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No.
COA No. 75537-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL IAN BURNS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Michael Burns asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Michael Ian Burns*, No. 75537-4-I (January 16, 2018). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. Here, on several occasions, Mr. Burns moved to represent himself, but the trial court refused to grant his request. Is a significant question of law under the United States and Washington Constitutions involved where the trial court impermissibly denied Mr. Burns' right to represent himself, thus requiring reversal of his convictions?

2. The Confrontation Clauses of the state and federal constitutions bar the admission of testimonial hearsay statements absent an opportunity for the defendant to cross-examine. The trial court

admitted the testimonial hearsay statements of Christine Jackson to a neighbor and a police officer where Mr. Burns had no prior opportunity to cross examine her. Is a significant issue under the United States and Washington Constitutions involved where the trial court violated Mr. Burns' right to confrontation, thus requiring reversal of his convictions?

3. Where multiple offenses occur at the same time and place, involve the same victim, and involve the same criminal intent, upon request they should be scored as the same criminal conduct. Despite the two offenses here sharing the same criminal intent, the court refused to find them the same criminal conduct. Is Mr. Burns entitled to reversal of his sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Michael Burns was charged with second degree assault for allegedly attempting to strangle Christine Jackson and felony violation of a court order.

At one of his first appearances, Mr. Burns moved to represent himself. 12/30/2015RP 7. He repeated his request at the next hearing one week later. 1/7/2016RP 12. On each of these two occasions, the

court postponed a colloquy with Mr. Burns regarding his wishes. E.g.,
1/7/2016RP 13.

On January 13, 2016, Mr. Burns for a third time expressed his
wish to represent himself:

Yeah. Yeah, I would like to go pro se for reasons other
than just becoming aware of certain things. And
furthermore, I just, you know, I'd rather handle my own
business considering certain matters especially when I've
gotten lied to, threatened, and coerced into certain things
that I wasn't aware of at the time but I am aware of now.
So I would like to go pro se because of those certain
aspects of things so.

1/13/2016RP 2-3. The court engaged in the required colloquy with Mr.
Burns this time regarding his motion. The court advised Mr. Burns of
the offenses with which he was charged and the maximum sentences
for each offense. 1/13/2016RP 3-7. Mr. Burns noted he understood but
still wished to represent himself:

Ma'am, I understand completely what you're talking
about. I understand that there is some, I, you know,
somebody could be charged and sentenced to a serious
amount of time for those matters, but like I said, they do
not pertain to me and I'm not going to allow this. I would
like to relieve counsel of their duties so I can become pro
se.

1/13/2016RP 7.

Apparently confused by Mr. Burns' response, the court again
advised him of the relevant charges and maximum sentences.

1/13/2016RP 7-11. Mr. Burns repeated that he understood the difficulty he faced but nevertheless wanted to represent himself:

I completely understand everything that I'm up against, okay, Your Honor? I completely understand what is up, what sentencing may occur, all of that stuff. I completely understand all of that and it doesn't phase me a bit. And, you know, I just, I made a mistake on asking for a public defender because I, I have a right to be represented as I see fit and the only person that's going to represent me as I see fit is me so that's why I'm here today, Your Honor.

1/13/2016RP 13.

Mr. Burns' unconventional views troubled the court but not so much that the court ordered a psychological evaluation to determine his competency. The court subsequently refused to allow Mr. Burns to represent himself:

THE COURT: Counsel, I'm going to deny Mr. Burns' motion to proceed without counsel. I don't think that Mr. Burns understands the nature of the charges and the seriousness of the situation –

MR. BURNS: I have the right to waive my right –

THE COURT: Mr. Burns, you need to stop talking now so that I can say what I have –

MR. BURNS: -- and I have the right to not waive my right. And I have the right to say –

THE COURT: Mr. Burns, sit down.

MR. BURNS: -- I want to not have this woman as my counsel any longer, okay?

