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Division II
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NO. 50837-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DENNIS JAMES JENKINS, JR.,

Appellant.

RESPONDENT'S BRIEF

**ERIC BENTSON/WSBA 38471
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Jenkins' convictions should be affirmed because:

- (1) The trial court did not abuse its discretion by not forcing Jenkins to represent himself when, after being given a proper colloquy, Jenkins was equivocal as to whether he desired to represent himself, and later he told the court he did not want to represent himself;
- (2) The trial court did not abuse its discretion in denying Jenkins' request for substitute counsel when Jenkins did not provide a legitimate reason for substitute counsel; and
- (3) There was sufficient evidence for the jury to find Jenkins guilty of making or having burglar tools.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Did the trial court abuse its discretion by not forcing Jenkins to represent himself when, after a colloquy, Jenkins was equivocal as to whether he desired to represent himself, and then later he told the court he did not want to represent himself?
- B. Did the trial court abuse its discretion by refusing to appoint Jenkins with substitute counsel when there was no evidence that Jenkins' attorney would be unable to effectively represent him?
- C. Taken in the light most favorable to the State, was there sufficient evidence for the jury to find Jenkins guilty of making or having burglar tools when he was caught fleeing the scene of a burglary with stolen property and a tool designed for breaking windows?

III. STATEMENT OF THE CASE

Austin Bass owned a house at 517 27th Avenue in Longview. RP 123 (5/18/2017).¹ Behind the house was an alley and a garage that led to that alley. RP 124 (5/18/2017). The man door from the garage faced the back door of the house, and the vehicle/garage door faced the alley. RP 125, 128 (5/18/2017). Inside his home, Bass had a Samsung flat screen television set mounted on the wall. RP 134 (5/18/2017). With the television he also had a Blu-Ray player, an “Apple TV” device, and several cords. RP 134-36 (5/18/2017). Also, Bass stored Kirkland brand toilet paper inside the house. RP 136 (5/18/2017)

Because Bass was a truck driver, he frequently would travel out of town. RP 123 (5/18/2017). In late February of 2017, Bass traveled on a work trip to Spokane. RP 132 (5/18/2017). When he left he locked all the doors to his house and garage. RP 133 (5/18/2017). While Bass locked the knob to the back door of the house, he was unsure whether or not he locked the deadbolt to that door. RP 134 (5/18/2017). When Bass left his

¹ The verbatim report of proceedings provided by Jenkins contains three parts labeled: Volume I, Volume II, and Supplemental Verbatim Report of Proceedings. Volume I contains the first day of trial on May 18, 2017. Volume II contains the readiness hearing on May 11, 2017, the second day of trial and sentencing on May 19, 2017, and the signing of the judgment and sentence on May 25, 2017. The Supplemental Verbatim Report of Proceedings contains an earlier hearing on April 27, 2017. Due to the unusual sequence of the transcripts provided, citation to the record will include the date of the part of the record referenced.

home, he did not give a key or permission to anyone else to enter his home or remove his property. RP 137-38 (5/18/2017).

Just before 4:30 a.m., on March 2, 2017, while Bass was still out of town on his trip, his neighbor, Jeffrey Sturdevant, was walking home. RP 79-80, 132, 138 (5/18/2017). Sturdevant's house was located at 550 28th Avenue in Longview. RP 74 (5/18/2017). The rear of Sturdevant's house shared the same alley with the rear of Bass's house. RP 77-78 (5/18/2017). As he approached his home, Sturdevant observed something in the middle of the alley and walked beyond his house to see what it was. RP 81 (5/18/2017).

In the middle of the alley near Bass's house, Sturdevant observed a person on a bicycle. RP 82 (5/18/2017). Sturdevant then observed a second person, Jenkins, who was wearing a black hood, exiting the garage to Bass's house pulling a bicycle and carrying Bass's television. RP 82-83, 85-87, 134-35 (5/18/2017). Sturdevant observed that the back door of Bass's house was open. RP 83 (5/18/2017). Jenkins put the television on his shoulder and rode his bicycle down the alley. RP 83-84 (5/18/2017). Sturdevant called the Longview Police Department and reported exactly what he had seen. RP 85 (5/18/2017).

