

NO. 48452-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT EVATT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 15-1-02622-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, at the time of trial, the defendant was competent to proceed *pro se* and made a knowing, voluntary, and intelligent waiver, when a forensic evaluation found the defendant competent and the court conducted multiple colloquies with the defendant prior to granting him *pro se* status? (Appellant's Assignment of Error 1 and 2)
2. Whether this Court should remand to the trial court to modify the judgment and sentence so as to comply with RCW 9.94A.703? (Appellant's Assignment of Error 3)
3. Should this Court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal?¹

B. STATEMENT OF THE CASE.

1. Procedure

Scott Emerson Evatt, hereinafter "defendant," was charged with one count of a violation of RCW 9A.36.031(1)(g), assault in the third degree, one count of a violation of RCW 9A.76.020(1), obstructing a law enforcement officer, and one count of a violation of RCW 69.50.102 and

¹ Defendant does not provide an assignment of error for appellant costs, however such is challenged in Part 3 of defendant's argument. *See* Brf. of App. 38.

69.50.412(1), unlawful use of drug paraphernalia. CP 1-2. The defendant decided to proceed to trial *pro se*. 1RP 23². The defendant waived his right to a jury trial and was subsequently tried in a bench trial by the Honorable Kitty-Ann van Doorninck. CP 51³. The court found the defendant guilty on Count I, assault in the third degree and Count III, unlawful use of drug paraphernalia, but acquitted on Count II, obstructing a law enforcement officer. CP 54-61, CP 106⁴. The defendant was subsequently sentenced to a period of confinement of 51 months with 12 months of community custody on Count I and sentenced to no more than 90 days on Count III. CP 68-83, 86-92⁵. The court entered Findings of Fact and Conclusions of Law for the verdict on December 23, 2015. The defendant timely appealed. CP 98.

² The Verbatim Reports of Proceeds will be designated with pretrial hearings as 1RP, trial proceedings as RP, and sentencing proceedings as 2RP. Both appellant and respondent are utilizing the same designations for the VRPs. *See* Brf. of App. 3 fn 1.

³ Judge van Doorninck presided over the bench trial and the Honorable Jack Nevin conducted all pretrial proceedings until the case was reassigned for trial to Judge van Doorninck. CP 104.

⁴ Due to a clerical error, Page 3 of 9 of the Findings of Fact and Conclusions of Law was not scanned into Linx by the Pierce County Clerk. However, such was included in the original paper filing. Respondent has designated Page 3 as CP 106. When Page 3 was scanned into Linx by the Pierce County Clerk, it was included with the original scan and remained dated December 23, 2015. As such, the correct numerical order for the Findings of Fact and Conclusions of Law is CP 54-55, 106, 56-61.

⁵ While the defendant was sentenced in the Judgment and Sentence to no more than 90 days confinement on Count III, the Warrant of Commitment lists no period of confinement for Count III. CP 86, 78.

2. Facts

a. Evidentiary Facts.

On July 6, 2015 Officers Zachary Spangler and Dean Waubanasum of the Tacoma Police Department were on patrol when they received a call regarding a suspicious individual looking into cars near the intersection of East 40th and East K Street in Tacoma. RP 162-165. The suspicious individual was described as a white male, late 30s or early 40s, wearing a black hat with a black jacket draped over his shoulders with a gray button shirt and black pants. RP 94-95. Sergeant Jon Verone, also of the Tacoma Police Department, was in the area and also responded to the call. RP 92.

Upon responding to the call, Sergeant Verone saw an individual, later identified as the defendant, matching the description of the suspicious individual. RP 95. Sergeant Verone told the defendant to stop. However, the defendant slowly continued to walk and appeared as if he was considering fleeing the scene. RP 96. Upon arrival, Officers Spangler and Waubanasum also issued verbal commands for the defendant to stop walking. RP 97. The defendant stopped walking, but still made some furtive movements. *Id.* The defendant eventually complied slowly with Officers Spangler's and Waubanasum's commands to stop moving and show his hands. RP 98.

Upon complying with the officers' orders, the defendant dropped a pipe on the ground in front of him. RP 168. The pipe was later determined

to be a methamphetamine pipe. RP 191. After the defendant complied with the officers' commands and dropped the pipe, he was detained in handcuffs. RP 99. After complying with the officers' orders, the defendant admitted he had recently smoked methamphetamine and had used the pipe he had dropped upon initially being contacted by the police. RP 209.

