SUPREME COURT NO. 91356-1

NO. 44725-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NELSON,

Petitioner.

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

The Honorable Beverly Grant, Judge
The Honorable John McCarthy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Michael Nelson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Nelson, No. 44725-8-III, filed January 27, 2015. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Did the trial court violate the petitioner's right to a public trial by taking peremptory challenges in a proceeding that was not open to public scrutiny?[1]

C. STATEMENT OF THE CASE

The State charged petitioner Michael Nelson with one count each of first degree robbery and first degree unlawful possession of a firearm for an incident that occurred on October 1, 2011. CP 3-4, 209-10; 6RP[2] 7.

After swearing in the venire, the trial court announced the charges against Nelson, and explained the process of jury selection. 8RP 7-13. The trial court asked prospective jurors if personal experiences would cause any of them to doubt whether they could remain fair and impartial on a case involving robbery and unlawful possession of a firearm. In open

[1] The Court has accepted review of this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted in part by, State v. Love, __ Wn. App. __, 340 P.3d 228 (2015).

[2] The index to the citations to the record is found in the BOA at 2, n.2.

court, the judge asked the potential jurors to explain their concerns about remaining fair and impartial in a case of this type and they did so. 8RP 38-46. After further questioning, the trial court excused one juror for stated concerns about impartiality. 8RP 87.

After further questioning by both parties, the court explained the peremptory challenge process:

> They [parties] have a piece of paper. They will write down their peremptory challenges, and they will pass that piece of paper back and forth. And when they exercise up to the number that they are allowed, then they will bring a sheet of paper forward to me. I will go through their work and I will announce the names of people that will serve as jurors and alternate jurors in this case.

8RP 127.

An unrecorded "sidebar conference" between counsel and the court then occurred. 8RP 127. The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection.

After the sidebar the court called out 14 juror names and excused the remaining jurors so they could return to Jury Administration. 8RP 128. Neither the prosecutor nor defense counsel had anything to add after the jury was selected. Later that same day, the court filed a chart showing which party excused which prospective juror. CP 388-91.

The jury found Nelson guilty as charged. CP 10-16. The jury also found Nelson was armed with a firearm during the robbery. CP 290. The trial court sentenced Nelson to standard range concurrent prison sentences of 108 months for the robbery and 102 months for the unlawful possession. The court also imposed a consecutive 60-month firearm enhancement. 7RP 12-13; CP 298-311.

Nelson appealed, arguing the issue identified above. In an unpublished January 27, 2014 opinion, Division II of the Court of Appeals rejected the argument, relying on the Court's prior opinions in State v. Marks, __ Wn. App. __, 339 P.3d 196, 199 (2014), petition for review pending (2015) and State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), to hold that the exercise of peremptory challenges was not a part of "voir dire." Opinion (Op.) at 4-5. The Court therefore determined that the private written exercising of peremptory challenges did not Violate Nelson's public trial right. Op. at 5.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED NELSON'S RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (3), AND (4).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that "[j]ustice in all cases shall be administered openly." CONST. art. I, section 10. Whether a defendant's public trial right has been violated is a question of law, subject to de novo review on direct appeal. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014).

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. Wise, 176 Wn.2d at 5. The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It 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. The public trial right is also 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. 2d 682 (1948)).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. Wise, 176 Wn.2d at 16-19l; Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). A public trial right violation may be raised for the first time on appeal and does not require an objection at trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

This Court has held the public trial right attaches to the voir dire portion of jury selection. See e.g. Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Nonetheless, this Court has also explained that application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (citing with approval State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

In concluding the private written exercising of peremptory challenges did not Violate Nelson's public trial right, Division II relied on its opinions in Marks, __ Wn. App. __, 339 P.3d 196 and Dunn, 180 Wn. App. 570, which held the exercise of peremptory challenges was not a part of "voir dire." Op. at 5.

In Marks, Division II, relying in part on its previous opinion in State v. Wilson, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013), held the exercise of peremptory challenges was not a part of "voir dire." Marks, 339 P.3d at 199. Division II therefore determined that application of the "experience and logic" test was necessary and ruled that the private exercise of peremptory challenges did not implicate the public trial right, relying on its opinion in Dunn, 180 Wn. App. 570. Marks, 339 P.3d at 199-200. That decision, in turn, relied on Division III's decision in Love,

176 Wn. App. 911, in rejecting a similar argument. Dunn, 180 Wn. App. at 574-75.

Contrary to the Marks opinion, however, the Wilson decision supports that the public trial right attaches not only to "for-cause," but also to peremptory challenges. There, the Court applied the "experience and logic" test adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. Wilson, 174 Wn. App. at 333. Division II noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, the Court of Appeals expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). Thus, in Wilson, Division II appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40.

