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NO. 58662-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL
THE HONORABLE MICHAEL HEAVEY
THE HONORABLE MICHAEL SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The court must indulge in every reasonable presumption against finding that a defendant waived the right to counsel. Before trial, the presiding court deferred ruling on the defendant's request to proceed pro se to (1) allow the defendant to properly set the motion on the court's calendar and consult with new counsel; and (2) allow new counsel to assess the defendant's competency. After obtaining new counsel, the defendant chose not to bring a motion to proceed pro se. In finding that the defendant had not waived his right to counsel, did the presiding court properly exercise its discretion?

2. A request to proceed pro se must be knowingly and intelligently made, unequivocal, and timely. A defendant may waive the right of self-representation by disruptive words or conduct. At trial, right before jury selection, the defendant expressed frustration with his counsel and said that he felt forced into proceeding pro se. The court denied his request. The next day, still before jury selection, the court asked the defendant again if he wished to proceed pro se. The defendant refused to answer, and said that it was an issue for an appellate court. During the proceedings, the defendant persistently interrupted the court and spoke at

inopportune times. The trial court found that the defendant's request to represent himself was untimely, and, if granted, would have obstructed the administration of justice. In denying the defendant's motion for a new trial, the trial court also found that the defendant's request was equivocal. Did the court properly exercise its discretion?

3. Two crimes constitute the "same criminal conduct" only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. Here, the defendant was convicted of three counts of felony violation of a court order for three separate phone calls. Although the crimes involved the same victim, they were not continuous or uninterrupted; the defendant had the opportunity to pause and reflect before committing each new violation. Did the court properly exercise its discretion by finding that the crimes were not the same criminal conduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Kurt Madsen was charged in King County Superior Court with three counts of Domestic Violence Felony

Violation of a Court Order. CP 18-19. A jury found Madsen guilty on all three counts. CP 47-50.

Before sentencing, Madsen moved for a new trial, alleging that the presiding and trial courts denied him his right to proceed pro se. CP 62-101; 9RP 2-21.¹ The court denied Madsen's motion, and found that Madsen's requests to represent himself were equivocal, untimely, and would have hindered the due administration of justice. 9RP 26-28.

At sentencing, Madsen argued that his three felony court order violations constituted the same course of criminal conduct. 9RP 42-45. The court rejected this argument, scored the three felonies separately, and imposed concurrent, standard-range sentences of 18 months of confinement. 9RP 49-51; CP 123-27, 197-98. Madsen appeals his conviction and sentence. CP 150.

¹ The Verbatim Report of Proceedings consists of nine volumes. The report will be referred to in this brief as follows: 1RP (January 24, 2006); 2RP (January 31, 2006); 3RP (February 6, 2006); 4RP (March 7, 2006); 5RP (March 9, 2006); 6RP (May 4, 2006); 7RP (May 2, 3, 4, and 8, 2006); 8RP (May 19, 2006); and 9RP (August 9, 2006). The May 4, 2006 proceedings are contained on two separate volumes (6RP and 7RP).

2. SUBSTANTIVE FACTS.

As of September 2, 2004, Madsen had been convicted at least twice for misdemeanor court order violations. 7RP 50-59; Pretrial Exs. 4-9, 12. At the time, Madsen was subject to a valid protection order entered in King County Superior Court. 7RP 161, 183-86, 194; Trial Ex. 2. The order restrained Madsen "from having any contact whatsoever, in person or through others, *by phone*, mail or any other means, directly or indirectly" with his former girlfriend, Deborah Stuart. 7RP 187; Trial Ex. 2 (emphasis added).

Despite the protection order, on September 2, 2004, around 10:32 p.m., Madsen called Stuart at her home and asked her to come over. 7RP 168, 175, 189. This call lasted less than three minutes. 7RP 168, 175. Stuart called 911. 7RP 189.

Around 10:41 p.m., Madsen called Stuart again. 7RP 168, 176, 190. Stuart tried to keep Madsen on the phone until police arrived, but was unsuccessful. 7RP 190-91. This call lasted around eighteen minutes. 7RP 168, 176. Around 11:00 p.m., King County Sheriff's Deputy Martin Duran responded to Stuart's home. 7RP 154-55. Duran noticed that Stuart was visibly upset. 7RP 156. He took a statement from Stuart and wrote down the

phone numbers of the incoming calls recorded on her phone log.
7RP 159-60.

Around 11:17 p.m., while Duran was still at Stuart's house, Madsen called a third time. 7RP 155-60, 169, 173-76, 192. Stuart picked up the phone, spoke to Madsen a few seconds, and then handed the phone to Duran. 7RP 155-59, 192. Duran heard a male voice on the line. 7RP 156. Duran identified himself as a police officer, and asked the caller if he was Kurt Madsen. 7RP 156. The caller admitted that he was. 7RP 158. Madsen then acknowledged that he was aware of the protection order, but claimed that he thought that Stuart was in the process of dropping the order. 7RP 158.

