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Court of Appeals
Division II
State of Washington
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NO. 52279-9-II

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

STATE OF WASHINGTON, Respondent

v.

KEITH BERNARD THREATTS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01444-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Threatts' statements to police were voluntarily made and were properly admitted at trial.**
- II. **The evidence found in Threatts' apartment was lawfully discovered pursuant to a valid search warrant and the evidence was properly admitted at trial.**
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- IV. **Threatts received effective assistance of counsel.**
- V. **The State agrees that the record does not demonstrate that Threatts' waiver of counsel was made knowingly, intelligently, or voluntarily and therefore the matter should be remanded for a new sentencing hearing where Threatts has the opportunity to have counsel appointed.**
- VI. **This Court should remand the matter to the trial court for consideration of Threatts' ability to pay and for determination of whether Threatts has previously had a DNA sample taken pursuant to a felony conviction in this State.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Keith Threatts (hereafter 'Threatts') made his first appearance in Clark County Superior Court on allegations of Theft of a Firearm and Unlawful Possession of a Firearm on August 3, 2015. RP 1-5. The trial court appointed attorney Gerald Wear to represent Threatts. RP 2. Less than a year later, Threatts requested that the trial court appoint new

counsel, claiming his attorney was not on his same page. RP 17. The trial court then appointed attorney Art Bennett to represent Threatts. RP 17-18. A year after that, new counsel was appointed again, this time Therese Lavallee. RP 120-21. A little more than a year later, the court appointed Neil Cane to represent Threatts. RP 155-62. Two months after that, the court appointed Threatts' fifth attorney, David Kurtz. RP 179. Regarding the first three attorneys, Threatts indicated to the court at one point that communication broke down with all of them. RP 147. Threatts believed he wasn't hearing back sufficiently from his third attorney. RP 147. That attorney indicated there were some very concerning communications from Mr. Threatts to the point where Mr. Threatts was not allowed to come to her office and any civility from him was hampered. RP 147. Threatts was then appointed his fourth attorney on April 12, 2018, and by June 1, 2018 that attorney was moving to withdraw due to a complete breakdown in communication with Threatts. RP 165-167. That attorney indicated that he believed he would never be able to get through to Threatts about the case and about what needs to be done. RP 167. Threatts told the court he believed every attorney he had had did not want to do any work on the case, and did not want to do an investigation, and only wanted to talk to him about the State's evidence. RP 168. The fourth attorney told the court that Threatts was trying to direct his work as defense counsel and that

Threatts was incorrect with his desires on the case. RP 169. After attempting to work things out with Threatts, the fourth attorney, Mr. Cane, told the court that after meeting with Threatts for an hour, Threatts exploded, yelled at him, and scared him. RP 176. Threatts told the court that his attorney told him that the State was going to win and that they couldn't do certain things that Threatts wanted to do in his case. RP 176. The State noted for the court that it was concerned Threatts was intentionally creating conflicts with his attorneys in order to impact the trial date. RP 178. On June 7, 2018, the trial court appointed his fifth and last attorney, David Kurtz. RP 176-87.

At the readiness hearing the State confirmed that defense was not calling any witnesses; Mr. Kurtz confirmed the defense had no witnesses, but Threatts interjected that he wanted to call witnesses to attest that he did not do the crime, but his attorney indicated they were all character witnesses. RP 188-89. Mr. Kurtz indicated he was ready to proceed to trial. RP 188. At trial Mr. Kurtz noted he had had a long conversation with Threatts about his right to testify and the pros and cons of testifying. RP 432. Threatts chose not to testify. *Id.*

Threatts has represented himself before. RP 151. In February 2018, between his third and fourth attorneys, Threatts made mention that he may want to represent himself in his case. RP 151. The trial court confirmed

that he could be entitled to represent himself, but that he would have to follow the rules of procedure. RP 151. The court then asked Threatts if he had represented himself before and Threatts indicated that he had. RP 151-52. At the next hearing, Threatts clarified that he had represented himself on a misdemeanor charge in the past. RP 157. Threatts indicated to the court that his first three attorneys hadn't been "cooperating with [him]" or helping him. RP 157. The trial court told Threatts that his expectations of counsel were too high and that there wasn't an "attorney in town that[] [would] meet your expectations." RP 157. The judge questioned whether it was game playing or strategy on Threatts' part to cycle through attorneys and to have continued the case for so long. RP 162.

1. CrR 3.5 hearing

Prior to trial the court held a CrR 3.5 hearing, and a hearing pursuant to CrR 3.6 and a hearing on Threatts' motion to dismiss. At the CrR 3.5 hearing, Corporal William Pardue of the Vancouver Police Department testified that he responded to an incident on July 31, 2015 regarding an allegation of a theft of a firearm. RP 28. The reporting party, Mr. Nelson, indicated he suspected that Threatts had stolen his firearm because he was recently in Mr. Nelson's apartment, and during the 2-hour time frame in which the gun went missing, Threatts' hat showed up

unexplained inside Mr. Nelson's apartment. RP 28-30. Mr. Nelson also reported that he had attempted to telephone Threatts, but that Threatts was not answering his phone, which was unusual for him. RP 30-31.

Cpl. Pardue and Officer Chamblee responded to Threatts' residence at 11:46pm. RP 31. Cpl. Pardue knocked on the door; Threatts asked who it was from behind the closed door. RP 32. Cpl. Pardue responded that it was "Bill." RP 32. Threatts then answered the door, opening it. RP 32. Cpl. Pardue had Threatts' hat with him and told Threatts that he had his hat and asked if he would come outside to talk to him about it. RP 32, 50-51. Threatts then stepped outside. RP 32-33. Cpl. Pardue spoke calmly and did not order Threatts to do anything at this point. RP 33, 50. Once Threatts stepped outside, Cpl. Pardue told him that he was investigating the theft of a firearm from Michael's house. RP 34. Threatts became upset and said that they had roused him and lied to him and that Cpl. Pardue should have identified himself as an officer. RP 34. Threatts also indicated that his four-year-old son was inside with no one else. RP 35. When Cpl. Pardue explained the circumstances of why he was there, Threatts told Cpl. Pardue that he was at Mr. Nelson's residence that afternoon. RP 35. Cpl. Pardue asked for permission from Threatts to search his apartment for the firearm, but Threatts did not give permission to the police to search. RP 35. Threatts asked for a sergeant or a lieutenant

