COA NO. 42425-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KERBY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial.

2. The court violated appellant's constitutional right to self-representation.

3. The court violated appellant's constitutional right to due process in failing to give his proposed instruction cautioning the jury regarding accomplice testimony.

Issues Pertaining to Assignments of Error

1. The trial court conducted a portion of jury selection at sidebar. Where the court did not analyze the requisite factors before conducting this private hearing, did the procedure violate appellant's constitutional right to public trial?

2. Whether the trial court violated appellant's constitutional right to self-representation because the request to proceed pro se was unequivocal, timely and knowing and the court gave no reason for declining to grant the request?

3. Where evidence showed the State's witness was an accomplice whose key testimony was uncorroborated, did the trial court commit reversible error in rejecting appellant's proposed cautionary instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Michael Kerby and Jeffrey Strickland with two counts of first degree assault while armed with a firearm. CP 1-2. The jury convicted on both counts. CP 63-66. The court sentenced Kerby to life without the possibility of parole on count I because it constituted a "third strike" under the Persistent Offender Accountability Act. CP 76. This appeal follows. CP 84.

2. The People Involved

Strickland, Kerby, and Kerby's girlfriend, Jerri Chrisman, went to Mac's Tavern in Aberdeen on the night of February 3, 2011. 3RP 350, 352, 357-58. Eugene Savage and co-worker Daniel Ivey were also there. 3RP[1] 32-35. Savage drank a good deal of alcohol that night and was highly intoxicated. 3RP 35, 37, 45-46, 105, 109, 198, 542. He acknowledged having a limited memory of what took place. 3RP 45, 77. Ivey drank alcohol that night but denied being intoxicated. 3RP 102-03, 105, 109.

[1] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 4/4/11, 5/16/11, 6/13/11, 6/27/11 and 7/25/11; 2RP - 4/8/11; 3RP - three consecutively paginated volumes consisting of 6/17/11, 6/28/11, 6/29/11, 6/30/11; 4RP - 6/28/11; 5RP - 7/1/11; 6RP - 7/5/11.

3. Testimony of Ivey and Savage

At some point that night, Savage stepped outside the bar for a cigarette. 3RP 35. Strickland and Kerby were there. 3RP 36. A woman was standing off to the side. 3RP 37. Savage said "que pasa." 3RP 36. Strickland and Kerby appeared offended, and one of them made it known that he did not like that Savage spoke to them in Spanish. 3RP 37. Savage "popped off something smart, being a bit of a smart ass," telling them to "shake the sand out of their pussy." 3RP 37, 58.

From inside the bar, Ivey saw Strickland and Savage "in each other's face" outside the bar. 3RP 87-88. Ivey went outside to see what was going on. 3RP 89, 94. Ivey noticed a woman sitting on a bench near the door behind Kerby. 3RP 106-08. Strickland or Kerby said something about being disrespected. 3RP 90, 107, 144. Savage apologized and shook hands with Kerby. 3RP 143-45, 165. Ivey thought everything had calmed down. 3RP 92-94.

Then the matter escalated, with Kerby telling Strickland that they did not have to tolerate this disrespect. 3RP 92, 164, 166. Kerby seemed to be encouraging Strickland to deal with the matter. 3RP 94-95. Kerby was "antagonizing Strickland or saying we don't need to put up with this." 3RP 147.

Strickland said this could or would be dealt with away from the bar. 3RP 91, 94, 147. Ivey took this to mean that Strickland and Savage would handle the matter amongst themselves. 3RP 154. According to Savage, Strickland or Kerby said "let's take it out in the alley." 3RP 42. Savage was just expecting a bar fight to take place. 3RP 38. Ivey encouraged Savage to leave with him. 3RP 95, 147.

The four men walked toward the parking lot, with Kerby and Strickland in front. 3RP 60-61. Ivey was in front of Savage. 3RP 76. When Ivey reached Savage's car in the parking area, he realized Savage was no longer with him and walked back to see where he was. 3RP 95-96, 155-56.

As he was walked back, he heard a woman yell, "shoot his ass." 3RP 97, 156-57, 168-69. That woman was Jerri Chrisman. 3RP 134, 136. She was near the front of bar. 3RP 135. Ivey did not hear Kerby say anything from the time Ivey walked back towards the bar to find Savage. 3RP 156-57. Ivey did not hear Chrisman say anything to Kerby. 3RP 168. Ivey only heard Chrisman say, "shoot his ass."[2] 3RP 97, 168-69.

[2] Savage remembered a woman was standing to the right of the two men, but did not remember if she participated in the exchange of words or said anything during the course of the encounter. 3RP 37, 77.

