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NO. 50400-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FORREST EUGENE AMOS,

Appellant.

Appeal from Lewis County Superior Court
Honorable James Lawler
No. 16-1-00399-21

BRIEF OF APPELLANT

Edward Penoyar, WSBA #42919
Joel Penoyar, WSBA #6407
Attorneys for Defendant/Appellant

Post Office Box 425
South Bend, Washington 98586
(360) 875-5321

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I. INTRODUCTION

Appellant Defendant appeals his eight convictions for forgery and criminal impersonation which resulted in a sentence of 116 months. Appellant was unfairly forced into pro se representation at his trial, and numerous legal errors occurred that are grounds for reversal. Specifically, there was neither the required intent nor legal efficacy to the allegedly forged documents. The exceptional sentence was manifestly unreasonable given the circumstances of the case. The judgment and sentence should be vacated and the matter remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

1. Insufficient evidence supported the conviction of forgery or criminal impersonation.
2. The trial court abused its discretion by requiring Appellant to wear a leg brace during trial.
3. Appellant was subject to ineffective assistance of counsel that substantially prejudiced his case.
4. The trial court abused its discretion by denying Appellant's request for continuance and by accepting his self-representation.
5. The exceptional sentence was not supported by the record.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1.1 Whether the instruments had the requisite legal efficacy to constitute forgery?
- 1.2 Whether defendant had the requisite intent to defraud to constitute forgery or criminal impersonation?

2.1 Whether a proper hearing was held regarding restraints?

3.1 Whether counsel's failure to meet with defendant despite a specific court order to do so constitutes ineffective assistance?

3.2 Whether counsel's failure to interview witnesses constituted ineffective assistance?

3.3 Whether defendant's choice to be pro se because of counsel's actions created substantial prejudice to his case?

4.1 Whether defendant's request to proceed pro se was untimely and thus should have been denied or a continuance granted?

5.1 Whether the trial court abused its discretion by ordering a Free Crimes Aggravating sentence?

IV. STATEMENT OF CASE

Appellant Forrest Amos was convicted of four counts of Forgery and four counts of Criminal Impersonation First Degree on June 15, 2017 following a trial by jury in Lewis County. CP 167-179. On March 11, 2016, Appellant executed four three-page pleadings entitled "Forced Commercial Contract" that were subsequently filed with the Lewis County Clerk four days later, on March 15, 2016. CP 31-42. Appellant has never denied executing the documents. The documents were executed from prison, where Appellant is currently serving a sentence under the same cause number (Lewis County Superior Court Case No. 13-1-00818-6) in which the four documents were filed.

The first page of the documents gave rise to the criminal charges in this matter. The full heading of the first page reads "Forced Commercial

Contract,” “Notice of Subrogation Bond [...],” “Clerk’s Action Required.” *Id.* Each of these four notices lists public officials in Lewis County that Appellant felt wronged him. VRP 151. The first sentence of the Notices is written in the first person: “[name], public servant, [...] do hereby enter myself security for costs in the cause [...].” CP 31-42. The final line of the first page then shows the name of each official printed over a line with the date. *Id.* The Notice is not sworn under penalty of perjury, but does begin with the “ss” header normally used in affidavits in Washington. See RCW 9A.72.085. The two pages following the first are pleadings signed by Appellant and properly notarized by a notary at the prison. CP 31-42.

Appellant was represented by counsel in his case up until one week before trial. VRP 47. For ease of reference, the events surrounding that withdrawal are specified in more detail in the argument section of this brief. Appellant proceeded to trial pro se. *Id.* The morning of trial, Appellant appeared from prison with multiple motions, including a motion to continue. Supp. VRP 1-55. The State appeared with multiple motions in limine, and a lengthy hearing was held, concluding in a denial of Appellant’s motion to continue. *Id.* Appellant was given an opportunity to interview the State’s witnesses that morning, the first time any such interview had taken place despite specific requests by Appellant for his former counsel to do so. *Id.* Over the next two and a half days, the trial proceeded. Appellant’s primary defense consisted of the arguments that (1) he believed in good faith he printed the officials’ names pursuant to a legal theory of “subrogation,” and (2) that the Notices had no legal effect and

therefore forgery had not legally occurred. During deliberation, the jury released a question to the Court inquiring about the definition of subrogation. CP 152. The court did not answer the jury's question. CP 152.

