70762-1

70762-1

NO. 70762-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TOMAS AFEWORKI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant's waiver of the right to counsel must be knowing, voluntary and intelligent. A colloquy on the record is the preferred means of ensuring that the defendant understands the dangers and disadvantages of self-representation. Two trial judges conducted thorough colloquies with Afeworki. After each colloquy, Afeworki unequivocally expressed his desire to represent himself. When he demanded an attorney following his second waiver, the trial court refused to reappoint counsel. Should this Court reject Afeworki's claim that the trial court violated his constitutional rights by "forcing" him to represent himself?

2. Once a defendant has been warned that he will lose his attorney if he continues to engage in certain misconduct, any such misconduct thereafter will be deemed to be a "waiver by conduct" of the right to counsel. After Afeworki had threatened his appointed counsel, the trial court warned Afeworki that if he said anything further to his attorney that caused the attorney to feel compelled to withdraw, the court would not appoint new counsel but would require Afeworki to represent himself at his trial. Afeworki made additional such remarks to his attorney later that same afternoon. Did Afeworki waive his right to counsel by this conduct?

3. While a defendant is ordinarily entitled to appear at trial free from bonds or shackles, the trial court has broad discretion to determine what security measures are necessary to protect courtroom decorum and guarantee the safety of participants. Afeworki was disrespectful and disruptive throughout the proceedings, and the trial court had to warn him repeatedly that he would be removed from the courtroom if he continued his disruptive behavior. He was charged with first-degree murder with a firearm, and was potentially facing his third strike; in addition, he had threatened the well-being of his attorney and his attorney's family. The trial court ordered that Afeworki be required to wear a band underneath his clothing by means of which an electrical shock could be delivered if necessary. Did the trial court properly choose the least restrictive means necessary to ensure courtroom security? Was any error harmless where the band was not visible to the jury, Afeworki has not shown how wearing the band interfered with his ability to present his case to the jury, and the evidence against Afeworki was overwhelming?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Tomas Afeworki was charged by information with Murder in the First Degree; the information included a firearm allegation. The State alleged that, on October 26, 2010, Afeworki, with no apparent provocation, killed Michael Yohannes with a single shot to the head on the corner of Second Avenue and Pike Street in downtown Seattle at around 4:40 p.m. CP 1-5.

A jury found Afeworki guilty as charged. CP 484, 485. The trial court sentenced him within the standard range to 540 months of confinement. CP 565, 567.

2. SUBSTANTIVE FACTS.

It began with a seemingly chance encounter. On October 26, 2010, Haylom Gebra and his friend Michael Yohannes were walking east on Pike Street in downtown Seattle when they saw an acquaintance, Tomas Afeworki, across the street. 15RP 135-36.[1] Gebra was on his phone, so he greeted Afeworki with an "elbow

[1] The verbatim report of proceedings consists of 23 volumes, which will be referred to in this brief as follows: 1RP (4/15/13); 2RP (4/16/13); 3RP (4/17/13); 4RP (4/18/13); 5RP (4/22/13); 6RP (4/23/13); 7RP (4/24/13); 8RP (7/16/13); 9RP (7/17/13); 10RP (7/18/13); 11RP (7/22/13); 12RP (7/23/13); 13RP (7/24/13); 14RP (7/25/13); 15RP (7/29/13); 16RP (7/30/13); 17RP (7/31/13); 18RP (8/1/13); 19RP (8/5/13); 20RP (8/6/13); 21RP (8/7/13); 22RP (8/8/13); 23RP (7/18/12, 7/25/12, 4/11/13, 6/18/13, 7/26/13, 8/27/13, 9/20/13, 10/8/13, 10/17/13).

shake" and continued toward Second Avenue and Pike. 15RP 137. Yohannes lingered briefly talking to Afeworki, and then caught up with Gebra at the intersection of Second and Pike. 15RP 137.

Gebra and Yohannes waited for the light to change, with Yohannes standing slightly ahead and to the right of Gebra. 15RP 137-38. Afeworki suddenly came up on Gebra's right, holding a white towel. 15RP 138. Yohannes turned, and Gebra heard a loud boom; Gebra watched as Yohannes fell to the ground. 15RP 138. Afeworki immediately turned and headed north on Second Avenue toward Pine Street. 15RP 138.

Gebra pointed Afeworki out to someone from the City of Seattle, and that person followed Afeworki.[2] Gebra got on a bus and went home. 15RP 153. Gebra contacted police two days later, and was interviewed. 15RP 174; 18RP 151. To the best of his recollection, Afeworki was wearing a brown jacket with a hood on the day of the shooting. 15RP 139.

A number of other persons observed the shooting or its immediate aftermath. Elijah Knight was canvassing in the area that day. 16RP 52-53. At around 4:30 – 4:40 p.m., Knight found himself standing with a handful of others at the intersection of

[2] This may have been Mohammed Dima, the Downtown Safety Ambassador who followed Afeworki north to Pine Street. 16RP 141-42, 147-48.

Second and Pike, on the northwest corner, waiting for the light to change. 16RP 52-55. He saw a person with a white handkerchief raise his hand; Knight heard a loud noise that sounded like a gunshot, and the man next to the man with the handkerchief fell to the ground. 16RP 55-56, 58.

The man with the handkerchief wore "crazy faded jeans" and a green-brown hooded parka. 16RP 56-57. Knight never saw the man's face. 16RP 60. The man headed north on the west side of Second Avenue, walking at a normal pace. 16RP 58-59. Knight called 911, then followed the man. 16RP 59. When the man turned the corner at Pine Street, Knight lost sight of him. 16RP 60.

Jean Marie Hayes was also standing on the northwest corner of Second and Pike that afternoon, waiting for the light to change. 16RP 86-87. She heard a gunshot, looked to her left, and saw a man with a head wound fall to the ground. 16RP 88-89. Her attention was drawn to a dark green "poofy" jacket with a hood leaving the scene northbound on Second Avenue. 16RP 90-91. She never saw the face of the person wearing the jacket. 16RP 90.

Natalia Espaillat was on a break from her job at the Hard Rock Café at the time of the shooting. 16RP 123-24, 126. From her position near the intersection of Second and Pike, she saw the

shooter raise an arm toward the victim's head; she saw the metallic glint of what she believed was a firearm. 16RP 124-29. She heard a loud noise, and saw the man fall to the ground. 16RP 130.

Espaillat saw the shooter only in profile. 16RP 127, 129. He had a medium-dark complexion. 16RP 129, 130. He was wearing dark-colored pants and a lighter-colored, oversized jacket with a hood. 16RP 129, 132. The jacket caught Espaillat's attention, as it was a warm day. 16RP 129. After the shooting, the man walked north on Second Avenue toward Pine at a regular or slightly quickened pace. 16RP 130-32.

Mohammed Dima was working in uniform as a Downtown Safety Ambassador on the afternoon of the shooting. 16RP 141-44. He was on the northeast corner of Second and Pike when he heard a shot coming from the northwest corner. 16RP 145-46. He looked over and saw a body drop, and people running. 16RP 146.

Dima saw a black man standing there with something white in his hand. 16RP 146. The man put something into the white thing, put the object in his pocket, and started walking north on Second toward Pine. 16RP 146. The man wore a brownish "hoody" and jeans with something brownish on the back pocket. 16RP 147.

