702360

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NO. 70236-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MERINO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL B. CAREY,
THE HONORABLE PATRICK OISHI, AND
THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

A defendant has a constitutional right to self-representation so long as that request is knowingly, intelligently, and voluntarily made. Here, after a searching colloquy on the record, the court granted Merino's request to proceed pro se. Was Merino's request knowingly, intelligently, and voluntarily made?

B. STATEMENT OF THE CASE

On November 16, 2011, the State of Washington charged Robert Merino with one count of rape of a child in the first degree, with a domestic violence allegation, and one count of rape of a child in the second degree. CP 1-2. On February 21, 2012, Merino moved to proceed pro se. The Honorable Cheryl Carey conducted an extensive colloquy with Merino. RP 2/21/2013 2-5, 11-13.

The court requested Merino recite the charges against him and Merino responded, "rape of a child 1 and rape of a child 2." RP 2/21/2013 3. The court inquired as to how a jury was selected and Merino stated he previously served as a juror and knew the process. RP 2/21/2013 3. Further, Merino expressed familiarity with the Rules of Evidence. *Id.* The court informed Merino of the difficulties of understanding the Rules of Evidence. *Id.* The court

admonished Merino that it was not wise to proceed pro se. RP 2/21/2013 4-5.

Next, the deputy prosecuting attorney, hereinafter "DPA," conducted a colloquy with Merino. RP 2/21/2013 5-9. Merino stated he understood he had the right to be represented by an attorney. RP 2/21/2013 5. The DPA recited the maximum penalties for each charge. RP 2/21/2013 6. The DPA then inquired if the defendant understood the role of a defense attorney and how one could assist Merino. RP 2/21/2013 6-7. Merino stated he understood that neither the trial court nor the DPA would assist him. RP 2/21/2013 7. The DPA inquired if Merino understood the awkward manner in which Merino would testify should he elect to do so. RP 2/21/2013 8.

The DPA then asked Merino to describe his legal training and experience. RP 2/21/2013 9. Merino stated he had two or three cases with the "Hernandez" family. *Id.* Merino boasted that he was successful in those cases. *Id.* The DPA clarified that those successes were in family court, not criminal court. *Id.* The DPA asked if Merino had all the information necessary to make his decision to proceed pro se and Merino stated he did.

RP 2/21/2013 9-10. Merino twice stated he was not being pressured to make this decision. RP 2/21/2013 10.

At this point in the hearing, the court observed that Merino seemed, "...very calm and he seem[ed] intent on moving forward with this." RP 2/21/2013 10. Merino stated he had previously reviewed the written waiver of counsel with his defense attorney and Merino did not have any questions regarding the form. RP 2/21/2013 11.

Finally, the court asked Merino if he had, "[a]ny doubts whatsoever?" RP 2/21/2013 12. Merino stated he had no doubts. Id. Merino then signed the written waiver of counsel, CP 27-28, in open court. RP 2/21/2013 13. Merino's counsel of record stated he previously went over the written waiver of counsel, CP 27-28, prior to the pro se motion. RP 2/21/2013 13. The court found Merino competent. CP 28; RP 2/21/2013 13. The court found that Merino was making a knowing, intelligent, and voluntary waiver of counsel. CP 28.

C. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND MERINO WAIVED HIS RIGHT TO ASSISTANCE OF COUNSEL AFTER THE COURT CONDUCTED A SEARCHING INQUIRY ON THE RECORD

Merino claims his waiver of counsel was invalid. This claim should be rejected. The court conducted a searching inquiry prior to finding that Merino was competently making a knowing, intelligent, and voluntary decision to exercise his constitutional right to represent himself.

A trial court's decision regarding waiver of counsel is reviewed for abuse of discretion. *In re Rhome*, 172 Wn.2d 654, 668, 260 P.3d 874 (2011). The reviewing court should uphold a court's decision unless it finds the court was manifestly unreasonable or based the decision on untenable grounds. *Id.*

Both federal and state constitutions guarantee the right to self-representation to every criminal defendant. U.S. Const. amends. VI and XIV; Const. art. I, § 22; *see also Faretta v. California*, 422 U.S. 806, 818-19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The right to self-representation is fundamental and any unjustified denial of the right is prejudicial. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1274 (1997). This deeply rooted right is

so fundamental that it is granted even though it may be detrimental to, "...both the defendant and the administration of justice." *State v. Vermillion*, 112 Wn. App. 844, 850-51, 51 P.3d 188 (2002).