The jury reached a verdict and found Appellant guilty on all eight counts originally charged, but denied the State's request for enhancements. VRP 376-378. Appellant was sentenced to the top-end of the Standard Range for each count, each served consecutively under a finding of the "Free Crimes Aggravator" exceptional sentence. Appellant now appeals.

V. LEGAL ARGUMENT

A. **Insufficient evidence supported the conviction of forgery or criminal impersonation.**

1. LAW

In determining the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence." *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). It makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a

jury of the defendant's guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

Forgery is defined in RCW 9A.60.020 (emphasis added):

(1) A person is guilty of forgery if, **with intent to injure or defraud:**

(a) He or she falsely makes, completes, or alters a written instrument or;

(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.[...]

Criminal impersonation is defined in RCW 9A.60.040:

(1) A person is guilty of criminal impersonation in the first degree if the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose; or

(b) Pretends to be a representative of some person or organization or a public servant and does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose. [...]

At common law, the instrument purported to be forged must have legal efficacy; as set forth by *State v. Smith*, 72 Wash.App. 237, 241, 864 P.2d 406 (1993):

At common law, forgery was the act of falsely making or materially altering, with intent to defraud, a writing “which, if genuine, might apparently be of efficacy or the foundation of legal liability.” Blackstone's Commentaries 247 (c. 1765); C. Torcia, 4 Wharton's Criminal Law 114–15 (14th ed.1981); R. Perkins, Perkins on Criminal Law 340–41 (2d ed. 1969); *Dexter Horton Nat. Bank v. U.S.F. & G. Co.*, 149 Wash. 343, 346, 270 P. 799 (1928), quoting New Standard Dictionary (1920 edition); see also 4 Wharton at 146–47.

Thus, forgery required a “writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability.” 4 Blackstone, Commentaries on the Law of England 247 (1765); C. Torcia, 4 Wharton's Criminal Law 114–15 (14th ed. 1981); Perkins on Criminal Law 340–41 (2d ed. 1969); *Dexter Horton Nat. Bank v. U.S.F. & G. Co.*, 149 Wash. 343, 346, 270 Pac. 799 (1928) (quoting New Standard Dictionary (1920 edition)). *Id* at 239, 407.

Although the reference to legal efficacy was removed from Washington’s prior forgery statute, the requirement still stands:

[...] the instrument must be “something which, if genuine, may have legal effect or be the foundation of legal liability.” [*State v. Scoby*, 117 Wash.2d 55, 810 P.2d 1358 (1991) at 57–58]. *Id* at 242, 409.

Even though a document may contain a false representation of fact, it is not necessarily forged. This scenario arose in *State v. Mark*, 94 Wn.2d 520, 618 P.2d 73 (1980) when pharmacists drafted false prescriptions but *did not* forge the physician’s signature on them:

[...] a criminal statute which must be strictly construed in favor of the defendant. In writing the doctors' names on his claim form, the defendant represented that they had submitted prescriptions to him, but he did not represent that the doctors themselves had signed the claim forms.

In *Dexter Horton*, we quoted with approval the following from the case of *People v. Bendit*, 111 Cal. 274, 43 P. 901 (1896):

“When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,-in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And

there was nothing of the kind in the case at bar....”
149 Wash., at 348, 270 P.2d 799. Accord: *State v. Marshall*, 25 Wn.App. 240, 606 P.2d 278 (1980).

Thus, there is a significant distinction between a forgery and a writing falsely representing that the facts which it reports are true. Since the claim forms submitted by the defendant were exactly what they purported to be, it was error to instruct the jury that it could properly find the defendant guilty of forgery, and the Court of Appeals was incorrect in sustaining the convictions on those counts. *Id* at 524, 75.

The Supreme Court referenced *Mark* again in *Scoby*: “The claim forms at issue in those cases [*Mark*] were genuine and unaltered, and the pharmacists' signatures were genuine. The forms and the signatures on them were thus exactly what they purported to be.” *State v. Scoby*, 117 Wn.2d 55, 61 810 P.2d 1358, 1361 (1991).