to come to the scene, so Cpl. Pardue had Sgt. Aaron Gibson come to the scene. RP 36. When Sgt. Gibson arrived, Cpl. Pardue told him what had transpired up until that point. RP 36. Cpl. Pardue told Threatts that he was free to leave, but that he could not go back inside the apartment, except to retrieve his son, until they had obtained a search warrant. RP 37, 52. Cpl. Pardue offered for Threatts to go inside to retrieve his son, but Threatts chose to stay outside and leave his son inside the apartment. RP 37, 53. Cpl. Pardue left the scene to go assist in authoring a search warrant affidavit and in applying for a search warrant. RP 36. Sgt. Gibson also told Threatts he was free to go and that the police could assist with getting his son and arrange for him to go somewhere else, but Threatts declined. RP 54. At this time, Threatts said that they would find the gun inside his residence. RP 54. At that moment, Officer Chamblee read Threatts his *Miranda* rights to him. RP 54. Post-*Miranda*, Threatts told Officer Chamblee that he went over to Mr. Nelson's house with his son and knocked on the door, but there was no answer. RP 56. Threatts said that when he turned back from the door he saw his son holding a gun. RP 56. Threatts indicated that he took the gun from his son and realized that it was real; he then put the gun in his pocket and left. RP 56. At this point, Threatts was no longer free to leave. RP 58.

While Cpl. Pardue was en route to the police station, he received a call from Officer Chamblee who told him that Threatts had said that when he was at Mr. Nelson's house the firearm was on a table outside and that Threatts had taken the firearm because it was "fair game." RP 39. Cpl. Pardue had this information included in the search warrant affidavit, and then Cpl. Pardue returned to Threatts' apartment about 45 minutes to 1 hour later. RP 40. When Cpl. Pardue returned, Threatts was sitting on the stairs outside the apartment, in handcuffs, with Officer Chamblee. RP 40. Officer Chamblee told Cpl. Pardue that he had informed Threatts of his *Miranda* warnings and that Threatts had indicated he understood them. RP 41. Cpl. Pardue confirmed with Threatts that he had had *Miranda* read to him and that he understood them. RP 41. Cpl. Pardue did not ask Threatts any questions. RP 41.

The trial court found that the police officers spoke to the defendant without use of any coercion and that Threatts spoke to them willingly. CP 136. The Court found that Threatts was not in custody, that neither officer placed a hand on Threatts and he was not placed in handcuffs at the time of his statements. CP 136. The Court found that the police told Threatts he was free to leave multiple times; police also told him that he could not re-enter his apartment, but could go to another location. CP 137. The Court found that police twice offered to go get Threatts' son from inside the

residence, but Threatts declined and asked police to get him a pair of shorts from inside his apartment instead. CP 137. The Court further found that the statements Threatts made about the gun being inside his residence occurred spontaneously and were not in response to any questioning from police. CP 137. Police then asked a clarifying question, and Threatts repeated that the gun was inside his apartment. CP 137. The Court found *Miranda* was then read to Threatts and Threatts was now “in custody.” CP 138. The Court found Threatts’ statements were voluntarily made, that he never requested an attorney and never indicated that he wished to terminate the discussion, and that the police never threatened or coerced Threatts. CP 138. Because Threatts was not in custody during the initial part of the conversation with police, the Court found that *Miranda* warnings were not required, and all the statements he made were admissible. CP 138. Thereafter, Threatts was properly *Mirandized* and knowingly, freely, and voluntarily, provided any additional statements to police; therefore any post-*Miranda* statements were admissible at trial. CP 138-39.

2. *Trial and Sentencing*

Threatts proceeded to trial on Theft of a Firearm and Unlawful Possession of a Firearm charges. CP 146. The State presented evidence

that Threatts was convicted of Assault in the Second Degree in 1996. CP 11; Ex. 17. The judgment entered in the 1996 Assault in the Second Degree case indicates that the defendant was present at sentencing, and the judgment indicates that Threatts may not own, use or possess any firearm unless his right to do so is restored by a court of record. Ex. 17. In addition, the fingerprints on the 1996 judgment match Threatts' fingerprints. RP 406-12. Threatts has also previously been convicted of Theft in the Second Degree in 1997. Ex. 20. The judgment and sentence in that case contains written notice that he was ineligible to possess a firearm. Ex. 20.

Michael Nelson met Threatts in 2015. RP 278. Threatts lived with Mr. Nelson for a two month period in mid-2015. RP 277-79. After Threatts moved out, he became aware that Mr. Nelson had a concealed weapons permit and was shopping for a handgun. RP 282-83. Mr. Nelson bought a handgun on July 30, 2015 and the next day he put it on a shelf in his garage. RP 282-86, 297-98. On July 31, 2015, Mr. Nelson's new handgun went missing while Mr. Nelson was taking a nap in the afternoon. RP 286-87. Mr. Nelson looked around for the gun, but couldn't find it anywhere. RP 287-88. While he was looking though, he found a hat that belonged to Threatts. RP 288. Mr. Nelson located the hat directly outside his front door. RP 289. After he found Threatts' hat, Mr. Nelson

tried calling Threatts on the phone. RP 290. Threatts did not answer Mr. Nelson's calls. RP 290. This was unusual as Threatts always responded to Mr. Nelson. RP 292. After that, Mr. Nelson called the police. RP 290. Corporal Pardue and Officer Chamblee went to Mr. Nelson's residence at approximately 10:30pm. RP 301, 325.

Mr. Nelson told police that he suspected Threatts took his gun as Threatts saw him while he was shopping for the gun the day before, and Threatts' hat showed up at Mr. Nelson's residence. RP 294. Police took the hat from Mr. Nelson and went to Threatts' apartment. RP 333, 358. At Threatts' apartment, Cpl. Pardue knocked on the door and said that he had a hat he wanted to return. RP 335, 359. From inside the residence, Threatts asked who it was; Cpl. Pardue responded that "it's Bill." RP 335, 359. Threatts opened the door and Cpl. Pardue told him that he had his hat and that they wanted to talk to him. RP 335. Threatts stepped outside and spoke with police. RP 335. The officers told Threatts that they found his hat at Mr. Nelson's residence; Threatts told police that the hat was his and that he had gone over to Mr. Nelson's residence earlier that day. RP 336-37, 360. Threatts told police no one was home so he left Mr. Nelson's residence. RP 362. Cpl. Pardue then asked Threatts if he had Mr. Nelson's firearm; Threatts denied that he did and became upset. RP 336. The police asked if they could search Threatts' residence for the gun, but Threatts

denied the request. RP 338. Threatts asked for a sergeant and a lieutenant to come to the scene; Sergeant Gibson came to the apartment. RP 338. After Sergeant Gibson arrived, Cpl. Pardue told Threatts he could not go back into his apartment as they were going to apply for a search warrant. RP 338.

