NO. 46685-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EXPY SANABRIA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson, Judge
The Honorable Garold Johnson, Judge

No. 13-1-04475-9

BRIEF OF RESPONDENT

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

1. Whether Defendant failed to show that the trial court abused its discretion in denying his motion to proceed *pro se* where that motion was not unequivocal.

2. Whether the trial court properly denied Defendant's motion to suppress evidence where the affidavit for search warrant established, *inter alia*, a nexus between the criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched, and hence, established probable cause for the search warrant based thereon.

3. Whether Defendant failed to show that the trial court abused its discretion in denying his motion to compel discovery of police reports regarding previous controlled buys where those reports were not relevant to the charged crime, and hence, not discoverable under CrR 4.7, and Defendant failed to otherwise show that they were favorable to him and material to guilt or punishment.

4. Whether Defendant failed to show that the trial court abused its discretion in denying his motion for a continuance to secure the testimony of Officer Conlon.

5. Whether, where the sentencing court does not seem to have made an individualized inquiry into Defendant's current and future ability to pay before it imposed a discretionary legal financial obligation, the matter should be remanded solely to allow the court to make such an inquiry.

B. STATEMENT OF THE CASE.

1. Procedure

On November 21, 2013, the State charged Expy Sanabria, hereinafter referred to as "Defendant," by information with unlawful possession of a controlled substance with intent to deliver, methamphetamine in count I and unlawful possession of a controlled substance with intent to deliver, marijuana in count III. CP 1-2.[1] *See* CP 3-4. The information listed Dany Ann, cause number 13-1-04476-7, as a co-defendant. CP 1.

On December 26, 2013, Defendant filed a letter with the superior court expressing his dissatisfaction with his assigned trial counsel, stating that there was "a [m]ajor conflict[,]" and "***asking for New Counsel*** that will work effectively on [his] case." CP 12-13 (emphasis added).

Then, at a January 10, 2014 hearing, Defendant who appeared with his court-appointed counsel, orally moved the court to allow him to proceed pro se, and to have stand-by counsel, other than his then currently-assigned defense counsel, appointed. 01/10/14 RP 2-9.[2]

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[1] The information did not include a "Count II." *See* CP 1-2.

[2] The verbatim report of proceedings consists of six consecutively-paginated volumes titled "Trial," followed by the volume number, which are herein cited in the form: RP [Page Number]. The remaining volumes are cited in the form: [Date of Proceeding] RP [Page Number].

The court ruled as follows:

> If you want to go pro se, I'll let you go pro se, but I'm going to ask [your already-appointed defense counsel] to remain as standby. I'm not letting you shop for standby counsel. If you don't want to accept her advice or assistance, don't.

01/10/14 RP 9.

The court continued

> I'll give you a little bit to think about it, but, you know, you go pro se at your own risk. You, I think, lessen the chance of getting – I mean, it will be a fair trial, but in terms of an effective defense, I think you lessen it if you try to go pro se.
>
> Do you want to think about it?

01/10/14 RP 10. The defendant asked how much time he had to do so, and the court informed him the trial was being continued. 01/10/14 RP 10. The court ultimately stated,

> I'm going to deny the motion without prejudice at this time. Think about it, okay? And "without prejudice" means if you decide in a week that you just got to do it, then you can come back and try to do it. I don't want you to jam yourself up, though, and I think you're getting ready to hurt yourself.

01/10/14 RP 11-12.

On March 11, 2014, the court heard Defendant's motion to compel discovery, including discovery of police reports detailing the two

controlled drug buys described in the complaint for search warrant. 03/11/14 RP 2-5, 7, 9. The State argued that the reports contained "information that would reveal the identity of the informant" and that "because the buys aren't charged" crimes, the reports were irrelevant to the instant case. 03/11/14 RP 8. The court denied the motion. 03/11/14 RP 9-10. Defendant made this motion again when the case was called for trial on June 23, 2014, RP 67-72, and the court denied it again. RP 73.

Defendant also moved the court to compel discovery of a vehicle registration and a suspect photograph shown to the confidential informant who conducted the controlled buys. 04/16/14 RP 2-8. The court denied the motion with respect to the registration, but granted it with respect to the photograph. 04/16/14 RP 8-12.

