No. 46758-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALLIXZANDER HARRIS,

Appellant.

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

The Honorable Sally F. Olson

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Allixander Harris was charged with promoting the commercial sexual abuse of two minor women, promoting prostitution of an adult woman, and witness tampering as well as several aggravating circumstances. One of these aggravating circumstances, recent recidivism was not supported by competent evidence, and was unconstitutionally vague. In addition, when imposing a substantial sum of Legal Financial Obligations (LFOs), the court failed to consider the financial circumstances of Mr. Harris. The court also denied Mr. Harris his right to be present at a pretrial hearing when it had him removed for misconduct without considering lesser sanctions. Finally, the court denied Mr. Harris's right to represent himself even though he assented to the court's invitation. Mr. Harris submits he is entitled to reversal of his convictions and remand for a new trial, or reversal of his sentence and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury's verdict regarding the aggravating factor of rapid recidivism.

2. The recent recidivism aggravator is unconstitutionally vague.

3. The trial court failed to find on the record that Mr. Harris had the ability to pay the Legal Financial Obligations (LFOs) imposed.

4. Mr. Harris's constitutionally protected right to be present was violated when the trial court barred him from the courtroom.

5. The trial court violated Mr. Harris's constitutionally protected right to represent himself at trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sufficient evidence supports an aggravating circumstance where the evidence is competent evidence. Hearsay is not competent evidence. Where the only evidence supporting the rapid recidivism aggravating circumstance was the Community Corrections Officer's (CCO) hearsay statements, is Mr. Harris entitled to reversal of the aggravating factor?

2. If counsel fails to object to incompetent evidence which is prejudicial to the defendant, counsel has rendered ineffective assistance. Here, counsel failed to object to the hearsay statement of the CCO, which was the only evidence supporting the rapid recidivism aggravating circumstance. Did counsel render ineffective assistance entitling Mr. Harris to reversal of the rapid recidivism aggravating circumstance?

3. Should the exceptional sentence be reversed where the recent recidivism aggravator is unconstitutionally vague?

4. A court may impose discretionary LFOs only after making an individualized assessment on the record of the defendant's financial situation and determining his ability to pay. The court here imposed over $7500 in discretionary LFOs without making any finding regarding Mr. Harris's financial circumstances or his ability to pay. Is Mr. Harris entitled to reversal of his sentence and remand for a new sentencing hearing?

5. A defendant possesses a constitutionally protected right to be present at all hearings where his rights are affected. That right may be limited by the trial court only if the court makes specific findings regarding the defendant's conduct and considered less restrictive alternatives to banishment. Is Mr. Harris entitled to reversal of his convictions for a violation of his right to be present where the court failed to consider any less restrictive alternatives to his banishment from then courtroom?

6. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. Here, Mr. Harris accepted the prosecutor's and the trial court's

invitation to represent himself but the trial court ignored his request. Did the trial court impermissibly deny Mr. Harris his right to represent himself requiring reversal of his convictions?

D. STATEMENT OF THE CASE

Allixander Harris was alleged to have profited off the prostitution of two minor women, S.D. and K.H. during the month of December 2012. Mr. Harris was also alleged to have promoted the prostitution of L.P., an adult. Finally, while awaiting trial, Mr. Harris was alleged to have tampered with potential witnesses in the case. As a result, Mr. Harris was charged with six counts of promoting commercial sexual abuse of a minor, one count of promoting prostitution, and one count of witness tampering. CP 196-202.[1] The first two counts of promoting commercial sexual abuse of a minor also charged sentence aggravators for recent recidivism, free crimes, and an ongoing pattern of sexual abuse and victimization of homeless youth. CP 196-97. The remaining promoting commercial sexual abuse of a minor counts charged only the ongoing pattern of sexual abuse and

[1] Mr. Harris was also charged with a count of second degree possession of depictions of a minor engaged in sexually explicit conduct, which was severed before trial and dismissed once the jury returned its verdicts on the other counts. CP 202-03, 327; 8/11/2014RP 44-45.

victimization of homeless youth. CP 197-201. The ongoing pattern of sexual abuse aggravator was dismissed at the close of the State's case. 8/27/2014RP 1526-28.

