

FILED
Court of Appeals
Division II
State of Washington
9/30/2019 1:23 PM
No. 53336-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

VIC LEE GARDENHIRE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-01027-34
The Honorable Christine Schaller and Chris Lanese, Judges

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Vic Gardenhire's constitutional right to represent himself.
2. The trial court erred when it found Vic Gardenhire guilty of felony harassment.
3. The trial court violated CrR 6.1(d) by failing to enter written findings of fact and conclusions of law following a bench trial on stipulated facts.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court violate Vic Gardenhire's constitutional right to represent himself when it denied him pro se status even though he was not overly disruptive and was not purposefully trying to delay the proceedings? (Assignment of Error 1)
2. Should Vic Gardenhire's felony harassment conviction be reversed where the stipulated facts show that Gardenhire only told the victim that he would "kick your ass," which is not a threat to kill and therefore does not establish beyond a reasonable doubt the essential element of felony harassment? (Assignment of Error 2)
3. Should this Court remand for entry of written findings and

conclusions where CrR 6.1(d) requires entry of written findings of fact and conclusions of law following a bench trial, and where the trial court failed to orally explain its ruling and failed to enter written findings and conclusions after Vic Gardenhire's stipulated facts bench trial? (Assignment of Error 3)

III. STATEMENT OF THE CASE

According to the police reports and affidavit of probable cause filed in this case, police responded to a 911 domestic violence call in the early morning hours of June 10, 2017. (CP 1, 51) Officers found Linda Brown (formerly Linda Gardenhire) standing on the front porch, crying hysterically.¹ (CP 1, 51; 04/01/19 RP 31) Brown told the officers that her husband, Vic Lee Gardenhire, had choked her and hit her. (CP 1, 51) She tried to call 911, but Gardenhire took her phone away from her. (CP 1, 51)

Antonio Valencia also lived in the apartment with Gardenhire and Brown. (CP 1, 51) He was awakened by Linda's screams for help. (CP 2, 51) He saw Gardenhire choke and slap Brown. (CP

¹ At the time of the incident, Linda Brown went by the name Linda Gardenhire, and she is referred to in the affidavit and in a subsequent protection order as Linda Gardenhire. To avoid confusion in this brief, however, she will be referred to as Linda Brown herein.

2, 51) When Valencia tried to intervene and call 911, Gardenhire slapped the phone out of Valencia's hand and told Valencia, "I'm going to kick your ass." (CP 2, 52)

The State charged Gardenhire with one count of second degree assault-domestic violence, one count of felony harassment-domestic violence, and two counts of interfering with the reporting of domestic violence. (CP 3-4) The superior court also entered a no-contact order prohibiting Gardenhire from contacting Brown "directly, in person or through others, by phone, mail, or electronic means[.]" (Exh. 1) The order made an exception for contact "through 3rd party for child visitation [and] email and text contact for work purposes only." (Exh. 1)

Gardenhire agreed to waive his right to a jury trial in exchange for entry into a diversion program. (CP 5-7; 01/25/18 3-8) As part of the diversion agreement, Gardenhire stipulated to the facts contained in the police reports, and agreed that those facts would establish the elements of the charges. (CP 6) Gardenhire also agreed to a number of conditions, including a reporting requirement, domestic violence treatment, and "having no criminal law violations during the period of diversion." (CP 7) Gardenhire also agreed to "abide by any No Contact, Restraining, Protection,

or Anti-Harassment orders.” (CP 7)

Gardenhire’s “successful completion of the program would result in a reduction of charges to one count of fourth degree assault-domestic violence, one count of misdemeanor harassment-domestic violence, and one count of interfering with the reporting of domestic violence. (CP 5)²

Gardenhire complied with the conditions for nearly a year, but the State eventually filed a motion to revoke diversion after receiving a report that Gardenhire had violated the no-contact order by having a telephone conversation with Brown. (CP 15-21)

Gardenhire asked to be allowed to represent himself at the revocation hearing. (03/07/19 RP 4, 6) Gardenhire responded appropriately to the court’s questions about his education level, his experience with the law, his understanding of the charges against him, and the potential sentencing consequences if convicted on the original charges. (03/07/19 RP 6-10) Gardenhire spoke out-of-turn a few times, and was ordered by the judge to stop. (03/07/19 RP 8-9) Gardenhire acknowledged the judge’s directive and returned to answering the court’s questions. (03/07/19 RP 9)

² A copy of the diversion agreement is attached in Appendix A.