THE COURT: Mr. Burns, is not in my view competent to represent himself and so I'm going to deny Mr. Burns' motion to proceed without representation. I'll leave it to counsel to consider the competency concerns that I've raised here at this hearing but obviously I will rely on counsel's assessment as to those competency issues.

1/13/2016RP 22.

During Mr. Burns' trial, Carol Donovan, Christine Jackson's neighbor, testified about hearing noises outside her door, opening the door, and seeing Ms. Jackson climbing the stairs with Mr. Burns close behind. 6/14/2016RP 253. Over Mr. Burns' hearsay objection, Ms. Donovan was allowed to testify that:

I asked what happened and she said that she had gotten into a fight, they were in the bedroom. He choked her, she blacked out, she came to, she kicked him and she ran out of there and that's when I saw her on the stairway.

6/14/2016RP 260. The court admitted Ms. Jackson's hearsay statements as excited utterances.¹

Later, Officer Kent Poortinga, the responding police officer, during redirect questioning, was allowed to testify extensively about

¹ ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

Ms. Jackson's statements to him about what had allegedly transpired inside her apartment between herself and Mr. Burns. 6/14/2016RP 299-301.

Ms. Jackson did not testify at trial.

At the conclusion of the jury trial, Mr. Burns was convicted as charged. CP 85, 87-88; 6/16/2016RP 510-11. At sentencing, Mr. Burns asked the court to find that the two offenses were the same criminal conduct. CP 92-94; 7/13/2016RP 370-71. The court refused to find the offenses to be the same criminal conduct:

In my view these crimes were two separate crimes. I believe the intent required for each of the crimes is different, certainly the conduct required for each of the crimes is different, and based on the evidence in the record, and I realize we were all at a disadvantage because the complaining witness was not present, but based on all the evidence in the record it was clear to me that the violation of the No Contact Order was a course of conduct rather than a single event. The assault of course was a single event and in my view they were two separate events so should be treated as such.

7/13/2016RP 372.

The Court of Appeals rejected Mr. Burns' challenges to his convictions.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The court denied Mr. Burns' constitutionally protected right to represent himself.

The Sixth Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967).

The Sixth and Fourteenth Amendments to the United States Constitution allow criminal defendants to waive their right to assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).² The Washington Constitution also guarantees the right to self-representation. Art. I, sec. 22; *State v. Silva*, 107 Wn.App. 605, 620-21, 27 P.3d 663 (2001). Courts regard this right as “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *Madsen*, 168

² The Sixth Amendment’s right to counsel carries with it the implicit right to self-representation. *Faretta*, 422 U.S. at 818. Article I, section 22 of the Washington Constitution creates an explicit right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

Wn.2d at 503. An improper denial of the right requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

To exercise the right to self-representation, the criminal defendant must knowingly and intelligently waive the right to counsel; that waiver should include advice about the dangers of and disadvantages of self-representation. *Faretta*, 422 U.S. at 835. A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); *State v. Dougherty*, 33 Wn.App. 466, 469, 655 P.2d 1187 (1982). The colloquy should, at a minimum, consist of informing the defendant of the nature and classification of the charge and the maximum penalty upon the conviction. Moreover, the defendant must be informed that technical rules apply to the defendant's presentation of his case. *Acrey*, 103 Wn.2d at 211. Courts should engage in a presumption against waiver of the right to counsel. *State v. Lawrence*, 166 Wn.App. 378, 390, 271 P.3d 280 (2012). The defendant has the right as a matter of law when the request is made well before trial. *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

The Court of Appeals agreed Mr. Burns' motion was timely made but ruled the motion was not knowingly or intelligently made. Decision at 10-11.

The trial court did not clearly express why it denied Mr. Burns' motion to represent himself. Mr. Burns' unconventional views did not form a valid basis for denying his motion to proceed *pro se*. "The value of respecting the right to self-representation outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509. The Court of Appeals disagreed regarding Mr. Burns' unconventional views, finding, despite the trial court's failure to find, that his views "prevented [him] from comprehending the seriousness of the situation." Decision at 11. But this was just another way of saying the Court disagreed with Mr. Burns' views, which is simply not a basis for denying him the right to represent himself.

