

FILED
10/27/2017 2:06 PM
Court of Appeals
Division II
State of Washington

NO. 50837-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DENNIS J. JENKINS, JR.,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	5
D. ARGUMENT	
I. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENDANT'S TIMELY AND UNEQUIVOCAL DEMAND TO ACT AS HIS OWN ATTORNEY DENIED THE DEFENDANT HIS RIGHT OF SELF-REPRESENTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT	13
II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST FOR A NEW ATTORNEY AFTER THE DEFENDANT DEMONSTRATED AN IRRECONCILABLE BREAKDOWN IN ATTORNEY-CLIENT COMMUNICATION	19
III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR POSSESSION OF BURGLARY TOOLS	21
E. CONCLUSION	26

F. APPENDIX

- 1. Washington Constitution, Article 1, § 3 27
- 2. Washington Constitution, Article 1, § 22 27
- 3. United States Constitution, Sixth Amendment 28
- 4. United States Constitution, Fourteenth Amendment 28
- 5. RCW 9A.52.060 28

G. AFFIRMATION OF SERVICE 29

TABLE OF AUTHORITIES

Page

Federal Cases

Faretta v. California,
422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) 13, 16-18

Godínez v. Moran,
509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed2d 32 (1993) 14, 16

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 22

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 23

McKaskle v. Wiggins,
465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) 14

Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991) 20

United States v. Morrison, 946 F.2d 484 (7th Cir.1991) 20

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 21

State v. Breedlove, 79 Wn. App. 101, 900 P.2d 586 (1995) 13, 14, 19

State v. Canedo-Astorga, 79 Wn.App. 518, 903 P.2d 500 (1995) 14

State v. Fritz, 21 Wn. App. 354, 585 P.2d 173 (1978) 13, 19

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 23

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 22

<i>State v. Khanteechit</i> , 101 Wn.App. 137, 5 P.3d 727 (2000)	14
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010)	13
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	22
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	13
<i>State v. Stark</i> , 48 Wn.App. 245, 738 P.2d 684 (1987)	20
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	22
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	13

Constitutional Provisions

Washington Constitution, Article 1, § 3	21
Washington Constitution, Article 1, § 22	13
United States Constitution, Sixth Amendment	13
United States Constitution, Fourteenth Amendment	21

Statutes and Court Rules

RCW 9A.52.060	23
---------------------	----

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to grant the defendant's timely and unequivocal demand to act as his own attorney denied the defendant his right of self-representation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The trial court abused its discretion when it denied the defendant's request for a new attorney after the defendant demonstrated an irreconcilable breakdown in attorney-client communication.

3. Substantial evidence does not support the defendant's conviction for possession of burglary tools.

Issues Pertaining to Assignment of Error

1. Does a trial court's refusal to grant a defendant's timely and unequivocal demand to act as his own attorney deny that defendant the right of self-representation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

2. Does a trial court abuse its discretion if it denies a defendant's request for a new attorney after that defendant demonstrates that there has been an irreconcilable breakdown in attorney-client communication?

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a defendant's conviction for possession of burglary tools when the only witness to testify concerning the item in question states that he "presumes" that it could be used to break glass?

STATEMENT OF THE CASE

Factual History

Jeffrey Sturdevant is 28-years-old and lives with his grandmother on 28th Street in Longview. RP I 74-76.¹ At about 4:30 am on the morning of March 3, 2017, he was walking down the alley behind 517 27th Avenue on his way back home when he saw a person wearing a black, hooded sweatshirt sitting on a bicycle in the alley just outside the open garage door of that residence. RP I 81-83. He then saw a second person come out of the open back door of the house, walk through the garage, exit the back door to the garage and get on the bicycle with the first person. RP I 83-84. All during this time the second person was holding a flat screen television. *Id.* The two people he saw then rode away down the alley on the bicycle with the second person still holding on to the television. *Id.* At that point Mr. Sturdevant called the police to report what he had seen. RP I 86.

Two Longview Officers responded to Mr. Sturdevant's call: Officer

¹The Record on appeal includes three volumes of verbatim reports. Each volume begins with a new page 1. Volume 1 includes the first day of the jury trial held on 5/18/17 and is referred to herein as "RP I [page #]." Volume II includes a transcript of the readiness hearing held on 5/11/17, the second day of the jury trial held on 5/18/17, and the sentencing hearing held on 5/25/17. It is referred to herein as "RP II [page #]." Volume III has the transcript of the pretrial hearing held on 4/27/17. It is referred to herein as "RP III [page #]."

