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Supreme Court No. 95528-0
(Court of Appeals No. 75537-4-I)

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MICHAEL BURNS, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court abused its discretion in denying defendant's motion to go pro se where the court could not find defendant was making a knowing and voluntary waiver of his right to counsel because he did not understand the charges pertained to him, he thought a corporation was involved in prosecuting him and he thought representing himself would only require some acting.
2. Whether defendant may raise a confrontation claim for the first time on appeal where such a claim is forfeited if not raised below, he opened the door to some of the statements, and any alleged error would not have been manifest under RAP 2.5 because defense counsel likely did not raise the issue to avoid the possibility of the victim testifying at trial.

B. STATEMENT OF SUBSTANTIVE FACTS

Around dinnertime, Carol Donovan, an upstairs neighbor of Christina Jackson's in a condominium complex, heard a lot of commotion from Jackson's unit. 10RP 249-53. She heard loud yelling and crashing, which seemed to subside for about five minutes. 10RP 253, 263. She then heard a noise outside, voices and someone coming up the stairs, so she opened the door and saw Jackson, barefoot, struggling to ascend the stairs as Burns was trying to grab Jackson's foot. 10RP 253-55. Jackson managed to get free, and called out to her, "He's trying to kill me. Call the police." 10RP 254. Donovan had seen Burns with Jackson before. 10RP 255-56, 269-70. Donovan grabbed Jackson by the arm and pulled Jackson into her apartment and locked the door. 10RP 254.

Jackson was extremely upset and was crying and having trouble breathing. 10RP 254. When Donovan asked Jackson if she was okay, Jackson said, "He choked me, he was choking me," and pulled her hair to the side to show Donovan red marks that were on her throat. 10RP 254-55, 258. After she attended to Jackson, Donovan called 911, and Jackson requested medical assistance. 10RP 256. Jackson's hair was a mess and she appeared to have some blood on her face in addition to the red marks on the side of her neck. 10RP 257-59. After Jackson started to calm down a bit, Donovan asked her what happened. Jackson said she had gotten into a fight, they were in the bedroom and Burns had choked her. She had blacked out, then came to, kicked him and ran out into the stairwell. 10RP 260, 266. Jackson said Burns had been living with her and they had been drinking. 10RP 264.

Officer Poortinga contacted Jackson, who was still crying and very upset, at Donovan's unit. 10RP 275-81. He observed some injuries to her neck as well a slight abrasion to her left cheek/jaw area. She complained that her head, neck and chest were very sore. 10RP 280-81, 285-86, 303. Jackson told the officer that Burns, whom she had dated and lived with before, had been staying with her for about two weeks, but recently she had tried to get him to leave. 10RP 294, 299. Burns had refused, and they had been discussing his leaving that day when Burns had gotten agitated

and snapped. He had gotten on top of her, with his knee on her chest, and covered her nose with one hand and gripped her neck with the other. 10RP 299-300. She said it felt like Burns was pushing all his body weight on her neck and she wasn't able to breathe. 10RP 300. She tried to plead with Burns but she couldn't really speak. She blacked out for a couple seconds, then regained consciousness. 10RP 300. When she asked Burns what had happened, Burns attacked her again, pushing against her forehead, nose and mouth, causing her to black out again. 10RP 300. After she regained consciousness again, Burns attacked her again, harder than before, and told her he was already going to prison, so he might as well make it worth it by killing her. 10RP 301. Jackson said she was able to kick him off and break free, and then she ran out the door. 10RP 302.

Another officer observed some fresh blood to Jackson's jaw, and pinkness on one side of her throat and broken capillaries on the other. 10RP 313-15; CP 142, Ex. 7 & 8. Burns was found later hiding in his father's motel room. 10RP 338-41.

C. ARGUMENT

- 1. The judge didn't abuse her discretion in denying Burns' request to go pro se because she couldn't find his waiver of the right to counsel was knowing and voluntary.**

Burns asserts the trial court abused its discretion in denying his request to represent himself because the denial was based on his

“unconventional views.” Contrary to Burns’ assertion, the judge clearly stated she was denying his request because she couldn’t find he was making a knowing and voluntary waiver of his right to counsel based on his lack of appreciation as to the criminal charges against him, the consequences of proceeding pro se, and the standard to which he would be held. During the colloquy, Burns didn’t appear to understand he had three cases pending against him. He thought a corporation was involved in prosecuting him, the prosecution related to a contract and that representing himself would mostly require maintaining his composure and acting. The judge did not abuse her discretion in finding that Burns was not knowingly and voluntarily waiving his right to counsel, which therefore required her to deny his request to represent himself.