Officer Nicholas Woodard was working patrol for the Longview Police Department when Sturdevant called. RP 97 (5/18/2017). Officer

Woodard observed two men on bicycles, with one of them carrying a “large-screen TV,” headed eastbound down Baltimore Street. RP 98 (5/18/2017). The man on the first bicycle crossed in front of Officer Woodard’s patrol vehicle followed by Jenkins carrying Bass’s flat screen television on his shoulder. RP 103, 107, 109, 135 (5/18/2017). Officer Woodard activated his overhead emergency lights and pursued Jenkins. RP 105 (5/18/2017). Jenkins set the television and bicycle down. RP 106 (5/18/2017). Officer Woodard placed Jenkins under arrest. RP 107 (5/18/2017). On Jenkins’ person Officer Woodard located six rolls of Kirkland brand toilet paper, Bass’s BluRay player, his Apple TV device, his cords, and a ceramic sparkplug end attached to a lanyard. RP 107-08, 135 (5/18/2017).

The lanyard attached to the sparkplug allowed for a person to swing it to strike things with the sparkplug end. RP 116 (5/18/2017). The ceramic end of the sparkplug gave it a “great capability of shattering glass.” RP 116 (5/18/2017). Due to this, the lanyard with the sparkplug end was recognizable as a tool commonly used to break windows. RP 108 (5/18/2017).

Officer Emilio Villagrana of the Longview Police Department responded to Bass’s house. RP 144-45 (5/18/2017). Officer Villagrana observed the back door to Bass’s house had been pried open. RP 146, 168

(5/18/2017). Inside the house Officer Villagrana observed Bass's wall mount for his television with no television on it. RP 148 (5/18/2017). Inside the house Officer Villagrana also observed Kirkland toilet paper and that items in the house had been tossed about and knocked over. RP 149, 176 (5/18/2017).

Jenkins was charged with Residential Burglary and Making or Having Burglar Tools. RP 14 (5/18/2017). Just before his trial at his readiness hearing on April 27, 2017, Jenkins' attorney told the court that Jenkins wished to represent himself. RP 3 (4/27/2017). The following exchange then took place:

THE DEFENDANT: Your Honor, may I speak on the record, please?

THE COURT: As long as you understand right now you are represented by an attorney and anything you say can be used against you, so just understand that.

DEFENDANT: Okay. I – I've asked this lawyer numerous times for paperwork so I can adequately go through my case and he denies me with my paperwork. He told me that because I want it, that I'm not entitled to it, and I just – I'm not ready for trial, and I told him that I would like to sign my rights to a fast and speedy and he told me that doesn't matter, I'm not going to ask for a continuance. We're going to trial on the 4th. I feel pressured by him.

I'd like a different, attorney, if that's possible. I just don't feel that he's adequate Counsel for me. We seem to butt heads and I just – if I could have a different attorney I'd appreciate it. I just – I feel pressured by him. Yesterday he came to see me, told me that I had ten

minutes to sign a plea agreement, I just didn't feel comfortable with that, I just – I feel pressured and I'd rather have a different attorney. I'd like to seek a different attorney.

THE COURT: So a couple of things that I will address. First off, the idea that you waive speedy trial doesn't necessarily mean that the Court will grant a continuance. I understand the State is ready to proceed to trial and so at this – this point, Mr. DeBray, do you feel like things have broken down to a point that you can no longer communicate with your client?

MR. DERAY: No, not at all.

THE COURT: Okay. So, Mr. Jenkins, you don't have a right to just pick and choose. Mr. DeBray is a very skilled attorney, he knows what he's doing. From any observations I've ever had of him, and I understand sometimes that may not be – he may tell you things you don't want to hear –

THE DEFENDANT: Yes.

THE COURT: -- but that's his job.

THE DEFENDANT: And I appreciate that. I'm not trying to pick and choose, I just – I honestly feel that he doesn't have my best interests at heart. I just – when we – when we have conversations they're short and we don't seem to see eye to eye. Like I said, I just – I don't feel that he's adequate counsel for me. We just – I don't honestly think – we just don't seem to get along. From the beginning it seemed like we didn't. Well, I asked him for the paperwork for my discovery over a month ago and he just tells me just no way that I – he says unnecessary work for him to provide that for me, I just – I just don't feel that –

THE COURT: So –

THE DEFENDANT: -- he's adequate for me. I would just – I'd like to have a different attorney, if that's possible.

THE COURT: Mr. DeBray, do you have anything you'd wish to say?

MR. DEBRAY: Only that in this particular representation, I opted not to follow the Court Rule and go through the redactions process and seek approval from the Court of the Prosecutor. Rather, I opted just to go to the jail and read discovery to my client.