Cpl. Pardue left Threatts' apartment and went to the police station to help prepare a search warrant and search warrant affidavit for Threatts' apartment. Officer Chamblee remained with Threatts while they waited for the officers to obtain a search warrant. RP 364. Officer Chamblee told Threatts he was free to leave and could take his son, who was asleep inside the residence, with him. RP 364. Threatts indicated he wanted to remain there. RP 366. While they were waiting outside Threatts' residence, Threatts spontaneously told police that the gun was inside his apartment and that the gun had been left on a table outside of Mr. Nelson's residence. RP 367. After that statement, Officer Chamblee read Threatts his *Miranda* rights. RP 367. Threatts then told police that he went to Mr. Nelson's house with his son and saw that his son had a gun in his hands. RP 368. Threatts said he took the gun from his son and put it in his back pocket and then left Mr. Nelson's residence. RP 368. He indicated that Mr. Nelson has memory problems and probably left the gun out on the porch

and forgot about it. RP 369. Threatts said he kept the gun because it was “fair game” since it was left on the porch. RP 369.

Officers returned with the search warrant and inside Threatts’ apartment they found Mr. Nelson’s gun and a magazine. RP 340, 380. The gun they found in Threatts’ apartment functioned properly. RP 378.

Threatts did not testify in his defense and did not offer any witnesses or evidence. RP 438. The jury returned verdicts of guilty on all three counts: Unlawful Possession of a Firearm in the First Degree, Unlawful Possession of a Firearm in the Second Degree, and Theft of a Firearm. CP 220-22.

At the sentencing hearing, Threatts expressed frustration with his trial counsel and indicated to the court that he wanted to proceed without his attorney. RP 530-33. The trial court asked if Threatts wanted the court to discharge Mr. Kurtz, and the trial court discharged him after Threatts indicated yes. RP 533. The court then sentenced Threatts to a standard range sentence. CP 230-39. The trial court imposed a \$200 criminal filing fee and a \$100 DNA collection fee after finding Threatts was not “indigent” as defined in RCW 10.101.010(3)(a)-(c). CP 233-36. Threatts then timely appealed his convictions and sentence. CP 244.

ARGUMENT

I. Threatts' statements to police were properly admitted at trial as they were voluntarily given while he was not in police custody.

- a. Use of a "ruse" did not render Threatts' statement involuntary.

Threatts claims the statements he made to police were not voluntary and therefore were improperly admitted at trial. These statements were voluntarily given and properly admitted at trial. Threatts' claim fails.

A trial court's determination that statements made by a defendant were voluntary will not be overturned if there is substantial evidence in the record from which the court could find voluntariness by a preponderance of the evidence. *State v. Reuben*, 62 Wn.App. 620, 624, 814 P.2d 1177, *rev. denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). The question to be answered is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined – a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." *Id.* (quoting *State v. Vannoy*, 25 Wn.App. 464, 467, 610 P.2d 380 (1980) (quoting *State v. Braun*, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973))).

Due process requires that a confession be voluntary and free of police coercion. *Reuben*, 62 Wn.App. at 624. Whether a confession is voluntary depends on a totality of the circumstances under which the statements were made. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). In considering whether statements were voluntary, a court considers the location, length, and continuity of an interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the *Miranda* warnings. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). This Court will not disturb a trial court's determination that statements were voluntary if there is substantial evidence in the record from which the trial court could have found voluntariness by a preponderance of the evidence. *Aten*, 130 Wn.2d at 664. Findings of fact entered following a CrR 3.5 hearing are verities on appeal if unchallenged. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Threatts does not challenge any findings of fact entered in this case, and they are therefore verities on appeal. The question therefore is whether the unchallenged findings support the conclusion of law the trial court entered. *State v. Burkins*, 94 Wn.App. 677, 695, 973 P.2d 15 (1999).

Threatts argues that his statements were not voluntarily made because police contact started with use of a ruse. Deception, by itself, does

not make statements to police inadmissible. *State v. Gilchrist*, 91 Wn.2d 603, 607, 590 P.2d 809 (1979). Instead, the question is whether the deception made any waiver of constitutional rights involuntary. *Id.* Thus, the question is, did the officer's response to Threatts' question of "who is it?" that "it [was] Bill" act to overbear Threatts' free will and will to resist and bring about a confession that was not freely self-determined? *Braun*, 82 Wn.2d at 161-62 (quoting *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961)). Our courts have frequently found use of deception, or ruses, to still lead to voluntarily-given confessions. "A confession has been held to be voluntary even though the suspect was falsely told that his polygraph examination showed gross deceptive patterns, or that a co-suspect had named him as the triggerman, or when police concealed the fact that the victim had died." *Braun*, 82 Wn.2d at 162 (citing *State v. Keiper*, 493 P.2d 750 (1972), *Commonwealth v. Baity*, 428 Pa. 306, 237 A.2d 172 (1968), and *People v. Smith*, 108 Ill.App.2d 172, 246 N.E.2d 689 (1969), *cert. denied*, 397 U.S. 1001, 90 S.Ct. 1150, 25 L.Ed.2d 412 (1970)).

In *Braun*, our Supreme Court addressed whether a confession was involuntary when it was induced by deceit. There, the defendant's co-defendant told him that the co-defendant was going to confess and that the State could use the co-defendant's confession against Braun at trial.