After a few more productive questions and answers, Gardenhire tried to ask the judge a question. The judge responded by ending the colloquy and stating:

I find that Mr. Gardenhire does not have the ability to represent himself, because he cannot follow the court's simple direction, and he would be held to the same standards as a lawyer. A lawyer cannot talk out of turn. Mr. Gardenhire talks out of turn.

The court has asked multiple times for him to stop and to simply answer the questions that were being asked. He had an inability to do that, and therefore he does not have the ability to represent himself in this matter ... and he cannot knowingly and voluntarily waive his rights to counsel, because he has an inability to represent himself for the reasons that I have articulated. And he has no training in the law and is facing a strike offense and a prison sentence. Therefore, I deny his request at this time to represent himself

(03/07/19 RP 10-11)³

At the next hearing, before a different judge, Gardenhire again asked permission to represent himself. (04/01/19 RP 8) The court denied the request without conducting any colloquy or inquiry, because "that request was made at the prior hearing in this matter. That request has been denied, and I am not going to revisit that issue given there has already been a judicial determination of that

³ The portion of the transcript containing the court's entire colloquy with Gardenhire on his request to represent himself is attached in Appendix B.

request.” (04/01/19 RP 10)

The court proceeded with the revocation hearing on April 1, 2019. Linda Brown testified that Gardenhire contacted her by telephone on November 9, 2018. She knew it was Gardenhire because she recognized his voice and because of the content of their conversation. (04/01/19 RP 33-34) The court found by a preponderance of the evidence that Gardenhire breached the conditions of the diversion agreement, and entered an order revoking the diversion agreement. (04/01/19 RP 46-47; CP 81, 96-97, 133-34)

The court then reviewed the police reports and other documents containing stipulated facts, and found Gardenhire guilty of the original charges. (04/01/19 RP 49) The court imposed a standard range sentence totaling 14 months of confinement. (04/11/19 RP 80-81; CP 121-22) Gardenhire filed a timely Notice of Appeal. (CP 103)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT VIOLATED GARDENHIRE’S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHEN IT DENIED HIS REQUEST TO REPRESENT HIMSELF.

Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit

right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”); U.S. Const. amend. 6; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002).

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right [and the] value of respecting this right outweighs any resulting difficulty in the administration of justice.

State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

The trial court’s denial of the right to defend in person is reviewed for abuse of discretion. *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). A trial court abuses its discretion if its “decision is manifestly unreasonable or ‘rests on facts unsupported in the record or was reached by applying the wrong legal standard.’” *Madsen*, 168 Wn.2d at 504 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

“A court may not deny a motion for self-representation based

on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel." *Madsen*, 168 Wn.2d at 505. Rather, the trial court may only deny a motion to proceed pro se when the request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05. Once granted, the court may appoint standby counsel or allow for hybrid representation. *Madsen*, 168 Wn.2d at 509 n.4.

In *Madsen*, the trial court denied the defendant's request to represent himself because, in the trial court's opinion, "Madsen had been 'extremely disruptive,' 'repeatedly addressed the court at inopportune times,' and 'consistently showed an inability to follow or respect the court's directions.'" *Madsen*, 168 Wn.2d at 502-03. Madsen appealed the denial of his motion to proceed pro se, and our Supreme Court reversed Madsen's conviction, stating:

Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. A court may not

deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.

Madsen, 168 Wn.2d at 509 (emphasis added).

In this case, Gardenhire's behavior was not nearly as "obnoxious" as Madsen's behavior. Gardenhire veered off-topic or made irrelevant comments a few times, but when admonished by the court he immediately and respectfully returned to the topic at hand and answered the court's questions. (03/07/19 RP 6-7, 9)

There was no indication that Gardenhire was purposefully trying to disrupt or delay the proceedings. He attempted to and did answer the court's questions appropriately, and he did not request a continuance or ask to delay the hearing. The court did not deny Gardenhire's request because it was equivocal, untimely, involuntary, or made without a general understanding of the consequences. Instead, the judge denied Gardenhire's request to represent himself simply because he "talks out of turn." (03/07/19 RP 10) This is not a proper reason to deny such a valued constitutional right.

The trial court's decision to deny Gardenhire his right to represent himself was an abuse of discretion. The improper denial

of the right to proceed pro se requires reversal, whether or not prejudice results. *Vermillion*, 112 Wn. App. at 851; *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (“The unjustified denial of this [pro se] right requires reversal”). Therefore, the trial court’s revocation of the diversion agreement and its findings of guilt should be reversed.