The defendant was then escorted to Officers Spangler's and Waubanasum's patrol vehicle where they attempted to place him in the back of the patrol vehicle and place him under arrest. RP 195. When the officers attempted to place the defendant into the patrol vehicle the defendant physically resisted. RP 197. The officers attempted to orally instruct the defendant to enter into the back of the vehicle as well as to physically force him into the vehicle. *Id.* Eventually, the officers were able to get the defendant into the vehicle. RP 199. However, the backseat door on the opposite side from where the officers were attempting to place the defendant in the vehicle was open. *Id.* The defendant attempted to roll over to the open door. *Id.* Officer Spangler ran to the open door in an effort to close it. *Id.* Prior to Officer Spangler closing the door, the defendant threw his foot up and kicked Officer Spangler in the stomach, causing the officer to buckle over and stumble backwards. *Id.*

After kicking Officer Spangler the defendant jumped out of the vehicle. *Id.* Officer Spangler grabbed ahold of the defendant and swept his legs to prevent him from running away or further assaulting either officer. *Id.* This caused the defendant to go to the ground. RP 204. While the

defendant was on the ground Officer Spangler called for backup due to the defendant fighting with the officers. RP 353. Officers Spangler and Waubanasum held the defendant down on the ground until Sergeant Verone returned to the scene to assist the officers. RP 204.

Once the three officers got control of the defendant, a hobble was placed around his legs to prevent him from any more kicking. RP 208. At that point the defendant was compliant and placed into the patrol vehicle to wait for Tacoma Fire to arrive due to the defendant having hit his face on the ground. RP 209. While waiting for Tacoma Fire to arrive, the defendant admitted he had swallowed methamphetamine at the scene at the start of the encounter with the officers, in addition to the defendant's previous admission of smoking methamphetamine. RP 209-210.

Upon arrival at the scene, Tacoma Fire evaluated the defendant for both injuries sustained in the assault and for the ingestion of methamphetamine. RP 214. The defendant was then transported to Tacoma General Hospital by Rural Metro for further evaluation. RP 214-215. Tacoma General Hospital cleared the defendant and he was taken by the officers for booking. RP 215.

b. Competency of the Defendant to Proceed
Pro Se.

On July 14, 2015, in a pretrial motion before the Honorable Jack Nevin, the defendant moved to proceed *pro se*. 1RP 3. The court noted

that the defendant had previously appeared before the same court in a *pro se* capacity in a different case. The court then conducted an examination of the defendant regarding whether he had ever studied the law, understood the Rules of Evidence and Rules of Criminal Procedure, how the defendant would need to present testimony, if the defendant understood the charges pending before the court, and the consequences if the defendant was found guilty. 1RP 4-6. The defendant stated he understood the charges against him, the consequences of the charges, and had limited familiarity with the Rules of Evidence and Rules of Criminal Procedure. *Id.*

The defendant also stated he wished to proceed *pro se* due to his history of having conflicts with the Pierce County Department of Assigned Counsel (DAC). 1RP 6-7. The court informed the defendant that it could appoint a non-DAC attorney to represent him, however, the defendant felt any attorney in Pierce County would still be a conflict. 1RP 7.

The defendant's standby counsel from DAC, David Shaw, suggested the defendant undergo a 10.77 evaluation to determine competency to stand for trial. *Id.* The defendant objected to undergoing a competency evaluation. 1RP 8. The court noted that in a previous case before the same court, the defendant underwent a competency hearing and was found competent to stand trial. 1RP 10. However, the court still decided to order a 10.77 competency evaluation for the current case. *Id.*

Dr. Mark Duris conducted the mental health evaluation of the defendant. CP 10-15. Dr. Duris found the defendant was competent to proceed to trial and was competent to proceed *pro se*. *Id.* The court subsequently entered an Order Determining Competency to Stand Trial on July 29, 2015. CP 16-17.

Following the signing of the competency order, on August 5, 2015 proceedings resumed for the court to rule on whether the defendant would be allowed to proceed *pro se*. 1RP 14. The court again questioned the defendant to determine if he was competent to proceed *pro se*. 1RP 15-18. The defendant, without any prompting from the court or counsel, was able to articulate the three charges pending before the court. 1RP 15. Again, the defendant reiterated that he wanted to proceed *pro se* due to conflicts with DAC. 1RP 17-18. The court asked the defendant if anybody was pressuring him to proceed *pro se*, which the defendant answered in the negative. 1RP 21. The court then advised the defendant that it was the court's opinion that the defendant was better off proceeding with an attorney. *Id.* The defendant stated he was knowingly, intelligently, and voluntarily proceeding *pro se* prior to being asked such by the court. *Id.* The court then found that the defendant had indeed knowingly, intelligently, and voluntarily waived his right to an attorney. 1RP 23.

On August 7, 2015 a hearing was held at the State's request to reevaluate the defendant's request to proceed *pro se*. 1RP 34. The court noted that Dr. Duris had found the defendant to be competent to proceed

pro se. 1RP 44-45. Further, the court noted that at that time the defendant did not

...present or exhibit symptoms of a mental disease or defect that would preclude his ability to have factual or rational understanding of the legal proceedings against him or impact his ability to work in a facilitated manner with his legal counsel for his defense.