The Court of Appeals addressed the intent element of forgery in *State v. Simmons*, 113 Wash.App. 29, 51 P.3d 828 (2002):

Our statute employs, disjunctively, the words “injure ‘or’ defraud,” but it does not define these words. Absent ambiguity or a statutory definition, we give words in a statute their common and ordinary meaning. [...] “Defraud” means “[t]o cause injury or loss to ... by deceit.” BLACK'S LAW DICTIONARY, 434 (7th ed.1999). The relevant definition of “injure” means “to inflict material damage or loss on.” *Id* at 32, 829

2. ARGUMENT

a) *Intent*

Here, there was insufficient evidence that Amos had the requisite intent to commit forgery. First, the trial court erred in apparently not understanding that intent was a required element of forgery:

THE COURT: Well, no. They have to prove that you falsely made or put off as true a written document.

MR. AMOS: Yes.

THE COURT: That's what they have to prove. **They don't have to prove anything about what your overall intent was.** That's the civil case. That's what your civil case is about. This is just about whether this document was forged or not. All right. That's what this case is about. [emphasis added]

See Supp. VRP pp. 23-24.

Amos made it plain that he did not intend to injure or defraud the victims:

MR. AMOS: And my understanding of the law at that time is these -- is right here. This is my understanding and intent right here in this part. This is the motion that's being made.

When these documents are submitted, this is what somebody intends to do. And that says "Notice of subrogation bond in the nature of RCW 7.44.040, 42.08.020, 24.08.080, and 42.20.100." That's my intent right here of this whole case, subrogation, to act in the shoes of another person to assert my rights against their sureties and their bonds because I believed I was damaged.

In my opinion, that's what these RCWs allowed me to do. That's all I was trying to do. It wasn't trying to defraud Mr. Meyers. I wasn't trying to defraud Mr. Halstead. I wasn't trying to defraud Mr. Withrow or Mr. Haggerty or the clerk that accepted these. That's what the process says is to file an affidavit with the clerk who holds these bonds.

Exhibit 11 has already been entered which is this bond that's been filed by the clerk. This gives Meyer and these people the power to do what they do, to arrest us, to get search warrants.

See VRP p. 301.

I don't know how much more I can explain to that. I don't know what else I need to explain to that other than my intent was when I signed my name only. I just simply printed these names of these people because these are the people that damaged me, in my opinion.

See VRP p. 304.

I have had Mr. Meyers and all these people's signatures before I filed this. I didn't intentionally try to mimic their signature. This is in plain handwriting and I just wrote it in because I thought that this is how I was supposed to secure that property until my claim was filed.

See VRP p. 306.

Amos correctly noted that the document was simply a “Notice”:

How can you intend to defraud somebody or injure somebody with a notice of subrogation? You cannot injure somebody strictly with a notice.

See VRP p. 366.

Amos is correct that the Notices all have printed names on them, with his *actual* cursive signature on the attached following page. The record is clear that Amos was confused as to what he drafted, giving multiple different explanations throughout pre-trial and trial that are not necessarily coherent. The fact that he attached his actual cursive signature to the second page of his Notices supports his assertion that he thought he was acting lawfully and undertaking the required procedure for whatever it was he was seeking to do. It would not make sense for a forger to attach their own notarized signature to their forgery, let alone to file it publicly with the Clerk of the Court. Furthermore, it is significant that Amos did not attempt the cursive signature of the victims, signatures which Amos stated he had in his possession from other documents and could have copied if he wished. VRP 306.

b) Legal Efficacy

As set forth *supra*, legal efficacy is a required element of forgery. It is apparent from the record that Amos was not even allowed to address that issue to the jury because of an oral motion in limine by the State:

MR. RICHTER: And finally, Your Honor, is a motion in limine. I think it goes both to questioning and argument. And that's going back, as the defendant mentioned, the Marse [sic] case. We had a Knapstad motion last week. The Court denied that Knapstad motion, finding specifically that the documents in question did have apparent legal effect. I don't believe it's proper for that issue to be brought up to the jury. The jury should be confined to the definition of written instrument that is in the jury instruction under the WPIC which states, "Written instrument means any paper document or other instrument containing written or printed matter."

I don't know that we need to get into the weeds again in asking a jury to define legal efficacy at this point. I think that's a matter of law for the Court and I think the Court has decided that issue.

THE COURT: Mr. Amos?

MR. AMOS: I disagree, Your Honor. They can't just necessarily -- I mean, if I print somebody's name on a piece of paper, that wouldn't -- you can't just say he's forged that document. If I go and print your name on something, on a blank piece of paper, is that forgery? No. It has to -- by law it has to have some kind of legal Preliminary Matters effect that affects somebody's rights. That's what the Supreme Court says or it's not forgery.