The man headed north on the west side of Second Avenue toward Pine, walking slowly. 16RP 147-48. After reporting the shooting to his dispatcher, Dima followed. 16RP 148. When the man got to the corner, he turned down Pine toward First. 16RP 148. Dima saw him go into a business. 16RP 149. When police arrived, Dima pointed them to the building that the man had entered. 16RP 151. The building contained several doorways, one leading into an apartment, one into a restaurant, and one into a different business; Dima was not sure which doorway the man had entered. 16RP 151-52.

Police initially focused on the Gatewood Apartments, located at 107 Pine Street. 16RP 168; 17RP 88; 18RP 67. They quickly shifted their attention to the business one door to the east, the Zaina Restaurant at 109 Pine, based on contact with the person working inside. 16RP 169-70; 17RP 89; 18RP 68.

Alvaro Sotelo was working as the cook and server at Zaina that afternoon. 15RP 36-37. Sometime after he began his shift at 4:00 p.m., a man came in, ordered fries, and asked to use the bathroom. 15RP 37-39. When police arrived a few minutes later, Sotelo told them about the customer in the bathroom. 15RP 40-41.

After learning from Sotelo that the front door of Zaina was the sole entry/exit, police focused their attention on the door in the back of the restaurant that led to the bathroom, and directed the person to come out. 15RP 41; 16RP 170-72; 18RP 68, 96. After a few minutes, a man matching the description given by Mohammed Dima emerged from the bathroom with his hands above his head, saying "I don't have a gun." 16RP 172-75; 17RP 87, 92; 18RP 70-71. Although he was slow to comply, the man eventually followed instructions and got down on the floor, and was taken into custody. 16RP 177-78; 17RP 93; 18RP 71-74. He was placed in a patrol car and read his Miranda[3] rights. 17RP 94.

In a search of the bathroom, police found a 9mm semi-automatic handgun that had been placed under the liner of the trash can. 14RP 147-48; 15RP 102-03; 17RP 176-77; 18RP 75-76. There were four cartridges in the magazine. 14RP 148; 15RP 103-05. In addition, police recovered three unfired cartridges from the toilet bowl. 14RP 144-45; 17RP 178. Forensic analysis showed that these unfired cartridges had been cycled through the handgun found in the trash can. 18RP 44-45. The analysis also

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

revealed that the bullet recovered from Michael Yohannes's head was fired from that same 9mm handgun. 14RP 26-29; 18RP 46-47.

The man who emerged from the Zaina Restaurant bathroom was Tomas Afeworki. 17RP 93-94; 18RP 74-75. He was wearing a brownish-green hooded jacket and jeans. 13RP 34-35, 37-38.

Three eyewitnesses were brought to a spot near the scene for a showup identification procedure. 16RP 105-09. Two of the witnesses, Elijah Knight and Jean Marie Hayes, identified Afeworki by his clothing. 16RP 61-63, 92-95, 109. DNA recovered from the handgun found in the bathroom trash can provided further evidence that Afeworki was the shooter; comparing the partial DNA profile obtained from the gun to Afeworki's DNA profile resulted in a 1 in 120,000 chance that someone other than Afeworki was the source of the DNA on the gun. 19RP 33-39.

Homicide detectives Cloyd Steiger and Jason Kasner came into contact with Afeworki later that same day at Seattle Police Headquarters in the homicide office. 13RP 31-33. They collected Afeworki's clothing, including a brownish-green hooded jacket. 13RP 33, 37-38. As they were transporting him to jail, Afeworki asked Steiger how old he was. 13RP 40-41, 140-43. Upon hearing

that Steiger was 52, Afeworki said something like, "Man, I am going to be as old as you when I get out." 13RP 41, 143.

Following the murder of Michael Yohannes, police collected video from security cameras located in the immediate area of the shooting and along Afeworki's route to Zaina Restaurant. 13RP 137-38; 14RP 171-72; 17RP 135-40, 154-60. Video from a camera outside the Gatewood Apartments that pointed east on Pine toward Second Avenue showed a person in a hooded jacket walking toward the camera with something white in his right hand. 18RP 145-47. The video then showed that person turning to the door of the Zaina Restaurant. 18RP 148. Video from that camera later shows a person wearing the same clothes as the individual pictured earlier being escorted in handcuffs from the restaurant. 18RP 148.

Crime scene photographs depicted a white towel or rag on the floor of the restaurant near the front door. 14RP 165; 15RP 111. On the day of the shooting, neither the detectives nor the officers responding to the restaurant with the Crime Scene Investigation Unit were aware of the possible significance of this object, and it was not collected. 14RP 165-66; 15RP 111-12.

An autopsy revealed that Michael Yohannes died from a contact gunshot wound to the left side of his head. 14RP 13-14,

21-23, 32. The medical examiner determined that the manner of death was homicide. 14RP 31. An x-ray revealed that the bullet was still inside Yohannes's head. 14RP 15. The bullet was recovered and turned over to the police. 14RP 27-28.

Afeworki testified on his own behalf. He said that, on October 26, 2010, at around 1:30 p.m., he got on a bus in Lynnwood and headed to downtown Seattle. 20RP 77. He stopped at the apartment of an old friend in Belltown, where the two smoked some "weed," shared some laughs, and reminisced. 20RP 78. He left and headed south to get something to eat. 20RP 79. When he saw a lot of people running near Second and Pine, he thought it was a drug raid. 20RP 79. He went into Zaina's and talked to his girlfriend on his phone, telling her to meet him there. 20RP 80. He ordered some food, and went to use the bathroom. 20RP 80. There were no cartridges in the toilet when he left the bathroom. 20RP 109.

Afeworki said that, when he came out of the bathroom, police with guns drawn were screaming commands at him. 20RP 80-81. He got down on the ground, and police jumped on him and handcuffed him. 20RP 81. After searching him for drugs, officers huddled and talked, "probably trying to figure out what's going on

and everything else." 20RP 81-82. No one explained what was going on. 20RP 82.

Afeworki said that he was driven to the precinct, where police took pictures of him and took his clothes. 20RP 83. The officers were courteous until Afeworki asserted his right to an attorney, at which point their attitude changed. 20RP 83. They left him in the interrogation room for a long time. 20RP 84.

While transporting him to jail, the police played "good cop/bad cop." 20RP 84-85. While one told him that everything would be all right if he provided information, the other was more hostile, saying: "Your black ass is stupid. Tell us what we need to know. You are making this harder on yourself. We're SPD. We are going to show you how deep it will get." 20RP 84.

When Afeworki found out that he was accused of murder, he "couldn't believe it." 20RP 85. Afeworki acknowledged that he knew Haylom Gebra and Michael Yohannes, but denied encountering either one on October 26. 20RP 89, 109, 114. He denied being at the intersection of Second and Pike that day, and denied walking up Second from Pike to Pine. 20RP 114. He denied killing Michael Yohannes. 20RP 89.

C. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE AFEWORKI'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Afeworki contends that he never chose to waive his right to representation by counsel, but rather was "forced" to represent himself. This claim should be rejected. Following two colloquies by two different judges, Afeworki knowingly, voluntarily and intelligently waived his right to counsel and chose to proceed pro se. Moreover, by continuing to threaten appointed counsel after the trial court had warned him of the consequences, Afeworki waived his right to counsel by his own conduct. This Court should not reward Afeworki's manipulative attempts to disrupt his trial.

a. History Of Afeworki's Representation.

An information charging Tomas Afeworki with Murder in the First Degree was filed on October 28, 2010. CP 1-5. On October 29, Nicholas Marchi filed a Notice of Appearance on behalf of Afeworki. CP 589. A little over a month later, on December 6, a Notice of Withdrawal and Consent for Substitution announced that John Henry Browne was substituting for Marchi. CP 590.

On January 31, 2011, Browne filed a Notice of Attorney's Intent to Withdraw. CP 591. On February 7, Anthony Savage filed a

Notice of Appearance. CP 593. Eight months later, on October 4, Savage was allowed to withdraw due to illness, and a hearing was set to confirm the appointment of counsel by the Office of Public Defense. 23RP 8; CP 594. On October 21, Marchi was back on the case as appointed counsel, filing a motion for expenditure of public funds for investigative services. CP 595-56.

Afeworki soon began to take an active role in his own defense, prevailing upon counsel to file his pro se "Motion to Dismiss for Violation of Due Process, [Due] to Prosecutorial Misconduct for Charging with Falsified Probable Cause" (March 29, 2012). CP 7-21.

Not content to work through counsel, Afeworki followed this motion a few months later with letters sent directly to the trial court. CP 601-10. In a letter to the Chief Judge dated June 18, 2012, Afeworki wrote that he had "instructed my Attorney Nicholas Marchi to put in a motion to dismiss for violation of Due Process" on various grounds. CP 603. He informed the court that if Marchi did not file his motion as directed, he would "feel like I don't have my Attorney's undivided loyalty and a conflict will arise because my constitutional rights are not protected." CP 604. Afeworki followed this with an even more emphatic letter, dated July 10, 2012, complaining that his attorney had not filed "important pretrial motions on my behalf," and

asking the court to appoint new counsel who would do as Afeworki wished. CP 608-09.

Judge Ronald Kessler held a hearing on the matter on July 18, 2012. 23RP 4. Marchi informed the court that Afeworki wanted to discharge him. 23RP 4. Marchi joined in the motion, telling the court that "[o]ur positions on how the case should proceed have now limited us to not being able to communicate." 23RP 4. Afeworki confirmed that Marchi was not doing the things that Afeworki wanted him to, and that Afeworki wanted a "conflict-free attorney." 23RP 5.

The court declined to find a conflict under the circumstances alleged. 23RP 6. When Afeworki pressed the court on why his pro se motions had not been ruled on, Judge Kessler said that he ruled on motions made by the attorneys. 23RP 7-10. Afeworki responded, "Your Honor, then I would like to move pro se pursuant to Faretta v. California, 422 US 806." 23RP 10. When Judge Kessler questioned whether Afeworki really wanted a new attorney, and tried to caution him on such a course, Afeworki responded unequivocally: "*Maybe you didn't understand me. I am invoking my right to proceed pro se.*" 23RP 10-11 (italics added).

Judge Kessler accordingly began the pro se colloquy. He asked Afeworki if he understood that the charged crime carried a

maximum penalty of life in prison and a $50,000 fine and that, *if* he were found guilty *and* the prosecutor proved that the current crime was his third strike, he would face life in prison with no possibility of parole. 23RP 11. Afeworki responded that he understood. 23RP 12.

The next part of the colloquy went less smoothly. When the court warned Afeworki that, should he be allowed to represent himself, he would be on his own and would not have standby counsel, Afeworki expressed disbelief and displeasure: "How is it I'm not going to get standby counsel? Everybody is entitled to standby counsel." 23RP 13. When the court asked what his authority was for that statement, Afeworki retorted: "*What is this bias about? Why is there so much bias in this courtroom*?" 23RP 13 (italics added).

When Afeworki continued to argue with the court rather than answer the questions, the court found that his request to proceed pro se was equivocal, and offered to contact the Office of Public Defense ("OPD") to appoint a new attorney for him. 23RP 14-15. Afeworki, however, insisted that his request was unequivocal, and that his right to self-representation was absolute and must be granted. 23RP 16.

Judge Kessler resumed the colloquy, but it quickly bogged down again. 23RP 17. When Afeworki indicated that he was forced to represent himself, the court again offered to have a new lawyer appointed. 23RP 21. Afeworki again refused the offer, insisting that the lawyers were "in cahoots" with the prosecutor and repeating his claim that the court was biased. 23RP 21.

Warning Afeworki that representing himself was a "serious mistake," the court tried one more time: "Since I am offering you the opportunity to have another lawyer, why don't you take that option and see what you think of that next lawyer before you decide to give up your right to a lawyer?" 23RP 22-23. When Afeworki insisted that he wanted to proceed pro se, the court found a knowing, voluntary and intelligent waiver of the right to counsel, and granted the request. 23RP 23; CP 25.

The court nevertheless left Afeworki the option of being represented by counsel. The court set a hearing for one week later, and required that defense counsel remain on the case until that time. 23RP 24. The court told Afeworki that he could choose at that hearing among three options: retain appointed counsel Marchi, have a different attorney appointed, or proceed pro se. 23RP 24.

The parties returned to court on July 25, 2012. Afeworki proffered a motion to dismiss. 23RP 30-31. The court agreed to allow the motion to be filed. 23RP 33. The court then asked Afeworki if he still wished to represent himself. 23RP 33. Accusing the court of "*intentionally impairing me and punishing me for exercising my rights*" by refusing him standby counsel and access to law books,[4] Afeworki withdrew his pro se status *"[u]nder duress and under fear."* 23RP 33-34 (italics added).

Afeworki asked for two attorneys "so they could go over everything that I have asked them to do and filing the proper motions that I have asked them to put in the proper motions." 23RP 38. He again alleged that he could not get "fair play" in this courtroom. 23RP 38. The court agreed to direct OPD to appoint new counsel. 23RP 38; CP 611-12.

On August 2, 2012, James Bible filed a notice of appearance. CP 613-14. Bible and co-counsel Anna Gigliotti[5] represented Afeworki before the trial judge, the Honorable Laura Gene Middaugh, through pretrial motions and voir dire (April 2013). 1RP through 6RP.

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[4] The trial court had explained that Afeworki would have access to legal materials through the Westlaw kiosk in the jail. 23RP 19.

[5] Bible had requested and obtained funding for a second attorney. CP 620-23.

The court denied defense motions to suppress evidence under CrR 3.5 and CrR 3.6.[6] 2RP 22-23, 178-80; 3RP 17; 4RP 4-7.

Afeworki continued to have the same problems with Bible's representation that he had had with Marchi's – Bible, like Marchi, was not doing everything that Afeworki directed him to do. *See, e.g.,* CP 615-19 ("I've asked my attorney to turn in important pretrial motions, for the past 5 month[s] my attorney has not done as such."); 5RP 29 ("For the record, I have asked my attorney to put in a motion to dismiss for violation of RPC 3.8 on the prosecutor's behalf. He has refused me, and I am just putting that on the record."). The court was at pains to explain what legal representation meant, i.e., that the attorney decides what motions to file. 5RP 7, 11-12. The court told Afeworki that he could either have a lawyer or he could represent himself, but "you can't have it both ways." 5RP 7.

