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Division III
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 35854-2-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JARED ANTHONY WINTERER,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The defendant's request to represent himself was unequivocal when for months the defendant made consistent, repeated, and strenuous requests to the court to be pro se.

B. ISSUES PRESENTED

- a. Is a defendant's request to represent himself unequivocal when he consistently, repeatedly, and strenuously requests the court, at almost every possible court hearing that he wants to represent himself, the court gets feedback from his appointed counsel, and the court conducts multiple hearings and has more than ten conversations with the defendant about representing himself?

C. STATEMENT OF THE CASE

In his representation for several felony offenses, Mr. Winterer was continually frustrated with the help, advice, and counsel of his defense attorneys. He was initially charged on August 5, 2016 with an information that alleged one count of Stalking for victim Rachel Massey, seven counts of felony harassment regarding threats made to corrections officers,

two counts of misdemeanor harassment also of corrections officers, and six counts of malicious mischief in the second degree for damage done while incarcerated in the jail. (CP at 1 – 6, 174; Supp ROP 82 - 84)^{1, 2} On August 9, 2016 Mr. Etoy Alford, Mr. Winterer’s first attorney in this case was appointed to represent him. (CP at 19).

At a hearing on September 23, 2016 Mr. Winterer voiced his dissatisfaction with the way his attorney was handling his case, saying, “This guy is doing his own thing. He refuses to do anything my way. He won’t give me evidence. He won’t do anything. You cannot force me to [unintelligible] counsel. It’s violating the Sixth Amendment. And this guy is not doing things my way.” (RP at 3 – 4). He continued, “You cannot force me to have ineffective counsel. That’s a Sixth Amendment violation. [Unintelligible] things my way. He has refused repeatedly to give me evidence, and he argues with my defense.” (RP at 4). This was the beginning of a long, repeated pattern of behavior for Mr.

¹ The counts were later amended and the counts involving jail personnel and damage to the jail was taken off of this case and added to another cause number, 16-1-00174-1. (RP at 20; Supp ROP at 82 – 83)

² Because this appeal focuses solely on the issue of self-representation, the summary of facts provided focus on the hearings where Mr. Winterer requested to represent himself rather than a recitation of the facts and evidence in trial; the defendant was found guilty at trial of one count of Stalking.

Winterer where at almost every court hearing³ he would complain about the way his attorney was representing him (RP at 3 – 4; 8)

On November 28, the defendant started the hearing by announcing to the court, “I need new counsel and I need a speedy trial waiver and new counsel [unintelligible] ineffective assistance of counsel, and I wanted a motion...” (RP at 8). He continued, “I need help, and there’s no attorney that will help me and –“(RP at 8). Mr. Alford moved to withdraw and when the court indicated that everyone agreed that Mr. Winterer should have a new attorney, Mr. Winterer asked the court to sign an order he had prepared. (RP at 9). The court asked Mr. Winterer if he wanted another attorney or if he wanted to represent himself and he told the court he was “doing this pro se, but [he] need[ed] counsel getting the evidence and such.” (RP at 9).

The court agreed with the defendant that he had “an absolute

³ Mr. Winterer had two other felony cases pending at the same time as this offense – 16-1-00232-2 and 16-1-00741-1, and most pretrial hearings addressed all three cases, but in 16-1-00232-2, Mr. Winterer went to trial where he was represented by Mr. James Kirkham and was displeased with Mr. Kirkham’s representation in that trial although was able to view an entire trial with an attorney representing him from start to finish. (CP at 8, RP at 23, 27; Supp ROP 99, 101 - 122).

right under [Washington] Constitution to represent himself
and engaged in this exchange:

THE COURT: You have a right to represent yourself;
I'm confirming that, that's what I'm telling you.

DEFENDANT: I know, but I need some counsel to
getting evidence and such.

THE COURT: Now, if you want standby counsel –

DEFENDANT: Yeah, exactly.