THE COURT: And that was the motion, that was the Knapstad motion, that there was no legal effect to this and so automatically your case should have been dismissed.

That was the argument. And now you're wanting to make that same argument to the jury, correct?

MR. AMOS: No. I want to ask the defendants -- or I mean not the defendants but the witnesses whether they were injured as a result of this, did they sustain -- did they have to work with anybody to recoup money, did they have to do

something as a result of this forgery, this forged document, allegedly.

THE COURT: All right. And I've already dealt with that argument. And my ruling is the same. So I'm granting this motion as well.

MR. RICHTER: Thank you, Your Honor.

See VRP pp. 69-70.

The legal efficacy of a specific document in a criminal case is a specific question of fact, since it requires a factual analysis of the document. Certainly, if the issue was the legal efficacy of some generic notices, in general, that may be a question of law; but this was the specific factual question regarding Amos' particular and peculiar Notices. This question, as a question of fact, should have gone before the jury. This is a fundamental principal of our legal system. *Hartigan v. Washington Territory*, 1 Wash.Terr. 447, 450, 1874 WL 3289 (1874).

Assuming without conceding that the question of legal efficacy was properly before the jury or before the court in the prior *Knapstad* motion, insufficient evidence was submitted that Amos' Notices had any legal effect whatsoever. Amos repeatedly admitted on the record that he did not know what he was doing. *See e.g.*VRP 63, 312-314. Despite hypothetical testimony from the victims that Appellant's Notices could have harmed them, the documents in fact make no sense whatsoever. The title of the document is "Forced Commercial Contract" and is filed in Amos' 2013 criminal matter. It is difficult to conceive how this document could have been used against the victims. As such, they had no legal effect whatsoever and no forgery occurred.

B. The trial court abused its discretion by requiring Appellant to wear a leg brace during trial.

1. LAW

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). This rule ensures that “the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution.” *Finch*, at 843. Restraints should be used only when necessary to prevent injury to individuals in the courtroom, to prevent disorderly conduct, or to prevent an escape. *Finch*, at 846. Restraints are disfavored because “they may abridge important constitutional rights [such as], ... the presumption of innocence, privilege of testifying in one's own behalf, and [the] right to consult with [and assist] counsel during trial.” *Finch*, at 845. A defendant may be deprived of the full use of all his faculties if restrained. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). A court must conduct a hearing regarding restraints. *Id.* at 691–92. Less restrictive alternatives must also be considered. *Finch*, at 850. There is an abuse of discretion unless the trial court’s decision rests on evidence that indicates the defendant poses an imminent risk of escape, the defendant intends to injure someone in the courtroom, or the defendant cannot behave in an orderly manner while in the courtroom. *Finch*, at 850. A trial court may consider several factors when deciding the issue of restraints:

[...] the 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 mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies. *State v Hartzog*, 96 Wn.2d 383, 400,635 P.2d 694 (1981).

In a recent unpublished opinion, the Court of Appeals “conclude[d] that the trial court abused its discretion when it ordered [defendant] to wear a leg brace restraint because extraordinary circumstances warranting its imposition were not present.” *State v. Boatright*, 1 Wash.App.2d 102 (Not Reported in P.3d)(2017).¹

2. ARGUMENT

Here, the trial court abused its discretion by not holding an appropriate hearing or making the considerations required by *Finch, supra*. The court simply deferred to the fact that it was “jail policy”:

MR. AMOS: One quick question, your Honor, before we take a recess. Is there a possibility that I can object to this leg brace being on my leg since I've got to get up and like talk to a jury and stuff? It's kind of awkward.

THE COURT: No. That's got to stay on. That's jail policy. I'm not going to direct that, because you just need to -- you've got to work with it.

MR. AMOS: Right here in our jury box it's like looking directly at this side of me. I understand I've got to work with it, but I think it's still prejudicial. I've never had any kind of eludes or any kind of attempts to do anything. We have an officer right here. I mean, that's not -- I'm just kind of –

¹ NOTE: This is an unpublished opinion. Opinions of the Court of Appeals have no precedential value and are not binding on any court. GR 14.1

THE COURT: I understand that but --

MR. AMOS: I'm just concerned about the prejudicial effect of this.