Afeworki nevertheless endeavored to "have it both ways," continuing to proffer his own motions to the court. 7RP 9-11. When defense counsel informed the court of a medical emergency in his

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[6] Immediately on the heels of these denials, Afeworki demanded a new judge, claiming that Judge Middaugh was discriminatory and biased, and granted everything the prosecutor asked for. 4RP 12. In support, he alleged that Judge Middaugh had deliberately placed a clock with a monkey on its face in the courtroom, intending to degrade and demean him because of his African heritage. 4RP 9-10. The prosecutor pointed out that the court had replaced the non-functioning courtroom clock with one that had been in chambers; this clock had a "Paul Frank" logo monkey on its face. 4RP 13-14. There had been no objection by anyone at the time. 4RP 14.

family, the court recessed the trial for almost two months (April 24 to July 16, 2013). 7RP 2-4, 9, 11; CP 132.

Before trial could resume, Afeworki on June 18, 2013 brought yet another motion for a new attorney. 23RP 68. Bible summed up the work that he had accomplished on the case since his appointment, but noted that he did not think there was any real possibility of pleasing Afeworki, who was alleging a conflict. 23RP 69-72. Bible said that Afeworki understood that the likely alternative to Bible's representation was to represent himself. 23RP 74, 81.

When the court invited Afeworki to speak, he detailed his dissatisfaction with Bible's representation.[7] 23RP 77. The court denied the motion for new counsel, pointing out that decisions as to trial strategy were for the lawyer to make. 23RP 78.

Afeworki responded by moving to proceed pro se "under Faretta v. California." 23RP 78. He repeatedly insisted that this was his wish, and that his request was unequivocal. 23RP 84, 86-87, 95-97. When the court tried to explain that he would not be entitled to standby counsel or to a continuance of the trial date, Afeworki responded, "What I understand is I want to go pro se and everything

[7] Afeworki again accused Judge Middaugh of racism, and objected to her presiding over his trial; he also objected to a picture of George Washington that was apparently hanging in the courtroom. 23RP 78, 83-84.

that you're saying just sounds like a whole bunch of bullshit." 23RP 89. The court continued the motion to be heard by Judge Kessler, to determine whether the request was unequivocal.[8] 23RP 87-88.

At a hearing before Judge Kessler several days later, on June 21, 2013, Afeworki chose not to renew his motion to represent himself. 8RP 2, 14, 17; CP 140-41. According to Judge Kessler's Order on Defendant's Reference to Self-Representation, Afeworki "referenced" self-representation, but refused to answer the court's questions on this topic, instead persisting in arguing his substantive motions. CP 140-41. One week later, Afeworki prepared and signed a notarized motion and affidavit to proceed pro se.[9] CP 237.

At the next hearing before Judge Middaugh, on July 16, 2013, Afeworki changed tack yet again and reiterated his demand that the court dismiss Bible and appoint a new attorney to represent him. 8RP 14-15. The court refused. 8RP 15. Afeworki then said unequivocally, "I am proceeding pro se. I am going to represent myself." 8RP 24. The court found this request untimely, as trial had restarted. 8RP 25-26. Afeworki persisted: "*You are denying my*

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[8] Judge Middaugh was going to be unavailable. 23RP 87.

[9] The motion was not filed in court until the next hearing, on July 16, 2013, although Afeworki said he sent it to the court through the mail on the date it was notarized. 8RP 37; CP 236-37.

constitutional right to represent myself, let me get that right." 8RP 26 (italics added).

In the midst of this hearing, Bible informed the court that Afeworki had just said something to him to the effect that, "If you play with fire, you get burned." 8RP 33. Bible found this comment "wholly inappropriate," and said that he was not sure what Afeworki meant by it. 8RP 33. Afeworki responded, "It means exactly as it sounds." 8RP 34. When pressed by the court, however, Afeworki tempered his words, claiming that he only meant that "[i]f there is any type of lawsuits, I am going to be suing his ass too." 8RP 34.

The court cautioned Afeworki that he would not be allowed to "create a situation where this trial will not go forward, *which is what I think that you are intending and trying to do*." 8RP 35 (italics added). The court made the consequences clear:

> If you should say or do anything further in this case that makes [Bible] as an officer of the Court feel that he has to withdraw as your attorney, he can do so. . . . If Mr. Bible says that he cannot continue because of what you say or do towards him and the associate counsel is unable to take over as counsel, you will be allowed to go pro se. But, you will step in at that moment with no additional prep time, nothing.

8RP 38.

Bible told the court that, in light of Afeworki's comment to him, Bible would find it difficult to meet with his client after the hearing that day. 8RP 49. Bible assured the court that he would meet with Afeworki the next morning to discuss voir dire. 8RP 50.

By the next morning, however, Bible was asking to withdraw. 9RP 55. He told the court that, as Afeworki was leaving the courtroom after the previous day's hearing, he accused Bible of "shaking down" Afeworki's sister for money. 9RP 53-54. Bible took this allegation very seriously, as his law firm had been appointed by OPD, and such a claim threatened his livelihood. 9RP 54-55.

Bible also reiterated his concern about Afeworki's "playing with fire" comment, which Bible took as a threat to his personal well-being. 9RP 53, 55. He pointed out that Afeworki did not limit this comment to a threat to sue Bible until after the court had inquired. 9RP 93. The threat now concerned Bible even more, because Afeworki had said that he knew Bible's younger sister. 9RP 93. Bible believed that his continued representation of Afeworki would be in violation of the Rules of Professional Conduct. 9RP 55.

The court asked Afeworki if he opposed Bible's request to withdraw. 9RP 59. Afeworki said he did not. 9RP 59. When the court said that Afeworki would be allowed to proceed pro se, his

response again showed that he wanted to have it both ways: "*I would like a different attorney. . . . I would like to renew all of my motions as a pro se defendant.*" 9RP 60 (italics added).

The State opposed Bible's motion to withdraw, in part out of concern that it would cause additional delay in getting the case to trial. 9RP 61. The prosecutor also feared, based on Afeworki's conduct to date, that he would disrupt the trial proceedings if allowed to represent himself. 9RP 62. The prosecutor thought that further colloquy was necessary before Afeworki should be granted pro se status. 9RP 62.

The trial court expressed its belief that Afeworki's persistently disruptive behavior was intended specifically to delay the trial. 9RP 67-68. The court believed that Afeworki's earlier motion to proceed pro se, which he never renewed in front of Judge Kessler, was also intended to delay and disrupt the trial. 9RP 68. The court believed that Afeworki had deliberately created a situation where Bible could no longer represent him, so that the court would give him a new attorney. 9RP 70. The court refused to condone this behavior:

> I know that you have been advised on this in the past. I did say yesterday that I will certainly consider allowing you to proceed representing yourself, but I will not delay this trial so that you can do that.

