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No. 53336-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

VIC LEE GARDENHIRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge;
The Honorable Chris Lanese, Judge
Cause No. 17-1-01027-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly concluded that Gardenhire was unable to knowingly, voluntarily and intelligently waive his right to counsel where he frequently interrupted the trial judge during the colloquy and demonstrated an inability to answer simple questions from the trial court.

2. Whether sufficient evidence was presented at the bench trial to support the charge of felony harassment, and if not, whether the trial court necessarily found the lesser included offense of gross misdemeanor harassment when it found Gardenhire guilty of the greater offense.

3. Whether the failure to enter written findings of fact and conclusions of law was harmless in light of the stipulated and uncontested facts presented at the bench trial, and if not, whether the proper remedy is to remand for entry of written findings and conclusions.

B. STATEMENT OF THE CASE.

The appellant, Vic Lee Gardenhire, was charged with assault in the second degree, domestic violence, felony harassment, domestic violence, and two counts of interfering with reporting of domestic violence. CP 3-4. Rather than go to trial, Gardenhire

accepted the State's offer to enter a Diversion Program. CP 5-7, RP (1/25/18) 3-8.¹ Gardenhire stipulated that, if he failed to complete the terms of the Diversion, the Prosecuting Attorney's Office may submit copies of all materials which make up the law enforcement/investigating agencies reports upon which the investigation was based, and that the Court may determine his guilt or innocence based on those reports. CP 6. He further stipulated that the facts contained within the investigative reports are sufficient for a trier of fact to find him guilty of the charges filed. CP 6.

If Gardenhire were to successfully complete the terms of the diversion program, the State agreed that it would amend the charges to assault in the fourth degree, domestic violence, gross misdemeanor harassment, domestic violence, and interfering with reporting domestic violence. CP 5. After Gardenhire committed a new violation of a no contact order involving the victim, Linda Brown, the State moved to revoke the diversion. CP 15-21.

At a hearing regarding the motion to revoke diversion, Gardenhire sought permission to represent himself. RP (3/7/19) at 4, 6. The trial court began a colloquy with Gardenhire to consider

¹ The verbatim report of proceedings from the diversion revocation, bench trial and sentencing, April 1, 2019, and April 11, 2019, are referred to herein as RP. All other reports of proceedings are reference as RP (date).

his request. RP (3/7/19) 6. The trial court asked, "have you ever studied law," and Gardenhire responded that he is a computer software engineer and "pretty smart." RP (3/7/19) 6. The trial court again asked if he had studied law, and Gardenhire responded "Yes," and when asked "when?" Gardenhire responded, "every day." RP (3/7/19) 6. The trial court then asked him, "have you ever represented yourself in a criminal action," to which Gardenhire responded,

No, because every time that I do, then I get shut up. Like the reason why you give me the public defender is to shut me up, and that's not going to happen.

RP (3/7/19) 6. The trial court then asked, "What is your highest grade of education?" and Gardenhire responded,

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

RP (3/7/19) 6. At that point, defense counsel Larry Jefferson attempted to assist Gardenhire by redirecting him to answering the trial court's questions, only for Gardenhire to chastise him stating, "And you're not my attorney." RP (3/7/19) 7. After the trial court corrected him, Gardenhire stated, "I didn't hire him." RP (3/7/19) 7.

The trial court attempted to continue the colloquy, asking “Do you read and write the English language?” to which Gardenhire responded, “Absolutely, The last time I was here, I think you are the one who –” at which time, Mr. Jefferson again attempted to remind him that he needed to just respond to her questions.” RP (3/7/19) at 7. At that point, Gardenhire engaged in a back and forth conversation with Jefferson arguing with him. RP (3/7/19) at 7-8.

The trial court informed Gardenhire that she was the one asking the questions, and continued the colloquy. RP (3/7/19) at 8. When the trial court asked him whether he understood the standard range on Count 1, he responded, “Bring it.” RP (3/7/19) 8. When the trial court clarified the range, Gardenhire stated, “Look at the title of the police report.” RP (3/7/19) at 9. The trial court then asked him to be quiet and explained that if he could not follow her directions, there was no way he would be able to represent himself. RP (3/7/19) at 9.