The right to represent oneself under the federal and state constitutions is “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); Faretta v. California, 422 U.S. 806, 819-21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right, however, is “neither self-executing nor absolute,” particularly given its tension with the right to counsel. State v. Curry, ___ Wn.2d ___, 423 P.3d 179, 182 (2018). A court may only deny a request to proceed pro se if the request is untimely, equivocal, involuntary, or “made

without a general understanding of the consequences.” Madsen, 168 Wn.2d at 504-05; *see also*, Curry, 423 P.3d at 182-83 (before permitting a defendant to proceed pro se, court must ensure waiver of right to counsel is knowing and intelligent). However, a court may not grant a motion to waive the right to counsel if the defendant is not competent to stand trial. State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702, 711 (2014).

Trial courts must “indulge in every reasonable presumption against a defendant’s waiver of his or her right to counsel” before permitting a defendant to go pro se. Curry, 423 P.3d at 184. A trial court’s decision regarding a request to go pro se, i.e., waiver of the right to counsel, is reviewed for an abuse of discretion. In re Rhome, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). Great deference is given to the trial court’s decision, as the court’s discretion is a “range of acceptable choices,” and the judge observed the defendant’s behavior and was more familiar with all the pertinent circumstances. Curry, 423 P.3d at 183-84. A reviewing court may not reverse a court’s decision that was within the “range of acceptable choices” even if it may have made a different decision. *Id.* at 184.

The waiver of the right to counsel itself must be knowing, intelligent, and voluntary. Faretta, 422 U.S. at 835. The focus of the waiver of the right to counsel inquiry is to ensure that a defendant is “aware of the dangers and disadvantages of self-representation, so that the

record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” Id. At a minimum, the defendant must understand the seriousness of the charges, the maximum penalties and the fact that technical procedural rules will govern the trial. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The trial court’s determination as to whether the defendant’s waiver is intelligent “depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused.” Rhome, 172 Wn.2d at 663.

“A trial court may consider a defendant’s mental health history and status when competency has been questioned, even where the defendant has been found competent to stand trial.” Id. at 667. The trial court may also take into consideration that a defendant’s mental capacity may have “serious and negative effects” on the defendant’s ability to conduct his defense, and may deny a defendant’s request to go pro se if the defendant lacks the mental capacity to conduct his defense. Id. at 669; Indiana v. Edwards, 554 U.S. 164, 174, 177-78, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). “Logically, the trial court cannot simultaneously question a defendant’s mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel.” U. S. v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990).

Judge Garrett held the first hearing on Burns' request to represent himself and engaged in the requisite colloquy.¹ Burns stated he wanted to go pro se "for reasons other than just becoming aware of certain things," and that he would prefer to handle his 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." 5RP 2. When the judge started to inform him of the charges, Burns stated, "These matters being spoken of do not pertain to me, okay?" 5RP 3-6. When the judge inquired why not, Burns stated, "Because they don't. I'm not a corporate entity, I'm a human being, and I'm not contracted into your place of business. Furthermore, I will not be contracted in your place of business, okay." When the judge explained the law did not require a contract in order to charge him with a crime and explained he was facing serious time on the charges, Burns replied he understood that "someone" could be charged with those matters and face serious time, but that they did not pertain to him and that he wasn't going to allow this. 5RP 7.

After the judge informed him as to the charges and maximum sentences on each, she asked Burns what his educational background was,

¹ Burns notes he had verbally requested a couple times before to represent himself. The State has set forth the facts regarding those prior hearings in its COA Response Brief at 10-13. At one hearing, Burns was obstructionist, refused to state his name, to enter a plea and to answer questions. During hearings and communications with the court, Burns expressed dissatisfaction with his public defender, but also stated things like he wasn't a corporation, he hadn't signed any contracts and addressed himself in the third person.