1RP 45. Although the court did not recite such orally, the remainder of the paragraph which the court read from the forensic evaluation concluded that the defendant was competent to proceed in his own defense “with or without counsel.” CP 10-15. The court noted that while it disagreed with Dr. Duris’ conclusions, the court “...is not a professional, and the professionals tell me [the defendant] is competent to represent himself in a *pro se* capacity.” 1RP 48. The court determined that it wanted to review the case law and forensic evaluation before issuing a new ruling. CP 48-49.

After the case was reassigned to Judge van Doorninck, the issue of the defendant’s competence came up again. On December 10, 2015, during additional pretrial motions the State noted that the defendant, prior to being granted *pro se* status, had an evaluation at Western State Hospital which determined that he was competent to proceed to trial. RP 3. The State noted that the issue had not been fully fleshed out prior to the case being reassigned. RP 3-4. While the court was never explicit on December

10, 2015 that the defendant was competent to proceed *pro se*, the Judgment and Sentence note that the defendant was granted *pro se* status by the court on both August 5, 2015 and on December 10, 2015. CP 86-92.

On December 23, 2015, during the sentencing hearing, the defendant's competency was brought up again. The court noted that in both the current case and in a past case the defendant was found competent. 2RP 17. Further, the court noted that the defendant had never been found incompetent. *Id.* Additionally, the court noted that the defendant had been competent to proceed throughout all of the trial proceedings in this matter. 2RP 13. The court stated that the defendant had been consistent in terms of his defense, that he was in the same mental state as he was in trial, he understood what the roles are of different individuals within the courtroom, and why he was in court. Finally, the court stated that the defendant was "an excellent advocate for himself." 2RP 18.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW A DUE PROCESS VIOLATION OCCURRED.

Both the Sixth and Fourteenth Amendments of the United States Constitution provides a criminal defendant must be given the right to the

assistance of counsel; however the Sixth Amendment also guarantees that a defendant in a criminal trial has the right to waive the assistance of counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A defendant may waive the right to the assistance of counsel, so long as the waiver is made knowingly and intelligently. *State v. Hahn*, 106 Wn.2d 885, 893, 726 P.2d 25 (1986). Such a waiver shall only be effective if a court makes a specific finding that the defendant is competent to waive the right to the assistance of counsel. RCW 10.77.020(1). When determining whether the defendant is competent to waive the right to the assistance of counsel, the court should be guided by determining if the defendant understands (a), the nature of the charges; (b) the statutory offense included with them; (c) the range of allowable punishments; (d) possible defenses to the charges and circumstances that mitigate the offense; and (e) all other facts essential to understanding the proceedings. *Id.*

Improper denial of the right of self-representation requires reversal regardless of whether prejudice results. *State v. Englund*, 186 Wn. App. 444, 455, 345 P.3d 859 (2015). A trial court's determination of a defendant's competency to stand for trial is reviewed for an abuse of discretion. *State v. Sisouvanh*, 175 Wn.2d 607, 622, 290 P.3d 942 (2012).

- a. The defendant was afforded due process of the law as the court conducted a thorough inquiry before determining that the defendant was competent to proceed *pro se*.

There is no constitutional requirement that a trial court makes an independent determination of competency for a defendant to proceed *pro se*. ***In re Personal Restraint of Rhome***, 172 Wn.2d 654, 665, 260 P.3d 874 (2011).

An accused in a criminal case has a fundamental right not to be tried while incompetent to stand trial. ***State v. Heddrick***, 166 Wn.2d 898, 903, 215 P.3d 201 (2009). Trying an incompetent defendant is forbidden by both the Due Process clause of the United States Constitution and by Washington State statute. ***State v. Lewis***, 141 Wn. App. 367, 381, 166 P.3d 786 (2007).

The test to determine competency to stand trial is if the defendant has the capacity to understand the nature of the proceedings against him and to assist in his own defense. ***State v. Ortiz***, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). If there is a reason to doubt a defendant's competency to stand trial, the trial court must order an expert to evaluate the defendant's mental condition. RCW 10.77.060; ***State v. Coley***, 180 Wn.2d 543, 552, 326 P.3d 702 (2014). If after such an evaluation the defendant is found to not be competent for trial, the court must stay further proceedings

and may commit the defendant for treatment. RCW 10.77.084; *Id.*

Following the period of commitment, if competency has been restored, the stay shall be lifted. RCW 10.77.084(1)(c).

The standard for waiver of the right to counsel is (1) competency to stand trial and (2) a knowing and intelligent waiver with “eyes open,” which includes understanding the dangers and disadvantages of proceeding *pro se*. *State v. Hahn*, 106 Wn.2d at 895. Past mental illness is not determinative of the defendant’s present mental capacity to conduct his own defense, though it is a factor which must be given considerable weight when determining the defendant’s present condition. *State v. Kolocotronis*, 73 Wn.2d 92, 102, 436 P.2d 774 (1968).