To exercise the right, the defendant must make a knowing, intelligent, and voluntary waiver of counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). There is no formulaic method for assessing the validity of a waiver of counsel. *Iowa v. Tovar*, 541 U.S. 77, 81, 124 S. Ct. 1379, 1383, 158 L. Ed. 2d 209 (2004) (holding that specific admonishments regarding possible defenses and independent opinions need not be given); *State v. Lillard*, 122 Wn. App. 422, 427, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005); *McCormick v. Adams*, 621 F.3d 970, 977 (9th Cir. 2010). However, in assessing the validity of a waiver of counsel, the court should ensure: (1) the defendant is aware of the seriousness of the charge, (2) the defendant is aware of the maximum penalty involved, and (3) the defendant is aware of the technical procedural rules that must be followed. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

State v. Lillard[1] provides an example of a sufficient waiver of counsel. In *Lillard*, the defendant was charged with possession of stolen property in the first degree. *Lillard*, 122 Wn. App. 422 (2004). On appeal, Lillard claimed his waiver was insufficient because the trial court failed to fully inform him of the nature of the charges and the possible defenses. *Id.* at 430. The record from Lillard's pro se motion revealed that the trial court discussed all of the following: Lillard's previous self-representation; Lillard's understanding of the rules of evidence; the perils of self-representation; the technical procedural aspects of law; the charge against Lillard; and the maximum penalty Lillard faced. *Id.* at 428-29. This Court found Lillard's waiver valid even though the trial court did not go over the charged crime in detail. *Id.* at 430.

Here, the record shows that Merino made a knowing, intelligent and voluntary decision in waiving his right to counsel. Specifically, Merino was made aware of the nature of the charges and the seriousness of the charges. Judge Carey had Merino recite the charges against him and Merino accurately stated the two charges against him. RP 2/21/2013 3. The charges were also spelled out in the written waiver of counsel that Merino and his

[1] 122 Wn. App. 422 (2004).

attorney reviewed prior to coming to the hearing. CP 27-28. Additionally, the DPA reviewed both counts with Merino on the record; explaining each count carried a maximum penalty of life in prison and a $50,000 fine. RP 2/21/2013 6. Later in the hearing, Judge Carey followed up with Merino and asked again if he wished to represent himself knowing the penalties he faced. RP 2/21/2013 11-12.

Next, the record makes clear that Merino was apprised of the peril he faced and the requirements of proceeding pro se. Judge Carey told the defendant she believed proceeding pro se was, "...the silliest thing that [Merino] could do in [his] entire life...." RP 2/21/2013 4-5. Judge Carey also informed Merino he would be at a serious disadvantage by proceeding pro se. RP 2/21/2013 5. The DPA also performed an extensive colloquy with Merino explaining the role of defense counsel and their ability to assist Merino. RP 2/21/2013 6-9.

Further, Merino's request was unequivocal. Merino claims the inquiry conducted by the trial court failed to establish Merino's subjective reasoning for proceeding pro se. Merino Brief 11. This claim is unsupported by the record. The hearing, taken as a whole, dispels any notion that Merino's request was equivocal. Ad hoc

speculation about the subjective intent of Merino at the time of hearing should not be considered by this Court.[2]

Finally, Merino cites *State v. Chavis*[3] as support for his argument that "yes" or "no" questions result in deficient waivers of counsel. This reliance is misplaced; as *Chavis* is factually distinguishable from the case at bar. Chavis was charged with one count of statutory rape in the third degree. *State v. Chavis*, 31 Wn. App. 784, 785, 644 P.2d 1202, 1203 (1982). At a hearing to proceed pro se, Chavis was asked five questions by the trial court and then allowed to proceed pro se. *Id.* at 786. The court in *Chavis* found the five questions inadequate to establish that Chavis understood the dangers and disadvantages of self-representation. *Id.* at 789.

In this case, the hearing on February 21, 2013, was not a series of "yes" or "no" questions. Many of Merino's responses involved detailed answers. For example, when asked if Merino had any previous legal experience he stated, "I've had two or three

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[2] Even if Merino's desire to proceed pro se was motivated in part by his dissatisfaction with defense counsel, that motivation would not vitiate the validity of the waiver. *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). In *DeWeese*, the defendant stated he had no choice but to represent himself when informed he would remain with appointed counsel. *Id.* The Court found the statement did not render the request equivocal, despite the defendant's frustration with current counsel. *Id.*

[3] 31 Wn. App. 784, 644 P.2d 1202 (1982).

cases with the Hernandez family that I represented myself, and I came out successful." RP 2/21/2013 9. Merino was asked 61 questions from Judge Carey and the DPA. RP 2/21/2013 2-13. These questions elicited Merino's understanding of the nature of the charges, the perils he faced, and his unequivocal desire to represent himself. Further, Merino reviewed the written waiver of counsel with his attorney prior to the pro se motion. RP 2/21/2013 13. At the conclusion of the hearing Judge Carey found Merino was competently exercising his right to self-representation and granted his request to proceed pro se. RP 2/21/2013 12. Unlike *Chavis*, Merino was afforded a lengthy hearing that probed his understanding and desire to represent himself.

Because Merino's request to proceed pro se was knowingly, intelligently, and voluntarily made, the trial court did not abuse its discretion in granting Merino's request. Merino's convictions should be affirmed.

D. CONCLUSION

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

DATED this 16th day of April, 2014.

Respectfully submitted,

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Respondent, vs. ROBERT MERINO, Appellant,	)	No. 70236-0-I CERTIFICATE OF SERVICE BY MAIL

I certify that copies of the following pleadings were placed in the United States Mail with properly affixed postage addressed to: Thomas Kummerow, Washington Appellate Project, 701 Melbourne Tower, 1511Third Avenue, Seattle, WA 98101.

Brief Of Respondent
Certificate of Mailing

DATED this 16th day of April, 2014.

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