Following a jury trial, Mr. Harris was convicted as charged including the sentence aggravators. CP 304-18. The trial court imposed an exceptional sentence of 486 months. CP 438-49.

E. ARGUMENT

1. The State failed to prove the aggravating circumstance regarding rapid recidivism with competent admissible evidence.

Following the jury's verdict finding Mr. Harris guilty of the charged offenses, the court conducted a subsequent jury trial on the recent recidivist aggravator. The sole witness to testify was CCO Rex Garland. 8/29/2014RP 8-9. Mr. Garland testified that based upon his review of the State's computer system, the Offender Management Network Information (OMNI), Mr. Harris was released from prison on October 1, 2012. 8/29/2014RP 11. Based solely on this testimony, the jury found Mr. Harris guilty of the aggravating factor. CP 324-26.

a. *The State bears the burden of proving each of the essential elements of the charged aggravating factor beyond a reasonable doubt.*

Under RCW 9.94A.585(4), the facts supporting an exceptional sentence must support the reasons for the exceptional sentence. *State v. Griffin*, 173 Wn.2d 467, 474, 268 P.3d 924 (2012). This is reviewed under a sufficiency of the evidence standard. *Id.*

Under the sufficiency of the evidence standard, the State is required to prove each element of the aggravating factor charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Griffin*, 173 Wn.2d at 474. The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The evidence supporting the aggravating factor must be competent, admissible evidence. *Griffin*, 173 Wn.2d at 475-76. Where the only evidence supporting the aggravating factor is inadmissible, "there is no evidence in the record supporting the trial court's aggravated circumstance finding." *Id.*

The court may impose an exceptional sentence where the defendant committed the offense "shortly after being released from incarceration." RCW 9.95A.535(3)(t). This aggravating factor is also known colloquially as "rapid recidivism." *State v. Williams,* 159 Wn.App. 298, 309, 244 P.3d 1018 (2011).

Here, as in *Griffin*, the only evidence supporting the jury's finding regarding the rapid recidivism factor was the testimony of the CCO regarding the date Mr. Harris was allegedly released from incarceration. Thus, as the Court ruled in *Griffin*:

> Because the only evidence supporting the trial court's finding of an aggravating circumstance was inadmissible, there is no evidence in the record supporting the trial court's aggravating circumstance finding.

Griffin, 173 Wn.2d at 475-76.[2]

Thus, as in *Griffin*, the jury's finding regarding the rapid recidivism aggravator was not supported by admissible evidence, thus the exceptional sentence must be reversed and the matter remanded for resentencing. *Griffin*, 173 Wn.2d at 476.

b. *Alternatively, defense counsel rendered constitutionally deficient performance when he failed to object to the inadmissible hearsay testimony of CCO Garland*

[2] *Griffin* involved a bench trial, thus the use of the terms "court's finding."

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;[3] Const. art. I, § 22;[4] *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no

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[3] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[4] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

Should this Court determine that in order for the holding in *Griffin* to apply, counsel was required to have objected, and the trial court was required to have made a ruling on that objection, then counsel's performance was constitutionally deficient for a failure to object. Here, counsel failed to object to inadmissible hearsay evidence: the CCO's testimony that Mr. Harris was released from custody on October 1, 2012. 8/29/2014RP 11.[5] Had counsel objected, the trial court would have been required to sustain the objection and the statement would have been excluded, thus eliminating the sole evidentiary basis for the jury's finding. *See* ER 802 ("Hearsay is not admissible").