Division II's attempt in Marks to reframe its prior consideration of the matter makes little sense. The Court observes that CrR 6.4(b) refers to "voir dire examination." Marks, 339 P.3d at 199. But, contrary to the Court's reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from "voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and this Court presumes statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). Division II's reframing of its discussion of the matter in Wilson violates this principle. Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to the Marks opinion, and consistent with the earlier decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether

the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Nelson can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[3] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, Love, the Division III case relied on in Dunn, appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918.

[3] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Thomas rejected the argument that "Kitsap County's use of secret — written — peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time.

Other Washington cases similarly suggest for-cause and peremptory challenges were historically made in open court. See State v. Njonge, 181 Wn.2d 546 (2014); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). Moreover, Washington statutes governing voir dire indicate challenges were historically made in open court. As the Love court noted in a footnote, "RCW 4.44.240 does provide for testimony if needed to assess a question of jury bias." Love, 176 Wn. App. at 919 n.7. RCW 4.44.240 provides:

> When facts are determined under RCW 4.44.230,[4] the rules of evidence applicable to testimony offered upon the

[4] RCW 4.44.230 provides:

> The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall determine the facts and decide the issue.

> trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a "trial of a challenge." RCW 4.44.240 (2002); Code 1881 s 218. As the Love court could not deny: "that aspect of jury selection would appear to need to take place in the public courtroom[.]" Love, 176 Wn. App. at 919 n.7. Yet, the court failed to give this requirement any significance, remarking only "we do not believe that the evidence gathering function should be confused with the legal question of whether a juror displays disqualifying bias." Id.

But the Love court does not explain why the challenge or the court's ruling would be divorced from the "trial" of the challenge or not conducted at the same time. As this Court has recognized, the presumption is in favor of openness. Paumier, 176 Wn.2d at 34-35.

Moreover, the next statutory provision provides: "[t]he challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side." RCW 4.44.250. This provision lends further weight to the conclusion the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right

attaches. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

Although Division II's opinion does not address the matter, the mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right. See e.g. State v. Filitaula, __ Wn. App. __, 339 P.3d 221 (2014). In Filitaula, Division I noted "a record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges." Filitaula, 339 P.3d at 224. Thus, Division I implicitly recognized that peremptory challenges implicate public trial rights. However, the court found no public trial right violation, because a member of the public could later access a form the parties filled out to exercise their peremptory challenges. Filitaula, 339 P.3d at 224.

Regardless of when the form was filed, Division I's rationale should be rejected outright, because a piece of paper fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the

identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. It is simply unrealistic to assume, as did Division I, that members of the public would be able to recall the specific features of so many individuals. As a result, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

Because the Court of Appeals' opinion conflicts with this Court's decisions, involves a significant question of constitutional law, and is a matter of substantial public interest, this Court should accept review. RAP 13.4(b)(1), (3), and (4).

E. CONCLUSION

For the foregoing reasons, Nelson requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 25th day of February, 2015.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL NELSON, Appellant.	No. 44725-8-II UNPUBLISHED OPINION

MAXA, J. — Michael Nelson was convicted and sentenced for first degree robbery and unlawful possession of a firearm. He alleges that (1) the parties' exercise of peremptory challenges in writing violated his public trial right, and (2) the trial court abused its discretion in denying his request to represent himself on the second day of trial. Nelson's Statement of Additional Grounds (SAG) alleges that defense counsel provided ineffective assistance in several respects and that the trial court erred by incorrectly calculating Nelson's offender score.

We hold that (1) peremptory challenges do not implicate the public trial right, (2) the trial court had discretion to deny Nelson's request to represent himself because it was untimely, and (3) Nelson fails to show a claim for ineffective assistance of counsel. We decline to address Nelson's offender score contention because it relies on facts outside the record. Accordingly, we affirm Nelson's convictions and sentence.

FACTS

Nelson, along with Theo Burke and another unidentified individual, offered a person a ride in their car. Nelson pointed a revolver at the person and took his wallet. The other individuals took the person's cell phone, hat, and jacket. The State charged Nelson with first degree robbery and first degree unlawful possession of a firearm.