At trial, Qwest and Verizon representatives testified that for all three calls, the phone number called was Stuart's and the originating number was Madsen's. 7RP 164-79. Madsen testified at trial, and denied ever calling Stuart or talking to Duran. 7RP 212. Instead, Madsen claimed that a female friend used his phone to call Stuart that night. 7RP 215-18.

C. ARGUMENT

**1. THE PRESIDING COURT AND TRIAL COURT
CORRECTLY FOUND THAT MADSEN HAD NOT
WAIVED HIS RIGHT TO COUNSEL.**

At two pretrial hearings, Madsen's requests to proceed pro se were equivocal. Moreover, at these hearings, the presiding court did not *deny* Madsen's requests; it merely deferred ruling on them to allow Madsen to consult with his newly appointed counsel and to allow his new counsel to assess Madsen's competency. After Madsen spoke with counsel, he did not request to represent himself. Thus, the presiding court correctly found that Madsen had not waived his right to counsel. On May 2, 2006, the day of trial, Madsen's request to proceed pro se was equivocal and untimely. In addition, because of Madsen's extremely disruptive behavior, granting his request would have seriously obstructed the administration of justice. The trial court did not abuse its discretion in denying Madsen's request.

a. Additional Relevant Procedural Facts.

i. Procedural history before May 2006.

On January 14, 2005, defense counsel Erik Kaeding filed a Notice of Appearance on Madsen's behalf. CP 117, 166. On

December 14, 2005, after being on warrant status, Madsen was arraigned. CP 162-65, 167-69.

On January 24, 2006, before Judge Jeffrey Ramsdell, Kaeding moved to withdraw as counsel. 1RP 3-11; CP 170. Neither Kaeding nor Madsen had set a motion to proceed pro se for that calendar. 1RP 3-11; 8/9/06 Ex. 1 ("DVD"), track 1/24/06, ~01:36:15.² During the hearing, Madsen said that the whole charge was a "pathetic joke" and that he wanted a "pro se order." 1RP 5; DVD, track 1/24/06, ~01:37:20. Madsen also insisted that the court address issues regarding bail, his access to legal research, and his speedy trial rights. 1RP 7. Because none of these motions were set for the calendar, Judge Ramsdell told Madsen, "We're not going to do the issues you want to do right now." 1RP 7. Instead of ruling on Madsen's request to proceed pro se, Judge Ramsdell appointed the Office of Public Defense to get counsel for Madsen. 1RP 5-11. Judge Ramsdell set a hearing for the next week, and explicitly told Madsen that if Madsen still wanted to proceed with his

² The State has designated Ex. 1 of Madsen's Motion for a New Trial — a DVD containing video of the pretrial proceedings for 1/24/06, 2/6/06, 3/7/06, and 3/9/06. Although these proceedings were transcribed as part of the report of proceedings, the DVD sheds additional light on Madsen's equivocal demeanor, and also helps show why Judge Ramsdell and Madsen's counsel had concerns about Madsen's competency.

pro se motion after an opportunity to confer with new counsel, he would be "more than happy" to set and hear the motion. 1RP 5-10. Madsen was assigned to defense counsel Michael McCullough of the Associated Counsel for the Accused ("ACA"). 2RP 3.

On January 31, 2006, McCullough was confirmed as Madsen's counsel. 2RP 3. At this hearing, Madsen asked the court to hear some pro se motions that he had drafted. 2RP 5. Judge Ramsdell told Madsen that he either represented himself or an attorney represented him, but he was not entitled to hybrid representation. 2RP 5. Madsen did *not* ask to proceed pro se or terminate counsel at that time. 2RP 3-6. Instead, Madsen and his counsel agreed to continue case-setting to February 2, 2006. CP 118, 171. On February 2, 2006, Madsen agreed to continue case-setting to February 16, 2006. CP 119, 172.

On February 6, 2006, defense counsel McCullough moved to reduce Madsen's bond. 3RP 3-11; DVD, track 2/6/06, ~11:52:39. At the bond hearing, although Madsen noted that he could not get written materials at jail because he was not pro se, Madsen did not make *any* requests to represent himself. 3RP 3-11. Madsen's motion to reduce bond was denied. 3RP 11; CP 120, 173.

On February 16, 2006, Madsen agreed to continue case-setting for five days. CP 121, 174. On February 21, 2006, case-setting was held. CP 175-76. The parties set omnibus for March 13, 2006 and trial for March 30, 2006. CP 175-76. There is no record of Madsen requesting to proceed pro se at any of these hearings. See CP 175-78.