Ivey looked up and saw Strickland lift a gun and shoot him. 3RP 97-98, 129, 131-32, 134, 150, 159-61. Ivey was shot in the chest. 3RP 99. At no point did Ivey see Kerby with a gun. 3RP 159. Ivey was certain that Strickland, not Kerby, was the man who shot him. 3RP 159. There was no one between Ivey and Strickland. 3RP 134. Savage was behind Ivey, Kerby was behind Savage, and Chrisman was behind Kerby. 3RP 135-36, 152. Kerby was about 15 feet away from Strickland and seven to eight feet behind Savage. 3RP 99, 152, 170.

After being shot, Ivey passed Strickland, then passed Savage about eight feet later, then passed Kerby another eight feet later, and finally passed Chrisman on his way into the bar. 3RP 180. Savage was in between Strickland and Kerby as Ivey ran into the bar. 3RP 174. Ivey did not hear Kerby say anything. 3RP 99.

Savage, for his part, remembered Ivey turning around and saying he was shot in the chest. 3RP 38, 39. Savage had not seen a gun when Ivey was shot. 3RP 38, 66. He heard the gun shot. 3RP 38. According to Savage, Strickland was right next to Kerby. 3RP 39. Savage also claimed Ivey was two steps in front of him when the latter was shot and that Ivey did not walk past Kerby upon returning to the bar. 3RP 38, 66-67, 76.

Savage continued advancing after Ivey was shot. 3RP 39-40, 67, 74. Strickland then shot Savage from about 10 feet away. 3RP 40, 67, 74.

Savage did not see the gun before he was shot. 3RP 42. He had no idea that either one of them may have had a firearm. 3RP 42. He did not remember anyone saying anything. 3RP 40.

Strickland and Kerby took off down an alley. 3RP 40. Savage went back inside the bar upon realizing he had been shot in the leg. 3RP 41. He did not see Kerby with a firearm at any time. 3RP 70.

4. Jerri Chrisman's Testimony

Chrisman described meeting up with Kerby at a bowling alley earlier that night, where she saw Kerby with a Taser.[3] 3RP 353-55. Chrisman and Kerby then went to Chrisman's residence, where she thought she saw Kerby fold a black gun into a towel, place it into his backpack, and put the backpack in his vehicle. 3RP 356-57, 409-10, 453-54, 457. She was unfamiliar with guns and was not sure if what she saw was actually a gun. 3RP 457.

At Mac's Tavern, Chrisman followed Strickland and Kerby outside. 3RP 360, 418-19. Two other men were there. 3RP 361, 419, 422. Chrisman was the only woman outside. 3RP 456.

She heard Savage (described as the man in the red tank top) say something in Spanish to Strickland. 3RP 362. Kerby became angry. 3RP

[3] Chrisman's employer, who accompanied Chrisman to the bowling alley, testified that she saw Kerby with a black Taser in two pieces at the bowling alley. 3RP 335, 337-38, 345-46.

362. Words were exchanged. 3RP 363. Another man came out and wanted to know what was going on. 3RP 363-64. Kerby said his friend had been disrespected. 3RP 364. All of the men were saying something to the effect of "why don't we take it over there in the alley." 3RP 364-65. Kerby pulled out a Taser, sparked it, and touched Savage.[4] 3RP 365, 442-43, 460.

According to Chrisman, Kerby pulled out a gun and said he was going to "shoot the motherfucker."[5] 3RP 366. Chrisman described the gun as black, the same as what she thought she saw earlier at the house. 3RP 367. She denied that she said, "shoot the mother fucker." 3RP 426. She walked away. 3RP 367. She heard a "pop pop," turned around, and saw the man in the tank top holding his side. 3RP 367.

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[4] Savage was adamant no Taser was involved in the altercation. 3RP 59, 68. Ivey did not see a Taser being used by anyone at any time. 3RP 106-07, 131, 139, 148, 159. A bar patron said she saw a man waving a Taser in front of Savage's face. 3RP 227, 230-31, 240. The bartender did not see a Taser. 3RP 242, 245-46.

[5] She later acknowledged that Kerby might have said "shock" instead of "shoot." 3RP 426. Chrisman was confused regarding when Kerby had a Taser versus when he had a gun. 3RP 443-44. She thought Kerby had a Taser in one hand and a gun in the other. 3RP 444. She later testified she thought he first had the Taser and then later pulled out what she thought was a gun. 3RP 460-61. She also said she had a tendency to "black things out" and "make them go away." 3RP 446.

5. Murphy's Testimony

Michael Murphy accompanied Savage and Ivey to Mac's Tavern. 3RP 522-24. He drank three beers. 3RP 524. At one point he walked outside the bar and saw Ivey and Savage talking to Strickland and Kirby. 3RP 527-28. A woman was standing on the side. 3RP 527, 528. He heard Strickland say, "let's go find a dark alley and we will take care of this." 3RP 530. Ivey replied, "he didn't need no dark alley to take care of it." 3RP 530. The woman turned to walk away. 3RP 546. She said she did not want "nothing to do with it" and "it wasn't worth it." 3RP 530. Murphy did not hear her say something like "shoot his ass." 3RP 546. When Murphy turned to go back into the bar, he heard two gunshots. 3RP 530-31, 547. Murphy never heard Kerby threaten to shoot anyone and never saw him with a firearm. 3RP 549-50.

