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Division II
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NO. 50899-1-II

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

STATE OF WASHINGTON, Respondent

v.

PATRICK MICHAEL BELSER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02401-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Belser knowingly, voluntarily, and intelligently waived his right to counsel because he was informed, among the other consequences of proceeding pro se, of the maximum possible sentence he faced if convicted at trial.**
- II. **The State agrees that the condition of Belser's sentence prohibiting marijuana possession or consumption should be stricken as not crime-related.**
- III. **The State agrees that the condition of Belser's sentence barring the unlawful use of electronic media is unconstitutionally overbroad and should be stricken.**
- IV. **Because the State agrees that Belser's case should be remanded to have some conditions stricken it does not object to having the two, overlapping prohibitions on Belser entering or frequenting places where minors congregate being stricken and reformulated into one prohibition that complies with the Constitution.**

STATEMENT OF THE CASE

Patrick Michael Belser was charged by amended information with Rape of a Child in the Second Degree, Child Molestation in the Second Degree, two counts of Child Molestation in the Third Degree, Rape of a Child in the Third Degree, and Sexual Exploitation of a Minor. CP 9-13. Each of the counts included the aggravating factor that the "defendant used his . . . position of trust, [or] confidence . . . to facilitate the commission of the current offense." CP 9-11; RCW 9.94A.535(3)(n). Four of the counts included the aggravating factor that the "offense was part of

an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.” CP 9-11; RCW 9.94A.535(3)(g). The charged offenses were perpetrated on three different male children and occurred on or about or between January 13, 2002 and June 16, 2011. CP 9-11.

Prior to trial, Belser moved to represent himself and to proceed to trial pro se. RP 27-39, 44-46; CP 8. The trial court, the Honorable Scott Collier, granted this motion following a colloquy between the parties and Belser’s attorney at the time. RP 27-39, 44-46; CP 8. The parties then proceeded to trial with Belser pro se.

At trial, the three victims, who were now adults, testified that Belser sexually assaulted them when they were children. Z.R. testified that Belser frequently performed oral sex on him and touched his penis between 2002 and 2006. *See* RP 446-482. J.A.M. testified that Belser placed J.A.M.’s penis into Belser’s mouth and that Belser used a sex toy on J.A.M.’s penis between 2009 and 2011. RP *See* 512-529. And G.B.P. testified that Belser instructed him to masturbate in front of him between 2003 and 2010. *See* RP 483-511.

Belser, largely did not contest that the alleged sex acts occurred, rather he argued that the sex acts were not crimes since they took place at

times later or much later than the victims alleged¹ except that he, in fact, agreed that he committed count 3, Child Molestation in the Third Degree against Z.R.² See RP 669- 697, 701, 704-740, 866-68, 871-880, 882-888.

The jury found Besler guilty as charged, to include the aggravating factors. RP 910-12; CP 132-146. The trial court imposed an exceptional sentence that was composed of a sentence of 230 months on the Rape of a Child in the Second Degree count (an ISRB offense), which the court ran consecutive to the remaining counts, which ran concurrent to each other, for an aggregate sentence of 350 months as the minimum term. RP 868-871; CP 159, 174, 178.

ARGUMENT

I. Belser knowingly, voluntarily, and intelligently waived his right to counsel because he was informed, among the other consequences of proceeding pro se, of the maximum possible sentence he faced if convicted at trial.

After Belser requested to proceed to trial pro se, the following excerpted discussion between Belser, his attorney, the trial court, and the State occurred:

THE COURT: So, if convicted on some of these counts, you could create the first or possibly the second strike if you have

¹ “I broke many laws, but I didn’t break these laws, except for one of them. And I said at the beginning it was more about the when than the what because when does make a difference, and you see that there. These charges are time sensitive on each.” RP 868.

² “Q: How old was [Z.R.] when, when I molested him? A: He was 14 in 2004.” RP 679 (Belser acting pro se is asking himself the questions and answering them).

prior convictions, so there's a lot at stake here. I don't know your criminal history and I've not pulled out the SRA to do any sort of scoring, but just taking a quick look at this, you could be looking, I don't know, at 10 plus years –

MS. TOTH³: No, yeah, he's –

DEFENDANT: Yes, sir.