The court and defense counsel may have been acting under the assumption that the Rules of Evidence do not apply at sentencing, thus the hearsay testimony was entirely proper. *See* 1101(c)(3) (rules of evidence "need not be applied" at sentencing). But, the Supreme Court in *Griffin* held that the term "sentencing" did not include evidentiary

[5] Hearsay is defined as statements "other than one made by declarant while testifying . . . .offered to prove the truth of the matter asserted. ER 801(c). The record here reflects that Garland's testimony was hearsay and did not fall under the business records exception because the State failed to lay a proper foundation. *State v. Walker,* 16 Wn.App. 637, 640, 557 P.2d 1330 (1976).

hearings such as the one at issue here involving a jury fact finding. *Griffin*, 173 Wn.2d at 475. Since *Griffin* predated the evidentiary hearing held in Mr. Harris's matter by three years, defense counsel was imputed with this knowledge.

Since there could be no legitimate strategic reason for counsel's failure to object to inadmissible hearsay evidence that was the sole basis for the jury's finding, Mr. Harris is entitled to reversal of his exceptional sentence and remand for resentencing.

2. The recent recidivist aggravator is unconstitutionally vague.

Regardless of the evidence actually presented in this case, the exceptional sentence should be reversed because the recent recidivist aggravator is unconstitutionally vague.

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *Id.* at 297. A statute fails to adequately guard against arbitrary enforcement where it lacks

ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973). The Court reviews a vagueness challenge *de novo*. *State v. Williams*, 159 Wn.App. 298, 319, 244 P.3d 1018 (2011).

The constitutional requirement must be applied to sentencing aggravators in light of recent federal cases. In *State v. Baldwin*, our Supreme Court held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct' and that it was 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.'" 150 Wn.2d 448, 458, 78 P.3d 1005 (2003), *quoting State v. Jacobson*, 92 Wn.App. 958, 966, 967, 965 P.2d 1140 (1998). But this holding is incorrect in light of *Blakely*, 542 U.S. 296 and *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013). *Baldwin*'s holding that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" cannot withstand these United States Supreme Court decisions finding statutory factors *do* alter the statutory maximum for the offense and must be first found by a jury beyond a reasonable

doubt. *E.g.*, *Blakely*, 542 U.S. at 306-07. The United States Supreme Court has also made clear that "due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi*, 530 U.S. at 484. *Apprendi* and *Alleyne* clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause; this Court should adhere to those precedents rather than to the conflicting holding in *Baldwin*.

The recent recidivism aggravator is impermissibly vague because it is impossible to know what the term "shortly after being released from incarceration" means. The statute provides no standards against which the jury, the accused, or the trial judge can measure what is "shortly." *See* RCW 9.94A.535(3)(t). A jury has no reference point from which to determine the conduct that constitutes "shortly after being released," just as the public has no way of knowing which conduct is proscribed. In Mr. Harris's case in particular, the jury had no reference point with regard to measure how much is "shortly" after being released; one day, one week, one month, etc. This statutory provision is vague because it is ripe for arbitrary enforcement. *Goguen*, 415 U.S. at 578. This Court should strike the aggravator for vagueness.

3. The trial court erred in imposing court costs and attorney's fees without making a finding regarding Mr. Harris's inability to pay.

At sentencing, the court imposed LFOs in the amount of $7,535 of which only $600 were mandatory fees. CP 445. The Judgment and Sentence contains a boilerplate finding stating: "The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations." CP 445. In sentencing Mr. Harris, the trial court made no oral finding regarding his ability to pay the LFOs, stating simply: "All the financials that the State imposed will be ordered." 9/26/2014RP 22.

a. *The court may impose court costs and fees only after a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or

will be able to pay them." *See also State v. Blazina*, ___ Wn.2d ___, 344 P.3d 680, 685 (2015) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs.

Blazina held:

> "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." [citation omitted] To determine the amount and method for paying of costs, "the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." [citation omitted]

Id., *citing* RCW 10.01.160(3) (emphasis in original).

The court here made no such inquiry and under *Blazina*, Mr. Harris is entitled to a new sentencing hearing.

b. *The trial court failed to make an individualized inquiry into Mr. Harris's ability to pay the LFOs.*

In its recent decision in *Blazina*, the Supreme Court held that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. *Blazina*, 344 P.3d at 685. In addition, the record must reflect this individualized inquiry:

> *Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry*. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. (emphasis added).