On April 14, 2014, Defendant moved to suppress evidence found in the residence because, he argued, the affidavit for the search warrant "fail[ed] on its face to establish probable cause because it d[id] not establish a factual nexus between the observed criminal activity and the searched premises." CP 34-60; 04/14/14 RP 2-9, 13-16. Alternatively, he moved for a hearing pursuant to ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). 04/14/14 RP 2-9, 13-16; CP 34-60. *See*

06/17/14 RP 7-11. The trial court found that because the defendant went to the two controlled buys directly from the residence in question, made the sales, and returned to that residence immediately afterwards, "there was dealing going on inside the home in some fashion," and "a nexus between the criminal conduct and th[e] residence [searched]." 04/14/14 RP 17; CP 131-35. *See* 04/16/14 (Johnson) RP 2-4. The court therefore denied the motion to suppress. 04/14/14 RP 17; CP 131-35. *See* 04/16/14 (Johnson) RP 2-4.

It also denied Defendant's motion for a ***Franks*** hearing because "there is no showing of any sort of deliberate misconduct or reckless disregard of the truth." 04/14/14 RP 17; CP 131-35. *See* 04/16/14 (Johnson) RP 2-4.

Defendant moved for discretionary review of the court's denial of his motion to suppress and for a ***Franks*** hearing, CP 141-46, but this Court denied that motion. CP 172

On June 23, 2014, the case was called for trial, along with that of co-defendant Ann. RP 3. The court conducted a hearing pursuant to CrR 3.5 on the admissibility of Ann's statements to police, RP 5-29, at which Lakewood Police Officer Jeff Martin testified, RP 5-24, and held that

those statements were admissible at trial. RP 29; CP . *See* 06/25/14am RP 24-26.

Defendant made another motion for a ***Franks*** hearing, RP 30-34, 41-47, but the court found it was "not persuaded" that there was "an intentional misrepresentation" in the search warrant affidavit and denied the motion. RP 51-53; CP 157-69. *See* CP 8-11.

Defendant then moved to sever his trial from that of his co-defendant arguing the co-defendant's statements, even if redacted, would be prejudicial, RP 53-59, but the court found that the statements at issue did "not directly incriminate[e D]efendant," and denied the motion. RP 59-64.

The State filed an amended information, which eliminated count III, CP 177, *see* RP 57, 64-66, and the court arraigned Defendant on that amended information. RP 122-23.

The court heard motions in *limine*. RP 73-75, 303-38, 344-49, 416-25.

The court heard the State's proffer to authenticate and ultimately admit a recording of a telephone conversation in which Defendant participated while in jail, RP 93-117, at which Jail Safety Officer Don

Carn testified, RP 94-112. It held that the recording was authentic for purposes of admissibility at trial. RP 117-21.

A venire was selected and sworn, and the parties conducted *voir dir*e and selected a jury. RP 121, 123-25, 128-56, 173-265, 271-75, 276-90 (peremptory challenges), 290-92, 342-45. *See* RP 77-81. The court then administered the oath and gave instructions. RP 292-303.

Defendant moved to dismiss, or alternatively, for a new venire, based on alleged prosecutorial misconduct during *voir dire*, but those motions were denied. RP 266-70.

Defendant later moved to dismiss, again based on prosecutorial misconduct in allegedly failing to provide timely discovery of documents seized from the residence searched, RP 397-414. The court did not dismiss, but ruled that documents bearing the address of the residence searched be redacted to eliminate that address or excluded from evidence. RP 414-16, 425-26.

The State subpoenaed Officer Sean Conlon, but he, with the exception of coming to work to serve a search warrant one morning, was on vacation for his daughter's wedding at the time of the trial. RP 125-27, 307-08, 341, 431, 510-25. During *voir dire*, Defendant moved to continue

or recess the trial to secure the presence of Conlon, despite not issuing a subpoena until after the case was called for trial.[3] RP 162-63, 165-73, 308-09. The court denied the motion, RP 173, and ultimately found that Conlon's testimony would not be material because Defendant made "no showing that the evidence he would provide is anything different than what's in front of the jury already in the first place or would counter anything that the jury has already that the jury is entitled to hear." RP 523-26, 558. The defendant announced his intention to call the person who served Conlon's office with a subpoena, but the court excluded such testimony. RP 551-59.

The parties gave their opening statements. 06/25/14am RP 3.