In this case, the trial court followed the statutory requirements under 10.77 when it initially determined that the defendant was competent to stand trial. During the initial pretrial proceeding where the defendant moved to proceed *pro se*, the defendant’s standby counsel from DAC, David Shaw, recommended that the defendant undergo a competency evaluation. 1RP 7. Although the defendant objected to such, the court determined that based upon its past experience with the defendant, a competency evaluation was appropriate and ordered an evaluation. 1RP 8-10. The competency evaluation by Dr. Duris determined that the defendant was competent to proceed to trial and, specifically, was competent to proceed *pro se*. CP 10-15.

The procedures followed by the court are exactly the procedures the various Washington State statutes require. *See* RCW 10.77.060, .084. The trial court ensured that the defendant underwent a competency evaluation prior to allowing the case to proceed further or for the defendant to represent himself. 1RP 7-10. The court noted that the defendant was found competent to proceed to trial. CP 16-17, 1RP 44-45. Further, the court made it clear while it may not have agreed with the forensic evaluation, it did note that Dr. Duris found the defendant competent to proceed *pro se*. 1RP 48.

The trial court signed an Order Regarding Competency of Defendant where it stated that a forensic evaluation had been conducted, the defendant was found to be competent, and as such, the defendant could understand the proceedings against him. CP 16-17. When this Order is taken in conjunction with the totality of the circumstances and the court proceedings, it is clear that the trial court followed the statutory requirements to ensure the defendant was afforded his due process rights. Because the court undertook all of the requirements prior to enter the Order of Competency, defendant is unable to show his due process rights have been violated.

In re Personal Restraint of Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011), is a Washington Supreme Court case which involved a similar situation to the present case. The court held that there was no constitutional requirement for the court to conduct an independent

competency proceeding once Rhome had been found competent to proceed *pro se*. *In re Rhome*, 172 Wn.2d at 670. Our Supreme Court noted that because the trial court engaged in a lengthy colloquy with the defendant regarding his motion to waive counsel and proceed *pro se*, the decision by the trial court was not an abuse of discretion and hence, not a violation of the defendant's due process rights. *In re Rhome*, 172 Wn.2d at 668. The *Rhome* court also made it clear that the Washington State Constitution does not afford additional due process rights or extra protections to mentally ill defendants than what is provided by the federal constitution. *In re Rhome*, 172 Wn.2d at 665 fn. 3.

In this case, procedures similar to those in *Rhome* occurred. First, the trial court was aware the defendant was found to be competent at a pretrial hearing by a different judge. RP 3. While the trial court did not engage in a colloquy with the defendant regarding his desire to be *pro se*, in pretrial proceedings the Honorable Judge Nevin conducted two separate colloquies and examinations of the defendant prior to granting him *pro se* status. 1RP 4-7, 15-29. As such, as in *Rhome*, because the defendant had previously been deemed competent to proceed *pro se*, it was not necessary for the trial court to make a second, independent determination of the defendant's competency prior to allowing him to continue to proceed *pro se*. While it was not necessary for the trial court to make an independent determination of the defendant's competency, the Judgment and Sentence

specifically note that the trial court had indeed found the defendant to be competent to proceed *pro se* on December 10, 2015. CP 86-92.

While in the present case defendant may have exhibited symptoms of mental illness, such behavior does not mandate a defendant to undergo a competency evaluation every time these symptoms manifest themselves. *State v. Hahn*, 106 Wn.2d 885, 726 P.2d 25 (1986), is a case where the defendant had severe mental health issues and was deemed to be competent to proceed *pro se*. In *Hahn*, the defendant was diagnosed as schizophrenic, chronic paranoid type. *State v. Hahn*, 106 Wn.2d at 887. Although Hahn continued to be delusional and schizophrenic to the point where the delusions and schizophrenia would not improve with medication, the court still concluded that he was competent to proceed *pro se*. *State v. Hahn*, 106 Wn.2d at 887-888.

Although the defendant had a history of mental illness, this did not mean the defendant was not competent or able to proceed to trial or represent himself. It is well-established that past mental illness is not determinative of the defendant's present mental capacity to conduct his own defense, though the court can consider such in determining the current mental health status of a defendant. *State v. Kolocotronis*, 73 Wn.2d at 102.