6. Strickland's Testimony

Strickland testified on his own behalf. 5RP 47-91. Under his version of events, there was an initial exchange of words with Savage. 5RP 59-60, 69-71. Both Strickland and Kerby had their own Taser. 5RP 71. Strickland pulled his Taser out. 5RP 72. Kerby displayed his Taser, but did not use it. 5RP 71-72. The situation appeared to calm down after Kerby shook hands with Savage and Ivey came out. 5RP 59-60, 73. Kerby walked toward his car. 5RP 60. Strickland started walking through

the alley. 5RP 61, 75. When he was in the alley or about a half block away, he heard a "pop, pop" and ran off in a panic. 5RP 61, 75. He heard gunfire but did not see anyone get shot. 5RP 63. Strickland denied having a gun that night or shooting anyone. 5RP 57, 62. He further testified he never saw Kerby with a gun that night and did not know Kerby to carry firearms. 5RP 57, 63.

7. Aftermath And Investigation

Chrisman fled the scene after the shooting and ended up at a Jack in the Box restaurant. 3RP 368. Police contacted her there. 3RP 369. They questioned her. 3RP 430-34. She told police she had been at Mac's with Strickland and Kerby and there had been a fight. 3RP 430-31. In her first statement to Detective Hudson on the morning of February 4, Chrisman said nothing about seeing Kerby with a gun in front of Mac's or that Kerby yelled anything about shooting anybody. 3RP 434-35.

As detectives continue to press her for an account of what happened, Chrisman later told Detective Laur that she heard Kerby say, "I will shoot you motherfucker." 3RP 432-33, 436-37. She also stated she saw Kerby grab for something in his pocket and pull out what she thought was a gun. 3RP 437. Chrisman agreed the detectives "didn't know whether I was a suspect or a witness." 3RP 440. It was important to her

that police believed her story, which caused them not to consider her a suspect any longer. 3RP 440-41.

Strickland text messaged an acquaintance after the incident that night and asked her to pick him up in her car, which she did. 5RP 11-13. Strickland was apprehended in a vehicle about five or ten blocks from Mac's Tavern. 3RP 209-10, 220.

Kerby called Erin Souther, his ex-girlfriend, after the shooting. 3RP 297-99, 308. He drove over and parked the vehicle in her garage. 3RP 299-301. He told Souther that he had a fight with a girl he was dating (Chrisman) and wanted to go to the beach. 3RP 301, 308. Souther drove him to Ocean Shores and stayed in a hotel for the night. 3RP 302, 313. The next morning Kerby retrieved his things from Chrisman's house in Aberdeen. 3RP 303, 315. He wanted Souther to go with him to California. 3RP 304. As she was leaving the hotel that morning, Souther noticed a plastic toy water gun in the door pocket of her car.[6] 3RP 302, 304-05, 316. Kerby had put it there. 3RP 305.

Kerby was arrested on February 4 at the hotel in Ocean Shores. 3RP 484-86. He was compliant. 3RP 490. While detained in the back of a detective car, Kerby said he was in a confrontation with "two drunk

[6] Kerby called Chrisman and asked why she spoke with the police. 3RP 369. He told her she saw a toy gun. 3RP 369.

asses." 3RP 564-65. He described them as two Mexicans, a big guy and a little guy. 3RP 566. The big guy said "let's settle this." 3RP 566. He went back inside the bar and when he came back out everyone was gone. 3RP 565. He did not see what happened. 3RP 566.

During subsequent interrogation at the police station, Kerby initially said he never saw or touched a gun. 3RP 578-79. He denied doing anything. 3RP 580. He saw a tall Mexican man walk by him grabbing his chest, whereupon he got into his vehicle and drove to Souther's house. 3RP 580.

Kerby acknowledged he had a Taser, but denied pulling its trigger. 3RP 581-82. When later asked during the course of interrogation if he had a gun during the incident, Kerby said at one point he did but got rid of it. 3RP 582, 583. He maintained the gun never went off in his hand, he did not do anything wrong, and that "if we asked the little Mexican guy, he can't state who actually pulled the trigger." 3RP 582. Kerby asked the detective if he could make a deal for him. 3RP 582. When the detective tried to "clarify" when Kerby had the gun in his hands, Kerby replied there was no gun and the only thing he had was a Taser. 3RP 583. Police later recovered a toy plastic hand gun in an area behind the hotel where Kerby and Souther had stayed. 3RP 576-77.

Two spent shells and one unspent round were recovered from the driveway area near Mac's Tavern. 3RP 182, 186. The shell casings were checked for DNA. 3RP 513. A partial DNA profile was detected, but Kerby and Strickland were excluded as contributors to that profile. 3RP 516.