Nicholas Woodard and Officer Emilio Villagrana. RP I 97-98, 145-147. According to Officer Woodard, when he got to the intersection of 20th Avenue and Alabama Street he saw two male subjects riding bicycles. RP I 103-104. The trailing bicycle rider was carrying a flat screen television. *Id.* Officer Sturdevant quickly caught up with the second bicyclist and had him put the flat screen television down. RP I 105-107. This person was the defendant Dennis Jenkins. RP I 107-107. Officer Sturdevant then arrested the defendant, seized the television, and searched the defendant incident to arrest. *Id.* The defendant had a few rolls of Kirkland brand Toilet Paper in his pockets, a DVD/Blue Ray player, a couple of cords, some Blue Ray disks, an Apple TV adaptor, and a lanyard with the ceramic part of a spark plug attached to it. RP I 106-112.

Once Officer Woodard got the defendant cuffed and in his patrol vehicle he drove to Mr. Sturdevant's location, where Mr. Sturdevant identified the defendant as the person he saw come out of the back door of the house carrying the flat screen television. RP I 86, 119. While Officer Woodard was with the defendant, Officer Villagrana and Longview Officer Deischer responded to the alley behind 517 27th Avenue. RP I 145-147. The officers then went inside the house through the back door, noting that it had been pried open. *Id.* Once inside the house they found an empty flat

screen television bracket on the living room wall, Kirkland brand toilet paper in a closet, and numerous items strewn about the house. RP I 148-149. They also found a safe in one of the bedrooms that had been turned over. *id.*

While inside the house the officers were able to determine that the homeowner was Austin Bass, a truck driver who was then working out of town. RP I 150-159. Once they got Mr. Bass on the phone they sent him photographs of the items Officer Woodard had taken from the defendant, as well as photographs of the mess inside the house. *id.* Mr. Bass told them that he was the owner of all of the property, which he had left in his locked home and locked garage when he last left for work. RP I 125-141. He denied ever giving anyone permission to break into his home and take his property, and stated that there had been no pry marks on the back door when he left. *id.*

Procedural History

By information filed March 17, 2017, the Cowlitz County Prosecutor charged the defendant Dennis James Jenkins, Jr., with one count of residential burglary and one count of making or having burglary tools. CP 5-6. The latter information alleged the following:

The defendant, in the County of Cowlitz, State of Washington,

on or about 3/2/2017, did make, mend, and/or possess a tool, and/or an implement adapted, designed, or commonly used for the commission of burglary, to wit: lanyard with ceramic plug end, under circumstances evidencing an intent to use or employ in the commission of a burglary, allowed the same to be used or employed in the commission of a burglary knowing the same was intended to be used or employed in the commission of a burglary, contrary to RCW 9A.52.060(1) and against the peace and dignity of the State of Washington.

CP 5.

On 4/27/17 the court called this case for a pretrial hearing. RP III 1-

2. At that time the defendant asked for a new appointed attorney, complaining that his current attorney had refused to allow him to have redacted copies of the police reports, that he had tried to force him to enter a guilty plea, that he had not prepared sufficiently to take the case to trial, and that both the defendant and his attorney had been “butting heads” from the beginning of the case. RP III 3-4. Upon being questioned by the court the defendant’s attorney denied that he and the defendant were not able to communicate. RP III 4-5. However, the defendant’s attorney did state that he had decided against redacting the police reports and giving the defendant a copy. RP III 5-6. Rather, he stated that he had opted to read the reports to the defendant at the jail. *Id.*

At this point in the proceedings, the defendant’s attorney, on the record, asked the defendant the following question: “Do you wish to ask the

judge to be allowed to represent yourself?” RP III 6. The defendant responded on the record, saying as follows: “Yes. Yes, I wish – I wish to represent myself in this matter, then.” *Id.* At this point the court engaged in the following colloquy with the defendant:

THE COURT: So you understand that if you cannot afford to pay for an attorney, or you can only partially pay the cost of an attorney and can't an attorney is appointed for you at public expense. You understand that?

THE DEFENDANT: Yes.

THE COURT: And have you ever studied the law?

THE DEFENDANT: No.

THE COURT: Have you ever represented yourself or any other Defendant in a criminal action?

THE DEFENDANT: I have not, Your Honor.

THE COURT: Do you know that the crimes that you are charged with, which appears to be residential burglary, making or having burglary tools, you understand that?