THE COURT: So you'll be representing yourself, and
if there's any -- if we have any hearings you'll be the
one asking the questions of the witnesses and –

DEFENDANT: Exactly.

THE COURT: -- doing all of the legal writing and all
of the legal briefing and –

DEFENDANT: I wrote this motion right here. I don't
know how good this motion is –

THE COURT: That would be for the court to decide;
wouldn't it?

DEFENDANT: Do you want to look at this?

THE COURT: Well, I do, but I want you to follow
the Court Rules on filing motions. You give a copy to
the State, you give a copy to the court, and you keep a
copy for yourself, and then the original goes –

DEFENDANT: Standby made copies of this (sic).

THE COURT: Okay. Stand by here. So I want to ask
a couple more questions. You do have the absolute
right to represent yourself, okay? And that's because,
you know, not everybody trusts the government that's,
you know, if the government is bringing the charges
against you and you have to be like wait a minute,
and then the government is going to give me an
attorney. That doesn't seem fair, right?

DEFENDANT: I have like [UNINTELLIGIBLE]
because I trust the government –

THE COURT: So you have the right to represent
yourself. However, you've heard this saying, haven't
you –

DEFENDANT: A dentist that treats himself is a fool.

THE COURT: That's close, yeah, a dentist that treats himself is a fool, but also a lawyer who represents himself has a fool for a client. Because it's hard to be objective when you're talking about your own problems. It's hard to be objective when you're wondering, you know, how you should deal with something. That's one of the greatest things about having an attorney is not just the fact that they've gone to law school and they understand the Rules of Evidence and the Rules of Criminal Procedure and the process and they've done it many, many times, that's not the only thing that they're good at. They're also good at being able to give you objective advice, you know. It's like, hey, I don't know what you want to do, but this is what you should do. That's good stuff. So –

DEFENDANT: Well, see, the thing is I don't take advice because it isn't in my game plan. I'm going strictly by my game plan.

THE COURT: Yeah, following advice is different than hearing advice. You don't have to follow the advice. So you want a different attorney, someone other than Mr. Alford?

DEFENDANT: Counsel, standby –

THE COURT: You want standby counsel, you want to represent yourself? You understand that you're doing this is probably not a good idea?

DEFENDANT: Says you, Judge.

THE COURT: That's right.

DEFENDANT: And so is the government. That's totally the government.

THE COURT: Okay.

DEFENDANT: I'm myself, and that's my case and myself –

THE COURT: Do you understand that you'll be held to the same rules as if an attorney -- if you were an attorney?

DEFENDANT: Yeah. And so –

THE COURT: So if you're asking a question and the prosecuting attorney objects and I sustain the

objection, you don't get to ask that question. You might not even know why. Do you understand that?
DEFENDANT: Yeah. All right. But, okay, so I need some standby counsel to help explain that to me.
THE COURT: Okay. We'll get you standby counsel, but you want to represent yourself, I understand. Now, we're today -- I'm going to grant the motion, Mr. Alford.
MR. ALFORD: Thank you, your Honor.
THE COURT: We'll find someone else to be your standby counsel.

(RP at 10 – 14).

At this hearing, his attorney Mr. Alford was allowed to withdraw from the case (RP at 13; CP at 66). The court also explained the role of standby counsel to the defendant that they were there to assist Mr. Winterer, but that he was representing himself and was the decision-maker (RP at 15).

On March 10, 2017 Mr. Winterer filed numerous motions with the court on his own behalf (Supp RP at 4 – 5). Mr. Bueschel (standby counsel) was present at this hearing to assist Mr. Winterer (RP at 6 – 7). There was an additional conversation about Mr. Winterer's self-representation where the state indicated Mr. Winterer "still wanted to run the show,"

but Mr. Winterer requested more “help,” with things like typing motions to be legible. (RP at 7 – 10). The court discussed what it meant for Mr. Winterer to represent himself when Mr. Winterer inquired about hiring someone and the court again engaged in a lengthy discussion with Mr. Winterer about his self-representation and his need for an attorney and at the end of that hearing, re-appointed Mr. Winterer a new attorney, at Mr. Winterer’s request.