On March 7, 2006, defense counsel McCullough set a motion to withdraw as counsel, or in the alternative, a motion to proceed pro se. 4RP 1-21; CP 179; DVD, 03/07/06, ~09:02:49. Judge Ramsdell spent over fifteen minutes on the hearing, trying to clarify whether Madsen truly wanted to proceed pro se. 4RP 1-21; DVD, 03/07/06, ~09:02:49-09:17:10. But when asked if he wanted to proceed pro se, Madsen would not answer Judge Ramsdell's questions. 4RP 6-16. Instead, Madsen criticized his counsel's work and continually interrupted the judge. 4RP 5-16; see DVD, 03/07/06, ~09:02:49-09:17:10. When Judge Ramsdell said that he was trying to help Madsen out, Madsen responded, "Bullshit." 4RP 9. Judge Ramsdell repeatedly asked Madsen if he wanted new counsel or instead wanted to represent himself. 4RP 6, 9, 12, 14-15. Madsen answered that he would rather represent himself, but then mentioned that an ACA supervisor, Don Madsen, could

assist him. 4RP 11-12. Based on Madsen's erratic courtroom behavior, Judge Ramsdell then expressed concerns about Madsen's competency. 4RP 12. Defense counsel McCullough agreed that he shared these concerns. 4RP 12.

Judge Ramsdell informed Madsen that he had the right to represent himself, but the waiver of counsel needed to be knowing, intelligent, and voluntary. 4RP 14-15. Because of competency concerns, Judge Ramsdell deferred ruling on Madsen's motion. 4RP 12-17. Judge Ramsdell said that he needed to find out if Madsen was competent to stand trial; he wanted to (1) allow Madsen to speak to new counsel and (2) have new counsel assess whether she had competency concerns. 4RP 16-17. Judge Ramsdell added that, if Madsen still wished to proceed pro se at that point, he would hear the motion. 4RP 16-17. McCullough's motion to withdraw was granted, and a hearing was set for two days later. 7RP 19-21; CP 122, 179.

On March 9, 2006, Leona Thomas was confirmed as Madsen's new counsel. 5RP 3-10; CP 180-81. Judge Ramsdell asked Thomas if she had any concerns after speaking with Madsen; she said that she did not. 5RP 4. At the hearing, Madsen *never* requested to proceed pro se. 5RP 3-10; DVD, 03/09/06,

~09:05:29-09:11:28. During the hearing, Thomas said to Madsen that he was not proceeding pro se, and Madsen responded in part, "I know."³ DVD, 03/9/07, ~9:07:52-09:08:06; 5RP 5.

On March 17, 2006, omnibus was continued a week. CP 182. On March 24, 2006, omnibus was held, and trial was continued to April. CP 183-85. On April 12, 2006, defense counsel filed her trial memorandum. CP 5-15. On April 20, 2006, defense counsel moved to change the trial judge. CP 16-17. Until the case was sent out to trial on May 2, 2006, nothing in the record shows that Madsen renewed a motion to proceed pro se, and Thomas never moved to withdraw as counsel.

ii. Procedural history from May 2006.

On May 2, 2006, the case was assigned to Judge Michael Heavey for trial, and pretrial hearings began. 7RP 4; CP 20, 186-87. Madsen was still represented by Thomas. 7RP 4; CP 20.

³ The report of proceedings mistakenly transcribes Madsen's response as, "No. No." 5RP 5. A review of the DVD shows that Madsen actually said, "I know." DVD, 03/9/07, ~9:07:52-09:08:06. The rest of Madsen's answer is difficult to decipher, but it was transcribed as, "I was going to give that to you though." 5RP 5.

When the parties appeared, Madsen did not initially raise *any* issues about proceeding pro se. 7RP 4-80.

The court heard motions in limine and defense counsel's motion to dismiss for violation of speedy trial rights. 7RP 4-80. The court found that during these proceedings, Madsen's behavior was extremely disruptive. CP 20. *Before* Madsen sought to represent himself, he was warned not to speak directly to the court regarding legal issues and to write down any questions for his counsel. But despite the court's repeated warnings, Madsen addressed the court at inopportune times, and persistently interrupted his defense counsel, the prosecutor, and the judge. CP 21; see, e.g., 7RP 5, 44-46, 49-51, 59, 62, 64-65, 69, 71, 74-76. Judge Heavey at one point noted for the record that Madsen "once every three minutes makes a comment that is very loud that everybody in the courtroom can hear. Sometimes it's intended for me, sometimes it is intended for his attorney." 7RP 66. The court also found that Madsen's outbursts and responses often were rambling, unfocused, and unresponsive, and that Madsen consistently showed an inability to follow or respect the court's directions. CP 21; see, e.g., 7RP 22, 26, 32-33, 50.

Only after almost an entire day of pretrial motions did Madsen request to proceed pro se. CP 21; 7RP 80. Madsen expressed concerns that Thomas did not have enough time to prepare for trial. CP 21; see 7RP 80-86. He also expressed a desire for Thomas to locate a witness named "Tracy Anderson" to testify on his behalf. CP 21; 7RP 85-86. Thomas informed the court that she had already tried to find Anderson as a witness, but Anderson was uncooperative. CP 21; 7RP 85-86.