THE DEFENDANT: I do.

THE COURT: And then you know if you represent yourself you're on your own? The Court cannot tell you how you should try your case, even advise you as to how to try your case. You understand that?

THE DEFENDANT: I do.

THE COURT: Do you understand you have a right to have your guilt decided by a jury?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And a jury consists of twelve people chosen from the community. Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: Are you familiar with the Rules of Evidence?

THE DEFENDANT: Not in particular, Your Honor.

THE COURT: Do you know that the Rules of Evidence govern what evidence may or may not be introduced at trial and in representing yourself you must abide by those rules. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you familiar with the Rules of Criminal Procedure?

THE DEFENDANT: No.

THE COURT: Do you know that those rules govern the way in which a criminal action is tried in this Court. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you know that if you decide to take the witness stand you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story, you must proceed question by question through your testimony. Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: So at this point why do you want to represent yourself?

THE DEFENDANT: Because I – I just – I honestly feel that – that Mr. DeBray does not have my best interest at heart and I just. I mean, I don't know how to represent myself through the procedures, but I just – I feel pressured by him and I just – I don't know. I just . .

THE COURT: Well, at this time I'm going to deny that you represent yourself, because that's not what I'm hearing. I'm hearing that you don't want Mr. DeBray. What I'm hearing is that you want a different attorney, that you're not getting it, so therefore you're going to be representing yourself. And, again, from everything I've heard that's not what you're wanting, you're just wanting a different attorney.

And, so, at this point I think what I'm inclined to do is not substitute a different attorney, but it sounds like maybe I understand the State is prepared to proceed to trial, but what I'm inclined to do instead is to look at the Waiver of Speedy Trial that the Defendant was requesting and re set the dates so Mr. DeBray, you can speak further with your client. And you can have more conversation with Mr. DeBray about where you see things and have more opportunity.

And if at that point you're still facing that same feeling and same issue, you can certainly bring this back up before the Court again. But I think at this point I'm just going to give it some more time.

You know, I'm not hearing that you understand the process or procedures, or again, that that's even what you want to do. So I just don't want to see you in some position where you don't have legal counsel through this process. You're facing felonies, which are serious charges; okay?

THE [DEFENDANT]: Yeah

RP III 6-9.

On May 11, 2017, two weeks after the first hearing in which the

defendant asked for a new attorney and then stated that he wanted to represent himself, the court called the case for a readiness hearing. RP II 1-2. At that time, the defendant again asked for a new attorney. RP II 3. In making this request he complained as follows about his attorney: that he hadn't "got any paperwork" from his attorney, that he had "filed a bar complaint" against his attorney, that he had only seen his attorney once, that "he will not give me discovery," that his attorney only "briefly went through" the discovery with the defendant, that the defendant wants a continuance because the case is not ready to go to trial and his attorney refuses to ask for one, that his attorney refuses to ask the court for a prison based DOSA sentence, and that his attorney refuses to explain the defendant's criminal history. RP II 3-9. The court again refused the defendant's request. RP II 9-10.

One week later this case came on for jury trial with the state calling four witnesses: (1) Jeffrey Sturdevant, (2) Officer Nicholas Woodard, (3) Austin Bass, and (4) Officer Emilio Villagrana. RP I 74, 90, 123, 142. These witnesses testified to the facts contained in the preceding factual history. *See Factual History, supra*. In addition, Officer Woodard testified as follows concerning Exhibit 2A, which was the lanyard with the ceramic piece of a spark plug attached that he took out of the defendant's pocket:

Q. (By Mr. Bentson:) How is that – that tool, now that you’ve put it in here – how is that used to – how would that function?

A. I’ve never used one, so I guess I’d presume with how it’s –

Q. Based on your experience in –

A. How it – how it’s designed with the loop, I’m assuming that that’s going to be the end that is either placed over a finger or two, held, and then it’s easy to then swing the item or, you know, swing it into something, glass (Witness demonstrating).

Q. Okay. And that would break glass –

A. And that –

Q – the end would break glass?

A. And that action with the ceramic, I don’t know how it all works or whatever, but ceramic has a great capability of shattering glass.

Q. Okay. And that was on the Defendant’s person when you searched him?

A. It was in his pocket, yes, sir.

RP I 116.

After calling its four witnesses the state rested its case. RP I 187.

The defense then rested its case without calling any witnesses. RP II 188.