DEFENDANT: Could I hire (inaudible)? (Inaudible).

THE COURT: You want to have an attorney?

DEFENDANT: (Inaudible) -- Can I still call the shots?

THE COURT: Well, you -- when you’re the attorney you of course have to respect your client’s decisions. So if you are the client -- You call the shots in that you decide whether or not you’ll testify, you decide whether or not -- you accept an offer from the state. You do call those shots.

DEFENDANT: So, what -- what -- what’s the -- what’s the (inaudible).

THE COURT: Because it’s the method by which you go through the case. That’s what the attorney gets to decide. Like -- like, filing specific motions. The attorney knows whether those are -- well-grounded; the attorney knows whether they are well grounded in law and in fact. And so the attorney does not have to file a motion that the defendant-client wants.

DEFENDANT: So,--

THE COURT: --client might want to file some motion but the attorney says, “You know, that’s

actually for me to decide, the process that we go through”—

DEFENDANT: (Inaudible).

THE COURT: But you do have a right to accept any offers -- okay?—

DEFENDANT: --tell him what to do, I can—

THE COURT: You can ask him what to do. You don't tell your -- your person that you're working in cooperation with how to do something. You don't tell the doctor how to do surgery on you.

DEFENDANT: (Inaudible)—

THE COURT: No, you're probably not because you don't have any idea how to do surgery on a human being.

DEFENDANT: -- (inaudible) ought to know what he's talking about, (inaudible).

THE COURT: So, do you want to have an attorney or not. We've already established that you do not

DEFENDANT: I -- (inaudible).

THE COURT: My patience is wearing thin.

DEFENDANT: I know. I can see that in your face.

But, -- what I'm saying is -- wants this and I can't get it. So, yeah, (inaudible) just wanted my attorney -- (inaudible) trial (inaudible). I don't want (inaudible) trial—

THE COURT: Forced into a trial or force out of a trial?

DEFENDANT: Forced out like—

THE COURT: The attorney can't do that.

...

THE COURT: Mr. Winterer, do you want to have an attorney assist you, instead of having standby counsel?

DEFENDANT: Yeah. And I have (inaudible) ambitious to make money. I mean, this statement right here (inaudible). So I want -- I want an attorney that's ambitious (inaudible) because (inaudible). I told him to -- I told him to -- to get me transcripts—

...

THE COURT: Mr. Winterer, do you want to have an attorney or not.

DEFENDANT: (Inaudible) -- yeah -- Yes, I do want an attorney. And -- I'm having some difficulty because I -- have (inaudible).

THE COURT: All right. Listen. This is what I'm going to do: I'm going to try to find an attorney for you out of Yakima.

...

THE COURT: So, -- I'm going to-- --order regarding counsel and -- hearing date. "Mr. Winterer has decided to waive his right to proceed -- pro se and wishes to have the court -- appoint counsel."

MOTION 3/10/17 19 So, Mr. Winterer, let me just confirm with you again, sir,--

DEFENDANT: Yeah.

THE COURT: You want me to -- you want me to appoint an attorney for you—

DEFENDANT: (Inaudible).

THE COURT: Is that right? Just to confirm. 'Cause that's what you said earlier.

DEFENDANT: (Inaudible).

THE COURT: I know you're on the fence, you want to either represent yourself or you want an attorney.

DEFENDANT: (Inaudible) -- Oh, I do want an attorney because he knows—

THE COURT: The attorney knows what -- the process.

DEFENDANT: Yeah.

THE COURT: Yeah. And that's the thing that you're getting struggle -- you're struggling with that. I understand.

DEFENDANT: (Inaudible) deal, man—

...