Burns replied, "I don't think that really matters." 5RP 8-11. Burns further stated, "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." 5RP 11. The judge informed Burns he would need to understand the rules of evidence and procedure, and he would be held to the same standard as the prosecutor. 5RP 12-13. Burns responded he understood the sentencing consequences, but he had a right to be represented as he saw fit and the only person who could do that was himself. 5RP 13.

When the judge inquired about his comments about lies and threats, Burns responded his attorney had been trying to get him to sign a contract, "-- and furthermore, her and Mr. Quinn have coerced me into opening a contract without my knowledge or consent and I shot that down." 5RP 14. When the judge told Burns she didn't understand what he meant by contract, Burns stated, "It's a contracts in the corporation and I'm not buying." 5RP 15. When asked what corporation, Burns said:

It's, the corporation is the United States, Your Honor, and I am not a citizen of that corporation. So I am not, I'm here to stand here today and tell you that I want to represent myself as pro se and I'm not buying into the company, okay? And I demand...

5RP 15. When the judge asked if Burns thought there was a corporation involved in prosecuting the charges, he stated there always was. 5RP 15.

Judge Garrett then asked Burns' attorney if she had spoken with him enough to determine if he was capable of assisting her at trial. Defense counsel responded she had had extensive conversations with him, and she did not have a reason to seek an evaluation. 5RP 15-16. Soon thereafter the prosecutor expressed concern about Burns' ability to waive his right to counsel. 5RP 17-18. When Burns indicated he would love to waive counsel, the judge informed him the question was whether he was able to with a full understanding of the situation, and she was concerned he didn't have a full understanding of the situation because he had said the penalty didn't matter to him, he thought there was a corporation involved and that the corporation had something to do with his trial, and he didn't appear to understand that the charges applied to him. 5RP 19-20. Burns responded, "It's not a case, Your Honor." 5RP 20. The judge then explained she was concerned he didn't understand how the criminal system worked and the potential consequences. Burns commented, "Your Honor, from what I just said I, my understanding, is that Mr. Burns is contracted into two cases that have been globalized into one matter, okay². There is a matter at your fingertips that is not a case yet, I have rejected

² Burns still believed a few months later when he renewed his motion for new counsel/to go pro se that he was facing only two charges. Burns stated that just because there were three packets of paperwork did not mean they were all pending, and he was only aware of two. When the judge informed him there were in fact three cases pending, he replied, "It's just paperwork." 8RP 59-60.

the contract for it to become a case and --.” The judge told him he had three cases and he was the one charged with those crimes, that he kept referring to “Mr. Burns” as if he were a different person, to which Mr. Burns interjected, “He is, he’s not me.” 5RP 21. He continued, “That’s a corporate entity, that is a false reality, okay. You understand?” 5 RP 22.

The judge stated she was denying Burns’ motion to proceed pro se because he didn’t appear to understand the nature of the charges and seriousness of the situation, and because she didn’t think Burns was “competent” to represent himself. 5RP 22. She indicated she would rely on counsel’s assessment regarding any competency issues. 5RP 22. After a recess due to Burns’ disruptive behavior, the judge mentioned the issue of competency again. The public defender assured the judge she knew the procedure for requesting a competency evaluation. 5RP 23-24.³

At a hearing a few months later before a different judge, Burns again expressed dissatisfaction with his attorney and requested new counsel. When that was denied, he asked to represent himself. 8RP 38, 41-53.⁴ The judge denied his request because she couldn’t find Burns’ waiver of his right to counsel was knowing and intelligent. 8RP 55-63.

³ The judge’s written order is attached as Appendix A.

⁴ The facts of this hearing are set forth in the State’s Response Brief at 20-24. As argued therein, even if Judge Garrett had erred in her determination, Burns had an adequate remedy to renew his motion, which he did, the denial of which he does not contest.

