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Supreme Court No. _____
(Court of Appeals No. 58662-9-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Petitioner.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kurt Madsen, through his attorney, Lila J. Silverstein, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Madsen seeks review of the Court of Appeals' opinion in State v. Madsen, No. 58662-9-1 (Slip Op. filed March 10, 2008). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant's timely, unequivocal request to proceed pro se must be granted as a matter of law unless the trial court has determined that the defendant is incompetent to stand trial or that his waiver of counsel is not knowing, intelligent and voluntary. Three months before trial, Mr. Madsen stated that he did not want to be screened by the Office of Public Defense and instead wanted to proceed pro se. He renewed his motion to proceed pro se two months before trial, citing article 1, section 22 of the Washington Constitution. Did the trial court err in repeatedly requiring Mr. Madsen to try new counsel instead of proceeding pro se, without finding that he was incompetent or that his waiver was not knowing, intelligent and voluntary? RAP 13.4(b)(3).

2. The competency standard for self-representation is the same as that for standing trial, and once there is reason to doubt a defendant's competency, the court must order an evaluation. The second time Mr. Madsen moved to proceed pro se – two months before trial – the court again required him to try new counsel instead, stating it had “concerns” about Mr. Madsen's competency. The court disregarded Mr. Madsen's offer to “take an IQ test or a psychological exam or whatever you need.” Did the trial court err in refusing to grant Mr. Madsen's request to proceed pro se based on “concerns” about competency, where it did not order a competency evaluation, never referenced competency again, and allowed Mr. Madsen to stand trial on the charges?

3. As Mr. Madsen noted in his pro se Statement of Additional Grounds, a defendant is deprived of the effective assistance of counsel if his attorney's performance was deficient and the deficiency prejudiced the defendant. Where his attorney failed to subpoena the alibi witness Mr. Madsen requested and failed to object to the admission of several items of evidence, was Mr. Madsen deprived of the effective assistance of counsel?

4. As Mr. Madsen noted in his Statement of Additional Grounds, the First Amendment and article 1, section 5 protect the

right to freedom of speech. Did the prosecution of Mr. Madsen for three "non-threatening, non-harassing" telephone calls to a protected party violate his right to freedom of expression?

5. As Mr. Madsen noted in his Statement of Additional Grounds, the Double Jeopardy Clause of the Fifth Amendment prohibits a person from being punished twice for the same offense. Does RCW 26.50.110(5) violate double jeopardy by elevating the violation of a court order from a misdemeanor to a felony based on two prior convictions for which the defendant has already been punished?

D. STATEMENT OF THE CASE

The State charged Mr. Madsen with three counts of felony violation of a no contact order. CP 18-19. On January 24, 2006, a hearing was held before the Honorable Jeffrey Ramsdell. The case had not yet been set for trial. 1/24/06 RP 3. Mr. Madsen's private attorney sought permission of the court to withdraw. 1/24/06 RP 2. The court permitted withdrawal. 1/24/06 RP 4. The following exchange then occurred:

COURT: Counsel, you're withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to –

MR. MADSEN: Motion –

COURT: proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5.

The court asked Mr. Madsen why he wanted to proceed pro se. 1/24/06 RP 5. Mr. Madsen responded that “the whole charge is just a pathetic joke,” and that he “could resolve the whole issue.”

1/24/06 RP 5. He stated that if the court granted his motion to proceed pro se, he would be able to engage in discovery, move to reduce bail, and investigate whether his predicate convictions were still pending. 1/24/06 RP 5.

The court did not conduct further colloquy and instead ordered counsel be appointed by the Office of Public Defense. 1/24/06 RP 5. The judge indicated that he would entertain the motion to proceed pro se again if Mr. Madsen still wished to do so after consulting with new counsel. 1/24/06 RP 5. The court denied Mr. Madsen’s request to “at least get an order stating that I could do some research on this for the meantime.” 1/24/06 RP 6.

Mr. Madsen tried new counsel as ordered. But on March 7, 2006, he again moved to dismiss counsel and proceed pro se. When the court asked Mr. Madsen what the problem was, he explained that his attorney wanted him to plead guilty, but he wanted to go to trial. 3/7/06 RP 7.

Mr. Madsen stated, "I think that I'd be better off representing myself." 3/7/06 RP 8. He noted that he had a right to self-representation under Article 1, section 22 of the Washington Constitution. 3/7/06 RP 8. He mentioned that under State v. Silva, the court could appoint standby counsel and address issues of research assistance and the appointment of an investigator. 3/7/06 RP 8-9.

The court stated that instead of proceeding pro se or having the attorney continue to represent Mr. Madsen, there was an "in between" solution of assigning new counsel. 3/7/06 RP 11. Mr. Madsen insisted that a better "in between" solution would be to allow him to proceed pro se and appoint standby counsel. 3/7/06 RP 11. He then stated, "I'd rather represent myself, Your Honor, honestly." 3/7/06 RP 11. He suggested that whomever the court had in mind to replace his attorney could instead assist him as standby counsel. 3/7/06 RP 12.