> I told you that quite clearly yesterday, that if you continue the disruptive behavior and if you continue to make statements to Mr. James Bible that caused him to be unable to represent you, then the consequences of that would be that you would be representing yourself but there would be no delay in trial. *You continue to make those statements.*

9RP 70 (italics added).

Having decided to allow Bible to withdraw, the court conducted the pro se colloquy. 9RP 69, 71-83. Afeworki assured the court that he was "ready to move forward." 9RP 77. He told the court that he needed to represent himself "in order for my issues to be brought forward." 9RP 79. He specified that "*if I am allowed to go pro se,* all of the motions that I have filed before previously, since I am representing myself need to be forwarded into the court as new pro se motions and for the court." 9RP 81 (italics added).

As he had done before, Afeworki unequivocally expressed his desire to proceed pro se:

> Now that I understand all of that, *I am ready to proceed pro se*. I am ready to represent myself. I feel like it is my US constitutional right. I am pretty sure it is under Washington State law too, where I could represent myself if I decide to represent myself. . . . *I am letting you know, we are going pro se.*

9RP 89-90, 92 (italics added). Afeworki insisted that he was ready to proceed with the trial: "Your Honor, I just want to move forward. We

could pick voir dire and everything today." 9RP 94. The court decided to postpone a final decision until the next day. 9RP 95.

The next day, the trial court found that Afeworki had knowingly and voluntarily waived his right to counsel: "he understands the charges against him, the consequences, if he is found guilty under all of the scenarios that he has been proposed." 10RP 118. The court added that this conclusion was supported by Afeworki's deliberate actions in creating a situation where appointed counsel was unable to continue to represent him. 10RP 118. The court informed Afeworki, "I am going to allow you to go pro se, sir." 10RP 119; CP 266. Afeworki immediately responded that he wanted the court to consider his pro se issues. 10RP 119.

A discussion of what discovery had already been provided to Afeworki, and how to get additional discovery to him, followed. 10RP 119-25. When this was concluded, the court allowed Bible to withdraw. 10RP 130; CP 266.

By the time the parties next appeared in court three days later, Afeworki had changed course yet again, telling the court that he did not want to proceed pro se, but wanted counsel. 11RP 211-12. The court responded that he had waived the right to counsel by his actions. 11RP 212. The court elaborated:

> I will say it now, I believe that your actions were done with the intent of having Mr. Bible withdraw so that you could get another attorney, when I had refused your motion.
>
> That I believe that you were trying to set it up so that you could be put in the position where I would have to give you another attorney. I explained to you that that is not going to happen.
>
> You made your decision to go pro se by acting towards Mr. Bible in such a fashion that he could not ethically continue to represent you. I made it clear to you that when you made your motion to go pro se, if you did that, you would have to go forward with trial.
>
> That is an irrevocable decision. It cannot be changed. You are now representing yourself. It was not a wise decision, I agree.
>
> We all tried to make it quite clear to you that you would be required to do these issues on your own and they were very complex. You are an intelligent person. You know or you knew the risks that were involved because they were explained to you quite clearly. You chose to take those actions. You cannot change them now.
>
> I will not give you another lawyer.

11RP 212-13. *See also* CP 277.

Afeworki insisted that he "didn't understand what is going on," but acted "under duress and frustrations." 11RP 213. "I am saying that I want counsel. I just don't understand what happened, what transpired because this is just too much for my comprehension, I guess that you could say. But I do not want to go pro se." 11RP 214.

Noting that Afeworki's responses in the pro se colloquy were "quite coherent," and that he had already been through the colloquy once before with Judge Kessler, the court reiterated: "You can sit here and say that you don't understand it, what went on, but your actions last week prove to me that you did understand what went on." 11RP 216.

Afeworki continued to insist that he did not understand the proceedings. When the court asked what he thought about the State's proposal for voir dire questioning, he responded, "I wouldn't know, because I don't understand the proceedings. I want counsel." 11RP 234. He repeatedly "note[d] for the record" that the court was "forcing me to go pro se." 11RP 255, 276, 284.

Afeworki continued in this vein, insisting that he was being forced to go pro se, did not want to go pro se, did not understand the proceedings, wanted a lawyer, and was acting "under duress." 12RP 3 ("you forced me to go pro se"), 8 ("Let me state this for the record. I do not want to go pro se. I want counsel."), 21 ("I do not understand these proceedings. That's why I don't want to be pro se."), 23 ("I want a lawyer. For the record, I want a lawyer. Are we on the record? Because I want a lawyer."), 68 ("I am still objecting to these proceedings. I am not accepting the procedures. I want a lawyer."), 92 ("Again, everything that I am doing is, of course, under duress

because I am forced to go pro se."); 13RP 5 ("Well, under – again under – I am moving for[ward] only under duress. I don't know what is going on. I want counsel. It's my constitutional rights. I don't want to move forward."), 8-9 ("I don't understand anything. I need counsel. I don't understand these proceedings. I don't know what you are saying.").

The trial court patiently and repeatedly refuted these claims. 12RP 8-9 (explaining to Afeworki that he had caused his situation by his own actions, and that he did not need to renew his objections to the process as they were already on the record), 22 (finding that Afeworki "is an intelligent man who understands procedures when he wishes to understand them"). Noting that it would not address the issue again, the court summarized the reasons for Afeworki's pro se status:

> You made a motion to represent yourself on the eve of jury selection. I denied that as untimely. And then the next day I continued to inquire of you as to whether you wanted – really wanted to go *pro se* and if you understood the ramifications of that.
>
> And then you made statements that I found – to your attorney – were threats. Your attorney made a considerable effort to try to keep on as your attorney and said that because of the threats and the statements you had made to him, he did not feel that he could ethically represent you, because he would not be able to do that.

> And so I allowed him to withdraw, and you basically got your wish to go *pro se*. You have now changed your mind, and you don't want to go *pro se*. Perfectly understandable, because I think now you are beginning to understand exactly how difficult it is to represent yourself.
>
> But the constitution does not allow you to, once you are representing yourself, once you have made that request and you begin representing yourself, to change your mind in the middle of trial, nor does the constitution allow you to take actions such that your attorney is required to withdraw because of your actions under ethical rules and then say that you are required to [have] a new attorney. *I have made findings on the record that I believe that your actions have been intended to delay this trial, that your actions were intended to force Mr. Bible to withdraw because I denied your motion to grant you a new attorney, and I believe that your actions have been – I have made the findings, and I believe the record supports them, that it has been your intention all along to delay this trial, and you think that in some way you would force this Court to reconsider your motion and you give you a new attorney.*

13RP 7-8 (italics added). The court summed up the proceedings leading up to Afeworki's pro se status in written findings, concluding:

> Based on all the actions of the defendant leading up to the withdrawal of his attorney, the Court found that Mr. Afeworki's actions were intentional; created a situation where his attorney had to withdraw and that Mr. Afeworki more likely than not thought that he would get appointed a new counsel, which request had previously been denied, and trial would be further delayed. Mr. Afeworki's actions constitute a knowing waiver of his right to counsel.

CP 555-58 (¶ 10).

b. Afeworki Made A Knowing, Voluntary And Intelligent Waiver Of His Right To Counsel.