While in this case the defendant had been previously diagnosed with various mental health conditions, many of them were based upon

substance abuse disorders. CP 10-15. Dr. Duris noted that at the time of the forensic evaluation none of the defendant's diagnoses appeared to significantly impair the defendant's behavior, knowledge, or reasoning ability. *Id.* Further, Dr. Duris stated that while the defendant had been evaluated four times previously in other cases for competency to stand trial, in each case the defendant was found to be competent. *Id.* Based upon such, as well as the fact the defendant had a factual understanding of courtroom proceedings, knew the charges against him, the possible defenses, and the possible outcomes of the case, the defendant was found competent to proceed to trial, including by proceeding *pro se*.

In pretrial proceedings the court stated it did have some concerns regarding the defendant's competency based upon his history of mental illness. 1RP 44-45. However, based upon the defendant's competency evaluation, the court still found the defendant was competent at the time of trial and therefore, granted his motion to proceed *pro se*. CP 16-17, 1RP 14, 23.

During sentencing, the trial court noted that the defendant had been found competent in all of the previous cases where he had undergone a competency evaluation. 2RP 10, 17. The trial court specifically stated that it found the defendant was competent during all of the proceedings in this matter. 2RP 13. Therefore, like in *Rhome*, this court conducted the necessary inquiries and took the proper procedural steps prior to allowing

the defendant to proceed *pro se*. As such the defendant is unable to show a violation of his due proceed rights.

- b. Prior to the defendant being granted *pro se* status, the trial court ensured that the waiver of counsel was done knowingly, intelligently, and voluntarily.

The ad-hoc, fact specific analysis of questions regarding waiver of counsel are best assigned to the discretion of trial courts. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). A trial court's decision on a defendant's request for self-representation will only be reversed if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Id.* (quoting *State v. Madsen*, 168 Wn.2d 496, 504 229 P.3d 714 (2010) (citing *State v. Rohrich*, 149 Wn. 2d 647, 654, 71 P.3d 638 (2003))).

A defendant's request to proceed *pro se* must be timely made and stated unequivocally. *State v. Stenson*, 123 Wn.2d 668, 737, 940 P.2d 1239 (1997). If the request is made timely and stated unequivocally, the court must determine if the *pro se* request was made knowingly, intelligently, and voluntarily. *State v. Madsen*, 168 Wn.2d at 504. This can be accomplished by a colloquy. *Id.* The current law does not require a court to apply a standard that is different for a mentally ill defendant to

proceed *pro se* other than ensuring that such a decision is made knowingly and intelligently. *In re Rhome*, 172 Wn.2d 654 at 666.

State v. Hahn, *supra*, provides an example of how a trial court may conduct a colloquy to determine if the defendant knowingly, intelligently, and voluntarily waives the right to an attorney. Prior to granting Hahn *pro se* status, the trial court conducted multiple colloquies during the course of different hearings. *State v. Hahn*, 106 Wn.2d at 896. The court specifically noted that one of the colloquies with the defendant was a “textbook examination” and reprinted such as an example for trial courts⁶. *Id.* In the colloquy the Supreme Court deemed was a “textbook example,” the trial court questioned the defendant on, *inter alia*, the charge and elements of the crime to which he was proceeding to trial, whether the defendant understood the maximum penalties if convicted, the disadvantages of proceeding *pro se*, the rules on argument, how testimony would be conducted, the right to be represented by counsel, and the ability of the court to appoint standby counsel. *State v. Hahn*, 106 Wn.2d at 896 fn. 9. Additionally, the court inquired to ensure the defendant was proceeding voluntarily. *Id.*

Hahn also submitted a written affidavit explaining why he wished to proceed *pro se* and confirmed such orally in open court. *Id.* Our Supreme Court held that because the inquiry divulged into Hahn’s

⁶ The State has attached the full colloquy in *State v. Hahn* between the trial court and the defendant as Appendix A.

understanding of the consequences of proceeding *pro se*, the alternatives available, that he comprehended the consequences of representing himself, and that he freely chose to proceed, Hahn had validly waived his right to counsel. *Id.* at 901.

Here, the court undertook two colloquies on separate dates with the defendant to determine whether he was waiving his right to counsel knowingly, voluntarily, and intelligently. 1RP 4, 15. Both colloquies are similar to what occurred in *Hahn*. In each colloquy the court inquired as to whether the defendant knew the charges for which he was on trial, the maximum penalties for the charges, the Rules of Evidence and Rule of Procedure, the right to be represented by counsel, and the different ways the court could appoint counsel on the defendant's behalf. 1RP 4-7, 15-29.

During the second colloquy, where the court determined the defendant was competent to proceed *pro se* and was waiving his right to counsel knowingly, intelligently, and voluntarily, the court conducted an additional inquiry. In addition to the aforementioned questions, the court also inquired into whether the defendant was making the decision to proceed *pro se* voluntarily, explained what the disadvantages of proceeding *pro se* are, discouraged the defendant from doing so, and the court's ability to appoint standby counsel to assist the defendant. 1RP 15-29. Based upon the defendant's answers and subsequent conversation on the record with the court, the learned judge advised the defendant a second

time against representing himself and to allow the court to appoint standby counsel. 1RP 27-29.