THE COURT: Speedy trial's different. That's (inaudible) talking about. See, that's what I'm -- I'm proving to you—

DEFENDANT: (Inaudible)—

THE COURT: I'm proving to you that you don't even know the basic rules about what you're doing here.

That's why you need an attorney.

DEFENDANT: Exactly.

THE COURT: Okay.

DEFENDANT: (Inaudible).

...

THE COURT: --attorney will be provided.

(Supp RP at 11 – 22).

On March 16, the court held another pretrial hearing where Mr. Winterer was represented by James Kirkham upon the court's appointment (Supp RP at 24 – 25)⁴. Mr. Winterer still wanted to file his own motions (some of which Mr. Kirkham supported) and address the court on his own behalf and the court reminded him that his communications to the court should come through his attorney (Supp RP at 30).

At a hearing on April 3, 2017, still being represented by Mr. Kirkham, Mr. Kirkham informed the court that Mr. Winterer wished to represent himself and have Mr. Kirkham as standby counsel (Supp RP at 34 – 35). The court once again engaged in a discussion with Mr. Winterer about his right to represent himself and Mr. Kirkham and Mr. Winterer gave the court information about their desired or

⁴ Mr. Kirkham represented Mr. Winterer on all three of his pending Superior Court matters, one of which (16-1-00232-2) he took to trial and represented Mr. Winterer for the entire trial (Supp RP at 32, 47, 50, 81; Supp ROP 101).

expected defenses in the case and how Mr. Winterer believed his defense claim was not being taken seriously by his attorney. (Supp RP at 37 – 39). The court discussed Mr. Winterer’s history in the case(s) of representing himself, having standby counsel, and Mr. Kirkham’s attempts to assist him. (Supp RP at 40). No action was taken by the court to remove Mr. Kirkham from the case (Supp RP at 40 – 41).

In Court on April 28, Mr. Winterer continually interrupted Mr. Kirkham and then told everyone in the courtroom that he was “defending himself” and then repeated his request to “defend [himself] pro se again.” (Supp RP at 44). The court denied his motion to represent himself.

On July 24, 2017 at a hearing, Mr. Kirkham informed the court that Mr. Winterer had written a letter, again requesting to represent himself (Supp RP at 50). Mr. Winterer became agitated that Mr. Kirkham wasn’t getting him the right medical treatment and also wanted to file motions on his own

behalf, telling the court that he “needed control over this stuff.” (Supp RP at 51).

After additional court hearings and an evaluation by a mental health defense expert, on August 25, 2017 Mr. Winterer again renewed his motion to represent himself (Supp RP at 68 – 69). And again, before the court on October 9, the defendant told the court he needed “some assistance – counsel, Judge (inaudible) evidence, I – some witnesses” and Mr. Kirkham renewed his motion to represent himself again with the court:

MR. KIRKHAM: Met with Mr. Winterer this morning, and we have a little difference of opinion on how the case should be tried. He would like to proceed pro se again. And I let him know that the court was not likely to do that—

DEFENDANT: (Inaudible) it’s my right, (inaudible) -- likely is me doing pro se. And I’m -- I need some counsel to get me some evidence or help me get evidence—

THE COURT: Wait a minute. Do you want an attorney or no?

DEFENDANT: No. No attorney—

THE COURT: No—

DEFENDANT: --counsel.

THE COURT: Counsel. What do you mean by that?

DEFENDANT: Well, like some assistance of counsel. Someone to assist me, not run the

show. It's my show, Judge. If you want something done right you do it yourself. And -
- I just need some help, some assistance -- of counsel. And I need -- I need some -- need help (inaudible) like getting -- (inaudible) evidence and I need -- call a few witnesses.

...

DEFENDANT: (Inaudible) me. I'm -- I'm pro se. I'm -- I'm not ready for trial until -- I want to set status for like next month. And so -- I want some assistance of counsel (inaudible). Because I -- I can do -- I can (inaudible) it would go faster if I had some assistance of counsel. And that's what (inaudible) says I get, some assistance of counsel. And -- Kirkham refuses to help me, and -- (inaudible).