8. Case Theories

The State argued in closing that Strickland was the shooter. 5RP 140, 148-49, 228, 230. The State's theory was that Kerby was guilty as an accomplice because he was involved in the argument, displayed a Taser, escalated the argument and gave the gun to Strickland. 5RP 133-34, 148-49, 222-23, 229-30. Kerby's defense theory was that he was in the wrong place at the wrong time. 5RP 212, 214. Kerby's counsel argued the State had not proven beyond a reasonable doubt that he acted as an accomplice to the first degree assaults. 5RP 202-04, 219-20.

C. ARGUMENT

1. THE COURT VIOLATED KERBY'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

The parties exercised challenges to jurors on the venire panel at an off-the-record sidebar discussion. That proceeding was not open to the public. The court erred in conducting a portion of the jury selection process in private without justifying the closure under the test established

by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions and remand for a new trial.

a. A Portion Of The Jury Selection Process Was Not Open to The Public.

Jury selection took place on June 28, 2011. 4RP. The venire panel was questioned on the record in the courtroom. 4RP 1-106; CP 100. At the close of questioning, the court announced, "Ladies and gentlemen, the attorneys and I are going to be step [sic] over to the table with Mr. Strickland and Mr. Kerby. I will allow you to stand and stretch while we have a discussion. It should not take us a long time. Then we will be seating the panel. Please remain in the courtroom. You do not have anything to talk with each other at this point in time, outside the stretching, and rest-assured, we are talking about you." 4RP 106.

A jury panel was subsequently impaneled and sworn. 3RP 24. The jurors exited the courtroom. 3RP 24. The trial judge then stated, "Let's make a record. The record will reflect, that approximately, 12:05, the lawyers and Mr. Strickland and Mr. Kerby and I stepped to the table and a side bar to select the jury. We spent approximately 20 to 25 minutes doing that. Every one was given the opportunity to exercise their challenges, and for all intents and purposes as making a record of the side

bar, that's what took place." 3RP 24. The trial judge then confirmed this was an accurate representation of the record by obtaining agreement from the prosecutor, Strickland, Kerby, and their respective counsel. 3RP 24-27. For example, the judge addressed Strickland's attorney as follows: "we have a side bar regarding the selecting of the jury. Every one exercised their challenges, and we selected a jury; were you present at that side bar?" 3RP 27. Farra answered in the affirmative, and agreed that was an accurate recitation of what took place. 3RP 27.[7]

b. The Trial Court's Failure To Justify The Closure Requires Reversal Of The Convictions.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Whether a trial court has violated the defendant's right to a

[7] As of the filing of this brief, appellant is waiting to receive an additional verbatim report of proceedings covering a portion of a hearing that took place before the jury panel was brought into the courtroom. Appellant may file an amended opening brief after receiving the additional transcript if it contains information significant to the public trial issue.

public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173–74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, __Wn.2d__, 288 P.3d 1113, 1115 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 288 P.3d at 1115. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515,

122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993).

Before a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 288 P.3d at 1118. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its

application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 288 P.3d at 1117.[8]

Here, the trial judge conducted a portion of the jury selection process in private. 3RP 24. Dismissal of jurors during a courtroom side-bar discussion is a portion of jury selection held outside the public's purview. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012). While the courtroom was open to the public in the sense that no one was precluded from entering or asked to leave, everyone was excluded from the private bench conference except counsel, the co-defendants, and the judge. RP 354, 375. The court reporter was not present. As a practical matter, the judge might as well have conducted this private hearing in chambers or dismissed the public from the courtroom because the public was not privy to what occurred at the sidebar. What took place at sidebar should have taken place in open court.

There is no indication the court considered the Bone-Club factors before conducting this private hearing at the sidebar table. By employing

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[8] The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller. Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 130 S. Ct. at 724 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

this procedure, the court violated Kerby's right to public trial. Wise, 288 P.3d at 1119 ("The trial court's failure to consider and apply Bone–Club before closing part of a trial to the public is error."). Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Id. at 1118.

The State may try to argue the issue is waived because defense counsel did not object to conducting this portion of voir dire at side bar. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 1115, 1120. The issue may be raised for the first time on appeal. Id. at 1116 (citing Brightman, 155 Wn.2d at 514–15).

The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 288 P.3d at 1115. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22.

Because a portion of jury selection was not open to the public, Kerby's constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is

structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 288 P.3d at 1115, 1119-20. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 1120. Kerby's convictions must be reversed and the case remanded for a new trial due to the public trial violation. Id. at 1122.

2. THE COURT VIOLATED KERBY'S RIGHT TO SELF-REPRESENTATION.

Criminal defendants have the right to self-representation under the federal and state constitutions. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The court committed structural error by denying Kerby's request to represent himself because the request was unequivocal, timely and knowing.

a. Kerby Requested To Proceed Pro Se.