The trial court continued asking about Gardenhire’s understanding of the consequences of the charges and Gardenhire stated, “Yes, I do think this is irrelevant though, because,” and the trial court attempted to stop him stating “that was” but was interrupted by Gardenhire. RP (3/7/19) 9-10. The trial court was

able to explain that her question was whether he understood the sentencing range, and Gardenhire stated, "the problem is that I," at which time the trial court stated "do you understand," only to be interrupted again by Gardenhire stating, "I feel like you're asking me questions, but I can't ask you questions." RP (3/7/19) at 10.

The trial court then found

. . . 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 . . .

RP (3/7/19) 10.

Gardenhire interrupted the trial court's ruling to ask if the questions were "normal questions." RP (3/7/19) 11. The trial court continued

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 law and is facing a strike offense and a prison sentence. Therefore, I deny his request at this time to represent himself.

RP (3/7/19) 11. Gardenhire then asked, "Are those questions, like, regulatory questions to ask somebody," to which Mr. Jefferson

responded, "You need to stop – stop. Please stop." RP (3/7/19) 11. The motion to revoke diversion was then scheduled for an evidentiary hearing. RP (3/7/19) at 11-12.

Prior to the evidentiary hearing, the State filed an additional motion to revoke diversion which had the police reports attached. CP 30-78. As the State was calling its first witness at the evidentiary hearing, Gardenhire stated, "I'm not prepared for this. He didn't call me." RP 5. After the trial court stated "I always want to make sure the defendant knows what is happening," Gardenhire stated, "And I have no clue. I've been ambushed." RP 5. When the trial court indicated that Gardenhire should speak to his lawyer, Gardenhire stated, "I'll represent myself." RP 5-6. At that point the trial court allowed, Mr. Jefferson to confer with Gardenhire off the record. RP 6.

When the record continued, Mr. Jefferson informed the trial court,

Mr. Gardenhire said that he's not ready to proceed in this matter, and we have somewhat of a dispute. I'm not certain that we need to put it on the record, but he is not comfortable going forward with this hearing today.

RP 6. After advising Gardenhire that it was more advantageous to speak through an attorney, the trial court allowed Gardenhire to explain why he was not comfortable proceeding. RP 7.

Gardenhire stated

Okay. So I came in here I think, whatever the last court date was, and I wanted to represent myself, and the judge was like really high energy, and she had to personally go back and look on Google herself to find out whether or not – what the rules were for representing myself, like she didn't know, and then she was trying to question me on these things, and I'm like is there an actual structure beyond this to actually - - what is the structure on, you know, proving someone is able to represent themselves, okay? I am a computer programmer. I built a website that's better than Microsoft, and I just don't have it invested, you know, but the point is is [sic] I can represent myself.

RP 7-8. The trial court responded by asking if the reason Gardenhire was not comfortable with the proceedings was that he would like to represent himself. RP 8.

Gardenhire responded

Absolutely, and the thing is that - - is that I had - - I asked him to call me. I was trying to talk to him about it, and he left in the middle of our conversation after this last court thing, and we haven't had one conversation about this. Like I came in here - - I feel kind of like they're working together with each other, and it's really - - he's not on my team. He's on their team.

RP 8. The trial court then informed Gardenhire that “Mr. Jefferson is an exceptional attorney with outstanding integrity.” RP 8.

After hearing from the attorneys, the trial court stated

So the basis for the request not to proceed at this time because the defendant is not prepared but that he wants to represent himself, that request was made prior to this 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 request.

RP 10. The trial court then allowed Mr. Jefferson time to speak with his client. RP 10.

When the matter came back on the record, Mr. Jefferson indicated that Gardenhire “would like the time to hire someone else in this case.” RP 11. The trial court denied the request to continue stating, “This motion to revoke diversion has been pending, as [the prosecutor] articulated, for quite some time. To the extent the defendant desired to have a private attorney represent him, he has had more than ample time to do that.” RP 12.

Following the evidentiary hearing, the trial court found that “the State [had] met its burden to revoke the diversion agreement in this case.” RP 47. The trial court then considered the record and found, “Based on the reports that I am allowed to review in deciding the guilt of the defendant in this case, pursuant to the diversion

agreement I am finding the defendant guilty of those charges.” RP 49.