Further, the court may deny self-representation only where it finds the purpose of the motion was to delay the trial or obstruct justice. *Vermillion*, 112 Wn.App. at 851; *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). The court made no finding, and there was no evidence from which to infer, that Mr. Burns' motion to represent

himself was done with anything other than the desire to represent himself.

Finally, in the absence of a finding by the trial court, the trial court's denial could have been based on a concern regarding Mr. Burn's mental competency to represent himself. The Court of Appeals disagreed, but in the absence of a competency evaluation, this was nothing more than another concern over Mr. Burns' judgment. The defendant's "skill and judgment" is simply not a basis for rejecting a request for self-representation. *State v. Hahn*, 106 Wn.2d 885, 890 n. 2, 726 P.2d 25 (1986).

Finally, to the extent the court denied Mr. Burn's motion to represent himself based upon a determination that he was not sufficiently mentally competent, the court utilized the wrong standard; the standard is the same whether one has mental health concerns or not:

[A] defendant's mental health status is but *one* factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel[.]

In re Rhome, 172 Wn.2d 654, 665, 260 P.3d 874 (2011) (emphasis added). But, "concern regarding a defendant's competency alone is insufficient" to deny a *pro se* request. *Madsen*, 168 Wn.2d at 505.

The court failed to inquire into Mr. Burns' mental health status at all. The court engaged in the colloquy with Mr. Burns, who clearly stated he understood the court the difficult task ahead of him, but nonetheless desired to represent himself. Again, the court's concern appeared to be that Mr. Burns lacked the skill necessary to represent himself. As argued, that was simply not a sufficient ground no matter the well-meaning the desire of the court. *Faretta*, 422 U.S. at 835; *Rhome*, 172 Wn.2d at 669.

The trial court erred in denying Mr. Burns the right to represent himself. This Court must grant review and remand for a new trial. *Madsen*, 168 Wn.2d at 503.

2. The violation of Mr. Burns' right to confrontation was appealable as a manifest error affecting a constitutional right.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI, XIV. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177

(2004). A statement is testimonial if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A Confrontation Clause analysis is separate from analysis under the rules of evidence. *Crawford*, 541 U.S. at 51.

The admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the Confrontation Clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54; *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011).

In general, where a statement is functionally trial testimony, it is testimonial; where it is just a casual statement made to a friend, it is not testimonial. *Crawford*, 541 U.S. at 51. An out-of-court statement is testimonial if, in the absence of an ongoing emergency, the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

The Court of Appeals ruled that Mr. Burns failed to object at trial on confrontation clause grounds, thus he cannot seek review on appeal. Decision at 13. Despite Mr. Burns arguing that alternatively, the Court could review the claim as a manifest error affecting a constitutional right under RAP 2.5(a)(3), the Court of Appeals failed to address this argument. Decision at 13.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988). Constitutional errors are treated specially because they often result in serious injustice to the accused. *Id.* at 686.

Under RAP 2.5 (a)(3), an “appellate court may refuse to review any claim of error which was not raised in the trial court,” but there are exceptions to this general rule. One exception is that “a party may raise ... manifest error affecting a constitutional right” for the first time on appellate review. *Id.* To qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. *State v. Lamar*, 180 Wn.2d 576, 582-83, 327 P.3d 46 (2014). The defendant

must make a plausible showing that the error resulted in actual prejudice, which means the claimed error had practical and identifiable consequences in the trial. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100.

The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of RAP 2.5(a)(3) serves a gatekeeping function that bars review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.

Lamar, 180 Wn.2d at 583.

