

NO. 49346-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER DUANE CALHOON,

Appellant.

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

The Honorable Anne Hirsch, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering that appellant Roger Calhoon be shackled with a mechanical leg restraint throughout trial; denying Mr. Calhoon his right to due process of law guaranteed by the state and federal constitutions.

2. The trial court violated Mr. Calhoon's CrR 3.3 right to a speedy trial.

3. The trial court abused its discretion in admitting highly prejudicial "flight" evidence to show consciousness of guilt.

4. The appellant was wrongly deprived of his Wash. Const. Art. 1, §22¹ right to self-representation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court abuse its discretion by ordering that Mr. Calhoon be shackled with a leg brace throughout trial without supporting evidence that he posed a danger to anyone in the courtroom, would be disruptive in court or might escape, and without giving sufficient consideration to less intrusive alternatives? Assignment of Error 1.

2. Did the trial court abuse its discretion by granting a continuance for "good cause" where it found that Mr. Calhoon would not be prejudiced by a continuance based on the State's claim of witness unavailability, where the State's primary witness gave notice that he was unavailable a month before the scheduled trial, and where the State took no action to secure the presence of two other State Patrol officers, who subsequently claimed unavailability shortly before the scheduled trial, and where Mr. Calhoon had already been held for approximately nine months and where he faced a standard range of 0 to 60 days? Assignment of Error 2.

3. Whether the trial court committed reversible error in admitting

¹Wash. Const. Art. 1, § 22, provides; "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...."

evidence that after he stopped his vehicle, Mr. Calhoon would not get out of the car, requiring law enforcement to break a window and forcibly extract him and handcuff him, and that he refused to provide his identity to officers because such evidence did not show consciousness of guilt? Assignment of Error 3.

4. Whether the trial court committed reversible error in admitting a photograph of a bumper sticker on the back of his car asserting anti-law enforcement sentiments, and a photograph showing the absence of a rear license plate on his vehicle, because such evidence did not show consciousness of guilt? Assignment of Error 3.

5. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. Was the trial court's denial of Mr. Calhoon's request to represent himself a violation of his constitutional right to self-representation? Assignment of Error 4.

6. Did the trial court err in entering a finding of fact that "the defendant lacks the capacity to represent himself" in the order denying Mr. Calhoon's motion for self-representation? Assignment of Error 4. Clerk's Papers 34.

C. STATEMENT OF THE CASE

1. Procedural facts:

Roger Calhoon was charged in the Thurston County Superior Court on September 15, 2015 with attempting to elude a pursuing police vehicle.² Clerk's Papers (CP) 337. RCW 46.61.024(1)(a), RCW 9.94A.834 and RCW 9.94A.533. The State initially alleged that on September 13, 2015 the defendant, subsequently identified as Roger Calhoon, willfully failed to immediately bring his car to a stop

²Mr. Calhoon was initially charged as "John Doe." CP 337. The state filed an amended information on September 17, 2015 naming the defendant as Roger Calhoon. CP 336.

and drove in a reckless manner after having been given visual or audible signs to stop, and a “special allegation” that he endangered persons other than himself or the pursuing officer. CP 337. After Mr. Calhoon was identified, the State amended the information on September 17, 2015, removing the “reckless” allegation. CP 336.

2. Competency proceedings:

Defense counsel expressed concern to the court regarding Mr. Calhoon’s fitness to proceed to trial following arraignment on September 29, 2015, and stated that he would be moving for a competency hearing pursuant to RCW 10.77. Report of Proceedings³ (RP) (10/14/15) at 3. The court entered an order for a fifteen-day Pretrial Mental Health Evaluation to be conducted by Western State Hospital (WSH) on October 14, 2015. CP 330-333. Mr. Calhoon was subsequently transferred by order entered November 2, 2015 to WSH. CP 327. WSH psychologist Dr. Gina Najolia subsequently prepared a report, after unsuccessfully attempting to meet with Mr. Calhoon at the Thurston County Jail in October, 2015, and again at WSH in December, and concluded that he was unable to understand the nature of the legal proceedings against him and lacked sufficient capacity to assist his attorney.

At a competency hearing on December 21, 2015, Dr. Najolia testified that she initially tried to meet with Mr. Calhoon at the Thurston County Jail in mid-

³The verbatim record of proceedings consists of the following hearings: September 29, 2015 (arraignment); October 14, 2015 (motion for competency evaluation); December 21, 2015 (competency hearing); January 7, 2016 (hearing on motion for bail reduction); April 18, 2016; April 27, 2016, May 8, 2016 (motion to proceed pro se); June 8, 2016; June 15, 2016 (motion for continuance); July 20, 2016; IRP—May 4, 2016, May 11, 2016, May 8, 2016 (pretrial hearings), July 26, 2016 (jury trial, day 1); and 2RP—July 27, 2016 (jury trial, day 2), and July 28, 2016 (sentencing hearing).

October, 2015, but that “he refused to meet with me,” and he was subsequently transferred to Western State Hospital. RP (12/21/15) at 5-7. She stated that he also refused to meet with her at WSH for the evaluation. RP (12/21/15) at 7. She stated that based on the inpatient information provided by WSH, she believed that he was not competent to proceed to trial. RP (12/21/15) at 9.

The State requested that the court find that Mr. Calhoon is not competent and order him to a 45-day competency restoration treatment at WSH. RP (12/21/15) at 25. The defense argued that RCW 10.77.092—pertaining to involuntary medication—was not applicable and that Mr. Calhoon should not be involuntarily treated at Western State. RP (12/21/15) at 29-30. The court entered an Order for 45 Day Competency Restoration on December 21, 2015. CP 316-17. The court found that Mr. Calhoon was incompetent and ordered him to be committed to WSH and ordered that he be subject to involuntary medication for competency restoration. RP (12/21/5) at 31. The court ordered that Mr. Calhoon be committed to WSH “for a period not to exceed forty-five (45) days, without further order of the court, and there undergo evaluation and treatment to restore the defendant’s competency to proceed to trial, to include the administration of psychotropic medications . . .” CP 316-17 (Order for 45 Day Competency Restoration, 12/21/15).