At this point the court instructed the jury with the defense taking exception to the trial court’s refusal to give the defendant’s proposed lesser-included offense instruction of third degree theft. RP II 12-20, 31-43; CP 21-29.

Following instructions the parties presented their closing arguments, during which the state twice argued that the *spark plug piece on the string* was the burglary tool the state alleged in Count II of the information that the defendant illegally possessed. RP II 54-55. The following gives a portion of the state's argument on this point:

Oh, and one more thing is on his person, this little thing. The lanyard with the spark plug on the end of it. A homemade tool that is often used to commit burglary. You're going to have to search a long time to come up with another reason than breaking the window to have a tool like this. Figure out another thing you could do with this tool, you're not going to be able to. And that's on him, as well.

. . .

Now the next part of it, the other crime is making or having burglar tools. There's three elements to that crime, and there's a lot of language there. If a person makes or has burglar tools. Now number three is the State of Washington, so that's no issue. And the item, of course, we're talking about is the lanyard with the spark plug and we were just talking about (1) on March 2nd, 2017 – and there's a long list, but basically if there was any implement adapted, designed, or commonly used for a burglary, that's a burg tool.

RP II 54-55.

Following argument, the jury retired for deliberation, eventually returning verdicts of "guilty" on both charges. RP II 44-72, 72-80. The court then sentenced the defendant within the standard range, refusing the defendant's request for a prison-based DOSA alternative. RP II 82-94.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENDANT'S TIMELY AND UNEQUIVOCAL DEMAND TO ACT AS HIS OWN ATTORNEY DENIED THE DEFENDANT HIS RIGHT OF SELF-REPRESENTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant in a criminal proceeding is guaranteed the right to self representation. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001). Where a defendant asserts this right, the court's duty is solely to determine whether or not the request is knowing, intelligent, and unequivocal and not made for an improper purpose such as delay. *State v. Breedlove*, 79 Wn. App. 101, 900 P.2d 586 (1995); *see also State v. Fritz*, 21 Wn. App. 354, 585 P.2d 173 (1978). A trial court's decision whether or not to grant a defendant's request for self-representation is reviewed under an abuse of discretion of standard. *State v. Madsen*, 168 Wn.2d 496, 505, 229 P.3d 714 (2010). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In addition, a trial court abuses its discretion when it categorically refuses to consider one or more available alternatives, or if it

simply fails to exercise that discretion when required. *State v. Khanteechit*, 101 Wn.App. 137, 5 P.3d 727 (2000).

A defendant's ability to represent himself has no bearing on whether or not he should be allowed to assert this right; rather, the issue is whether or not the waiver of the right to counsel is knowing, intelligent and unequivocal. *State v. Canedo-Astorga*, 79 Wn.App. 518, 903 P.2d 500 (1995); *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed2d 32 (1993). Erroneous deprivation of this constitutional right is conclusively prejudicial thus compelling automatic reversal. *Breedlove*, 79 Wn. App. at 110; *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

For example, in *Godinez v. Moran*, *supra*, the defendant was charged in Nevada with multiple murders following two separate incidents. After the second incident the defendant unsuccessfully attempted to commit suicide. He later called the police to his hospital bed and confessed to the offenses. After arraignment the court found the defendant competent after two psychiatrists evaluated the defendant and provided a report in which both indicated that the defendant understood the nature of the charges and proceedings and was capable of assisting counsel. The defendant thereafter informed the court that he wanted to represent

himself because he wanted to plead guilty and he wanted to prevent his attorneys from presenting any mitigating evidence during sentencing. Upon hearing this the court entered into a colloquy with the defendant and granted his request. The defendant then pled guilty. The court ultimately sentenced him to death.

The defendant later filed a petition for habeas corpus in federal court arguing that he should be allowed to withdraw his guilty plea because (1) the standard of competency to waive the right to counsel or plead guilty was higher than the level of competency necessary to stand trial, and (2) while he had been competent to stand trial, he had not been sufficiently competent to waive his right to counsel and represent himself. A Federal District court denied his requested relief but the Ninth Circuit Court of Appeals accepted the defendant's arguments and granted the relief requested. The United States Supreme Court then accepted review and held under the due process clause the level of competence necessary to stand trial was the same as the level of competence to waive the right to counsel and continue *pro se*. The court held:

[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In *Faretta v. California*, we held that a defendant choosing self-representation must do so "competently and intelligently", but we made it clear that the

defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored". Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,"... a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation.

