

No. 95528-0

75537-4

No. 75537-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL IAN BURNS,

Appellant.

---

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

The Honorable Deborra Garrett

---

REPLY BRIEF OF APPELLANT

---

THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711  
tom@washapp.org

TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. The trial court’s “concern” about Mr. Burns’s competency was an insufficient basis to deny his right to represent himself..... 1

    2. Ms. Jackson’s hearsay statements were testimonial and admitted in violation of the right to confrontation. .... 4

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

FEDERAL CASES

*Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....5

*United States v. Cromer*, 389 F.3d 662 (6th Cir.2004) ..... 6

WASHINGTON CASES

*In re Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001).....4

*In re Rhome*, 172 Wn.2d 654, 260 P.3d 874 (2011)..... 1, 2, 3

*State v. Englund*, 186 Wn.App. 444, 345 P.3d 859, *review denied*, 183 Wn.2d 1011 (2015) .....3

*State v. Hahn*, 106 Wn.2d 885, 726 P.2d 25 (1986).....3

A. ARGUMENT

1. **The trial court’s “concern” about Mr. Burns’s competency was an insufficient basis to deny his right to represent himself.**

The State claims that the trial court’s concern about Mr. Burns’s competency was a sufficient ground to deny him his constitutionally protected right to represent himself. Mr. Burns’s request to represent himself was timely and unequivocal. The trial court erred and Mr. Burns is entitled to reversal of his convictions.

In its response brief, the State failed to address the definitive decision on this point; *In re Rhome*, 172 Wn.2d 654, 260 P.3d 874 (2011). In *Rhome*, Mr. Rhome had a lengthy history of mental illness and his competency was extensively litigated before trial. *Rhome*, 172 Wn.2d at 656-57. Throughout these proceedings, Mr. Rhome sought to represent himself. *Id.* Ultimately, the trial court found Mr. Rhome competent to stand trial. *Id.* at 657. Further, after an extensive colloquy where Mr. Rhome’s mental illness was not addressed, the court granted his request to proceed *pro se*. *Id.* Mr. Rhome represented himself at trial and was subsequently convicted. *Id.* at 657-58.

On appeal, Mr. Rhome challenged the decision to allow him to proceed *pro se* based upon the evidence of his mental illness and

continuing concerns about his competency. *Rhome* 172 Wn.2d at 663-69. Mr. Rhome asserted the court in its *pro se* colloquy must determine whether a defendant is mentally competent to represent himself as well as competent to stand trial. *Id.* The Supreme Court rejected this notion and adhered to the test for determining a waiver of the right to represent oneself:

As noted, our existing law does not require a court to apply a different standard beyond securing a knowing and intelligent waiver from a mentally ill defendant seeking to waive counsel and proceed *pro se*. The existing law already provides for judges to be sensitive to mental health issues when considering whether to grant a waiver, *but this does not translate into a heightened standard for waiver of counsel and pro se representation when there are mental health issues present*. If we announced such a requirement, it would be a new rule.

*Rhome*, 172 Wn.2d at 666 (internal citations omitted, emphasis added).

Thus, the rule remains: “when a defendant who has been found competent to stand trial seeks waiver of counsel, the waiver must be not only voluntary, but knowing and intelligent.” *Id.* at 667. The court can consider the defendant’s mental health but the rule remains the same and the defendant’s mental health status is only *one* factor to be considered. *Id.*

The trial court’s concern about Mr. Burns’s competency was nothing more than concerns about his knowledge and skill, which are

not proper grounds for denying one to proceed *pro se*. *State v. Hahn*, 106 Wn.2d 885, 890 n. 2, 726 P.2d 25 (1986). The court never sought a mental health evaluation to determine whether Mr. Burns was competent to stand trial despite its continuing concerns. In addition, the court never inquired into Mr. Burns's mental health status at all, including a determination whether he had suffered in the past from mental health issues.

Mr. Burns was unequivocal in his request to proceed *pro se* and stated several times that he understood the dilemma he faced but nonetheless wished to represent himself. Under the well-established rules as outlined in *Rhome, supra*, the trial court erred in refusing to allow Mr. Burns to represent himself.

The State places all of its reliance on the decision in *State v. Englund*, 186 Wn.App. 444, 345 P.3d 859, *review denied*, 183 Wn.2d 1011 (2015). *Englund* provides no support for the court's actions here.

