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Court of Appeals
Division II
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No. 52362-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PALMER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRAYS HARBOR COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Palmer did not waive or forfeit his constitutional right to counsel. Because he was improperly forced to represent himself, the convictions must be reversed.

a. The waiver by conduct doctrine does not apply because the trial court did not warn Mr. Palmer about the risks of self-representation or that he would lose his right to counsel if he engaged in specific misconduct.

Under the state and federal constitutions, criminal defendants have a fundamental right to defend by counsel and, if indigent, to have counsel appointed at public expense. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996).

A person may give up their right to counsel in three ways. First, after being provided sufficient warnings by the court, one may knowingly, intelligently, and voluntarily waive this right. Id. at 855-56. Second, in very limited circumstances, a defendant may involuntarily forfeit their right to counsel by engaging in serious misconduct. Id. at 858-59. And third, the defendant waives their right to counsel through conduct if the defendant engages in specific misconduct that the court warned would result in waiver, and the defendant was also aware of the risks of self-representation. Id. at 859.

In this case, the trial court never warned Mr. Palmer of the risks of self-representation. Br. of App. at 20-26, 30-32. Neither did the court warn

Mr. Palmer that if he engaged in specific misconduct, he would lose his right to counsel. Br. of App. at 20-26, 30-32. Still, after permitting counsel—David Arcuri—to withdraw from his representation of Mr. Palmer, the court refused to appoint new counsel. The court reasoned Mr. Palmer had waived his right to counsel by naming his attorney as a defendant in a lawsuit against Grays Harbor County. Because Mr. Palmer did not waive or forfeit his constitutional right to counsel, his convictions must be reversed.

The prosecution appears to largely agree on the relevant legal framework. The prosecution does not contend that Mr. Palmer voluntarily waived his right to counsel. Neither does the prosecution contend that Mr. Palmer involuntarily forfeited his right to counsel. Rather, the prosecution contends Mr. Palmer waived his right to counsel by his conduct. Br. of Resp't at 14-15.

The prosecution is incorrect that the waiver by conduct doctrine applied for at least two reasons. First, the record does not show that Mr. Palmer was warned by the court of the dangers of self-representation. There was no on-the-record colloquy with Mr. Palmer concerning the risks of self-representation. And the record does not show he was warned about the maximum possible penalties for the charged offenses, which is essential information for a voluntary waiver. State v. Howard, 1 Wn. App.

2d 420, 429-30, 405 P.3d 1039 (2017). The prosecution does not argue otherwise.

Second, the waiver by conduct doctrine does not apply because the record does not show that Mr. Palmer was warned by the court that a particular action would result in waiver. The prosecution asserts that the court warned Mr. Palmer that David Arcuri would be his final attorney. Br. of Resp't at 6, 15. The record does not show this. In support of its contention, the prosecution cites an order setting trial date, filed on March 12, 2018. Br. of Resp't at 6; CP 471. But this document does not support the prosecution's contention. CP 471. And the transcript from the proceedings on March 12, 2018 do *not* show that the court warned Mr. Palmer that he would not be appointed a new attorney if Mr. Arcuri withdrew. 3/12/18 RP 34-35.

Further, such a warning would be inadequate. There must be a warning that specific misconduct will result in waiver. United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995) (“waiver by conduct” requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se”). Here, there was no warning from the court, let alone a warning that Mr. Palmer would lose his right to counsel if he alleged his court-appointed attorney was ineffective or if he named his attorney in a lawsuit. And in any event, it is doubtful

that seeking redress in the courts for violation of one's constitutional rights could be labeled misconduct. Filing a complaint or lawsuit naming one's attorney does not mandate withdrawal by the attorney. State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986); Carter v. Armontrout, 929 F.2d 1294, 1300 (8th Cir. 1991); see State v. Fualaau, 155 Wn. App. 347, 361, 228 P.3d 771 (2010).

Because the record does not show that Mr. Palmer was aware of the risks of self-representation or that the trial court warned Mr. Palmer that naming his attorney in a lawsuit would result in waiver of his right to counsel, the waiver by conduct doctrine does not apply. State ex rel. Schmitz v. Knight, 142 Wn. App. 291, 296, 174 P.3d 1198 (2007); Br. of App. at 29.