B. THE EVIDENCE DID NOT ESTABLISH BEYOND A REASONABLE DOUBT ALL OF THE ELEMENTS OF FELONY HARASSMENT.

The evidence presented to the court at the bench trial did not establish beyond a reasonable doubt that Gardenhire threatened to kill Valencia, which is an essential element of felony harassment as charged in this case.⁴

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. This requirement applies as well in a stipulated facts trial. In a stipulated facts trial the defendant does not stipulate to guilt. Instead, the trial

⁴ A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal, even when the appeal is from a stipulated facts trial. RAP 2.5(a)(3); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995).

court must still make a determination of guilt and the State continues to bear the burden of proving each element of each charge beyond a reasonable doubt. *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995); *State v. Jacobson*, 33 Wn. App. 529, 534, 656 P.2d 1103 (1982).⁵

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

RCW 9A.46.020(1) provides in relevant part that a person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .
 - and
 - (b) The person by words or conduct places the person

⁵ The diversion agreement does include language that Gardenhire stipulates “that the facts contained within the investigation reports are sufficient for a trier of fact to find me guilty[.]” (CP 6) However, strict enforcement of this language would make the diversion agreement “tantamount to a guilty plea,” and would require the court to engage in the procedural requirements of CrR 4.2. See *State v. Wiley*, 26 Wn. App. 422, 425-27, 613 P.2d 549 (1980); *State v. Johnson*, 104 Wn.2d 338, 340-41, 705 P.2d 773, 774 (1985).

threatened in reasonable fear that the threat will be carried out.

Harassment is a gross misdemeanor, but is elevated to a felony if “the person harasses another person ... by threatening to kill the person threatened or any other person.” RCW 9A.46.020(2)(a)(b)(ii). The State alleged that Gardenhire committed felony harassment under RCW 9A.46.020(2)(b)(ii) because he “knowingly threatened to kill, immediately or in the future Antonio D. Valencia.” (CP 3)

Gardenhire agreed to a bench trial on stipulated facts “based solely upon the law enforcement/investigating agency’s reports[.]” (CP 6) In the incident report narrated by Officer Reisher, it states that “Antonio told me that Vic threatened Antonio by saying ‘I’m going to kick your ass’. Antonio told me that he did believe that Vic was going to assault him.” (CP 52)

“I’m going to kick your ass” is not a threat to kill. Nor did Valencia appear to interpret it as a threat to kill, as he only told Officer Reisher that he believed Gardenhire would “assault” him, not that he believed Gardenhire would kill him.

“I’m going to kick your ass” is commonly understood to mean that the speaker intends to hurt, not kill, the person threatened. In

State v. Cross, for example, the defendant told an arresting police officer he would “kick [his] ass if [I] wasn’t in handcuffs.” 156 Wn. App. 568, 580, 234 P.3d 288, 294 (2010) (alterations in original). This Court noted at the outset that “Cross did not threaten to kill Officer Williams” and therefore the State properly charged Cross with misdemeanor harassment rather than felony harassment. *Cross*, 156 Wn. App. at 582.

Likewise here, Gardenhire did not threaten to kill Valencia. The evidence did not support the trial court’s finding that this crime was proved. Gardenhire’s harassment conviction must be vacated and dismissed.⁶

C THE TRIAL COURT’S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE BENCH TRIAL IS NOT HARMLESS AND REQUIRES REMAND.

The trial court erred by failing to enter written findings of fact and conclusions of law following the bench trial on stipulated facts, and its oral findings are inadequate to permit a thorough appellate review.

CrR 6.1(d) requires entry of written findings of fact and

⁶ The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

conclusions of law following a bench trial.⁷ The findings should include the elements of each crime separately and specify the factual basis for each. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437 (1995). The findings of fact must be sufficient to inform the appellate court how the trial court decided all material issues. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979).

If the trial court fails to enter sufficient findings and conclusions, it is harmless error if the trial court's oral findings are sufficient to permit appellate review. *State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008). If the oral findings are conclusory or otherwise insufficient for review, the reviewing court must remand for entry of sufficient findings. *State v. Strong*, 23 Wn. App. 789, 793, 599 P.2d 20 (1979); *Daughtry*, 91 Wn.2d at 711.

The record here is completely devoid of any findings or conclusions, either oral or written. The trial court never entered written findings and conclusions. And its oral ruling is extremely brief and conclusory:

Based on the reports that I am allowed to review in deciding the guilt of the defendant in this case,

⁷ "In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated." CrR 6.1(d).

pursuant to the diversion agreement I am finding the defendant guilty of those charges.