While repeatedly citing *Rhome*, the decision in *Englund* fails to correctly apply the decision. Initially, the trial court's decision on Mr. Englund's motions were form over function, the court denying one because he didn't file a written motion and then denying another one because it was not a proper motion to reconsider. 186 Wn.App. at 455-

56, 459-60. Regarding the one motion denied on the merits, the trial court placed far too much emphasis on its concern regarding the defendant's competency, ignoring the rule announced in *Rhome* that mental health is but *one* factor to be analyzed along with a determination of whether the waiver of the right to counsel is knowing and voluntary. *Englund*, 186 Wn.App. 456-59. The trial court's denial of the *pro se* motion was based upon a finding that the defendant "lacked capacity to aid in his defense." *Id.* at 457. Yet, if this was the case, the defendant was incompetent to stand trial. *See e.g., In re Fleming*, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (competence to stand trial requires a present ability to assist in his defense). *Englund* provides no support for the State's argument.

Given the fact that Mr. Burns's motion was timely and his request unequivocal, the trial court erred in refusing to allow him to represent himself. Mr. Burns is entitled to a new trial.

**2. Ms. Jackson's hearsay statements were testimonial and admitted in violation of the right to confrontation.**

Initially, regarding Ms. Jackson's statements admitted through Ms. Donovan, the State argues Mr. Burns analyzed the admission through the wrong person; Ms. Donovan instead of Ms. Jackson. While

the State is correct, even analyzing the issue from Ms. Jackson's view, the inescapable conclusion is that the statements were testimonial. Further, the State's response urging this Court to find Ms. Jackson's statements were not testimonial from the view of Ms. Jackson in reality provides ample reasons for why the statements were in fact testimonial. As a result, the trial court erred in admitting Ms. Jackson's statements to Ms. Donovan.

The State accurately sets out the law in noting that the *Crawford* court declined to define "testimonial statements" but did identify three examples of statements that would be testimonial, one of which is relevant here: statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Ms. Jackson was aware that 911 had been called in light of her cries for help and the fact she was seen apparently fleeing from Mr. Burns. Once inside Ms. Donovan's apartment, Ms. Jackson was upset and crying and told Ms. Donovan Mr. Burns had choked her. Brief of Respondent at 35. Ms. Jackson continued, claiming she momentarily blacked out from the choking and when she regained consciousness,

she fled, running up the stairs away from Mr. Burns until she found safe haven in Ms. Donovan's apartment. Brief of Respondent at 35-36. In light of these facts it seems ludicrous for the State to then argue a reasonable person in Ms. Jackson's shoes would not have believed her statements to Ms. Donovan would not be used in a later prosecution of Mr. Burns. Ms. Jackson's statements were just the sort of accusations that would lead to a prosecution, a fact that any reasonable person would understand. *See e.g., United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004) (the proper inquiry is whether a reasonable person in the declarant's position would anticipate her statement being used against the accused in investigating and prosecuting the crime).

The trial court erred in admitting Ms. Jackson's testimonial hearsay statements to Ms. Donovan.

**B. CONCLUSION**

For the reasons stated in the previously filed Brief of Appellant and this reply brief, Mr. Burns asks this Court to reverse his convictions and remand for a new trial or reverse his sentence and remand for resentencing.

DATED this 17<sup>th</sup> day of May 2017.

Respectfully submitted,

*s/Thomas M. Kummerow*

---

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 701

Seattle, WA. 98101

(206) 587-2711

Fax (206) 587-2710

tom@washapp.org

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 75537-4-I
	)	
MICHAEL BURNS,	)	
	)	
APPELLANT.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MAY, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                     |  |                          |   |
|-------------------------------------|--|--------------------------|---|
| <input checked="" type="checkbox"/> | HILARY THOMAS<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>[Appellate_Division@co.whatcom.wa.us]<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | ( )<br>( )<br>(X)<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE<br>VIA PORTAL |
| <input checked="" type="checkbox"/> | MICHAEL BURNS<br>380953<br>WASHINGTON CORRECTIONS CENTER<br>PO BOX 900<br>SHELTON, WA 98584  | (X)<br>( )<br>( )        | U.S. MAIL<br>HAND DELIVERY<br>_____                   |

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MAY, 2017.

X \_\_\_\_\_ 

# WASHINGTON APPELLATE PROJECT

May 17, 2017 - 4:28 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 75537-4  
**Appellate Court Case Title:** State of Washington, Respondent v. Michael Burns, Appellant  
**Superior Court Case Number:** 15-1-01383-4

### The following documents have been uploaded:

- 755374\_Briefs\_20170517162654D1595018\_6077.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was washapp.org\_20170517\_160045.pdf*

### A copy of the uploaded files will be sent to:

- wapofficemail@washapp.org
- tom@washapp.org
- Appellate\_Division@co.whatcom.wa.us
- hthomas@co.whatcom.wa.us

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20170517162654D1595018**