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Division III
State of Washington
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No. 35865-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

TANAWAH M. DOWNING,

Appellant

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

NO. 17-1-01244-4

BRIEF OF RESPONDENT

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I. INTRODUCTION

The facts of the case are straightforward. The defendant was caught in a vehicle with his wife, although a No Contact Order prohibited such contact. He had four prior convictions for Violation of the No Contact Order, resulting in a charge of Felony No Contact Violation. The defendant wanted to go to trial. He perceived that an attorney would not vigorously defend him and would harangue him into pleading guilty. So, he requested to proceed pro se.

The trial court warned him against doing so, told him he could be sentenced to five years in prison, and would be held to the same standards as an attorney. But, the defendant was adamant. He stated he had a Master's Degree in substantive criminal law and a degree in forensics. He said he had work experience with rules of evidence and criminal procedure. The trial court granted his request on December 13, 2017.

He wanted to bring a Motion to Dismiss and thought that perhaps he may need an attorney if the motion was denied. The trial court denied the Motion to Dismiss on December 27, 2017 and appointed a standby attorney for him. Yet he remained adamant that he wanted to proceed pro se.

The defendant did not request a standby counsel on December 13 or December 27. Until this appeal, the defendant never complained about

the lack of a standby counsel between these dates and does not cite anything specific the standby counsel could have assisted with.

The defendant had a fair trial and his conviction should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The State disagrees that the trial court erred in allowing the defendant to represent himself.
2. The State disagrees that the trial court erred in failing to appoint standby counsel.

III. STATEMENT OF FACTS

A. The crime

Sergeant Bryce Henry of the Richland Police Department stopped a vehicle on November 10, 2017 for a failure to stop at a stop sign. RP 02/07/2018 at 26-28. Henry identified the defendant as the driver and his wife, Jennifer Downing, as the passenger. RP 02/07/2018 at 28-29. Henry found there was a No Contact Order prohibiting the defendant from having contact with Jennifer. *Id.* The defendant said he knew about the No Contact Order and that he and his wife were trying to reconcile and planned to terminate the order. RP 02/07/2018 at 31.

The defendant had four prior convictions for Violation of an Order of Protection, with a Domestic Violence allegation. CP 104, 116. Based on

these convictions, he was charged with Violation of a Protection Order— Felony, under RCW 26.50.110 (5). CP 1-2. He was found guilty of the charge and the Domestic Violence allegation. CP 102-03.

B. The defendant requests to represent himself and the Court appoints standby counsel.

The defendant was arraigned on November 16, 2017 and an Omnibus hearing was set for December 13, 2017. CP 5-6. At the scheduled Omnibus hearing on December 13, 2017 the defendant stated, “I would like to represent myself.” RP 12/13/2017 at 4. He repeated that he wanted to represent himself before the Court began a colloquy with him. *Id.* at 5.

The defendant stated he had a Master’s Degree in Substantive Criminal Law from Georgetown University and a degree in Forensics from George Washington University in answer to the Court’s question about legal training. *Id.*, RP 01/03/2018 at 6. He stated he had an engineering firm which produced forensic video analysis for law enforcement which had been presented in court. RP 12/13/2017 at 6.

The defendant had a Motion to Dismiss he wanted to present which he thought would be dispositive. RP 12/13/2017 at 7-8. He stated,

If it moves beyond today, your Honor, then I would—I would say that perhaps I do need an attorney. But as of this moment, my request to—to dismiss the case which has

very, very valid arguments and very, very valid justification, I don't need an attorney to present this.”

Id. at 8.

The Court continued the colloquy regarding self-representation. He stated he “absolutely” knew the rules of evidence, that he knew he would be held to the same standards of an attorney. *Id.* at 9-10. He again declined the Court’s offer to appoint an attorney. *Id.* at 10. The Court also advised the defendant that he was charged with a Class C felony, with a maximum punishment of five years imprisonment and a fine of \$10,000. *Id.* at 12-13.

The colloquy ended with the Court asking if, after being advised on the problems with self-representation and the possible punishment, it was still the defendant’s intention to represent himself. *Id.* at 13. The defendant answered, “Absolutely it is. Yes.” *Id.*

At the next hearing, on December 27, 2017, on the State’s motion, the Court appointed standby counsel for the defendant. RP 12/27/2017 at 4, 7.

Also at that hearing, the Court denied the defendant’s motion to dismiss. *Id.* at 18.

C. On January 16, 2018, after the Court has denied his Motion to Dismiss, the defendant restates he is adamant about self-representation and explains his choice.

At a hearing on January 16, 2018, the defendant elaborated about his decision to be pro se. He stated that his experience led him not to trust court appointed attorneys. RP 01/16/2018 at 8. “[W]hat I found is that the defense attorneys that have been appointed and have been brought in, they are working for whatever reason, whether they realize it or not, they are not working as a defense attorney.” *Id.*

I do not feel as though the person that’s sitting next to me has been helpful. I don’t feel as though this person sitting next to me has ever brought any sort of defense for the defendant. . . . When you say that one will be appointed for you to represent you, where is the representation when they come in and say, Here is your plea.”