A defendant in a criminal prosecution has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. This right does not encompass an absolute right to any particular attorney. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991) (citing United States v. Wheat, 486 U.S. 153, 159 n.3, 108 S. Ct. 1692, 100 L. Ed.2d 140 (1988)).[10] Whether an indigent defendant's dissatisfaction with court-appointed counsel justifies the appointment of new counsel is within the discretion of the trial court. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

A defendant also has a constitutional right to waive the assistance of counsel and represent himself. DeWeese, 117 Wn.2d at 375 (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed.2d 562 (1975)). Such a waiver must be knowing, voluntary and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

Before he can execute a valid waiver, a defendant must be made aware of the dangers and disadvantages of self-representation. Acrey, 103 Wn.2d at 209 (citing Faretta, 422 U.S. at 835). A colloquy

[10] The right to counsel of choice does not extend to a defendant who requires appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed.2d 409 (2006) (citing Wheat, 486 U.S. at 159).

on the record is the preferred means of ensuring a valid waiver; the colloquy should inform the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist that will govern the presentation of the case. Acrey, 103 Wn.2d at 211. In the absence of a colloquy, the reviewing court can rely on evidence in the record that shows the defendant's actual awareness of the risks of self-representation. Id.; DeWeese, 117 Wn.2d at 378.

Whether a defendant's dissatisfaction with court-appointed counsel justifies the appointment of new counsel is within the discretion of the trial court. DeWeese, 117 Wn.2d at 376. When the defendant fails to state legitimate reasons for the assignment of substitute counsel, the court may require him to either continue with current appointed counsel or represent himself. Id. If the defendant chooses not to continue with appointed counsel, requiring him to proceed pro se does not violate the constitutional right to counsel and may represent a valid waiver of that right. Id.

The requirement of a knowing and voluntary waiver of the right to counsel extends to a defendant's choice to represent himself rather than remain with current appointed counsel. Id. at 377. Once a defendant has unequivocally waived counsel, he may not later

demand reappointment of counsel as a matter of right; rather, the matter is wholly within the discretion of the trial court. DeWeese, 117 Wn.2d at 376-77.

Afeworki had the benefit of not one, but two thorough colloquies prompted by his requests to represent himself. Two different judges informed him of the seriousness of the charge and the maximum possible penalty, the difficulties of self-representation, and the existence of technical rules that would govern presentation of his case. 23RP 11-23; 9RP 71-83. After each colloquy, Afeworki expressed an unequivocal desire to represent himself. 23RP 23; 9RP 89-90.

On appeal, Afeworki tries to disclaim his knowing, voluntary and intelligent waiver of his right to counsel, asserting that he never asked to proceed pro se. BOA at 18. The record belies this claim. Following Judge Middaugh's pro se colloquy, Afeworki told the court, "*Now that I understand all of that, I am ready to proceed pro se. I am ready to represent myself.*" 9RP 89 (italics added). He followed that with an unequivocal announcement: "*I am letting you know, we are going pro se.*" 9RP 92 (italics added).

Afeworki further claims that the trial court misadvised him of the punishment he faced, and thus invalidated his waiver of counsel,

by telling him that if convicted he faced a sentence of life without possibility of parole as a persistent offender. BOA at 20. The record belies this claim as well.

During the first pro se colloquy, Judge Kessler informed Afeworki that if he were found guilty *and the prosecutor proved that this crime was his third strike*, he would face life in prison without possibility of parole. 23RP 11. When Judge Kessler asked Afeworki directly if he understood that he was facing the *possibility* of life without parole, Afeworki confirmed that he understood. 23RP 12.

During the second pro se colloquy, Judge Middaugh asked Afeworki if he understood that the State was *alleging* that this was a "three strikes" case. 9RP 72. Afeworki confirmed that he understood that the State was alleging this, but added that he did not believe that it *was* a "three strikes" case.[11] 9RP 73, 74. He informed the court that Bible had told him that his case *might not* be a "three strikes" case – that there were issues still to be resolved.[12] 9RP 75. He confirmed his understanding that a "three strikes" finding meant the rest of his life in prison. 9RP 75.

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[11] In the end, Afeworki turned out to be correct. An explanation of the confusion is contained in the State's Presentence Memorandum. CP 636. *See also* 23RP 196.

[12] Bible had previously assured the court that Afeworki understood the punishment that he faced: "I can competently represent that we have made very clear what the consequences are for this particular sort of case." 8RP 44.

The court postponed its final decision on Afeworki's pro se status until the following day. 9RP 95. The next afternoon, in the context of explaining that Afeworki would not get a new appointed attorney, the court mentioned that he would be allowed to proceed pro se. 10RP 115. The court then asked the prosecutor what penalty Afeworki faced if the current crime turned out not to be his third strike. 10RP 116. The prosecutor clarified that, if Afeworki's offender score turned out to be 8, the standard range for first degree murder was 370-493 months; if the score were 9, the range would be 411-548 months. 10RP 117. An additional 60 months would apply if the State proved the firearm allegation. 10RP 117. The trial court then explained the standard ranges for second degree murder. 10RP 117. While Afeworki quibbled about his "points," he confirmed that he understood the potential punishments. 10RP 118.

It was only after ensuring that Afeworki understood all of the possible punishments he faced that the trial court formally found "that Mr. Afeworki has knowingly and voluntarily waived his right to counsel," and told him, "I am going to allow you to go pro se, sir." 10RP 118, 119. The trial court acted properly here.

In spite of this record, Afeworki repeatedly insists that he was "forced" to represent himself, that he had "no choice." BOA at 21, 22.

A comparison with the facts of DeWeese is helpful here. DeWeese, like Afeworki, had had disagreements with prior attorneys that had led to their withdrawal. DeWeese, 117 Wn.2d at 372. The trial court refused DeWeese's request for a third appointed attorney, giving him the option of being represented by the second appointed attorney or representing himself. Id. The Court of Appeals firmly rejected DeWeese's claim that he had had no choice in the matter but was forced to represent himself:

> 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. These disingenuous complaints in Mr. DeWeese's case mischaracterize the fact that Mr. DeWeese did have a choice, and he chose to reject the assistance of an experienced defense attorney who had been appointed.
>
> . . .
>
> We hold that after a valid denial of a defendant's request for appointment of substitute counsel, the trial court may require the defendant to choose between remaining with current counsel or proceeding pro se.

Id. at 378-79.

Like DeWeese, Afeworki rejected the assistance of experienced defense counsel. Going forward pro se was his own choice; he cannot now argue that his waiver of counsel was invalid.

c. Afeworki Waived His Right To Counsel By His Conduct.

In addition to his knowing, voluntary and intelligent waiver of counsel, Afeworki also waived his right to counsel by his conduct. "Waiver by conduct" requires that a defendant be warned of the consequences of his actions, including the risks of proceeding pro se. Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing United States v. Goldberg, 67 F.3d 1092, 1101 (3rd Cir. 1995)).[13] "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel." Id. (citing Goldberg, 67 F.3d at 1100).

Afeworki's claim that he was not warned that his behavior could be deemed a waiver of the right to counsel (BOA at 24) is again belied by the record. Immediately after the threat to Bible ("If you play with fire, you get burned."), the trial court warned Afeworki of the consequences of such behavior going forward:

> [I]t is important for you to know that you cannot create a situation where this trial will not go forward, which is what I think that you are intending and trying to do. . . .

