

NO. 46758-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALLIXZANDER DEVELL HARRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00087-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Harris's claim that the evidence was insufficient to support the rapid recidivism aggravating circumstance is based on an unpreserved evidentiary issue, is substantively without merit, and ultimately moot where the trial court specifically found that it would impose the same sentence even without that aggravator?

2. Whether the claim that the rapid recidivism aggravating circumstance is vague as applied is without merit where this Court has previously held that a new crime within two months of release clearly falls within the statutory language?

3. Whether the Court should decline to review an unpreserved claim regarding LFOs where Harris was on notice of the Court of Appeals decision in *State v. Blazina*?

4. Whether the trial court acted within its discretion in removing Harris from the courtroom after he would not contain himself at the third omnibus hearing, where the court had repeatedly admonished Harris to not speak out in court, and where no substantive rulings were made at the hearing after his removal?

5. Whether Harris's purported request to proceed pro se, raised on the third day of trial after his issues with four separate attorneys had already delayed trial for 15 months, was neither unequivocal nor

timely, so that the trial court did not abuse its discretion in not allowing him to represent himself?

II. STATEMENT OF THE CASE

Allixzander Devell Harris was charged by information filed in Kitsap County Superior Court. Counts I through VI alleged counts of promoting commercial sexual abuse of minor, involving two underage girls, KH and SD. All six counts alleged the aggravating circumstances that the offenses were part of an ongoing pattern of sexual abuse (RCW 9.94a.535(3)(g)), and that they involved the victimization of homeless youth (RCW 9.94A.535(3)(j)). Counts I and II additionally alleged the “free crimes” (RCW 9.94A.535(2)(c)) and rapid recidivism (RCW 9.94A.535(3)(t)) aggravating circumstances. The information further alleged counts of (VII) tampering with a witness, (VIII) second-degree promoting prostitution, which involved an adult, LP, and (IX) second-degree possession of depictions of minor engaged in sexually explicit conduct. CP 196-203.

The State agreed to the defense motion to sever Count IX at the beginning of trial. 1RP 44. The count was later dismissed without prejudice. CP 327. The State also conceded to a defense motion to dismiss the ongoing pattern of sexual abuse aggravating circumstance after it rested. 11RP 1528-29.

After trial a jury found Harris guilty as charged of Counts I-VIII. CP 304-06. It also found by special interrogatory the homeless youth aggravator as to Counts I-VI CP 308, 310, 312, 313, 316, 318. After a bifurcated proceeding, the jury also found the rapid recidivism aggravator as to Counts I and II, CP 324-25.

Counts I through VI each had an offender score of 22 and a standard range of 240 to 318 months. CP 440. The trial court imposed an exceptional sentence of 486 months for each of these counts. CP 440.

Counts VII and VIII had an offender score of 12 and a range of 51 to 60 months. CP 440. It imposed standard range sentences of 60 months on each of these counts. CP 441. All eight counts were ordered to run concurrently. CP 441.

The Court entered written findings of fact and conclusions of law in support of the sentence. Its final two conclusions provide:

IV.

That the exceptional sentence is justified by the following aggravating circumstances–

- (a) Under RCW 9.94A.535(2)(t), the defendant committed this offense shortly after his release from incarceration.
- (b) Under RCW 9.94A.535(2)(j), the defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

- (c) Under RCW 9.94A.535(2)(c), the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished

V.

That the grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid.

CP 436-37.

Throughout the sentencing hearing, Harris in no way objected to or even referenced the imposition of legal financial obligations. RP (9-26-14). The court imposed a total of \$7135 in legal financial obligations in the judgment and sentence:

\$500	Victim Assessment
\$1135	Court-appointed attorney fees
\$200	Filing Fee
\$100	DNA/Biological Sample Fee
\$100	Kitsap County Expert Witness Fund
\$100	Kitsap County Special Assault Unit
\$5000	Mandatory fine

CP 445.

Harris has not challenged the factual basis for his convictions. As such the State will omit a recitation of the evidence adduced at trial. The facts relating to the rapid recidivism aggravating circumstance will be addressed in the argument portion of the brief.

III. ARGUMENT

A. HARRIS'S CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE RAPID RECIDIVISM AGGRAVATING CIRCUMSTANCE IS BASED ON AN UNPRESERVED EVIDENTIARY ISSUE, IS SUBSTANTIVELY WITHOUT MERIT, AND ULTIMATELY MOOT WHERE THE TRIAL COURT SPECIFICALLY FOUND THAT IT WOULD IMPOSE THE SAME SENTENCE EVEN WITHOUT THAT AGGRAVATOR.

Harris argues that the evidence was insufficient for the jury to find the rapid recidivism aggravating circumstance. This claim is without merit because it depends on this Court finding that the evidence of his release date was inadmissible hearsay. That claim, however, has not been preserved for review. Moreover, even if it had been, the State laid a sufficient foundation to admit the evidence. Finally, since the trial court stated it would impose the same exceptional sentence with or without this aggravator, the point is largely moot.

1. Harris failed to preserve this evidentiary issue by objecting at trial.

Harris has failed to give any reason why this Court should consider his claims that were not raised below. RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted,

and (3) manifest error affecting a constitutional right. Questions of the admissibility of evidence, are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). Harris's only claim is that the State failed to lay an adequate foundation for introducing the Department of Corrections record of his release from prison. Since he did not object in any way to this evidence at trial, *see* . RP (8/29/14) 9-11, he cannot now assert that it should not have been admitted.

