disrupted the orderly administration of justice", and "could result in the prosecutor being able to get into evidence items that can be used against" him. CP 112-13; 1RP 514. Because these findings are not supported by the record, or do not constitute a valid basis to deny a demand to proceed pro se, Higashi's convictions must be reversed.

Similarly, the trial court erred in summarily denying Higashi's demand to proceed pro se after the prosecutor's initial closing remarks to the jury. 1RP 605. The court failed to engage Higashi in the preferred colloquy and failed to otherwise establish the demand was "equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 505. Reversal is warranted for this error as well.

- a. Higashi's demands to proceed pro se were unequivocal.

A reviewing court looks at the record as a whole to determine whether a demand to proceed pro se was unequivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). In Stenson, the defendant moved to proceed pro se only after the trial court denied his motion to substitute counsel. Stenson, 132 Wn.2d at 739. And even after his demand, Stenson continued to request the appointment of new counsel and otherwise made it apparent he felt forced into representing himself. 132 Wn.2d at 740, 742. The Stenson court held that where the demand is conditioned on denial of a new attorney, the record must establish the demand is unequivocal, which it was not in Stenson's case. Rather, his request was both conditional and equivocal. 132 Wn.2d at 741-742.

In United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994), Kienenberger repeatedly expressed dissatisfaction with appointed counsel, and insisted he be allowed to represent himself, but with counsel to assist with procedural matters. 13 F.3d at 1355-56. At a hearing on appointed counsel's motion to withdraw, Kienenberger reiterated this demand. It was denied. 13 F.3d at 1356.

On appeal, the Ninth Circuit rejected Kienenberger's claim that his demand to proceed pro se was unequivocal:

We have reviewed the record. While Kienenberger, on numerous occasions, requested that he be counsel of record, his requests were always accompanied by his insistence that the court appoint advisory or standby counsel to assist him on procedural matters. Kienenberger never relinquished his right to be represented by counsel at trial. His requests to represent himself were not unequivocal. The district court did not err.

Kienenberger, 13 F.3d at 1356.

Unlike in Kienenberger or Stenson, Higashi's demands to proceed pro se were made without conditions. They were not made as an alternative to appointment of new counsel. They were not conditioned on the appointment of stand-by counsel. They were not conditioned on a continuance so he could muster his resources. Nor did Higashi give any indication he felt forced to represent himself.

Higashi's demand at the close of the prosecution's case-in-chief was not, as the trial court concluded, "somewhat equivocal as it was based primarily on his desire to testify as he wished and to answer the questions he wished to be asked." CP 112 (finding of fact 9). Defense counsel did state that the "conundrum" caused by counsel's refusal to ask Higashi specific question was the basis. 1RP 495. Higashi immediately clarified, however, that not only was he dissatisfied with counsel's refusal to ask

him specific questions, but he also disagreed with counsel's decision not to call any defense witnesses and not to cross examine most of the prosecution witnesses. 1RP 496, 498-99, 501-02, 507-08, 512. Higashi was displeased with how counsel had conducted the defense, and as a result made an unequivocal demand to exercise his right to self-representation for the remainder of trial. 1RP 503.

Similarly, Higashi's demand made after the prosecutor's initial closing remarks was unequivocal. Like the previous demand, there is no basis in the record to conclude otherwise. That the trial court failed to make any inquiry into the reasons for this demand eliminates any way to conclude it was anything but unequivocal, timely, voluntary, knowing, and intelligent. Madsen, 168 Wn.2d at 505-06.<sup>4</sup>

The court also found Higashi "has made prior requests to represent himself and then changed his mind, indicating that his requests are equivocal." CP 115 (finding of fact 23). Higashi did withdraw his first demand to proceed pro se. 1RP 15-16, 21. Notably, however, the trial court never asked why it was made in the first place, or why it was subsequent withdrawal. The resulting lack of information does not support a conclusion that any of the demands were equivocal. The finding

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<sup>4</sup> "[T]he court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met." Madsen, 168 Wn.2d at 506.

is not supported by substantial evidence in the record and should be disregarded. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (valid findings of fact are only those supported by substantial evidence).

All of Higashi's demands to exercise his right to self-representation were unequivocal. The trial court erred in concluding otherwise.

b. Higashi's demands to proceed pro se were timely.