[13] Bishop has been cited with approval in recent years by the Washington Supreme Court. City of Seattle v. Klein, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007).

> If Mr. Bible says that he cannot continue because of what you say or do towards him and the associate counsel is unable to take over as counsel, you will be allowed to go pro se. But, you will step in at that moment with no additional prep time, nothing.

8RP 35, 37; *see also* CP 556-57 (¶ 4). The court had just reminded Afeworki that his motion for a new attorney had been denied. 8RP 36; CP 557 (¶ 4). And the risks of self-representation had been brought home to Afeworki on more than one occasion. 23RP 12-14, 17-23; 9RP 77-86.

Afeworki did not cease his misbehavior. As they were leaving the very hearing at which Afeworki had been warned of the consequences, Afeworki accused Bible of "shak[ing] [Afeworki's] sister down" for money. 9RP 53-54. Bible reported this to the court the next day and explained that, under the circumstances, he perceived this comment as a threat to his livelihood. 9RP 54-55. Bible also reported that Afeworki had told Bible that he knew Bible's little sister, Eva. 9RP 93; CP 557 (¶ 6). In light of Afeworki's other comments, Bible could reasonably perceive this as a threat as well.

The record is thus clear that Afeworki deliberately persisted with the same type of threatening and harassing behavior even after being warned by the court that any more such behavior would result in his attorney being allowed to withdraw, no new attorney being

appointed, and Afeworki being required to represent himself with no continuance of his trial. Accordingly, Afeworki waived his right to counsel by his own conduct.

"What the defendant cannot obtain because of a lack of a valid reason, that defendant should not be able to obtain through disruption of trial or a refusal to participate. A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial." DeWeese, 117 Wn.2d at 379. The record is replete with Afeworki's manipulation. *See, e.g.,* 23RP 21 (when offered a new lawyer, Afeworki insists on representing himself), 33-34 (withdrawing from pro se status one week later, "[u]nder duress and under fear"); 8RP 24, 26 (insisting on his constitutional right to represent himself); 9RP 60 (one day later, upon being told he will be allowed to represent himself – "I would like a different attorney. I would like a different attorney."). The trial court repeatedly and reasonably concluded that Afeworki's purpose was to delay and disrupt his trial. 8RP 35; 9RP 67-70, 92-93; 10RP 115-16; 11RP 212-13; 12RP 22; CP 558. He should not be allowed to profit from this manipulation.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING AFEWORKI TO WEAR A SECURITY DEVICE THAT WAS INVISIBLE TO THE JURY AND HAD NO EFFECT ON THE OUTCOME OF HIS TRIAL.

Afeworki claims that the trial court simply deferred to the wishes of security officers in ordering Afeworki to wear an invisible electronic restraint during his trial. In doing so, Afeworki argues, the court abused its discretion. He further argues that the alleged error was not harmless, and that his conviction must be reversed.

Afeworki's claim fails. There was ample evidence in the record of Afeworki's disorderly and disruptive behavior in court. Moreover, the trial court chose the least restrictive means – the "Band-It" electronic restraint system, which is worn under clothing and is thus invisible to the jurors. Finally, because the jurors could not have been aware of the "Band-It," because there is no evidence that the device had a deleterious effect on Afeworki's presentation of his case, and because there was overwhelming evidence that Afeworki murdered Michael Yohannes, any error in ordering the "Band-It" was harmless beyond a reasonable doubt.

a. The Trial Court Had A Sufficient Basis To Order Afeworki To Wear The Band-It.

Following a hearing in the trial court, the court ordered that Afeworki be required to wear an electronic device known as the "Band-It." 10RP 140-53; CP 265. The device is essentially a tazer contained in a band that is worn under a sleeve or pant leg. 10RP 148. The device is invisible when worn. 10RP 148. It does not constrain the wearer's movements in any way. 10RP 149.

"[A] defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." State v. Clark, 143 Wn.2d 731, 772, 24 P.3d 1006 (2001). At the same time, trial courts have broad discretion in deciding what security measures are necessary to maintain decorum in the courtroom and protect the safety of its occupants. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The court must base its decision to physically restrain a defendant on evidence indicating that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, *or that the defendant cannot behave in an orderly manner while in the courtroom.* State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999).

Courts have set out a list of specific factors that may be considered in determining whether the use of restraints is justified: 1) the seriousness of the present charge; 2) the defendant's temperament and character; 3) his age and physical attributes; 4) his past criminal record; 5) past escapes or attempted escapes, and evidence of a present plan to escape; 6) threats to harm others or cause a disturbance; 7) self-destructive tendencies; 8) the risk of mob violence or of attempted revenge by others; 9) the possibility of rescue by other offenders still at large; 10) the size and mood of the audience; 11) the nature and physical security of the courtroom; and 12) the adequacy and availability of alternative remedies. Damon, 144 Wn.2d at 691.

A number of these considerations support some type of restraint in Afeworki's case. Afeworki was charged with an extremely serious offense – first degree murder with a firearm. CP 1. He was subject to either a life-without-parole sentence (if found to be a persistent offender) or an extremely high term-of-years sentence based on his high offender score. CP 565.

Afeworki's unruly temperament was on display throughout the trial. The trial court more than once threatened to have him removed from the courtroom because he was disrupting the

proceedings. 8RP 16, 18, 27; 23RP 224-25 (court had Afeworki removed and terminated proceeding). The court was forced on numerous occasions to chide him for interrupting the court and counsel. 4RP 15-19; 8RP 7-8; 16RP 12; 23RP 73-74. He was repeatedly rude to the court. 8RP 35 ("I don't want to hear nothing from you, your Honor."); 15RP 24 ("I don't got time for that shit."); 18RP 6 ("Bullshit. I don't want to hear nothing more you have to say."), 165 ("You're crazy. You lost your rabid-ass mind in this courtroom."); 20RP 14 ("You crazy."), 126-27 ("My God, are we done? . . . So are we done? Are we done or what?"); 23RP 89 ("[E]verything that you're saying just sounds like a whole bunch of bullshit."). During a hearing on July 16, 2013 (only two days before the court ordered the "Band-It"), the court was forced to recess the proceedings twice in an attempt to control Afeworki's disruptive behavior, and the number of jail personnel in the courtroom was doubled from two officers to four. CP 249-50; 8RP 12, 36.

As to age and physical attributes, Afeworki was born on September 19, 1983; he was thus in his late 20's during these proceedings. CP 572. He was 5'10" tall, and weighed 190 pounds. CP 6. There is nothing to indicate that he was not capable of

physically disrupting the court, should his anger and frustration boil over.

Afeworki's criminal record was replete with serious crimes, including second degree assault with a weapon, first and second degree burglary, unlawful imprisonment, first degree unlawful possession of a firearm, and possession of cocaine. CP 569. Moreover, counsel and the court reasonably believed that this conviction might very well be Afeworki's third strike. CP 636; 23RP 196. As the attorney for the King County Jail noted, Afeworki's status as a potential persistent offender left him with "nothing to lose" should he attempt to escape or assault someone in the courtroom. 10RP 123, 141.