Braun, 82 Wn.2d at 161. The police had induced the co-defendant to share this inaccurate information with Braun in the hope it would induce Braun to confess. *Id.* The Supreme Court found that this deception did not make Braun's confession involuntary as there were no threats, coercion, or cajolery. *Id.*

Quite recently, in the unpublished decision of *State v. Clark*, 5 Wn.App.2d 1019 (unpublished, Div. 3, 2018)¹, Division 3 of this Court addressed the voluntariness of a confession given when police used deceptive tactics. There, the police lied to the defendant regarding DNA evidence in the State's possession. *Clark*, slip. op. at 2. On appeal, Clark argued that his confession was involuntary due to the lies told to him by the police. *Id.* In reviewing the issue, Division 3 of this Court considered that the police officers involved did not make any threats, promises, or inducements to compel the defendant to speak with them, that the defendant was free to leave during the interview, that he never asked for an attorney, and that he was *Mirandized*. *Id.*, slip op. at 3. In reviewing the issue, the Court was unpersuaded that the officers' lie about the DNA evidence "exerted great pressure" on Clark to confess. *Id.* The same is true

¹ GR 14.1 permits citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding precedent and may be given as much persuasive value as this Court sees fit.

here; while the police officer's potential ruse² may have helped get Threatts to open the door, he saw they were uniformed police officers the moment he opened the door and yet still chose to exit his residence and speak with officers. The officers told him on more than one occasion that he was free to leave, they did not make any threats, promises, or in any way coerce Threatts to speak. The moment Threatts was no longer free to leave he was *Mirandized*, and all subsequent statements were made after waiving his rights. In reviewing the totality of the circumstances it is clear that Threatts' statements were made voluntarily, without coercion. The State's burden is to prove voluntariness by a preponderance of the evidence. *Braun*, 82 Wn.2d at 162. Under this standard, and considering the trial court's findings as verities, it is clear that there was no coercion and Threatts' statements were made voluntarily, of his own free will. The trial court properly admitted the statements Threatts made to police.

- b. Threatts was not "in custody" when he initially spoke with police officers.

Threatts also argues that he was effectively seized by police while he was outside his residence speaking to them and that the officers' failure to *Mirandize* him renders his statements inadmissible. However, Threatts

² The police told no lies, only failed to identify themselves as police before the defendant opened his front door.

was not in custody and therefore his statements were properly admitted.

This claim fails.

The first requirement to invoke the need to inform a suspect of the *Miranda* warnings is custody. In *Miranda*, the U.S. Supreme Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To determine whether a situation is “custodial” as that word was intended in *Miranda*, the U.S. Supreme Court developed an objective test to apply: whether a reasonable person in a suspect’s position would have felt that his or her freedom was curtailed to the degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345(2004). Our State adopted this objective test in *State v. Short*, 113 Wn.2d 35, 775 P.2d 458 (1988). Our courts examine the totality of the circumstances to determine whether a suspect was in custody. *U.S. v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008).

Both the U.S. Supreme Court and our own state Supreme Court have found situations where an individual is not free to leave do not necessarily rise to the level of “custody” for purposes of *Miranda*. We are

reminded that *Miranda* was intended to inform a suspect of his or her rights when they are in the “coercive environment of police custody.” *Heritage*, 152 Wn.2d at 214. For example, *Terry* stops are not “custodial” as that term is defined for purposes of *Miranda*. *Berkemer*, 468 U.S. at 439-40; *State v. Hilliard*, 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977). In *Heritage*, our Supreme Court found that a defendant, a minor, was not in “custody” for *Miranda* purposes, when she was stopped by park security guards and asked questions. *Heritage*, 152 Wn.2d at 219. The Court found that a reasonable person in the defendant’s position would not have believed her freedom was curtailed to a degree analogous to arrest. *Id.*

In *Grogan*, the defendant was interrogated at a police station. In determining whether the defendant was in “custody” for *Miranda* purposes, the Court considered that the defendant came to the police station voluntarily, he was not handcuffed or arrested, and was allowed to leave. *State v. Grogan*, 147 Wn.App. 511, 195 P.3d 1017 (2008). The Court found the defendant was not in “custody” as there was no “formal arrest or restraint of the defendant to a degree consistent with a formal arrest.” *Id.* At 518 (quoting *State v. Rehn*, 117 Wn.App. 142, 69 P.3d 379 (2003)). As the defendant was not in “custody,” no *Miranda* warnings needed to be given. *Id.* The Court specifically stated, “[e]ven though [the

defendant] responded to police interrogation, he was not in custody. Thus, no *Miranda* warnings were required.” *Id.*

“Custody” also does not occur any time police contact an individual who is suspected of a crime or is the focus of a criminal investigation. *Beckwith v. U.S.*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). *Miranda* warnings are not required “simply because the questioning takes place at the station house, or because the questioned person is one whom the police suspect.” *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

In *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005), Division 3 of this Court held that a defendant who voluntarily exited a garage on his property to speak with a police officer was not in “custody” for *Miranda* purposes. There, the officer was investigating a possible poaching of an elk. *Id.* at 46. Information led the officer to the defendant’s residence; the officer drove down the defendant’s driveway and parked outside of a garage where the defendant was skinning an elk. *Id.* Upon the officer’s arrival, the defendant exited the garage and approached the officer and spoke with the officer about the elk. *Id.* The conversation was cordial and noncoercive and afterwards the defendant returned to his garage. *Id.* at 46-47. In analyzing whether the defendant’s statements during this conversation were properly admitted at trial, the appellate

Court found that the defendant was not in “custody” for *Miranda* purposes and was not in any way deprived of his freedom of action. *Id.* at 53.

An officer who approaches a suspect in public, detaining him for a *Terry* stop, and questions him about a crime does not put that suspect in “custody” for *Miranda* purposes. In *State v. Marshall*, 47 Wn.App. 322, 737 P.2d 265 (1987), an officer on patrol saw a man matching the description of a suspect in a rape investigation. *Marshall*, 47 Wn.App. at 323. The officer contacted the suspect and detained him for an investigatory stop, asking him a few questions. *Id.* The officer took the suspect’s driver’s license during the contact. *Id.* On appeal, Division 1 of this Court considered whether the suspect was in “custody” at the time that he made statements to the police officer who detained him for the investigatory stop. *Id.* at 325. Generally, *Terry* stops are not subject to the dictates of *Miranda* because they are comparatively nonthreatening in nature. *Id.* (citing *Berkemer*, 468 U.S. at 440; *State v. Bockman*, 37 Wn.App. 474, 682 P.2d 925, *rev. denied*, 102 Wn.2d 1002 (1984); *State v. Sinclair*, 11 Wn.App. 523, 523 P.2d 1209 (1974)). In finding the officer in *Marshall* properly stopped and detained the defendant for a short period of time, within the confines of a permissible *Terry* stop, the Court found that the defendant was not subjected to the “coercive pressures” associated

with formal arrest, and he was therefore not “in custody” when he spoke with the officer. *Id.* at 326.