THE COURT: So Mr. Jenkins, what I'm hearing is that Mr. DeBray is following the Court Rules that talk about discovery and what be provided and what can't be provided to you. So again, it may not be what you want to hear or what you like, but again, it's his job to tell you like it is and not just what you want to hear.

So I'm not hearing that there is any breakdown in communication. It may be that you butt heads. It may be that you don't agree with each other, and at the same time that doesn't mean that it's to the point where Mr. DeBray can no longer represent you. That's not what I'm hearing.

So with that, I will not be substituting any attorney for Mr. DeBray.

MR. DEBRAY: Do you wish to ask the Judge to be allowed to represent yourself?

THE DEFENDANT: Yes. Yes, I wish – I wish to represent myself in this matter, then.

RP 3-6 (4/27/2017).

After Jenkins asked to represent himself, the court administered the following colloquy:

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 the right to have your guilt decide 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...

RP 6-8 (4/27/2018).

After hearing Jenkins equivocate regarding representing himself, the court denied his request, determining that from what he had told the court his desire was for a different attorney, not to represent himself. RP 8-9 (4/27/2018). Although the State was prepared to proceed to trial the following week, the court granted Jenkins' request for a continuance. RP 9-11 (4/27/2018). The court did this to provide Jenkins with the opportunity to consult with his attorney about how to proceed. RP 9 (4/27/2018). The court also informed Jenkins that after consulting with his attorney, he could renew the request to represent himself at a later time stating: "And if at that point you're still facing the same feeling and the same issue, you can certainly bring this back up before the Court again." RP 9 (4/27/2017).

At Jenkins' next readiness hearing, on May 11, 2017, the court stated the trial would begin on May 18, 2017. RP 3 (5/11/2017). Jenkins asked the court if he could speak, and the court allowed him to. RP 4 (5/11/2017). The following exchange then took place:

THE DEFENDANT: My last court date, I – I asked for a new attorney, because DeBray and I, we have a lot of issues – well, I actually have a lot of issues. I haven't gotten any paperwork; I am not ready for this trial.

I've got a Motion here I'd like to file with you, if possible, for a new attorney. It's due process, Sixth Amendment.

I've also filed a Bar complaint against him with the Washington State Bar. Fortunately – or, not fortunately,

Judge Haan, I think is her name, she said we were to have a couple of weeks for me to iron things out or whatever. I haven't seen him but one time, he came to me the next day, told me all the deals are off the table that we were going to trial, that was all he had to say to me.

I still feel the same as I did, then. I'm just asking the Court for a different attorney because I feel that he does not have my best interests at heart.

THE COURT: Okay, so I was just taking a look at the notes from back on February – or on April 27th when you mentioned the discussion about representing yourself and the Court denied – denied the request, and said that you were to continue to be represented by Counsel.

So, are you asking to represent yourself?

THE DEFENDANT: No, I'm asking for a – for a different attorney, because I don't – I don't know the laws, per se –

RP 4-5 (5/11/2017).

After Jenkins informed the court that he did not want to represent himself, the court inquired into his request for a new attorney. RP 5-8 (5/11/2017). The court confirmed that Jenkins and his attorney had reviewed discovery together. RP 5-6 (5/11/2017). The court also confirmed that despite their disagreements, Jenkins and his attorney were able to effectively communicate with each other. RP 7 (5/11/2017). The court asked Jenkins' attorney whether Jenkins' filing of a bar complaint against him would pose any issues in representing him. RP 7 (5/11/2017). Jenkins' attorney said it would not. RP 7 (5/11/2017). Because Jenkins was able to communicate with his attorney, had reviewed discovery, and

there were no issues raised that would cause his attorney to be unable to represent him, the court denied Jenkins' request for a new attorney. RP 9 (5/11/2017). The case proceeded to trial and the jury found Jenkins guilty of Residential Burglary and Making or Having Burglar Tools. RP 77 (5/19/2017).