2. *The evidence was properly admitted.*

Harris relies primarily on *State v. Griffin*, 173 Wn. 2d 467, 474, 268 P.3d 924, 928 (2012). That case, however, sheds no light on the issue presented here. There, the defendant's release date was testified to by a deputy sheriff, Sergeant Davis. As the Court noted, the "Court of Appeals held, and the parties do not dispute, that Sergeant Davis' testimony was inadmissible under the rules of evidence." *Griffin*, 173 Wn. 2d at 475. The Court of Appeals decision in that case was unpublished, and thus also does not illuminate the matter.

Harris fails to seriously address the evidentiary issue at all. He attempts to piggyback onto *Griffin* by assuming that case to be factually

the same as this one.¹ However, a review of the evidence in this case shows that the testimony was admissible.

Great weight is given to the trial court's decision to admit or exclude evidence under the business records exception. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). Accordingly, its ruling will not be reversed unless there has been a manifest abuse of discretion. *Ziegler*, 114 Wn.2d at 538. Here, of course, the trial court was never given an opportunity to rule on the issue.

There are five requirements for the admission of business records, all of which are satisfied here. First, the evidence must be in the form of a "record." *State v. Kreck*, 86 Wn.2d 112, 118, 542 P.2d 782 (1975). Here, the Community Corrections Officer, Rex Garland testified that the information came from the Department of Corrections Offender Management Network Information system ("OMNI"), which he characterized as the offender's "electronic file." RP (8/29/14) 10. According to DOC Policy 280.500(III)(A):²

The Department will maintain electronic files to track information on all offenders admitted to a Department

¹ He also makes passing reference in his ineffectiveness claim to *State v. Walker*, 16 Wn. App. 637, 557 P.2d 1330 (1976). As will be seen, that case does not support his position either.

² Retrieved from <http://www.doc.wa.gov/policies/default.aspx?show=200> (viewed August 27, 2015). While the State notes that this information was not presented at trial, if Harris had objected to the foundation, the information could easily have been presented.

facility of supervised by the Department.

Second, the record must be of an “act, condition or event”; accordingly, entries in the form of opinions are not admissible. *Kreck*, 86 Wn.2d at 118. Garland testified that the OMNI system contained “records of the events in prison, the placement in prison, the time for release, time that they are released, the time they begin their community supervision, the time they end their community supervision, and what transpires during community supervision.” RP (8/29/14) 10. Further, Policy 280.500(III)(C)(1) specifically provides that “information that is subjective” shall not be entered into the electronic file.

Third, the record must be made in the regular course of business. It cannot be suggested that an offender’s electronic file containing “records of the events in prison, the placement in prison, the time for release, time that they are released, the time they begin their community supervision, the time they end their community supervision, and what transpires during community supervision” is not a record made in the ordinary course of business of the Department of Corrections, whose mandate is the supervision of offenders in prison and in the community.

Fourth, the record must be made “at or near the time of the act, condition or event.” Policy 280.500(III)(D) requires that chronological entries for prisons shall be made no later than 72 hours after the event or

action.

Finally, the court must be satisfied that “the sources of information, method and time of preparation were such as to justify its admission.” *Kreck*, 86 Wn.2d at 119. There is no reason to believe that the official Department of Corrections record for an offender is not reliable.

Additionally it should be noted that under DOC Policy 280.525(I)(C) “[e]ach Department employee ... is a Records Custodian.” Garland was thus officially a custodian of the record in question.

Harris’s reference to *Walker* is also not particularly useful. The entire passage discussing business records reads as follows:

At trial, the court allowed a police officer to testify that the computer had reported no license number corresponding to the robbery victim’s report. (The victim told the police that the getaway car had a license number JDW 631; the license number of Walker’s car was IDW 631.) Walker’s hearsay objection to this testimony was denied. It was error to admit the testimony; the record does not reflect that a proper foundation was laid for admitting the testimony under the business records exception to the hearsay rule. *Seattle v. Heath*, 10 Wn. App. 949, 520 P.2d 1392 (1974); RCW 5.45.020.

Walker, 16 Wn. App. at 640. As discussed previously, Garland’s testimony met the requirements of the business records exception. To the extent it did not, if Harris had objected, it is clear that the DOC policies governing the electronic offender files did meet the requirements and the

foundation could easily have been established. As such this claim would be without merit even if it had been preserved for review.

3. The record fails to show counsel was ineffective for not objecting.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

As discussed above, the claim of an insufficient foundation is without merit. As such, counsel cannot be deemed to be deficient for failing to make a pointless objection.

Moreover, Harris cannot show prejudice. As also discussed previously, to the extent there was any deficiency in the foundation, such deficiency could easily have been met if there had been an objection. Finally, as discussed in the next section, even if the jury had not found the recent recidivism aggravator, the trial court would have still imposed an exceptional sentence. This claim should be rejected.

4. Even if the evidence were insufficient, Harris's sentence should be affirmed.

Here the trial court specifically ruled that it would impose the same exceptional sentence even without this aggravating circumstance:

That the grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid.

CP 437. Thus even if Harris's contentions regarding the recent recidivism

aggravator were accepted, his sentence would properly be affirmed, as the Supreme Court has held:

The next question is whether the exceptional sentences should be upheld on the basis of victim vulnerability alone or whether remand for resentencing is necessary. An exceptional sentence may be affirmed where only one of the trial court's reasons for imposing an exceptional sentence is upheld; however, remand for resentencing is necessary where it is not clear whether the trial court would have imposed the exceptional sentence on the basis of the factor which is upheld. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

Here, the trial court's conclusions of law state as to each count that the particular vulnerability of each of the victims alone justifies an exceptional sentence. There are no contrary indications in the record. Accordingly, we conclude that the trial court would have imposed the exceptional sentences solely on the basis of victim vulnerability, and therefore Gore's exceptional sentences are affirmed on the basis of victim vulnerability.