Further, whether a police officer has probable cause to arrest, or an unstated plan to arrest or detain a suspect, has no bearing on whether the suspect was in “custody” for purposes of *Miranda*. See *State v. Lorenz*, 152 Wn.2d. 22, 93 P.3d 133 (2004). It is irrelevant to a “custody” analysis whether an officer’s unstated plan is to take a suspect into custody after speaking with him or her; it is also irrelevant to a “custody” analysis whether the person interrogated is the focus of a police investigation at the time of the interrogation. *Lorenz*, 152 Wn.2d at 37. Instead, our Supreme Court stated that “[i]n order for there to be custody, a reasonable person in [the defendant’s] position would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest.” *Id.* A suspect’s psychological state is not the critical inquiry in a “custody” analysis. *State v. Sargent*, 111 Wn.2d. 641, 762 P.2d 1127 (1988). Instead, the critical inquiry focuses on whether a reasonable person in the suspect’s position would have felt that his or her freedom was curtailed to the degree associated with formal arrest. See *Heritage*, 152 Wn.2d at 218.

Threats came outside of his residence, on a landing in his apartment complex, with two police officers. He was not in handcuffs and he voluntarily agreed to speak to police. His freedom of movement was

not curtailed and he was free to leave and he was told he was free to leave. Based on legal precedent available to this Court, it is clear that Threatts was not in “custody” at the time he initially spoke with police. Accordingly, *Miranda* warnings were not required and the trial court properly ruled that the statements were admissible at trial. Threatts’ claim fails.

II. The Search Warrant was properly issued and the evidence obtained therefrom was properly admitted at trial.

Threatts argues that the search warrant was invalid and lacked probable cause because police officers included information learned from Threatts in the search warrant affidavit. Threatts argues the statements he made were illegally obtained and therefore invalidate the search warrant. However, the information was properly included in the search warrant and the statements’ inclusion does not invalidate the search warrant.

As discussed in the preceding section, the statements Threatts made to law enforcement were lawfully obtained, and were voluntarily made, and therefore they were properly included in the search warrant affidavit. However, even if this Court finds they were not properly included, the search warrant still contained probable cause to search the defendant’s residence for the gun and therefore the search warrant was still valid.

When a search warrant affidavit contains information that was obtained in violation of an individual's constitution rights, the reviewing court must determine if probable cause exists in the absence of the illegally obtained information. *State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987). After excising the information, it is appropriate to consider the affidavit anew and determine if probable cause is established. *See id.* An affidavit establishes probable cause to support a search warrant if it sets forth facts sufficient to allow a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Johnson*, 75 Wn.App. 692, 709, 879 P.2d 984 (1994). In Threatts' case, even in excising Threatts' statements to police from the search warrant affidavit, there remains probable cause to issue the search warrant.

The search warrant affidavit still contained information that established probable cause that Mr. Nelson's firearm was taken from his residence without his permission. CP 19-20. In addition, the affidavit indicated that Mr. Nelson believed that Threatts, a friend of his, had taken the firearm because Threatts' hat was on a table at the front of Mr. Nelson's residence and the hat appeared during the time frame when the theft occurred, and also because Mr. Nelson had attempted to contact Threatts and Threatts was not answering his calls and did not call him

back, something which was unusual for their relationship. CP 20. The fact that Threatts' hat appeared at Mr. Nelson's residence during the same short time frame during which his firearm was stolen, and there was no reason that Threatts' hat would be at Mr. Nelson's residence, shows that Threatts was likely present at Mr. Nelson's residence, when Mr. Nelson wasn't there, and during a time when Mr. Nelson's firearm was stolen. The affidavit also contained information that Threatts was aware that Mr. Nelson had just purchased a firearm. CP 19-20. Those facts combined with Threatts silence in response to Mr. Nelson's attempt to contact him, unusual behavior, is sufficient to establish probable cause that Threatts was the person who stole the firearm and therefore probable cause that the firearm would be with Threatts at his residence at the time the search warrant affidavit was authored, very shortly after the theft occurred. Therefore, even if this Court were to find that the statements were improperly obtained, the search warrant affidavit still establishes probable cause and therefore the search warrant was valid and the evidence was properly admitted at trial.

III. The defendant was notified he could not possess a firearm and he therefore did not establish the affirmative defense pursuant to RCW 9.41.047.

Regarding his unlawful possession of a firearm conviction, Threatts claims that he was not present when the trial court sentenced him on his

underlying Assault in the Second Degree conviction and that he never received a copy of the judgment and sentence. Despite this contention, however, the State presented evidence to the contrary which rebutted his affirmative defense. In viewing the evidence in the light most favorable to the State in this claim of insufficient evidence, it is clear that the State did establish sufficient evidence to overcome Threatts' claim in his affirmative defense. This Court should reject Threatts' claim that he was not notified of the prohibition against possessing firearms.

While Threatts does not characterize it as such, what he actually raises in this appeal is an issue of sufficiency of the evidence for proving an affirmative defense. *See State v. Mitchell*, 190 Wn.App. 919, 928, 361 P.3d 205 (2015). Affirmative defenses are reviewed for sufficiency of the evidence, though in Threatts' case he did not offer any evidence to support or sustain an affirmative defense and the jury was not instructed on such. *See State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996). In determining whether a defendant presented sufficient evidence of an affirmative defense, the reviewing Court views the evidence in the light most favorable to the State, and determines whether a rational trier of fact could have found the defendant failed to prove the defense by a preponderance of the evidence. *Id.* Threatts' claim can be taken as an argument that no reasonable juror could have concluded that he had

written and oral notice of the firearm prohibition, had the jury been instructed to consider such a claim. *See Mitchell*, 190 Wn.App. at 928.

RCW 9.41.047(1)(a) states:

At the time a person is convicted ... the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record.

RCW 9.41.047(1)(a). In order to prevail on an affirmative defense of lack of statutory notice, a defendant “must show that when they were convicted of the prior offense, they did not receive either oral or written notice that it was illegal for them to own a firearm.” *State v. Serrano Berrios*, 194 Wn.App. 1024 (Unpublished, Div. 3, 2016) (citing *State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011)).³ In *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008) our Supreme Court held that the appropriate remedy for violating RCW 9.41.047(1)(a) by failing to give either written or oral notice of the firearm prohibition was reversal of a current conviction for unlawful possession of a firearm when the court on the predicate offense had not followed the requirements of RCW 9.41.047(1)(a). *Minor*, 162 Wn.2d at 804. Then in *Breitung*, our Supreme Court affirmed the Court of Appeals which had held that,

³ GR 14.1 permits citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding precedent and may be given as much persuasive value as this Court sees fit.

‘...where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart, the defendant’s subsequent conviction for unlawful possession of a firearm is invalid and must be reversed.’