IV. ARGUMENT

A. **THE TRIAL COURT WAS NOT REQUIRED TO FORCE JENKINS TO REPRESENT HIMSELF WHEN, AFTER CONDUCTING A COLLOQUY, JENKINS WAS EQUIVOCAL AS TO WHETHER HE DESIRED TO REPRESENT HIMSELF AND THEN LATER HE TOLD THE COURT HE DID NOT WISH TO DO SO.**

The trial court did not abuse its discretion by not forcing Jenkins to represent himself when, after a colloquy, he was equivocal about wanting to do so, and then later he informed the court that did not want to represent himself. The Washington Supreme Court has stated: “[B]oth the United States Supreme Court and this court have held that courts are required to indulge in ‘every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (citing *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977))). Jenkins claims he was denied the right to self-representation. However, after the court informed him of the risks of self-representation through a colloquy,

Jenkins was equivocal as to whether he wanted to represent himself. RP 8 (4/27/2017). Later, when asked if he still desired to represent himself, Jenkins told the court he did not. RP 5 (5/11/2017). Because, after being properly informed, Jenkins abandoned his request to represent himself, the Court did not abuse its discretion when it did not force Jenkins to represent himself against his will.

While criminal defendants have the right to represent themselves, *Madsen*, 168 Wn.2d at 503 (citing Wash. Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)), this right is not absolute. *State v. Vermillion*, 112 Wn.App. 844, 851, 51 P.3d 188 (2002) (citing *In re Richardson*, 100 Wn.2d 669, 674, 675 P.2d 209 (1983)). “The right to proceed pro se is neither absolute nor self-executing.” *Madsen*, 168 Wn.2d at 504 (citing *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001)). The court should indulge in every reasonable presumption against a defendant’s waiver of his or her right to counsel. *Id.* A trial court’s denial of a request for self-representation is reviewed for abuse of discretion. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995).

The trial court’s discretion is vital because there is “a tension between a defendant’s autonomous right to choose to proceed without counsel and a defendant’s right to adequate representation.” *State v.*

DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). This tension can create a “‘heads I win, tails you lose’ proposition for the trial court.” *Id.* at 377 (quoting *State v. Imus*, 37 Wn.App. 170, 179-80, 679 P.2d 376 (1984) (citing *People v. Sharp*, 7 Cal.3d 448, 462 n.12, 499 P.2d 489, 103 Cal.Rptr. 233 (1972), *cert. denied*, 410 U.S. 944, 93 S.Ct. 1380, 35 L.Ed.2d 610 (1973))). “If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation.” *Id.* “To limit baseless challenges on appeal, courts have required that a defendant's request to proceed pro se be stated unequivocally.” *Id.*

“[A] defendant’s request to proceed pro se must be both timely and stated unequivocally.” *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis in original). A “motion to proceed pro se must be timely, or it is relinquished and left to the discretion of the trial judge.” *State v. Barker*, 75 Wn.App. 236, 240-41, 881 P.2d 1051 (1994) (citing *DeWeese*, 117 Wn.2d at 377). When a demand for self-representation is accompanied by a motion to continue and is made shortly before a trial or hearing is about to commence, the right of self-representation “depends on the facts of the particular case with a measure of discretion reposing in the trial court.” *See id.* at 241. “Even when a request is unequivocal a

defendant may still waive the right of self-representation by subsequent words or conduct.” *Vermillion*, 112 Wn.App. at 851 (citing *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995)).

In addition to being timely and unequivocal, a defendant’s request for self-representation must be voluntary, knowing, and intelligent. *See Madsen*, 168 Wn.2d at 504 (citing *Faretta*, 422 U.S. at 835; *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994)). Once a defendant raises the issue of self-representation, “the trial court should assume responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what the task entails.” *City of Bellevue v. Acrey*, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). Rather than simply allowing the defendant to forfeit his or her right to counsel without considering the consequences,

‘[a] judge must investigate as long and as thoroughly as the circumstances ... demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.’

Id. (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-24, 68 S.Ct 316, 92 L.Ed. 309 (1948)).

When a defendant asserts a desire for self-representation, instead of immediately permitting the defendant to proceed pro se, “a colloquy on the record is the preferred means of assuring that defendants understand

the risks of self-representation.” *Id.* at 211. “An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused’s comprehension of the offer and capacity to make the choice intelligently and understandably has been made.” *State v. Chavis*, 31 Wn.App. 784, 789, 644 P.2d 1202 (1982). “Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer on ruling if the court is reasonably unprepared to immediately respond to the request.” *Madsen*, 168 Wn.2d at 504.