State v. Gore, 143 Wn.2d 288, 321, 21 P.3d 262 (2001), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118, 131 n.2, 110 P.3d 192 (2005). Here, we know what the trial court would have done because it explicitly stated what it would have done. Regardless of the sufficiency of the evidence for rapid recidivism, Harris's sentence should be affirmed.

B. THE CLAIM THAT RAPID RECIDIVISM AGGRAVATING CIRCUMSTANCE IS VAGUE AS APPLIED IS WITHOUT MERIT WHERE THIS COURT HAS PREVIOUSLY HELD THAT A NEW CRIME WITHIN TWO MONTHS OF RELEASE CLEARLY FALLS WITHIN THE STATUTORY LANGUAGE.

Harris next argues that the rapid recidivism aggravating factor is

unconstitutionally vague. Harris’s as-applied challenge lacks merit where this Court has previously held that a new crime within two months of release clearly falls within the statutory language.

RCW 9.94A.535(3)(t) provides that it is an aggravating factor that “[t]he defendant committed the current offense shortly after being released from incarceration.” Harris argues that the words “shortly after” give insufficient notice and are therefore vague. This Court has previously rejected this argument.

A statute is unconstitutionally vague if (1) it does not define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The reviewing court presumes that a statute is constitutional, and the party challenging the statute’s constitutionality bears the burden of proving the statute’s invalidity beyond a reasonable doubt. *Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). Where the statute does not impinge on First Amendment rights, the Court evaluates a vagueness challenge “by examining the statute as applied under the particular facts of the case.” *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

Washington courts have considered RCW 9.94A.535(3)(t) and the

term “shortly after” on multiple occasions. *See, e.g., State v. Williams*, 159 Wn. App. 298, 320, 244 P.3d 1018 (rejecting vagueness challenge and upholding exceptional sentence where current third-degree assault was committed within 24 hours of release on a prior third degree assault conviction), *review denied*, 171 Wn.2d 1025 (2011); *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) (holding that an eluding offense committed six months after release from prison was not an offense committed “shortly after being released”); *State v. Saltz*, 137 Wn. App. 576, 585, 154 P.3d 282 (2007) (affirming exceptional sentence where the defendant committed malicious mischief 30 days after release).

This Court most recently considered RCW 9.94A.535(3)(t) in *State v. Mata*, 180 Wn. App. 108, 321 P.3d 291, *review denied*, 180 Wn.2d 1026 (2014). There, the Court rejected a vagueness challenge on the grounds that “[c]ommitting a crime within six weeks of release fits well within any common understanding of “shortly after.” *Mata*, 180 Wn. App. at 120.

Similarly, in *State v. Zigan*, 166 Wn. App. 597, 270 P.3d 625, *review denied*, 174 Wn.2d 1014 (2012), the defendant challenged on vagueness grounds the application of the rapid recidivism factor to a vehicular homicide that occurred two months after he was released from prison. *Zigan*, 166 Wn. App. at 600, 603. This Court ruled that while the

statute requires some subjective evaluation, it was not unconstitutionally vague. *Zigan*, 166 Wn. App. at 605. The Court concluded that no “reasonable person could believe that the circumstances presented here constitute anything other ‘[t]han the defendant committed the current offense shortly after being released.’” *Zigan*, 166 Wn. App. (editing the Court’s) (quoting RCW 9.94A.535(3)(t)). These cases bear out the observation in *Combs* that “what constitutes a short period of time” necessarily “will vary with the circumstances of the crime involved.” *Combs*, 156 Wn. App. at 506.

Here, Harris was released on October 1, 2012. RP (8/29/14) 11. The evidence showed that Harris began pimping out the two girls in either late November or early December. 4RP 482, 6RP 757, 6RP 820, 9RP 1299. This case is indistinguishable from *Zigan*, and Harris’s claim should be rejected. Moreover, even if it had merit, his sentence should be affirmed for the reasons discussed in Part A(4), *supra*.

C. THIS COURT SHOULD DECLINE TO REVIEW AN UNPRESERVED CLAIM REGARDING LFOS WHERE HARRIS WAS ON NOTICE OF THE COURT OF APPEALS DECISION IN STATE V. BLAZINA.

For the first time on appeal, Harris challenges the court’s imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay, citing *State v. Blazina*, 182

Wn.2d 827, 344 P.3d 680 (2015). Four of the seven legal financial obligations were mandatory and are unaffected by the decision in *Blazina*.³ The court should decline to consider the remaining amounts, for attorney’s fees and for the county expert witness and special assault funds, because Harris failed to object at sentencing, despite being put on notice by this court’s decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013).

In its 2015 *Blazina* opinion, the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of LFOs made for the first time on appeal. *Blazina*, 182 Wn.2d at 832. “Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.” *Blazina*, 182 Wn.2d at 833 (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), *review granted*, 353 P.3d 641 (2015), the court held that defendant’s failure to object was not

³ Four of the seven LFOs ordered by the trial court were mandatory, and do not come within the reach of *Blazina*, which by its terms only applies to discretionary awards. See RCW 7.68.035(1)(a) (victim assessment); RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA fee); RCW 9.68A.105 (mandatory fine upon conviction of promoting commercial sexual abuse of a minor). These fees are mandatory, not discretionary. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (“For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant’s ability to pay should not be taken into account.”).

because the ability to pay LFOs was overlooked; rather, the defendant reasonably waived the issue, considering “the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive” *Duncan*, 180 Wn. App. at 250, 253. *Duncan* reflects the policy embodied by RAP 2.5(a), a policy that encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Here, Harris failed to object at sentencing. Furthermore, Harris is in a nearly identical position to the defendant in *State v. Lyle*, ___ Wn. App. ___, 2015 WL 4156773 (July 10, 2015). There, this court refused to address Lyle’s LFO claim, holding that Lyle was on notice regarding waiver of *Blazina* issues. “Our decision in *Blazina*, issued before Lyle’s March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.” *Lyle*, ___ Wn. App. at ¶ 10. Harris was sentenced on September 28, 2014, so he too had notice, and still failed to object.⁴ This Court should therefore

⁴ Though not raised by Harris, it follows that there is a potential claim of ineffective assistance of counsel. However, even assuming, arguendo, deficient performance on this issue, Harris must further show that he was prejudiced. Just as in *Lyle*, there are no additional facts in the record in this case that would allow the court to determine whether the trial court would have imposed fewer or no LFOs if defense counsel had objected. Because Harris must establish prejudice on the record below and the record is not

decline to review this issue.