(04/01/19 RP 49) This oral finding does not explain how the facts in the reports met the elements of the crimes and is not a suitable substitute for written findings.

Furthermore, as argued above, the trial court obviously overlooked the fact that proof of one essential element of harassment was totally lacking in the record. Without any oral or written findings, it is impossible to determine whether the trial court overlooked or misunderstood essential elements of the remaining crimes. The lack of adequate oral or written findings is therefore not harmless error.

When a trial court fails to enter written findings of fact and conclusions of law following a bench trial, the proper remedy is to remand for entry of those findings and conclusions. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). This case should be remanded for entry of written findings and conclusions.

V. CONCLUSION

The trial court violated Gardenhire's fundamental right to represent himself when it denied his request simply because of frustration with his talking "out of turn." The trial court's frustration

did not outweigh Gardenhire's right to represent himself, and the denial of this right requires reversal of Gardenhire's convictions.

Gardenhire's felony harassment conviction must also be reversed and dismissed because the stipulated facts do not establish that he threatened to kill Valencia. Finally, in the alternative, this Court should vacate the convictions and remand this case for entry of appropriate findings of fact and conclusions of law.

DATED: September 30, 2019



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Vick Lee Gardenhire

CERTIFICATE OF MAILING

I certify that on 09/30/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Vic Lee Gardenhire, DOC# 415524, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A
DIVERSION AGREEMENT AND STIPULATIONS

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 JAN 25 PM 3:11

Linda Myhre Enlow
Thurston County Clerk

17-1-01027-34
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Waiver of Jury Trial by Defendant
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**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

VIC LEE GARDENHIRE,

Defendant.

NO. 17-1-01027-34

DECLARATION OF DEFENDANT,
WAIVER OF JURY TRIAL,
STIPULATION TO FACTS SUFFICIENT
FOR GUILT

COMES NOW the Defendant, having first been fully advised by counsel, and in consideration for entry into the "Friendship" Diversion Program, make the following Declaration:

1. I have no prior conviction(s) for a felony offense in the State of Washington nor in any other state or country, nor have I been convicted of a crime in another state or country which would be considered a felony in the State of Washington, nor do I have any other felony offenses pending in Washington or anywhere;

2. I have never before participated in any diversion or similar program or arrangement for any other felony offense, as defined under section "1" above:

3. I am requesting that the Thurston County Prosecuting Attorney's Office and this Court permit me to enter into the Thurston County "Friendship" Diversion Program which, successful completion of the program, will result in the State's agreement to amend the pending charge(s) against me in this case to Count 1 Assault 4 DV, Count 2 Gross Misdemeanor Harassment DV; and Count 3 will remain as originally charged.

DECLARATION/STIPULATION RE: PRETRIAL CONTINUANCE

JON TUNHEIM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
360/786-5540 Fax 360/754-3358

1 4. I understand that “successful completion” of this program means that I strictly comply with all
2 program requirements as directed by the administrating agency, “Friendship,” which includes: reporting to the
3 agency as directed; paying administrative costs/assessments; having no criminal law violations during the
4 period of diversion; paying full restitution and any other LFOs under this cause number for damage arising from
5 this case and as determined by “Friendship; completing community service hours as directed by Diversion; and
6 fully complying with the treatment recommendations as outlined in the STOP evaluation dated January 10,
7 2018, to include state certified WAC compliant domestic violence treatment and remaining abstinent from
8 alcohol/drug use during his treatment;

9 5. I understand that if I fail to successfully comply with this agreement, I will be removed from
10 the diversion program, and the Thurston County Prosecuting Attorney’s Office will recommence prosecution of
11 this case against me;

12 6. If I fail to successfully complete the conditions of this continuance and prosecution is
13 recommenced, I stipulate that the Prosecuting Attorney’s Office may submit to this court copies of all materials
14 which make up the law enforcement/investigating agency’s reports on which this prosecution is based;

15 7. I stipulate that this court may determine my guilt or innocence for the charge presently filed
16 against me in this matter based solely upon the law enforcement/investigating agency’s reports on which this
17 prosecution was based, and I stipulate that the facts contained within the investigation reports are sufficient for a
18 trier of fact to find me guilty of the charge(s) presently filed against me in this matter;

19 8. I stipulate that any statements which I have provided to law enforcement, the investigating
20 agency, and/or the Thurston County Prosecuting Attorney’s Office relating to this matter are admissible for this
21 court to consider at the time it determines my guilt or innocence as described above, and I waive any and all
22 objections I may have to the admission of such statement(s) for the court’s consideration;