Contrary to Burns' assertion, Judge Garrett did articulate why she denied his motion to go pro se, because she could not find that he was knowingly and voluntarily waiving his right to counsel. Burns' responses to a number of basic questions did not make sense. He claimed the charges didn't relate to him, he was fixated on a corporation being involved in the prosecution and some kind of contract(s) he did not agree with or he had been forced to sign. He believed he had only two cases, instead of the three that were pending. The judge found Burns did not appreciate 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." App. A. Therefore, she could not find that he was knowingly and voluntarily waiving his right to counsel. Although the judge decided not to order a competency evaluation, she could consider his mental capacity in determining whether he was making a knowing and voluntary waiver of his right to counsel. *See, State v. Englund*, 186 Wn. App. 444, 345 P.3d 859 (2015), *rev. den.*, 183 Wn.2d 1011, 352 P.3d 188 (2015) (court did not abuse its discretion in denying motion to go pro se where defendant lacked the capacity to defend himself). The judge did not abuse her discretion in following the presumption against finding a waiver of the right to counsel.

2. Burns waived his right to assert a confrontation clause challenge by failing to raise the issue below and opening the door to some of the statements.

Burns asserts that admission of some of Jackson's statements violated his right to confrontation and that he should be able to assert this claim for the first time on appeal under RAP 2.5. Burns waived his confrontation clause challenges because he failed to object below, when any error could have been corrected, and by opening the door to Jackson's statements to the officer. Moreover, any error would not have been manifest under RAP 2.5 because defense counsel likely did not object because she didn't want Jackson to testify. Finally, Jackson's statements to her neighbor weren't testimonial, and any error was harmless.

a. Burns waived his right to confrontation by failing to object and by opening the door to Jackson's statements to the officer.

Defense counsel waives a defendant's Sixth Amendment right to confrontation by failing to object below. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313 n. 3, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *accord*, U.S. v. Plitman, 194 F.3d 59, 64 (2nd Cir. 1999) (counsel may waive a defendant's right to confrontation where decision is one of sound trial tactics or strategy); *accord*, Wilson v. Gray, 345 F.2d 282, 286 (9th Cir. 1965), *cert. den.*, 382 U.S. 919 (1965) (waiver of confrontation right may

be effected by counsel, as a matter of trial tactics).⁵ Counsel also waives a defendant's confrontation rights by opening the door to testimony regarding the non-testifying witness. U.S. v. Lopez- Medina, 596 F.3d 716 (10th Cir. 2010); *see also*, State v. Hartzell, 156 Wn. App. 918, 934-35, 237 P.3d 928 (2010) (defendant opened the door to otherwise inadmissible evidence under the confrontation clause by cross examining the officer regarding what the victim had told him).

This Court has also recognized that a defendant waives the right to confrontation by failing to assert it at trial. State v. Slert, 186 Wn.2d 869, 877 n.3, 383 P.3d 466 (2016); In re Adoption of M.S.M.-P., 184 Wn.2d 496, 500, 358 P.3d 1163 (2015). This is particularly appropriate in those cases where the failure to object prevents the court from correcting the error at the time it is alleged to have occurred. *See*, Slert, 186 Wn.2d at 876 (defendant waived issue regarding his constitutional right to be present by failing to raise it at trial). Failing to raise a timely objection "strongly indicates that the party did not perceive any prejudicial error." State v. Jones, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016). Requiring an objection to preserve error promotes judicial efficiency by permitting a court to know when defense isn't intending to waive an error by silence.

⁵ Burns has relied upon both the state and federal confrontation clauses, but has not done a *Gunwall* analysis. This Court held in State v. Lui, 179 Wn.2d 457, 467-70, 315 P.3d 493 (2014), that a broader interpretation under the state constitution was not warranted.

The proposition that a defendant waives a confrontation challenge by failing to object is also supported by the U.S. Supreme Court's upholding of the constitutionality of notice-and-demand provisions⁶ in Bullcoming v. New Mexico, 564 U.S. 647, 666–67, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). “The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so.” Melendez-Diaz, 557 U.S. at 327. Notice-and-demand statutes condition a “defendant’s confrontation right on the timely filing of an objection to the State’s offer of evidence.” State v. Lui, 179 Wn.2d 457, 527, 315 P.3d 493 (2014) (Stephens, J., dissenting), *cert. den.*, 134 S.Ct. 2842 (2014).

It was the repeated references to a defendant’s obligation to object in Melendez-Diaz, that led the court in State v. O’Cain, 169 Wn. App. 228, 235-39, 279 P.3d 926 (2012), to conclude that a defendant must raise a confrontation clause objection at trial, or waive it. Quoting Melendez-Diaz, O’Cain stated:

The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.