Moreover, although Harris now speculates that a *Blazina* inquiry would have weighed heavily against a finding of ability to pay, nowhere does the record support his contention. To the contrary, Harris is in his early twenties and by all appearances does not suffer from any handicap that would prevent him from being gainfully employed. There is therefore no obvious error on the record, the matter was not preserved for review, and the Court should not consider the issue of LFOs for the first time on appeal.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REMOVING HARRIS FROM THE COURTROOM AFTER HE WOULD NOT CONTAIN HIMSELF AT THE THIRD OMNIBUS HEARING, WHERE THE COURT REPEATEDLY ADMONISHED HARRIS TO NOT SPEAK OUT IN COURT, AND WHERE NO SUBSTANTIVE RULINGS WERE MADE AT THE HEARING AFTER HIS REMOVAL.

Harris next claims that the trial court abused its discretion in removing him from the courtroom after he would not contain himself at the third omnibus hearing. This claim is without merit because the trial court repeatedly admonished Harris to not speak out in court. Moreover,

sufficient for the court to determine whether there is a reasonable probability that the trial court's decision would have been different, a claim of ineffective assistance of counsel on this basis must fail. *See Lyle*, ___ Wn. App. at ¶¶ 14-15.

no substantive rulings were made at the hearing.

Contrary to Harris's representations, he was not summarily "banished" without prior warning. He had been disruptive at a number of hearings before the omnibus. The trial court had warned him on numerous occasions about his conduct:

THE COURT: Mr. Harris, that is enough for now. We have a full calendar. He will come speak to you.

THE DEFENDANT: Your Honor, I am facing 16-and-a-half years.

THE COURT: I am asking you to be quite [sic] or you will be removed.

RP (5/15/13) 6. He threatened both court and counsel, and was repeatedly disrespectful:

THE DEFENDANT: I am just saying that you gave me an attorney already, and he wasn't doing the motions that I asked him to, so everyone from here who was doing all of the wrong will be hearing from the Washington State Bar Association.

RP (6/6/13) 10.

THE DEFENDANT: How do you guys violate speedy rights and just get away with it like that? Of course you won't answer.

RP (8/1/13) 4; *also* RP (9/20/13) 6.

Moreover, while Harris notes that he was objecting to his appointed counsel, he fails to acknowledge that James Schoenberger was his third appointed counsel. He first asked for attorney Craig Kibbe to be replaced on April 17, 2014. RP (4/17/13) 8-9. The motion was denied.

RP (4/29/13) 5. At the very next hearing he again requested new counsel, which was again denied. RP (5/15/13) 2-4. At the next hearing, scheduled for the omnibus, Harris again sought a new attorney, and Kibbe reported that Harris had filed a bar complaint against him. He further reported that Harris was refusing to talk to him. RP (5/23/13) 2. The motion was denied, but the omnibus was set over so that counsel could attempt to resolve their differences. RP (5/23/13) 7, 9.

At the next hearing, Kibbe moved through to withdraw. RP (5/30/13) 3. The hearing was set over so the codefendant's counsel could be present. RP (5/30/13) 5. At the hearing, Kibbe related that Harris was not cooperating with him:

Your Honor, I have been before the Court a couple of times on this matter. I guess that I can just add that basically the last few weeks since the Court first basically did not allow me to be removed from the case, Mr. Harris has continued to persist and, I guess, not participate in any way with his defense, not – I guess I would say turn his chair around and not talking. I guess that is his right. However, I think that it's going to be difficult to prepare for this case given the level of breakdown in communication. I can't think of a case I have had more of a breakdown in communication than this case.

RP (6/6/13) 2-3. The court granted the motion. RP (6/6/13) 3.

At the next hearing, new counsel Charles Lane moved to continue trial to November due to volume of discovery to go through. RP (6/21/13) 3. Counsel stated that he had spoken with Harris and he did not object to

continuance. RP (6/21/13) 7. Harris nevertheless changed mind and objected. RP (6/21/13) 8.

At the next hearing, Lane moved to withdraw. RP (8/1/13) 2. He noted that Harris had filed a bar complaint against him within two weeks of his appointment. CP 26. He further noted that Harris had repeatedly called his office and been disrespectful to his staff and made threats. *Id.* The court granted the motion. RP (8/1/13) 2.

Schoenberger first appeared at a trial status hearing on September 20, 2013. At that hearing, Harris objected to any continuance, claiming his speedy trial rights were being violated. RP (9/20/13) 6.

The next hearing was the omnibus. Harris omits the initial exchanges from the excerpt presented in his brief. The defendant was immediately obstreperous:

MR. SCHOENBERGER: Good afternoon, Your Honor. For the record, James Schoenberger with Mr. Park,^[5] and we are here for an omnibus hearing. And we have the order prepared and signed, and I would like to give it to Mr. Park.

THE COURT: Certainly. Thank you.

MR. SCHOENBERGER: Mr. Park, I know what you are going to say, and I caution you not to do this. You are not helping your case.

