NO. 45654-1
47394-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY J. ROHN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 13-1-02680-7

BRIEF OF RESPONDENT

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

1. Did the trial court err by denying the defendant's motion for self representation where the defendant did not show that he had made a voluntary and knowing and intelligent decision?

2. Did the trial court err by permitting the defendant to defend himself with general denial when the defendant explicitly objected to an insanity defense?

3. Is remand for correction of the defendant's community custody term required?

B. STATEMENT OF THE CASE.

On July 3, 2013, appellant Timothy J. Rohn ("defendant") was charged with felony harassment stemming from a July 2, 2013, incident on a treatment ward at Western State Hospital. CP 1-2. His first appearance was held on July 3, 2013. 1 RP 4-5[1]. At the first appearance, the court deferred arraignment and ordered a competency evaluation at the request of the prosecution with the agreement of the defense. 1 RP 3-4. CP 6-10. On August 15, 2013, the court found the defendant competent, arraigned him, entered a competency order, and set the case for trial. CP 52 - 54.

[1] The verbatim record in this case consists of ten volumes. In this brief the volumes have been assigned a volume number in chronological order from 1 – 10. The references are to the particular volume and page number.

The trial court set an omnibus hearing for September 9, 2013. At the hearing the court heard defense counsel's motion for a continuance. 2 RP 5. The defendant objected to the continuance and requested leave to represent himself so that the continuance would not be granted. 2 RP 5-6. The court granted the continuance and set over the defendant's request to represent himself. 2 RP 8. A self representation hearing was set for September 23, 2013. 2 RP 8.

The self representation hearing was heard on September 23, 2013. 3 RP 3. On that date the court engaged in a colloquy with the defendant and the attorneys. 3 RP 4-10. The trial court denied the motion. 3 RP 10-11. The defendant was represented at all further proceedings.

On November 13, 2013, defendant was charged with several additional offenses. The amended charges included a total of six counts: first degree arson, two counts of first degree malicious mischief, felony harassment, intimidating a public servant and third degree theft. CP 129-131. His case proceeded to trial.

The trial court heard pretrial motions on November 6, 2013. During the pretrial motions, the defendant changed his mind about self representation. 5 RP 61. Although he was not entirely in agreement with his counsel's trial strategy, he explicitly requested that she represent him at trial. 5 RP 61, 63. He also explicitly objected to an insanity defense. He

advised the court that he was highly intelligent and that he had deceived Western State professionals and malingered in order to obtain an insanity plea on a prior felony. 5 RP 11, 17-19. He then stated that he was not insane and that "I feel that I don't belong in Western State Hospital because I don't deserve to be there." 5 RP 21.

At trial, the state presented testimony from a number inmates and staff from Western State Hospital and from law enforcement officers. The defense was general denial. 10 RP 40. The defendant did not make any motions to change his plea to insanity, nor did he request a hearing on an insanity motion. In closing argument, the defendant argued that there was insufficient proof of key elements of the crimes charged. 10 RP 41-42.

On November 22, 2013, the defendant was found guilty as charged. CP 168 - 173. He was sentenced on January 3, 2014, within the standard range to 61 months in prison. CP 197-210. The judgment and sentence form included a reference that community custody would be the longer of the period of earned early release or a specific number of months. CP 204-05. In an order correcting the judgment and sentence entered on August 1, 2014, the trial court changed the length of the term for count one from 12 to 18 months, but otherwise left intact the reference to earned early release. The defendant's notices of appeal were timely filed on January 23, 2013, and August 27, 2014. CP 249, 261.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ITS RULINGS CONCERNING SELF REPRESENTATION.

Criminal defendants have both a federal and state constitutional right to self representation at trial. Sixth Amendment. Article 1, § 22. ***In re Rhome***, 172 Wn.2d, 654, 260 P.3d 874(2011), *citing*, ***Indiana v. Edwards***, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345(2008), and ***State v. Kolocotronis***, 73 Wn.2d 92, 436 P.2d 774 (1968). Neither right is absolute. ***In re Rhome***, 172 Wn.2d at 661-62.

Whether or not to permit a criminal defendant to represent himself is a matter entrusted to the discretion of the trial court. ***State v. Hahn***, 106 Wn.2d 885, 726 P.2d 25(1986). Such decisions are to be made on a case by case basis taking into account "the particular facts and circumstances of the case, including the background, experience and conduct of the accused." ***State v. Hahn***, 106 Wn.2d at 900. This court reviews such decisions for an abuse of discretion. ***State v. Lawrence***, 166 Wn. App. 378, 394, 271P.3d 280(2012). Abuse of discretion means that the decision was "manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard." ***State v. Coley***, 180 Wn.2d 543, 559, 326 P.3d 702(2014)(internal quotation marks omitted).