The police reports in the record indicated that on June 10, 2017, Gardenhire had choked Linda Brown.² CP 51. Mrs. Brown told law enforcement that her husband, Vic, had come home heavily intoxicated and woke her up. CP 51. When she asked him to sleep in another room he got angry and suggested that she leave the house. CP 51. Mrs. Brown then moved to the floor of the bedroom and Gardenhire began to “choke her pressing his forearm against her neck while simultaneously slapping her on the face.” CP 51. Mrs. Brown stated that the “force on her neck made it difficult for her to breath to the point where she thought she was going to go unconscious or even die.” CP 51.

Brown was able to scream for a roommate, Antonio Valencia, who was in another room. CP 51. She stated that eventually Gardenhire got off of her and confronted Valencia. CP 51. Brown ran outside and stated she was “calling the cops” at which time Gardenhire followed her outside and stripped her phone

² As noted in the Brief of Appellant, at the time of the incident, Linda Brown went by the name Linda Gardenhire. As done in the Brief of Appellant, the State will refer to her as Linda Brown in this brief, despite the fact that the reports reference her as Linda Gardenhire. Brief of Appellant at 2, n. 1.

from her before running back inside, preventing her from calling 911. CP 51.

Valencia stated that he woke up to the sound of Brown screaming for him. CP 51. He said that he went into the bedroom and saw Gardenhire holding Brown down and choking her by wrapping her own arms around her. CP 51. He also stated that he saw Gardenhire slap Brown. CP 51. Valencia stated that he pulled Gardenhire off of Brown but Gardenhire jumped back on her and began choking her with his hands. CP 51. Valencia stated that he said that he was going to call 911 and Gardenhire slapped the phone out of his hand. CP 51. Valencia stated that Gardenhire threatened him by saying "I am going to kick your ass," and that he believed Gardenhire was going to assault him. CP 52. At that point, Gardenhire left after Brown went downstairs. CP 52. Gardenhire refused to exit the house for law enforcement and he was eventually placed into custody using a K-9 unit. CP 52, 57.

The trial court entered written findings of fact regarding the diversion revocation. CP 132; 133-134; RP 57. There do not appear to be written findings of fact and conclusions of law regarding the stipulated facts bench trial in the record. Gardenhire

was sentenced to a total term of incarceration of 14 months. CP 122, RP 78. This appeal follows.

C. ARGUMENT.

1. The trial court properly considered Gardenhire's request to represent himself and did not abuse its discretion by denying the request when Gardenhire demonstrated an inability to respond to the trial court's colloquy.

The denial of a request to proceed pro se is reviewed for abuse of discretion. State v. Burns, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019). A trial court abuses its discretion if the decision is manifestly unreasonable such that no reasonable mind could come to that decision, if the decision is not supported by the facts, or if the judge applied an incorrect legal standard. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Absent an abuse of discretion, this Court should not reverse a trial court's decision, "even if [it] may have reached a different conclusion on de novo review." State v. Curry, 191 Wn.2d 475, 486, 423 P.2d 179 (2018).

When considered a request to proceed pro se, courts should indulge in "every reasonable presumption against a defendant's waiver of his or her right to counsel." In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). In evaluating such a request, a trial court first must determine if the request is

unequivocal and timely. Burns, 193 Wn.2d at 203. If a request is both unequivocal and timely, a trial court must then determine if the request is knowing, voluntary, and intelligent. Id.; citing Madsen, 168 Wn.2d at 504. The method of determining whether a defendant understands the risks of self-representation is a colloquy on the record. Burns, 193 Wn.2d at 203.

Our Courts have required that the colloquy “generally include a discussion of the nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of the case.” Id. citing, City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 057 (1984). Case law also suggest that trial courts include education, experience with the judicial system, mental health, and competency in the colloquy. Burns, 193 Wn.2d at 203. The trial court may also look to the defendant’s behaviors, intonation, and willingness to cooperate with the court. Curry, 191 Wn.2d at 484-485. As long as the trial court conducts an “adequate inquiry into a defendant’s request and there is a factual basis for the court’s finding that the waiver of counsel is not knowing, intelligent, and voluntary, then the trial court’s discretionary decision will not be disturbed on appeal.” Burns, 193 Wn.2d at 204.