THE DEFENDANT: I have a motion to put in.

⁵ Park is Harris's alias. RP (1/29/13) 3.

THE COURT: Sir, if you have a motion, you need to bring them through your attorney.

THE DEFENDANT: I am not speaking to my attorney.

THE COURT: Sir, he is your attorney. If you have a motion, you need to raise it through him. I will not hear from you individually.

THE DEFENDANT: He is not my counsel, so we can't proceed in this omnibus matter if I am not being counselled. And I have a motion to withdraw counsel.

THE COURT: Mr. Harris or Mr. Park, how do you prefer to be addressed?

THE DEFENDANT: It doesn't matter to me.

THE COURT: All right. Mr. Harris, I am going to ask the jail to take you back. I have a very large calendar, and I will hear you later, but Mr. -- tell me your last name, again.

MR. SCHOENBERGER: Schoenberger.

THE COURT: Mr. Schoenberger is your court-appointed counsel; your third by the way. I don't have time to listen to you right now. So either you sign the order, or I will address this matter after all of my matters, including a very long civil matter I have.

THE DEFENDANT: Later today?

THE COURT: Not past 4:30. I am not giving you any special time. I am not going to listen to you right now because I have other matters.

THE DEFENDANT: That's fine.

THE COURT: Counsel, if you wish to speak to him –

MR. SCHOENBERGER: Mr. Harris, I was hoping you would sign this. I would like to come and meet with you and take you back to the jail. We have a lot to go over. But if you are not going to do that, then we are not going to be able to meet because they won't put you back

where I can meet with you.

THE COURT: Sir – excuse me, Officer? Is there kind of a waiting room area, or do you have to take him all the way back?

CORRECTIONS OFFICER: We have to take him all the way back.

THE COURT: Okay. All right. We will handle the Harris matter a little bit later.

(Whereupon, there was a pause in the proceedings.)

RP (10/4/13) 2-4.⁶

The passage quoted in Harris’s brief came after the trial court dealt with other matters. Thus this hearing was the trial court’s third attempt over a five-month period to hold the omnibus hearing. Essentially nothing had occurred to move the case toward trial in that time. Each time the trial court attempted to hold the omnibus hearing, it was thwarted by Harris’s (apparently groundless) complaints about his attorney.

This Court reviews de novo whether a trial court violated a defendant’s constitutional right to be present. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The core of the constitutional right to be present is the right to be present when evidence is being presented. *In re Lord*, 123 Wn. 2d 296, 306-07, 868 P.2d 835 (1994) citing *United States*

⁶ Harris’s objections came as a surprise to counsel:

MR. SCHOENBERGER: This is the first that I have heard that Mr. Harris, who is in constant contact with my office at my legal assistant several times a day, this is the first I have heard of his displeasure. He has never expressed that to me.

RP (10/4/13) 6.

v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.’” *Id.* (quoting *Gagnon*, 470 U.S. at 526). The defendant therefore does not have a right to be present at conferences between the court and counsel on legal matters, *Id.* (citing *United States v. Williams*, 455 F.2d 361 (9th Cir.), *cert. denied*, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. *Id.* (citing *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction)).

The omnibus hearing meets that that description. Harris therefore had no constitutional right to be present during any of these proceedings. *Lord*, 123 Wn. 2d 307. Similarly, in *In re Benn*, 134 Wn. 2d 868, 920, 952 P.2d 116 (1998), the Supreme Court held that the defendant did not have a right to be present during a hearing on a continuance motion:

Nor did the defendant have the right to be present during a hearing on a motion for a continuance. His absence during that hearing did not affect his opportunity to defend the charge. The motion for continuance involved no presentation of evidence, nor was the purpose of the hearing on the motion to determine the admissibility of evidence or the availability of a defense or theory of the case. Moreover, the trial court was aware of the defendant’s opposition to any continuance. The trial was delayed at defense counsels’ request to enable counsel to

provide the defendant with a competent defense.

Here, after Harris was removed, nothing of evidentiary significance was discussed. Schoenberger apprised the court of the status of discovery, noting he was not making any motions, but “just making a record.” RP (10/4/13) 7. The trial court then approved a stipulation to a protective order covering the release of the child interview DVD to defense counsel, as well as some child pornography images. RP (10/4/13) 7-8. The stipulation was signed only by counsel, not the defendant, and was to replace a release stipulation entered by prior counsel. RP (10/4/13) 7-8; *see* Supp. CP. The court then set a status hearing. RP (10/4/13) 8-11.

Plainly nothing impacting the theory of the defense, the admission or admissibility of evidence, or any other matter relating to the ability of Harris to defend the charges was presented. To the contrary, the matters discussed were purely ministerial, and no court ruling was made, other than to set another hearing. Harris’s constitutional right to defend was in no way affected by his removal.

Moreover, prejudice to the defendant will not simply be presumed. *Lord*, 123 Wn. 2d 307 (citing *Rushen v. Spain*, 464 U.S. 114, 117–20, 104 S. Ct. 453, 455–56, 78 L. Ed. 2d 267 (1983), and *State v. Rice*, 110 Wn.2d 577, 615 n. 21, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910 (1989)).

As in *Lord*, 123 Wn. 2d 307, Harris does not explain how his absence affected the outcome of the hearing. Nor is any impact obvious. The only arguably substantive matter was the protective order for the interview and the child pornography. The DVD was presumably turned over, counsel interviewed the child witness in question, and the pornography charge was severed from trial and ultimately dismissed.