The prosecution contends this case is similar to State v. Afeworki, 189 Wn. App. 327, 358 P.3d 1186 (2015). In that case, the record established that the defendant "engaged in misconduct that caused the court to warn him that, if he engaged in further misconduct that caused his attorney to seek to withdraw, he would be required to proceed pro se." Afeworki, 189 Wn. App. at 347. Despite the warning, the defendant engaged in further misconduct that caused counsel to seek to withdraw. Id. The record also showed that the court had warned the defendant of the risks of self-representation, including providing the essential information

about the maximum penalties the defendant faced. Id. at 347-49.

None of this occurred in Mr. Palmer's case. Without the requisite warnings and showing that Mr. Palmer was aware of the risks of self-representation, the waiver by conduct doctrine did not apply. The trial court erred in ruling otherwise.

The prosecution cites several cases involving denials of a defendant's request to substitute or appoint a new attorney. Br. of Resp't at 12; Wheat v. United States, 486 U.S. 153, 154, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); State v. Staten, 60 Wn. App. 163, 168, 802 P.2d 1384 (1991); State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986).

Those cases are inapposite because they involve different alleged errors. The error in this case is the trial court's ruling that Mr. Palmer waived his right to counsel by his conduct.

b. The prosecution improperly makes assertions that are unsupported by the record. These assertions should be disregarded.

It is well established that appeals are decided based on the "record on review." RAP 9.1(a). "Matters referred to in the brief but not included in the record cannot be considered on appeal." State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982). "Allegations of fact without support in the record will not be considered by an appellate court." Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 513, 857 P.2d

283 (1993).

Relatedly, the rules of appellate procedure require that “each factual statement” be supported by a citation to the record. RAP 10.3(a)(5).

These references should be specific because “shotgun references to the record are of little assistance and ill serve a party.” Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). “The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.” Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990). It is not the function of the appellate court to search the record for evidence in support of a party’s assertions. Cowiche Canyon Conservancy, 118 Wn.2d at 819.

In its brief, the prosecutor (who was also the prosecutor in the trial court) asserts that the State learned from jail staff that Mr. Palmer threatened to physically attack David Mistachkin, who was Mr. Palmer’s second attorney. Br. of Resp’t at 5, 14. The prosecution represents that it conveyed this information to Mr. Mistachkin. Br. of Resp’t at 5.

These allegations are largely unsupported by citation to the record, and the few citations supplied do not support the prosecution’s allegations. The prosecution’s allegations should accordingly be disregarded. Cowiche Canyon Conservancy, 118 Wn.2d at 809; Stockton, 97 Wn.2d at 530.

Similarly, the prosecution devotes about a page of its brief to

praising the three defense attorneys who represented Mr. Palmer in this case prior to trial. Br. of App. at 3-4. Because the prosecution's personal opinions about these attorneys are outside the record (and also irrelevant), this Court should disregard this portion of the State's brief. Cowiche Canyon Conservancy, 118 Wn.2d at 809; Stockton, 97 Wn.2d at 530.

Moreover, the skill of these attorneys is not the issue in this appeal. The issue is whether Mr. Palmer was improperly deprived of his constitutional right to counsel when the trial court ruled Mr. Palmer had waived this right by his conduct. This Court should not be distracted by red herrings.

c. The deprivation of the right to counsel is structural error requiring reversal.

This Court should hold that the trial court erred in ruling that Mr. Palmer waived or forfeited his right to counsel. The deprivation of the right to counsel is structural error. Br. of App. at 32. The prosecution does not argue otherwise. Because Mr. Palmer was deprived of his right to counsel, this Court should reverse his convictions and remand for a new trial.

2. By not permitting Mr. Palmer himself to cross-examine his accusers and by ordering that Mr. Palmer be out of the view of his accusers during their testimony, the court deprived Mr. Palmer of his constitutional rights to self-representation and confrontation, and turned the presumption of innocence on its head.

a. In violation of Mr. Palmer's rights to self-representation and confrontation, Mr. Palmer was not permitted to cross-examine his accusers himself.