Here, the trial court failed to make the individualized inquiry required under 10.01.160. CP 445. At sentencing, the court's imposition of LFOs was short and succinct: "All the financials that the State imposed will be ordered." 9/26/2014RP 22.

Further, the Supreme Court rejected the argument that the issue was not ripe for challenge because like here, there has been no attempt to collect the LFOs:

> The State argues that the issue is not ripe for review because the proper time to challenge the imposition of an LFO arises when the State seeks to collect. Suppl. Br. of Resp't (Blazina) at 5-6. We disagree. "'Three requirements compose a claim fit for judicial determination: if the issues are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl,* 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r,* 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). A challenge to the trial court's entry of an LFO

> order under RCW 10.01.160(3) satisfies all three conditions.

Blazina, 344 P.3d at 682 fn. 1.

Only the $100 victim assessment and the $500 DNA collection fee were mandatory fees that arguably could not be waived. *See State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson,* 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived. Yet, the court failed to consider waiving these discretionary costs or even consider the impact that imposition of these fees would have on Mr. Harris as required by *Blazina*. This was error.

c. *The remedy for the court's failure to inquire into Mr. Harris's financial circumstances and make a finding of his ability to pay the LFOs is remand for a new sentencing hearing.*

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 344 P.3d at 685. This Court should remand Mr. Harris's matter to the trial court for a new sentencing hearing.

4. The trial court violated Mr. Harris right to be present during the October 4, 2013, hearing.

On October 4, 2013, the court held an omnibus hearing, at which Mr. Harris vociferously objected to his court-appointed counsel serving as his representative:

> THE COURT: The next matter is State versus Harris.
>
> MR. SCHOENBERGER: Mr. Harris, do you wish to come up to the bar?
>
> THE COURT: Do you wish to come up to the bar?
>
> THE DEFENDANT: Are you asking?
>
> THE COURT: Do you want to stand up next to your attorney?
>
> THE DEFENDANT: That is not my attorney.
>
> THE COURT: We are here today for omnibus. Mr. Schoenberger, how do you wish to proceed?
>
> MR. SCHOENBERGER: Yes. And I have an omnibus order that was signed by the State and myself.
>
> THE DEFENDANT: No disrespect –
>
> THE COURT: Sir, no.
>
> THE DEFENDANT: We cannot go through omnibus –
>
> THE COURT: No. No. Sir, one more word and you are coming out of this jail [sic] right now. Look at me.

> He is your attorney until he has been withdrawn. I haven't done that yet, and I am not entertaining a motion to his withdrawal. That is not what we are here for.
>
> THE DEFENDANT: I am here against the law.
>
> THE COURT: One more word and you are out of here. We are here for omnibus only. If you have a separate motion to make, you note it up through your attorney. You have been here long enough you know how.
>
> THE DEFENDANT: I am –
>
> THE COURT: Not another word. Hand me the order, please.
>
> MR. SCHOENBERGER: Thank you, Your Honor.
>
> THE DEFENDANT: You can take me back, but I am –
>
> THE COURT: Take him back now. Take him out.
>
> THE DEFENDANT: Take me back, but I never signed that order, and you cannot proceed with that because I never gave him prior consent, so all that should be on record.

10/4/2013RP 4-5.

Mr. Harris was removed from the courtroom, the court and parties discussed continuing discovery issues and a protective order the State sought regarding a DVD recording of an interview with K.H., as well as some alleged pornographic images. 10/4/2013RP 5-10. The court adjourned to the following Monday. 10/4/2013RP 10-11.

a. *Mr. Harris had a constitutionally protected right to be present during the hearing.*

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. U.S. Const. amends VI, XIV; *Rushen v. Spain,* 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Under this standard, a defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts,* 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." art. I, § 22. In addition, Washington's criminal rules state that "[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown." CrR 3.4(a); *State v. Chapple*, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). Thus, in Washington, "[i]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel ... *at every stage of the trial when his substantial rights may be affected.*" *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011),

quoting State v. Shutzler, 82 Wn. 365, 367, 144 P. 284 (1914) (emphasis in original).