Further, even if Harris's rights could have been impacted at the hearing, the trial court was justified in removing him. In *State v. DeWeese*, 117 Wn. 2d 369, 380, 816 P.2d 1, 6-7 (1991), the Supreme Court quoted the U.S. Supreme Court with approval:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant ... (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Illinois v. Allen, 397 U.S. 337, 343-44, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970) (editing the Court's).

Here, the court had warned Harris at prior hearings that if his

outbursts continued he would be removed. On the day in question, it suspended the hearing when Harris first began to disrupt it. Despite having time to compose himself, Harris again began to make unfounded objections to counsel and to argue with the court. The trial court had twice previously attempted to conduct an omnibus hearing, and twice previously had failed due to Harris complaints about his (two different) attorneys. Given the minor nature of the hearing, it cannot be said that it should instead have gagged Harris or taken the time to go through contempt proceedings.⁷ Finally, Harris was permitted to appear at the very next hearing, RP (11/4/13) 3, and appeared at every subsequent hearing through trial nearly a year later. This claim is without merit and should be rejected.

E. HARRIS'S PURPORTED REQUEST TO PROCEED PRO SE, RAISED ON THE THIRD DAY OF TRIAL AFTER HIS ISSUES WITH FOUR SEPARATE ATTORNEYS HAD ALREADY DELAYED TRIAL FOR 15 MONTHS, WAS NEITHER UNEQUIVOCAL NOR TIMELY AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT ALLOWING HIM TO REPRESENT HIMSELF.

Harris next claims that the trial court abused its discretion in not allowing him to proceed pro se. This claim is without merit because

⁷ Given that Harris was already incarcerated and indigent, it is not apparent that a contempt citation would have been effective in moving the case forward.

Harris's purported request to proceed pro se, raised on the third day of trial after his issues with four separate attorneys had already delayed trial for 15 months, was neither unequivocal nor timely. As such, the trial court did not abuse its discretion in not allowing him to represent himself.

In *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), the defendant—21 days into jury selection on a death penalty charge—moved to appoint new counsel or, in the alternative, to proceed pro se, arguing that his counsel failed to vigorously represent him. *Stenson*, 132 Wn.2d at 730-31, 735-36. The trial court denied his motion, and he again asked to represent himself, stating, “I do not want to do this but the court and the counsel that I currently have force me to do this.” *Stenson*, 132 Wn.2d at 739. The court denied his request: “At this point in time I find that the motion is not timely made and I also find based upon your indications that you really do not want to proceed without counsel.” *Stenson*, 132 Wn.2d at 740 (emphasis omitted). Viewing the record as a whole, the court found:

[A]most all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. He explained he had contacted a number of attorneys and had asked for permission to talk with his newly-selected counsel. He told the trial court he did not want to represent himself but that the court and his counsel had forced him to do that. More importantly, the Defendant did not refute the trial court's final conclusion that he “really [did] not want to proceed without counsel.”

After the trial judge denied the request for substitution of new counsel and the request to proceed pro se, the Defendant, pursuant to a request from the trial court to put his request in writing, filed a written request which sought appointment of new lead counsel, retention of the existing second counsel, appointment of Mr. Leatherman as counsel for the penalty phase, and a continuance. In that request, the Defendant did not mention proceeding pro se. While the Defendant's request was conditional, it was also equivocal based on the record as a whole. The trial court's refusal to allow the Defendant to proceed pro se was not an abuse of its discretion.

Stenson, 132 Wn.2d at 742 (citation omitted).

The record here is similar. Harris's inability to work with Kibbe and Lane was discussed in Part D of this brief, *supra*. As also noted there, Harris began complaining about Schoenberger at the latter's second appearance in court. This pattern continued.

In January, Schoenberger sought a continuance because of ongoing discovery and his own medical issues. Harris reacted negatively and the court advised Harris it was not appointing yet another attorney. Harris was very clear that he did not wish to represent himself:

THE COURT: ... So the two choices are proceed by yourself or proceed with Mr. Schoenberger and with the continuance. I will give you a few moments to discuss it with your attorney.

THE DEFENDANT: I don't need to discuss it. No disrespect. It's I don't need to discuss it because *I am not stupid. I am not going to go pro se*. I am not to do that, so I am going to have to do this with him. But I do ask the Court -- I don't know if you have to put in a motion, but do you think that you can compel them to give us the stuff that they have?

RP (1/14/14) 20-21 (emphasis supplied). Because of scheduling issues, the earliest available trial date was in April. Harris again expressed dissatisfaction, and the Court reiterated its position:

THE COURT: Sir, I can tell you right now the last two attorneys you made motions to fire, and I granted them, and I appointed Mr. Schoenberger. And it was mutual, but he is doing a very good job for you. So it's unlikely that if you make another motion that you are unhappy with him and you want the Court to relieve him, assuming I grant it, I can assure you that I am not going to appoint a fourth public defender for you.

So unless some egregious breakdown occurs between the two of you, it's highly unlikely that I will appoint another attorney and that Mr. Schoenberger will be your attorney, and this matter will go to trial in April.

RP (1/14/14) 22.

At the very next hearing Schoenberger moved to withdraw:

Mr. Harris, as you may recall, has on at least one occasion quite vocally fired me and told the Court I was not his attorney. He won't listen to me. I have no communications with him that are worthwhile. So communications have irretrievably broken down with that. And I could go into further details on that in camera, if Your Honor would like.

RP (3/28/14) 11. Schoenberger also indicated that he was continuing to have health problems. Because of this the court granted the motion, noting that it would not be delaying trial again due to attorney issues:

THE COURT: Okay. All right. It's based on your health reasons that I'm going to grant your request. So the record is clear, it is not on the others. I'm not letting attorneys withdraw days before trial. But due to your healths [sic] concerns, the Court will find just cause. So now we need to address appointment of new counsel.