At the trial where *the court* forced Mr. Palmer to represent himself, the court did not permit Mr. Palmer to confront his accusers. Instead, an attorney who did not represent Mr. Palmer appeared in Mr. Palmer's place and asked questions that Mr. Palmer had written down. As part of this procedure, the accusers and Mr. Palmer were positioned in a manner so that Mr. Palmer would be out of view by his accusers during their testimony. The record shows that this made follow-up questioning by Mr. Palmer extremely difficult. For example, when the attorney who was reading Mr. Palmer's questions to P. tried to follow-up one question, the court interrupted, recognizing that this was off script. 7/3/18RP 373. Mr. Palmer tried to provide some follow-up questions for the attorney to read afterward, but the Court concluded they were improper and did not read them. 7/3/18RP 383.

As explained in the opening brief, this procedure violated Mr. Palmer's constitutional rights to self-representation and confrontation. Br.

of App. at 37-40; Com. v. Conefrey, 410 Mass. 1, 12-13, 570 N.E.2d 1384 (1991); Const. art. I, § 22 (defendants have “the right to appear and defend in person” and “to meet the witnesses against him face to face”). There was no evidence presented showing that either P. or A. would likely suffer severe emotional trauma from being cross-examined by Mr. Palmer. Neither was there evidence showing a such a risk merely by the witnesses seeing Mr. Palmer during their testimony. Absent such evidence, the infringement upon Mr. Palmer’s constitutional rights cannot be justified. See Maryland v. Craig, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (to justify use of one-way closed circuit television procedure, “[t]he trial court must hear evidence” to show the procedure is necessary).

The prosecution does not contend that the trial court heard evidence showing that P. or A. would be at risk of serious emotional harm if the ordinary court procedures were followed. Br. of Resp’t at 25-26. Rather, the prosecution only recounts that it “believed” there was such a risk of harm. Br. of Resp’t at 25. This “belief” is wholly inadequate to justify the infringement upon Mr. Palmer’s constitutional rights.

In support of its contention that no violation of Mr. Palmer’s constitutional rights occurred, the prosecution discusses this Court’s opinion in State v. Estabrook, 68 Wn. App. 309, 842 P.2d 1001 (1993). Br. of Resp’t 15-17. As explained in the opening brief, that decision is

materially distinguishable because there was actual evidence in that case showing the child was particularly vulnerable. Br. of App. at 39-40.

Moreover, Estabrook did not address a confrontation claim or a claim that the procedure improperly eroded the presumption of innocence. The decision also only addressed a claimed violation of the right to self-representation under the federal constitution, not the state constitution. Estabrook, 68 Wn. App. at 314, 319.

The prosecution also discusses Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995). Br. of Resp't at 19-25. There, in a case on habeas review, the federal court held the petitioner's right to self-representation was not violated because the record supported the state court's finding that the petitioner failed to invoke his right to self-representation. Fields, 49 F.3d at 1034. Although this resolved the case, the court reasoned that if the petitioner had invoked his right to self-representation, no violation of this right occurred. Id.¹ The trial court had given the petitioner the opportunity to write out his questions and have them read by his lawyer. Id. Based on the United States Supreme Court decision in Maryland v. Craig, which approved of a procedure where a child testified via-closed circuit

¹ This alternative holding is suspect. As the dissent in Fields explained, “[h]oldings in the alternative are suspect, because they enable the court to address controversies not necessary for the proper resolution of the case, and thus fly in the face of judicial restraint.” Fields v. Murray, 49 F.3d 1024, 1044 (4th Cir. 1995).

television against a confrontation clause challenge, the Court reasoned that a defendant's self-representation rights could be similarly limited. Id. at 1034-35.

In reaching this conclusion, the Fields court reasoned this must be so because the federal constitutional right to confrontation is explicit while "the self-representation right is only implicit" in the Sixth Amendment. Id. at 1035. "By contrast, the right of self-representation under the Washington Constitution is clear and explicit." State v. Silva, 107 Wn. App. 605, 618, 27 P.3d 663 (2001). Defendants have "the right to appear and defend in person." Const. art. I, § 22. Explicit rights in article I, section 22, are "to be accorded the highest respect" by Washington courts. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). It is error to "minimize[e] the significant textual differences between article I, section 22 and the Sixth Amendment." State v. Martin, 171 Wn.2d 521, 530, 252 P.3d 872 (2011); accord Silva, 107 Wn. App. at 618 (explicit right to self-representation means "great significance in determining what is required to effectuate those rights.")). For these reasons, Washington Courts have held that the right to defend in person and confront witnesses in article I, section 22 is subject to independent interpretation. Martin, 171 Wn.2d at 530-33; Silva, 107 Wn. App. at 622. Given Washington jurisprudence, the analysis in Fields should be rejected.