MS. TOTH: We have gone over that, Your Honor, multiple times in terms of the, the offer in King County. Once again, he has discussed that with his attorney up there, he and I have discussed it at length, it was discussed, obviously plea negotiations and things of that nature, so I'm confident that he's well aware. That's something that I've impressed upon him, most importantly based on his request to go pro se, so . . .

THE COURT: So, there's a lot at stake here.

DEFENDANT: I understand that, sir.

...
...

[STATE]: Your Honor, might I make a record just (inaudible - away from mic)

THE COURT: Yes.

[STATE]: -- and as Your Honor stated, if convicted as charged, the Defendant would be facing of all counts 210 to 280 months on ISRB on the rape two, this is not a second strike, he has no prior –

THE COURT: Okay.

...
...

THE COURT: Well, let's have a little discussion about it. The first point she [(the State)] brought up was one that I was headed to, this is an ISRB case, you've had that explained to you?

³ Ms. Toth represented Belser and became his standby counsel when Belser began representing himself.

DEFENDANT: Yes, sir.

THE COURT: So, you understand that even if you were convicted and the Court sentenced you to something within the standard range, this Review Board could determine you still need to remain in custody.

DEFENDANT: I, I understand that.

THE COURT: Potentially up to life.

DEFENDANT: Yes, sir.

THE COURT: All right.

RP 30-34. The trial court also established that Belser had a Master's Degree in Education, warned him about the perils of proceeding pro se, explained to him that he would be held to the same rules as an attorney, to include the rules of evidence, and informed him of the limited role of standby counsel. RP 27-39, 44-46, 133-34.

Belser now claims that his "waiver of the right to counsel was not knowingly, voluntarily, or intelligently made" because the court "never informed [him] about . . . the maximum penalties if he was convicted" and "never advised [him] regarding the indeterminate sentence . . . or the potential for an exceptional sentence." Brief of Appellant at 8-9. These claims fail because Belser was adequately informed of the maximum sentence he faced upon conviction.

Criminal defendants have the right to represent themselves at trial under the Washington Constitution and the United States Constitution. *State v. Curry*, --- Wn.2d. ----, --- P.3d ----, 2018 WL 3911220, slip op. at 2 (citations omitted). In order for a defendant to represent himself at trial, otherwise known as proceeding pro se, the defendant must “unequivocally request” to do so and the trial court must “establish that a defendant . . . makes a knowing and intelligent waiver of the right to counsel.” *Id.* (citations omitted).

A “trial court’s decision to grant or deny a defendant’s request to proceed pro se” is reviewed for “abuse of discretion.” *Id.* at 3 (citing *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010)). Because the trial courts “have far more experience considering requests to proceed pro se and are better equipped to balance the competing considerations” a reviewing court must “give great deference to the trial court’s determination: even if [it] disagree[s] with the trial court’s ultimate decision.” *Id.*

When a defendant requests to proceed pro se the trial court must “indulge in every reasonable presumption against . . . [the] defendant’s request.” *Madsen*, 168 Wn.2d at 504 (citation and internal quotation omitted). The reasons for the presumption against self-representation at trial include that by invoking the right to represent oneself a defendant

necessarily waives “the right to counsel” and that a defendant’s lack of legal training may have a “detrimental impact on both the defendant and the administration of justice.” *Id.* at 503-04; *State v. Howard*, 1 Wn.App.2d 420, 424-25, 405 P.3d 1039 (2017).

After confirming, however, that a defendant unequivocally wishes to proceed pro se—a fundamental and longstanding right of an accused—the trial court must ensure that the defendant’s waiver of counsel is voluntary, knowing, and intelligent. *See Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *Howard*, 1 Wn.App.2d at 425. Essentially, the trial court must confirm that the defendant who chooses to proceed to trial without an attorney does so “with eyes open.” *Faretta*, 422 U.S. at 835.

