NO. 44725-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Beverly Grant
The Honorable Judge John McCarthy

No. 11-1-04142-7

Response Brief

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Table of Contents

Table of Authorities

State Cases

Federal And Other Jurisdictions

Constitutional

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in denying defendant's equivocal and untimely request to proceed pro-se where the case had already been delayed multiple times due to frequent substitution of counsel and a mistrial likely caused by defendant himself?

2. Under the controlling authority of ***State v. Dunn***, has defendant failed to show any improper courtroom closure by conducting peremptory challenges on paper and in a sidebar?

B. STATEMENT OF THE CASE.

On February 28, 2013, the State charged Michael Nelson (defendant) with one count of robbery in the first degree and one count of unlawful possession of a firearm in the first degree. CP 209-210.

Pre-trial hearings were held before the Honorable Beverly Grant on August 28, 2012. 1RP 3.[1] Defendant was represented by his third attorney because his first two attorneys withdrew due to unspecified conflicts of interest. CP 5, 26-27; 6RP 156. On September 11, 2012, just

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP - August 28, 29, and 30, 2012 and September 5, 11, 14, and 17, 2012; 2RP - September 4, 2012; 3RP - September 11, 2012 (afternoon colloquy); 4RP - January 7, 2013; 5RP January 16, 2013; 6RP - February 21 and 28, 2012 and March 4 and 5 2013; 7RP - April 5, 2013; 8RP February28, 2013 (Voir Dire).

prior to jury selection, the court declared a mistrial after finding out that defendant's mother paid and threatened the State's witnesses to recant their testimony most likely at defendant's request. 1RP 160-163, 1RP 171, 4RP 211, 4RP 4. Defense counsel moved to withdraw, and defendant later indicated that he wanted to retain private counsel. 1RP 201. Over the State's objection, the court granted defense counsel's motion to withdraw. 3RP 1; 4RP 4. In doing so, the court expressed concerns that defendant should not be able to delay the case through constant substitution of counsel. 1 RP 172.

On February 21, 2013, the parties reconvened for a new trial. 6RP 3. That day, defendant, who was then represented by his fourth attorney, again tried to switch counsel by sending a letter to the court alleging ineffective assistance of counsel; claming that his attorney had never met with him. 6RP 23, 156. The court found that contrary to defendant's claims, that defense counsel had met defendant several times prior to trial and dismissed defendant's allegations. 6RP 23-24.

Following the completion of voir dire and "for cause" challenges, the court informed the parties that peremptory challenges would be exercised by passing a sheet back and forth and reviewed in a side-bar conference. 6RP 26-27. Neither party objected and peremptory challenges proceeded accordingly. 6RP 27.

After the State finished its direct of its second witness, defendant requested that he be allowed to cross-examine the State's witnesses; alleging that defense counsel was inadequately prepared for trial and asking the wrong questions. 6RP 153-156. The court engaged in a lengthy colloquy with defendant where it both found that he lacked education and legal experience and cautioned him on the risks involved with self-representation:

> You know, [defense counsel] is an experienced attorney. He understands questioning and cross-examination. He also understands that sometimes if you ask the wrong question, you open the door to a response that may be more harmful, or you may implicate yourself through the type of questioning that one would ask. So at this point in time, he is your appointed counsel. I know you've had other counsel appointed on this case, but I am going to ask you to confer with him and let him make the decision as to what would be an appropriate question to ask... The fact that [defense counsel] isn't doing what you want him to do doesn't necessarily mean that's a bad thing... So, at this point in time, I am not going to let you cross-examine the witness....We talked about this issue last week when you brought up lack of contact, and we talked about how much time there was to further have conversations. But at this point in time, I am not gonna let you cross-examine the witnesses.

6RP 153.

In response to defendant's persistence, the court noted that although he has the right to appointed counsel and self-representation, he does not have the right to his choice of an attorney. 6RP 156. Defendant never explicitly stated that he wanted to proceed pro se. However, the

court inferred from his persistence that defendant might prefer to proceed pro se rather than have his attorney to cross-examine the State's witnesses. 6RP 156-157. When asked by the court if he wanted to proceed pro se, the defendant said he did. 6RP 156-157.

Before ruling on Defendant's request, the court the court briefly allowed defendant to question the witness outside the presence of the jury, but stopped him when he began implicating himself.

> I am going to stop you, [Defendant], because you are now making statements now that implicate yourself as an accomplice or as a perpetrator of the offense.... based on what you are saying now, that certainly is -- I can understand why [defense counsel] would not want to pursue a line of inquiry that further implicates knowledge that you had. So -- and I don't want to go any further in this discussion with you because it's really apparent to me that you are not prepared through education, training or experience to represent yourself or cross-examine the witness. So I am not going to allow you to do that at this time.

6RP 157-159.