A demand to proceed pro se must be made in a timely fashion. In determining whether a demand is timely, the trial court's discretion lies along a continuum corresponding to the time when the demand is made;

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing 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 or hearing, the right to proceed pro se largely rests 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).

For sure, a demand to proceed pro se is not considered 'timely' if it is made "to delay one's trial or obstruct justice." State v. Paumier, 155 Wn. App. 673, 230 P.3d 212, (quoting State v. Breedlove, 79 Wn. App.

101, 106, 900 P.2d 586 (1995), review granted, 169 Wn.2d 1017, 236 P.3d 206 (2010). There must, however, be substantial evidence in the record to support such a finding, or any other finding relevant to timeliness. Winterstein, 167 Wn.2d at 628.

Higashi's second and third demands to proceed pro se were made during trial, and therefore subject to the "informed discretion of the trial court." Fritz, 21 Wn. App. at 361. The trial court's factual predicates for rejecting these demands as untimely, however, are not supported by substantial evidence.

For example, Higashi specifically denied the need for a continuance in order to proceed pro se following the close of the prosecution's case-in-chief. Although he needed to develop a witness list, he offered to do so in a matter of minutes, to only identify witnesses already on the prosecution's witness list, and to only call those willing to appear the following day. 1RP 498-503, 511-14. With regard to the remainder of the day, Higashi correctly noted it could be filled with his own testimony, which it ultimately was for the most part. 1RP 514, 516-43. Similarly, although the record is sparse in light of the court's summary denial of the demand made during closing argument, there is no basis to find Higashi could not have immediately engaged in closing remarks to the jury. 1RP 605. As such, the trial court's finding that allowing Higashi

to proceed pro se would have required a "recess" and "cause a significant delay and disrupted [sic] the orderly administration of justice[,]" are simply untrue. CP 113 (finding of fact 10); CP 116 (conclusion of law 2).

With regard to the court's oral ruling that allowing Higashi to proceed pro se "could result in the prosecutor being able to get into evidence items that can be used against" him (1RP 514), this is not a valid basis to deny a defendant pro se status. See Madsen, 168 Wn.2d at 505 ("A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case . . ."). Higashi might proceed pro se at his peril, but he had the right to do so nonetheless.

Finally, substantial evidence fails to support the trial court's finding that Higashi's demands were intended to delay, obstruct or disrupt the trial. As the court correctly noted prior to his mid-trial demand, Higashi attended the first eight days of trial without incident, and other than his refusal to appear on the morning of March 3, 2011, he never engaged in any disruptive behavior for the remainder of the proceedings, including sentencing. 2RP 13. That he may have had prior conduct issues in the jail and at some previous hearing does not provide a basis to conclude his unequivocal demands to proceed pro se were intended to disrupt or delay the proceedings. Moreover, adequate remedies are

available to a court to attenuate the impact of a disruptive defendant at trial, such as the "bandit" Higashi wore during trial, which provided the necessary security but did "not interfere with [Higashi's] ability to participate in the trial process." *CP 206-08*.<sup>5</sup>

When considered as a whole, the record fails to provide a valid basis for denying Higashi's demands to proceed pro se. Higashi made unequivocal, knowing, voluntary, intelligent and timely demands to exercise his right to self-representation and they should have been granted. Madsen, 168 Wn.2d at 505-06. The rejection of those demands requires reversal. Madsen, 168 Wn.2d at 510.

D. CONCLUSION

For the reasons stated, this Court should reverse Higashi's judgment and sentence and remand for a new trial.

DATED this 13<sup>th</sup> day of September 2011.

Respectfully Submitted,

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\_\_\_\_\_  
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<sup>5</sup> This citation is to the anticipated clerk's paper index numbers for a document titled "Order Re: Restraints" filed on February 28, 2011. A supplemental designation clerk's papers was filed September 8, 2011.

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

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	)	
Respondent,	)	
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vs.	)	COA NO. 41926-2-II
	)	
KIYOSHI HIGASHI,	)	
	)	
Appellant.	)	

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**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 13<sup>TH</sup> DAY OF SEPTEMBER 2011, 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] KIYOSHI HIGASHI  
DOC NO. 318852  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF SEPTEMBER 2011.

x Patrick Mayovsky

**NIELSEN, BROMAN & KOCH, PLLC**

**September 13, 2011 - 1:38 PM**

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