On June 13, 2011, Kerby sent a letter to the court, stating that he wanted to be placed on the docket for one of three things to happen: (1) a "dismissal;" (2) "let me represent myself;" and (3) "replace Debray and Keehan for obvious reasons with David Mistackin and Christine Newbry." CP 86. After alleging various ways in which his assigned counsel was

deficient, the letter continues: "that leaves you and I to come up with [sic] solution. (1) I would like to have and want Mr. David Mistachkin and Christine Newbry (2) If not - I wish to represent my self with no problem doing so your honor. I welcome that decision. (3) You dismiss this case." CP 91. The letter goes on to ask the court to grant one of these three requests. CP 92. The letter also states "I will not be coming to court anymore to watch and be a part of all the disrespect coming my way by DA [and] my ex-attorney. I trust 2 people (me and your honorable judge)." CP 92.

In a letter dated June 16, 2011, the court responded as follows:

> I have reviewed your correspondence presented to the court on June 13, 2011. It appears you have three issues you believe you need to be heard by the court. Specifically:
>
> A. You are concerned regarding representation by your present attorneys.
> B. You are requesting appointment of different counsel or in the alternative to represent yourself;
> C. You indicate that you will not be appearing in further court proceedings.
>
> I am placing your correspondence in the court file. Copies are being sent to your attorneys and to the prosecuting attorney as I am required to do.
>
> *The issues you raise in your correspondence will be addressed at hearing on Friday, June 17*, 2011, at 8:30 A.M. Your attendance is required.

CP 95 (emphasis added).

After some initial discussion of other matters at the June 17 hearing, the court told Kerby "I am going to let you put in your two bits, and then I'm going to have my own discussion." 3RP 7. Kerby said he was ready for trial. 3RP 8. He said the prosecutor lied about something. 3RP 8. He then voiced his displeasure with the performance of one of his attorneys, stating "I would like to dismiss DeBray, keep Hatch and Keehan, for all the reasons I mentioned in there." 3RP 9. Kerby did not reference what he wrote in the letter about not coming to court.

The court responded by saying he did not care if Kerby liked his lawyers and they knew what they were doing. 3RP 10-11. The court next addressed a motion for continuance made by Strickland's attorney. 3RP 11-12. The court then addressed Kerby's comment in his letter indicating he did not want to be in court if he did not get a new lawyer. 3RP 12-13. The court said he had the authority to force defendants into court. 3RP 13. In summing up his ruling, the court said "replacement of counsel and anything of that nature, no, denied." 3RP 13-14.

Strickland's attorney indicated his understanding that Kerby had also asked to proceed pro se. 3RP 14. The court responded, "Well, if you are not Mr. Kerby's attorney, Mr. Farra, why don't you take care of your

client. I gave Mr. Kerby an opportunity to address the court. Issues have been addressed. Thank you." 3RP 14.

b. The Request Was Unequivocal.

In assessing whether the right to self-representation has been violated, the controlling factors are whether the request to proceed pro se is unequivocal, timely and knowing. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A reviewing court looks at the record as a whole to determine whether a demand to proceed pro se was unequivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). "[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel." Madsen, 168 Wn.2d at 507; see State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) ("Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver.").

Kerby requested in writing that he be allowed to represent himself in the event that the court denied his request for new counsel. CP 86, 91-92. The court understood his request, as shown by the response letter in which he understood the issue that needed to be heard by the court was Kerby's request to appoint different counsel "or in the alternative to

represent yourself." CP 95. Kerby's request was clear and the court clearly understood it. The fact that Kerby couched his request to proceed pro se as the alternative in the event he was denied new counsel does not render the request equivocal. Madsen, 168 Wn.2d at 507.

Kerby did not withdraw that unequivocal request to proceed pro se at that hearing on June 17. He did not abandon it. The court simply denied his request for new counsel and disregarded Kerby's alternative request that he be allowed to proceed pro se, despite the fact that the hearing was scheduled to specifically address both issues. CP 95. In order to exercise the right to self-representation, it is incumbent on the defendant to request it. State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). Kerby did just that in his letter to the court.

Kerby is not a professional advocate. He was never notified that his request to proceed pro se would be denied if he did not repeat his request without prompting from the court. He relied on the court's word that it would address his request to proceed pro se at the hearing. The court, meanwhile, expressed no confusion or doubt over what Kerby was requesting in responding to Kerby's letter. CP 95. The court was on notice of Kerby's request to proceed pro se. The court had an obligation to address that request at the hearing because it said it would do so in its

letter to Kerby.[9] Instead, the court steamrolled Kerby by denying his request for new counsel and "anything of that nature" at the June 17 hearing. 3RP 13-14.

c. The Request Was Timely.