The State called Forensic Scientist Mark Strongman, 06/25/14am RP 3-24, Lakewood Police Investigator Jeffrey C. Martin, 06/25/14am RP 26-44, RP 350-70, 374-96, 426-39, Pierce County Corrections Deputy Donald Carn, RP 439-65, and Lakewood Police Officer Jeremy James, RP 470-550.

The State then rested. RP 570.

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[3] The court signed Defendant's subpoena for Officer Conlon on June 24, 2015. RP 308; CP 272-73.

Defendant Ann moved to dismiss for insufficient evidence, but that motion was denied. RP 576-85. Defendant also moved to dismiss for lack of sufficient evidence of intent to deliver, RP 585-87, and the court denied this motion, as well. RP 587-88. Neither Defendant presented a case. *See* RP 559, 570, 601.

The parties discussed proposed instructions to the jury. RP 160, 559-69, 571-76, 588-89. *See* CP 246-71. The court took the parties' exceptions to its proposed instructions, RP 589-97, and read its final instructions to the jury. RP 601-02, 652-55; CP 288-312.

The parties then gave their closing arguments. RP 602-21 (State's closing argument); RP 621-32 (Defendant's closing argument); RP 633-43 (Co-Defendant Ann's closing argument); RP 643-52 (State's rebuttal argument).

On June 27, 2014, after asking a question, RP 664-72, the jury returned a verdict of guilty as charged in the amended information. RP 672-77, CP 286.

On September 11, 2014, the court sentenced Defendant to a standard range sentence of 70 months in total confinement, and 12 months in community custody. CP 325-38. The State asked that the court impose $1,300 as recoupment for the services of Defendant's court-appointed

attorney, RP 689, but Defendant objected to this, RP 691-92, and the court reduced it to $500, finding that "$1,300 seems excessive in this particular case for DAC." RP 693; CP 329.

Defendant filed a timely notice of appeal the same day he was sentenced. CP 319. *See* RP 694-95.

2. Facts

On November 30, 2013, Lakewood Police served a search warrant on a trailer used as a residence, located at 3301 80th Street Court South, No. 63 in Lakewood, Washington, and on a 2004 Acura TL automobile. RP 350-52.

At about 9:00 that morning, an entry team staged near the residence, and Lakewood Police Investigators Martin and Conlon, using an unmarked Chevrolet Tahoe, conducted surveillance of the residence itself. RP 353. Martin and Conlon circled the block around the residence, and as they were on their way out of the horseshoe-shaped driveway of the residence, saw an Acura TL driving towards them. RP 354.

They stopped the vehicle within 50 to 100 feet of the residence, and contacted Defendant, who was driving that vehicle. RP 354-55, 430. Defendant was detained, and Martin and Conlon searched his person. RP

355-56, 430. They found two one-half to one-inch by one-inch Ziploc baggies of methamphetamine in Defendant's "right front coin pocket[,]" RP 355-56, and $781.00 in cash. RP 357-61, 428, 490-1; Exhibit 46. The baggies themselves were black in color with a design consisting of gold-colored skulls on their front sides, and contained crystal methamphetamine, or crystal "meth." RP 356, 360. *See* 06/25/14am RP 30-39. The cash was in denominations of hundreds, fifties, twenties, tens, fives, and ones. RP 357. The investigators searched the Acura, but found nothing additional of evidentiary interest inside. RP 357, 429.

Specifically, investigators did not find a pipe, a lighter, tubing, foil, or matches on Defendant or in the vehicle he was driving. RP 357-58.

After Defendant was searched, the entry team was ordered up to the residence, and knocked and announced. RP 365-66, 473. They received no response, and gained entry through an unlocked door. RP 365-66, 473-74. Co-defendant Ann was found inside the residence, read the ***Miranda***[4] warnings, and interviewed. RP 366-67, 474. She confirmed that she resided in the residence and that there were "drugs" in the house. RP 367, 384. Ann told Investigator Martin that these drugs were stored in a

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

cooler inside the trailer. RP 367-68. Ann did not display any signs of drug use. RP 433.

