

31754-4-III
COURT OF APPEALS
DIVISION III

FILED
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Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LONNIE L. BLACK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in ruling Mr. Black would represent himself.
(RP 63)

B. ISSUES

1. Absent an express request to proceed *pro se*, does a court violate the defendant's right to assistance of counsel by determining that the defendant may represent himself?
2. When a defendant asks the court about the consequences of self-representation, does the court's failure to mention that the charged offense is a felony, which carries a maximum sentence of ten years, before permitting the defendant to proceed *pro se* violate the defendant's right to assistance of counsel?

C. STATEMENT OF THE CASE

Melissa and Lonnie Black got into an argument on March 6. (RP 19) Mr. Black put his hand over his wife's mouth and she bit his finger. (RP 19) The dispute continued through the following day and in the evening Ms. Black went to her sister's house. (RP 20-21) The following afternoon, March 8, Ms. Black's sister took her to the hospital where they were joined by police officers. (RP 21, 38) Ms. Black's sister told the officers she believed Ms. Black

had been in a “domestic violence dispute.” (RP 38) On March 13, the State filed an information charging Mr. Black with assaulting his wife by strangulation. (CP 1)

On the first day of trial, the deputy prosecutor questioned Ms. Black repeatedly asking her to affirm various out-of-court statements she had made after the alleged assault: (RP 17, 21, 26) The deputy prosecutor asked whether Ms. Black remembered telling a police officer while at the hospital, that she was “suffering a great deal of pain.” (RP 17) After Ms. Black acknowledged she had made a telephone call to Peggy Arnold, a person at the prosecutor’s office, the deputy prosecutor asked: “Did you express to her that you were fearful?” and “Do you recall telling Ms. Arnold that you were afraid your husband would shoot you?” (RP 26-28) Ms. Black responded by asserting that she did not recall the alleged statements. Defense counsel did not object to these questions.

The following day, Mr. Black told the court he believed his appointed counsel was biased against him and was unwilling to present any defense. (RP 50-52) The court told Mr. Black that no conflict or ineffective assistance of counsel had been established. (RP 54) Mr. Black responded: “I think I would be better off without her. . . . I don’t know how it works pro se, but - -” whereupon the court advised Mr. Black of his right to represent himself and the risks of self-representation. (RP 54-55) Mr. Black asked if he could get some kind of legal

assistance and the court again declined to appoint new counsel and reminded Mr. Black of his right to represent himself. (RP 55-56)

Following a break during which Mr. Black consulted with his appointed counsel, he told the court that he understood that appointment of standby counsel would be an option: “[T]here is an option called standby counsel where she will be here and be available to tell me the rules and the laws of the court and to ask her advice about the laws, how to address the court appropriately. I’d like to exercise that option if that’s fine.” (RP 57-58)

The court explained the limitations on the assistance available from standby counsel, and Mr. Black expressed his belief in the legal system. (RP 60-62) The court suggested “Beyond that, it's up to you to represent yourself and I guess . . . and take the consequences of that.” Mr. Black asked: “What are the consequences? Am I going to get in trouble here?” The court responded:

However this trial turns out, I guess, that’s – you’re going to represent yourself, and I don’t know what the outcome of the trial will be, but that is something that you are responsible for as your attorney, so -- or as representing yourself.

So -- because you’re not getting to be in trouble with the court or anything of that nature.

(RP 63) Whereupon Mr. Black was apparently permitted to proceed *pro se*.

(RP 63) The State presented an audio recording of Ms. Black’s statement to a police officer on the day she went to the hospital, along with various documents and photographs. (RP 109-10; Exh. 12-18) A jury found Mr. Black guilty of

second degree assault and the court imposed a 6-month sentence, the midpoint of the standard range. (CP 58, 60, 62)

D. ARGUMENT

1. THE COURT VIOLATED MR. BLACK'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.
 - a. Mr. Black's Requests To Proceed Pro Se Were At Most Equivocal.

Both the State and federal constitutions guarantee a criminal defendant the right to counsel and the right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010). A trial court's decision granting a defendant's request for self-representation is reviewed for abuse of discretion. *State v. James*, 138 Wn. App. 628, 636, 158 P.3d 102 (2007).