The court advised Madsen of some of the risks and consequences of self-representation. CP 21; 7RP 81-82. In response, Madsen again complained that Thomas had not had enough time to prepare for trial, and said that she was not given a "chance to even do anything." 7RP 82-83. When asked if he wanted more time for her to prepare, Madsen said, "No, I'm not asking for more time because it's already too late for that." 7RP 83. When asked if he wanted a recess, Madsen responded, "No, no, because the City of Kent is the most ruthless court system in the world, I believe." 7RP 84. Madsen then launched into an unrelated diatribe about his prior Kent municipal court matters. 7RP 84.

The court advised Madsen that he had the right to represent himself, and again asked if he wished to proceed pro se. Madsen responded,

It's a--at 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. Can I make another statement? Brief? Please, your Honor?

7RP 86-87.

Madsen then explained how a previous attorney had quit on him, and that he was forced into having a public defender. 7RP 87. Madsen talked about his prior convictions for court order violations, and complained about bail being excessive. 7RP 87-88. Madsen said he was not a "threat to the community or anything like that" and that he wanted "to get on with this trial." 7RP 88. He then got upset talking about his grandfather passing away. 7RP 88-89. Defense counsel then noted for the court that Madsen was "extremely distressed at [her] inability to locate certain orders and information with the acuity that he has lived through these convictions and lived through this accusation." 7RP 89-90. The court denied Madsen's motion to proceed pro se. 7RP 89.

On May 3, 2006, the next day, Madsen was again told by the court to behave, and cautioned about his interruptions.⁴ See, e.g., 7RP 97-98, 115. Yet Madsen continued to disrupt the proceedings. See, e.g., 7RP 97-98, 112-15, 117, 121-25, 134-35. After repeated interruptions, the court had to ask that Madsen be removed to the jail. 7RP 123-25.

When Madsen returned in the afternoon, and still before jury selection, the court provided more detail about its ruling denying Madsen's request to proceed pro se. 7RP 138. The court noted that Madsen seemed reluctant to represent himself and rolled his eyes when asked if he knew what to say to jurors. The court also noted that Madsen brought his motion just as jury selection was to begin. 7RP 138-39. The court then asked Madsen *again* if he wished to represent himself. 7RP 138. Rather than taking the opportunity to proceed pro se, Madsen refused to answer the question, and had the following exchange with the judge:

MADSEN: I was denied that motion on record on May 9th and also--May 9th, 2006, and also January 23rd, 2006. And I don't believe that this is an appellate court, Your Honor. And I believe you denied my motion yesterday.

⁴ Thomas also informed the court that Madsen was being held at the Seattle jail instead of the Kent Regional Justice Center jail "partially in terms of his behavior." 7RP 99.

THE COURT: Okay. Mr. Madsen, yesterday was May 2nd.

MADSEN: I refuse to answer that because, as you well noted earlier, my only choice now is to decide whether to testify or not. Correct? And I pled not guilty. Now my choice is to choose whether or not to testify. You stated that today.

THE COURT: Okay. That is correct.

MADSEN: *I refuse to answer any questions.*

7RP 138-39 (emphasis added). Madsen again repeatedly interrupted the court, and objected to the court explaining why it denied his motion. 7RP 139. Because of Madsen's behavior, the court had to warn Madsen that it may need to send him back down to the jail. 7RP 139.

On May 4, 2006, the jail informed the court that Madsen refused to be transported to the court for trial. 7RP 142-45. The court signed an order authorizing the jail to use reasonable force to compel Madsen's presence. 7RP 145; CP 196. That day, the court signed an order denying Madsen's motion to proceed pro se. CP 20-22.

On May 8, 2006, Madsen was transported for trial. During the trial, Madsen continued to interrupt the judge and prosecutor, which prompted Judge Heavey to again warn Madsen that he could

be removed from the courtroom. See, e.g., 7RP 147-51, 208-09.

On May 9, 2006, the jury found Madsen guilty of all three counts of felony violation of a court order. CP 47-50.

Over two months later, Madsen's new counsel, Juanita Holmes, moved for a new trial, arguing that Judge Ramsdell and Judge Heavey improperly denied Madsen's right to represent himself. 9RP 2. Judge Michael Spearman denied the motion, and found that Judge Ramsdell and Judge Heavey properly indulged in every reasonable presumption against a waiver of right to counsel. 9RP 21. After reviewing transcripts and the DVD of pretrial proceedings, Judge Spearman found that Madsen's requests to Judge Ramsdell were equivocal. 9RP 21-26. He also found that based on Madsen's statements and his conduct as reflected on the DVD, Judge Ramsdell's concerns about Madsen's competency were valid. 9RP 24. Lastly, Judge Spearman found that Madsen's request to represent himself before Judge Heavey was equivocal, untimely, and, if granted, would have hindered the due administration of justice. 9RP 21-28.

b. Because Of Madsen's Equivocal Requests To Represent Himself And His Counsel's Competency Concerns, The Presiding Court Properly Found That Madsen Had Not Waived His Right To Counsel.