Investigator Conlon handled a search dog that found a cooler matching Ann's description inside the residence. RP 368-70, 376, 389-90, 428, 436; Exhibit 34. It was in the utility/storage /washroom of that residence. RP 539. Police found methamphetamine inside the cooler. RP 391-93. They found three small baggies of methamphetamine, empty baggies of the same nature as the baggies containing methamphetamine, and two spoons. RP 376-77, 393, 475, 491-95, 500; Exhibit 37, 41. The baggies were the same as those found on Defendant, including, apparently, the design printed on them. RP 377-79. Investigator Martin testified that designs of this sort are sometimes helpful in identifying a particular dealer's product. RP 378-39.

Three digital scales were also found inside the residence. RP 503-07; Exhibit 42, 43, 44.

Police found a half of a box of Remington .380-caliber, hollow-point ammunition in the house, in the same area as the cooler and suspected methamphetamine. RP 379-82, 501-03; Exhibit 45.

All of these items were associated with drug dealing. RP 437-38. Martin, who had training and experience, among other things, as a drug recognition expert, testified that crystal meth is smoked, and that users of that substance will typically have a smoking device or pipe and a lighter in their possession. 06/25/14am RP 30-39. People who smoke crystal meth also sometimes use tin foil in lieu of a pipe. RP 38.

Users themselves tend to have heavy calluses on their fingertips, and sometimes black smudges from the smoke itself. RP 37. Their fingertips are often "very tor[n] up." RP 37. Users also often exhibit chapped or burnt lips, often in "a crescent moon" shape, and chapped nostrils from the intense heat of the smoke. RP 37. As a result users sometimes utilize surgical tubing, towels, glows, and other "protectants" from the heat. RP 37-38.

On the other hand, people who sell illicit drugs tend to have, in addition to the drugs themselves, packaging material, such as one-inch-by-one-inch Ziploc baggies, scales, a cutting agent, such as baking soda, cash, and weapons to protect themselves and their drugs. RP 41-44.

Finally, police found documents related to Ann and Defendant inside the trailer, including two temporary and one permanent Washington

State driver's license issued to Defendant, RP 382-86, and documents and photographs of Defendant. RP 394-96, 426-27, 507-09, 534-35.

Lakewood Police Officer Jeremy James logged, collected, and transported the evidence collected from Defendant and the residence to the Lakewood Police Department, where it was logged into the police department's evidence system. RP 477-79, 528. He also noted where each piece of evidence was found and who found it. RP 525.

Defendant's mother was found to own the trailer. RP 429.

CD Recordings of two telephone calls, made November 20, 2013 one at 11:25 a.m. and one at 1:21 p.m., both initiated by Defendant from the jail, were admitted and published to the jury. RP 446-52, 463-64; Exhibit 37A.

Between March 3 and 11, 2014, Mark Strongman, a forensic scientist with the Washington State Patrol crime laboratory, tested 0.17 grams of a "crystal material" contained in a Ziploc bag and 0.39 grams of "crystalline material" in a second bag, both recovered from Defendant on the day of the search, and found that both contained methamphetamine. 06/25/14am RP 4, 9-16. *See* RP 361-62.

C. ARGUMENT.

1. DEFENDANT FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO PROCEED *PRO SE*, BECAUSE THAT MOTION WAS NOT UNEQUIVOCAL.

"The sixth and fourteenth amendments to the United States Constitution guarantee that a criminal defendant must be afforded the right to the assistance of counsel." ***State v. Hahn***, 106 Wn.2d 885, 889, 726 P.2d 25 (1986). "In ***Faretta***[***v. California***, 422 U.S. 807, 95 S. Ct. 2525 (1975)], the United State Supreme Court held that the Sixth Amendment to the United States constitution, applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a criminal trial also has a constitutional right to waive the assistance of counsel and represent himself." ***Hahn***, 106 Wn.2d at 889 (*citing* ***Faretta v. California***, 422 U.S. 807, 95 S. Ct. 2525 (1975)).

Similarly, the State Supreme Court has found that Article I, section 22 of the Washington State Constitution "grants a [criminal] defendant the explicit right to appear pro se[.]" ***In re Rhome***, 172 Wn.2d 654, 661, 260 P.3d 874 (2011)(*discussing* ***State v. Kolocotronis***, 73 Wn.2d

92, 97, 436 P.2d 774 (1968)). *See* ***State v. Madsen***, 168 Wn.2d 496, 500-03, 299 P.3d 714 (2010).