Here, not only was Jenkins’ request to represent himself untimely and equivocal, but he later told the court he did not want to represent himself. The trial court did not abuse its discretion by performing a colloquy prior to granting this request, giving Jenkins additional time to consider how he wanted to proceed, and not forcing Jenkins to represent himself against his will. Because the court had the responsibility to “investigate as thoroughly as the circumstances ... demand[ed],”² once Jenkins asked to represent himself it was incumbent upon the court to consider the circumstances carefully to ensure this was actually Jenkins’ desire. For this reason, it was noteworthy that Jenkins did not make this request until after he was denied his request for a new attorney and only

² *Acrey*, 103 Wn.2d at 210 (quoting *Von Moltke*, 332 U.S. at 723-24).

raised the issue at his attorney's prodding. Further, his initial request showed hesitation. When his attorney asked him if he wished to represent himself, Jenkins stated: "Yes. Yes, I wish – I wish to represent myself in this matter, then." RP 6 (4/27/2017). As the record shows, Jenkins stuttered as he communicated this request, and his use of the word "then" indicates he was only making this request as a consequence of having been denied a request for a new attorney.

Rather than immediately finding Jenkins had waived his constitutional right to counsel, the court conducted a colloquy to ensure Jenkins understood the risks of self-representation. Because it appeared Jenkins' request was based on his frustration with not being given a new attorney, this colloquy was necessary to ensure he was knowingly, intelligently, and voluntarily waiving his constitutional right to counsel. After the court advised Jenkins of the risks of self-representation, it asked Jenkins why he wished to represent himself. At this point, Jenkins became even more equivocal, stating:

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...

RP 8 (4/27/2017). Jenkins demonstrated his nervousness by repeating "I just" five times in his response. He also told the court he did not know

how to represent himself and did not know why he wanted to do so. Because after the colloquy Jenkins was equivocal as to whether or not he wanted to represent himself, at this point it would have been error for the court to find Jenkins had waived his right to counsel.³

Instead, the court wisely gave Jenkins more time to consider if this was the course of action he wished to take. The court denied his request, at that time, because Jenkins was not communicating that he actually desired to represent himself. However, this denial was not necessarily permanent. The court continued the trial, despite the State's desire to proceed, and gave Jenkins the opportunity to discuss the matter further with his attorney. The court informed Jenkins that if he later still desired to represent himself, he could "certainly bring this back up before the Court again." RP 9 (4/27/2017). By denying Jenkins' equivocal request until he had more time to consider his decision, the court made sure Jenkins had the benefit of counsel while he considering this decision. The court's deferral was appropriate as "a court may defer on ruling if the court is reasonably unprepared to immediately respond to the request."⁴

Later, at his next readiness hearing, the court specifically asked: "So, are you asking to represent yourself?" RP 5 (5/11/2017). Jenkins

³ Jenkins' brief fails to consider Jenkins' equivocation after having been advised of the dangers of self-representation through a colloquy. In contrast, the trial court did consider his equivocation after the colloquy and then rendered an appropriate ruling.

⁴ *Madsen*, 168 Wn.2d at 504.

then told the court he was not.⁵ Thus, even if Jenkins' earlier request had been unequivocal, his later statement that he did not wish to represent himself demonstrated his intent to "waive the right of self-representation by subsequent words or conduct."⁶ To force Jenkins to represent himself at this point would have made his self-representation involuntary.

Moreover, Jenkins' request was untimely. He did not ask to represent himself until the readiness hearing for a trial that was scheduled for the following week. RP 3 (4/27/2017). The request was made after Jenkins had told the court he was "not ready for trial" and wanted a continuance. RP 3 (4/27/2017). Because the request to represent himself was made shortly before the trial was to commence and was accompanied by a request for a continuance, the decision on whether to grant this request depended "on the facts of the particular case with a measure of discretion reposing in the trial court."⁷

The trial court considered the manner in which the request was brought about—only after Jenkins was denied a new attorney. After conducting a colloquy, it inquired as to why the request was being made. In response, Jenkins equivocally communicated he was doing so only because he desired a different attorney. When it was obvious that this was

⁵ Jenkins' brief fails to mention that on May 11, 2017, when the court asked Jenkins if he wished to represent himself, he informed the court he did not.

⁶ *Vermillion*, 112 Wn.App. at 851 (citing *Luvene*, 127 Wn.2d at 699).

⁷ *Barker*, 75 Wn.App. at 241.

not a decision Jenkins was entering thoughtfully, the court denied the request to give him more time to consider whether this was the manner in which he wanted to proceed. Had Jenkins later requested to represent himself, there would have been greater clarity that his decision to waive his right to counsel was knowing and intelligent. Under these circumstances, when Jenkins made the untimely request, the court did not abuse its discretion in denying it until he had more time to consider whether or not this was how he wanted to proceed.