Criminal defendants have a constitutional right to waive assistance of counsel and represent themselves. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975)). This right, however, is neither absolute nor self-executing. State v. Woods, 143 Wn.2d 561, 585-86, 23 P.3d 1046 (2001); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). The court must "indulge in every reasonable presumption" *against* a defendant's waiver of his right to counsel. In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). This court reviews a trial court's denial of a request for self-representation for abuse of discretion. Vermillion, 112 Wn. App. at 855.

A motion to proceed pro se should be granted only if it is knowingly and intelligently made. Vermillion, 112 Wn. App. at 851. To make a knowing and intelligent waiver, a defendant must be mentally competent. See State v. Imus, 37 Wn. App. 170, 173, 679 P.2d 376 (1984); State v. Brown, 33 Wn. App. 843, 849, 658 P.2d 44 (1983).

A request to proceed pro se also must be unequivocal. Stenson, 132 Wn.2d at 740-41. This helps protect defendants "from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation." Id. at 740. The request must be unequivocal in the context of the record as a whole. Id. at 741-42 (citation omitted); Woods, 143 Wn.2d at 586. A request to proceed pro se as an alternative to substitution of counsel may be an indication that the request is not unequivocal. Stenson, 132 Wn.2d at 740-41; see also State v. Luvane, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995) (court upheld trial court determination that defendant's expression of frustration with counsel and with delay of trial rendered request to proceed pro se equivocal). For example, in Stenson, the defendant told the trial court that he did not want to represent himself, but was forced into doing so by the court and his counsel. 132 Wn.2d at 742. Because of the defendant's wavering, the Washington Supreme Court upheld the trial court's determination that the defendant's request was equivocal. Id.

Here, Madsen argues that the presiding court improperly denied him his right of self-representation on January 24, 2006 and March 7, 2006. His argument fails. At these two hearings, the

presiding court appropriately deferred ruling on Madsen's requests to proceed pro se. First, Madsen's motions were not properly set on the court's calendar. Second, the court had justified concerns about whether Madsen's waiver of counsel was knowing, intelligent, and unequivocal. Third, the court and defense counsel had justified concerns about Madsen's competency. And although given many opportunities, when Madsen returned to court after conferring with new counsel, he did not seek to represent himself.

At the January 24, 2006 hearing, Judge Ramsdell did not *deny* Madsen's motion to proceed pro se; rather, he never *ruled* on the motion at that hearing. 1RP 3-10. The hearing was not set as a motion to proceed pro se; it was set as defense counsel's motion to withdraw. 1RP 3. At the hearing, without any notice to the court, Madsen mentioned for the first time that he wanted a "pro se order." 1RP 5. Because no motion to proceed pro se was set for that calendar, the court properly did not rule on Madsen's motion at that time. The court instead allowed Madsen to consult with new counsel so that he could make a knowing and intelligent waiver of his right to counsel. 1RP 5-10. Judge Ramsdell told Madsen that if Madsen still wanted to proceed with his pro se motion after meeting

with new counsel, he would be "more than happy" to set and hear the motion. 1RP 5-10.

But Madsen did not set a motion to proceed pro se. Instead, one week later, he appeared at a case-setting hearing with new counsel, Michael McCullough, and never requested to represent himself. 2RP 3. Madsen had several other hearings before the court, but never raised a motion to discharge McCullough or to proceed pro se. See CP 119-21, 171-73, 175-78.

On March 7, 2006, Judge Ramsdell properly deferred ruling on Madsen's motion to proceed pro se because of concerns about whether Madsen was competent and whether Madsen's waiver of counsel was knowing, intelligent, or unequivocal. For over fifteen minutes, Judge Ramsdell valiantly tried to clarify whether Madsen truly wanted to proceed pro se. 4RP 1-21; DVD, ~09:02:49-09:17:10. Madsen would not provide a clear answer. Instead, he criticized his defense attorney, and continually interrupted the judge. 4RP 1-21; DVD, ~09:02:49-09:17:10.

More important, both Judge Ramsdell and Madsen's counsel had concerns about Madsen's competency. 4RP 12. Given these

concerns and Madsen's erratic behavior, Judge Ramsdell could not have reasonably found at that time that Madsen could knowingly and intelligently waive his right to counsel. See Imus, 37 Wn. App. at 173 (to make knowing and intelligent waiver, defendant must be mentally competent).

Two days later, Madsen appeared in court with new counsel, Leona Thomas. 5RP 3-10; DVD, ~09:05:29-09:11:28. Thomas informed the court that she had no competency concerns. Although he had the opportunity, Madsen made no request to proceed pro se. 5RP 3-10.

Madsen was not entitled to an *immediate* ruling on his unscheduled requests to proceed pro se. Judge Ramsdell had discretion to defer his ruling for a short period of time to ensure that Madsen's request was knowing, intelligent, and unequivocal. Each time Judge Ramsdell offered Madsen the opportunity to properly bring his motion, Madsen never did so. Rather than violating Madsen's constitutional rights, the court protected them by indulging against a waiver of right to counsel, and thus did not err.

c. Madsen's May 2006 Request To Proceed Pro Se Was Equivocal And Untimely, And Granting The Request Would Have Obstructed The Orderly Administration Of Justice.

i. Madsen's request was equivocal.