Breitung, 173 Wn.2d at 402 (quoting *State v. Breitung*, 155 Wn.App. 606, 624, 230 P.3d 614 (2010)). Additionally, the Court held that lack of notice must be established by the defendant as an affirmative defense. *Id.* at 403. To rebut the defense, the court placed the burden on the State to establish the defendant had otherwise acquired actual knowledge. *Id.* at 402-04. Thus, if a court in the underlying predicate offense did fail to advise the defendant, either orally or in writing, of his inability to possess a firearm, the State can overcome the lack of notice affirmative defense by presenting other evidence of actual knowledge of the firearm prohibition. *State v. Garcia*, 198 Wn.App. 527, 535-36, 393 P.3d 1243 (2017).

Here, the State showed that Threatts received “either oral or written notice” by proving that he received written notice. The State introduced the judgment and sentence on Threatts’ prior Assault in the Second Degree conviction into evidence. EX. 17. This document had Threatts’ fingerprints on it and indicated that Threatts was present in court when it was entered. *Id.* The document indicates:

FIREARMS: PURSUANT TO RCW 9.41.040,
YOU MAY NOT OWN, USE OR POSSESS ANY
FIREARM UNLESS YOUR RIGHT TO DO SO IS
RESTORED BY A COURT OF RECORD.

EX. 17. While Threatts is correct that the record is silent regarding oral notice, this does not establish his affirmative defense. *See Mitchell*, 190 Wn.App. at 929. Threatts would still have maintained the duty of establishing his defense by a preponderance of the evidence. *Breitung*, 173 Wn.2d at 403. While Threatts testified that he did not receive any notice regarding his right to possess a firearm, “[t]he jury was free to make its own judgment as to whether [his] statements were credible.” *Id.* The jury clearly rejected Threatts’ version of events and found he was not credible and had not proven his affirmative defense by a preponderance of the evidence.

In *Mitchell*, the defendant was convicted of unlawful possession of a firearm. *Mitchell*, 190 Wn.App. at 922. He claimed at trial that he was not given notice under RCW 9.41.047(1). *Id.* at 923. On appeal, the Court reviewed the sufficiency of his affirmative defense. *Id.* at 928. The Court noted that the State presented evidence that the defendant received written notice by introducing into evidence the statement of defendant on plea of guilty from the underlying conviction. *Id.* That document was signed by the defendant and acknowledged the consequences of a guilty plea,

including that he would lose the right to own or possess firearms. *Id.* at 929. In addition, the document contained brackets around that statement that indicated “[JUDGE MUST READ THE FOLLOWING TO OFFENDER].” *Id.* The disposition order was also entered into evidence and this also notified the defendant that he could not possess firearms; this document was also signed by the defendant. *Id.* While the Court noted that this evidence, as presented by the State, did not establish that the defendant received oral notice of the prohibition against possessing firearms, this did not establish his affirmative defense. *Id.* It is the defendant’s obligation to establish that he did not receive oral notice and that he did not receive written notice pursuant to RCW 9A.04.047(1) by a preponderance of the evidence. *Id.* The burden is not on the state in this situation. *See id.* Therefore the jury could determine the credibility of the defendant and his memory that he was not given oral notice, but under a sufficiency of the evidence standard, viewing the evidence in the light most favorable to the State, the jury was free to disbelieve the defendant. *Id.* at 930. As the jury was free to disbelieve the defendant, the Court on appeal rejected his challenge to the sufficiency of the evidence on his affirmative defense, and the Court affirmed his conviction.

The same is true in Threatts’ case: the jury would have been free to disbelieve his version of events that he was not present in the courtroom

and failed to receive any kind of notice. The State introduced evidence at trial that Threatts was given notice of the prohibition against possessing firearms when the court in the predicate offense entered a judgment, when he was present in court, that advised him he was barred from possessing firearms. The court in the predicate offense did satisfy the requirements of RCW 9.41.047(1). While Threatts could have presented evidence to raise the affirmative defense, the jury would have likewise been free to find he was not credible and to find that he was notified and therefore was guilty of the crime of unlawful possession of a firearm. Based on the evidence, it is clear the State did present evidence from which the jury could have found Threatts was properly informed that possession of firearms was unlawful. Threatts was properly convicted and his conviction should be affirmed.

IV. Threatts received effective assistance of counsel.

Threatts argues that his attorney was ineffective at trial, arguing that because the attorney who represented him at trial had only been appointed 23 days prior to trial that he could not have been effective. Threatts also argues that his attorney was not in sufficient communication with him and that he did not inquire sufficiently into an issue that arose with a juror. Threatts cannot show his attorney was deficient in his performance or that

any of his attorney's conduct prejudiced him. Accordingly, Threatts' ineffective assistance of counsel claim should be denied.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

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

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)

(stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

It is important to note that the attorney who represented Threatts at trial was not the first, second, third, or even fourth attorney appointed on Threatts' case. While the last attorney was appointed a little more than a

month before trial,⁴ Threatts had had the benefit of effective assistance of counsel through the entire pendency of his case, which due to Threatts' requests, took nearly three years to proceed to trial. All attorneys communicated with him, to the best of their ability before Threatts became intimidating and engaged in inappropriate communications with his attorneys; one attorney filed a motion to suppress and a motion to dismiss, another attorney handled those hearings, and pretrial interviews were done and recorded so that other attorneys had the benefit of those interviews. This was a case that essentially amounted to a he said/he said with no eye-witnesses to the crime and circumstantial evidence (Threatts' hat) to corroborate the victim's suspicions and Threatts' confession. While it is true that the right to effective assistance of counsel includes time for trial preparation, *see State v. Sain*, 34 Wn.App. 553, 558, 663 P.2d 493 (1983), Mr. Kurtz never indicated to the court that he was not prepared for trial. In addition, his performance at trial shows that he was prepared: he made proper objections, he had a theory of the case that he wove throughout trial, and he was prepared for his cross-examinations of State's witnesses. There is nothing to indicate that Mr. Kurtz was unprepared except for Threatts' allegation.

⁴ While Threatts indicates in his brief that his attorney was appointed 23 days prior to trial (*See Br. Of Appellant*, p. 37-38), Mr. Kurtz, Threatts' trial attorney, was appointed on June 7, 2018 (RP 176-87) and trial was held on July 9, 2018 (RP 274) and thus there was a time period of 32 days between Mr. Kurtz's appointment and trial.