In addition to his verbally aggressive behavior toward the court, Afeworki had actually threatened his attorney.[14] Bible, who was well acquainted with his client and had heard the threat ("If you play with fire, you get burned."), quite reasonably did not believe that it was limited to a threat to sue. 8RP 33; 9RP 93. Afeworki made additional comments that Bible took to be threats to both his livelihood and the well-being of his younger sister. 9RP 53-55, 93.

[14] The jail's attorney explicitly relied on this threat at the hearing as part of the reason for security concerns. 10RP 155.

While there was no direct evidence of an escape plan, or rescue by others, the attorney for the jail cited evidence of Afeworki's membership in at least two gangs, which might provide assistance in escape or in assaulting someone in the courtroom. 10RP 141.

Finally, the court considered and rejected other, more restrictive alternatives, such as a belly chain with standard handcuffs, or soft hand restraints. 10RP 147-48, 152.

Contrary to Afeworki's claim, the court did not simply accept the jail's suggestions as to security measures. While the court accepted the jail's assessment of Afeworki's "security risk level," this was not the sole basis for the court's decision. In response to Afeworki's insistence that he would not cause problems, the court relied on its own experience: "I hardly have defendants, when this issue comes up who say, 'oh yes, I am going to jump up and attack.' It usually happens in a fit of anger." 10RP 152.

Thus, many of the factors that support some type of courtroom restraint are present in this case.[15] Moreover, it is important to recognize the nature of the Band-It system. Unlike

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[15] The numerous factors supporting the use of the electronic restraint belie Afeworki's argument that the trial court based its decision solely on Afeworki's exercise of his right to represent himself. BOA at 26-27.

most restraints, which are either visible to a jury or readily perceived by jurors, the band employed in Afeworki's case is placed under a shirt sleeve or a pant leg; it is invisible when the person is clothed. 10RP 148. As such, it could not have undermined the presumption of innocence in the jury's eyes. *Cf.* Damon, 144 Wn.2d at 692-93 (jurors were aware that defendant was confined in a restraint chair); Clark, 143 Wn.2d 774 (jurors could infer shackling from defendant's "stilted and restrained movement").

Afeworki relies on federal cases to argue that electronic restraints raise the same constitutional concerns as bonds or shackles. BOA at 7-8. But both Gonzalez v. Pliler, 341 F.3d 897 (9th Cir. 2003) and United States v. Durham, 287 F.3d 1297 (11th Cir. 2002) involved "stun belts." These devices have metal prongs that may leave welts on the skin that can take six months to heal. Gonzalez, 341 F.3d at 899. It is easy to conceive how such a device could have a lasting impact on a defendant throughout the trial. By contrast, there is no indication in this record that the Band-It causes any pain or discomfort to the wearer.

Moreover, there is no reason to believe that the likelihood of fear and anxiety relied upon in those cases was present here. The

jail's attorney assured the court that Afeworki would be informed every morning of what activities – e.g., lunging at someone – would cause the Band-It to be activated. He was informed that rudeness or interrupting the court would not trigger this consequence. And because Afeworki remained seated at counsel table throughout the trial, the chances that he would make a move that would inadvertently lead to activation of the device were minimized.[16] Afeworki can point to nothing in the record indicating that the Band-It system caused him undue anxiety, or in any way hindered him in presenting his case to the jury.

b. Any Error Was Harmless.

A claim of unconstitutional shackling is subject to harmless error analysis. State v. Elmore, 139 Wn.2d 250, 274, 985 P.2d 289 (1999). In order to succeed on such a claim, a defendant must show "a substantial or injurious effect or influence on the jury's verdict." Id. (quoting State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)). Other than the vaguest generalities, Afeworki has not even attempted to show how the Band-It system affected

[16] The trial court required both the prosecutor and Afeworki to remain seated at counsel table during the trial. 10RP 141, 142, 144.

him or deprived him of a fair trial. Any error was harmless. *See* Hutchinson, 135 Wn.2d at 888 ("The Defendant does not argue persuasively that he was prejudiced in any way by the unseen restraints. Accordingly, we hold that any error was harmless.").

Even if it is the State's burden to show that any error in using the Band-It was harmless beyond a reasonable doubt, the burden has been met on this record. Error of constitutional magnitude is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

First of all, given that the band Afeworki wore was invisible to the jury, caused him no pain, and was unlikely under the circumstances of this case to have caused such fear and anxiety as to hamper him in the presentation of his defense, it cannot be said that the device affected the outcome of his trial. *See* State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), review denied, 148 Wn.2d 1001 (2003) (finding any error harmless where stun belt was not visible to jury); State v. Monschke, 133 Wn. App. 313, 336-37, 135 P.3d 566 (2006), review denied, 159 Wn.2d 1010 (2007) (finding that defendant had not shown prejudice where stun belt

was invisible and defendant offered only conclusory statements that belt hampered his participation in his defense); *see also* Arizona v. Benson, 232 Ariz. 452, 461-62, 307 P.3d 19 (2013) (distinguishing stun belt from such visible restraints as shackles and gags); Mungo v. United States, 987 A.2d 1145, 1149 (D.C. 2010) (questioning whether stun belt is a "physical restraint" for purposes of cases governing use of restraints).

Moreover, the evidence against Afeworki was overwhelming. An eyewitness who was acquainted with Afeworki identified him as the shooter. Several other eyewitnesses identified him by his distinctive clothing. He was followed from the scene by a witness who pointed out to police the building (if not the exact door) that the shooter had entered. Afeworki was the only person in the bathroom in the Zaina Restaurant, and he was arrested as soon as he emerged. The gun that was used in the shooting was found in the trash can in that bathroom. A partial DNA profile linked Afeworki to the gun with a probability level of 1/120,000. Shortly after his arrest, Afeworki made a statement to a homicide detective that a jury would likely interpret as a confession of guilt ("Man, I am going to be as old as you when I get out.").

Under all of these circumstances, it is clear that any error in requiring Afeworki to wear an invisible electronic device while presenting his case to the jury was harmless beyond a reasonable doubt.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Afeworki's conviction for Murder in the First Degree.

DATED this 4th day of November, 2014.

Respectfully submitted,

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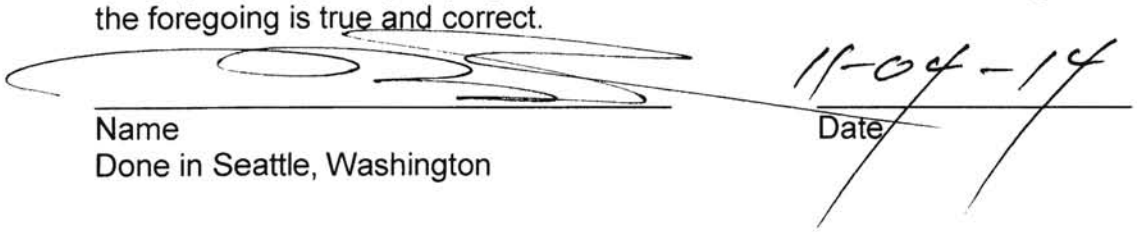
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Gregory C. Link,** the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. TOMAS AFEWORKI**, Cause No. **70762-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



11-04-14

Name Date

Done in Seattle, Washington