In ***Coley***, *supra,* the trial court ruled several times on a defendant's self representation requests. As in this case, the defendant in ***Coley*** changed his mind before ultimately deciding against conducting the trial *pro se*. The trial court ruled that Coley would continue to be represented by an attorney. As to that ruling, the Supreme Court stated that the trial court had not abused its discretion. Coley had "made no unequivocal requests after he was deemed competent to stand trial." ***State v. Coley***, 180 Wn.2d at 560. The court also observed that "courts are required to indulge in 'every reasonable presumption against a defendant's waiver of his or her right to counsel.' " *Id.* at 560, *quoting,* ***State v. Madsen***, 168 Wn.2d 496, 504, 229 P.3d 714(2010).

Where a defendant asks to represent himself, the request must be shown to have been unequivocal, knowing, voluntary, intelligent, and timely. ***City of Bellevue v. Acrey***, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984), ***State v. Vermillion***, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003). In cases involving a defendant with a mental health history, it is permissible for a court to consider that history in its ruling on a motion for self representation. ***In re Rhome***, 172 Wn.2d, 654, 665, 260 P.3d 874(2011). The court may also consider the context in which a self representation request is made, particularly where it is made in conjunction with a defendant's objection to a continuance

motion. ***State v. Woods,*** 143 Wn.2d 561, 587-88, 23 P.3d 1046 (2001), ***State v. Luvene,*** 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). Considering the consequences of the decision to proceed *pro se*, an "accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandably has been made." ***State v. Chavis***, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982).

In this case, in an appearance before the criminal presiding judge, the defendant made his initial self representation request while simultaneously objecting to a short continuance. 2 RP 6. This is similar to the context in which self representation was raised in ***Woods*** and ***Luvene***. The trial court reasonably granted a continuance of a little more than a month, but set a much quicker hearing date for the self representation motion. The decision to grant or deny a continuance motion is generally left to the trial court's discretion. ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 116 (2004). Such decisions are reviewed for an abuse of discretion and will not be reversed "absent a showing of manifest abuse of discretion". ***State v. Campbell***, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). It can hardly be said that the court abused its discretion by granting the short continuance while at the same time setting a separate

self representation hearing. To have decided the self representation issue without due deliberation or a meaningful colloquy or an adequate record would have been an abuse of discretion.

The self representation hearing on September 23, 2013, included a meaningful colloquy. During the colloquy, the defendant advised the court that his education was limited to the equivalent of a high school diploma. 3 RP 5. He admitted that he was not then familiar with the rules of evidence. 3 RP 5. Regarding his knowledge of criminal procedure, he stated that he had come by what knowledge he had through having previously been in court as a criminal defendant. 3 RP 6. He stated that his trial strategy was to not challenge any of the state's evidence, and to only present a closing argument. 3 RP 7-8. Considering the deficits in the defendant's trial strategy and his ability to adequately represent himself, the trial court appropriately had "grave concerns about whether [the defendant] completely understands what it is that he is doing at this point in time asking to represent himself." 3 RP 10.

The trial court's caution was prudent and providential. The court did not rule that its decision could never be revisited. It based its decision on the record that had been made "at this point in time. . . ." 3 RP 10. In due course the issue of self representation was again brought before the court during preliminary matters before the trial. 5 RP 60. At that time,

the defendant unequivocally elected to be represented by his attorney. 5 RP 61, 62 - 63. Not surprisingly, his decision was respected and the defendant was ably represented by his lawyer for the remainder of the proceedings.

Had the defendant persisted in his request for self representation, his arguments might have more weight. Such was the case in ***State v. Breedlove***, 79 Wn. App.101, 110, 900 P.2d 586(1995). In ***Breedlove,*** the defendant filed either two or three (the record on appeal was unclear) written motions for self representation and unequivocally made an oral request "that I be able to handle my own defense." ***State v. Breedlove***, 79 Wn. App. at 105. Because there was no evidence of improper motive or of an impairment of the orderly administration of justice, the ***Breedlove*** court held that the denial of self representation was an abuse of discretion and not subject to harmless error analysis. ***State v. Breedlove***, 79 Wn. App. at 110.