Moreover, the Fields court failed to recognize that requiring defendants to write down their questions for someone else to read may impair the defendant's ability to effectively defend and cross-examine witnesses. Cf. State v. Foster, 135 Wn.2d 441, 478, 957 P.2d 712 (1998) (Alexander, J., concurring) ("Because the right to cross-examine is in no way impaired by closed-circuit testimony, criminal defense is not compromised by admission of this testimony."). Contrary to the Massachusetts Supreme Court in Conefrey, the Fields court disregarded the requirement that there be actual evidence of a severe risk of harm. Fields, 49 F.3d at 1036-37 and n. 13. And as the dissent in Fields recognized, "the majority's view of this constitutional matter is completely in error." Id. at 1045 (Ervin, C.J., dissenting). The prosecution's reliance on Fields should be rejected.

In further support of its argument, the prosecution improperly relies upon an unpublished decision from this Court. Br. of Resp't at 25. While some unpublished decisions from this Court may be cited as persuasive authority, only to unpublished opinions filed on or after March 1, 2013 may be cited. GR 14.1(a). The unpublished decision cited by the prosecution is from 1998. The prosecution also treats the unpublished decision as if it were precedent, which it is not. Because the prosecution's citation of an unpublished case is improper, that case and the prosecution's

argument based upon it should be disregarded. See State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012) (explaining that State’s citation to unpublished opinion was improper and rejecting State’s reliance on the opinion).

Having a person who does not represent a defendant read a set of questions to the defendant’s accusers while the defendant sits out of view of the accusers is not true confrontation. The procedure tramples upon the defendant’s right to appear and defend in person. Accordingly, this Court should hold that the trial court’s procedure unconstitutionally deprived Mr. Palmer of his rights to confrontation and self-representation.

b. The prosecution fails to respond to Mr. Palmer’s claim that the trial court’s procedure violated due process by unconstitutionally eroding the presumption of innocence.

Mr. Palmer also argues that the court’s procedure, which placed him out of the view of his accusers during their testimony and required that his examination consist of questions read by an attorney who did not represent him, unconstitutionally eroded the presumption of innocence. It effectively turned the presumption of innocence on its head, creating the appearance of guilt. Br. of App. at 41-42. The prosecution fails to respond. “By its failure to address [Mr. Palmer’s] contention . . . the State apparently concedes the issue.” State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003). The implied concession of error should be accepted.

c. The constitutional violations are prejudicial, requiring reversal.

A violation of one's right to self-representation is per se prejudicial error and is not amendable to harmless error analysis. Br. of App. at 40. The prosecution does not argue otherwise. Thus, reversal is required.

The violation of Mr. Palmer's confrontation rights and the due process violation as to the presumption of innocence are also prejudicial. Br. of App. at 40-42. While these violations are subject to harmless error analysis, the prosecution does not argue harmless error. Accordingly, the prosecution has not met its burden to rebut the presumption of prejudice and prove the errors harmless beyond a reasonable doubt. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). This Court should reverse.

3. The prosecution improperly elicited testimony from a detective that Mr. Palmer invoked his right to silence following his arrest and that he refused "to do the right thing" by confessing. This violation of Mr. Palmer's constitutional right to post-arrest silence was prejudicial and requires reversal.

The privilege against self-incrimination is violated when a prosecutor elicits testimony that comments on a defendant's exercise of his their right to silence post-arrest. State v. Romero, 113 Wn. App. 779, 786-87, 793, 54 P.3d 1255 (2002); State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004).

In this case, the prosecutor elicited from Detective Richard Ramirez that Mr. Palmer invoked his right to remain silent when he sought to

interrogate Mr. Palmer a second time—in the hopes that Mr. Palmer would “do the right thing” and (falsely) confess. 7/5/18RP 75. A person may revoke a waiver of their constitutional right to remain silent at any time. Nysta, 168 Wn. App. at 41. Here, Mr. Palmer unequivocally invoked his right to silence and revoked any earlier waiver by stating, “You already told me I’m full of crap. No. I don’t want to talk.” 7/5/18RP 75. It was manifest constitutional error for the prosecutor to elicit this testimony that commented on Mr. Palmer’s invocation of his right to silence. Br. of App. at 43-44; see also State v. A.M., 194 Wn.2d 33, 39-40, 448 P.3d 35 (2019) (admission of intake form that juvenile defendant was compelled sign upon admission to jail violated privilege against self-incrimination and qualified as manifest constitutional error).