Godinez v. Moran, 509 U.S. at 400, 113 S.Ct. at 2687 (some citations and footnotes omitted).

In *Faretta v. California*, *supra*, mentioned in *Godinez*, the court accepted an appeal from a defendant in a California Criminal Proceeding who argued that the trial court erred when it ultimately decided to refuse his request for self-representation. In fact the court had initially granted the request after holding a colloquy in which it informed the defendant of his potential peril if convicted. However, the court later reversed itself after holding a colloquy in which it became evident that the defendant did not understand any of the hearsay rules or procedures associated with voir dire. In addressing this issue the court first noted the following concerning the trial court's belief that the defendant did not have the ability to represent himself.

It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily

accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta v. California, 422 U.S. at 834, 95 S.Ct. at 2240-2241 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring)).

The court then held that since the record established that the defendant had been informed of the perils of self-representation and knowingly waived the right to counsel, the trial court erred when it denied the defendant's request. The court stated:

Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions

that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta v. California, 422 U.S. at 835-836, 95 S.Ct. at 2540-2541 (footnotes omitted).

In the case at bar, a careful review of the record of the April 27th hearing reveals that the trial court denied the defendant the right to self-representation based upon its belief that given the court's refusal to appoint a new attorney, the defendant was opting for self-representation rather than continue with his current appointed attorney. The court stated as follows on this point:

THE COURT: Well, at this time I'm going to deny that you represent yourself, because that's not what I'm hearing. I'm hearing that you don't want Mr. DeBray. What I'm hearing is that you want a different attorney, that you're not getting it, so therefore you're going to be representing yourself. And, again, from everything I've heard that's not what you're wanting, you're just wanting a different attorney.

RP III 8-9.

The trial court's assessment of the defendant's reason for wanting to represent himself was correct. Absent the appointment of a new attorney, the defendant preferred self-representation over continuing with his current appointed attorney. However, even though the court's factual assessment was correct, the court's conclusion that this fact provided the

court with a reason to deny the defendant's demand for self-representation was not correct. As was mentioned above, where a defendant asserts the right to self-representation, the court's sole authority at that point is to determine whether or not the request is knowing, intelligent, and unequivocal and not made for an improper purpose such as delay. See *Breedlove, supra*; see also *Fritz, supra*. In this case the trial court did not claim that the defendant was not acting knowingly, intelligently, or unequivocally, or that he was acting for an improper purpose such as delay. Rather, what the court ruled in essence was that it believed the defendant's desire to represent himself as opposed to continuing with his current attorney was imprudent. In so ruling the trial court abused its discretion when it denied the defendant's demand to represent himself. As a result, this court should reverse the defendant's convictions and remand for a new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST FOR A NEW ATTORNEY AFTER THE DEFENDANT DEMONSTRATED AN IRRECONCILABLE BREAKDOWN IN ATTORNEY-CLIENT COMMUNICATION.

A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in

communication between the attorney and the defendant. *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense. *See e.g., State v. Lopez*, 79 Wn.App. 755, 766, 904 P.2d 1179 (1995) (citing *United States v. Morrison*, 946 F.2d 484, 498 (7th Cir.1991)). By contrast, the general loss of confidence or trust alone is not sufficient to require the appointment of new counsel. *Id.* Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. *State v. Stark*, 48 Wn.App. 245, 253, 738 P.2d 684 (1987).

In this case at bar, a review of the record of the two hearings in which the defendant was requesting the appointment of new counsel indicates that in spite of his attorney's claims to the contrary, his relationship with his attorney and his inability to communicate with his attorney had completely broken down. The defendant made the following claims, which his attorney did not deny: (1) that his attorney hadn't provided him with redacted copies of discovery in this case in spite of the defendant's repeated requests, (2) that his attorney had only briefly told

him what was in the police reports, (3) that his attorney had refused to explain the defendant's criminal history, (4) that his attorney refused the defendant's request to potentially ask for a DOSA sentence, (5) that his attorney had refused the defendant's request for a continuance so the defendant could better acquaint himself with the evidence the state had against him, and (6) that their relationship has deteriorated to the point that the defendant had filed a bar complaint against his attorney. RP II 3-9.