In Madsen, which Gardenhire relies on in his Brief of Appellant, our State Supreme Court reversed a trial court's denial of a defendant's request because the trial court did not create a sufficient record for review. 168 Wn.2d at 510. Unlike the facts of this case, it does not appear as though the trial court in Madsen ever attempted to engage in a full colloquy of the defendant. Id. at 501-502, 506. In this case, the trial court attempted to engage Gardenhire in the proper colloquy; however, Gardenhire simply would not answer the trial court's questions. RP (3/7/19) at 9-11. The trial court was in the best position to observe Gardenhire's behavior, intonation, and willingness to cooperate with the Court.

Madsen was distinguished by the Court in Burns, where the trial court engaged in a comprehensive colloquy and despite Burns' claims that he understood what he was up against, his other remarks and behaviors indicated the opposite. Burns, 193 Wn.2d at 204. As occurred in Burns, the trial court here expressed concerns regarding whether Gardenhire could knowingly and intelligently waive his right to counsel based on Gardenhire's statements and behavior during the attempted colloquy. Id. at 204-205, RP (3/7/19) at 10-11.

Despite the trial court informing Gardenhire of the need to conduct an inquiry and going so far as to take a recess to ensure that the proper questions would be asked at the colloquy, Gardenhire continually interrupted, inserted irrelevant arguments into his answers, and questioned the reasoning of the trial court in asking the questions. RP (3/7/19) at 4-5, 6-8, 9-11. As in Burns, Gardenhire's responses to the trial court evidenced a lack of understanding of the gravity of the situation. Burns, 193 Wn.2d at 205. While the exact extent of his behavior likely does not show on paper, his attorney's reactions and the trial court's findings demonstrate that Gardenhire's behavior justified the trial court's finding that he was not able to knowingly, voluntarily and intelligently waive his right to counsel. By repeatedly interrupting and not answering the Court's questions, Gardenhire prevented the trial court from engaging in further inquiry. When a defendant sabotages the colloquy, the trial court does not abuse its discretion by denying the request. State v. Ratliff, 2017 Wn. App. LEXIS 957.³

When Gardenhire again asked to represent himself at the revocation hearing, the context of the request was equivocal. He

³ This is an unpublished decision not offered as precedential authority, but rather for whatever persuasive value the court allows. GR 14.1.

stated that he was unprepared because his trial attorney had not called him, accused the previous trial judge of not understanding the rules for determining his motion to proceed pro se, going as far as indicating she “had to googled” the rules, and indicated that he believed his attorney was working for the State. RP 8. When the trial court indicated that the issue had been decided by another judicial officer and then gave Gardenhire a chance to meet with his attorney, the response from the defense was that Gardenhire wished to hire additional counsel. RP 10-11.

Neither Judge Schaller, nor Judge Lanese, abused their discretion by denying Gardenhire’s requests to proceed pro se. Gardenhire’s responses and behavior justified Judge Schaller’s finding that he was unable to knowingly, voluntarily and intelligently waive his right to counsel due to this inability to follow the procedure of the court. Judge Lanese was not required to conduct a second colloquy where Judge Schaller had already inquired. This is especially true in light of the equivocal nature of the second request, which morphed into a request for a continuance to hire private counsel. See State v. Woods, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001) (a pro se request made in the context of expressing

displeasure with one's counsel often indicates that the request is equivocal).

2. If this Court finds that the record did not support a finding that the threat made by Gardenhire to Valencia was a threat to kill, the proper remedy is to remand for entry of findings of fact for gross misdemeanor harassment.

The diversion agreement entered in this case included language that Gardenhire stipulate “that the facts contained within the investigation reports are sufficient for a trier of fact to find [him] guilty.” CP 6. Gardenhire stipulated that the facts contained in the police reports were sufficient to convict him of the charged offense, and the record clearly indicates that the trial court considered those reports. RP 49. A stipulation is not tantamount to a plea of guilty. State v. Wiley, 26 Wn. App. 422, 425-426, 613 P.2d 549, *review denied*, 94 Wn.2d 1014 (1980).