O’Cain, 169 Wn. App. at 237. The O’Cain court explained that Washington has such a state procedural rule, ER 103, which requires a

⁶ See, e.g., CrR 6.13 and CrRLJ 6.13.

defendant to make a timely objection on a specific ground at trial. *Id.* at 242-43. “This rule protects the integrity of the judicial proceedings by denying a defendant the opportunity to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal.” *Id.* at 243. The court further explained that were this not the case, the judge would be placed in the difficult position of potentially interfering with defense counsel’s tactical decisions and perhaps with the attorney-client relationship itself. *Id.* at 243-44. As noted by the court, the decision of whether or not to raise a confrontation challenge is left to defense counsel, and any error in counsel’s failure to assert such an objection can be addressed through an ineffective assistance of counsel claim. *Id.* at 244-45. Often times counsel does *not* raise a confrontation clause objection because not doing so works to the benefit of his or her client. *Id.* at 245.

That is the very case here. Burns’ counsel almost assuredly did not raise a confrontation clause challenge to the testimony regarding what Jackson said to her neighbor and the police officer because he did not want her to testify. Defense knew full well that if they had asserted such an objection, the State would have made additional efforts to bring Jackson to court to testify. 11RP 359-62. Without her testimony, defense counsel was able to argue there were inconsistencies in Jackson’s

statements to others, without Jackson being able to explain those inconsistencies, and to discredit Jackson's statements by arguing that Jackson didn't appear for court even though she'd been summoned and that none of her prior statements had been made under oath. 11RP 489-92. It was to Burns' benefit not to object on confrontation grounds, and this tactical decision waived his right to confront Jackson with her statements.

Defense also opened the door to Jackson's statements to the officer because Burns' counsel was the one who first introduced Jackson's statements to the officer in cross examination. The statements Burns now complains of were only elicited by the prosecutor upon redirect. Notably Burns's counsel did not raise any objections when the prosecutor inquired into these statements on redirect. 11RP 298-301. Burns waived any confrontation challenge to Jackson's statements to Officer Poortinga by failing to object and opening the door to those statements on cross.⁷

b. The alleged errors were not manifest.

Prior to Melendez-Diaz, this Court held in State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007), that a confrontation challenge could be raised for the first time on appeal if the appellant could satisfy the requirements of RAP 2.5. As noted in O'Cain, the Kronich holding in this respect was undermined by this Court's decision in State v. Jasper, 174

⁷ The State briefed this issue more fully in its COA Response Brief at 37-41.

Wn.2d 96, 271 P.3d 876 (2012), and it is certainly contrary to Melendez-Diaz. O’Cain, 169 Wn. App. at 247-48. A state court must decide a federal question based on U.S. Supreme Court precedent. Jasper, 174 Wn.2d at 116. Despite the State’s argument the issue had not been preserved, the Jasper court addressed Moimoi’s confrontation clause claim on the basis that the objection had been sufficient to raise the challenge, without engaging in a RAP 2.5 analysis. Id. at 108 n.2.

Even assuming the RAP 2.5 analysis employed by Kronich survives Melendez-Diaz and Jasper, the asserted error here does not meet the “manifest” requirement of RAP 2.5(a)(3). An alleged error of constitutional magnitude is only “manifest” under RAP 2.5 if the appellant can show actual prejudice, i.e., “practical and identifiable consequences” in the trial. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” Id. at 100.

Here, if the public defender has asserted a confrontation clause objection, the State likely would have been able to produce Jackson for trial. While Jackson did not respond to the subpoena, the prosecutor knew where she lived, had been in recent contact with her and had been

prepared to send a deputy to give her a ride to the courthouse. 11RP 359-60, 378-79. Burns has not asserted counsel was ineffective in failing to object, and counsel clearly could have strategically chosen not to assert a confrontation clause knowing full well the State might then actually produce Jackson as a witness. Given the court's probable awareness of this strategic reason not to object, any alleged error was not manifest.