Dr. Jude Bergkamp of WSH subsequently filed an Inpatient Forensic Psychological Evaluation with the court on March 9, 2016. CP 193-201. The report noted that although the court had entered a forced medication order, Mr. Calhoon was not prescribed any psychotropic medication. CP 197. Dr.

Bergkamp stated that after the evaluation, Mr. Calhoon “possesses the capacity to understand the legal proceedings against him and the capacity to assist defense counsel,” and that he was competent to stand trial. CP 200.

On April 18, 2016, the deputy prosecutor and defense counsel filed an agreed competency order. RP (4/18/16) at 4-5; CP 190-91. The court’s written findings of fact state “[t]he court finds the presumption that the defendant is competent has not been overcome by the preponderance of the evidence. The defendant has the capacity to understand the nature of the proceedings against him/her and to assist in his/her defense.” CP 191. The court found “[t]he defendant is competent to proceed and the tolling provisions of CrR 3.3 no longer apply. CP 191.

After entry of the order, the case was set for trial on May 24, and omnibus hearing on April 27, 2016. RP (4/18/16) at 5.

3. Trial continuances:

Mr. Calhoon was arraigned on September 29, 2015. RP (9/29/15) at 3-5. His trial date was initially set for November 16, 2015. RP (9/29/15) at 5. Following the evaluation at Western State Hospital and entry of the order of competency on April 18, 2016, trial was set for May 24, 2016. RP (4/18/16) at 5. The case was continued May 18, 2016, and a new trial date was scheduled by court order for the week of June 20, 2016. RP (5/18/16) at 5.

On June 14, 2016, the State moved for second continuance based on the unavailability of three law enforcement witnesses during the scheduled trial weeks. CP 310-15. At a hearing on June 15, the State requested a “good cause” continuance to the week of July 25. RP (6/15/16) at 6-8. Defense counsel

objected to the continuance, noting that Mr. Calhoon had been in custody for a long period of time. RP (6/15/16) at 10. The court found good cause to continue the case until July 25, 2016. RP (6/15/16) at 11-12.

4. Motion to proceed *pro se*:

Mr. Calhoon moved to dismiss counsel and to represent himself in a motion filed May 19, 2016. CP 184 (Motion to Move Forward Pro Se). Mr. Calhoon consistently filed *pro se* motions throughout the case, including a Motion to Dismiss with Prejudice for Lack of Jurisdiction and Violation of Speedy Trial on December 15, 2015, CP 310-15; Notice of Non-Consent, CP 295-299; Notice For Dismissal For Lack of Jurisdiction, June 9, 2016, CP 154-179; Defendant's Pretrial Motion to Dismiss, CP 212-261; and Request for Bill of Particulars, CP 275-294.

At his motion hearing, Mr. Calhoon told the court that the case had been repeatedly continued, that he had been held for nine months, and that he believed that he should have been released on personal recognizance rather than being held in custody. RP (6/8/16) at 10-11. After explaining his position, Mr. Calhoon also discussed his concern that the court was under the jurisdiction of "the British Crown." RP (6/8/16) at 16. During the court's colloquy, Mr. Calhoon explained that the flag in the courtroom is the "U.S. war flag of the United States Corporation under the District of Columbia and the gold fringe that surrounds the flag is the crown. It represents the British Crown." RP (6/8/16) at 17. He stated that

under my history and studying of the history of that land that is a representation of the U.S. corporation named after—it's called the United

States Minor. It's named after the United States of America Major which is the continental land mass. That flag represents war and we've been at war since Lincoln, okay, we've been in the war, excuse me, under what it is, the marshal (sic) law that hasn't really been practiced. It's been under marshal (sic) law since President Lincoln.

1RP (6/8/16) at 17-18.

The court inquired if he understood the consequences of being convicted, whether he had previously represented himself in a criminal matter, whether he had legal training, and if he understood the rules of evidence and criminal procedure. RP (6/8/16) at 28-31. Mr. Calhoon stated that he had not previously represented himself in a criminal case, had "no understanding of the rules of criminal procedure," or the rules of evidence, but that he would not have any disadvantages as long as the judge was "fair and non-partial." RP (6/8/16) at 32-33. He stated that he had "studied the case law," and "studied the Supreme Court rules. . . ." RP (6/8/16) at 33. After the colloquy with Mr. Calhoon, the court denied his motion. RP (6/8/16) at 51-52. In denying the motion, the court stated:

The Court cannot deny a defendant the right to represent him or herself simply because they do not have the skill, and in the Court's estimation, to do so. But the Court may consider capacity, not skill, but capacity to represent one's self when evaluating this decision, and again, putting all presumptions against the waiver of the right to counsel.

And I put all that together and couple it with my observations of Mr. Calhoon and our discussion we've had here today. Mr. Calhoon, I am left with the following conclusion. Number one, you strike me as an intelligent person. I am not surprised that you were found competent to stand trial, but I have grave concerns when I listen to you talk about your capacity to represent yourself. I have great concerns about your skill to represent yourself. I do not believe you have the skill to represent yourself. But I want to be clear, I'm not denying your motion on that basis. . . .

...

I am denying your motion, Mr. Calhoon, because I don't believe that you have the capacity to represent yourself based on what I am observing and based on the words you are using and based on the submissions you have made, including your understanding of the application of law to you and the authority of his court.

RP (6/8/16) at 51-52.

The court entered findings in an Order Denying Motion for Pro Se Representation. CP 34. The court made the following written finding: “[A]fter observation of the demeanor, behavior, statements of the defendant, the court finds the defendant lacks the capacity to represent himself.” CP 34.

The case came on for jury trial on July 26, 2016, the Honorable Anne Hirsch presiding. 1RP at 15-218, 2RP at 221-326.

5. Motions *in limine*

a. Admission of video showing the multiple vehicle stops and forcible extraction of Mr. Calhoon from the car and photographs of the car after it was stopped.