While not explicitly conceding error, the prosecution does not argue that no error occurred. Br. of Resp’t at 29. The failure to respond is an implied concession of error. E.A.J., 116 Wn. App. at 789. It should be accepted.

The prosecution appears to contend that any error was harmless. Br. of Resp’t at 29-30. The prosecution’s contention should be rejected. Constitutional error is prejudicial and the prosecution bears the burden of proving the error harmless beyond a reasonable doubt. A.M., 194 Wn.2d

at 41-42. The prosecution must show beyond a reasonable doubt the error did not contribute to the verdict. Id. at 41.

The prosecution has not met its heavy burden. Br. of App. at 45-46. Commenting on a defendant's silence is extremely prejudicial. This is especially true in this case given the Detective's commentary about hoping Mr. Palmer would "do the right thing." Here, the outcome of this case hinged on credibility determinations, not physical evidence. When a case boils down to credibility determinations, the appellate court is not in a position to deem harmless a constitutional error that may have affected a juror's credibility determinations. State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979); Romero, 113 Wn. App. at 795; Holmes, 122 Wn. App. at 447. Here, the jurors may have thought Mr. Palmer's refusal to continue to speak with detectives meant he had something to hide, suggesting guilt. They may have rejected his exculpatory story, which was plausible, and proclamations of innocence based on Detective Ramirez's improper commentary. This Court should reverse.

4. Prosecutorial misconduct and cumulative error deprived Mr. Palmer of his right to a fair trial.

Mr. Palmer reiterates his argument that prosecutorial misconduct and cumulative error deprived him of his right of fair trial, requiring

reversal. Br. of App. 46-53. The opening brief adequately addresses the prosecutor's opposing arguments.

5. If his convictions are not reversed, Mr. Palmer is entitled to the sentencing relief he requests.

The prosecution concedes that Mr. Palmer's offender score on count three was improperly calculated. Br. of App. at 32. The concession should be accepted.

The prosecution, however, fails to concede that community custody was improperly imposed on the misdemeanor conviction for fourth degree assault. Br. of App. at 55. The prosecution cites no authority in support of its assertion that community custody was appropriate on this count. Br. of Resp't at 32-33.

In section 4.6 of the judgment sentence, under number 5, the judgment and sentence says "The Defendant shall receive an exceptional sentence." CP 82. This statement is in error and should be stricken. Br. of App. at 55. Although citation was provided to in the opening brief, the prosecution states it "does not know what the Appellant is referring to." Br. of Resp't at 33.

Concerning Mr. Palmer's challenges to the conditions of community custody, these were imposed *by the trial court* over his objection. Br. of App. at 55. The prosecution's apparent position that these

conditions were imposed by the Department of the Corrections is incorrect. Br. of Resp't at 33-34.

Otherwise, the prosecutor only cursorily asserts that the challenged conditions are lawful. Br. of Resp't at 34. This is wholly inadequate. RAP 10.3(b); Cowiche Canyon Conservancy, 118 Wn.2d at 809. The prosecution's "non-response response" should read as an implied concession of error. For the reasons stated in the opening brief, the challenged conditions of community custody are unlawful. The Court should order them stricken.

Concerning the issue of supervision fees and the interest accrual provision, the prosecution again pretends it does not know what Mr. Palmer is referring to. Br. of Resp't at 34. To reiterate, the interest accrual provision in the judgment and sentence is unlawful in light of recent amendments. State v. Dillon, __ Wn. App. 2d __, 456 P.3d 1199, 1209 (2020). And the provision ordering that Mr. Palmer pay supervision fees should be stricken because the trial court intended to impose only mandatory legal financial obligations. Id.

B. CONCLUSION.

The violation of Mr. Palmer's constitutional rights deprived him a fair trial. His convictions should be reversed and the case remanded for a new trial. Alternatively, this Court should remand to correct the sentencing

errors.

Respectfully submitted this 15th day of April, 2020.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 52362-1-II
)	
MICHAEL PALMER,)	
)	
APPELLANT.)	

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