THE COURT: Well, I will tell you I didn't notice that you had anything on until you said that. And I-- that is minimally intrusive. You know, it's not something they can see. The only thing that is going to happen is you are going to reach down to your knee and hit the release when you sit down, and that's the only thing that's going to happen. So that has to stay on.

MR. AMOS: All right.

THE COURT: All right. I don't think that it's going to be an issue for here, but there is -- we have had other people who have tried to bolt, and it's just -- it's a security -- it's a safety thing, and it's just something that we need to deal with it.

MR. AMOS: All right.

MR. RICHTER: If I could just make a record, your Honor, it appears that there is no exterior discernible protruding item that at all shows through the clothing of the defendant, at least not from this view, and I don't see anything either. So for the record --

MR. AMOS: You looking at the wrong leg just for the record.

THE COURT: Well, but there's nothing -- it's all contained. It's underneath your pant leg, correct?

MR. AMOS: Yes.

See Supp. VRP pp. 51-52.

The State's impromptu attempt to inform the court of what was or was not visible does not constitute a proper hearing. Amos makes it clear he is concerned a bulge may be visible underneath his pant legs, even if it is covered by cloth. He is concerned he cannot stand or walk around as any advocate would do, attempting to make his case; and if he could, that his

leg motions would be encumbered by the brace. This is especially important for a pro se criminal defendant; which would have appeared particularly subject if he had to remain seated the whole trial while the prosecutor was free to walk around and engage with the jury. It is not clear from the record whether this was the case or not. Amos was clearly intent on making a legal case to the jury and court, and there is no indication he would attempt to flee. The trial court's abuse of discretion constitutes reversible error.

C. Appellant was subject to ineffective assistance of counsel that substantially prejudiced his case.

1. LAW

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v Washington*, 466 U.S. 668, 685–86, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable. *Thomas*, 109 Wash.2d at 225–26, 743 P.2d 816.

Under this standard, performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, at 688. A defendant alleging ineffective assistance must overcome “a strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Washington courts have made it clear that failure to interview witnesses constitutes ineffective assistance of counsel:

Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest. *State v. Visitacion*, 55 Wash.App. 166, 173–74, 776 P.2d 986 (1989)

2. ARGUMENT

Here, defense counsel was specifically ordered by the trial court in September 2016 to physically meet with Amos:

THE COURT: And I'm specifically ordering Mr. Blair to make however many trips between here and Clallam Bay Corrections Facility as is necessary to properly prepare the defense in this case. If you need to ask the court for reimbursement of mileage and time for doing that, bring your motions.

MR. BLAIR: I will do that, your Honor.

THE COURT: That's not a reason not to go.

MR. BLAIR: I'm thinking I can just get with the court administrator and we could agree on it.

THE COURT: Well, I would think that you would just do an order that authorizes a sum of up to however many dollars in advance, and then you go up there and then you come back and present your bill just as you would for an expert.

MR. BLAIR: I will do that.

See Knapstad Motion, September 29, 2016, VRP p. 54.

Amos repeatedly made it clear at the June 1, 2017 hearing, one week before trial, that this meeting never occurred and it was clear from the discovery handed to him that day that no interviews of the witnesses had occurred (see *infra*).

The failure of defense counsel to assist Amos forced Amos to move for self-representation on June 1, 2017, one week before trial:

MR. AMOS: Your Honor, last time we were here in November right before trial confirmation, Mr. Brosey had -- I mean, not before trial confirmation, before jury selection, Mr. Judge Brosey had directed Mr. Blair to actually come to the prison and talk to me. That hasn't happened in six months now.

You know, this is -- all of a sudden I was brought down here yesterday. I wasn't even aware that I was staying here. They wouldn't let me bring any of my paperwork. I thought it was possibly a day trip for a motion, being a Wednesday. Usually they transport me back and forth because I don't go through Shelton, I don't go through a regular chain, so it's kind of a spur of the moment.

So me and Blair have not even talked about a strategy in this. We haven't even talked about anything in person until we come to court. And we are so off base with his theory, the State's theory, and what the actual case law says, and he refuses to even bring up my points on what the -- what -- what the legal efficiency, I don't know if Motion by Mr. Amos I'm pronouncing that right, is even in these documents based on Marks. There's misrepresentations. I think Blair is so off point. We haven't done anything.