The State moved for admission of three photos of the vehicle driven by Mr. Calhoon after it was stopped, and for admission of a video made by a State Patrol vehicle driven by WSP Trooper Maurice Ball. Defense counsel argued that the photographs were not relevant to the elements of attempted eluding. 1RP at 33. Counsel argued that the photos were taken after Mr. Calhoon's vehicle was stopped and show that the car “probably has no license plate” and show a bumper sticker “that can do nothing except to inflame and prejudice my client because many people may not agree with my client's bumper sticker, and my client's bumper sticker is certainly not an element of the crime of attempt to elude.” 1RP at 33. The prosecution argued that that the photographs show the condition of car

including the fact that it is missing a left hand mirror, “which is an important component to safe driving, and since eluding is a reckless driving component, that is certainly relevant.” IRP at 33-34. The State also argued that the picture shows the car has no license plate, and “that’s relevant towards the value of the officer for pulling him over” and “also is significantly relevant towards the defendant’s state of mind. He does not believe he has to yield to the authority of a police officer.” IRP at 34.

A video from Trooper Ball’s vehicle shows, Mr. Calhoon stopping his car four times on Interstate 5 and then starting again after each stop. IRP at 167-82. During the second time he stopped he handed a card to WSP Trooper Guy Rosser through a partially opened window, and then again re-entered the freeway and continued driving. The video shows that the pursuing troopers continue following Mr. Calhoon. When Mr. Calhoon stopped his car the fourth time, Trooper Ball directed him to roll down his window, but Mr. Calhoon did not comply. IRP at 178. After several minutes, the troopers tell him if he does not roll down his window they will break it. Trooper Chris Bendiksen, who had arrived after Mr. Calhoon’s car had stopped for the fourth time, pulled in front of the car, blocking it in. Trooper Bendiksen then used a baton to break the passenger side window and three troopers dragged Mr. Calhoon out of the car, forced him to the ground and handcuffed him. IRP at 178-81.

The State argued that the video showing Mr. Calhoon’s refusal to roll down his window and failure to provide his name to the arresting troopers was relevant to the issue of attempting to elude because it constituted evidence of

consciousness of guilt. 1RP at 36.

After hearing argument, the court permitted to offer the photos at trial, subject to authentication. 1RP at 41, 42. The court, without having viewed it, also permitted the State to offer the video, including the ending where the troopers broke the car window, extracted Mr. Calhoon and handcuffed him, ruling that it “goes to the state of mind of the defendant, and the court is finding that any unfair—excuse me—that the probative value of that to the State’s case outweighs any unfair prejudice to the defendant.” 1RP at 42.

Defense counsel later moved to limit the portion of the video to the first of four stops, arguing that the offense of attempted eluding ended at that point and the further incident culminating in Trooper Bendiksen breaking the passenger side window was not relevant and highly prejudicial to Mr. Calhoon. 1RP at 126, 128. The court ruled, again without having seen the video, that “all of the behaviors point to evidence of flight, evidence that Mr. Calhoon has a belief that he is guilty and that’s fleeing in order to not respond to the law enforcement officers.” 1RP at 129. The court ordered that the video be admitted up to the point that Mr. Calhoon is placed in handcuffs. 1RP at 129.

b. Imposition of a leg restraint

The morning of trial, the jail staff had placed a leg restraint device on Mr. Calhoon, preventing him from bending his knee. 1RP at 47-48. Defense counsel objected and requested that the brace be removed. 1RP at 47-48. Before ruling, the court heard the testimony of Thurston County Corrections Deputy Robert Olson, Mr. Calhoon, and the argument of counsel. 1RP at 48-56. The prosecutor

argued that the brace was needed for courtroom security. 1RP at 48. Corrections Deputy Olson stated that the corrections staff requested the leg restraint to “kind of control him a little bit for outbursts and any threats against any of the staff or the public, and keep him from fleeing or leaving the courtroom as well.” 1RP at 50. The deputy acknowledged that Mr. Calhoon had “zero infractions” at the jail, but had “informational type reports” based on “odd behavior, oppositional behavior, confrontational to the point of argumentative, not physical.” 1RP at 50. Mr. Calhoon was under had medium classification at the jail, had been incarcerated at the jail, or at WSH, since September 13, 2015. 1RP at 50, 51. Mr. Calhoon had no reports when he was at Western State Hospital. Deputy Olsen stated that due to his status as medium security, one deputy would be required for courtroom security if in the leg restraint, and two would be assigned without the restraint. 1RP at 51.

Mr. Calhoon testified that the leg restraint was “[v]ery uncomfortable,” and that it was directly on his ankle bone. 1RP at 56, 57. Defense counsel noted that Mr. Calhoon was charged with a Class C felony, had been in custody at the jail or in civil commitment at WSH since September, 2015 and had no reports of disruptive or violent behavior and no infractions or fights. 1RP at 58-59. He also argued that Mr. Calhoon is 54 years old, has no felony convictions, no history of attempted escape, or threats to harm others, no self-destructive tendencies. 1RP at 59. The judge after hearing the testimony and argument of counsel stated:

Since the court has begun hearing this matter a little over an hour ago, Mr. Calhoon has made it clear that he does not believe that the court should be addressing this case. He has made it clear that he’s not in agreement with the authority of the court, and

frankly given that the court is about to bring in approximately 40 members of the public in what I would describe as one of our smaller courtrooms, that causes the court concern for the safety and well-being of the public. It causes the court concern about maintaining decorum and an orderly process during the trial.

1RP at 61-62.

The court stated that “the restraint that’s requested by the State on behalf of corrections is, as I stated earlier, the least restrictive method.” 1RP at 63. The court recited the factors that must be considered, and then without further explanation, stated “in balancing the evidence that’s been presented, including the charge and the other factors that the court has just outlined on the record, the court is going to grant the State’s request for the leg restraint during the course of the trial.” 1RP at 62-63.

6. State’s case

While on patrol the morning of September 13, 2015, on Interstate 5 in Thurston County, Washington State Patrol Trooper Maurice Ball saw a vehicle traveling northbound in the left lane at what he estimated to be 80 miles an hour. 1RP at 145. Trooper Ball was wearing a standard uniform and was in a car equipped with lights and siren. 1RP at 143-44.

