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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELUTERIO MORFIN-CAMACHO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the court abuse its discretion in permitting the Defendant to represent himself?
2. May the ministerial error in the judgment and sentence, which has no effect on the term the Defendant will serve, be perfunctorily amended?

IV. STATEMENT OF THE CASE

The Defendant Eluterio Morfin Camacho was charged with burglary in the second degree (a class B felony) and possession of methamphetamine (a class C felony). CP 57-58. On March 17, 2015, the Defendant explained that although he had never requested an

attorney, the court had appointed one. 1RP[1] 2, ll. 13-14. He asked to proceed pro se. 1RP 2.

The Defendant informed the court that he had a JD from Gonzaga and training and experience in the legal field. 1RP 2-3, 8. The court had the prosecutor explain the range of punishment the Defendant was facing; the prosecutor explained the standard range for each count. 1RP 3-4. The charging information provides the elements of the crimes. CP 57-58. The court explained that the State would be represented by an experienced prosecutor and the Defendant would be held to "the exact same standards as if you were an attorney regarding rules of evidence, rules of procedure." 1RP 4-5. The Defendant claimed to understand each point and to have experience with the procedural rules. 1RP 5.

The Defendant strenuously objected to his attorney discussing any competency concerns, explaining that his attorney had no point of reference to offer an opinion, having had minimal contact with his client. 1RP 6-7. The Defendant told the court he "[didn't] really need" standby counsel and would be requesting a "3.6 hearing in this

[1] The notation used in the Brief of Appellant is adopted here, such that "1RP" refers to the pretrial and sentencing hearings transcribed by Joe King and "2RP" refers to the trial transcribed by Pat Adams.

matter." 1RP 9.

At trial, the prosecutor invited the court to explain the jury selection process to the Defendant. 2RP 5 ("I'm not sure whether he needs orientation on the process as far as who he can strike"). The Defendant declined any assistance: "I don't, Your Honor. I'm good. I'm ready to go." 2RP 5. *See also* 2RP 7. The Defendant used all seven of his peremptory challenges and attempted to draw out from one potential juror whether he had law enforcement experience or connections. 2RP 9-10.

The Defendant cross-examined every witness called by the State, called his own witness, and made a closing argument. 2RP 2-3. The Defendant used his self-representation to forward a reasonable strategy. In cross-examination, the Defendant attempted to use his relationship with the victim to obtain a recantation of events. 2RP 62, 65, 71-72, 73-74, 83-85, 87-88 (attempting to ingratiate himself with the witness); 2RP 66, 79 (badgering the witness to tell a different story); 2RP 69 (prosecutor objecting that Defendant was "trying to convince the witness of his version" of events). He interrupted proceedings in order to obtain his mother's presence in the gallery for the victim's testimony. 2RP 46-48 (indicating that he

would "not be able to proceed" until his mother was called).

The victim struggled with using the interpreter. 2RP 49, 53. And in representing himself, the Defendant used his Spanish proficiency to try to reshape or manipulate the victim's testimony. 2RP 56, ll. 11-12 (interrupting direct examination to suggest that the witness testify differently); 2RP 57-58 (complaining that the incriminating testimony had been misinterpreted).

The Defendant used his cross-examination to appropriately challenge the officers' judgment as well as present his side of events, without having to take the stand. 2RP 36, 108-12, 117-19, 216. He pointed out discrepancies in testimony. 2RP 141 (officer attempted but did not actually succeed in interviewing inmates). He appeared to have gotten under a witness' skin. 2RP 142-45. He questioned the thoroughness of the investigation. 2RP 42-43, 112-13. He questioned police about possible prejudice and use of force. 2RP 40-41, 114, 136-37, 167-68, 171-73, 200-08.

The Defendant did not shy away from cross-examining the expert witness. 2RP 156-60 (inquiring about prescribed methadrine and its effects). And he presented a defense of necessity through his own witness. 2RP 214-21.

The Defendant was convicted as charged. CP 5-17. The prosecutor requested and the court imposed a high end sentence within the standard range. 1RP 12, 20.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE DEFENDANT'S REQUEST TO REPRESENT HIMSELF.

The United States and Washington Supreme Courts recognize a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. *Faretta v. California,* 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Hahn,* 106 Wn.2d 885, 889, 726 P.2d 25 (1986). Unlike the United States Constitution, the Washington State Constitution explicitly provides a constitutional right to self-representation. WASH. CONST. art. I, § 22 (providing that "the accused shall have the right to appear and defend in person").

Decisions on the right to self-representation are reviewed for abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702, 710 (2014) *cert. denied*, 135 S. Ct. 1444, 191 L. Ed. 2d 399 (2015).

> The "ad hoc," fact-specific analysis of waiver of counsel questions is best assigned to the discretion of the trial court. *State v. Hahn,* 106 Wash.2d 885, 900–01, 726 P.2d 25 (1986) (emphasis omitted). A decision on a defendant's request for self-representation will therefore be reversed only if the decision is "manifestly unreasonable," relies on unsupported facts, or applies an incorrect legal standard. *Madsen,* 168 Wash.2d at 504, 229 P.3d 714 (citing *State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

State v. Coley, 180 Wn.2d at 559.

When a defendant expresses a desire to proceed without the assistance of counsel, the trial court must assure the defendant understands the risks of doing so. *Faretta v. California,* 422 U.S. 806, 836. The defendant should be made aware of the risks and disadvantages of self-representation, with an indication on the record that " 'he knows what he is doing and his choice is made with eyes open.' " *City of Bellevue v. Acrey,* 103 Wn.2d 203, 209, 691 P.2d 957 (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975)).