Courts considering the timeliness of a motion to proceed pro se have generally held: (a) the right of self-representation stands as a matter of law if made well before the trial without an accompanying request to continue; (b) the trial court retains a measure of discretion to be exercised after considering the particular circumstances of the case if the request is made as the trial is about to begin or shortly before; and (c) the right to proceed pro se rests largely in the informed discretion of the trial court if the request is made during the trial. Fritz, 21 Wn. App. at 361.

Kerby made his request on June 13. CP 95. A hearing on that request took place on June 17. 3RP 7-14. The trial was set for June 28. 3RP 5-7. Kerby's request to proceed pro se occurred well before trial. See, e.g., State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994) (defendant's request to proceed pro se, made five days before scheduled trial date, and three weeks before trial actually began, occurred "well before trial began," under first Fritz category). "[W]here a defendant

[9] The court did address the other issue raised in Kerby's letter — not coming to court — even though Kerby did not talk about that at the June 17 hearing. 3RP 12-13.

makes a proper demand for self-representation well before the trial, the right of self-representation exists as a matter of law." State v. Paumier, 155 Wn. App. 673, 686, 230 P.3d 212 (2010), aff'd, __Wn.2d__, 288 P.3d 1126 (2012).

Even if Kerby's request did not take place "well before the trial," it was still timely because there was no evidence that the trial would have been delayed or that granting his request would impair the orderly administration of justice.

In Paumier, the defendant requested to represent himself after the jury was selected but before it was sworn. Paumier, 155 Wn. App. at 687. Paumier expressed his dissatisfaction with his attorney and simply said he would rather present his case himself. Id. He did not ask for a continuance. Id. The trial court denied the request on the sole basis that it was untimely. Id. This Court held the trial court abused its discretion in denying Paumier's request to represent himself because the request was clear, and there is no evidence that the trial would have been delayed or that granting his request would impair the orderly administration of justice. Id.

The same conclusion holds here. Only two types of circumstances warrant the denial of a motion to proceed pro se that is made shortly before trial or as the trial is about to begin: (1) the motion is made for

improper purposes, i.e., for the purpose of unjustifiably delaying a trial or hearing or (2) granting the request would obstruct the orderly administration of justice. Breedlove, 79 Wn. App. at 107-08.

There is no evidence in the record that the motion was interposed for the purpose of delay or harassment. Nor does the record reflect that granting the motion would likely have impaired the efficient judicial administration in the present case. As the trial court neither engaged in a colloquy with Kerby regarding the pro se motion nor stated on the record the reasons for its denial of his motion, there is no basis to conclude otherwise. Id. at 108.

Significantly, Kerby requested no additional time to prepare for trial. See State v. Vermillion, 112 Wn. App. 844, 856, 51 P.3d 188 (2002) (in reversing trial court's denial of defendant's request to present his own case, appellate court noted defendant "did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial."), review denied, 48 Wn.2d 1022, 66 P.3d 638 (2003); United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (assertion of right to self-representation is timely if asserted before the jury is empaneled and there is no suggestion or affirmative showing that the motion is a tactic to secure delay); see also Breedlove, 79 Wn. App. at 109

(request to proceed pro se accompanied by request for continuance made 12 days before set trial date not untimely).

d. The Request Must Be Deemed Knowing, Voluntary And Intelligent In The Absence Of Any Effort By The Trial Court To Conduct A Proper Colloquy.

Courts 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). Yet this presumption "does not give a court carte blanche to deny a motion to proceed pro se." Madsen, 168 Wn.2d at 504.

"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." Id. at 504-05. Such a finding must be based on some identifiable fact. Id. at 505. A trial judge may not deny a motion for self-representation on the theory that it "would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel." Id.

Importantly, "the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met." Id. By failing to conduct a

colloquy on Kerby's request to proceed pro se, the judge stacked the deck against Kerby. As the court failed to ask questions about Kerby's request to proceed pro se and there is no evidence to the contrary, the only permissible conclusion is that Kerby's request was voluntary, knowing, and intelligent. Id. at 505-06.

Kerby informed the court he wanted to represent himself, his request came well before the trial date, and he did not request a continuance to prepare for trial. His request was unequivocal and should have resulted in further inquiry from the court. Kerby should not be penalized because the court declined to consider his request at the hearing specifically held in order to address that request. The trial court's failure to make any inquiry into Kerby's request to represent himself eliminates any basis to conclude it was not knowing, voluntary and intelligent. Madsen, 168 Wn.2d at 505-06.

e. The Court Abused Its Discretion In Rejecting Kerby's Request To Proceed Pro Se.

A claimed denial of a constitutional right is reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009). But it is also recognized that a trial court's denial of a request to proceed pro se is reviewed for abuse of discretion. Madsen, 168 Wn.2d at 504. A trial court's discretionary decision is based on untenable grounds or made for

untenable reasons "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. Rafay, 167 Wn.2d at 655; Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). The court also necessarily abuses its discretion by denying a defendant's constitutional rights. Iniguez, 167 Wn.2d at 280.