THE COURT (off mic'): (Inaudible) other -- Every other attorney -- had you've had conflicts (inaudible).

...

DEFENDANT: It's my defense and I need some assistance so I'm not ready for trial. I don't care what Jodi [Hammond] says. It's not going to happen (inaudible) because I'm the one defending myself.

(Supp RP at 73 – 77). Mr. Winterer and his attorney continue to discuss on the record that they do not agree on trial strategy. During every hearing, Mr. Winterer is consistently interrupting his attorney, interjecting his opinion about trial strategy, the work his attorney is doing, and his plans in the case.

On December 18, when parties were announcing ready on Mr. Winterer's first trial, where he was represented by Mr. Kirkham, Mr. Winterer again expressed his displeasure with counsel and his desire to be in charge of the direction of the case:

DEFENDANT: Yeah. I -- I hear what you're saying, but, you know, I need to talk first, 'cause -- really -- I -- you -- let the -- my -- my counsel and -- prosecutor talk. I have not talked and I need to talk, because -- you -- I don't know what you guys are talking about. Because I have not been on the same page to you guys. --you guys are ready for trial, I'm not.

THE COURT: And so every time you walk into a room you get to the start the conversation (inaudible)—

DEFENDANT: Judge,--

THE COURT: -- (inaudible)—

DEFENDANT: --well, especially now 'cause I'm not talk.

THE COURT: Yeah.

DEFENDANT: I haven't talked the whole time—

(Supp ROP at 87). At this hearing when Mr. Kirkham announced that he was ready and that the defendant was not happy with his trial strategy, the defendant told Mr. Kirkham he was fired. Mr. Kirkham again indicated to the court that Mr. Winterer wanted to represent himself.

MR. KIRKHAM: He would like to pursue the case pro se. I've indicated to him that he had that opportunity -- before. I was appointed to represent him. I'm doing my best to represent him like I would any other client. The defenses that we have I do not believe are mutually exclusive. So I -- I see no reason why I would not as an attorney allow him to present -- his testimony, and I

don't know that it would necessarily conflict with the defenses that I've come up with. I've attempted to go through each and every count with Mr. Winterer. It was not exactly fruitful. I do appreciate the time the court gave me, given the number of counts, so there is some issue with effective assistance, but he's -- already -- his, not mine. He has already been evaluated by Eastern, said that he's competent. We had a diminished capacity eval done that did not go where I thought it should have. So, I'm ready for trial if the court chooses to leave it set and -- and go despite his pleas to the contrary.

(Supp ROP at 87 – 88). The defendant told the court he had continued to file his own motions on his own behalf and asked the court if the court had received his motions. (Supp ROP at 88). He articulated his anticipated defenses, citing the constitution and cited the justification defense (ultimately what he argued in front of the jury). (Supp ROP at 89, 92, 93, 98). He discussed the defense of entrapment and that the state had exploited his trauma. (Supp ROP 92). On that date, they affirmed the case set for trial where Mr. Kirkham represented the defendant for the entire trial. (Supp ROP at 99).

After that first time with Mr. Kirkham as Mr. Winterer's defense attorney, a status hearing was set to discuss sentencing on January 5, 2018. At that

hearing, Mr. Winterer continued to tell the court about his desire to speak and reiterated that he didn't need an attorney because he needed to control his own defense, cross exam, and witnesses. (Supp ROP at 102). He discussed with the court needing to understand the hearsay rule and the exceptions (Supp ROP at 102 – 103). Mr. Kirkham told the court that during a district court case where Mr. Winterer was not represented by Mr. Kirkham but Mr. Kirkham was present, Mr. Winterer told the district court that Mr. Kirkham was fired as his attorney in Superior Court for ineffective assistance of counsel (Supp ROP at 103). He again directly requested the court to be "pro se" with a need for standby counsel. (Supp ROP at 104). The court reviewed the previous record and requests made by Mr. Winterer to represent himself and how things had gone back and forth. (Supp ROP at 106). Mr. Winterer told the court it was a mistake to have Mr. Kirkham represent him. (Supp ROP at 106). Mr. Winterer told the court he was unhappy with Mr. Kirkham's prior representation because Mr.