The trooper followed the car, which he described as a Chrysler four door passenger vehicle with no rear license plate and missing a driver’s side outside mirror. 1RP at 146. He activated his overhead light bar and the car slowed and then moved to the middle lane, then moved back into the left lane and then went onto the left shoulder. 1RP at 147. The car slowed on the left shoulder near the jersey barrier and the trooper, using a public-address system, told the car to move

to the right shoulder. 1RP at 149. The car then merged into traffic and started to move the right and "briefly" came to a complete stop on the right shoulder. 1RP at 150. Using the public-address system again, Trooper Ball told the driver to put the car in park and turn off the ignition. 1RP at 151. The car then accelerated and reentered traffic and then stopped again on the right shoulder. 1RP at 155.

State Patrol Trooper Rosser, who was in a Chevrolet Tahoe, was also present, stopped his vehicle behind the Chrysler and approached the car on the right side. 1RP at 155-56. The driver handed the trooper a card which he put in his pocket. 1RP at 156. The car then left again and pulled over to the right shoulder and stopped again after passing Exit 111. 1RP at 158. The car then accelerated into traffic again and then stopped again on the right shoulder. 1RP at 160.

Another WSP vehicle driven by Trooper Bendiksen arrived near the now-stopped vehicle. Trooper Ball approached with car with his weapon out and Trooper Bendiksen pulled his vehicle in front of the Chrysler, blocking it in. 1RP at 161. Trooper Ball directed the driver, subsequently identified as Mr. Calhoon, to put the car in park, roll down his window, unlock his door, and show his hands. 1RP at 162, 178. WSP Sergeant James Prouty also arrived at the scene. Mr. Calhoon lowered the driver's window an inch and Trooper Ball talked to him through the opening. 1RP at 180. Trooper Bendicksen then used an Asp baton to break the passenger side window and unlocked the passenger door. 1RP at 163. The troopers also utilized a dog which was sent into the car through the passenger door. 1RP at 181. The troopers pulled Mr. Calhoon from the car and he was

taken to the ground and then handcuffed. 1RP at 164

Trooper Ball testified that after he was taken out of the car and handcuffed, the driver did not identify himself when asked for his identity, but stated that he was “just a man, a traveler.” 1RP at 164.

A video system in Trooper Ball’s car was activated when he turned on the overhead lights, and a DVD of incident was entered as Exhibit 1 and played the jury while Trooper Ball provided a narrative of the events. 1RP at 148, 166-182. The video was stopped after the point that Mr. Calhoon was pulled out of the car and handcuffed. 1RP at 182, 2RP at 262. Trooper Ball stated during his narrative testimony of the video that Mr. Calhoon “was actively resisting us while we were trying to secure his hands and place handcuffs on his wrists.” 1RP at 182.

Three photographs of the Chrysler after it was stopped were admitted into evidence. 1RP at 186. Exhibit 6 showed that the car did not have a rear license plate. 1RP at 187. Exhibit 7 showed a bumper sticker on the back of the car that stated: “Stop. Private property” in red lettering, and in white lettering stated: “Please take note: I do not consent to federal police enforcers, legal jargon, unlawful search and seizures, touching me or my property in any way,” and again in red “Fee schedule begins at \$100.000.” 1RP at 192.

Sergeant Prouty testified that he arrived after the Chrysler stopped for the final time and that he heard the driver being instructed to unlock the door and to show his hands. 1RP at 202-03. He stated that the car had tinted windows and that it was hard see inside. 1RP at 203. He testified that he directed Trooper Bendicksen to “breach” the passenger side window using a baton, and he did so.

1RP at 203-04. He testified that after the door was opened, Mr. Calhoon did not initially comply, but eventually took off his seatbelt but did not get out of the car. 1RP at 204. He stated that Trooper Ball and Trooper Rosser grabbed him but he continued to resist, and was removed and taken to the ground and handcuffed. 1RP at 204-05. He said that Mr. Calhoon would not provide his name and instead stated that he was "a traveler." 1RP at 205.

Trooper Bendiksen testified regarding using the baton to break the window. 1RP at 214. He stated that Mr. Calhoon did not give his name after he was taken into custody. 1RP at 214.

A video from Trooper Rosser Tahoe was also admitted as Exhibit 2 and played to the jury. 2RP at 243-44. The trooper testified that Mr. Calhoon did not give his name after he was extracted from the Chrysler. 2RP at 244. The defense rested without calling witnesses. 2RP at 258.

In his closing argument, the prosecutor reminded the jury that Mr. Calhoon "was fighting them to the end" and that "guilty people tend to run. They don't stand around and wait. They tend to run away and they tend to struggle and they tend to fight." 2RP at 301.

7. Verdict and sentence:

The jury found Mr. Calhoon guilty of attempting to elude a pursuing police vehicle as charged in the amended information. 2RP at 310; CP 80. The court sentenced Mr. Calhoon, who had a standard range of zero to sixty days and was in custody for approximately 10 months in at the Thurston County Jail and WSH, to 60 days with credit for time served. 2RP at 322; CP 52-60. Mr. Calhoon stated that he had not worked for ten to fifteen years and lives by gardening. 2RP at 321. Defense counsel stated that Mr. Calhoon did not have the

ability to pay legal financial obligations. 2RP at 320. The court imposed legal financial obligations including \$500.00 for victim assessment, \$200.00 court costs, and \$100.00 felony DNA collection fee. 2RP at 323; CP 54.

Timely notice of appeal was filed on August 23, 2016. CP 21-32. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING MR. CALHOON TO BE SHACKLED WITH A LEG RESTRAINT DURING TRIAL IN VIOLATION OF HIS STATE AND FEDERAL RIGHT TO DUE PROCESS.

Under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 22 of the Washington Constitution, except in extraordinary circumstances, a criminal defendant in Washington is entitled to appear at trial free from all bonds or shackles. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). See, e.g., *Illinois v. Allen*, 387 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

The trial judge must exercise discretion based on a factual record before ordering shackling; imposing a physical restraint on an accused person merely because of the charges and because he or she may be “potentially dangerous” is an abuse of discretion:

A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be

founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be ‘potentially dangerous’ is a failure to exercise discretion.