The judge then turned to the fired defense attorney and asked if he had any concerns about Mr. Madsen's competency. 3/7/06 RP 12. The attorney stated that he did. 3/7/06 RP 12. Mr. Madsen said, "Oh, wow." Mr. Madsen suggested that they hire a psychologist. 3/7/06 RP 13, 16. He stated he would take an IQ test or a psychological exam or "whatever you need." 3/7/06 RP 19. The court declined the offer; no competency evaluation was ever ordered, and no competency determination was ever made.

Mr. Madsen stated:

I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that's what I'm going to move forward with doing, none of this psychologist, all this BS. I want this thing set for trial right now. And you can have any opinion you want of me, your Honor.

3/7/06 RP 13.

Once again, no colloquy was held on the motion. Once again, the court ordered appointment of new counsel and told Mr. Madsen he would entertain the motion to proceed pro se after Mr. Madsen and new counsel had consulted. 3/7/06 RP 16-17. Mr. Madsen objected and noted that the court had made the same ruling the last time he moved to proceed pro se. 3/7/06 RP 17.

On May 2, 2006, the day before voir dire, Mr. Madsen again moved to proceed pro se, and the trial court again denied the motion. 5/2/06 RP 80, 82, 89; CP 20-22. The case proceeded to trial and the jury found Mr. Madsen guilty on all three counts. CP 48-50.

Mr. Madsen moved for a new trial under CrR 7.5, arguing that the trial court violated his state and federal constitutional rights in denying his motion to proceed pro se. CP 62-101; 135-149. The trial court heard and denied the motion on August 9. 8/9/06 RP 28. The court imposed a sentence of 18 months. 8/9/06 RP 51; CP 126.

On appeal, Mr. Madsen argued that the trial court violated his constitutional right to self-representation. He argued that because his requests to proceed pro se were timely and unequivocal, they should have been granted as a matter of law. The "competency concern" was a red herring: if the court were actually concerned about competency, it was required to stay the proceedings and order an evaluation. The fact that the case proceeded to trial belies any claim of incompetence.

Mr. Madsen argued in his Statement of Additional Grounds that his counsel was ineffective and that RCW 26.50.110 violates

both the right to free expression and the prohibition against double jeopardy.

The Court of Appeals rejected Mr. Madsen's arguments. The court reasoned that the trial court did not deny Mr. Madsen's January 24 and March 7 requests to proceed pro se, but merely "deferred ruling" on the motion while requiring Mr. Madsen to try new counsel instead. Slip Op. at 9-10. The court further reasoned that the trial court had the discretion to require Mr. Madsen to try new counsel again on March 6 because it had "concerns about Madsen's competency." Slip Op. at 9-10.

Mr. Madsen seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- 1. This Court should grant review to clarify that the competency standard for proceeding pro se is the same as that to stand trial, and therefore the constitutional right to self-representation may not be denied based on inchoate 'competency concerns.' RAP 13.4(b)(3).**

- a. The state and federal constitutions guarantee criminal defendants the right to represent themselves. The Washington Constitution expressly guarantees the right of self-representation: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel" Wash. Const. art. 1, §

22; See State v. Breedlove, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995). “In this state, a defendant may conduct his entire defense without counsel if he so chooses.” State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931).

The Sixth Amendment to the United States Constitution implicitly provides the right to proceed pro se.¹ Faretta v. California, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although the constitution includes safeguards – like the right to counsel – designed to protect the accused, “to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.” Faretta, 422 U.S. at 815 (internal citations omitted). Thus, “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” Id. at 834 (internal citations omitted).

Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of

¹ The amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. 6.

individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

Breedlove, 79 Wn. App. at 110-111 (internal citations omitted).

b. A timely, unequivocal request to proceed pro se must be granted as a matter of law. A defendant's request to proceed pro se must be (1) timely made and (2) stated unequivocally. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). If the demand for self-representation is made well before the trial and unaccompanied by a motion for a continuance, the trial court must grant the request as a matter of law. State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). The trial court does not have the discretion to deny the request unless it is made just before or during trial. Id. "Where a court is put on notice that the defendant wishes to assert his right to self-representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request. Breedlove, 79 Wn. App. at 109.

Once the accused makes a timely, unequivocal request to represent himself, the court must engage in a colloquy to determine whether the defendant is waiving his right to counsel knowingly, intelligently, and voluntarily. Faretta, 422 U.S. at 835; Breedlove, 79

Wn. App. at 111. In order to make this determination, the trial court must apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-representation. Woods, 143 Wn.2d at 587-88. Unless the court finds the waiver is invalid, it must grant a timely, unequivocal motion to proceed pro se. Barker, 75 Wn. App. at 241.

c. The trial court's repeated refusal to grant Mr. Madsen's timely, unequivocal requests to proceed pro se was improper because (1) there is no requirement to try new counsel first and (2) the standard for competency is the same as that for standing trial. Mr. Madsen's requests to proceed pro se were timely and unequivocal. Accordingly, the trial court was required to grant the request after ensuring that the waiver of counsel was knowing, intelligent and voluntary. The trial court failed to do this, and therefore Mr. Madsen's convictions must be reversed and his case remanded for a new trial.