Kirkham hadn't subpoenaed his witnesses. (Supp ROP at 107).

The court discussed the pros and cons of letting Mr. Winterer represent himself and the difficulty he had encountered when represented by several attorneys and Mr. Winterer told the court he didn't need an attorney (Supp ROP at 108). Mr. Kirkham also expressed the difficulty an attorney might have assisting Mr. Winterer in trial (Supp ROP at 108 – 109). Mr. Winterer renewed his request to be pro se, citing his Sixth Amendment rights (Supp ROP at 109).

At the sentencing hearing on his other case that day, Mr. Winterer told the court the mistake in the case was the court allowing Mr. Winterer to be represented by Mr. Kirkham (Supp ROP at 113). He reiterated again his desire to represent himself in the two additional cases he had pending (Supp ROP at 118 – 119). The court requested Mr. Kirkham research the issues about the defendant representing

himself and having standby counsel. (Supp ROP at 119).

At the status conference on February 2, Mr. Kirkham told the court that Mr. Winterer still wished to represent himself (Supp ROP at 124). Mr. Kirkham indicated he had written a letter to the court that summarized his research on the defendant's request to represent himself in which he opined that the defendant did have a constitutional right to represent himself as he was in fact requesting to do; Mr. Kirkham indicated he had spoken to Mr. Winterer about his desire to represent himself. (CP at 129). The court then engaged in conversation with Mr. Winterer, again, about his right to represent himself, reminding him about the trial he had just done where he had been represented by Mr. Kirkham and convicted and asked about the second trial: Mr. Winterer told the court, "No, I just want to represent myself—." (Supp RP at 126). The defendant was charged in that case with stalking and since Mr. Winterer was insisting on representing himself, the

state raised some procedural concerns to the court about Mr. Winterer directly being allowed to cross examine the victim. (RP at 127). The court then discussed cross examination with the defendant and some limitation the court might put on that because the victim did not want to have direct contact with the defendant (Supp RP at 129). Having those limitations on cross examination in mind, the court again asked the defendant if he wanted to represent himself, doing cross examination by writing his questions down and then giving them to the judge to ask the victim when she was testifying and Mr. Winterer agreed (Supp RP at 129 – 30).

The court then discussed the process of voir dire with the defendant and his opportunity to ask the potential jurors questions (Supp RP at 130). He reminded the defendant that his standby counsel wouldn't be making any objections; the defendant brought up hearsay and relevancy (Supp RP at 131). The court told the defendant about giving his opening statement; the defendant indicated he already had the

statement written down (Supp RP at 131). They talked about any witnesses the defendant wanted to call and they discussed the relevancy of the doctors Mr. Winterer had been requesting to call as witnesses and the court talked about prior rulings it had made about those witnesses not being relevant to the case (Supp RP at 132 – 33). The defendant told the court that he wanted to represent himself on the two remaining pending Superior Court cases (Supp RP at 134). Mr. Kirkham told the court he wanted to continue to represent Mr. Winterer because Mr. Kirkham thought it would be better than Mr. Winterer proceeding pro se, but the court reiterated that Mr. Winterer had made multiple requests to represent himself and the court had granted his request, then changed the ruling, appointing him counsel, then granted his request again and the court was unwilling to reconsider re-appointing counsel with Mr. Winterer's adamancy that he proceed pro se (Supp RP at 137). At the end of the hearing, the defendant asked the court about a concern he was having with a

hearsay objection and the court told Mr. Winterer he would rule on any objections made in trial as they happened and reiterated that Mr. Winterer's proposed witnesses were not relevant. (Supp RP at 138 – 39).