Finch, 137 Wn.2d at 847 (quoting *Hartzog*, 96 Wn.2d at 400). “Restraints should ‘be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.’” *Id.* (quoting *Hartzog*, at 398). The trial court may authorize restraints only if they are justified by an essential state interest specific to that trial. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 694-95, 101 P.3d 1 (2004).

Restraints may not be used “‘unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody.’” *Finch*, at 842 (quoting *Hartzog*, 96 Wn.2d at 398).

a. Allowing the restraint was an abuse of discretion.

In this case, the record does not suggest that any “impelling necessity” for physical restraint of Mr. Calhoon in the courtroom. Mr. Calhoon did not pose an imminent risk of escape, did not pose a threat to anyone in the courtroom, and behaved appropriately throughout the proceedings. Because the court improperly imposed restraints, his conviction must be reversed.

In *State v. Finch*, the Court set out the relevant factors to be considered by the trial court to determine if shackling should be ordered. A court may only impose restraints upon a showing that the accused person (1) poses an imminent risk of escape, (2) intends to injure someone in the courtroom, or (3) cannot

behave in an orderly manner while in the court. *Finch*, 137 Wn.2d at 850.⁴

Just as the Court found in *Finch*, the trial court in this case abused its discretion in ordering shackling based essentially on a generalized concern for safety. 1RP at 60-63. The record showed that the current charge was a Class C felony, and that Mr. Calhoon had an outstanding warrant for a similar offense that was approximately five years old. RP (6/15/16) at 8. Mr. Calhoon had no felony convictions, and there was no evidence of physically disruptive behavior, no threats to harm or disrupt the proceedings, no self-destructive behavior, no escape plans or threat of mob violence, and no large number of people anticipated to attend trial. 1RP at 60-63.

In contrast to *Finch*, the trial court did not even find that Mr. Calhoon, who was 54 years old at the time of trial, was physically imposing, menacing or otherwise threatening. 1RP at 59, 62-63. In *Finch*, the trial court relied on the defendant's size and threatening comments about certain witnesses to justify shackling him. *Finch*, 137 Wn.2d at 850-852. Our Supreme Court reasoned, however, that *Finch* had no history of being violent or attempting to escape while in custody and had not been disruptive in pretrial court proceedings. *Id.*, at 852. Under these circumstances, the Court found *Finch*'s shackling an abuse of discretion—a “clear error” – notwithstanding his size and comments. *Id.*, at 862.

In *State v. Donery*, 131 Wn.App. 667, 128 P.3d 1262 (2006), this Court upheld an

⁴ “[T]he seriousness of the present charge against the defendant; defendant’s temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and the mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.” *Finch*, 137 Wn.2d at 848 (quoting *Hartzog*, 96 Wn.2d at 383).

order permitting shackling of the defendant against a claim that the order was based on “generalized concerns based about safety.” Unlike facts in Mr. Calhoon’s case, Donery had a history of disrupting prison discipline proceedings, displayed a “propensity for outbursts during court,” and had threatened prison and court officials. *Donery*, 131 Wn.App. at 39-40.

In contrast, Mr. Calhoon exhibited none of these characteristics or actions, and had had no infractions or disciplinary issues with jail staff or while at WSH. Deputy Olson’s testimony showed that the staff’s concern with Mr. Calhoon boiled down to the fact at he tended to question their procedures and generally talk back to jail staff. 1RP at 50. Deputy Olson stated that Mr. Calhoon

constantly contests any orders that he’s given. He wants to argue the point. He did that today on his way up to court when we advised him that any time he was in movement he’d be handcuffed behind his back. He wanted to—he confronted us with that. He wanted to argue the point. He further wanted to say that we were not following—there is no such thing as policies and procedures in the sheriff’s office, and that we are not wearing the true colors of the sheriff’s office or law enforcement.

1RP at 54.

The trial court’s findings are not adequate to justify the imposition of restraints. The judge did not find an imminent risk of escape, any threat of violence, or likelihood that Mr. Calhoon would disrupt proceedings. 1RP at 61-62. Instead, the court, after merely reciting the various factors contained in *Finch* without determining any specific application to the present facts, imposed restraints based on the small size of the courtroom, that approximately 40 members of the public were expected to be brought into the courtroom, and the court’s perception that Mr. Calhoon does not recognize the court’s authority to

hear the case. 1RP at 61-62.

Absent evidence that Mr. Calhoun posed a risk of violence, any concerns about the size of the court room amounted to a blanket policy of the type specifically prohibited under *Hartzog*. See *Hartzog*, 96 Wn.2d at 383, 400. Instead, the court's ruling appears to be based on the fact that Mr. Calhoun, as described by Deputy Olson, tends to be argumentative with jail staff and that he had "odd behavior, oppositional behavior, confrontational to the point of argumentative, not physical." 1RP at 50.

b. The trial did not consider less restrictive alternatives

Before imposing restraints, a trial court must consider less restrictive alternatives to a mechanical leg brace. *Finch*, 137 Wn.2d at 850. Here, the court not only failed to consider the less restrictive alternative of having a second guard in the courtroom,⁵ the court apparently believed that the leg restraint *was* the less restrictive alternative and failed to even consider adding a second guard, stating that "the testimony of the corrections officers is that leg brace is the least restrictive alternative that it would recommend." 1RP at 61. The error in shackling Mr. Calhoun and not considering less intrusive alternatives was constitutional error.

c. The error was not harmless

Improper use of restraints is presumed to be prejudicial on direct appeal. *State v. Clark*, 143 Wn.2d 731, 774, 24 P.2d 1006, cert. denied, 534 U.S. 1000 (2001); *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004). As

⁵Deputy Olson testified that courtroom security for Mr. Calhoun without a leg restraint, "would more than likely be two deputies." 1RP at 51.

constitutional error, the abuse of discretion in shackling the accused is presumed to be prejudicial. *Finch*, 137 Wn.2d at 859. The State may overcome this presumption only when an examination of the record shows that the error was harmless beyond a reasonable doubt. *Clark*, 143 Wn.2d at 775.