The next day, Defendant was found guilty as charged. 6RP 334; CP 289, 290-291. He was sentenced to the low end of the standard range for a total of 108 months in custody: 108 months for robbery, and 102 months for unlawful possession to be served concurrently. 7RP 12-13; CP 298-311. Defendant was also sentenced to 60 months for a firearm enhancement. 7RP 12-13; CP 298-311. Defendant timely filed a Notice of Appeal. CP 312-313.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S UNTIMELY, EQUIVOCAL REQUEST TO PROCEED PRO SE WHEN HE ALREADY DELAYED THE CASE MULTIPLE TIMES BY SWITCHING ATTORNEYS AND CAUSING A MISTRIAL.

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves at trial. ***Faretta v. California***, 422 U.S. 806, 819-820, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975); ***State v. Barker***, 75 Wn. App. 236, 238, 881 P.2d 1051 (1994). While an unjustified denial of this right requires a new trial, the right to self-representation is not absolute. ***State v. Madsen***, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); ***State v. Breedlove***, 79 Wn. App. 101, 111, 900 P.2d 586 (1995); ***State v. DeWeese***, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). A defendant's request to proceed pro se must be both timely and unequivocal. ***State v. Stenson***, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Where a defendant's request for self-representation is untimely, "the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge." ***DeWeese***, 117 Wn.2d at 377.

A trial court's decision whether to grant or deny a request to proceed pro se is reviewed for an abuse of discretion. ***Madsen***, 168 Wn.2d at 503.

a. Defendant's request was equivocal.

The request to proceed pro se must be voluntary, knowing, and intelligent. ***Madsen***, 168 Wn.2d at 504. Thus, where a defendant makes a timely and unequivocal request for self-representation, the court should ascertain that the defendant understands "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rule governing the presentation of this defense." ***DeWeese***, 117 Wn.2d at 378.

Here, defendant's request to represent himself was neither clear nor unequivocal. He did not raise the issue of proceeding pro se with the court, he only asked to be allowed to cross-examine that State's witnesses. 6RP 153-156. It was only from his persistence that the court inferred that he wanted to represent himself.

> Ct: At this point in time, if you are asking me to represent yourself in this proceeding entirely, examine witnesses --
> D: Yes.
> Ct: ---prepare jury instructions, argue the law and the facts to the jury and entirely take over the case?
> D: Yes.

6RP 156-157.

Where defendant's desire was not to represent himself, but only to cross-examine the State's witnesses, he never made a clear unequivocal request to proceed pro se. In light of the presumption against the waiver of right to counsel, the trial court properly denied defendant's request for

self-representation where he did not make an unequivocal request to proceed pro se.

b. Defendant's request was untimely and made only to further delay trial.

The trial court's discretion to grant or deny a motion to proceed pro se "lies along a continuum that corresponds with the timeliness of the request." ***State v. Honton***, 85 Wn. App. 415, 420, 932 P.2d 1276 (1997); ***State v. Fritz***, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). If request is made during trial, "the right to proceed pro se rests largely in the informed discretion of the trial court." ***Fritz***, 21 Wn. App. at 361. In assessing a request made after the commencement of trial, the trial should consider the following factors: "(1) the quality of counsel's representation of the defendant; (2) the defendant's prior proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings, and (5) the disruption or delay which might reasonably be expected to follow the granting of such a motion." ***Fritz***, 21 Wn. App. at 363 (quoting ***People v. Windham***, 19 Cal.3d 121, 128-129, 560 P.2d 1187 (1977)).

Here, the trial court properly denied defendant's request to proceed pro se. As defendant's request was made well into trial, the decision to grant or deny his request was within the discretion of the trial court. In light of all the factors to be considered when deciding whether or not to grant such a request, the trial court properly denied defendant's request for self-representation.

First, the quality of defense counsel's representation was satisfactory such that it was not only proper, but also in defendant's best interest that he remain represented. Prior to defendant's request, defense counsel had made an opening statement, effectively argued pre-trial motions, cross-examined the State's witnesses and objected at proper times. 3RP 401; 6RP 139, 183. The court acknowledged the quality of defense counsel's representation stating,

> Mr. Quillian is an experienced attorney. He understands questioning and cross-examination. He also understands that sometimes if you ask the wrong question, you open the door to a response that may be more harmful, or you may implicate yourself through the type of questioning that one could ask.

6RP 153.

Second, defendant had a proclivity for substitution of counsel as he was represented by four different attorneys over the course of the case. Defendant's first three attorneys withdrew based on conflicts of interest. While defendant's first two attorneys withdrew based on unspecified conflicts of interest, the record shows that defendant's third attorney withdrew due to a mistrial that defendant likely caused himself. At the time his third attorney withdrew, the court noted that defendant should not be allowed to delay trial by switching attorneys at will:

> However, I am concerned because there is nothing to prevent [defendant] from playing a shell game of terminating her services even if we went through that. So there is no guarantee on that, and it's just a further delay.... So I don't want to play this game where he decides for

> whatever reason after we go through all of this, "Well, I'm just going to change attorneys." If that occurs, that is not going to be looked very kindly given the scenario of events and why [defense counsel] is asking for more time.