In addition to the multiple court hearings where the defendant made requests to represent himself, while the case was proceeding whether during times he was represented by counsel or not, he wrote at least ten letters directly to the court between August, 2016 and October, 2017 – many times referencing his right and request to represent himself. (CP 20 – 21, 22 – 24, 40 – 42, 43 – 45, 53 – 54, 58 – 59, 60 – 61, 62, 89 – 90, 109 – 110, 111 – 112, 113 – 114, 119 – 120).

Mr. Winterer proceeded to trial, representing himself and was convicted of one count of stalking and sentenced to 120 months in prison. (CP at 201, 204 – 214).

D. ARGUMENT

Criminal defendants have a right to self-representation under the Washington Constitution and the

United States Constitution. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Wash. Const, art. I, § 22 ("the accused shall have the right to appear and defend in person")); Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). However, the right to self-representation is neither self-executing nor absolute. Id. at 504. In fact, the right to self-representation is in tension with another crucial constitutional right: a defendant's right to the assistance of counsel. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Because of this tension, a defendant must unequivocally request to proceed pro se before he or she will be permitted to do so. Id. This requirement protects defendants from inadvertently waiving assistance of counsel and protects trial courts from "manipulative vacillations by defendants regarding representation." Id. Additionally, "a trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel." Id. at 377.

A reviewing court reviews a trial court's decision to grant or deny a defendant's request to proceed pro se for abuse of discretion. Madsen, 168 Wn.2d at 504. A trial court

has abused 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.'" Id. (Quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The grant of discretion given to trial courts is broad: "Affording discretion to a trial court allows the trial court to operate within a 'range of acceptable choices.'" State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting Rohrich, 149 Wn.2d at 654).

Great deference must be given to the trial court's determination: even if a reviewing court disagree with the trial court's ultimate decision, that decision is not reversed unless it falls outside the range of acceptable choices because it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard. See State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Recently, giving a lot of guidance to appellate courts, the Washington Supreme Court decided State v. Curry, 423 P.3d 179, 2018 Wash. LEXIS 542 (2018) where it reviewed

the standards for reviewing a court's decision on a defendant's request to represent themselves and articulated several factors when reviewing a trial court's decision to grant or deny self-representation for abuse of discretion.

State v. Curry, 423 P.3d 179, 183-184, 2018 Wash. LEXIS 542, *8-10 (2018):

First, the trial court is in a favorable position compared to that of an appellate court. Trial judges have far more experience considering requests to proceed pro se and are better equipped to balance the competing considerations. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (stating that “‘the trial judge,’ having ‘seen and heard’ the proceedings, ‘is in a better position to evaluate and adjudge than can we from a cold, printed record’” (quoting State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967))). Additionally, trial courts have the benefit of observing the behavior and characteristics of the defendant, the inflections and language used to make the request, and the circumstances and context in which it was made. See id.

Second, whether a request for self-representation is unequivocal must be determined on a case-by-case basis, considering the circumstances, the defendant, and the request. Sisouvanh, 175 Wn.2d at 621-22 (applying an abuse of discretion standard when “a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis” (citing In re Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003); State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003))). The decision is inevitably fact intensive and involves the weighing of numerous factors. See DeWeese, 117 Wn.2d at 378 (noting that the validity of a waiver of counsel depends on the facts of the case and that “there is no

checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant”).

Third, a generally applicable rule cannot be effectively constructed. Sisouvanh, 175 Wn.2d at 621-22. This is because the decision is fact specific and the extent of the trial court's discretion is partially tied to the timing of a defendant's request to proceed pro se. State v. Breedlove, 79 Wn. App. 101, 107, 900 P.2d 586 (1995) (discretion of a trial court “lies along a continuum that corresponds with the timeliness of the request to proceed pro se”); State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). Accordingly, we have not articulated a bright-line rule instructing the trial court when to grant and when to deny a request for self-representation, nor is it pragmatic to do so.