RP (3/28/14) 13-14. The court reiterated the point that it expected Harris to work with counsel, and Harris reiterated that he did not want to represent himself:

THE DEFENDANT: Same thing with my attorney, when I asked him to do these things for me that you're telling me to do properly, he didn't do it. So what am I supposed to do if these attorneys aren't going to do it for me? *I'm not going to go pro se.*

THE COURT: Go through this attorney. Give him a chance. You're assuming this new attorney isn't going to represent you well. I'm not going to take that from you. Work with the new attorney. And if you feel he's not doing what you want him to do, then you can bring it back in front of me, but not before.

Are we clear?

THE DEFENDANT: Yes, ma'am.

RP (3/28/14) 19-20 (emphasis supplied).

The court appointed Eric Valley to represent Harris. RP (3/28/14) 14. A month later, Valley moved for a continuance, noting the large volume of discovery that he was still going through. RP (5/5/14) 24. Harris objected to a continuance, and the court informed him that counsel was entitled to prepare for trial:

THE COURT: Mr. Harris, you have two choices. Your attorney has good cause to ask for a continuance. If you wish the trial to go forward on May 14 —

THE DEFENDANT: *I will not go pro se.*

THE COURT: — the State is ready. Your choices are, we have this matter continued to sufficient time for your attorney to be ready, or to go by yourself.

Those are the only two choices.

THE DEFENDANT: It's like *deja vu* for the fourth time. So go ahead do your business. Do what you're going to do.

THE COURT: Mr. Harris, I would remind you it's based on some of your conduct the fact that you've had so many attorneys.

THE DEFENDANT: In all respect, if an attorney is not doing what I need them to do and they are violating the RPC rules –

THE COURT: I'm just reminding you, counsel – it's my turn, sir. The only reason I let Mr. Schoenberger go is because of his medical issues. So don't think I'm letting this fourth attorney go.

THE DEFENDANT: So that wasn't my fault.

THE COURT: I'm not saying that. I'm just telling you that you're not entitled to public defender after public defender after public defender. And the only reason I'm allowing you the fourth one is because of Mr. Schoenberger's medical issues. I understand there was conflicts between the two of you, as there have been with prior public defenders. So if you want this trial to go forward, I suggest that you work with your current attorney. And we're going to set this matter – I'm going to have to set it until August, if this is going to be a three-week trial. Because I'm gone the last week of July. And the State isn't ready, can't even start this until July 14. There's not enough time.

THE DEFENDANT: Hold on. I object because *State v. Campbell* clearly says you can only ask for 30 days –

THE COURT: Mr. Harris, Mr. Harris, I've bent over backwards –

THE DEFENDANT: Can you take me to the jail?

THE COURT: — giving you latitude. Mr. Harris, look at me when I talk to you. In all rights, I

shouldn't even allow you to speak. You have a court-appointed attorney. I've just been trying to accommodate you because I know you have things to say. I'm going to get off the bench for five minutes, and I want the attorneys and you, sir, to figure out. This trial is either going to trial in June or August. July isn't going to work based on what I'm hearing from the State. That's their representation. And I've probably got a retrial on a murder coming in September. So just a heads up, we've got to get this tried this summer.

RP (5/5/14) 26-28.

By mid-July, Harris was again refusing to work with counsel.

MR. VALLEY: Your Honor, I feel duty-bound to say one thing, which is – I will say two things. One, I have not seen Mr. Harris since our last hearing. I have worked literally, and I have billed for it – this is an accurate representation – 40 hours in the last two weeks. So I have been working hard on his case. I haven't seen him. That is the first thing.

And the second thing is, when I went to speak with him before the hearing, I believe there has been a breakdown in communication. Having said that, I will defer to Mr. Harris.

RP (7/25/14) 11. Harris noted that he had filed a bar complaint against Valley. RP (7/25/14) 19. He then repeatedly asked for new counsel to be appointed. RP (7/25/14) 19-21. The court rejected the request, and advised Harris that he could go pro se if he wished:

THE COURT: Mr. Harris, I have several concerns. I told you last time that if you want to represent yourself you may do that. I am not going to keep continuing to appoint public defender after public defender for you. You have made similar complaints about each and every attorney I have appointed for you. I am quite concerned it wouldn't matter how many attorneys I gave you. You will have the same problems with them. None of

the attorneys that I appoint for you would be good enough, that would do what you want them to do. I am not going down that road.

What I am hearing from this counsel is that he is working hard. Maybe you disagree with him in strategies, but there is -- I am not going to -- I am not going to get into his domain. He has not told me that he can't work with you. I am concerned about your ability to work with any attorney, quite frankly, and so at this time I am denying your request. I don't believe what I am hearing -- especially the efforts I am hearing him make.

RP (7/25/14) 22-23. Harris continued to complain about what Valley did or did not do, and the court ultimately told him that it had already given him his choices:

THE COURT: Mr. Harris, I have been very patient with you. And Mr. Talebi is correct. I have let you speak more than any other defendant that I can remember in my career, and the time is stopped. All right?

You have good counsel. What he is telling me indicates to the Court that he's exercising his legal judgment. I am not going to make a legal decision whether his judgment is right or wrong, but he is telling me and Mr. Talebi is confirming that he is working hard. He is making legal decisions. He is an experienced attorney.

You know, it will be up to the Court of Appeals, if we ever get there. I am not saying one way or another, but I am just saying the time for you to speak every time you are in court is now over. I have been very, very patient with you and very accommodating.

I am denying your request for new counsel. You need to work with your current counsel. Your only other alternative is to go by yourself or hire private, and obviously you can't do that. So you have two choices. You can represent yourself, you stay with counsel -- or actually there is a third choice -- you hire private counsel.