Here, the State cannot prove beyond a reasonable doubt that the leg restraint was invisible to jurors. Although the judge said that she could not see it from the bench (1RP at 125), nothing in the record suggests what may have been visible from the jury's perspective, nor did the court make a record of the courtroom layout, other than to describe it as one of the smaller courtrooms. 1RP at 62.

In addition, prejudice may attach even when jurors do not have the opportunity to see the restraints. See, e.g., *Davis*, 152 Wn.2d at 704–05 (reversing death penalty even though “No jurors saw Davis in shackles during the penalty phase.”)

In this case, Mr. Calhoon's conviction should be reversed because the trial court abused its discretion by ordering shackling and without even giving cursory consideration to less restrictive alternatives such as adding a second guard. The error is presumed prejudicial, and the State cannot prove the error was harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859. Accordingly, Mr. Calhoon's conviction must be reversed and the case remanded for a new trial. *Id.*, at 866.

2. **THE TRIAL COURT VIOLATED MR. CALHOON'S RIGHT TO SPEEDY TRIAL**

A defendant is guaranteed the right to a speedy trial by both the federal and

state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right “is as fundamental as any of the rights secured by the Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting *Barker*, 407 U.S. at 515 n.2). This right is also fundamental under Washington’s speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88, opinion amended, 990 P.2d 962 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000).

The determination of whether a defendant's time for trial has elapsed in violation of CrR 3.3 requires application of the court rules to the particular facts of the case and is, therefore, reviewed *de novo*. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003); *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013), *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010).

A defendant who is in custody pending trial is entitled to be tried within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). Under CrR 3.3(h), “[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.” Periods during which the trial court has granted a continuance are excluded from the rule. CrR 3.3(e)(3). The time between when a competency examination is ordered and when a competency determination is made is also excluded from this 60-day calculation. CrR 3.3(e)(1). In addition, if any period of time is excluded under these exceptions, the time for trial does not expire sooner than thirty days after the end of the excluded period. CrR 3.3(b)(5). It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1).

State v. Kenyon, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009). If the time for trial expires “without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case.” *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009).

Under CrR 3.3(f)(2), a case may be continued on motion of a party, but only if “such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” When a continuance is granted, the court “must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2).

In this case, Mr. Calhoon was determined to be competent on April 18, 2016 and the matter was initially set for trial to take place on May 23, 2016. On May 19, 2016, however, the case was continued on the State’s claim of “detrimental reliance” of an anticipated change of plea. CP 130-31. The State requested a second continuance on June 15, 2016, based on unavailability of three State Patrol officers. RP (6/15/16) at 4-10; CP 130-32. Defense counsel noted its objection to the continuance. RP (6/15/16) at 9-11.

A trial court may grant a continuance based on witness unavailability if the party seeking the continuance has exercised due diligence in securing the witness’s attendance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). Here, the prosecution noted in its motion that after the first continuance on May 18, 2016, subpoenas were issued to four State Patrol officers the following day, and that on the same day the “primary trooper and main witness in the case” contacted the State and indicated he had a prescheduled vacation from June 15

through July 4, and then from July 9 to July 21, 2016. CP 131. The record shows however, that despite knowledge that its primary witness would be absent, the State took no action to attempt to secure the required testimony by other means, including to ensure that the other three troopers would be available for trial. Instead, it appears that the State assumed the case was not going to proceed on June 20, based on Mr. Calhoun's motion to represent himself, which was heard June 8, 2015. On June 15, 2016, the deputy prosecutor stated to the court that "there was a real question as to whether the trial would even be going on the 20th depending on what the court did in terms of appointing a new attorney or whether the defendant was going to represent himself at that time." RP (6/15/16) at 7. The deputy prosecutor noted that it was only after the motion was denied that the case was "definitively going to trial," after which he received notice that the second and third WSP witnesses were also unavailable during the week of trial. RP (6/15/16) at 7.

The prosecutor did not indicate what efforts the State had made to secure the other witnesses' presence at trial or why the other two troopers, who had apparently received their respective subpoenas on May 19, chose to wait until June 10 and June 13, to inform the prosecutor's office that they would be unavailable during the two scheduled trial weeks. It should be noted that the trooper who gave notice of his unavailability on June 13 cited "training" as the reason for his unavailability. CP 131.

Based on the forgoing, the court should not have granted the "good cause" continuance. First, the State did not take adequate steps to ensure the witnesses were available after the primary witness gave notice that he was unavailable on May

19. *Clewis*, 159 Wn. App. at 847. Moreover, the State made no effort to present the required testimony through the fourth WSP witness, nor was that witness identified at the motion trial.

The court abused its discretion by granting the State's second motion to continue. Mr. Calhoon had been in custody at the jail or at WSH since September 13, 2016, pending adjudication of a Class C felony. The State's assertion that three of its four witnesses were unavailable for an in-custody defendant with no felony criminal history facing a standard range of zero to 60 days, after having been held for approximately nine months, must be viewed with a jaundiced eye. Mr. Calhoon asserts that under the circumstances, the trial court's finding that the further delay would not result in prejudice to Mr. Calhoon was unsupported, and that his conviction must be reversed and the case dismissed with prejudice. CrR 3.3(h).

3. **THE TRIAL COURT ERRED BY ADMITTING EVIDENCE NOT PROBATIVE OF GUILT AND SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY A JURY**

The trial court committed reversible error in admitting evidence of Mr. Calhoon's failure to roll down his window, unlock his door and show his hands after he ultimately stopped his car, resulting in a trooper breaking his passenger side window, extracting him from the car and handcuffing him, and Mr. Calhoon's failure to give his name to the troopers. The court also erred in admitting photographs of the car after it was stopped.

Evidence of "flight" does not show "consciousness of guilt" in light of the fact that Mr. Calhoon had other reasons for trying to escape apprehension, including

an outstanding warrant in another case. Whatever marginal relevance the evidence had was outweighed by its unfair prejudicial effect under ER 403.

