

NO. 44725-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NELSON,

Appellant.

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

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

REPLY BRIEF OF APPELLANT

JARED B. STEED
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A. ARGUMENT IN REPLY

1. THE COURT ABUSED ITS DISCRETION IN DENYING NELSON'S UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF.

Nelson unequivocally requested to represent himself at trial. He expressed his dissatisfaction with counsel and announced he would rather present his case himself than proceed with counsel with whom he did not communicate. Nelson unequivocally stated he was prepared to represent himself "in this proceeding entirely," including preparing jury instructions and arguing the law and facts to the jury. 6RP 156-57. Nonetheless, the trial court denied Nelson's request. 6RP 157-60.

Nelson contends, for reasons set forth more fully in the amended opening brief, that the trial court committed reversible error by denying Nelson's motion to represent himself because (1) the request was unequivocal; (2) the request was not designed to delay trial, and (3) the trial court's basis for denying the motion was an abuse of discretion. Amended Brief of Appellant (ABOA) at 7-16. The State maintains the trial court did not abuse its discretion in denying Nelson's unequivocal request to represent himself. Brief of Respondent (BOR) at 5-10. For the following reasons, Nelson asks this Court to reject the State's arguments.

The State first argues Nelson's request "was neither clear nor unequivocal." BOR at 6. Nelson however, made clear he wanted to

represent himself at the “proceeding entirely,” including “prepar[ing] jury instructions, argu[ing] the law and the facts to the jury and entirely take over the case.” 6RP 156-57. The State cites no authority for its proposition that this affirmative acknowledgment is insufficient to demonstrate an unequivocal request.

That Nelson may have been motivated to represent himself by dissatisfaction with counsel and his desire to personally conduct cross-examination also does not make his request any less unequivocal. A clear request to proceed pro se does not become equivocal simply because the defendant is motivated by more than the single desire to present his own defense. State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff'd. on other grounds, 164 Wn.2d 83 (2008). Although Nelson cited Modica in the amended brief of appellant, the State does not acknowledge this decision. See ABOA at 8-9.

The State next argues the trial court properly denied Nelson’s unequivocal request to proceed pro se because of his “proclivity for substitution of counsel[.]” BOR at 9. Nelson’s first two attorneys withdrew because of unspecified conflicts of interest however. 3RP 1; 6RP 156. Nelson’s third attorney withdrew after it was disclosed that Nelson’s mother gave witnesses money in exchange for altering their anticipated testimony. Though failing to cite anything in the record, the State suggests Nelson was

somehow responsible for his mother's actions. BOR at 8, 10. As Nelson's attorney made clear when the alleged witness tampering disclosure was made however, "there is no evidence that Mr. Nelson had anything to do with this." IRP 154. There is no evidence showing Nelson was involved in the alleged witness tampering in any manner. Indeed, the prosecutor acknowledged as much. IRP 154.

Finally, the State argues there would have been a significant disruption and delay if Nelson had been permitted to represent himself. BOR at 10. As discussed fully in the supplemental opening brief however, Nelson requested no additional time to prepare for trial, and the trial court did not find Nelson's request was untimely. In addition, Nelson's offer of proof as to what questions he would ask the witnesses, confirmation he would prepare jury instructions, and assurance he would argue the law and facts, demonstrated he was prepared to continue immediately with the trial. ABOA at 14-15. Significantly, the trial court did not deny Nelson's unequivocal request to represent himself on the basis that granting such a request would delay trial.

The trial court's denial of Nelson's unequivocal motion to proceed pro se was an abuse of discretion and requires reversal of his convictions.

2. THE SILENT AND PRIVATE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL.

As discussed fully in the supplemental opening brief, even under the “experience and logic” test, the secret ballot method of exercising peremptory jurors in Nelson’s case implicated his right to a public trial and constituted an unlawful closure. ABOA at 18-22. There, Nelson distinguished State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013)¹, on several bases, including that State v. Thomas,² upon which Love relied, predated State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995). ABOA at 23-25.

Recently, this Court adhered to Love without independent analysis. State v. Dunn, __ Wn. App. __, 321 P.3d 1283, 1285 (2014). In turn, the same reasons that distinguish Love from the present situation likewise distinguish Dunn. ABOA at 23-25.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. The error violated Nelson’s public trial right, which requires automatic reversal

¹ Petition for review pending, No. 89619-4 (2013).

² State v. Thomas 16 Wn. App. 1, 553 P.2d 1357 (1976).

because it affects the framework within which the trial proceeds. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012).

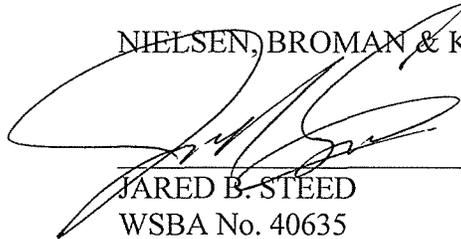
B. CONCLUSION

For the foregoing reasons, and those reasons stated in the amended opening brief of appellant, Nelson requests this Court reverse his convictions.

DATED this 22nd day of July, 2014.

Respectfully submitted,

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)	
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 22ND DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** 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 22ND DAY OF JULY 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

July 22, 2014 - 2:51 PM

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