Because Jenkins' request to represent himself was untimely and equivocal the court did not abuse its discretion in denying this request. Further, because after the colloquy Jenkins did not express a desire to represent himself, had the court granted his earlier request to represent himself his waiver of his right to counsel would not have been knowing and intelligent. Finally, because Jenkins later told the court he did not want to represent himself, forcing him to do so would have made his self-representation involuntary. Accordingly, the trial court did not abuse its discretion when it did not force Jenkins to represent himself.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO APPOINT SUBSTITUTE COUNSEL WHEN THERE WAS NO SHOWING JENKINS' COURT-APPOINTED COUNSEL WOULD BE UNABLE TO EFFECTIVELY REPRESENT HIM.

The trial court did not abuse its discretion by refusing to appoint substitute counsel when there was no evidence that substitute counsel was necessary. “When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself.” *DeWeese*, 117 Wn.2d 376. After determining that Jenkins and his attorney were able to communicate, share discovery, and Jenkins’ attorney did not have a conflict in representing him, the trial court did not abuse its discretion in refusing to appoint Jenkins with new court-appointed counsel.

“Whether an indigent defendant’s dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court.” *Id.* “A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.” *State v. Lopez*, 79 Wn.App. 755, 764, 904 P.2d 1179 (1995), *abrogated on other grounds by State v. Adel*, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998). “[E]ven when a defendant does not want to appear pro se, if he fails to provide the court with legitimate reasons

why he is entitled to reassignment of counsel, the court can require that he either waive or continue with appointed counsel.” *State v. Sinclair*, 46 Wn.App. 433, 436, 730 P.2d 742 (1986). “[T]he factors to be considered in deciding whether to grant 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.” *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). “A defendant’s conclusory, unsubstantiated statement that his or her current counsel is unqualified does not entitle a defendant to new counsel.” *State v. Staten*, 60 Wn.App. 163, 169, 802 P.2d 1384 (1991) (citing *Wilks v. Israel*, 627 F.2d 32, 36 n.4 (7th Cir.1980), *cert denied*, 449 U.S. 1086, 101 S.Ct.874, 66 L.Ed.2d 811 (1981)). Further, “[u]nsupported general allegations of deficient representation are inadequate to support a motion to substitute, particularly when the motion to substitute is brought shortly before or during trial.” *Id.* at 170.

In *Sinclair*, on the day of trial, the defendant asked for substitute counsel, and his attorney asked to withdraw. 46 Wn.App. at 434-35. The trial court asked the defendant why he was dissatisfied with his court-appointed counsel. 46 Wn.App. at 436. The defendant provided a vague account of how his attorney had lied and had not shown him fingerprint evidence. *Id.* There was no indication that his attorney attempted to rebut

these claims. *See id.* 435-36. The Court of Appeals held that because the defendant did not articulate a justification for replacement and only expressed a discomfort with his attorney's representation, there was not a valid reason to replace her. *Id.* at 436. Additionally, the Court of Appeals considered that the defendant had filed a complaint with the Washington State Bar Association against his attorney and found that making an allegation was an insufficient basis to disqualify appointed counsel. *Id.* at 437. Accordingly, the Court of Appeals found the trial court did not abuse its discretion in denying the defendant's request for a new attorney. *Id.*

Here, the trial court did not abuse its discretion in refusing to appoint Jenkins with substitute counsel after he failed to provide legitimate reasons as to why he was entitled to substitute counsel twice on the eve of trial. According to Jenkins' brief, the reasons for Jenkins' dissatisfaction were that he wanted discovery paperwork, he did not agree with his attorney's explanation of his criminal history, his attorney refused to request a Drug Offender Sentencing Alternative ("DOSA") sentence, his attorney refused to request a continuance for Jenkins to become better acquainted with the evidence, and he had filed a bar complaint against his attorney. Yet none of these claims show a conflict of interest, an irreconcilable conflict, or a breakdown in communication as Jenkins argues here.