The *preferred* “means of assuring that defendants understand the risks of self-representation,” i.e., that the waiver of counsel is voluntary, knowing, and, intelligent, is through a colloquy. *Howard*, 1 Wn.App.2d at 426 (quoting *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). “That colloquy, *at a minimum*, should consist of informing the defendant of the nature and classification of the charge, *the maximum penalty upon conviction* and that technical rules exist which will bind defendant in the presentation of his case.” *Id.* (emphasis in original) (quoting *Acrey*, 103 Wn.2d at 211). In the absence of a colloquy, “the

record *must reflect* that the defendant understood the seriousness of the charge, *the possible maximum penalty involved*, and the existence of technical procedural rules governing the presentation of his defense.” *Id.* at 427 (emphasis in original) (quoting *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991)). In *Howard*, this Court recently concluded that the “maximum penalty for the charged crime is essential information that a defendant needs in deciding whether to represent himself or herself” and that a defendant’s waiver of the right to counsel “is invalid if the trial court does not inform the defendant of the maximum penalty for the charged crime and the defendant is not otherwise aware of the maximum penalty.” *Id.* at 429.

Aside from being informed about the maximum penalty if convicted, however, “there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant.” *DeWeese*, 117 Wn.2d at 378 (citation omitted). Instead, the determination of whether a defendant’s waiver of counsel is valid “depends on the facts and circumstances of each case.” *Id.* (citation omitted). *People v. Jackio*, consistent with this State’s case law, persuasively explained why the maximum possible punishment is all that a defendant *need* be informed of in a multiple count case:

When a defendant represents himself, he may be acquitted, which means he will not be subject to punishment. On the other hand, he may be convicted of all the crimes charged, with true findings on all the enhancements. In that case, the court may impose the maximum punishment for the crimes and enhancements charged. Also, the jury may convict on some counts and acquit on others or convict of lesser included crimes, and the jury may do the same with the enhancement allegations. If the defendant is convicted and enhancements are found true, the court may strike or stay some of the punishment or select lower terms. In other words, a requirement that a trial court advise a defendant desiring to represent himself at trial of the full range of possible punishments would require the trial court to start with no punishment for acquittal and work its way through the virtually endless permutations and combinations of terms, ending with the maximum possible punishment. Merely to state it demonstrates the unworkability of requiring the court to advise the defendant as to every possible punishment.

Instead, the most reasonable solution consistent with case law and the United States Constitution is to require the trial court to advise a defendant desiring to represent himself at trial of the maximum punishment that could be imposed if the defendant is found guilty of the crimes, with enhancements, alleged at the time the defendant moves to represent himself. By so advising, the trial court puts the defendant on notice that, by representing himself, he is risking imposition of that maximum possible punishment. The defendant who decides to represent himself after this advisement proceeds with his “eyes open” and understands the dangers of self-representation, at least with respect to the possible punishment.

186 Cal.Rptr.3d 662, 669 (2015) (quoting *Faretta*, 422 U.S. at 835 and holding that an advisement that defendant could spend the rest of his life

in prison if convicted was sufficient to apprise him of the possible maximum sentence).

Here, contrary to Belser's claims, he was directly informed by the trial court that his maximum possible punishment was life in prison:

THE COURT: Well, let's have a little discussion about it. The first point she [(the State)] brought up was one that I was headed to, this is an ISRB case, you've had that explained to you?

DEFENDANT: Yes, sir.

THE COURT: So, you understand that even if you were convicted and the Court sentenced you to something within the standard range, this Review Board could determine you still need to remain in custody.

DEFENDANT: I, I understand that.

THE COURT: *Potentially up to life.*

DEFENDANT: Yes, sir.