This evidence unequivocally supports the conclusion that there had been a complete breakdown in the attorney-client relationship to the point that the trial court abused its discretion when it denied the defendant's request for a new attorney. As a result, this court should vacate the defendant's convictions and remand for a new trial with the defendant given the option of having a new attorney appointed to represent him or to represent himself.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR POSSESSION OF BURGLARY TOOLS.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488,

670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

“Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count II with possession of burglary tools under RCW 9A.52.060. This statute states:

(1) Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

(2) Making or having burglar tools is a gross misdemeanor.

RCW 9A.52.060.

Under the plain language of this offense, in order to obtain a conviction for possession of a burglary tool the state had the burden of proving beyond a reasonable doubt that the defendant (1) did “have in his or her possession, any . . . implement adapted, designed or commonly used for the commission of a burglary,” and (2) that the defendant possessed that item “under circumstances evincing an intent to use” that implement “in the commission of a burglary.” In the case the defendant argues that

substantial evidence does not support the conclusion that the item the defendant possessed, a “lanyard” with a broken ceramic piece of spark plug attached, constituted an item “adapted, designed or commonly used for the commission of a burglary.” The following sets out this argument.

In this case Officer Woodard presented the only testimony on what the lanyard with the spark plug piece attached was. This testimony went as follows:

Q. (By Mr. Bentson:) How is that – that tool, now that you’ve put it in here – how is that used to – how would that function?

A. I’ve never used one, so I guess I’d presume with how it’s –

Q. Based on your experience in –

A. How it – how it’s designed with the loop, I’m assuming that that’s going to be the end that is either placed over a finger or two, held, and then it’s easy to then swing the item or, you know, swing it into something, glass (Witness demonstrating).

Q. Okay. And that would break glass –

A. And that –

Q – the end would break glass?

A. And that action with the ceramic, I don’t know how it all works or whatever, but ceramic has a great capability of shattering glass.

Q. Okay. And that was on the Defendant’s person when you searched him?

A. It was in his pocket, yes, sir.

RP I 116.

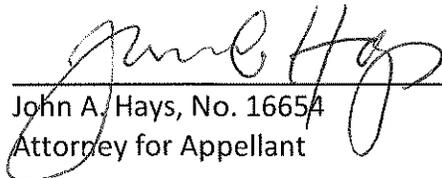
In this exchange Officer Woodard did not claim that the broken spark plug was designed to be used as a burglary tool. Rather, he testified that he “presumed” and “assumed” that it could be used to break class although he didn’t “know how it all works.” This testimony was complete speculation and does not constitute substantial evidence proving that the item admitted into evidence as Exhibit 2A was a burglary tool. Consequently, substantial evidence does not support the defendant’s conviction for possession of a burglary tool and this court should vacate the conviction for this offense and remand with instructions to dismiss.

CONCLUSION

The trial court erred when it denied the defendant's demand for self-representation and when it denied the defendant's motion for a new attorney. As a result, this court should vacate the defendant's convictions and remand for a new trial. In addition, since substantial evidence does not support the defendant's conviction for possession of a burglary tool this court should vacate that conviction and remand for dismissal of that charge.

DATED this 27th day of October, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9A.52.060
Making or Having Burglar Tools**

(1) Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

(2) Making or having burglar tools is a gross misdemeanor.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

DENNIS J. JENKINS, JR.,
Appellant.

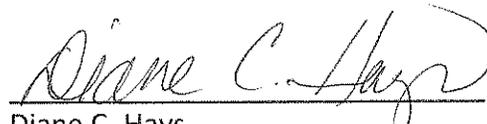
NO. 50837-1-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvakainen
Cowlitz County Prosecuting Attorney
312 SW First Avenue
Kelso, WA 98626
sasserm@co.cowlitz.wa.us
2. Dennis J. Jenkins, Jr., No.989739
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this October 27, 2017, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

October 27, 2017 - 2:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50837-1
Appellate Court Case Title: State of Washington, Respondent v Dennis J. Jenkins, Jr., Appellant
Superior Court Case Number: 17-1-00287-6

The following documents have been uploaded:

- 4-508371_Briefs_20171027140543D2596939_5418.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Jenkins Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- appeals@co.cowlitz.wa.us
- bentsone@co.cowlitz.wa.us
- sasserm@co.cowlitz.wa.us

Comments:

Sender Name: Diane Hays - Email: jahayslaw@comcast.net

Filing on Behalf of: John A. Hays - Email: jahayslaw@comcast.net (Alternate Email: jahayslaw@comcast.net)

Address:
1402 Broadway
Longview, WA, 98632
Phone: (360) 423-3084

Note: The Filing Id is 20171027140543D2596939