Mr. Madsen first asked to proceed pro se on January 24, 2006. 1/24/06 RP 3. His request was clearly timely because it was made before his case had even been set for trial and over three months before his trial actually commenced. 1/24/06 RP 3.

Mr. Madsen's request was also unequivocal. After his retained counsel was allowed to withdraw, the following exchange occurred:

COURT: Counsel, you're withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5. The court denied the motion, stating that Mr. Madsen could renew his motion after discussing it with new counsel. 1/24/06 RP 5.

At the later hearing on Mr. Madsen's motion for a new trial, the judge deemed this demand to proceed pro se equivocal because it was made in connection with the withdrawal of counsel. 8/9/06 RP 22. But that is not the test. A defendant can only proceed pro se if his counsel withdraws, so withdrawal of counsel does not render an unequivocal request for self-representation equivocal. See, e.g., Breedlove, 79 Wn. App. at 105 (defense attorney asked to withdraw due to "complete breakdown in communications" and defendant moved to proceed pro se; court of appeals reversed

conviction because trial court improperly denied defendant's request to proceed pro se).

Courts have even deemed requests to proceed pro se unequivocal where the trial court denied the defendant's request for new counsel and limited the defendant's choices to current counsel or self-representation. See, e.g., Barker, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new counsel); DeWeese, 117 Wn.2d at 372 (grant of request to proceed pro se affirmed even though defendant's first choice was appointment of new counsel). Even a defendant's "remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver." Id. at 378. Mr. Madsen did not even make such claims, so if Mr. DeWeese's request to proceed pro se was unequivocal, Mr. Madsen's certainly was. It is difficult to imagine a more unequivocal request than "I want a pro se order, Your Honor. You want to proceed pro se? Pro se. Yes. Exactly." 1/24/06 RP 4-5. Mr. Madsen's request to proceed pro se was unequivocal.

Because his request was timely and unequivocal, Mr. Madsen was entitled to proceed pro se as a matter of law unless the trial court determined, after a proper colloquy, that his waiver of counsel was not knowing, intelligent, and voluntary. Barker, 75 Wn. App. at 241; Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. The trial court did not engage in such a colloquy – nothing in the record reveals that the judge advised Mr. Madsen of the nature of the charges or the possible penalties before denying his request on January 24. 1/24/06 RP. Nor did the court find that Mr. Madsen's waiver was not knowing, intelligent, and voluntary. 1/24/06 RP. There is no legal basis for the court's requirement that Mr. Madsen give new counsel a chance before being allowed to proceed pro se. 1/24/06 RP 5. Mr. Madsen's request was timely and unequivocal, so he was entitled to represent himself as a matter of law.

On March 7, 2006, Mr. Madsen again moved to dismiss counsel and again requested to proceed pro se. 3/7/06 RP 4. Mr. Madsen stated, "I think that I'd be better off representing myself." 3/7/06 RP 8. He went on, "According to the Washington Constitution I have a right to represent myself. Under Article 1, Section 22 I have a right to represent myself." 3/7/06 RP 8. He mentioned that under State v. Silva, the court could appoint

standby counsel and address issues of research assistance and the appointment of an investigator. 3/7/06 RP 8-9 (citing State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001)).

For all of the reasons discussed above with respect to the January 24th request to proceed pro se, the March 7th request was also unequivocal. Yet the trial court once again denied the request and once again stated that Mr. Madsen would have to discuss it with new counsel first. 3/7/06 RP 16-17.

The March 7th denial did contain one new twist: the court raised a concern about Mr. Madsen's competency. 3/7/06 RP 12. This was a red herring. It is true that a defendant must be competent to waive the assistance of counsel and proceed pro se, but the standard for competency in this context is the same as that for standing trial or pleading guilty: the accused must merely possess the capacity to understand the proceedings and to assist counsel in his defense. Godinez v. Moran, 509 U.S. 389, 391, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). A court is required to make a competency determination if and only if it has reason to doubt the defendant's competence. Id. at 402 n.13.

Once there is reason to doubt the competency of a defendant, the procedures outlined in the competency statute,

RCW 10.77, must be followed. In re the Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). As soon as a party or the court raises doubts as to the defendant's competency, the court must order an evaluation of the defendant by proper experts. RCW 10.77.060. Upon completion of the evaluation, the court must then determine the individual's competency to stand trial, plead guilty, or waive counsel. Fleming, 142 Wn.2d at 863. "It is the responsibility of the trial court to determine a defendant's competency intelligently to waive the services of counsel and act as his own counsel." State v. Vermillion, 112 Wn. App. 844, 857-58, 51 P.3d 188 (2002).