Under an abuse of discretion standard, we do not reverse a trial court's decision unless the trial court applied the wrong legal standard, based its decision on facts unsupported by the record, or made a decision that is manifestly unreasonable—even if we may have reached a different conclusion on de novo review.

Starting with the deference given to the trial court and applying those factors to the facts of this case, it is clear that there was no abuse of discretion in the judge allowing the defendant to choose to represent himself in this case.

With regard to the first factor, this court was very familiar with the defendant, Mr. Winterer. Literally for months the defendant was making repeated, consistent, and numerous attempts to represent himself. It is rare to have so much support from the record on a defendant's adamant

assertion that they request to represent themselves, but we have that here. A thorough review of all of the record, including the portions that have been supplemented after the appellants brief was filed show that his decision to represent himself was knowing, intelligent, and voluntary.

Secondly, Mr. Winterer's request(s) were unequivocal. In the Curry case, the issue for the court was that defendant was arguing because of the late appointment of a new attorney, he would have to choose between his speedy trial rights and representing himself- making his request to proceed questionable, because it was made only in order to affect his speedy trial rights. The court was not persuaded by that argument, concluding Mr. Curry's request was unequivocal. Here, we have no choice between a rock and a hard place for Mr. Winterer – his constant and repeated requests were made because of and in furtherance of his own belief that he could do a better job presenting his defense to the jury and that his attorney(s) would not put forward the defense he wanted them to present. His request was unequivocal, thoughtful, and purposeful – he wanted to present his case his way to the jury and for more than a year

as this case progressed, his request to be pro se never diminished. Looking specifically at the facts, the amount of time, attention, and detail the court went into with Mr. Winterer, at multiple hearings, about what representing himself might look at weighs heavily in favor of his request being unequivocal. Additionally, the record supports that Mr. Kirkham had multiple conversations with Mr. Winterer and made multiple recommendations that Mr. Winterer not proceed pro se, advice which Mr. Winterer did not agree with and would not take – he continued to ask the court to represent himself.

The third factor for Curry has to do with timing – when was the request made. Unlike in Curry, this request was not made on the eve of trial. Mr. Winterer’s request to be pro se began when the case was filed and for more than a year, even after denying the request for months, the court granted the motion at the status conference, four days prior to the trial beginning. Although the timing was such that in effect, the defendant had a very short time between the request being granted and the trial beginning, because he had been making the request for months, filing pro se motions,

and writing the court letters, he had been operating as a pro se litigant prior to the official ruling by the court that he could do the trial as his own counsel. Additionally, the record does not support any finding that the court would not have granted Mr. Winterer more time, had he made that request – it appears everyone was ready for trial, the only question for the court was who was representing the defendant, Mr. Kirkham or the defendant himself.

A careful review of the record does not support the standard the appellant must meet on appeal; the defendant cannot show the judge applied the wrong legal standard, or the court based its decision on facts unsupported by the record, or the court made a decision that is manifestly unreasonable. In fact, a careful and thorough review of the record shows an abundance of caution on the part of the trial judge – making every effort to protect Mr. Winterer’s constitutional rights, even requesting his counsel brief the issue for the court. The court was careful, thorough, and cautious in reviewing, discussing, and eventually granting the defendant’s repeated request to represent himself.

Mr. Winterer had one desire in this case, as well as his other two cases – to get his defense in front of the jury. He wanted the jury to know that he was justified in his actions and that there was no basis, in his mind, for the underlying no contact order that Ms. Massey had obtained against him. He consistently on the record and in writings to the court made requests to represent himself. The court did not abuse its discretion in granting his motion.

E. CONCLUSION

For the reasons stated, the conviction should be affirmed.

Dated this 26th day of November, 2018.

/s/ Jodi M. Hammond
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PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 26th day of November, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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