Id. at 10.

He also stated that he felt harangued into pleading guilty in prior cases. “These defense attorneys are coming in and saying, You are guilty. Here is your plea. Here is your offer. And once again that constitutes indirect intimidation. . . . If the information comes directly from her [the deputy prosecutor] to—through the defense attorney, then unfortunately it is indirect intimidation.” *Id.* at 8. Referring to one of his previous cases, “Back on August 6th of 2016, when I pled guilty to . . . three to four separate—four separate charges. . . . That defense attorney said to me, Well, if you do not plead guilty to these four charges . . . I would go to prison for three years.” *Id.* at 15-16.

The defendant repeatedly demanded the right to represent himself. “I have a constitutional right to defend myself.” *Id.* at 8. “I am here today to defend myself because I don’t feel as though I have had any sort of defense whatsoever up until this point.” *Id.* at 9. “I deserve the right to defend myself.” *Id.* “What I am saying, Your Honor, is I have the right to defend myself. I have the right to confront my accusers. I have been here now for 74 days. I deserve this opportunity. I ask for you to please give that to me. Thank you.” *Id.* at 11-12.

IV. ISSUES

- A. Did the trial court abuse its discretion in granting the defendant’s motion to proceed pro se?
 - 1. What is the standard on review for a trial court’s decision to allow a defendant to proceed pro se?
 - a) Did the trial court apply the correct legal standard and was the granting of the defendant’s request to proceed pro se reasonable?
 - i. Where the defendant begins and ends a colloquy with the statement that he “absolutely” wants to represent himself, was his request equivocal?
 - ii. Where the trial court warns the defendant about the maximum sentence, his responsibilities as a pro se defendant, and that he would be at a disadvantage, is the defendant’s choice to proceed pro se voluntary and knowing?

- B. Was there any error regarding appointment of a standby counsel two weeks after the defendant was granted his request to proceed pro se?
1. What is the standard on review regarding the appointment of standby counsel?
 2. Should the defendant be allowed to raise this issue for the first time on appeal, particularly where he did not request or complain about his standby counsel?
 3. Is there anything of significance that occurred within the two-week gap that a standby counsel could have resolved, helped, or mitigated?

V. ARGUMENT

A. **The trial court did not abuse its discretion in granting the defendant's motion to proceed pro se.**

1. **Standard on review is "abuse of discretion."**

A trial court's decision on the defendant's waiver of an attorney is reviewed for abuse of discretion. Great discretion is given to a trial court's determination. Unless the trial court's decision falls outside the range of acceptable choices because it is manifestly unreasonable, a reviewing court will not reverse. Trial courts have more experience than appellate courts with requests to proceed pro se and are better equipped to balance the competing considerations. Also, trial courts have the benefit of observing the behavior and characteristics of the defendant, including the inflections and language used to make the request. *State v. Curry*, 423 P.3d 179 (2018).

Trial courts must “indulge in ‘every reasonable presumption against a defendant’s waiver of his or her right to counsel’” before granting a defendant’s request to waive the right to counsel. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). This requires the court to engage in a two-step determination. First, the court must determine whether the request for self-representation is timely and unequivocal. If the request for self-representation is untimely or equivocal, the trial court must deny the request. Second, if the request is timely and unequivocal, the court must then determine whether it is also voluntary, knowing, and intelligent. *Id.*

To determine if a request for self-representation is unequivocal, the court must answer two questions: 1) Was a request made? If so, 2) was that request unequivocal? *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). An unequivocal request requires a defendant to make an explicit choice between exercising the right to counsel and the right to self-representation so that a court may be reasonably certain that the defendant wishes to represent himself. Relevant considerations include whether the request was made as an alternative to other, preferable options and whether the defendant’s subsequent actions indicate the request was unequivocal. *Id.*

B. The trial court applied the correct legal standard and was reasonable in determining that the defendant's request to represent himself was timely, unequivocal, and voluntary.

1. Timely and unequivocal: The defendant said he "absolutely" wanted to be pro se at every hearing it was discussed.

The request was timely. It came two weeks after the arraignment and roughly two months before the trial. It was also unequivocal. The defendant did state he may "perhaps" need an attorney if his Motion to Dismiss was denied. RP 12/13/2017 at 8. However, he began the same hearing saying it was his constitutional right to represent himself and ended it saying he "absolutely" intended to represent himself. *Id.* at 4, 9, 13.

Any ambiguity was resolved by the defendant's subsequent actions. His Motion to Dismiss was denied on December 27, 2017 and he continued to demand his right of self-representation. RP 12/27/2017 at 18. On the hearing on January 16, 2018, he made at least four statements demanding his right to proceed pro se. RP 01/16/2018 at 8-10, 12. Put another way, at every hearing in which the subject of self-representation came up, the defendant began and ended with adamant statements that he wanted to proceed pro se.

The defendant's reasons for wanting to be pro se are understandable. His desire for a trial was clear. It is also clear an attorney

would have told him he had no defense. The defendant's belief that an attorney would have harangued him to plead guilty was reasonable.