1RP 172.

Defendant even attempted to substitute for a fifth attorney at trial when he filed a letter alleging ineffective assistance of counsel. The court was cognizant of defendant's proclivity for substitution of counsel noting the following:

> Ct: You have the right to a lawyer. You have the right, in some circumstances, to represent yourself. Mr. Quillian is your second or third appointed counsel on this? How many lawyers have you had?
>
> D: I think three.
>
> Ct: So you have the right to a lawyer of your own choice, if you hired a lawyer. You don't have the right to an appointment of a lawyer of your own choice, nor do you have the right to switch attorneys whenever you decide that an attorney is giving you advice that you don't want to hear and not proceeding in a manner that you think is appropriate.

6RP 156-157.

Third, defendant lacked a valid reason for his request to proceed pro se. Defendant only insisted that he proceed pro se out of frustration that the court would not allow him to cross-examine the State's witnesses. Even his reasons for wanting to cross-examine the witnesses was without merit in that defendant felt that his "attorney is not putting up a good enough fight," and that defense counsel was not asking the right questions

on cross-examination. 6RP 156. The court found that defendant's desired line of question was incriminating and harmful.

Fourth, defendant's request was properly denied given the stage of the proceedings. Defendant never indicated that he wanted to proceed pro se until mid-trial.

Finally, there would likely have been a significant disruption and delay had the court granted defendant's motion. Allowing defendant to proceed pro se would have been a disruption to the proceedings given the fact that he lacked any legal education or experience. Further, granting such a request would only have caused in the completion of trial yet another delay to an already drawn out case. This case was set over multiple times due to frequent substitutions in counsel and the mistrial caused by defendant himself.

Taking into consideration all of the factors that the court should consider before granting or denying a motion to proceed pro se, the trial court properly denied defendant's untimely and equivocal request for self-representation. As such, this Court should affirm defendant's conviction.

2. PURSUANT TO *STATE V. DUNN*, DEFENDANT'S PUBLIC TRIAL RIGHTS WERE NOT VIOLATED WHERE PEREMPTORY CHALLENGES NEED NOT BE CONDUCTED IN PUBLIC.

Article I § 22 guarantees a criminal defendant many trial rights, including the right to "a speedy public trial by an impartial jury." The

meaning of the "public trial" right has been heavily litigated the past several years. In an overly simplified form, it is error under § 22 to "close" the courtroom to any aspect of a criminal trial that is required to be "open." Whether or not a courtroom was properly closed is adjudged by application of the factor test set forth in ***State v. Bone-Club***, 128 Wn.2d 254, 261, 906 P.2d 325 (1995). Whether or not a particular portion of a proceeding was required to be held in public is determined by use of the "experience and logic" test. ***State v. Sublett***, 176 Wn.2d at 141, 292 P.3d 715 (2012). Jury selection in a criminal case is considered part of the public trial right and is typically open to the public. ***State v. Strode,*** 167 Wn.2d 222, 227, 217 P.3d 310 (2009).

The "experience and logic" test requires courts to access the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic). ***Sublett***, 176 Wn.2d at 73. The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. If both prongs are answered affirmatively, then the ***Bone-Club*** test must be applied before the court can close the courtroom. *Id.*

As this Court stated in ***Dunn***, a defendant's trial rights are not violated where peremptory challenges are exercised at a side-bar. ***State v. Dunn***, __P.3d__, 2, 2014 WL 1379172 Wn. App. This Court followed Division Three's opinion in ***State v. Love*** where the court concluded that

the experience and logic test does not require peremptory challenges to be public because jury questions historically had not been answered in open court and that there was no logical need to do so. ***State v. Love,*** 176 Wn. App. 911, 919, 309 P.3d 1209 (2013).

Here, the trial court did not erroneously close the courtroom by hearing peremptory challenges at sidebar. Pursuant to ***Dunn***, the public trial right does not attach to the exercise of peremptory challenges during jury selection. ***Dunn***, __P.3d at 2. Only peremptory challenges were heard at the sidebar while both voir dire and challenges for cause were heard on the record in open court. As such, defendant's public trial rights were not violated.

D. CONCLUSION.

The trial court properly denied defendant's request to proceed pro se where it was untimely, unequivocal, and made only to further delay trial. In addition, the trial court did not violate defendant's right to public trial by exercising peremptory challenges at sidebar where the court has

clearly stated that they need not be done in public. For the foregoing reasons, the State respectfully requests that this Court affirm Defendant's convictions.

DATED: April 25, 2014.

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