The plain meaning of threaten includes all threats, including non-verbal utterances or gestures. State v. Pinkney, 2 Wn. App.2d 574, 411 P.3d 406 (2018). In this case, the victim indicated that Gardenhire threatened him by saying “I am going to kick your ass,” and that he believed Gardenhire was going to assault him. CP 52. The context of the threat was immediately after Valencia woke up to the sound of Brown screaming for him, he saw Gardenhire

holding Brown down and choking her by wrapping her own arms around her, saw Gardenhire slap Brown, and saw Gardenhire jumped back on Brown and began choking her with his hands after Valencia had pulled him away. CP 51. Combined with Gardenhire's stipulation that the facts were sufficient and taking the evidence in a light most favorable to the State, the trial court could have found that the threat to kick Valencia's ass could implicitly have been construed as a threat to kill.

Even if this Court finds that the facts and stipulation are insufficient for a finding that a threat to kill occurred, the trial court necessarily found that a threat occurred which Valencia believed would be carried out by finding Gardenhire guilty of felony harassment. When an appellate court finds the evidence insufficient to support a conviction for a charged offense, it may remand the case and direct the trial court to enter a judgment on a lesser included offense when the lesser offense was necessarily proved at trial. State v. Garcia, 146 Wn. App. 821, 830-831, 193 P.3d 181 (2008), *review denied*, 166 Wn.2d 1009; State v. A.M., 163 Wn. App. 414, 421-422, 260 P.3d 229 (2011). In a bench trial, the Judge may properly find a defendant guilty of any inferior degree of the crimes included in the original information. State v.

Peterson, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997); In re Pers. Restraint of Heidari, 159 Wn. App. 601, 609-610, 248 P.3d 550 (2011); *affirmed* 174 Wn.2d 288, 274 P.3d 366 (2012); State v. Jollo, 38 Wn. App. 468, 474, 685 P.2d 669 (1984).

Unlike in a jury trial, where the jury must be instructed on a lesser included offense in order for remand to a lesser included offense, this case was a bench trial, and necessary to the trial court's finding of guilt to the charge of felony harassment was the conclusion that Gardenhire was also guilty of the lesser included offense of gross misdemeanor harassment.

3. The State concedes that the record does not include findings of fact and conclusions of law from the bench trial per CrR 6.1(d), however, the error is harmless given the nature of the proceedings.

CrR 6.1(d) requires entry of written findings of fact and conclusions of law following a bench trial. If the trial court fails to enter sufficient findings and conclusions, it is harmless error if the trial court's findings are sufficient to permit appellate review. State v. Smith, 145 Wn. App. 268, 274, 187 P.3d 768 (2008). Because this case was a stipulated facts bench trial governed by a diversion contract, it is clear that the trial court accepted the facts presented by the State and concluded that the facts were sufficient for each of

the charged offenses. The only evidence presented was that which was proffered for the State. While written findings of fact and conclusions of law should have been entered, the lack of such findings is harmless because this Court has the ability to conduct appellate review based on the record.

If this Court finds that the error was not harmless, the correct remedy is to remand to the trial court for the entry of written findings of facts and conclusions of law. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

D. CONCLUSION.

The trial court did not abuse its discretion when it denied Gardenhire's request to proceed pro se. If this Court finds that the facts presented at the stipulated facts bench trial were insufficient to support a finding that there was a threat to kill as charged in Count 2, the trial court necessarily found all of the elements of the lesser included crime of gross misdemeanor harassment and because this was a bench trial, the proper remedy would be to remand for entry of a conviction and resentencing on the lesser included charge. The trial court should have entered written findings of fact and conclusions of law following the stipulated facts

bench trial, however, due to the nature of the proceedings in this case, the failure to do so does not hinder appellate review and is therefore harmless. If this Court remands the matter, the correct remedy is for the trial court to enter written findings and conclusions.

Respectfully submitted this 11th day of December, 2019.



Joseph J.A. Jackson, WSBA# 37306
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: December 11, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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