I don't think I will be able to even effectively even communicate with this guy anymore, and the fact that I think he already sold me down the river on my last case already. That was just horribly argued in front of Division II last week. And it's just to a point where I can't even get face time with this guy to actually come up with a strategy and participate in how I see it. I have -- I would like to do it

myself so I can know that, hey, I'm arguing it the right way that I want to see it argued to the jury because what he just argued to you is so off base and was so like on one sole point of this whole document when there's case law that supports misinformation does not constitute a forgery and he wouldn't even bring up the Marks case and what happened in the Marks case.

He's simply allowing and the State is honing in on one...

See Knapstad VRP pp. 39-40.

MR. AMOS: All right. Your Honor, as you know, last week I just got this case. I'm severely prejudiced in the fact that this is the first time I've seen this discovery last week, and I have -- it's come to my attention just over the weekend that Mr. Blair has not even produced any witness list or witness interviews. There was absolutely nothing done besides a couple Knapstad motions with regard to preparation for this; I think that's what led me to make my decision last week to represent myself because nothing was done, your Honor. I'm severely prejudiced in the fact that I was prejudiced with Mr. Blair and his lack of preparation.

See Supp. VRP pp. 15-16.

Amos did not apparently want to be pro se. He specifically asked for standby counsel, but was only offered the counsel that had just been shown by Amos to be ineffective:

THE COURT: All right. Okay. Let me follow up now. The next part of that is if you represent yourself, Mr. Blair could be appointed as standby counsel to -- as somebody for you to consult about procedural things. He would not make any arguments, he wouldn't talk to the jury, he wouldn't talk to the witnesses, he wouldn't do any of that for you. That would all be on you. But he could be available to you as standby basically as a coach for procedural things and to answer questions that you have and that's what his role would be limited to, responding to the questions you ask. He's not going to be telling you, okay, you should do this now, you should do that now, but if you have questions, he would answer them for you.

MR. AMOS: I've had standby counsel before in the past on a few occasions with Mr. Brosey that he appointed. I don't -

- I can't even get this gentleman to pick up a phone when I pay for it. He can't even call –

THE COURT: I'm talking about sitting with you at the trial.

MR. AMOS: Yeah, I don't feel comfortable with Mr. Blair being that guy if you're going to appoint standby counsel.

THE COURT: Well, I'm asking if you want it. It's not going to be somebody else with trial going next week because nobody else knows anything about your case. So I'm asking if you would want standby counsel, it would be Mr. Blair.

MR. AMOS: I do not want Mr. Blair as my standby counsel.

THE COURT: All right. All right. And are you making this decision voluntarily?

See Knapstad VRP pp. 46-47.

The court later mischaracterized Amos's request for standby counsel

Brosey:

THE COURT: Okay. We will go through all of that. And, you know, you don't have standby counsel because you specifically said you did not want one.

See Supp. VRP p. 32.

The failure of defense counsel to meet with a client when specifically ordered by the court should be considered per se ineffective assistance of counsel. Defense counsel both defied the trial court, failed to prepare for trial, and improperly forced Appellant to become pro se against his wishes one week before trial. As discussed *infra*, counsel's actions also placed Appellant in a position of being denied a continuance. Amos was forced to interview the witnesses *the morning of trial*. The trial court erred by exacerbating counsel's ineffective assistance when it denied Amos standby counsel, a service normally provided by trial courts.

D. The trial court abused its discretion by denying Appellant’s request for continuance and by accepting his self-representation.

1. LAW

“Assessment of a defendant's request to waive the right to counsel and represent him or herself involves several competing constitutional questions.” *State v. Thompson*, 169 Wash.App. 436, 465 290 P.3d 996, 1013 (2012). Courts must honor a properly made request for self-representation. *Id.* “But because a defendant necessarily waives the right to counsel by invoking the right to represent himself, courts must also indulge in “every reasonable presumption” against waiver of the right to counsel. The request must therefore “be unequivocal, knowingly and intelligently made, and must be timely.” *Id.* quoting *State v. Vermillion*, 112 Wash.App. 844, 851, 51 P.3d 188 (2002).

The Washington Supreme Court recently ruled that if a waiver of counsel is untimely, it must be denied:

[...] This requires the court to engage in a two-step determination. First, the court must determine whether the request for self-representation is timely and unequivocal. *Id.* If the request for self-representation is untimely or equivocal, the defendant's right to counsel remains in place and the trial court must deny the request to proceed pro se. *State v. Woods*, 143 Wash.2d 561, 587–88, 23 P.3d 1046 (2001). Second, if the request is timely and unequivocal, the court must then determine whether the request is also voluntary, knowing, and intelligent. *State v. Madsen*, 168 Wash.2d at 504, 229 P.3d 714.