But here, despite Mr. Madsen's offers to be tested, the court did not order a competency evaluation as required under RCW 10.77 and Fleming, and did not make a competency determination. Nor did the prosecutor or any of Mr. Madsen's attorneys request a competency evaluation, which is something they would have been ethically obligated to do if there was a question of Mr. Madsen's competency. ABA Criminal Justice Standard 7-4.2; see also Fleming, 142 Wn.2d at 867 ("When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot

excuse failure to raise competency at any time so long as such incapacity continues”).

The State was permitted to prosecute Mr. Madsen and Mr. Madsen’s not-guilty pleas were accepted without anyone ever mentioning competency again.² If Mr. Madsen were truly incompetent, the court could not have allowed him to be tried. While the court could have denied a request to proceed pro se upon a finding of incompetence, it cannot violate the accused’s constitutional right to self-representation based upon a hunch. Because Mr. Madsen made another timely and unequivocal request to proceed pro se, and because the trial court never found him to be incompetent, the trial court erred in denying Mr. Madsen’s March 7th request to represent himself, just as it erred in denying his January 24th request.

The Court of Appeals erred in concluding that Mr. Madsen’s constitutional right to self-representation was not violated because the trial court repeatedly “deferred ruling” on the motion rather than denying it. Slip Op. at 9-10. The court’s logic is flawed because a

² The Court of Appeals’ opinion erroneously states that on March 9 Madsen’s new counsel stated that she “had no concerns about his competency.” Slip Op. at 4. Competency was never mentioned at that hearing. 3/9/06 RP1-10. Indeed, nothing in the record indicates that competency was ever mentioned except at the March 7th denial of the motion to proceed pro se.

repeated refusal to grant a motion constitutes a de facto denial. Thus, in both Breedlove and Vermillion, the convictions were reversed on Faretta grounds even though the trial court had technically “deferred ruling” on the motions initially. Breedlove, 79 Wn. App. at 109; Vermillion, 112 Wn. App. at 855. Mr. Madsen should similarly be granted a new trial, because the trial court erred in failing to grant his two very early, unequivocal requests to proceed pro se.

The Court of Appeals further erred in concluding that Mr. Madsen’s requests were equivocal based on his failure to renew his motion at every possible hearing. Slip Op. at 10-11. Mr. Madsen was, of course, following the trial court’s order to try new counsel first. He vociferously objected when the trial court order him to try new counsel again when he renewed his motion on March 7. 3/7/06 RP 17. Both the January 24 and March 7 requests were clearly unequivocal.

Finally, the Court of Appeals erred in condoning the trial court’s refusal to grant the second motion to proceed pro se because of “competency” concerns. As discussed above, the standard for competency is the same for self-representation as it is for standing trial. This Court should grant review and hold that a

court may not refuse to grant a timely, unequivocal motion to proceed pro se by merely stating it has "concerns" about competency. If a defendant is competent to be tried, he is competent to represent himself. RAP 13.4(b)(3).

2. This Court should grant review of the issues presented in Mr. Madsen's Statement of Additional Grounds.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Counsel is ineffective if (1) his or her performance is deficient and (2) the deficiency prejudices the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Mr. Madsen's counsel did not subpoena his alibi witness or object to certain documentary and testimonial evidence the State presented. SAG at 1-2. These failures prejudiced Mr. Madsen, because there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). RAP 13.4(b)(3).

The First Amendment and article 1, section 5 guarantee freedom of expression. U.S. Const. amend. 1; Wash. Const. art. 1, § 5. Mr. Madsen asks this Court to review his claim that he was

improperly prosecuted for engaging in constitutionally protected conduct. SAG at 2-3. RAP 13.4(b)(3).

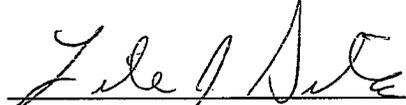
The Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Mr. Madsen asks this Court to review his claim that RCW 26.50.110(5) violates double jeopardy by elevating the violation of a court order from a misdemeanor to a felony based on two prior convictions for which the defendant has already been punished. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons set forth above, Mr. Madsen respectfully requests that this Court grant review.

DATED this 9th day of April, 2008.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

RECEIVED

MAR 10 2008

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 58662-9-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
KURT RANDALL MADSEN,)	Unpublished Opinion
)	
Appellant.)	FILED: March 10, 2008

LAU, J.—Kurt Madsen appeals his conviction for three counts of felony violation of a no-contact order involving three telephone calls to his former girl friend. He argues that the trial court erred in repeatedly denying his timely, unequivocal requests to proceed pro se and that the sentencing court erred in finding that the telephone calls did not encompass the same criminal conduct. Because Madsen’s requests were untimely and equivocal and because the crimes do not encompass the same intent, we affirm.