The constitutional error here is the right guaranteed under the United States and Washington Constitutions to confront the witnesses against you. The error is manifest as Ms. Jackson’s hearsay statements were the only evidence of the assault, and had an objection been

lodged, the trial court could have excluded the statements, thus avoiding the constitutional error.

The confrontation issue was properly before the Court of Appeals. This Court must grant review, find Mr. Burns' right to confrontation was violated, and remand for a new trial.

3. The assault and violation of a court order convictions were the same criminal conduct.

Mr. Burns committed the second degree assault and the felony violation of a court order at the same time and place and against the same victim. The only issue was whether he committed these offenses with the same criminal intent. The trial court concluded they did not and the Court of Appeals agreed. Decision at 13.

A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). The "same criminal intent" element examines whether the defendant's objective intent changed

from one act to the next. *State v. Dolen*, 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). “This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan, and whether the criminal objectives changed.” *State v. Calvert*, 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

Here, the offenses were committed with the same criminal intent. The felony violation of a court order and the second degree assault were part of a continuing, uninterrupted sequence of conduct. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997). Mr. Burns’ objective criminal purpose was to assault Ms. Jackson: he allegedly grabbed her and attempted to strangle her in her apartment. Thus, the felony violation of a court order furthered the offense of second degree assault as he was in violation of the court order, where he was prohibited from being and where the assault occurred. *See State v. Phuong*, 174 Wn.App. 494, 548, 299 P.3d 37 (2013) (where defendant dragged the victim from her car, through the garage, and upstairs to his bedroom, the court could determine that defendant’s

convictions for unlawful imprisonment and attempted rape constituted the same criminal intent).

Contrary to the Court of Appeals conclusion, the two offenses shared the same criminal intent and should have been found to be the same criminal conduct. This Court should grant review and find the two offenses constituted the same criminal conduct.

F. CONCLUSION

For the reasons stated, Michael Burns asks this Court to grant review, reverse his convictions and remand for a new trial.

DATED this 14th day of February 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 MICHAEL IAN BURNS)
)
 Appellant.)

No. 75537-4-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: January 16, 2018

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STATE OF WASHINGTON
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TRICKEY, A.C.J. — Michael Burns requested to proceed pro se while facing charges for assault and felony violation of a no contact order. After a lengthy colloquy, the trial court denied Burns's request because he was unable to knowingly and voluntarily waive his right to counsel. On appeal, Burns claims that the trial court violated his constitutional rights to self-representation and confrontation. He also argues that the trial court erred by determining that his convictions did not encompass the same criminal conduct. Finding no error, we affirm.

FACTS

Burns was charged with assault in the second degree and felony violation of a no contact order, both with a domestic violence allegation. At the time of charging, Burns had two additional cases pending against him with charges of burglary in the first degree, two felony violations of a no contact order, interfering with reporting of domestic violence, and assault in the second and fourth degrees.

At an early court appearance, Burns raised a general request to relieve counsel and proceed pro se.

Due to the seriousness of the charges, including a strike offense, the trial court strongly advised Burns against representing himself. The trial court deferred a decision and informed Burns that he could file a motion on the issue. The trial court deferred again at a subsequent appearance when Burns informed the court that "Mr. Burns is here to fire his public defender . . . and become pro se as of today."¹ The trial court requested that Burns set a separate hearing for his motion to represent himself.

When the trial court heard the motion to proceed pro se, Burns told the court that he wanted to "go pro se for reasons other than just becoming aware of certain things."² Burns said that he wanted to handle his own business because he had been lied to, threatened, and coerced. The trial court probed Burns on his claim. Burns told the court that the "United States" is a corporation and his counsel and the prosecutor had attempted to coerce him to sign a contract with it.³ Burns wanted to represent himself because he was not a citizen of the corporation and would not be "buying into" the company.⁴

The trial court explained the seriousness of the charges and possible sentences to Burns. Burns responded that the charges and potential sentences did not pertain to him, stating, "I'm not a corporate entity, I'm a human being, and

¹ Report of Proceedings (RP) (Jan. 7, 2016) at 12.