Defense counsel's performance is presumed effective, and Threatts' theory that the short period of time between counsel being appointed and going to trial necessarily means he was unprepared is simply not supported by reality. A month is sufficient time to prepare for trial in some cases, especially when you're the fifth attorney on board a case in which all the pretrial motions have already been litigated. It is also worth noting that it appears the majority of Threatts' attorneys had the same theory on his case, and attempted to counsel Threatts on the strength of the State's case and the inability of defense to offer certain witnesses.

In the unpublished case of *State v. Barbaro*, 188 Wn.App. 1063 (unpublished, Div. 2, 2015),⁵ this Court addressed whether the trial court violated the defendant's Sixth Amendment rights by denying him and his attorney adequate time to consult and prepare for trial. *Barbaro*, slip. op. at 2. This Court noted that in arguing that his attorney needed more time to prepare for trial, Barbaro failed to explain "what other defense, if any, was available[.]" and that "consequently, [Barbaro] [could] not show prejudice from the denial of the continuance." *Id.* Barbaro also failed to show that the result of the trial would have been different had a continuance been granted. *Id.* The same is true in Threatts' case. Threatts does not claim any

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other defense would have been available had his attorney had more than 32 days to prepare for trial, and does not explain how or why the result of the trial would have been different had his attorney had more than 32 days between being appointed and proceeding to trial. Threatts has not shown that he was prejudiced by his attorney's actions or performance at trial. Threatts does not point to any decision, action, or inaction on the part of his lawyer that can be blamed on lack of preparation, or that altered the outcome of the case. Accordingly, Threatts cannot meet his burden of showing prejudice and therefore cannot sustain a claim of ineffective assistance at trial.

Threatts also claims that his attorney was ineffective for failing to make a meaningful inquiry regarding juror 8 who notified a bailiff that he thought he had previously had contact with one of the state's witnesses, Corporal Pardue, at a barbeque. Mr. Kurtz did inquire into the juror's potential contact with the state's witness and determined that the juror would not give additional weight to the witness's testimony due to his potential interaction with the witness. Threatts cannot show deficient performance or prejudice regarding this issue.

In addition to the information the prosecutor elicited from juror 8, Mr. Kurtz inquired into further details regarding juror 8's wife's relationship with the man at the barbecue's wife and he learned more

details about the substance of the conversation between juror 8 and the man at the barbeque, to the extent that the man at the barbeque said he had “minimal training,” and further confirmed that the juror would not find the Cpl. Pardue more credible because he believed him to be the man at the barbeque. *See* RP 426-27. Mr. Kurtz then made a strategic decision to question juror 8 no further and not to object to juror 8 remaining on the jury. *Id.* Reasonable strategic decisions cannot be a basis for ineffective assistance of counsel claims. *Flores-Ortega*, 528 U.S. at 481. Here, Threatts cannot show that Mr. Kurtz’s performance during this portion of the trial was not strategic. It’s possible that juror 8 was one of Mr. Kurtz’s preferred jurors, one whom he believed he had won over, in addition, that juror indicated that the officer had admitted he had received only “minimal training,” something that could only be good information for defense. In addition, the juror indicated he would not put Cpl. Pardue’s testimony above anyone else’s and would not find the corporal more credible because of that interaction. This did not give Mr. Kurtz a reasonable basis to object to the juror’s continued presence on the jury, as the juror could be unbiased, and there is no requirement that attorneys make all possible objections or motions in order to be effective. An attorney need not make frivolous objections. In addition, because the juror properly remained on the jury, Threatts cannot show any prejudice from

his attorney's performance on this issue. The juror indicated he could remain unbiased and neutral and even if Mr. Kurtz had inquired further or objected, the trial court would have left the juror on the jury as he promised he could remain neutral and unbiased. Threatts has not sustained his burden of showing ineffective assistance of counsel. This claim fails.

V. The State agrees that the record does not demonstrate that Threatts' waiver of counsel was made knowingly, intelligently, or voluntarily and therefore the matter should be remanded for a new sentencing hearing where Threatts has the opportunity to have counsel appointed.

Threatts argues that the trial court conducted an insufficient colloquy regarding his rights to counsel and to proceed pro se and therefore his waiver of counsel for sentencing was not knowingly, voluntarily, and intelligently made. The State agrees that the trial court's colloquy was insufficient and therefore the matter should be remanded for a new sentencing hearing.

A defendant has a constitutional right to proceed without counsel as long as his constitutional right to counsel is knowingly, intelligently, and voluntarily waived. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). A defendant's waiver of right to counsel must be unequivocal. *State v. DeWeese*, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991). A defendant's waiver of counsel "must be unequivocal in the

context of the record as a whole.” *State v. Modica*, 136 Wn.App. 434, 441, 149 P.3d 446 (2006), *aff’d*, 162 Wn.2d 1001, 175 P.3d 1093 (2007). This Court reviews a trial court’s decision on a request to proceed pro se for an abuse of discretion. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995).

While a colloquy on the record which includes informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist which will bind a defendant in the presentation of his case is the preferred method of assuring a defendant’s waiver of right to counsel is made knowingly, voluntarily, and intelligently, it is not required. *Acrey*, 103 Wn.2d at 211. When no such colloquy exists, a reviewing Court should look at any evidence on the record that shows the defendant’s actual awareness of the risks of self-representation. *Id.* The record also must somehow show that the defendant understood the seriousness of the charges and knew the possible maximum penalty. *Id.* The record also must show the defendant is aware that there are technical rules that go along with presenting one’s case. *Id.* In Threatts’ case, the trial court asked Threatts if he wanted the court to discharge his attorney, yet another attorney he was unhappy with, and Threatts responded “yeah, I need him –I need him discharged as my attorney.” RP 533. The trial court did not engage in any further colloquy,

did not inform Threatts of the possible maximum penalty of the crimes he faced sentencing on, did not discuss that there were technical issues that an attorney may be aware of that Threatts may not understand, or in any other way ensure that Threatts understood the risks of self-representation. The State agrees with Threatts that the trial court did not engage in a sufficient colloquy about proceeding pro se, and there is no evidence in the record to establish that Threatts understood the maximum penalty or that he was aware of any technical issues regarding sentencing that an attorney may be aware of and able to assist him with. Accordingly, the trial court erred in releasing Mr. Kurtz from the case without a sufficient colloquy with Threatts on his rights to counsel and self-representation.

As the trial court erred in allowing Threatts to proceed pro se without a sufficient colloquy, the matter should be remanded for a new sentencing hearing at which time Threatts is either appointed counsel, or allowed to proceed pro se after a sufficient colloquy is performed on the record.