By contrast to ***Breedlove***, in this case the defendant went to trial with counsel after explicitly requesting that he be represented by counsel. There can hardly have been an abuse of discretion in this case when the trial court ruled in accordance with the defendant's stated preference. The trial court's rulings should be affirmed.

2. THE TRIAL COURT DID NOT ERR BY PERMITTING THE APPELLANT'S GENERAL DENIAL DEFENSE.

Insanity is an affirmative defense that must be pleaded by a defendant at or within ten days of arraignment. RCW 10.77.030(1). Insanity at the time of the offense may be pursued via a motion to the court or as a defense at trial. RCW 10.77.040 and 080. It must be proved by a preponderance of the evidence. RCW 10.77.030(2).

In this case, the defendant objected forcefully to an insanity defense. 5 RP 21. A court may interpose an insanity defense over a defendant's objection in "only the rarest of cases". ***State v. Jones***, 99 Wn.2d 735, 747, 664 P.2d 1216(1983)(court must be assured that a competent defendant is knowingly waiving an insanity defense). Insanity, like other affirmative defenses, is a decision reserved to the defendant "out of respect for a defendant's individual freedom". *Id.* at 743. Several cases have reversed a trial court for imposing an affirmative defense over a defendant's objection. ***State v. Coristine***, 177 Wn. 2d 370, 40-05, 300 P.3d 400 (2013)(error to instruct on an affirmative defense to second degree rape over a defendant's objection). ***State v. McSorely***, 128 Wn. App. 598, 116 P.3d 431(2005)(error to instruct on an affirmative defense to child luring over a defendant's objection).

During preliminary matters the defendant asserted and the trial court found that he is highly intelligent. 5RP 17. He admitted having falsely presented an insanity defense in the past by malingering and manipulating the Western State evaluators. 5 RP 19. He had been confined at Western State Hospital as a result and was unhappy with the conditions there. With that experience in mind his primary aim was to go to trial without a mental health defense. He had decided that his past malingering and manipulation had done him no good and that he was ready for a change. As he put it:

> And I feel like I can't turn that around until I face up to what I do, which is get over and play the system. I need to sit down and seriously make amends for my behavior and work on my issues. And that's what I want. 5 RP 21.

Whether or not a defendant validly declines to pursue an insanity defense is a judgment left to the trial court's discretion. ***State v. Higa,*** 38 Wn. App. 522, 524, 685 P.2d 1117(1984). In this case, the trial court's exercise of discretion occurred after the defendant had spelled out what he hoped to accomplish at trial. The defendant did not want to be returned to Western State Hospital. He had experience with having been held there and did not wish his detention at the hospital to continue. He did not want to plead guilty. He did not want to give up any of his trial-related rights. He was willing to accept the judgment of the court and become a model prisoner.

It can hardly be said that the trial court abused its discretion by permitting the defendant to present the trial defense that he explicitly wanted. The defendant knew better than most the consequences of an insanity plea and the trial court was aware of his insight. That knowledge, coupled with the defendant's undisputed intelligence, is all that was required for the court to allow the defendant to assert a general denial defense. The court's respect for the defendant's election was admirable. There is no reason for defendant's conviction not to be affirmed.

3. REMAND IS REQUIRED FOR THE TRIAL COURT TO AMEND THE COMMUNITY CUSTODY TERM CONSISTENT WITH RCW 9.94A.701(2) and (3).

Until 2009, trial courts were required to impose a community custody range for violent offenses, or "up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer". RCW 9.94A.701(1). In 2009, this section was re-written so that trial courts now must sentence offenders to community custody for a straight up eighteen months for violent offenses such as first degree arson, or twelve months, for a crime against persons. RCW 9.94A.701(2) and (3).

In this case, both the original judgment and the subsequent order correcting referenced the period of earned early release from former RCW 9.94A.701. Under the current statute, "a court may no longer sentence an offender to a variable term of community custody [that is]

contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." ***State v. Franklin,*** Wn.2d 831, 836, 263 P.3d 585 (2011). This error is not an error susceptible of correction by Department of Corrections and thus remand is appropriate for the trial court to correct the community custody terms. ***State v. Boyd,*** 174 Wn.2d 470, 473, 275 P.3d 321(2012).

D. CONCLUSION.

The State urges the Court to affirm the defendant's conviction, but to remand to the trial court for entry of an order correcting the community custody terms.

DATED: February 2, 2015.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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