> "***Preferably***, there [will] be a colloquy on the record informing the defendant of the nature of the charge, the maximum penalty, and technical rules he must follow in presenting his case." *City of Tacoma v. Bishop,* 82 Wash.App. 850, 856, 920 P.2d 214 (1996) (citing *Acrey,* 103 Wash.2d at 211, 691 P.2d 957). "In the absence of a colloquy, the record must otherwise indicate that the defendant was aware ***of the risks of self-representation***." *Bishop,* 82 Wash.App. at 856, 920 P.2d 214 (citing *Acrey,* 103 Wash.2d at 211, 691 P.2d 957).

State v. Afeworki, 189 Wn. App. 327, 344-45, 358 P.3d 1186, 1197 (2015) (emphasis added). The most commonly understood method of waiving a constitutional right is by an affirmative, verbal request. *United States v. Goldberg*, 67 F.3d 1092, 1099 (3rd Cir. 1995).

The Defendant relies on *State v. Silva*, 108 Wn. App. 536, 31 P.3d 729 (2001). The *Silva* court acknowledged that there is "no formula" in weighing a waiver's validity. *State v. Silva*, 108 Wn. App.at 539. But the "preferred method" includes a colloquy which explains the seriousness of the charge, the possible maximum penalty, and the existence of technical, procedural rules which govern how the defense may be presented. *Id.* Despite this clear language, the Defendant attempts to interpret a formula from the holding in *Silva*. This is a misinterpretation of the case.

The facts in Silva's case are extreme and unlike the facts here. Silva had two cases proceeding at the same time. *Id.* at 538. He had requested permission to proceed pro se in a contemporaneous case in which he was requesting post-conviction relief. The court conducted a colloquy appropriate for the circumstances in that case. *Id.* at 538-39.

When Silva later requested to proceed pro se in the matter which is the subject of the published case, the court did not conduct a second colloquy, but relied instead on the colloquy conducted in the post-conviction matter. *Id.* at 538. This earlier colloquy in the post-conviction matter "was insufficient as applied to [the other] case." *Id.* at 541. It did not address any of the elements of the "preferred method." It had not addressed the facts specific to the matter which was proceeding to trial. The judge would not have and did not address trial competencies, because those were not at issue in a post-conviction matter. The earlier colloquy did not warn of the risks associated with preparing for a jury trial and did not advise of the nature of the charges and maximum penalty. *Id.* at 540.

The *Silva* court was willing to overlook many of these deficiencies to the "preferred method." *Id.* at 540 (finding the absence

of a separate colloquy was "not fatal"). However, on balance, the standard could not be met, and the conviction was reversed.

The Defendant Camacho argues that, like Silva, he was not aware of the maximum penalties. But as *Silva* notes, **there is no formula**. And unlike Silva, the Defendant received a colloquy tailored to the particular case. In the discussion, the Defendant was advised of the risks of going to trial and the requirement that he abide by procedural rules.

At trial, the Defendant demonstrated full involvement in the trial process. He presented a complex defense, challenging the thoroughness and neutrality of investigators, appealing to the sympathy of his victim, and presenting a defense of necessity. The record demonstrates that he was advised of the nature and gravity of the charges and that the Defendant was aware of the risks and disadvantages of self-representation.

The trial court did not abuse its sound discretion in permitting the Defendant to exercise his constitutional right to self-representation. The decision cannot be said to be "manifestly unreasonable," unsupported by facts, or applying an incorrect legal standard.

B. THE SENTENCE ON THE SECOND COUNT MAY BE CORRECTED

The Defendant correctly notes that the sentence on the second (lesser) count exceeds the standard range by one day. It is appears to be a ministerial error. Orally there was no error. The sentencing judge correctly noted the range was on count two was "six-plus to 12 months." 1RP 20. The judge imposed high end sentences on each count. 1RP 20.

The addition of the extra day does not affect the actual sentence, because the sentence in the second count runs concurrently with the larger sentence in the first count.

It is appropriate to request the superior court make this correction of a ministerial error. Because it is a ministerial error, the correction does not require the Defendant's presence. *State v. Jury*, 19 Wn. App. 256, 270, 576 P.2d 1302, 1310 (1978) (The defendant's presence is required only when it bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge), *citing Snyder v. Massachusetts,* 291 U.S. 97, 106–07, 54 S.Ct. 330, 78 L.Ed. 674 (1934)), *cert. denied,* 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989). *See also United States v. Truscello,*

168 F.3d 61, 63–64 (2d Cir.) (trial court could enter written judgment and sentence without defendant's presence where defendant was present for oral sentencing, and oral and written sentences did not conflict), *cert. denied*, 120 S.Ct. 335 (1999); *Cherry v. State,* 361 F.Supp. 1284, 1288 (N.D.Tex.1973) (written judgment and sentence was a ministerial act rather than a critical stage); *State v. Mazurek,* 537 P.2d 51, 55 (N.M.App.1975) (trial court could enter written judgment and sentence without defendant's presence where defendant was present for oral sentencing, and entry of written judgment and sentence was merely a ministerial act); CrR 3.4 (defendant required to be present at the 'imposition' of sentence). And the correction will not create a right for a new appeal. *State v. Wade*, 133 Wn. App. 855, 138 P.3d 168 (2006).

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and remand for correction of the ministerial error.

DATED: February 17, 2016.

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Christopher H. Gibson gibsonc@nwattorney.net sloanej@nwattorney.net Eluterio Morfin-Camacho DOC No. 358301 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA 99001	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 17, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**