² RP (Jan. 13, 2016) at 2.

³ RP (Jan. 13, 2016) at 15.

⁴ RP (Jan. 13, 2016) at 15.

I'm not contracted into your place of business. Furthermore, I will not be contracted in your place of business, okay."⁵

The trial court attempted to explain to Burns that the law did not require a contract if a person was accused of a crime, and that a person would be tried in court regardless of their agreement. Burns again replied that the matters did not pertain to him, stating, "I understand that . . . somebody could be charged and sentenced to a serious amount of time for those matters, but like I said, they do not pertain to me and I'm not going to allow this."⁶ The court reiterated the seriousness of the crimes charged in the three separate cases pending against Burns, detailed their possible sentences, and explained the potential for concurrent and exceptional sentences.

When the trial court attempted to evaluate Burns's educational background in order to assess his ability to represent himself, Burns said, "I think I'm highly educated enough to represent myself because other than maybe a little looking into a few things about the law I think I can handle it because it's mostly just keeping your composure and acting."⁷ The trial court strongly disagreed with Burns's statement, and informed Burns that he would be required to comply with the rules of procedure and evidence and would be held to the same standards as the prosecutor. Burns responded, "I completely understand what is up, what sentencing may occur, all of that stuff. I completely understand all of that and it doesn't phase [sic] me a bit."⁸

⁵ RP (Jan. 13, 2016) at 6.

⁶ RP (Jan. 13, 2016) at 7.

⁷ RP (Jan. 13, 2016) at 11.

⁸ RP (Jan. 13, 2016) at 13.

After these exchanges with Burns, the trial court asked his counsel if she believed Burns understood the nature of the charges against him and was capable of assisting at trial. Counsel stated that she had spoken extensively with Burns and did not think an evaluation of his competency was necessary. The trial court expressed concerns about whether Burns understood his situation.

[F]rankly, I am concerned that you don't seem to have a full understanding of the situation you're in because just observing you you've not, you've been very impatient for me to finish describing the charges and potential penalty to you, you've indicated that doesn't matter to you.

. . . .
. . . You also indicated a belief that there is a corporation involved here that you were required to be involved with and that your not being involved with the corporation has something to do with your, with the fact you're going to have to go to trial. And you've said that you don't believe the charges against you apply to you. I've tried to explain that they very much apply to you.^[9]

Burns responded, "It's not a case, Your Honor."¹⁰

The trial court attempted to explain the situation again.

You have a trial in those cases because you've been charged with these crimes. So all in all I'm concerned about whether you understand how the criminal system works and what the consequences of criminal charges can be. And if you don't understand how that legal system works and what the results of being charged with a crime can be, you're going to need legal help.^[11]

Burns replied, "[M]y understanding is that Mr. Burns is contracted into two cases that have been globalized into one matter, okay. There is a matter at your fingertips that is not a case yet, I have rejected the contract for it to become a case."¹²

⁹ RP (Jan. 13, 2016) at 19-20.

¹⁰ RP (Jan. 13, 2016) at 20.

¹¹ RP (Jan. 13, 2016) at 20.

¹² RP (Jan. 13, 2016) at 20-21.

The trial court then voiced concern that Burns was referring to himself as if he was a different person. Burns informed the court, "He is, he's not me."¹³ Burns elaborated, "That's a corporate entity, that is a false reality, okay."¹⁴

The trial court denied Burns's motion to proceed without counsel because Burns did not understand the nature and seriousness of the charges against him. Burns was removed from the courtroom after he became angry, claiming the court had no right to hold him because there was no claim against him or contract over his head. After Burn's removal, the trial court again expressed concerns about possible competency issues.¹⁵

The trial court issued a written order denying Burns's motion to proceed pro se citing concerns about his inability to fully understand the nature of the charges against him and properly represent himself. "[T]he defendant's interaction with the court raises significant concerns about the defendant's appreciation of the nature of the criminal charges against him, the potential consequences of proceeding pro se, and the standard of legal advocacy to which he would be held, including knowledge of courtroom procedures and rules."¹⁶ The trial court concluded that it was "unable to find that the defendant was able to knowingly and voluntarily waive his right to counsel at this time."¹⁷

¹³ RP (Jan. 13, 2016) at 21.