Jenkins' claim of not being provided with discovery materials ignores the fact that rather than provide him with paperwork, which always entails a risk of being passed around in jail, his attorney elected to read him the entirety of his discovery in the jail. Thus, Jenkins was fully informed of the evidence against him, and Jenkins' attorney communicated this to the court. RP 5 (4/27/2017). The court found Jenkins' attorney had complied with the court rules regarding discovery. RP 5 (4/27/2017). Jenkins debate with his attorney regarding his criminal history, demonstrated the two of them were discussing the issue. Of course, it is not uncommon for a defendant not to agree with his attorney regarding his criminal history. The voicing of this disagreement did not create a conflict of interest, rather, it demonstrated that Jenkins and his attorney were able to communicate.⁸

Jenkins' claim that his attorney did not request a DOSA sentence was without merit. When Jenkins made this claim, he had not been convicted of a crime, so his attorney could not make this request to the court. Further, Jenkins' attorney, like all defense attorneys, could not control what type of offer the State made in the case. It is noteworthy that later at sentencing, Jenkins' attorney requested a DOSA sentence. RP 86

⁸ Also, at sentencing Jenkins stipulated that this was his criminal history, demonstrating his attorney was ultimately correct. RP 83 (5/25/2017).

(5/25/2017). Thus, not only was Jenkins' complaint meritless, but his claim that his attorney would not pursue a DOSA sentence was ultimately proved incorrect – his attorney pursued this sentence when the time for sentencing came.

Jenkins' claim that he needed a continuance on May 11, 2017, so he could be better acquainted with the evidence after the court had already given him a continuance on April 27, 2017, was not a sufficient basis to continue the case. Being prepared for trial is the attorney's responsibility, not the client's. His attorney's refusal to request a continuance, when the attorney was prepared for trial was appropriate, professional conduct. It also demonstrated his attorney's knowledge of what would and would not suffice as a legitimate reason for a continuance. Finally, Jenkins' filing of a bar complaint also failed to provide a sufficient reason for substitute counsel. As explained in *Sinclair*, a bar complaint is merely an allegation and does require substitute counsel. Thus, Jenkins failed to provide legitimate reasons that would justify substitute counsel.

Additionally, when Jenkins made his request on April 27, 2017, the court inquired to evaluate his attorney. The court asked Jenkins' attorney if there was a breakdown that prevented him from being able to communicate with Jenkins. RP 4 (4/27/2017). Jenkins' attorney's response was: "No, not at all." RP 4 (4/27/2017). After Jenkins made his

complaint about discovery paperwork, the court asked Jenkins' attorney if he had anything to say. Jenkins' attorney explained that he had in fact provided Jenkins with the information contained in discovery by reading it to him. RP 5 (4/27/2017). Because Jenkins' attorney was following the court rules, and there was not a breakdown in communication, the court refused to appoint substitute counsel on April 27, 2017. RP 5-6 (4/27/2017). The court explained that the disagreement between Jenkins and his attorney had not caused a communication breakdown or created a conflict that had gotten to the point where Jenkins' attorney could no longer represent him. RP 6 (4/27/2017).

When Jenkins made his second request for substitute counsel on May 11, 2017, the court again evaluated his attorney. After Jenkins complained about not receiving the police reports, the court inquired as to whether Jenkins' attorney had reviewed the discovery with him. Jenkins' attorney informed the court that he had reviewed discovery with Jenkins, and ultimately Jenkins agreed this had occurred. RP 6 (5/11/2017). The court inquired regarding Jenkins' ability to communicate with his attorney, and Jenkins agreed they were able to communicate. RP 6 (5/11/2017). The court also asked Jenkins' attorney if Jenkins' bar complaint against him posed any issues for the attorney in representing Jenkins. Jenkins' attorney told the court it did not. RP 6 (5/11/2017). In evaluating the

situation, the court found that while Jenkins and his attorney may have had disagreements, there was no conflict or inability to communicate that prevented Jenkins' attorney from continuing to represent him. RP 7-8 (5/11/2017). Thus, in both instances where Jenkins sought substitute counsel, the court investigated and determined that his attorney was able to adequately represent him.

The court was also aware that Jenkins made both his requests for substitute counsel at final readiness hearings on the eve of trial. On April 27, 2017, Jenkins made his first request for substitute counsel at his readiness hearing just before trial was to begin the following week. Although the court denied his request for substitute counsel, it continued the trial to the week of May 15, 2017. RP 12 (4/27/2017). At his May 11, 2017, readiness hearing for his new trial date, Jenkins again requested substitute counsel when trial was to occur the following week. RP 3-5 (5/11/2017). Thus, in both situations the substitution of counsel would have placed his new attorney in the position of being unprepared for trial, as that attorney would have less than a week to prepare.