Evidence that is relevant under ER 401 is inadmissible if the court finds that it “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

The probative value of so-called “flight evidence” is as an admission by conduct. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010); *State v. Freeburg*, 105 Wn.App. 492, 497, 20 P.3d 984 (2001). “Flight” evidence includes any “evidence of resistance to arrest, concealment, assumption of a false name, and related conduct . . .” *State v. McDaniel*, 155 Wn. App. at 854 (quoting *Freeburg*, 105 Wn.App. at 497-98). Here, the “flight” evidence consisted of Mr. Calhoon failing to roll down his window and unlock his door and show his hand, and failure to get out of the car voluntarily, resulting in being physically dragged from the car and handcuffed, and failure to give his name to the arresting officers. 2RP at 205. See also, *Freeburg*, 105 Wn. App. at 498.

“When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence.” *Freeburg*, 105 Wn. App. at 498. “[W]hile the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” *Id.* The probative value of flight evidence as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn:

from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Id. (citing *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)). Courts “will not accept ‘[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.” *McDaniel*, 155 Wn. App. at 854, (alterations in original) (quoting *State v. Bruton*, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)). Instead, “the government must make certain that each link in the chain of inferences that concludes with a consciousness of guilt of the crime charged is sturdily supported.” *United States v. Wright*, 392 F.3d 1269, 1278 (11th Cir. 2004) (citing *Myers*, 550 F.2d at 1049).

As noted above, the “flight evidence” in this case included the failure to lower the window resulting in the broken window, failure to leave the car resulting in being dragged from the car and handcuffed, and failure to provide his name. 2RP at 205-06.

Under the *Freeburg* test, Mr. Calhoon's actions may have constituted flight evidence and marginally indicated a sense of guilt, but they neither supported a substantial inference of consciousness of guilt for the specific crime charged, nor any inference of actual guilt of the crime charged. *Freeburg*, 105 Wn. App. at 501.

The evidence that Mr. Calhoon's actions at the time of arrest were a consciousness of guilt fails the inferences outlined in *Freeburg*. The record

shows a significant anti-authoritarian streak in virtually all of Mr. Calhoon's actions and relationship with the law enforcement. From the absence of a rear license plate and the bumper sticker contained in Exhibit 7, all show that Mr. Calhoon was disinclined to be cooperative or forthcoming with law enforcement even under the best of circumstances.

In addition, Mr. Calhoon had an outstanding warrant that was approximately five years old. RP (6/15/16) at 8. This fact further cuts the link between Mr. Calhoon's behavior and consciousness of guilt for the charged crime. See *McDaniel*, 155 Wn. App. at 855 (fact that defendant was wanted on several warrants, not just the one related to the charged incident, was a factor weighing against finding of consciousness of guilt for charged crime). Mr. Calhoon may have stopped and then resumed driving and then refused to exit the car for a reason that had nothing to do with the charged crime. He may have tried to evade police apprehension and refused to give his name because he knew he would be jailed on the outstanding warrant in an unrelated matter.

Given the foregoing, Mr. Calhoon's "consciousness of guilt" cannot be inferred from this evidence with any degree of confidence. See *Freeburg*, 105 Wn. App. at 498.

The relevance of the evidence of flight depends on whether the four inferences that link defendant's conduct to actual guilt can be drawn with any degree of confidence. As to each item of evidence, one or more of those inferences involves speculation, conjecture or sheer fancy. The probative value of the evidence is thus minimal.

Not only was this evidence insufficiently probative, it was impermissibly prejudicial. The prejudicial effect of “other misconduct” evidence lies in the inference that any criminal behavior shows that the defendant has a propensity for criminal conduct such as the crime with which he is charged. See *State v. Everybodytalksabout*, 145 Wn.2d 456, 465, 39 P.3d 294 (2002). Such inferences of criminal propensity would be particularly prejudicial under the facts of this case. The video, photograph of the bumper sticker, and accompanying testimony showing the frankly spectacular circumstances of the arrest, including Trooper Ball’s statement to Mr. Calhoon in the video that he was not a “federal agent,” (IRP at 180), that he refused to lower his window, refused to put his hands out the window, refused to leave the car, and refused to give his name allowed jurors to surmise Mr. Calhoon, without the necessary foundation, was a criminal type person who flaunted his outlaw status and had no respect for laws or law enforcement and therefore was consciously guilty of the charged crimes. Given that the flight evidence was at best weakly probative of guilt with the lack of nexus between the outstanding warrant and circumstances of the actual arrest, any probative value was substantially outweighed by unfair prejudice. The flight evidence should have been excluded under ER 403.

Similarly, Mr. Calhoon’s refusal at the time of the stop to give his name did not permit a “direct inference” of guilt of the specific charge, as opposed to an attempt to avoid capture on a separate warrant. See, *McDaniel*, 155 Wn. App. At 855.

Evidence of flight is inherently unreliable. *Myers*, 550 F.2d at 1050. At

best, such evidence is only "marginally probative." *Freeburg*, 105 Wn. App. at 498. The required strong evidentiary link to allow for the consciousness of guilt inference is missing here. There are too many other reasons for Mr. Calhoon's "flight" behavior. Moreover, the flight evidence was irrelevant and unduly prejudicial. This evidence permitted jurors to conclude Mr. Calhoon was a criminally inclined person who tried to evade law enforcement and therefore was consciously guilty of the charged crimes.

Given that the flight evidence was at best weakly probative of guilt and any probative value was substantially outweighed by unfair prejudice, the flight evidence should have been excluded under ER 403.

When, as here, a trial court errs in admitting evidence, reversal is required when the admission of the evidence affected the outcome of trial within a reasonable probability. *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). The "flight" evidence error cannot be considered trivial or insignificant. Evidence that Mr. Calhoon refused virtually all cooperation at the time of the final stop when confronted at was extremely damaging and succeeded in painting Mr. Calhoon as a guilty scofflaw. The evidence was prejudicial because the case hinged on the defense argument that Mr. Calhoon was not driving recklessly in the course of pulling over for the traffic stop. 2RP at 294-95. The admission of the arrest evidence compelled the jury to disregard counsel's argument that he did in fact pull over and did not drive in reckless manner in the course of stopping. 2RP at 295. Within a reasonable probability, this flight evidence affected the outcome of the trial and the error is grounds for reversal and a new trial.