¹⁴ RP (Jan. 13, 2016) at 22.

¹⁵ "I don't believe I'm in a position to properly assess Mr. Burns'[s] competency based on simply the behavior that I've seen here, but if counsel has a question about competency obviously you know the procedure better than I do for raising that issue." RP (Jan. 13, 2016) at 23-24.

¹⁶ Clerk's Papers (CP) at 8.

¹⁷ CP at 8.

Burns renewed his request for self-representation multiple times before his trial. While in jail, he sent several complaints and "kite[s]" to the superior court with similar assertions.¹⁸ He also requested to proceed pro se at a subsequent hearing. The trial court conducted a second colloquy and denied the pro se request because Burns did not understand the nature and seriousness of the charges and was, therefore, unable to knowingly and intelligently waive his right to counsel.

During the trial, the victim, Christina Jackson, did not testify. Jackson's neighbor, Carol Donovan, testified about the evening of the alleged assault. This testimony included Jackson's statements to Donovan. Burns objected to the testimony as hearsay. The trial court allowed the testimony as an excited utterance and present sense impression.

Donovan heard commotion coming from Jackson's condominium unit. When she opened the door, Donovan saw Jackson struggling up the stairs with Burns trying to grab her foot. Jackson called out, "He's trying to kill me. Call the police."¹⁹

Donovan pulled Jackson into her apartment and locked the door. A distraught Jackson told Donovan that Burns had choked her. Jackson pulled her hair aside and showed red marks on her throat. Donovan called the police and requested medical assistance. Jackson told Donovan that Burns had been living with her. Jackson said they had been drinking when they began fighting and he choked her until she blacked out.

¹⁸ CP at 12-21 (capitalization omitted).

¹⁹ RP (June 14, 2016) at 254.

Bellingham Police Officer Kent Poortinga responded to the emergency call. When he arrived, Jackson was upset and crying and had visible injuries. Jackson told him that Burns had been staying with her for two weeks. Jackson told Officer Poortinga that she had been talking to Burns about leaving when he became agitated. Burns "snapped" and began choking her.²⁰ Jackson was rendered unconscious multiple times until she kicked Burns off, broke free, and ran to Donovan's apartment.

After two days of testimony, a jury found Burns guilty of assault in the second degree and violation of a no contact. The jury also returned special verdicts finding that Burns and Jackson had been members of the same household and that Burns had twice been previously convicted for violating the provisions of a court order.

At sentencing, Burns argued that the two crimes should be considered the same course of criminal conduct for calculation of his offender score because the crimes were committed contemporaneously with the single objective of assaulting the victim. The trial court disagreed, citing the different intent and conduct required for each of the crimes. The trial court noted that violation of the no contact order was a course of conduct, while the assault was a single, separate event. As a result, the trial court considered the crimes separately for calculating Burns's offender score and sentence.

Burns appeals.

²⁰ RP (June 14, 2016) at 300.

ANALYSIS

Right to Self-Representation

Burns argues that the trial court deprived him of his right to self-representation when it denied his timely and unequivocal request to proceed pro se.²¹ Because the lengthy colloquy revealed significant concerns about Burns's understanding of the gravity of his situation, we disagree.

"Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing WASH. CONST. art. I, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). This right to self-representation is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen, 168 Wn.2d at 503. But courts are required to give "every reasonable presumption" against a defendant's waiver of right to counsel. Madsen, 168 Wn.2d at 504 (internal quotation marks omitted) (quoting In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1990)).