The threshold issues of timeliness and equivocality focus on the nature of the request itself—if, when, and how the defendant made a request for self-representation—not on the motivation or purpose behind the request. *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989).

See, State v. Curry, 191 Wn.2d 475, 487, 423 P.3d 179, 184 (2018).

An analysis of timeliness was conducted in *State v. Fritz*, 21 Wash.App. 354, 361, 585 P.2d 173, 178 (1978):

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.

The decision to continue trial is “within the trial court's discretion and will not be disturbed” without a showing of abuse. *State v. Staten*, 60 Wash.App. 163, 172, 802 P.2d 1384, review denied, 117 Wash.2d 1011, 816 P.2d 1224 (1991).

The issue of witness availability was addressed in *State v. Silva*, 107 Wash.App. 605, 624 27 P.3d 663, 675 (2001):

Meaningful access to witnesses requires at a minimum that the defendant be afforded the opportunity to prepare for witness interviews, preferably by advance notice of both the meeting date and the names of the persons to be interviewed. In addition, a defendant must also have some means by which to impeach the witness at trial should the need arise.

The *Silva* court concluded that although defendant's access to witnesses was awkward, it was constitutionally sufficient. *Id.*

2. ARGUMENT

Here, the trial court did not indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel. Amos was understandably frustrated with his counsel who did not perform his court-

ordered duties. On the day of trial, Amos filed a formal written motion for continuance. CP 112-114. Amos pleaded with the court for more time to prepare:

MR. AMOS: I understand that, your Honor. It's just that in addition with this, I just got this case last week. This is the first time I've seen this, so I had filed a few motions after I got back to the prison regarding potential continuances and so I can just at least interview these people in this matter.

You know, I haven't been able to do that. Mr. Blair was directed to come -- start coming to the prison and seeing me, and that's what led to this. Because for six months he refused to come see me by order of Mr. Brosey before he left.

See Supp. VRP pp. 5-6.

THE COURT: All right. We are done with that part, though. Tell me about why you need more time.

MR. AMOS: Why I need more time, your Honor, is I need to be able to develop a witness list and develop a defense in this matter so I can actually present a defense, because right now I don't have any defense.

THE COURT: Well, what -- well, how is time going to change that? Who are potential witnesses that you would need to interview?

MR. AMOS: I would need to interview the victims of the case regarding their bonds, stuff like that, ask questions regarding those, whether they were filed with the Court, whether they are sustained against damages, stuff like that. And also I would like to call individuals that actually asserted those and gave those, you know, just to show that they --

THE COURT: They asserted --

MR. AMOS: The bonds and issued those bonds to these elected officials that they are operating under. I think that is vital to my case, because this case revolves around an attempt to attach I guess equity to those bonds, I guess you would say.

So just being able to have time to interview these people and get a better grasp on this case before I'm just shoved into -- in front of a jury, you know, that's -- it's just -- it's uncommon for somebody to get a case and bring it to trial with less than a week. That's when I got this case.

I understand that it's been going on a long time, but I didn't get a chance to talk to Mr. Blair. I was in prison, your Honor. Judge Brosey before -- back in November when he continued this matter, he directed him saying, I don't care how many times you have to go to the prison, Mr. Blair. You need to go to the prison, and you need to visit Mr. Amos and go over his defense and answer his questions and prepare something. And that was never -- that never occurred. For six months he kept pushing it off. That wasn't on my request. Nobody came and got me for the February hearing. He never came to the prison, not one time, to interview me, ask me anything, ask me about who we want to call as a witness, ask me any questions about interviewing the victims and the state's witnesses, which I believe that the defense has a right to do pretrial. Nothing was done.

So last week when that came to the court -- when it came to my attention when it was first brought back, it's like I have no other choice but to take the case on myself and attempt to let the jury know what I did wasn't an attempt to defraud, wasn't an attempt to do anything other than pursue a civil claim against somebody. So -- and it's not as simple for somebody to just take a case from the attorney's hands and try to present it to a jury. I've been up since last week trying to get stuff done at the prison and trying to get stuff done last night. I have barriers in my place unlike an attorney. I don't have a complete law library. I don't have -- I can't even have my stuff in my cell here. I have to come out at night to look at it. I was up all night last night trying to figure something out that I can present to a jury, and right now it's impossible.