But, persistent, disruptive conduct by a defendant can constitute a voluntary waiver of this right. *Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. DeWeese,* 117 Wn.2d 369, 381, 816 P.2d 1(1991).

Although both *Allen* and *DeWeese* held that the appropriate method for dealing with a disruptive defendant should be left to the discretion of the trial judge, both courts set forth basic guidelines to assist trial courts in such circumstances. The defendant should be warned that his conduct could lead to removal; the defendant's conduct must be severe enough to justify removal; the court should choose the least severe alternative that will prevent the defendant from disrupting the trial, and; the defendant must be allowed to reclaim his right to be present upon assurances that the defendant's conduct will improve. *Allen,* 397 U.S. at 343; *DeWeese,* 117 Wn.2d at 380-81.

"The guidelines are not meant to be constraints on trial court discretion, but rather to be relative to the exercise of that discretion such that the defendant will be afforded a fair trial while maintaining

the safety and decorum of the proceedings." *Chapple*, 145 Wn.2d at 320.

A claim of a violation of the constitutional right to be present is reviewed *de novo*. *Irby*, 170 Wn.2d 880.

b. *The trial court failed to consider less severe alternative to Mr. Harris's removal.*

Mr. Harris had the right to be present at this hearing. The court deemed his behavior disruptive enough that it removed Mr. Harris from the courtroom. This was error because Mr. Harris's behavior was not that disruptive, and the court failed to consider any reasonable alternatives to banishment.

While the court was certainly frustrated with Mr. Harris, the hearing had just begun. 10/4/2013RP 2. Mr. Harris's conduct was not offensive or disruptive; Mr. Harris was talking out of turn. Further, in ordering Mr. Harris removed for his conduct, the court never considered less restrictive alternatives.

This was not just a *pro forma* hearing where Mr. Harris's presence was not necessary. The hearing was the omnibus hearing where the parties were to speak about pretrial matters and matters expected at trial. The State was seeking protective

orders regarding discovery items linked to K.H. Mr. Harris's rights were affected and he had the right to be present.

The court's act was premature and unjustified.[6] The court violated Mr. Harris's constitutionally protected right to be present.

5. The trial court violated Mr. Harris's right to represent himself.

Regretfully frustrated by the performance of his court-appointed attorneys, and after being told by the court on suggestion of the prosecutor that he could represent himself, on August 13, 2014, Mr. Harris unequivocally took the court up on its invitation and requested he be allowed to represent himself:

> THE DEFENDANT: For the record, my attorney did not want to excuse that juror until we put it on record about this whole issue. I'm asking to revisit the non-objections from the motions in limine that he refused to do.
>
> MR. TALEBI: Your Honor, if this is going to be persistent -- I mean, the defendant, once again, which we've been over, he has two decisions, whether to plead

---

[6] *See* Code of Judicial Conduct (CJC) Canon 2.6(a):

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Comment 1 to Canon 2.6 notes: "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

or to testify. *If he wants to make legal arguments, then he can go pro se*. I mean, this continued behavior normally isn't allowed for any defendant and it's just -- I think it's going to interrupt the proceedings.

THE COURT: I will admonish him again. Mr. Harris, you need to speak through your attorney. Thank you.

MR. VALLEY: May it please the court –

THE DEFENDANT: How you just –

THE COURT: Mr. Harris, you are speaking out of turn over and over again. Look at me, I'm warning you again. If you don't stop talking outside your attorney, I'm going to have you removed from the courtroom.

THE DEFENDANT: He doesn't do it.

THE COURT: You speak through your attorney. *You have choices of going pro se or letting your attorney do your job*. I will not allow this to continue. Mr. Talebi is correct, it's gone on too long. If you have motions, you make your attorney –

THE DEFENDANT: He won't do it.

THE COURT: He exercises his judgment as to what motions need to be made, period. We have a note from Juror No. 65.

THE DEFENDANT: *I want to go pro se.*

THE COURT: I believe I -- wait a minute. Mr. Harris, you are interrupting the proceedings. I'm trying to talk to counsel about another juror questionnaire. Are you ready to listen?