In each colloquy the defendant provided specific and articulable reasons as to why he wished to represent himself. 1RP 6, 18, 20. This once again follows *Hahn* where the Supreme Court noted that in addition to the colloquy, the defendant had filed a written affidavit with the court expressing why he wanted to represent himself and stated such in open court. *State v. Hahn*, 106 Wn.2d at 896.

While in this case the defendant did not provide a written affidavit that he wanted to proceed *pro se*, the defendant made it clear from arraignment that he wished to represent himself. 1RP 3. Further, throughout all pretrial proceedings the defendant did not elect to withdraw or change his *pro se* status. 1RP 14, 34, 58, 68. Rather he was consistent in wanting to proceed *pro se* and his reasons for wishing to represent himself. 1RP 6-7, 17-21.

Based upon the defendant's answers and requests, the court determined the defendant waived the right to counsel knowingly, intelligently, and voluntarily. 1RP 23. Further, with the defendant's eventual consent, the court appointed standby counsel for the defendant at the time when he waived the right to counsel⁷. 1RP 29.

⁷ Prior to the commencement of the bench trial, the defendant decided that he did not want to have standby counsel and the court excused the previously appointed standby counsel. RP 22.

When considering previous Washington State Supreme Court precedent, as well as the totality of the circumstances in this case, it is clear that the defendant knowingly, voluntarily, and intelligently, waived the right to counsel. The actions of the trial court directly parallel the “textbook examination” the Supreme Court published in *Hahn*. Therefore, the trial court did not abuse its discretion in finding the defendant’s decisions to proceed *pro se* was made knowingly, voluntarily, and intelligently.

2. THIS COURT SHOULD REMAND WITH AN ORDER TO CORRECT THE JUDGMENT AND SENTENCE AND REDUCE THE COMMUNITY CUSTODY TO WITHIN THE STATUTORY MAXIMUM.

Assault in the third degree is a class C felony. RCW 9A.36.031(2). A class C felony carries a maximum period of confinement of five years. RCW 9A.20.021(1)(c). For a crime against a person, the sentencing court shall sentence the defendant to one year of community custody. RCW 9.94A.701(3)(a). Assault in the third degree is considered a crime against a person. RCW 9.94A.411(2)(a). Whenever the period of community custody imposed by the sentencing court exceeds the statutory maximum, the community custody shall be reduced by the court. RCW 9.94A.701(9).

The defendant was sentenced to 51 months confinement in prison and 12 months of community custody. CP 68-83. The total time of

confinement and community custody, 63 months, exceeds the statutory maximum of five years or 60 months of confinement. RCW 9A.20.021(1)(c). The proper remedy is to remand to the trial court to either amend the community custody terms or to resentence the defendant. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). This Court should remand to the trial court with instructions to amend the defendant's community custody to not exceed the statutory maximum.

3. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

a. The defendant's ability to pay appellate costs should only be considered when the State submits a cost bill, if it elects to do so.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

In *Nolan* the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which

to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue not before the Court. *If* the defendant does not prevail, and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

- b. In the alternative, this Court should rule that the defendant must pay for the costs of his appeal.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute which authorizes the imposition of costs. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, they may petition the sentencing court for remission of any unpaid costs if such would impose a hardship on the defendant or their immediate family. The sentencing court may then either remit the costs in all or part or modify such payments under RCW 10.01.170. In *Blank, supra*, at 242, the Supreme Court found this relief provision prevented RCW 10.73.160 from being unconstitutional.

The defendant argues that the Court should not impose costs on indigent defendants. App. Brf. at 40. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including prosecuting the defendant and his incarceration. *Id.*, RCW 10.01.160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina*

instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

The unfortunate fact is most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In *Blazina*, the Supreme Court was likewise critical of these statutes and their result. See 182 Wn.2d at 835-836. Yet, the Court did *not* find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

- c. The defendant may have the ability to pay for appellate costs and, if not, can follow the legislative remedies for relief.

Recently, in *State v. Caver*, ___ Wn. App. ___ (2016), Division One of this Court directly addressed the situation where a defendant did not have the ability to pay appellate costs at the time of appeal, but was likely to have the ability to pay appellate costs in the future. *State v. Caver*, Slip Op. at 12-13 (2016). Division One found that, while the defendant was indigent at the time of appeal, because he was only 53 years old and had a short sentence of incarceration, there is a “realistic possibility” that Caver would be able to pay costs in the future. *Id.* (quoting *State v. Sinclair*, 192 Wn. App. at 393).

In this case, the defendant is even younger at 46 years of age than the defendant was in *Caver*. Additionally, the defendant will serve a total prison term of 51 months, inclusive of the time already served prior to conviction and while this appeal is pending. As such there is a “realistic possibility” the defendant here will be able to pay costs in the future when he is released from incarceration.