Peremptory Challenges

At trial, the parties conducted voir dire of the prospective jurors. The trial court then explained the peremptory challenge process as follows:

> [The parties] have a piece of paper. They will write down their peremptory challenges, and they will pass that piece of paper back and forth. And when they exercise up to the number that they are allowed, then they will bring a sheet of paper forward to me. I will go through their work and I will announce the names of people that will serve as jurors and alternate jurors in this case.

Report of Proceedings (RP) (Feb. 28, 2013) at 127. A sidebar conference was held, and then the trial court announced in open court the selected jurors and alternate jurors. The trial court did not consider the *Bone-Club*[1] factors before holding the sidebar. The list of peremptory challenges was filed with the court later that same day.

Request for Self-Representation

During trial, Nelson's attorney presented an opening statement, cross-examined the State's witnesses, and objected to improper questioning. The attorney performed similarly on the second day of trial. At a recess on the second day, Nelson told the trial court that he knew more about his case than his attorney and wanted to cross-examine the State's witnesses. The

[1] *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (establishing the five criteria a trial court must consider before closing a courtroom proceeding to the public).

trial court asked Nelson if he had any formal legal training, and Nelson admitted he did not. But Nelson persisted and stated, "[T]he questions that I have, they're specific, and I feel that they will get the truth out of the witness." RP (Mar. 4, 2013) at 152-53.

The trial court expressed concern that Nelson would implicate himself, and strongly cautioned him against questioning witnesses himself. However, Nelson continued to express frustration with his defense attorney's cross-examination of the State's witnesses. The following exchange then occurred:

> Court: [Y]ou 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.
>
> At this point in time, if you are asking me to represent yourself in this proceeding entirely, examine witnesses - -
>
> Nelson: Yes.
>
> Court: - - prepare jury instructions, argue the law and the facts to the jury and entirely take over the case?
>
> Nelson: Yes.
>
> Court: Well, at this point in time . . . based on everything I have seen and heard, that is not in your best interest. You are not sufficiently trained in the law. You have a very experienced attorney.
>
> Like I say, maybe he's giving you some advice that you don't want to hear. Sometimes attorneys can't do anything to alter evidence that's presented. That doesn't necessarily mean that you can proceed on your own.
>
> I am reluctant to ask you what kind of questions you wanted to ask of these witnesses because, once again, I'd hate you to say anything that implicated yourself.

RP (Mar. 4, 2013) at 156-57.

Nelson then reiterated his request to cross-examine one of the State's witnesses. The trial court asked what Nelson would ask the witness, Nelson gave a short reply, and the trial court stated:

> I am going to stop you, Mr. Nelson, because you are making statements now that implicate yourself as an accomplice or as a perpetrator of the offense. . . .You have the right to impeach things that [a witness] said . . . through other witnesses. But based on what you are saying now, that certainly is - - I can understand why [your attorney] would not want to pursue a line of inquiry that further implicates knowledge that you had.
>
> [I]t'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.

RP (Mar. 4, 2013) at 158-59.

Verdict and Sentence

Nelson's trial continued and he was found guilty on both charges. At sentencing Nelson's prior criminal history was submitted to the trial court. He had several prior felony convictions, including four 2006 convictions: two for possession of a controlled substance and two for conspiracy to deliver a controlled substance. The trial court calculated that Nelson's offender score for his current offenses was eight. The trial court sentenced Nelson to 168-204 months on the first degree robbery charge and 77-102 months on the unlawful possession of a firearm charge.

Nelson appeals.

ANALYSIS

A. PUBLIC TRIAL RIGHT

Nelson argues that the trial court violated his right to a public trial by allowing the parties to exercise peremptory challenges in writing. We recently addressed this issue in *State v. Marks*,

___ Wn. App. ___, 339 P.3d 196, 199-200 (2014), holding that (1) the exercise of peremptory challenges are not part of voir dire and therefore do not automatically implicate the public trial right, and (2) peremptory challenges do not satisfy the experience prong of the experience and logic test. We cited to our prior decision in *State v. Dunn*, which also held that peremptory challenges do not implicate the public trial right. 180 Wn. App. 570, 575, 321 P.3d 1283 (2014), *review denied*, ___ Wn.2d ___ (2015). Accordingly, we follow *Marks* and *Dunn* and hold that the trial court did not violate Nelson's public trial right by allowing the parties to conduct peremptory challenges in writing.