FACTS

On September 2, 2004, Deborah Stuart called 911 and reported that Kurt Madsen had just called her on the telephone and asked her to come to his house, in violation of a valid no-contact order. That call was placed at 10:32 P.M. and lasted for

three minutes. Madsen called Stuart again at 10:40 P.M. She tried unsuccessfully to keep him on the phone until police arrived. This call lasted about 18 minutes. At around 11 P.M., a sheriff's deputy arrived at Stuart's home. He took a statement from Stuart and wrote down the phone numbers of the incoming calls recorded on her phone log. At 11:17 P.M., Madsen called Stuart a third time. She picked up the phone and handed it to the sheriff's deputy. He identified himself as a police officer and asked the caller if he was Kurt Madsen. Madsen admitted that he was, but claimed that he thought Stuart was in the process of dropping the protection order. Madsen was arrested and charged with three counts of domestic violence felony violation of a court order.

On January 24, 2006, before the presiding judge, private counsel Erik Kaeding withdrew because his relationship with Madsen had "become unworkable." Report of Proceedings (RP) (Jan. 24, 2006) at 3. The court then explained to Madsen that the Office of Public Defense (OPD) would need to assign new counsel. Madsen responded, "No. I want a pro se order, Your Honor Pro se. Yes. Exactly." *Id.* at 4-5. When the court inquired into his motives, Madsen stated, "[T]he whole charge is just a pathetic joke, and I'd rather—I mean, I just get to trial and I could resolve the whole issue, honestly." *Id.* at 5. Madsen also asked the court to address his bail, access to legal research, and speedy trial rights. The court deferred ruling on Madsen's requests and continued the hearing until OPD could appoint new counsel, adding, "[A]fter you have a chance to talk with them, if you still want to proceed pro se, I'm more than happy to hear the motion." *Id.* at 6.

On January 31, 2006, the presiding judge confirmed Michael McCullough as Madsen's new counsel. At that hearing, Madsen asked the court to hear his pro se motions. The court stated, "I won't hear pro se motions . . . if you have an attorney. Either you represent yourself or an attorney represents you. There is no hybrid representation." RP (Jan. 31, 2006) at 5. Madsen did not ask to proceed pro se or to terminate counsel at that hearing. And at subsequent hearings in February, Madsen did not request to proceed pro se or to terminate counsel.

On March 7, 2006, McCullough moved to withdraw or for Madsen to proceed pro se, explaining, "I cannot provide an adequate defense for Mr. Madsen at this point because he simply won't listen." RP (Mar. 7, 2006) at 4. He also told the presiding judge that communications with Madsen had broken down. When the court inquired into Madsen's motives, Madsen began to argue his other motions. The court repeatedly questioned Madsen to clarify the basis for his pro se request. But Madsen frequently interrupted the court and offered various reasons for his dissatisfaction with counsel. He then said, "[A]s far as him representing me, Your Honor, I'm just not satisfied with it and I think that—I think that I'd be better off representing myself." Id. at 8. Madsen then asked the court to hear his other motions.

When the court told Madsen that it would not hear his motions yet, Madsen became increasingly agitated, asserted his constitutional right to proceed pro se, suggested that the court could appoint standby counsel, and again started arguing his other motions. The court explained standby counsel's role to Madsen and again sought to clarify his request by asking "do you want to really represent yourself or do you want a different attorney?" Id. at 10–11. The court suggested that he try a different attorney

as an “in between” solution. Id. at 11. Madsen again suggested standby counsel, but then said, “I’d rather just represent myself, Your Honor, honestly. And I don’t think that—who do you have in mind to change to?” Id. at 12. Madsen also suggested that McCullough’s supervisor could assist him, but then said, “I’d rather just represent myself and then address my motions right now” Id. at 12.

Concerned about Madsen’s behavior, the court asked McCullough if he had concerns about Madsen’s competency, and McCullough said that he did. Madsen became angry, asserted his right to self-representation, and again started arguing his motions. The court told Madsen that he had a right to represent himself, but his waiver must be knowing, intelligent, and voluntary. The court then granted McCullough’s request to withdraw effective upon the appointment of new counsel and deferred ruling on Madsen’s motion to proceed pro se.

I want new counsel to have an opportunity to talk to Mr. Madsen, find out what their perspective is with regard to him, find out whether he can communicate with that attorney or whether or not we’re at the same loggerhead, and revisit this as soon as they’ve had an opportunity to do that. And then if Mr. Madsen wishes to proceed pro se with standby counsel, I’ll entertain the motion. But I think I need somebody to talk to him and find out, number one, whether he’s competent, and if there are no issues with regard to that, great. And, number two, whether or not he’s going to get along with new counsel and not want to represent himself.

Id. at 16–17. Madsen objected and said that the court had already denied his pro se motion so it could not revisit the issue.

At a hearing on March 9, the presiding judge confirmed Leona Thomas as new counsel. She told the court that after talking to Madsen, she had no concerns about his competency and no issues to bring to the court’s attention. Madsen did not renew his

request to proceed pro se at that hearing. Nor did he raise the issue again over the next two months as Thomas continued to represent him.