Even if the court decides to award the State costs, this does not leave the defendant without a recourse if in the future he cannot pay. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, they may petition the sentencing court for remission of any unpaid costs if such would impose a hardship on the defendant or their immediate family. The sentencing court may then either remit the costs in all or part or modify such payments under RCW 10.01.170.

If the Court decided to excuse every indigent defendant from payment of costs, such a policy would create a heavy burden on law-abiding taxpayers. Hence, this Court should address the issue of appellate costs only if the State prevails and seeks enforcement.

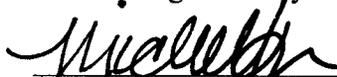
D. CONCLUSION.

This Court should affirm the trial court's ruling that the defendant was competent to represent himself. Prior to being granted *pro se* status, multiple judges undertook multiple colloquies with the defendant to determine that he waived the right to counsel knowingly, intelligently, and voluntarily. Additionally, the forensic evaluation ordered by the court found the defendant to be competent, as did all previous mental health evaluations. Further, the judgment and sentence should be remanded to the trial court to enter a corrected judgment and sentence as to comply with

the statutory maximum. Finally, this Court should address the issue of appellate costs only if the State prevails and seeks enforcement. For the aforementioned reasons the defendant's convictions should be affirmed.

DATED: September 28, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



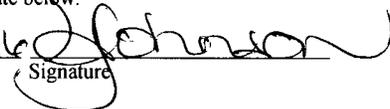
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724



Nathaniel Block
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/30/16 
Date Signature

APPENDIX “A”

State v. Hahn, 106 Wn.2d 885, 896 fn. 8, 726 P.2d 25 (1986)
Colloquy between court and defendant re: Motion to Proceed pro se

Appendix A
***State v. Hahn*, 106 Wn.2d 885, 896 fn. 8, 726 P.2d 25 (1986)**
Colloquy Between Court and Defendant re: Motion to Proceed *pro se*

“THE COURT: Now, Mr. Howson [appointed defense counsel] ... filed with this Court a written statement of a series of various things that he's advised you of and that you acknowledge having been advised of. The first and foremost is that you are being charged with the crime of murder in the second degree. Have you discussed what the elements of that offense are with Mr. Howson?

THE DEFENDANT: I have, your Honor.

THE COURT: You understand that for this offense, as you are presently charged, if convicted, you could be sentenced to a maximum penalty of life in prison?

THE DEFENDANT: That is correct.

THE COURT: And a fine of \$50,000?

THE DEFENDANT: That's correct.

THE COURT: Okay, has Mr. Howson discussed the concept of potential lesser included offense that also might be presented to a jury?

THE DEFENDANT: We have discussed the details to the very fine point.

THE COURT: Have you discussed the questions of included offenses that you could also find yourself potentially being convicted of?

THE DEFENDANT: We have, your Honor.

THE COURT: Have you discussed what the penalties are for these offenses that are lesser for the crime of murder in the second degree, but still substantial penalties?

THE DEFENDANT: Yes, we have, your Honor. We have in great detail.

THE COURT: Have you also discussed as indicated from Mr. Howson's point of view there are basically two positive kinds of defense that can be presented, there is the defense of justifiable homicide in accordance with the state statute that is set out, which essentially refers to an act of homicide in self-defense as a reasonable use of force?

Have you discussed that?

THE DEFENDANT: We discussed this area, yes, your Honor.

THE COURT: Has he also discussed the defense of insanity that we have just ruled on here in court?

THE DEFENDANT: We have, your Honor.

THE COURT: Is it correct to indicate that you do not wish that particular defense to be interposed in this case in your behalf?

THE DEFENDANT: That is accurate.

THE COURT: You understand that if you were willing to put this defense forward of insanity, that the State would stipulate or agree to it?

THE DEFENDANT: Yes, I do, but I have no wish to do so. I should have described the words 'thought' and 'wish' and put that in.

THE COURT: I also should know whether you have discussed with Mr. Howson the various disadvantages you will find yourself in because you don't understand all the procedures that are happening here.

THE DEFENDANT: We have discussed it and that is why I am very happy to have Mr. Howson represent me in this case.

THE COURT: You have to understand that if I allow you to represent yourself and I allow Mr. Howson to remain as a legal assistant or backup counsel to you and you proceed on that basis, he is not going to be making any presentation to any judges or jurors in your behalf. Do you understand that?

THE DEFENDANT: I understand.

THE COURT: You will be held to the same obligation as a lawyer would be in the course of a trial. Do you understand that?

THE DEFENDANT: I understand that, sir.