You can't do that the day before trial either because that would require a whole new continuance. I am just kind

of warning you: *Do not come in here the day of trial before and try to say, "Now I have money. I am going to hire a private lawyer."* That won't fly.

RP (7/25/14) 30-31 (emphasis supplied). Harris then inquired whether he was entitled to standby counsel:

THE DEFENDANT: If I chose to represent myself, would counsel be able to like still be there for me to refer to?

THE COURT: No.

THE DEFENDANT: Because, I mean, I – no counsel is going to be able to be –

THE COURT: My understanding is there is no legal right to what we call standby counsel.

THE DEFENDANT: So you would be refusing my standby counsel?

THE COURT: I would have to ask counsel if he is willing to do that.

THE DEFENDANT: So will you be able to ask him right now?

THE COURT: We are not continuing this trial, unless there's more motions that need to be raised.

Hang on. No, I did this on the last trial. Standby counsel, they end up, you know, being your attorney. So just have him represent you. I am stopping the conversation. We are going way beyond what this hearing is about.

I have signed orders. I have listened to you. I have denied your motion. I have ordered your attorney to show you the DVD's that he was unable to do before because of the type of computer he had, and he has promised me in open court that he will do that. This hearing is over.

RP (7/25/14) 31-32.

Harris continued to interrupt the proceedings on the first day of

trial:

THE COURT: Tomorrow morning we'll be
in –

THE DEFENDANT: Your Honor, I would
like to say my attorney did not show me those CDs. He
won't do it.

THE COURT: I'm not going to let you
speak during the trial. Any point you need to make is made
through your attorney.

1RP 83.

THE DEFENDANT: My attorney did not
show me the CDs I asked him to and was court ordered on
July 11th.

THE COURT: Mr. Harris, I'm asking you to
not speak. You have an attorney who is representing you.
Thank you.

THE DEFENDANT: Sally Olsen,^[8] I hope
that's on record.

1RP 86.

THE DEFENDANT: I asked for a
suppression hearing on the pretextual stop. And if denied, I
put in notice of appeal for my arrest December 31st, 2012.
And I –

THE COURT: Mr. Harris, I asked you twice
to not speak.

THE DEFENDANT: — for appeal.

THE COURT: Mr. Harris, if you continue to
talk against my instructions, I'll have the officer remove
you from the courtroom. You run the risk of not being in
the courtroom when the trial is going forward.

1RP 87-88.

⁸ Judge Olsen was presiding.

The second day of trial, Harris continued to speak out, and the court continued to admonish him:

THE COURT: Number 56. The last one I had was 27. Any objection?

MR. VALLEY: Not from the defense.

MS. SCHNEPF: No, Your Honor.

THE COURT: Those four will be excused.

THE DEFENDANT: Yes, Your Honor, I have an objection.

THE COURT: Sir, you need to make any remarks/comments through your attorney.

2RP 154.

THE DEFENDANT: My attorney told me that he was told to not object until after this, and I asked him clearly before that.

THE COURT: Sir, I'm not going to hear from you unless you're speaking through your attorney.

2RP 158.

THE DEFENDANT: I asked my attorney to object to the racial thing with the jury before he considered that.

THE COURT: Mr. Harris, I'm not going to tell you again.

THE DEFENDANT: He won't do it in all respect, Your Honor. He is refusing. I don't know what else to do. I don't mean to disrespect, because he's refusing. I don't know what to do. That's ineffective assistance of counsel. I'm trying to be respect –

THE COURT: Mr. Harris, I'm asking you again, to speak through your attorney.

2RP 162.

Harris's alleged request to proceed pro se did not occur until the

third day of trial, after he was again admonished for interrupting the proceedings:

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 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?

3RP 344-45. Although there were subsequent outbursts during trial, 9RP 1177-79, 9RP 1240-41, 10RP 1340-57, Harris never again suggested he wished to go pro se.

Given the totality of the circumstances, this case is indistinguishable from *Stenson*. Harris consistently complained about every one of the four attorneys who were appointed to represent him. He also, however, repeatedly disavowed any desire to represent himself. The one time he did so was during another of his outbursts in court. As in *Stenson*, his request was not unequivocal, and the trial court was not required to take it as an unequivocal request to represent himself.

In addition to being unequivocal, a request to proceed pro se must also be timely. *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002) (citing *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995)). The trial court's decision on such a request is discretionary, and the degree of its discretion varies with the timing of the request. *Breedlove*. 79 Wn. App. at 107; *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). If the request 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. Madsen*, 168 Wn.2d 496, 508 n.4, 229 P.3d 714 (2010) (quoting *State v. Barker*, 75 Wn. App.

236, 241, 881 P.2d 1051 (1994)).

If, on the other hand, the request is 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.”” *Madsen*, 168 Wn.2d at 508 (*quoting Barker*, 75 Wn. App. at 241). Absent “substantial reasons,” a last-minute request for self-representation “should generally be denied, especially if the granting of such a request may result in delay of the trial.” *State v. Garcia*, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979). Decisions on requests for self-representation or a continuance are reviewed for abuse of discretion. *Madsen*, 168 Wn.2d at 504.

Here, the request, if it be one, was made in August 2014, on the third day of trial. The case had been pending since January 2013. Even a casual review of the record shows that the 15-month delay was largely due to Harris’s inability to work with any attorney appointed to represent him. His request, even if it were deemed unequivocal, would have come far too late in the proceedings, and the trial court did not abuse its discretion in declining to have Harris proceed pro se.

IV. CONCLUSION

For the foregoing reasons, Harris's conviction and sentence should be affirmed.

DATED August 31, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal line extending to the right.

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KITSAP COUNTY PROSECUTOR

August 31, 2015 - 4:00 PM

Transmittal Letter

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