23 9. I understand that, by this process, I am giving up the following constitutional rights: the right to
24 a jury trial; the right to a speedy and public trial by an impartial jury in the county where the crime(s) is/are
alleged to have been committed; the right to hear and question witnesses who testify against me; the right to call
witnesses in my own behalf and at no expense to me; the right to testify or not to testify; the right to appeal a

DECLARATION/STIPULATION RE: PRETRIAL CONTINUANCE

JON TUNHEIM
Thurston County Prosecuting Attorney
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1 determination of guilty after trial; and the presumption of my innocence until the charge(s) has/have been
2 proven beyond a reasonable doubt or I enter a plea(s) of guilty;

3 10. I understand that the crime(s) with which I am charged have a maximum sentence of Count
4 1, 10 years of imprisonment, Count 2, 5 years of imprisonment, Count 3, 364 days of jail, and a \$20,000 fine
5 for Count 1, a \$10,000 fine for Count 2, and a \$5,000 fine for Count 3. The standard range for Count 1 is
6 12+ months to 14 months, based on the prosecuting attorney's understanding of my criminal history.

7 This standard range may increase should I be later convicted of other crimes prior to my sentencing in this case
8 should I fail to successfully complete diversion. Also, if I am later convicted of the present charge(s) against
9 me, I will be prohibited from possessing, owning, or having under my control any firearm unless my right to do
10 so is restored by a court of record.

11 11. I agree that I will pay \$500.00 to the Crime Victims Fund, a \$200.00 filing fee, and \$115
12 Domestic Violence fee through the Clerk of the Thurston County Superior Court

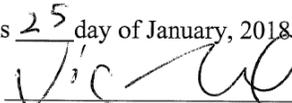
13 12. I agree to obtain a Domestic Violence evaluation by a WAC compliant State Certified
14 Domestic Violence Treatment Agency and comply with any recommended treatment. Bill Notrafrancisco is not
15 an approved domestic violence treatment provider for the purposes of this agreement.

16 13. I agree to abide by any No Contact, Restraining, Protection, or Anti-Harassment orders.

17 14. I agree to not possess any firearms while on supervision.

18 15. By my signature below I waive any and all defenses to the commission of the charge(s) filed
19 against me.

20 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true
21 and correct. Signed in Olympia, Washington this 25 day of January, 2018


Defendant

22 RESPECTFULLY SUBMITTED:
23 JON TUNHEIM
24 Prosecuting Attorney

WITNESSED AND APPROVED FOR
PRESENTATION:

DECLARATION/STIPULATION RE: PRETRIAL CONTINUANCE

JON TUNHEIM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
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APPENDIX B

COURT'S COLLOQUY WITH DEFENDANT ON REQUEST FOR SELF-REPRESENTATION

1 All right. Mr. Gardenhire, you have indicated
2 that it is your desire to represent yourself in this
3 case; is that correct?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. And have you ever
6 studied law?

7 THE DEFENDANT: I'm a computer software
8 engineer. I'm pretty smart.

9 THE COURT: Have you ever studied law?

10 THE DEFENDANT: Yes.

11 THE COURT: When?

12 THE DEFENDANT: Every day.

13 THE COURT: Have you ever represented yourself
14 in a criminal action?

15 THE DEFENDANT: No, because every time that I
16 do, then I get shut up. Like the reason why you give
17 me the public defender is to shut me up, and that's
18 not gonna happen no more.

19 THE COURT: What is your highest grade of
20 education?

21 THE DEFENDANT: I got some college, and I
22 graduated. But I was a 17 year -- I lived in foster
23 care, and I graduated as an orphan in Washington.
24 You guys ripped me out of my home and then never let
25 me go back home.

1 MR. JEFFERSON: Your Honor, if I could --
2 excuse me, sir. Those comments are not going to be
3 helpful.

4 THE DEFENDANT: And you're not my attorney.

5 THE COURT: Do you read and write the
6 English -- Mr. Jefferson is, in fact, standing in as
7 your lawyer today who has been appointed to represent
8 you.