2. **The defendant knowingly and voluntarily chose to proceed pro se although the trial court advised him that he would be at a disadvantage, told him the maximum penalty for the crime, and told him of his responsibilities as a pro se defendant.**

In response to the court's questions, the defendant stated he had extensive experience in criminal law via an engineering firm he established that produced video forensics for law enforcement and courts. He had a Master's Degree in substantive criminal law and a Master's in forensics. The court made sure that the defendant knew he would be held to the same standards as an attorney, and that the court would not assist him with things like filing and noting motions. The court also asked if the defendant understood the rules of evidence and procedure. The defendant responded, "Absolutely, I do." The court also advised the defendant that he would be at a very substantial disadvantage if he proceeded pro se. The court, although it was at the prosecutor's suggestion, advised the defendant of the penalty for the crime charged. The colloquy concluded with the defendant saying he "absolutely" intended to represent himself.

There is nothing in this colloquy which would give the trial court pause. The defendant stated he was educated in substantive criminal law, had work experience with the rules of evidence and criminal procedure,

and that he wanted to represent himself, absolutely, although he was facing a Class C felony and would be at a considerable disadvantage compared to a professional prosecutor.

3. There is no requirement that the trial court appoint a standby counsel, the defendant never requested one or complained about the appointed standby counsel, and there is nothing the standby counsel could have assisted with during the two weeks before standby counsel was appointed.

a) Standard on appeal: There is no right to a standby counsel.

Once a defendant has validly waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. *State v. Silva*, 107 Wn. App. 605, 626-27, 27 P.3d 663 (2001). As noted in *Silva*, 107 Wn. App. at 626, the problems with a standby counsel normally occurs when one is appointed over the defendant's objections or when there is an issue regarding the role of the standby counsel.

b) The defendant should not be allowed to raise this issue for the first time on appeal.

RAP 2.5 is on point. There is no constitutional right the defendant has to a standby counsel. The defendant did not request appointment of a standby counsel; the State did. RP 12/27/2017 at 4. He did not thereafter complain about the actions of the standby counsel. There is no requirement that a trial court appoint a standby counsel anytime a

defendant proceeds pro se. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

- c) **In any event, there is nothing a standby counsel could have done to assist the defendant during the two weeks in question.**

On appeal, the defendant complains that he was without standby counsel from December 13 to December 27, 2017 when he argued his Motion to Dismiss. CP 14-31. However, he had that motion prepared on December 13, 2017. RP 12/13/2017 at 4. The defendant cites nothing a standby counsel would have accomplished during the two-week gap.

VI. CONCLUSION

Whenever a defendant requests to proceed pro se, an appeal will follow. If the trial court grants the request, the defendant on appeal will argue that his waiver was equivocal or that he did not knowingly, intelligently, and voluntarily waive his right to an attorney. If the request is denied, the defendant will argue that the trial court interfered with his right of self-representation.

That is why a reviewing court needs to give great discretion to the trial court's determination. In this case, the defendant appeared to know what he was doing. He told the trial court that he had degrees in Criminal Law and Forensics. He said he had extensive work experience with rules

of evidence and criminal procedure. The trial court advised him of the seriousness of the offense, told him the maximum punishment, and said he would be at a disadvantage if he proceeded pro se. Still, the defendant concluded the colloquy by saying he absolutely wanted to represent himself.

He did state during the colloquy on December 13, 2017, that “perhaps” he may need an attorney if his Motion to Dismiss was denied. That motion was denied on December 27, 2017, but the defendant adamantly insisted on proceeding pro se on January 16, 2018 and elaborated on his reasons. He perceived that an attorney would not want to go to trial and would attempt to harangue into pleading guilty.

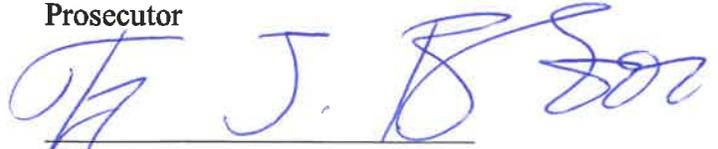
The defendant also assigns error to the trial court’s failure to appoint standby counsel until two weeks after he was allowed to go pro se. However, the defendant did not request a standby counsel, did not complain about the work of the standby counsel, and does not point to anything the standby counsel could have assisted with during those two weeks.

The conviction should be affirmed.

RESPECTFULLY SUBMITTED on November 1, 2018.

ANDY MILLER

Prosecutor

A handwritten signature in blue ink, appearing to read "Terry J. Bloor". The signature is written in a cursive style with a horizontal line underneath the name.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

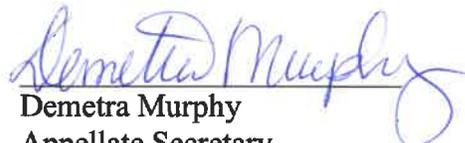
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement
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Signed at Kennewick, Washington on November 1, 2018.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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