Burns asserts the violation was manifest because "Jackson's hearsay statements were the only evidence of the assault." Petition at 14. The statements Burns challenges now were not the only evidence of assault. Jackson told her neighbor that Burns choked her and was trying to kill her. Burns has not challenged these statements. There was evidence of red marks on her neck and injuries to her face, and Jackson's statement "Get away from me!" made on her 911 call. The neighbor testified Jackson had difficulty breathing and the officer testified she complained of chest and neck pain.

c. Statements to the neighbor were not testimonial

Even if Burns could assert a confrontation clause claim for the first time on appeal, Jackson's statements to her neighbor were not testimonial. Testimonial statements are those whose primary purpose is to create "an out-of-court substitute for trial testimony." Ohio v. Clark, ___ U.S. ___, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015). Statements made to persons

other than police officers are much less likely to be testimonial. *Id.* at 2181-82. The test regarding nongovernmental witnesses is whether a reasonable person in the declarant's position would think she was making a record of evidence for a future prosecution when she made the statement. State v. Shafer, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006). A reasonable person in Jackson's shoes would not have thought her statements made to a neighbor right after she fled from Burns were statements that would be used as evidence in a later prosecution. Their admission did not violate the confrontation clause.⁸

d. any error was harmless

Confrontation clause errors are harmless if the State shows that the error complained of did not contribute to the verdict beyond a reasonable doubt. Jasper, 174 Wn. 2d at 117. This Court has also considered confrontation clause errors harmless if the untainted evidence is overwhelming or if there is no reasonable probability the outcome of the trial would have been different absent the error. State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).⁹

Even if Jackson's statements to the neighbor about what happened were testimonial, any error was harmless as that testimony was cumulative

⁸ The State more fully briefed this issue in its COA Response Brief at 32-36.

⁹ The State briefed the harmless error issue more fully in its COA Brief at 41-42.

of Jackson's statements to Officer Poortinga, to which statements Burns opened the door. Jackson told the neighbor that Burns had choked her, she had blacked out and then had run away when she regained consciousness. Jackson told the officer that Burns had gotten on top of her, covered her nose with one hand and gripped her neck with the other, that she couldn't breathe, that she blacked out for a couple seconds and after she regained consciousness, he attacked her again, causing her to black out again. Any error in admitting Jackson's statements to the neighbor about what happened did not contribute to the verdict beyond a reasonable doubt, particularly given Jackson's uncontested initial statement to the neighbor that Burns had choked her.

D. CONCLUSION

For the foregoing reasons, the State requests that the Court affirm Burns' convictions.

DATED this 21st day of September, 2018.

Respectfully submitted,



HILARY A. THOMAS
WSBA No. 22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

APPENDIX

A

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WHATCOM COUNTY
WASHINGTON

BY _____

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 15-1-01383-4
vs.)	
)	
MICHAEL I. BURNS,)	ORDER DENYING DEFENDANT'S
)	REQUEST TO PROCEED PROSE
Defendant.)	
)	

THIS MATTER having come before the court on defendant's motion to proceed prose in the above-entitled matter, the State of Washington being represented by Christopher Quinn, Deputy Prosecuting Attorney for Whatcom County and the defendant being present and being represented by Shoshana Paige, and the court having heard the defendant's request and argument; and the court having questioned the defendant as to his understanding of the risks related to his request to proceed prose, issues the following order related to findings:

FINDINGS

- 1) That the 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 ^{PIP SR NY} ~~prose~~, and the standard of legal advocacy to which he would be held, including knowledge of courtroom procedures and rules.
- 2) That the court was unable to find that the defendant was able to knowingly and voluntarily waive his right to counsel at this time.

Order denying defendant's request to proceed prose

Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 676-6784
(360) 738-2532 Fax

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion to proceed prose in the above-entitled matter is denied at this time. Further the defendant is not precluded from renewing his request to represent himself upon a change of circumstances justifying reconsideration.

DATED this 20 day of January 2016.



JUDGE/COURT COMMISSIONER

Presented by:



Christopher D. Quinn, WSBA #34695
Deputy Prosecuting Attorney

Approved for Entry



Shoshana Paige, WSBA #91001
Attorney for Defendant

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

September 21, 2018 - 3:42 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95528-0
Appellate Court Case Title: State of Washington v. Michael Ian Burns
Superior Court Case Number: 15-1-01383-4

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