9 THE DEFENDANT: I didn't hire him.

10 THE COURT: Do you read and write the English
11 language?

12 THE DEFENDANT: Absolutely. The last time I
13 was here, I think you are the one who --

14 MR. JEFFERSON: It's not, sir -- please just
15 respond to her questions, sir, and --

16 THE DEFENDANT: Listen --

17 MR. JEFFERSON: -- just respond to her
18 questions.

19 THE DEFENDANT: -- I need you to stop talking
20 to me.

21 MR. JEFFERSON: I'm not going to stop talking.
22 I'm doing my job.

23 THE DEFENDANT: No, you're not.

24 MR. JEFFERSON: I am.

25 THE DEFENDANT: I called you guys several

1 times, and you didn't do your job.

2 THE COURT: Mr. Gardenhire, I am asking
3 questions right now. This is not your opportunity to
4 provide information to the court. Do you understand
5 that you are charged with assault in the second
6 degree domestic violence, which is a Class B felony;
7 felony harassment domestic violence, which is class C
8 felony; interfering --

9 THE DEFENDANT: Absolutely.

10 THE COURT: -- with the reporting of domestic
11 violence, which is a gross misdemeanor; and another
12 count of interfering with the reporting of domestic
13 violence, a gross misdemeanor?

14 THE DEFENDANT: Absolutely.

15 THE COURT: And do you realize, what there
16 are -- what is the sentencing range as it relates
17 to --

18 THE DEFENDANT: I do.

19 THE COURT: These charges, Ms. Lord?

20 MS. LORD: Just a moment, Your Honor. Let me
21 see. Count 1, 12 and a day to 14 months; Count 2,
22 4 to 12 months, and then 364 days on Count 3.

23 THE COURT: And I'm sorry. So Count 1 is
24 12 and a day to 24?

25 THE DEFENDANT: Bring it.

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MS. LORD: 12 and a day to 16.

THE COURT: To 16. Thank you.

MS. LORD: Or, excuse me, to 14.

THE COURT: 14. Thank you.

THE DEFENDANT: Look at the title of the police report.

THE COURT: Okay. I need you --

THE DEFENDANT: The title of the police report.

THE COURT: -- to be quiet --

THE DEFENDANT: Okay.

THE COURT: -- because if you can't follow my direction now, no way can you represent yourself.

THE DEFENDANT: Fair enough --

THE COURT: Do you understand that?

THE DEFENDANT: -- fair enough.

THE COURT: All right. Do you understand that for Count 1, which is a Class B felony and a strike offense, that if you are found guilty, that the sentencing range would be 12 months and a day to 14 months, which is a prison sentence? Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And that in Count 2, the sentencing range would be 4 months to 12 months of

1 incarceration if you were found guilty?

2 THE DEFENDANT: Yes, I do think this is
3 irrelevant (sic) though, because --

4 THE COURT: That was --

5 THE DEFENDANT: -- because --

6 THE COURT: -- not my question as to what you
7 think. The question is whether or not you understand
8 what the sentencing range is. So that is my
9 question --

10 THE DEFENDANT: The problem is is that I --

11 THE COURT: -- do you understand --

12 THE DEFENDANT: -- I feel like you're asking
13 me questions, but I can't ask you questions.

14 THE COURT: I find that Mr. Gardenhire does
15 not have the ability to represent himself, because he
16 cannot follow the court's simple direction, and he
17 would be held to the same standards as a lawyer. A
18 lawyer cannot talk out of turn. Mr. Gardenhire talks
19 out of turn.

20 The court has asked multiple times for him to stop
21 and to simply answer the questions that were being
22 asked. He had an inability to do that, and therefore
23 he does not have the ability to represent himself in
24 this matter --

25 THE DEFENDANT: Are these questions the normal

1 questions?

2 THE COURT: -- and he cannot knowingly and
3 voluntarily waive his rights to counsel, because he
4 has an inability to represent himself for the reasons
5 that I have articulated. And he has no training in
6 the law and is facing a strike offense and a prison
7 sentence. Therefore, I deny his request at this time
8 to represent himself.

9 THE DEFENDANT: Are those questions, like,
10 regulatory questions to ask somebody?

11 MR. JEFFERSON: You need to stop -- stop.
12 Please stop.

13 THE COURT: So as it relates to the diversion
14 review today, Ms. Lord?

15 MS. LORD: Thank you, Your Honor. I've had
16 contact with the prosecutor in the city of Olympia
17 case, which is the basis underlying the State's
18 motion. And at this time, I think that what we may
19 need to do is just go ahead and set this on for an
20 evidentiary revocation hearing, Your Honor. It
21 appears as though there's some back and forth going
22 on between these two matters with one won't proceed
23 if the other one's still pending. And at this time,
24 I would request that we just set it on for an
25 evidentiary hearing.

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