4. **THE TRIAL COURT DENIED MR. CALHOON'S
CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION**

The Sixth Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). The Sixth and Fourteenth Amendments to the United States Constitution allow criminal defendants to waive their right to assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Washington Constitution also guarantees the right to self-representation. Art. I, sec. 22; *State v. Silva*, 107 Wn.App. 605, 618, 27 P.3d 663 (2001).

Courts regard this right as “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). An improper denial of the right requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

To exercise the right to self-representation, the criminal defendant must knowingly and intelligently waive the right to counsel; that waiver should include advice about the dangers of and disadvantages of self-representation. *Faretta*, 422 U.S. at 835. A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); *State v. Dougherty*, 33 Wn.App. 466, 469, 655 P.2d 1187 (1982). The colloquy should, at a minimum, consist of

informing the defendant of the nature and classification of the charge and the maximum penalty upon the conviction. Moreover, the defendant must be informed that technical rules apply to the defendant's presentation of his case. *Acrey*, 103 Wn.2d at 211. Courts should engage in a presumption against waiver of the right to counsel. *State v. Lawrence*, 166 Wn.App. 378, 390, 271 P.3d 280 (2012). The defendant has the right as a matter of law when the request is made well before trial. *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

This presumption does not give courts carte blanche to deny a motion to represent oneself. Courts are limited to finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05.

Although courts are instructed to presume against the waiver of counsel, improper rejection of the right to self-representation requires reversal. *Madsen*, 168 Wn.2d at 503-04. The grounds allowing a court to deny a defendant the right to self-representation are limited: the request must be unequivocal, timely, voluntary, and made with a general understanding of the consequences. *Id.* at 504-05. A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. *Id.* The relevant question in deciding whether to grant a motion for self-representation is not whether the defendant has the skill or ability, but rather, whether his waiver is valid. *Godinez v. Moran*, 509 U.S. 389, 400, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

Here, Mr. Calhoon's motion over a month before trial began and he was clear and unequivocal in his desire to represent himself. Mr. Calhoon had by the time of the motion filed several pro se motions seeking dismissal. See e.g., CP 212-261, 275-294. Mr. Calhoon's motions, although perhaps untutored, were readable and cited recognizable legal concepts and principles. Given his timely request, demonstrated ability to draft and file pleadings, and unequivocal desire to represent himself, the trial court erred in failing to allow Mr. Calhoon to proceed without appointed counsel.

Mr. Calhoon's unconventional, anti-authoritarian views did not form a valid basis for denying his motion to proceed pro se. "The value of respecting the right to self-representation outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509. Further, the court may deny self-representation only where it finds the purpose of the motion was to delay the trial or obstruct justice. *State v. Vermillion*, 112 Wn.App. 844, 851, 51 P.3d 188 (2002); *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995).

To the extent the court denied Mr. Calhoon's motion to represent himself based upon a concern that he was recently determined to have been restored to competency, the standard is the same whether one has mental health concerns or not:

[A] defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel[.]

In re Rhome, 172 Wn.2d 654, 665, 260 P.3d 874 (2011). But, "concern regarding a defendant's competency alone is insufficient" to deny a pro se

request. *Madsen*, 168 Wn.2d at 505. The defendant in *Rhome* was allowed to represent himself despite a significant mental health history and continuing questions about his competency:

Rhome's mental competency became an issue at trial. Since early childhood, Rhome has been treated for psychiatric disturbances, including several in-patient stays at psychiatric hospitals. Personal Restraint Petition (PRP), Ex. A at 2. He received multiple diagnoses during those stays, including psychotic disorder, delusional disorder, oppositional defiant disorder, mild mental retardation, obsessive-compulsive personality traits, and pervasive development disorder (Asperger's disorder). *Id.* at 4.

Id., 172 Wn.2d at 656-57.

Here, the court engaged in colloquy with Mr. Calhoon, who clearly stated he understood the difficulty he faced, but stated that he but nonetheless desired to represent himself. The court's concern was that Mr. Calhoon lacked the capacity necessary to represent himself, as argued above, was simply not a sufficient ground no matter the well-meaning the desire of the court. *Faretta*, 422 U.S. at 835; *Rhome*, 172 Wn.2d at 669.

The trial court erred in denying Mr. Calhoon the right to represent himself. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. *Madsen*, 168 Wn.2d at 504; *Breedlove*, 79 Wn.App. at 110; *State v. Estabrook*, 68 Wn.App. 309, 317, 842 P.2d 1001, rev. denied, 121 Wn.2d 1024, 854 P.2d 1084 (1993). Denial of the constitutional right is prejudicial in itself. *Breedlove*, 79 Wn.App. at 110.

Mr. Calhoon respectfully asks the Court to reverse his conviction and order

a new trial, at which he may assert the right to self-representation.

5. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Calhoon does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. Mr. Calhoon had not worked for a substantial length of time and was in Thurston County to provide care for his mother at the time of his arrest. 2RP at 320-21. The record does not show that he had any assets or if he a fixed residence. 2RP at 320-21.

At sentencing, the court imposed fees, including \$500.00 victim assessment, \$200.00 court costs, and \$100.00 felony DNA collection fee. CP 54; 2RP at 323. The trial court found him indigent for purposes of this appeal. CP 31-33. There has been no order finding Mr. Calhoon's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*,

192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Calhoon’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Calhoon respectfully asks this Court to reverse his conviction and dismiss the charge with prejudice. In the alternative, he asks this Court to reverse the conviction and remand for a new trial. This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Calhoon not prevail in his appeal.

DATED: February 22, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

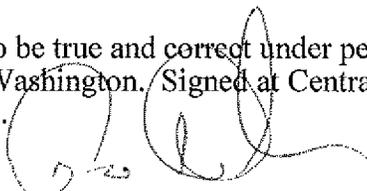
The undersigned certifies that on February 22, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 22, 2017.



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TILLER LAW OFFICE

February 22, 2017 - 4:59 PM

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