Because the trial court was silent as to the reasons for denying Kerby's request to proceed pro se, this Court cannot say whether the trial court rested its decision on facts supported by the record. Rafay, 167 Wn.2d at 655. Nor can this Court be sure what legal standard the trial court applied. Depending on what the trial court thought about the issue or to what extent the court did or did not incorporate the proper legal standard into its reasoning, it may be that it abused its discretion per se based on an erroneous interpretation of law. Id.

A trial court abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986). That is what happened here. The court made a discretionary

ruling denying the motion to proceed pro se but gave no reason for why it ruled that way. 3RP 13-14.

In some instances, appellate courts may overlook a court's abuse of discretion if its decision can be affirmed on any ground within the pleadings and the proof. Rafay, 167 Wn.2d at 655. "But such a rule presupposes that we have some knowledge of the reasons upon which the lower court based its decision, and the rule should not apply where, as here, we have no insight into the lower court's reasoning." Id. The trial court abused its discretion as a matter of law by denying the motion to proceed pro se without giving a reason for its decision.

The bottom line is that "[t]he 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 504-05. The trial court here made no such finding. It did not deny Kerby's request to proceed pro se on any of these enumerated grounds. The court abused its discretion in applying the wrong legal standard. Id. at 504. The court's denial is also untenable because it is based on facts that do not meet the requirements of the correct legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997) (discretion abused where facts do not meet the requirements of the correct standard).

f. The Remedy Is Reversal.

The unlawful deprivation of the right to self-representation is structural error. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). The trial court unjustifiably denied Kerby's request to proceed pro se. The unjustified denial of the fundamental right to proceed pro se right requires reversal. Madsen, 168 Wn.2d at 503; see also Vermillion, 112 Wn. App. at 851 ("The right to self-representation is either respected or denied; its deprivation cannot be harmless."); Breedlove, 79 Wn. App. at 110 ("The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice."). This Court should therefore reverse the convictions and remand for a new trial.

3. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CAUTION THE JURY ABOUT UNRELIABLE ACCOMPLICE TESTIMONY.

Accomplice testimony is of "questionable reliability." State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988). The jury must be cautioned about such testimony unless the accomplice's testimony is substantially corroborated. Harris, 102 Wn.2d at 155.

Kerby was entitled to an instruction cautioning the jury about the accomplice testimony of Jerri Chrisman. His proposed instruction was a correct statement of the law and was supported by the evidence. The court violated Kerby's constitutional right to due process in failing to give it. U.S. Const. amend XIV; Wash. Const. art I, § 3. The court's rejection of the cautionary instruction requires reversal because important parts of Chrisman's testimony relied on by the State to prove its case were not corroborated by other evidence.

Kerby's counsel proposed an instruction based on WPIC 6.05, which reads "Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth." CP 27.

During discussion of jury instructions, counsel told the court "As the Court's aware, we proposed WPIC 6.05. I believe that this is a consistent and coherent theory of this case, regardless of whether Ms. Chrisman was a charged accomplice or not. If the court is not inclined to give that instruction, then we take exception for the record." 5RP 99.

The court responded, "I'm not inclined to give that instruction. If your reference regarding that instruction would be reference that Ms. Chrisman is an accomplice, I don't believe the instruction's appropriate under the circumstances. You're free to argue it, though, Counsel." 5RP 99.

A trial court's refusal to give a jury instruction based on the evidence is reviewed for abuse of discretion; the refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). The court's cursory remarks here do not show the basis for its refusal to give the instruction. The court erred under either standard of review.

"A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." State v. Harvill. 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). But here, we do not know what the court's view of the law was in relation to this issue. The court abused its discretion in failing to articulate the basis for its decision. Hampton, 107 Wn.2d at 409; Rafay, 167 Wn.2d at 655. In addition, the court abused its discretion because the facts meet the applicable legal standard for giving the cautionary instruction. Littlefield, 133 Wn.2d at 47 (a court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard).

WPIC 6.05 cautions jurors to examine the testimony of an accomplice carefully and not to find the defendant guilty upon accomplice testimony alone unless they are satisfied beyond a reasonable doubt that the accomplice's testimony is true. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 6.05 (3d Ed). The "Note on Use" following this instruction states, "Use this instruction in *every* case in which the State relies upon the testimony of an accomplice." Id. (emphasis added). This note reflects the Washington Supreme Court's belief that "it is preferable to give a cautionary jury instruction whenever the prosecution introduces accomplice testimony." Harris, 102 Wn.2d at 154.

A defendant is entitled to have the jury fully instructed on the defense theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). A party is entitled to instructions supporting his case theory if evidence exists to support the theory. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). These are due process requirements. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); U.S. Const. amend XIV; Wash. Const. art I, § 3.

Sufficient evidence to give a proposed instruction exists if a rational trier of fact could find the facts necessary to support the

instruction. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994). When determining if the evidence supports an instruction, courts view the evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56; Ginn, 128 Wn. App. at 879.