In looking at the entire record, Madsen's May 2006 request to represent himself was equivocal. Judge Heavey did not specifically find that the request was equivocal. CP 20-22. Still, this Court may affirm the trial court's decision if the decision can be sustained on any theory supported by the record and the law. State v. Gutierrez, 92 Wn. App. 343, 347, 961 P.2d 974 (1986). Moreover, Judge Heavey's written findings were confined to Madsen's May 2, 2006 request, and did not address his attempts on May 3, 2006 to have Madsen clarify his request. See CP 20-22. Further, in ruling on Madsen's motion for a new trial, Judge Spearman looked at Madsen's responses to the court on *both* May 2 and May 3, 2006. 9RP 21-28. Looking at both dates and the record as a whole, Judge Spearman found that Madsen's request was equivocal. 9RP 26-28.

On May 2, 2006, when asked if he wanted to proceed pro se, Madsen responded, "It's a - at this point I am forced, almost forced into doing that, so I would say yes." 7RP 87. Rather than

expressing a true desire to represent himself, Madsen's request was couched in terms of his frustration with counsel. See Luvene, 127 Wn.2d at 698-99 (while words defendant uses may suggest unequivocal request for self-representation, record as a whole may reveal that request is equivocal and an "expression of frustration."). Madsen complained how a previous attorney had quit on him, and that he was forced into getting a public defender. 7RP 87. He complained about bail being excessive. 7RP 87-88. Defense counsel noted that Madsen was distressed by her inability to find certain information. 7RP 89-90.

On May 3, 2006, still before jury selection, the court gave Madsen another chance to express unequivocally whether he wanted to proceed pro se. 7RP 138. Madsen easily could have clarified whether he wanted to represent himself. He did not. Instead, he refused to answer, said the court already denied his motion, and said, "I don't believe that this is an appellate court." 7RP 138-39. The presumption against waiver of counsel is designed to protect against exactly this type of gamesmanship and "manipulative vacillation." See State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

A defendant's request for self-representation "can be a 'heads I win, tails you lose' proposition for a trial court." DeWeese, 117 Wn.2d at 377. If the court too readily grants a request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. Id. But if the trial court denies the request, it runs the risk of depriving the defendant of his right to self-representation. Id. Either way, a defendant likely will appeal the court's decision. Stenson, 132 Wn.2d at 741. For this reason, there is a presumption against finding an unequivocal request to proceed pro se. Based on Madsen's vacillations, his May 2006 request was equivocal.

ii. Madsen's May 2006 request to proceed pro se was not timely.

A defendant's motion to proceed pro se must be made in a timely fashion or the right is relinquished, and the matter of the defendant's representation is left to the trial court's discretion. Stenson, 132 Wn. 2d at 737 (citations omitted). The Washington Supreme Court has refused to adopt a *per se* rule regarding the timeliness of defendant's requests for self-representation. See Stenson, 132 Wn.2d at 739. If a request is made as trial is about to

begin, the right depends upon the particular case's facts, with the trial court having a measure of discretion. Vermillion, 112 Wn. App. at 855. The trial court may look at such factors as whether the request is made for purposes of delay or to gain tactical advantage, and whether the lateness of the request may hinder the administration of justice. Stenson, 132 Wn.2d at 739.

Here, Madsen requested to proceed pro se on May 2, 2006, as jury selection was about to begin. 7RP 80, 138-39; CP 20-22. At the proceedings, Madsen expressed a wish for his defense counsel to track down a witness. Although Madsen told the court that he wanted to call this witness, he did not know where she was, and she had not received a subpoena. See 7RP 122. Judge Heavey properly found that this circumstance would have likely necessitated a continuance or an additional delay in the proceedings. CP 20-22.

Madsen argues that, although jury selection was about to begin, his request to represent himself was timely because it was a renewal of two previous requests that had been denied. App. Brief, at 23. This is incorrect. As argued above, Madsen's two previous requests were not denied. Judge Ramsdell merely deferred ruling on them. Although given the opportunity, after meeting with

appointed counsel, Madsen chose not to raise his requests again. Further, if Madsen merely was seeking to renew his previous requests, he would have done so once he appeared before Judge Heavey. Instead, Madsen waited to raise his request after almost an entire day of pretrial motions. 7RP 80; CP 21.

Given that Madsen made his request to proceed pro se merely one day before jury selection, the court did not err in finding that the lateness of the request may have hindered the administration of justice.

iii. Granting Madsen's May 2006 request to proceed pro se would have obstructed the orderly administration of justice.