RP 30-34 (emphasis added). Additionally, the record reflects that Belser had knowledge of the crimes with which he was charged and the standard range of confinement, if convicted as charged, for the headline charge of Rape of a Child in the Second Degree. RP 3-8,⁴ 33.⁵ Furthermore, during the colloquy his attorney explained to the trial court that they had gone over the stakes if he was convicted "at length, it was discussed, obviously

⁴ At Belser's first appearance the court read aloud the information and the record shows that after receiving a copy of the information that his attorney reviewed the information with him.

⁵ The State indicated on the record as part of the colloquy with Belser that he "if convicted as charged[,] . . . would be facing of [sic] all counts 210 to 280 months on ISRB on the rape two."

during plea negotiations . . . so I'm confident he is well aware." RP 27,⁶
31.

Consequently, Belser was informed by the trial court of the maximum penalty for his crime, the record shows that he was aware of the maximum penalty for his crime, and that he, therefore, knowingly, voluntarily, and intelligently waived his right to counsel.⁷ *Howard*, 1 Wn.App.2d at 429. Accordingly, the trial court did not abuse its discretion when it accepted Belser's waiver and allowed him to proceed to trial pro se.

II. Because some of Belser's conditions of community are impermissible, the State agrees that his case must be remanded to the trial court for those conditions to be stricken or revised.

Community custody conditions must be "crime-related" and constitutional. RCW 9.94A.030(1); *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Community custody conditions are unconstitutional when they are overbroad—the condition unlawfully prohibits a person from engaging in constitutionally protected activities—or vague—the condition does not sufficiently apprise the defendant of what conduct is

⁶ Belser's attorney explained that "[o]f course, I've cautioned him . . . especially based on the nature of the charges and seriousness of them."

⁷ Belser acknowledges that the "court asked [him] about his educational background, familiarity with the rules of evidence, motivation for self-representation, and understanding that neither the judge nor stand-by counsel would assist him at trial." Br. of App. at 8.

prohibited or allows for arbitrary enforcement. *State v. Halstien*, 122 Wn.2d 109, 121-23, 857 P.3d 270 (1993); *State v. Wallmuller*, --- Wn.App.2d ----, --- P.3d ----, 2018 WL 3737093 (2018).

Here, Belser argues that the community custody condition prohibiting him from possessing or consuming marijuana should be stricken as not crime-related. Br. of App. at 10-11. The State agrees. No evidence was presented at trial or sentencing that Belser used marijuana or provided marijuana to his victims before or during his crimes. *See* RP. The presentence investigation report did reference Belser using marijuana with a victim, but the source of this information was a police report that was not admitted into evidence. Belser properly objected to this information being considered at his sentencing. RP 864; CP 222. Consequently, the State agrees that his condition must be stricken as not crime-related.

Belser also argues that the condition prohibiting “[n]o unauthorized use of electronic media” is overbroad. Br. of App. at 12-14; CP 172. The State agrees that this condition cannot withstand constitutional scrutiny. Accordingly, this condition should be stricken or revised to be narrower in scope.

Finally, Belser argues that the conditions prohibiting him from entering into or frequenting establishments or areas where “minors

congregate” are unconstitutionally vague. Br. of App. at 15-16; CP 170, 172. The State does not agree with this contention.⁸ Due to the fact that a remand to the trial court is necessary for the purpose of addressing Belser’s other conditions, however, the State does not object to this Court remanding on this condition as well for the purposes of revising it. Revision seems especially prudent since Belser is subject to two different “minors congregate” conditions, which contain different and somewhat contradictory language. *Compare* CP 170 *with* CP 172.

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⁸ Conditions prohibiting defendants from being in areas where “minors congregate” have recently and frequently been challenged by defendants, which has resulted in divergent opinions on the constitutionality of said conditions depending on the exact language of conditions and the composition of the court reviewing the challenge. *See Wallmuller*, slip op. at 5-10 (Lee, J., concurring in part and dissenting in part) (cataloguing the recent cases in which the “minors congregate” condition has been challenged).

CONCLUSION

For the reasons argued above, this Court should affirm Belser's convictions and remand to strike or revise the community custody conditions about which he complains.

DATED this 24th day of August, 2018.

Respectfully submitted:

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