For purposes of a cautionary instruction, whether a witness is an accomplice depends on whether she could be indicted for the same crime for which the defendant is being tried. State v. Boast, 87 Wn.2d 447, 455, 553 P.2d 1322 (1976). A person is liable as an accomplice for the criminal conduct of another if, with knowledge that it will facilitate commission of a crime, she "[s]olicits, commands, encourages, or requests such other person to commit it." RCW 9A.08.020(3)(a)(i).

Ivey testified that Chrisman yelled, "shoot his ass" right before Strickland shot Ivey and Savage. 3RP 97, 134, 136, 168-69. That amounts to command, encouragement, or request to commit the crime, making her an accomplice under RCW 9A.08.020(3)(a)(i). Chrisman is an accomplice because she could have been charged with the crime of first degree assault based on that utterance. Boast, 87 Wn.2d at 455.

A cautionary instruction is mandatory when an accomplice's testimony is not substantially corroborated. State v. Sherwood, 71 Wn. App. 481, 485, 860 P.2d 407 (1993). The failure to give the cautionary instruction "is always reversible error when the prosecution relies *solely*

on accomplice testimony." Harris, 102 Wn.2d at 155. The State did not rely solely on Chrisman's accomplice testimony. But that is not the end of the analysis.

"[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration." Id. at 155. If the accomplice testimony is not substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court commits reversible error by failing to give the instruction. Id.

An accomplice's testimony need not be corroborated in each and every detail. Id. (adopting reasoning in State v. Moore, 229 Kan. 73, 81, 622 P.2d 631 (1981)). But here, important parts of a Chrisman's accomplice testimony are uncorroborated.

Kerby gave conflicting, equivocal statements to police about whether he had a gun at the time of the incident. 3RP 582-83. But Chrisman told the jury that she saw Kerby with a gun at her house and that he put it in the vehicle that they took to the bar. 3RP 356-57, 409-10, 453-54.

Most importantly, no one but Chrisman maintained Kerby pulled a gun in the midst of the confrontation with Ivey and Savage. 3RP 366-67, 437. Chrisman was the only witness who testified that Kerby said "I'm

going to shoot the motherfucker" right before Ivey and Savage were shot. 3RP 366, 436-37. The State's theory was that Kerby was guilty as an accomplice because he gave the gun to Strickland. 5RP 133-34, 148, 222-23, 229-30. Chrisman's uncorroborated testimony supported the State's theory on this key point in a way that no other evidence did.

The failure to give the cautionary instruction prejudiced the outcome of the trial because it forced the jury to consider a version of events supported only by the testimony of a self-interested party. The accomplice is a special kind of witness, required, as a matter of law, to be given a special kind of attention where the accomplice's testimony is not substantially corroborated. State v. Carothers, 84 Wn.2d 256, 268, 525 P.2d 731 (1974), disapproved on other grounds, Harris, 102 Wn.2d at 153-54 ("To the extent that Carothers implies that it is error not to give a cautionary instruction, even where accomplice testimony is substantially corroborated, it is disapproved."). WPIC 6.05 "instructs the jury about the provisions of a rule of law applicable to the class to which the witness belongs. It is a rule which has long found favor in the law, evolved for the protection of the defendant." Carothers, 84 Wn.2d at 269.

The court told counsel that he was free to argue the issue to the jury. 5RP 99. And counsel did argue Chrisman was an accomplice whose credibility should be judged accordingly. 5RP 202. But "[a] jury should

not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). "[L]awyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). Kerby's convictions should be reversed based on the failure to give the cautionary instruction to which he was entitled.

D. CONCLUSION

For the reasons set forth, Kerby requests that this Court reverse the convictions and remand for a new trial.

DATED this 21st day of December 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, DSHS,	)	
Respondent,	)	
v.	)	COA NO. 42425-8-II
MICHAEL KERBY,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL KERBY
DOC NO. 725509
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2012.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. MICHAEL KERBY, Appellant.	No. 42425-8-II NOTICE TO ADOPT ARGUMENT OF CO-APPELLANT

Pursuant to RAP 10.1(g), appellant Michael Kerby, by and through counsel of record, Nielsen, Broman & Koch, hereby gives notice that he adopts by reference the following parts of co-appellant Michael Strickland's opening brief:

(1) Co-appellant Strickland's assignments of error 1, 2, 3 and 4 located at pages "xii" and 2 of the opening brief.

(2) Co-appellant Strickland's issue pertaining to assignments of error 1, 2, 3 and 4 located at page 4 of the opening brief.

(3) Co-appellant Strickland's argument relating to the speedy trial violation, located at pages 17-21 of the opening brief.

DATED this 26th day of December 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, DSHS,	)	
Respondent,	)	
v.	)	COA NO. 42425-8-II
MICHAEL KERBY,	)	
Appellant.	)	

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X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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