MR. VALLEY: I'm ready, Your Honor. Absolutely. Yes.

8/13/2014RP 344-45 (emphasis added). The court never responded to Mr. Harris's request to represent himself.

a. *Mr. Harris had a constitutionally protected right to represent himself.*

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). In addition, the Sixth and Fourteenth Amendments to the United States Constitution as well as art. I, § 22 of the Washington Constitution allow criminal defendants to waive their right to the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). This waiver of the right to counsel must be knowing, voluntary, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *DeWeese*, 117 Wn.2d at 377.

The right to proceed *pro se* is neither absolute nor self-executing. *State v. Woods,* 143 Wn.2d 561, 586, 23 P.3d 1046, *cert.*

denied, 534 U.S. 964 (2001). When a defendant asks to represent himself, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson,* 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), *cert. denied,* 523 U.S. 1008 (1998). Absent a finding that the request was equivocal or untimely, the trial court must then determine if the defendant's request is voluntary, knowing, and intelligent. *Faretta,* 422 U.S. at 835; *State v. Stegall,* 124 Wn.2d 719, 881 P.2d 979 (1994).

> 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. Such a finding must be based on some identifiable fact; the presumption in *Turay* does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right itself illusory.
>
> 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.

Madsen, 168 Wn.2d at 504-05. The unjustified denial of this right requires reversal. *Madsen,* 168 Wn.2d at 503; *Stenson,* 132 Wn.2d at 737.

b. *Mr. Harris's request was unequivocal and timely.*

Mr. Harris was unequivocal and unwavering about his desire to represent himself. Mr. Harris accepted the court's suggestion that he could go *pro se*. The court erred in failing to grant Mr. Harris's subsequent request.

"If the demand for self-representation is made . . . well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists *as a matter of law*." *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994) (emphasis added). "Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509.

Here, Mr. Harris continually sought a speedy trial and objected each time his attorney's moved to continue the trial. His request to represent himself here was not accompanied by a request to continue the trial. Mr. Harris demanded to exercise his right to represent himself unequivocally, and in answer to the suggestion of both the prosecutor

and the court. 8/13/2014RP 344-45. This was a sufficient invocation of the right to represent oneself and the trial court was compelled to rule on it. *See Madsen,* 168 Wn.2d at 506 ("Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution - the provision protecting Madsen's right to represent himself." (emphasis in original)).

Further, the request was timely. Although Mr. Harris's request was made during jury *voir dire*, it was made on the suggestion of the prosecutor and the court. These entities would not have suggested Mr. Harris represent himself if the request would have been untimely.

Further, "the right of self-representation is afforded a defendant despite the fact that its exercise will almost surely result in detriment to the defendant[.]" *Id.* at 858. "If a person is competent to stand trial, that person is competent to represent himself." *Id.* at 857, *citing Godinez v. Moran,* 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

The trial court's refusal to grant Mr. Harris's timely and unequivocal request to represent himself was unjustified.

c. *The unjustified denial of Mr. Harris's motion to represent himself requires reversal of his conviction.*

Where a defendant's motion to represent himself was erroneously and unjustifiably denied, the defendant is entitled as a

matter of law to reversal of his conviction and remand to allow him to defend in person as guaranteed by the United States and Washington Constitutions. *Madsen,* 168 Wn.2d at 510. Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. *State v. Vermillion*, 112 Wn.App. 844, 848, 51 P.3d 188 (2002).

Mr. Harris unequivocally requested to represent himself prior to trial. The trial court's refusal to allow him to represent himself at that time was unjustified and his convictions must be reversed.

F. CONCLUSION

For the reasons stated, Mr. Harris asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Harris requests the Court reverse his sentence and remand for resentencing.

DATED this 6th day of May 2015.

Respectfully submitted,

s/ THOMAS M. KUMMEROW (WSBA 21518)
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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 46758-5-II
v.	)	
	)	
ALLIXZANDER HARRIS,	)	
	)	
Appellant.	)	

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[X] ALLIXZANDER HARRIS 324111 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL

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