See Supp. VRP pp. 16-18.

The court did not inquire if Amos wanted other counsel. The June 1st hearing went immediately from defense counsel making argument to a colloquy with Amos about self-representation. VRP 42. Amos was facing the possibility of more than ten years in prison, his request for self-

representation, even if unequivocal, was untimely and should have been denied so he could retain other counsel.

Finally, Amos' access to the witnesses went beyond mere awkwardness and was not meaningful. This is perhaps the most important reason a continuance should have been granted. The trial court abused its discretion by granting Amos's self-representation and denying his request for continuance.

E. The exceptional sentence was not supported by the record.

1. LAW

RCW 9.94A.585 sets forth the procedure for appellate review of sentences outside the standard range:

[...]

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.[...]

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient. [...]

A defendant's standard range sentence reaches its maximum limit at an offender score of 9 or more. RCW 9.94A.510. An offender score is computed based on both prior and current convictions. RCW 9.94A.525(1). For the purposes of calculating an offender score when imposing an

exceptional sentence, current offenses are treated as prior convictions. *State v. Newlun*, 142 Wash.App. 730, 742, 176 P.3d 529 (2008). When a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. See *State v. Alvarado*, 164 Wash.2d 556, 561–63, 192 P.3d 345 (2008). However, RCW 9.94A.535(2)(c) allows a trial court to impose an exceptional sentence under the “free crimes aggravator” theory when “[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c).

The standard of review for exceptional sentences is addressed in *State v. France*, 176 Wash.App. 463, 469, 308 P.3d 812 (2013):

To reverse an exceptional sentence, we must find: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

2. ARGUMENT

The sentencing court set forth its reason for the exceptional sentence as follows:

THE COURT: The free crimes aggravator is not something that a jury decides. And I do find that that has a substantial impact here in this case. There are consequences to actions. You should know that as well as anybody, especially now. The arguments that you make here for a lower sentence are the same arguments that you made to the jury which the jury did not accept. I respect the jury's decision, and they found you guilty of all of these crimes.

You know, I hope that the attitude that you have now that wanting to do things different sticks. I hope...

It's not really remorse that I'm seeing. It's, I guess, just a struggle for you to try to get all -- to get me to accept that you really didn't mean this, you weren't trying to do anything wrong. Well, again, as I said, the jury has spoken on this.

And the fact that you've dropped the civil case, if that's what's happened, you're coming to this realization a little bit late in the game. None of this is happening until after you've been convicted. It might have meant a little bit more if that had happened before this case had come to trial.

But the consequences here of your actions are important. It's important that you understand those things. The fact that you committed these crimes and the last set of crimes from inside prison gives me a lot of concern that the public needs to be protected.

I hope you do things differently. But you understand, you know that there are no felonies that you can commit that aren't going to be subject to this free crimes aggravator. You know, it's just that is the history that you have created for yourself.

So, anyway, that is the basis for my decision.

See VRP pp. 410-411.

The record does not support the sentencing court's findings. If anything, the record supported an exceptional downward sentence. Amos did not have an opportunity to argue for such a sentence, because he did not have counsel. Ten years of incarceration for four simultaneous "forgeries," on a handwritten pleading that had no legal effect whatsoever, is manifestly unreasonable and clearly erroneous. Taken to its logical conclusion, the sentencing court's theory of punishment could have resulted in Appellant serving a *life sentence* for these Class C felonies, had he named more individuals in these ineffectual "Notices." This was clearly not the intent

of the Free Crimes Aggravator statute. The exceptional sentence should be reversed.

VI. CONCLUSION

For the reasons set forth above, the judgment and sentence should be vacated and the matter remanded for further proceedings.

Respectfully submitted this 15th day of May, 2019.

/s/ Edward Penoyar _____
EDWARD PENOYAR, WSBA #42919
edwardpenoyar@gmail.com
Counsel for Appellant
P.O Box 425
South Bend, WA 9858
(360) 875-5321

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I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

DATED this 15th day of May, 2019, South Bend, Washington.

/s/ Tamron Clevenger
TAMRON CLEVINGER, Paralegal
to Joel Penoyar & Edward Penoyar
Attorneys at Law
PO Box 425
South Bend, WA 98586
(360) 875-5321
tamron_penoyarlaw@comcast.net

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