As the Washington Supreme Court stated in DeWeese, "[t]here is no place in the courtroom for obnoxious or obstructionist behavior." 117 Wn.2d at 382. Even when a request to proceed pro se is unequivocal, a defendant may still waive the right of self-representation by disruptive words or conduct. State v. Hemenway, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). In Hemenway, the defendant consistently engaged in disruptive behavior that obstructed the orderly administration of justice; he

repeatedly interrupted judges and had to be instructed not to act out in court. 122 Wn. App. at 794-96. Therefore, the court affirmed the trial court's decision to deny the defendant's request to represent himself. Hemenway, 122 Wn. App. at 798.

In making this holding, the Hemenway court considered (1) the defendant's purposeful, disruptive misconduct toward the court and its officers; (2) the totality of the circumstances of defendant's self-representation request; and (3) the presumption against waiver of a right to counsel. Id. The court noted that other decisions upholding a defendant's request to self-representation involved a record completely *absent* of any disruption or disrespect by the defendant. Hemenway, 122 Wn. App. at 795 (citing Vermillion, 112 Wn. App. at 848 (finding that defendant at all times "was courteous and respectful to the court;" thus, there was no indication that his purpose was to delay trial or obstruct orderly administration of justice.); State v. Breedlove, 79 Wn. App. 101, 108, 900 P.2d 586 (1995)).

By stark contrast, the trial court found that Madsen's behavior during proceedings was extremely disruptive. CP 20-22. Despite the court's repeated warnings, Madsen persistently interrupted his defense counsel, the prosecutor, and the judge.

see, e.g., 7RP 45, 46, 49, 50, 64-66, 69, 71, 74-76; CP 20-22. At one point during pretrial, Madsen had to be removed to the jail. 7RP 123-25.

Madsen claims that these disruptions were a result only of his desire to represent himself. This is incorrect. His disruptions occurred even *before* he requested to represent himself. And regardless of the reasons for Madsen's disruptions, he had no right to continually speak out of turn, interrupt the prosecutor and judge, and disrespect the rules of the court. Thus, the trial court did not err in holding that Madsen's self-representation would obstruct the orderly administration of justice.

2. THE TRIAL COURT PROPERLY FOUND THAT THE THREE FELONY COURT ORDER VIOLATIONS DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

Madsen argues that the trial court abused its discretion in finding that his three felony court order violations were not the same criminal conduct. Madsen is mistaken. Madsen committed three distinct violations of a court order by calling Deborah Stuart three times. The calls were not continuous or uninterrupted; Madsen had an opportunity to reflect before committing each new

violation. Because the three violations involved different intents and occurred at different times, the trial court properly found that the crimes did not comprise the same criminal conduct.

This Court will not disturb a trial court's determination regarding same criminal conduct absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

In determining a defendant's offender score under the Sentencing Reform Act ("SRA"), 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 crimes constitute the "same criminal conduct" only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). Failure to meet any one element precludes a finding of same criminal conduct, and the offenses must be

counted separately in calculating the offender score. Vike, 125 Wn.2d at 410. Courts narrowly construe the concept of same criminal conduct to disallow most assertions of it. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

Here, although the three violations were committed against the same victim, they did not involve the same intent and did not occur at the same time.

a. The Three Violations Did Not Share The Same Intent, Because Madsen Had The Time To Reflect And Pause Between Violations.

In determining whether crimes shared the same criminal intent, the courts evaluate two things: (1) whether a defendant's intent, viewed objectively, changed from one crime to the next; and (2) whether one crime furthered the other. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); Grantham, 84 Wn. App. at 858. As part of this analysis, courts consider whether the crimes are "merely sequential, or whether they form a continuous, uninterrupted sequence of conduct." State v. Price, 103 Wn. App. 845, 858, 14 P.3d 841 (2000).

The intent need not be a different *type* of intent. Different criminal conduct can be found when an intent is renewed or

re-formed, creating a distinction from one act to the other. Thus, unless the crimes are continuous, they are not the same course of criminal conduct. Grantham, 84 Wn. App. at 858 (citing Dunaway, 109 Wn.2d at 215).

In State v. Tili, the Washington Supreme Court provided guidance in analyzing whether crimes share the same criminal intent. 139 Wn.2d 107. There, the court held that the three counts of rape constituted the same criminal conduct. Tili's three penetrations of the victim were nearly simultaneous, all occurring within two minutes. The court focused on the "extremely short time frame coupled with Tili's *unchanging* pattern of conduct" and found it unlikely that Tili formed "an independent criminal intent between each separate penetration." Tili, 139 Wn.2d at 124 (emphasis added).

In reaching its conclusion, the Tili court distinguished State v. Grantham.⁵ In Grantham, the defendant raped the same victim, at the same place twice, within minutes of each other. 84 Wn. App. at 859. Grantham forced anal intercourse on the victim, and then withdrew. Id. at 856. The victim crouched in a corner, while the

⁵ The Tili court distinguished Grantham instead of disagreeing with it. 139 Wn.2d at 124. Thus, this court is not faced with divergent lines of authority.

defendant kicked her, called her names, and threatened her not to tell anyone about the rape. Id. The victim begged him to stop and take her home. Id. At that point, Grantham forced her to perform oral sex upon him. Id.