B. RIGHT TO SELF-REPRESENTATION

Nelson argues that he was deprived of his constitutional right to self-representation when the trial court denied his request to represent himself on the second day of trial. We disagree.

Criminal defendants have an explicit right to self-representation under article I, section 22 of the Washington State Constitution and an implicit right under the Sixth Amendment to the United States Constitution. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *see also Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is so fundamental that it is protected despite its potentially detrimental impact on both the defendant and the administration of justice. *Madsen*, 168 Wn.2d at 503. The unjustified denial of the right of self-representation requires reversal. *Id.*

But the right of a defendant to represent himself is not absolute or self-executing. *Id.* at 504. If a defendant asks to represent himself, then the trial court must determine whether the defendant's request is unequivocal and timely. *Id.*. If the defendant's request is not equivocal or untimely, the trial court must determine whether the defendant's request is voluntary, knowing,

and intelligent. *Id.* Courts are required to indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel. *Id.* We review a trial court's decision to deny a request for self-representation for an abuse of discretion. *Id.* at 504.

We assume without deciding that Nelson's request to represent himself was unequivocal. But even if a defendant makes an unequivocal request to represent himself, a trial court has broad discretion to grant or deny an untimely request. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

Whether a request is timely, and the extent of the trial court's discretion in considering such a request, is determined on a continuum. *Madsen*, 168 Wn.2d at 508. Our Supreme Court in *Madsen* stated:

> "If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self-representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court."

Id. (quoting *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)) (emphasis omitted).

Nelson made his request to represent himself on the second day of trial. We hold that the third *Madsen* rule applies. Therefore, we acknowledge that the decision whether to grant or deny Nelson's request to represent himself rested largely in the trial court's discretion.

Factors to be considered in assessing a request for self-representation during trial include:

> "[T]he quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."

State v. Fritz, 21 Wn. App. 354, 363, 585 P.2d 173 (1978) (quoting *People v. Windham*, 19 Cal. 3d 121, 128-29, 560 P.2d 1187 (1977)). Absent "substantial reasons," a last minute request for self-representation "should generally be denied, especially if the granting of such a request may result in delay of the trial." *State v. Garcia*, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979).

The application of the relevant factors here does not suggest that the trial court abused its discretion. There is nothing in the record to suggest that Nelson received anything short of proper representation.[2] Nelson's apparent reason to represent himself – his frustration with his attorney's unwillingness to ask the State's witnesses the questions Nelson wanted him to ask – is not particularly compelling. And Nelson's request was made in the middle of a jury trial after the jury had already heard testimony from two of the State's witnesses.

Because Nelson made his request to represent himself after the second day of trial, it was untimely and the trial court had broad discretion whether to grant or deny it. Nelson did not provide substantial reasons to grant his last minute request. Accordingly, we hold that the trial court did not abuse its discretion in denying Nelson's request to represent himself.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

In his SAG, Nelson argues that he was denied his right to effective assistance of counsel because defense counsel allegedly failed to (1) contact Nelson for a three-month period

[2] Our analysis is not helped by the second *Fritz* factor. The State contends Nelson had a proclivity for substitution of counsel, but the record does not support this. Nelson's prior attorneys appear to have withdrawn due to a conflict of interest, or for an unspecified reason after Nelson's mother attempted to bribe witnesses to alter their testimony. There is no evidence that Nelson caused his attorneys to withdraw or requested that they withdraw.

regarding his case, (2) impeach a witness who testified against Nelson about an alleged videotaped confession, and (3) show Nelson a video of a witness's confession.

1. Legal Principles

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id.* at 34. Reasonable probability in this context means a probability sufficient to undermine confidence of the outcome. *Id.*

We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel's performance was reasonable. *Id.* at 33. A claim that trial counsel provided ineffective assistance does not survive if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 33. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any " ' *conceivable* legitimate tactic explaining counsel's performance.' " *Id.* at 42 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

2. Lack of Contact

Before trial, Nelson alleged that his attorney did not discuss trial strategy with him outside of court and did not tell him about the State's potential plea deals. His defense attorney denied the allegations, telling the trial court that he had met with Nelson on several occasions and had discussed the merits of his case with him. Similarly, Nelson claims in his SAG that his defense counsel did not contact him about his case for a three-month period, and generally failed to keep him informed about his case.