Washington has a strong policy in favor of conserving judicial resources and the efficient administration of justice.⁹ Courts are overburdened with criminal cases, and court-appointed counsel is in high

⁹ See *State v. Bryant*, 89 Wn.App. 857, 867, 950 P.2d 1004 (1998).

demand. When, as here, there is a weak justification for substitute counsel, a court does not have the luxury of granting a defendant a new court-appointed attorney at his or her whim. Doing so would negatively impact a court's ability to fairly administer justice in all cases. To avoid having to continue Jenkins' case again or place a new attorney in the position of having to prepare to try the case in less than a week, the court declined to appoint substitute counsel just prior to the scheduled trial.

Accordingly, the court did not abuse its discretion when it refused to appoint Jenkins with substitute counsel. The reasons given for the dissatisfaction did not establish a breakdown in communication or a conflict of interest. The court carefully evaluated Jenkins' attorney and found he was capable of representing him. And, a substitution of counsel at the readiness hearing would have either caused a delay in the proceedings or placed another attorney in the position of being unprepared to effectively represent him. By carefully considering the reasons, evaluating the attorney, and considering the timing of the requests, the court did not abuse its discretion in refusing to appoint substitute counsel.

C. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND JENKINS GUILTY OF MAKING OR HAVING BURGLAR TOOLS.

There was sufficient evidence for the jury to find Jenkins guilty of making or having burglar tools. The Washington Supreme Court has stated:

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. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Despite the fact that Jenkins was apprehended bicycling away from a house he had just burglarized while carrying a large flat screen television he had just stolen from inside, and he did so while possessing a homemade tool designed to break windows, he claims there was insufficient evidence that he made or had a burglar tool. However, when all reasonable inferences are drawn in favor of the State and interpreted most strongly against Jenkins, there was sufficient evidence for the jury to find he had committed this crime.

When determining the sufficiency of evidence the standard of review is "whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State’s evidence. *Jones*, 63 Wn.App. at 707-08. “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State’s favor and

interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

RCW 9A.52.060(1) states:

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.

RCW 9A.52.060 utilizes “appropriately broad language to capture any device that could conceivably be used to commit burglary[.]” *State v. Larson*, 184 Wn.2d 843, 852, 365 P.3d 740 (2015) (emphasis in original). It is noteworthy that the statute does not require the burglar tool to have actually been used in the burglary. Rather, if the device is possessed under circumstances evincing an intent to be used in a burglary this is sufficient. *See, e.g., State v. Fitzpatrick*, 141 Wn. 638, 640, 251 P. 875 (1927) (evidence found sufficient when “the jury had the right to infer that the false keys and picklocks found in the appellant’s possession were possessed by him with intent to use them for criminal purposes.”). Further, bringing a burglar tool to a location where a burglary is attempted has also been found to evince this intent. *See State v. Cass*, 146 Wn. 585, 587, 264 P. 7 (1928) (“We can conceive of nothing more clearly tending

to prove the intent of the defendant to commit burglary that that of driving his automobile to the premises in question and taking with him burglar's tools."); *State v. Klein*, 195 Wn. 338, 347, 80 P.2d 825 (1938) (burglar tools brought to the building by the defendants "clearly justified" the jury finding the intent to commit a burglary).

Here, there was sufficient evidence for the jury to find Jenkins guilty of making or having a burglar tool. The item in Jenkins' possession was a sparkplug with a lanyard attached. While normally a spark plug is used to ignite fuel in an internal combustion engine, here it had been attached to a lanyard that allowed it to be swung to break windows. The jury observed the item and heard testimony from Officer Woodard as to how this homemade tool was used, and that it had a great capability of shattering glass. RP 115-16 (5/18/2017). The evidence was overwhelming that Jenkins was leaving the scene of a home he had just burglarized. Entry was made by forcing the door open, and the tool found on Jenkins' person immediately after the burglary was specifically designed to break windows. The most reasonable inference to draw was that Jenkins brought the tool to enter the house by breaking a window, but found this unnecessary after he or his accomplice forced the door open. Drawing all reasonable inferences in the State's favor and most strongly against Jenkins, there was sufficient evidence for the jury to find that

Jenkins possessed an implement adapted or designed to commit a burglary under circumstances evincing an intent to use that item in the commission of a burglary.

V. **CONCLUSION**

For the above stated reasons, Jenkins' convictions should be affirmed.

Respectfully submitted this 16th day of February, 2018.



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net
donnabaker@qwestoffice.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 10th day of February, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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