Although the rapes occurred close in time, the Grantham court held that they constituted different criminal conduct for two reasons. First, the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App. at 859. Although the second rape had the same general objective intent as the first rape – sexual intercourse – the pause supported a finding that the second rape "was accompanied by a *new* objective intent." Id. (emphasis added). The "crimes were sequential, not simultaneous or continuous." Id. Second, each sexual act "was complete in itself; one did not depend upon the other or further the other." Id.

The factors emphasized in Tili – the extremely short timeframe and the continuous, unchanging pattern of the defendant's conduct – are not present here. Rather, the circumstances are more similar to cases in which courts have found different criminal intents. For example, in State v. Price, the

defendant shot the victim while he was standing by her car. 103 Wn. App. at 849. When the victim drove away, Price followed her onto the freeway and shot at her again. Price, 103 Wn. App. at 849-50. In affirming the trial court's determination that the two attempted murder counts did not involve the same criminal intent, the appellate court stressed that each shooting was a complete criminal act in and of itself, and, after the first shooting, Price returned to his car and made the choice to pursue the victim a second time. Id. at 858. This "allowed time for Price to form new criminal intent." Id.

Similarly, in State v. Rangel, the defendant fired shots from his car into another car. 99 Wn. App. 596, 996 P.2d 620 (2000). After the other car crashed, the car Rangel was riding in turned around, and Rangel shot at the car and its occupants a second time. Id. at 600. In concluding that the crimes did not involve the same objective criminal intent, the court reasoned that Rangel was able to form a new criminal intent before his second criminal act because the "crimes were sequential, not simultaneous or continuous." Id.

Here, in concluding that Madsen's violations did not encompass the same criminal conduct, the trial court did not abuse

its discretion. When viewed objectively, Madsen's criminal intent changed from one violation to the next. The three violations were not a "continuing, uninterrupted" sequence of conduct. Around 10:32 p.m., Madsen called Stuart and talked to her for less than three minutes. 7RP 168, 175, 189. Over eight minutes elapsed before the next call. Around 10:41 p.m., the defendant called Ms. Stuart a second time. 7RP 168, 176, 190-91. Over fifteen minutes elapsed before the next call. Around 11:17 p.m., Madsen called Stuart a third time. 7RP 155-60, 169, 173-76, 192.

Before each felony violation, Madsen had time to reflect and cease his activity. Instead, he formed a new intent to commit a new violation. Because of the time to reflect, the three violations were sequential, and were not simultaneous or continuous. Moreover, each violation was complete in itself, and one violation did not depend upon the other or further the other.

The evidence supports a conclusion that the three violations had different intents. Even if the evidence also might have supported an opposite conclusion, this is an issue in which the trial court has discretion. This discretion was not abused.

b. The Three Court Order Violations Did Not Occur At The Same Time.

Madsen argues that the "same time" requirement was met because the three phone calls were part of the same scheme or plan. App. Brief at 29. His argument fails. The three violations were not sequential and did not occur during the same incident. Because of the time gap between the violations, it is reasonable to conclude that the violations occurred at different times.

Although two crimes need not be simultaneous to meet the requirement that they take place at the same time, the crimes still must occur extremely close in time. State v. Porter, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997). For example, in Porter, the defendant delivered two different kinds of drugs to the same police officer "as closely in time as they could without being simultaneous." 133 Wn.2d at 183. The court concluded that the "sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time," and held that immediately sequential drug sales satisfy the "same time" element of the statute. Porter, 133 Wn.2d at 183.

By contrast, in Price, the court concluded that because the defendant had enough time after the first shooting to return to his

truck, pursue the victims up an on-ramp, and pull up next to them on the freeway, there was no continuing, uninterrupted sequence of conduct. 103 Wn. App. at 856. Therefore, the crimes did not take place at the same time. Id.

Here, as argued above, there was not a continuing, uninterrupted sequence of conduct. Madsen's violations occurred over a period of forty-five minutes, and more importantly, were interrupted by the opportunity to reflect and decide not to engage in another felony violation.

Because the three violations had different intents and did not occur at the same time, the trial court did not abuse its discretion by scoring the crimes separately.

D. CONCLUSION

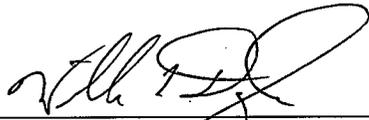
Both the presiding court and trial court properly found that Madsen had not waived his right to counsel. Moreover, Madsen's three felony court order violations order did not involve the same intent nor did they occur at the same time. The sentencing court correctly construed the statute regarding same criminal conduct narrowly, and properly found that the three violations did not

comprise the same criminal course of conduct. This Court should affirm Madsen's convictions and sentence.

DATED this 19th day of July, 2007.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KURT MADSEN, Cause No. 58662-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/13/07
Date

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