A defendant's request for pro se status must be unequivocal, timely, voluntary, knowing, and intelligent. Madsen, 168 Wn.2d at 504. "[T]he record [should] establish that he knows what he is doing and his choice is made with eyes open." State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986) (internal quotation

²¹ Burns assigns error to the deprivation of his constitutional right to represent himself at trial. Burns focuses on his motion to proceed pro se that the trial court denied on January 13, 2016. Burns does not raise the self-representation issue with respect to his subsequent requests to represent himself or the trial court's denial of his second pro se motion in May 2016. Because Burns does not offer argument with respect to these assertions of his right to self-representation, we decline to address them. RAP 10.3(a)(6).

marks and citation omitted) (quoting Faretta, 422 U.S. at 835). "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504-505. This finding must be based on an identifiable fact. Madsen, 168 Wn.2d at 505.

We review the denial of a request for pro se status under an abuse of discretion standard. Madsen, 168 Wn.2d at 504. Discretion is abused if a decision is manifestly unreasonable, based on facts unsupported by the record, or reached by application of the wrong legal standard. Madsen, 168 Wn.2d at 504. Improper denial of the right of self-representation requires reversal regardless of whether prejudice results. Madsen, 168 Wn.2d at 503.

Here, Burns made a timely and unequivocal request to waive counsel and represent himself. Therefore, the issue before this court is whether Burns's request was made knowingly and voluntarily.

The trial court conducted an extensive colloquy which revealed that Burns believed that the United States government was a corporation and was attempting to coerce him into a contract, which he refused to enter because he was not a citizen of the corporation. He wanted to be pro se and was "not buying into the company."²² He persisted in the belief that the charges did not pertain to him because he had not agreed to the contract for the charges.

²² RP (Jan. 13, 2016) at 15.

The trial court was unable to convince Burns of the seriousness of his situation despite explaining several times that Burns was subject to the charges and was facing the possibility of significant prison time and fines. In response, Burns stated that he understood the severity of the alleged crimes and possible sentences but that they did not pertain to him. At the end of the hearing, Burns was still convinced that the court could not hold him without a contract.

Burns also did not understand the skills he would need to represent himself. Burns insisted that he only needed the ability to keep his composure and act in order to defend himself in court. The trial court attempted to explain the importance of the various court rules of procedure and evidence to which Burns would be required to adhere. While Burns was unfazed, the trial court had concerns that Burns did not fully appreciate the technicalities of self-representation. Burns's interactions with the trial court revealed a lack of understanding of the gravity of his situation. Thus, his attempt to waive counsel was not knowing and voluntary.

Burns argues that the trial court did not clearly articulate the reasons for denying the motion for self-representation. We disagree. Throughout the colloquy and in the order, the trial court expressed concern about Burns's understanding of the situation. As noted in its order denying Burns's request, the trial court had "significant concerns about [Burns's] appreciation of the nature of the criminal charges against him, the potential consequences of proceeding pro se, and the standard of legal advocacy to which he would be held."²³ Burns's belief that the serious charges did not pertain to him without a contractual relationship hampered

²³ CP at 8.

his understanding of the situation and, therefore, his ability to waive his right to counsel.

Burns also contends that his "unconventional views" are not a valid basis for denying his motion to proceed pro se.²⁴ The colloquy demonstrates the trial court's concern that Burns's ideas compromised his ability to understand the severity of the charges and the difficulties he would face while representing himself. Thus, the trial court did not deny the motion merely because of Burns's "unconventional views," but because those views prevented Burns from comprehending the seriousness of the situation.

Finally, Burns argues that the trial court improperly denied his request to proceed pro se based on his mental competency without inquiring into his mental health status.

A defendant's mental health status is only one factor a trial court may consider to determine whether the right to counsel is knowingly and intelligently waived. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 665, 260 P.3d 874 (2011). If the court has concerns about mental health, a "searching inquiry" into the defendant's mental health status is required. Rhome, 172 Wn.2d at 669.