Here, there is no evidence in the record that substantiates Nelson's claims that his attorney failed to contact him about his case, and therefore Nelson's claims rely on facts outside the record. We do not address claims based on facts outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Accordingly, we do not address this claim.

3. Failure to Impeach

Nelson argues that his trial attorney was ineffective because he allegedly failed to impeach Burke, one of the State's witnesses who testified against Nelson. We hold that defense counsel's alleged failure to impeach Burke presents a matter of trial strategy and therefore was not deficient.

Nelson's SAG references Burke's videotaped confession in which Nelson contends Burke confessed to taking the victim's wallet. The record does not show what Burke actually said in the videotape. But the record does show that Nelson's attorney interviewed Burke prior to trial, and that his interview was consistent with what Burke stated in the videotape. At trial, Nelson's attorney impeached Burke by eliciting his testimony that Burke made a deal with the

State for a reduced charge and sentence in exchange for testifying against Nelson. Moreover, Nelson's attorney questioned Burke about his alleged videotaped confession – Burke admitted to taking the victim's cell phone but not the victim's wallet.

Here, there is no evidence in the record to support Nelson's claim regarding Burke's confession. But to the extent defense counsel's performance might be deficient, Nelson also does not show that any error affected the outcome of his trial. Therefore, we hold that this claim has no merit.

4. Failure to Show Video

During trial, Nelson alleged that his attorney had failed to show him Burke's videotaped testimony against him. In his SAG, Nelson claims that his attorney's failure to show him the videotape constituted ineffective assistance of counsel. The record shows that as of the first day of Nelson's second trial, his defense attorney had not shown him Burke's videotape. The trial court instructed Nelson's attorney to show him the videotape either that day or the next. There is no evidence in the record as to whether or not Nelson was actually shown the video.

However, even if we presume this was deficient attorney conduct, Nelson fails to show how this was prejudicial to the outcome of his trial. Accordingly, we hold that this claim fails.

D. CLAIMED SENTENCING ERROR

Nelson's SAG asserts that the trial court erred in calculating his offender score by including two prior convictions that constituted the same criminal conduct. We hold that we do not have a sufficient record to review this assignment of error.

When a defendant is convicted of multiple crimes, each is treated like a prior conviction for purposes of calculating the defendant's offender score unless the crimes constitute the same

criminal conduct. RCW 9.94A.589(1)(a). A sentencing court must find that two or more crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* " 'If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.' " *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (quoting *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

In *State v. Deharo*, our Supreme Court examined a defendant's convictions of possession with intent to deliver heroin and conspiracy to deliver. 136 Wn.2d 856, 857, 966 P.2d 1269 (1998). The defendant's convictions were based solely on his possession of six bindles of heroin at the time of arrest. *Id.* at 857. The defendant argued that the two counts encompassed the same criminal conduct, and our Supreme Court agreed. *Id.* at 857-58. The court concluded that the objective intent underlying the two charges – to deliver the heroin in the men's possession – was the same. *Id.* at 859. According to the court, the result might have been different if the record had established a distinction between the time or place of the two charges. *Id.* at 858. But because there was unity of intent, time, place, and victim, the two charges were considered the same criminal conduct for sentencing purposes. *Id.* at 858-59.

Here, the record is insufficient for us to determine whether Nelson's possession and conspiracy convictions constitute the same criminal conduct. The record does not show at what time or at what place Nelson's two convictions for conspiracy and possession took place. It is possible that either of Nelson's conspiracy convictions could have been completed at a time separate from his possession convictions, which would show Nelson's convictions were not the same criminal conduct. Alternatively, like the situation in *Deharo*, Nelson's two separate

convictions for possession and conspiracy could have been based solely on the same conduct, which could have established that the two convictions were the same criminal conduct.

Here, Nelson's SAG contention refers to facts outside the record that we cannot review. *McFarland*, 127 Wn.2d at 337-38 (a personal restraint petition is the appropriate method to obtain review of matters outside the record). Therefore we do not further consider this issue.

We affirm Nelson's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Sutton, J.
SUTTON, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 44725-8-II
	)	
MICHAEL NESLON,	)	
	)	
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 25TH DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL NELSON
DOC NO. 898806
AIRWAY HEIGHTS CORRECTION CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 25, 2015 - 3:45 PM

Transmittal Letter

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Court of Appeals Case Number: 44725-8

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