Madsen's trial began on May 2, 2006, with pretrial motions. During Thomas's arguments on motions, Madsen's behavior became increasingly disruptive. The trial court noted that "once every three minutes [Madsen] makes a comment that is very loud that everybody in the courtroom can hear." RP (May 2, 2006) at 66. After a recess, Madsen said that he wanted to proceed pro se and immediately began to argue his other motions. The court stopped Madsen and said that Madsen was not prepared to represent himself. Madsen told the court that his counsel did not have enough time to prepare for trial, but when the court asked if he wanted more time, he said, "No, I'm not asking for more time because it's already too late for that." Id. at 83. The court again asked Madsen if he wanted to represent himself, and Madsen said, "[A]t this point I am forced, almost forced into doing that, so I would say yes. Because, I mean, not forced into it, but like I said before, I didn't really get finished what I was saying." Id. at 87. The trial court denied Madsen's motion to proceed pro se.

The following day, May 3, 2006, the trial court warned Madsen not to be disruptive. But Madsen's behavior continued, and the court ordered that he be removed to jail. When Madsen returned in the afternoon, the court noted that it had denied Madsen's motion to proceed pro se the day before because his "eyes were rolling" and he "did not appear to relish the idea" of selecting a jury. RP (May 3, 2006) at 138. The court also observed that Madsen's request was brought on the eve of trial. The court again asked Madsen if he wanted to proceed pro se. Madsen responded that the trial court could not revisit its previous ruling, and he refused to answer any more questions.

On May 4, 2006, Madsen refused to be transported to court for trial, and the court signed an order authorizing the jail to use reasonable force to compel him to appear. The court also signed an order denying Madsen's motion to proceed pro se. The order stated that Madsen's behavior on May 2 was "extremely disruptive," that his outbursts were "rambling and unfocused," that he "persistently interrupted his defense counsel, the deputy prosecuting attorney, and the judge," and that he "consistently showed an inability to follow or respect the court's directions." Clerk's Papers (CP) at 21. The order also stated that Madsen was "at first equivocal about his request, and said that he had concerns about his defense attorney's preparedness for trial." CP at 21. The order further noted that his request to proceed pro se occurred after his disruptive behavior began, the request occurred one day before jury selection and two days before trial was to commence, it was not accompanied by a motion to continue with a waiver of speedy trial rights, and Madsen's desire to track down another witness would likely have necessitated a continuance. The court concluded that Madsen's request was untimely, and if granted, the request would obstruct the orderly administration of justice. Trial commenced four days later, with Madsen present. The jury convicted him as charged.

More than two months later, before the sentencing judge, Madsen's new counsel Juanita Holmes moved for a new trial. She argued that the presiding judge and trial judge improperly denied Madsen's right to represent himself. The court denied the motion after reviewing the record as a whole, including video tapes of the January, February, and March proceedings. The court found that Madsen's January 24 request was made in connection with the withdrawal of counsel and was appropriately deferred

pending consultation with new counsel. It found that the presiding judge was properly cautious when it deferred ruling on Madsen's March 7 request pending appointment of new counsel based on the court's difficulty in getting clear answers from Madsen and concerns about Madsen's competency. The court further observed that Madsen did not renew his request until May 2, despite having many opportunities to do so. The court therefore concluded that prior to the commencement of trial, "there was not an explicit, unequivocal request to proceed pro se and a knowing, intelligent and voluntary waiver of the right to counsel" RP (Aug. 9, 2006) at 26. The court found that Madsen's May 2 request was equivocal, noting that it was not brought until after almost a full day of pretrial motions had taken place, that his responses to questions were indirect, that he said he was "almost forced" into representing himself, and that he refused to answer when the court gave him yet another chance. Id. at 27. The court also accepted the trial court's findings that the May 2 request was not timely and would hinder the administration of justice if granted at that time.

Madsen appeals.

ANALYSIS

Self-representation

Madsen argues that he is entitled to a new trial because the trial court erred in denying his timely, unequivocal requests to proceed pro se on January 24, March 7, and May 2, 2006. A trial court's denial of a request for self-representation is reviewed for abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Discretion is abused if the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120

Wn.2d 822, 830, 845 P.2d 1017 (1993). Courts indulge every reasonable presumption against finding that a defendant has waived the right to counsel. State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982).

Criminal defendants have a constitutional right to waive assistance of counsel and to represent themselves. Wash. Const. art. I, § 22; U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 814, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Breedlove, 79 Wn. App. at 105-06. This right is afforded even though it is likely to prove detrimental to the accused and to the administration of justice. State v. Vermillion, 112 Wn. App. 844, 850, 51 P.3d 188 (2002). But this right is not absolute or self-executing. State v. Woods, 143 Wn.2d 561, 585-86, 23 P.3d 1046 (2001).

First, the defendant's request must be unequivocal. Vermillion, 112 Wn. App. at 851. This requirement serves to "protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations" State v. Stenson, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997). A request to proceed pro se as an alternative to substitution of counsel may be an indication that the request was equivocal in light of the record as a whole. Stenson, 132 Wn.2d at 740.

Second, the waiver must be knowingly and intelligently made. State v. Imus, 37 Wn. App. 170, 173, 679 P.2d 376 (1984).

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). The legal competency standard for pleading

guilty or waiving the right to counsel is (1) whether the defendant understands the nature of the charges and (2) whether he is capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). “The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court.” Id. at 863.