Here, the trial court briefly inquired as to counsel's opinion on competency and encouraged counsel to seek evaluation if needed. But the court did not deny Burns's pro se request based on his competency. Instead, the trial court denied the request based on concerns about Burns's ability to knowingly and voluntarily

²⁴ Br. of Appellant at 10.

waive his right to counsel given his persistent belief that none of the issues pertained to him.

A trial court may properly deny a motion for self-representation "made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504-05. Given Burns's demonstrated inability to understand that he was facing significant criminal charges and long-term incarceration, Burns was not unconstitutionally denied his right to self-representation. Therefore, we conclude that the trial court's denial of Burns's pro se request was not an abuse of discretion.

Confrontation Clause

Burns argues that admission of Jackson's statements, through the testimony of Donovan and Officer Poortinga, was a violation of the confrontation clause. But because Burns failed to assert his right to confrontation at trial, we conclude that he may not raise the issue for the first time on appeal.

The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A defendant has an "obligation to raise at or before trial a Sixth Amendment confrontation clause objection to the admission of statements made by an absent witness." State v. O'Cain, 169 Wn. App. 228, 232, 279 P.3d 926 (2012). This obligation also applies to the right to confrontation afforded by the Washington State Constitution, article I, section 22. O'Cain, 169 Wn. App. at 252.

If not timely asserted, the right to confrontation is lost. O'Cain, 169 Wn. App. at 240. The failure to assert results in a loss rather than a denial of the right. State v. Fraser, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012). “[I]f there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.” Fraser, 170 Wn. App. at 25-26. Therefore, assertion of the right to confrontation for the first time on appeal is not reviewable as a manifest error affecting a constitutional right. Fraser, 170 Wn. App. at 25-26.

Here, Burns did not assert his right to confrontation before or during trial. Burns only objected to Donovan's testimony repeating Jackson's statements as hearsay, and he failed to raise any objection to Officer Poortinga's recount of Jackson's statements. Because Burns did not raise the issue of confrontation below, he may not now seek appellate relief on this claim. See O'Cain, 169 Wn. App. at 252.

Same Criminal Conduct

Burns claims that the trial court erred by finding that his convictions for felony violation of a no contact order and second degree assault were not the same criminal conduct for the purposes of offender score calculation and sentencing. He argues that the two crimes were part of an ongoing, uninterrupted sequence of conduct with the intent to assault Jackson. The trial court concluded that the crimes should be treated separately because the violation of the no contact order was a course of conduct while the assault was a single event. We agree with the trial court.

When a defendant is sentenced for two or more current offenses, the trial court may find that some or all of the offenses encompass the same criminal conduct and count as one crime. RCW 9.94A.589(1)(a). "Same criminal conduct . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Intent is viewed objectively. State v. Chenoweth, 185 Wn.2d 218, 222-23, 370 P.3d 6 (2016). The statute, RCW 9.94A.589(1)(a), is construed narrowly and the defendant bears the burden to show that current offenses encompass the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013).

Deciding whether crimes constitute same criminal conduct often involves determination of fact. Chenoweth, 185 Wn.2d at 220. Therefore, a trial court's determination of whether two or more offenses are the same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law. Chenoweth, 185 Wn.2d at 220-21. "[W]here the record adequately supports either conclusion, the matter lies in the court's discretion." Graciano, 176 Wn.2d at 538.

Here, testimony at trial showed that Burns had been staying with Jackson for about two weeks prior to the assault. On the day of the assault, the two had been drinking together before Burns "snapped" and began choking Jackson. Violation of the no contact order happened when he began staying with her, which occurred prior to the assault and without evidence of intent to assault. Given this evidence, the trial court reasonably concluded that Burns's violation of the no

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contact order and his assault on Jackson did not encompass the same criminal conduct.

Affirmed.

Trickey, A & J

WE CONCUR:

Mann, J.

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75537-4-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 14, 2018

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