The right to self-representation is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). A court must indulge in "every reasonable presumption" against a defendant's waiver of the right to counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)), cert. denied, 531 U.S. 1125 (2001). Consequently, a "criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand 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)

(citing *State v. Lavene*, 127 Wn.2d 690, 698–99, 903 P.2d 960 (1995), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008)).

The unequivocal demand requirement resolves the inherent conflict between the right to counsel and the right to self representation by creating a default rule favoring representation. The purpose of the unequivocal demand requirement is “[t]o limit baseless challenges on appeal.” *State v. Imus*, 37 Wn. App. 170, 179, 679 P.2d 376, *review denied*, 101 Wn.2d 1016 (1984). When a defendant conditions a demand to proceed *pro se* on the trial court’s refusal to appoint new counsel, the defendant presents the trial court with a “heads I win, tails you lose” proposition. *Imus*, 37 Wn. App. at 179. If the trial court permits the defendant to proceed *pro se*, it risks reversal based on an ineffective waiver of counsel argument. Similarly, if the court denies the request, it risks reversal based on a deprivation of the right to self representation argument. *Imus*, 37 Wn. App. at 179. The requirement permits trial courts to deny this type of vague request without fear of reversal.

“[W]hen the trial court has correctly ruled that substitute counsel will not be appointed and the defendant insists that in the absence of substitute counsel he be permitted to defend *pro se*, his request must be deemed unequivocal.” *State v. Sinclair*, 46 Wn. App. 433, 437–38, 730 P.2d 742 (1986), *review denied*, 108 Wn.2d 1006 (1987). Mr. Black never made an unequivocal request to represent himself. The court responded to his remark “I don’t know how it works

pro se” by telling him he had the right to represent himself and advising him of the risks this entailed. Mr. Black stated he would like to exercise the “option” of having standby counsel appointed, and when the court responded by describing the limited assistance standby counsel could provide, Mr. Black merely asserted his belief in the legal system. And when Mr. Black asked about the consequences of self-representation, the court asserted that Mr. Black was going to represent himself so he would be responsible for the consequences. This colloquy fails to provide any support whatsoever for the proposition that Mr. Black made an unequivocal request to represent himself.

b. The Court Failed To Ensure That Mr. Black’s Waiver Was Knowing And Intelligent.

“Once a defendant unequivocally demands self-representation, the trial court must determine if the defendant has made a knowing, intelligent, and voluntary waiver of the right to assistance of counsel.” *State v. James*, 138 Wn. App. at 636, *citing State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). “There is no formula for determining a waiver’s validity, but the preferred method is a court’s colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused’s defense.” *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. Silva was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel.”

Silva, 108 Wn. App. at 541.

“The proper inquiry in determining the ‘knowing’ waiver of a right to counsel is the state of mind and knowledge of the defendant at the time the waiver is made.” *State v. Modica*, 136 Wn. App. at 445 (citing *United States v. Erskine*, 355 F.3d 1161, 1169-70 (9th Cir.2004), *affirmed on other grounds*, 164 Wn.2d 83, 186 P.3d 1062 (2008) The court failed to provide any meaningful response to Mr. Black’s expressed concern about the consequences of representing himself. These would have included the fact that he would be convicted of a felony and that the maximum penalty would be incarceration for 10 years, as well as, perhaps, some discussion of Mr. Black’s likely standard range sentence. The court made no effort to advise Mr. Black of these consequences.

Improper acceptance of a defendant’s waiver request constitutes reversible error. *State v. Madsen*, 168 Wn.2d at 503; *see also United States v. Arlt*, 41 F.3d 516, 521 (9th Cir.1994). The right to counsel is so fundamental to the right to a fair trial that any deprivation of it cannot be treated as harmless error.

Silva, 108 Wn. App. at 542.

E. CONCLUSION

In presuming Mr. Black's equivocal remarks constituted an unequivocal, knowing, intelligent and voluntary request for self-representation, the court violated his constitutional right to the effective assistance of counsel. His conviction should be reversed.

Dated this 13th day of May, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31754-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
LONNIE L. BLACK,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2014, I served a copy of Appellant's Brief in this matter by email to the attorney for the Respondent, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2014, I mailed a copy of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on May 14, 2014.


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