Third, the request must be timely and not exercised for the purpose of delaying the trial or obstructing justice. Vermillion, 112 Wn. App. at 844.

If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter, and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). A request for self-representation may be properly denied when the defendant consistently engages in disruptive behavior that obstructs the orderly administration of justice. State v. Hemenway, 122 Wn. App. 787, 792, 95 P.3d 408 (2004).

Madsen argues that the trial court erred in denying his timely, unequivocal requests to proceed pro se on January 24 and March 7. But the trial court did not deny Madsen’s requests on those dates—it continued the hearings and deferred its rulings pending appointment of new counsel and concerns over Madsen’s competency. A trial court has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. Woodhead v. Discount Waterbeds, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). “Because trial calendar control and management necessarily involves the exercise of judicial discretion, granting a

continuance is reviewable on appeal only for a manifest abuse of discretion.” State v. Grilley, 67 Wn. App. 795, 798, 840 P.2d 903 (1992). Discretion is abused when it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

On January 24, noting that private counsel had just withdrawn over conflicts with Madsen, the presiding judge deferred ruling on Madsen’s motion to proceed pro se and told Madsen he could renew his request after he conferred with new counsel. But Madsen allowed counsel to represent him for the next six weeks without renewing his request to proceed pro se. This decision was a proper exercise of the court’s discretion to manage its trial calendar.

On March 7, noting that Madsen’s second attorney had just withdrawn, the presiding judge deferred ruling on Madsen’s second request until Madsen could consult with new counsel. Given that Madsen’s March 7 request to proceed pro se was interspersed with criticisms of his attorney and punctuated by angry outbursts and interruptions, that the court was unable to get a clear answer from Madsen regarding the basis of his request, and that the court had concerns about Madsen’s competency, the decision to defer ruling pending the appointment of new counsel was well within the trial court’s discretion.

Moreover, viewing the record as a whole, we agree with the sentencing court that Madsen’s January 24 and March 7 requests were equivocal.¹ Following both deferred

¹ We observe that Madsen did not explicitly assign error in his opening brief to the order denying his motion for a new trial, as required by RAP 10.3(a)(3). But because the relevant underlying issues are argued in the body of the brief, we nonetheless reach the issue in the interest of clarity. Wright v. Colville Tribal Enter.

rulings, Madsen had ample opportunities to renew his request to proceed pro se. Instead, he allowed new counsel to represent him, thereby demonstrating that he was no longer asserting his right to represent himself and rendering his requests equivocal.

Madsen further argues that the trial court erred in denying his May 2 request on numerous grounds, none of which we find persuasive. First, he contends that the ruling was improperly based on the trial court's decision that he was not sufficiently prepared. The record does suggest that the court's initial oral ruling was at least partially based on that ground, but the subsequent written order makes clear that Madsen's request was denied because it was untimely and would obstruct the orderly administration of justice.

Second, Madsen argues that his May 2 request was unequivocal. The trial court's May 4 written order denying Madsen's request to proceed pro se did not explicitly address that issue. But the sentencing court's subsequent order denying Madsen's motion for a new trial considered the record as a whole and found the May 2 request equivocal. Madsen couched his request in terms of frustration with counsel, and when given yet another chance to clarify himself on May 3, he refused to answer any questions. This was not an abuse of discretion.

Third, Madsen argues that granting his request would not have obstructed the orderly administration of justice because he did not ask for a continuance. But the record amply demonstrates that Madsen was highly disruptive throughout the proceedings. "[C]ourts upholding a defendant's right to self-representation involve a record completely absent of any disruption or disrespect by the defendant." Hemenway,

Corp., 127 Wn. App. 644, 648, 111 P.3d 1244 (2005), rev'd on other grounds, 159 Wn.2d 108, 147 P.3d 1275 (2006).

122 Wn. App at 795 (citing Vermillion, 112 Wn. App. at 848). Madsen claims that his disruptive behavior stemmed from frustration at not being allowed to represent himself and that “denial of one’s rights [cannot] be justified by reference to the nature of subsequent complaints protesting that denial.” United States v. Dougherty, 473 F.2d 1113, 1126 (D.C. Cir. 1972). But Madsen’s disruptive behavior began long before his request was denied.

Fourth, relying on Breedlove, Madsen contends that the timeliness of his May 2 request must be measured from the date of his original request on January 24 and that he was therefore entitled to proceed pro se as a matter of law. We disagree. In Breedlove, the defendant asked to proceed pro se almost two weeks before the scheduled trial date, but the court deferred its ruling until the day before trial and then denied his renewed request. The appellate court reversed, holding that the timing of the defendant’s request was not a sufficient reason for denial where there was no evidence that his motion was designed to delay his trial or that granting it would impair the orderly administration of justice. The court ruled that “where a court is put on notice that the defendant wishes to assert his right to self-representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request.” Breedlove, 79 Wn. App. at 109. In contrast, after both deferred rulings, Madsen allowed new counsel to represent him for substantial periods of time before changing his mind and reasserting his request to proceed pro se. Moreover, unlike Breedlove, Madsen’s persistent disruptions impaired the orderly administration of justice. Under these circumstances, Madsen is not entitled to claim that the timeliness of his motion should be measured from the date of his first request.