THE COURT: There are occasions when because of the fact that you don't really truly understand all of the rules and it will be difficult for Mr. Howson, obviously it takes years of training and experience to be a trial attorney, that you will find yourself making mistakes and perhaps being put in a position of disadvantage psychologically in the presence of the jury, where the judge may find himself having to correct you because of your failure to understand the procedures that are required and that may put you in some bad or disadvantageous light with the jury.

THE DEFENDANT: Your Honor, may I make a brief statement. I have served on juries. I have gathered evidence. I have assisted attorneys. I sat in courtrooms many hours, spent a great deal of time in law libraries.

THE COURT: What did you just say?

THE DEFENDANT: I spent a great deal of time in law libraries and I realize that I do not know all procedures accurately 120 percent, so to speak, and that is why I will work directly with Mr. Howson if I have any doubt about any pursuit of questions or anything.

I think Mr. Howson very clearly understands that I have information that I do not want to divulge unless it is absolutely necessary and if it comes to that, I will and I will do this right in the witness chair.

THE COURT: Well, that's a good example. for instance, if you have certain information that you want to convey to the jury or the judge at the time of your trial. it may be that you come to the conclusion at the point in time when you are arguing the case to the jury. By then it will be too late to present any evidence, because the case will already have been closed as far as evidence is concerned.

Now, you may have this information in your head, but you won't be able to argue it to the jury, because it's never been properly presented to them because you never took the stand and put yourself under oath.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: So, what I'm saying is one of the rules is you can't make an argument based on facts that have never been presented.

THE DEFENDANT: I grant you that.

THE COURT: It may be that because it's difficult in a trial and the heat of the adversarial proceeding of a trial to remember what you said on the witness stand and what you have in your head that you haven't said. You might find the prosecutor continuously objecting to your presentation and being sustained, which means that you are constantly being told that you are incorrect in the proceeding.

Do you understand the risks of that?

THE DEFENDANT: I do. I don't believe the prosecutor and I will have any problem whatsoever, or the Court, or the jury.

THE COURT: Now, if I allow you to proceed on your own, you understand the trial judge would retain the right at any time, if he should find that your behavior fails to conform or becomes disruptive or obstructionist, in the course of the trial to prohibit you from proceeding to represent yourself. Further, the Court has an interest in seeing to it that the trial proceeds in an orderly fashion according to the rule and you would be required to live up to those rules or forfeit your right to proceed as your own counsel.

Do you understand that?

THE DEFENDANT: I do very thoroughly, your Honor.

THE COURT: The other thing that is important to keep in mind is you can't keep changing your mind about things like this. If you elect to represent yourself and proceed forward, it may become apparent to the judge, for instance, that you are simply not able to proceed and you're

doing yourself so much damage that the Court won't allow you to proceed without someone taking over as an attorney, or you may come yourself to the realization that you cannot represent yourself and you may come to the point of asking Mr. Howson to step in as your attorney and the Court might allow that to happen and then a little bit later, you may change your mind and decide you want to proceed as your own counsel.

Do you understand that the Court won't let this take place?

THE DEFENDANT: I understand. I'm not wishy-washy.

THE COURT: If Mr. Howson acts in the capacity as an advisor, he will not be considered as you are in this case together, like you are both attorneys, you will be it as far as the representative of the defense is concerned.

Do you understand that?

THE DEFENDANT: I understand, sir.

THE COURT: Do you have a trial date on this case?

MS. EYCHANER [Deputy Prosecuting Attorney]: June 13th.

THE COURT: Are there any questions you have about the significance or potential problems that may arise from you acting as your own counsel?

THE DEFENDANT: I don't anticipate any problems at all, your Honor.

THE COURT: You feel at this point in time that your mind is made up in a clear and unequivocal way that you wish to be your own attorney and you have no doubt about that at this time?

THE DEFENDANT: Precisely, beyond any shadow of a doubt.

THE COURT: Now, if you proceed to represent yourself and at the conclusion of this trial you should be found guilty, you will have as any defendant will have, the right to appeal from that decision. There are all kinds of grounds upon which a person might press an appeal to a higher court.

One of them is the quality of the representation that they got at the time of trial.

Do you understand that in being your own attorney at the time of trial, you are not going to be able to complain about the fact that you didn't do a good job of it, if you should go to an appeal?

Do you know what I'm saying?

THE DEFENDANT: Yes.

THE COURT: You can't decide later on that you should have been represented by an attorney, because you wanted to represent yourself.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You do?

THE DEFENDANT: Very thoroughly.

THE COURT: The Court will note that the defendant has shown me a copy of 'Gideon's Trumpet,' which he is currently reading, which deals with the Gideon v. Wainwright case, the right to counsel."

PIERCE COUNTY PROSECUTOR

September 30, 2016 - 1:32 PM

Transmittal Letter

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Court of Appeals Case Number: 48452-8

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Objection to Cost Bill

Affidavit

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