VI. This Court should remand the matter to the trial court for consideration of Threatts' ability to pay and for determination of whether Threatts has previously had a DNA sample taken pursuant to a felony conviction in this State.

Threatts alleges the trial court improperly imposed the \$200 filing fee and \$100 DNA fee as he was indigent and, he argues, has previously had his DNA collected. While the trial court found Threatts was not "indigent," the court did not engage in an inquiry into Threatts' ability to pay. Accordingly, the LFOs should be stricken and the matter remanded to the trial court for a proper inquiry into Threatts' ability to pay.

Amendments to several LFO statutes went into effect on June 7, 2018, before Threatts proceeded to trial. LAWS OF 2018, ch. 269. These amendments, made through House Bill 1783, changed the absolute mandatory nature of the criminal filing fee. Threatts claims he was indigent, but does not demonstrate that he was "indigent" as that term is defined for the criminal filing fee LFO. Threatts' argument that the decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) should result in this Court striking the criminal filing fee is incorrect. Instead, this matter should be remanded for a full inquiry into Threatts' ability to pay pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The main effect of House Bill 1783 was the amendment to RCW 10.01.160(3), which changed the standard of imposing costs on a criminal

defendant from only imposing them if a defendant had an ability to pay now or in the future, to prohibiting imposition of costs if the defendant meets the definition of “indigent” set forth in RCW 10.101.010(3)(a)-(c).⁶ The only costs that RCW 10.01.160 applies to are those specially incurred by the state in prosecuting the defendant or in administering a deferred prosecution or for pretrial supervision. RCW 10.01.160(2). This statute also specifically includes costs imposed under RCW 10.46.190 within its application, but does not include fees for DNA, the criminal filing fee, the crime laboratory fee, the domestic violence fee, the domestic violence contact order violation fee, or the victim assessment fee. The holding in *Ramirez* does not support Threatts’ argument that the criminal filing fee assessed in his case should be stricken, without remand, due to indigency.

At the sentencing hearing, neither party discussed, nor did the trial court discuss how or why Threatts was not indigent. The trial court clearly entered a finding that Threatts was not “indigent” as defined in RCW

⁶ “Indigent” is defined in RCW 10.101.010(3)(a)-(c) as:

(3) “Indigent” means a person who, at any stage of a court proceeding, is:

- (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans’ benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or
- (b) Involuntarily committed to a public mental health facility; or
- (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;....

10.101.010(3)(a)-(c). CP 233. Not every definition of indigency is covered by the amendments to the LFO statutes. While Threatts now claims he is indigent in his appeal, he does not indicate pursuant to which subsection of RCW 10.101.010(3) he qualifies.

Had the trial court found Threatts indigent as defined by RCW 10.101.010(3)(a)-(c), then the trial court was prohibited from imposing certain costs. However, the trial court specifically found Threatts was not indigent pursuant to RCW 10.101.010(3)(a)-(c) and therefore it was permitted to impose costs after considering Threatts' ability to pay. In this case, however, the trial court did not inquire into Threatts' ability to pay as required by *Blazina, supra*.

a. Criminal Filing Fee

House Bill 1783 amended RCW 36.18.020(2)(h), changing the criminal filing fee from a mandatory fee to a fee which shall be assessed unless the defendant is "indigent" as defined in RCW 10.101.010(3)(a)-(c). Therefore, when the superior court now sentences a defendant, the court shall impose the filing fee unless the defendant is "indigent" as defined in RCW 10.101.010(3)(a)-(c). However, the trial court has never found that Threatts meets the definition of "indigent" under RCW 10.101.010(3)(a)-(c). Therefore, the amendments to the statute do not

prohibit the trial court from imposing the criminal filing fee in Threatts' case.

However, a trial court must conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay discretionary LFOs. *Ramirez*, 191 Wn.2d at 742 (citing *Blazina*, 182 Wn.2d at 827). This inquiry must consider factors such as incarceration and other debts the defendant may have. *Id.* In *Ramirez*, the Supreme Court found the trial court's inquiry into the defendant's ability to pay was insufficient when the trial court only confirmed with the State that the defendant had the ability to make money and to make period payments on his LFOs when he was not incarcerated. *Id.* at 742-43. The Court in Threatts' case performed less of an inquiry (in fact performed no inquiry) than the trial court did in *Ramirez*. The Court in Threatts' case did not inquire into Threatts' employment, his income, his debts, or his expenses. Under *Blazina, supra* and *Ramirez, supra*, this inquiry was insufficient. Accordingly, the matter should be remanded for resentencing on the issue of legal financial obligations.

b. DNA fee

House Bill 1783 did amend RCW 43.43.7541, which governs imposition of a DNA fee. The bill amended the statute to make the

imposition of the fee contingent upon whether the State has previously collected the defendant's DNA as a result of a prior conviction. RCW 43.43.7541. Threatts has alleged his DNA must have previously been collected as he has prior felony convictions. While this may be true, there is nothing actually in the record to show that Threatts' DNA was actually collected on those previous cases, and as they are over 20 years old, it may be possible that his DNA was not collected. The trial court did not make a finding regarding whether Threatts has previously had DNA collected. If he has, the State agrees the imposition of the DNA fee was improper. However, it is improper to presume that his DNA has been collected without evidence to support that. Accordingly, this Court should remand the matter for the trial court to determine whether Threatts has previously had his DNA collected pursuant to a prior conviction in this State. If he has, the trial court should strike the DNA fee. RCW 43.43.7541. If Threatts has not previously had his DNA collected, then the fee is mandatory and is not waivable due to indigency pursuant to RCW 43.43.7541.

CONCLUSION

Threatts has not sustained his burden of showing he was denied effective assistance of counsel. In addition, the State did present sufficient

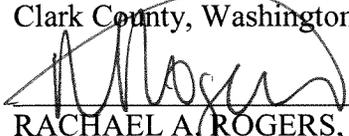
evidence of the crime of Unlawful Possession of a Firearm and Threats' conviction should be sustained, and the trial court properly admitted his statements made to police as they were made voluntarily at a time when Threats was not in police custody, and additional statements were made after a knowing, intelligent, and voluntary waiver of *Miranda* had been made. However, the trial court erred in allowing Threats to proceed pro se without engaging in a sufficient colloquy on the record. Therefore this matter should be remanded for a new sentencing hearing at which point Threats may be re-appointed counsel or allowed to proceed pro se after a sufficient colloquy is done.

DATED this 14th day of June, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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