Sentencing

Madsen argues that the sentencing court abused its discretion in finding that his three felony court order violations had to be counted separately because they did not constitute the same criminal conduct. A trial court's determination regarding same criminal conduct will not be disturbed absent a clear abuse of discretion. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

When calculating a defendant's offender score under the Sentencing Reform Act of 1981, multiple prior offenses are presumptively counted separately unless the trial court finds that the offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Two or more crimes constitute the "same criminal conduct" if the crimes (1) required the same criminal intent, (2) were committed at the same time and place, and (3) involved the same victim. Id. Courts narrowly construe "same criminal conduct" to disallow most assertions of it. State v. Price, 103 Wn. App. 845, 858, 14 P.3d 841 (2000).

The standard for the "same criminal intent" prong is whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 1960 (1987). This can be partially measured by whether one crime furthered the other. State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993). A defendant has the opportunity to form a new criminal intent when the crimes are sequential, rather than simultaneous or continuous. In re Pers. Restraint of Rangel, 99 Wn. App 596, 600, 996 P.2d 620 (2000).

In State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997), the defendant forced anal intercourse on the victim, paused to kick and threaten her, then forced oral sex a few minutes later. The court held that even though the two rapes had the same general intent—sexual intercourse—the second rape “was accompanied by a new objective ‘intent’” because the defendant “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” Id. at 859. On the other hand, in State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999), the court held that the defendant’s three penetrations of the victim had the same criminal intent because they were nearly simultaneous and comprised an unchanging pattern of conduct.

We hold that the trial court did not abuse its discretion in finding that Madsen did not meet the “same intent” prong of the test. Over eight minutes elapsed between the first and second calls and over fifteen minutes between the second and third calls. Each call was clearly terminated, with Stuart advising Madsen there was no wish for further communication. Although the general intent of the calls was to contact Stuart, Madsen had the opportunity after each call to reflect and decide not to call her again. Yet he chose, knowing there was a no-contact order, to call her two more times.

Because failure to meet one prong precludes a finding of same criminal conduct, State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994), we need not go further. We note, however, that the “same time” prong was not satisfied either. Two or more crimes can meet the “same time” requirement, even when not simultaneous, if they are “part of a continuous, uninterrupted sequence of conduct over a very short period of time.” State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). In contrast,

Madsen's calls occurred over a period of forty-five minutes with clear breaks in between each violation.

Statement of Additional Grounds

Madsen raises a number of additional issues in his statement for additional grounds, none of which have merit. The gist of his claims is that his counsel was ineffective for failing to take certain actions that Madsen deemed appropriate and necessary. "To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Legitimate trial strategy or tactics cannot serve as a basis for the claim. Id. The record indicates that Madsen's counsel had valid legal or tactical reasons for each of these alleged omissions.

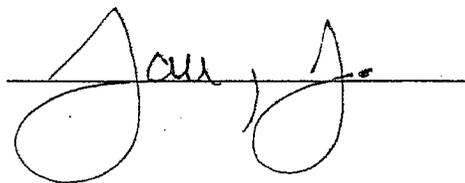
Madsen also argues that his free speech rights were violated because the no-contact order criminalized conversations that were, in his view, nonviolent and consensual. Madsen is mistaken. The State may validly impose reasonable time, place, and manner restrictions on speech "if they 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Bering v. Share, 106 Wn.2d 212, 222, 721 P.2d 918 (1986) (quoting United States v. Grace, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983)). In State v. Noah, 103 Wn. App. 29, 41-42, 9 P.3d 858 (2000), this court upheld an antiharassment order against a claim that it was an unconstitutional prior restraint on free speech.

Protecting citizens from harassment is a compelling state interest. The legislature authorizes the court to order that the defendant have no contact with his intended victim. . . . The statute is content neutral—no contact—whether

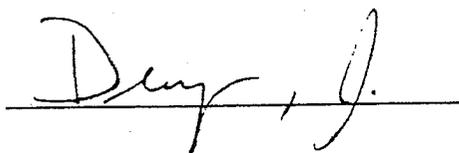
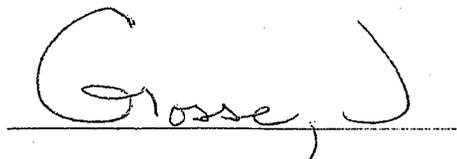
profession of love, screams of hate or anything in between. The interest to be served is the safety, security, and peace of mind of the victim. It is narrowly tailored by focus on the victim and a no-contact zone around the victim. It leaves open ample alternative channels of communications

The no-contact order against Madsen meets these criteria.

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dreyer, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Grosse, J.", written over a horizontal line.

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review** filed under **Court of Appeals No. 58662-9-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **William Doyle - King County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 9, 2008

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