However, "[t]he right to proceed pro se is neither absolute nor self-executing." ***Madsen***, 168 Wn.2d at 504. When a defendant requests pro se status, the request must be "***unequivocal*** and timely." *Id.* (emphasis added).

"A defendant's waiver of counsel 'must be unequivocal in the context of the record as a whole.'" ***Mehrabian***, 175 Wn. App. at 691 (*quoting* ***State v. Modica,*** 136 Wn. App. 434, 441, 149 P.3d 446 (2006), *aff'd*, 162 Wn.2d 1001, 175 P.3d 1093 (2007)). The request must be "unequivocal" to "[t]o protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation[.]" ***State v. Mehrabian***, 175 Wn. App. 678, 690, 308 P.3d 660 (2013) (*quoting* ***State v. DeWeese***, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991)).

While the State has not found a precise definition of "unequivocal" in this context, a dictionary defines it as

> [n]ot equivocal: leaving no doubt:
> a: ***expressing only one meaning: leading to only one conclusion***...

> b: expressed in full and definite terms: EXPLICIT, CERTAIN...
> c: ***expressing finality: carrying no implication of later change or revision***: CONCLUSIVE, ABOLUTE
> d: not open to challenge: UNQUESTIONABLE, UNMISTAKABLE

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2492 (2002)(emphasis added). *Cf., e.g.,* ***State v. Veliz***, 176 Wn.2d 849, 867, 298 P.3d 75 (2013)(*noting* that "[w]here a [statutory] term is undefined, it should be given its plain and ordinary meaning.").

As to the requirement of timeliness, "[a] court may deny pro se status if the defendant is trying to postpone the administration of justice." *Id.* at 509. Hence,

> [i]f 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.

State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994).

"***Absent a finding that the request was equivocal*** or untimely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy." *Id.* (emphasis added). *See*

Hahn, 106 Wn.2d at 889 (*quoting* ***Faretta***, 422 U.S. at 835)("a defendant's waiver of the assistance of counsel must be made 'knowingly and intelligently.'"). Hence,

> [a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, [she or] he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that [she or] "he knows what [she or] he is doing and [her or] his choice is made with eyes open." ***Adams v. United States ex rel. McCann,*** 317 U.S. [269], at 279, [87 L.Ed. 268, 63 S.Ct. 236, 143 A.L.R. 435 (1942)].

Faretta, 422 U.S. at 835; ***City of Bellevue v. Acrey***, 103 Wn.2d 203, 209, 691 P.2d 957 (1984).

"Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request." ***Madsen***, 168 Wn.2d at 504.

"Whether there has been an intelligent waiver of counsel is an ad hoc determination which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused." ***State v. Hahn***, 106 Wn.2d 885, 900, 726 P.2d 25 (1986).

"The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, ***or*** made without a general understanding of the consequences." ***Madsen*** 168 Wn.2d at 504-05 (emphasis added).

"[C]ourts are required to indulge in ''every reasonable presumption' against a defendant's waiver of his or her right to counsel.'" ***Madsen***, 168 Wn.2d at 504 (*quoting* ***In re Det. of Turay***, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)(*quoting* ***Brewer v. Williams***, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977))).

"The determination [of whether there has been an intelligent waiver of counsel by a defendant] is within the discretion of the trial court," ***Hahn***, 106 Wn.2d at 900, and appellate courts "review a trial court's decision on such a wavier for abuse of discretion."

> A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." ***State v. Rohrich***, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (*quoting* ***State v. Rundquist***, 79 Wash.App. 786, 793, 905 P.2d 922 (1995)). Moreover, a court "would necessarily abuse its discretion if it based its

> ruling on an erroneous view of the law." ***Fisons***, 122 Wash.2d at 339 [858 P.2d 1054].

In re Personal Restraint of Rhome, 172 Wn.2d 654, 668, 260 P.3d 874 (2011). *See also, e.g.,* ***Madsen***, 168 Wn.2d at 504; ***State v. Hemenway***, 122 Wn. App. 787, 792, 95 P.3d 408 (2004).

In the present case, Defendant argues that the trial court abused its discretion in denying his request to proceed *pro se* by doing "nothing to inquire whether the request was being voluntarily, unequivocally, intelligently and knowingly made." Brief of Appellant (Br. of App.), p. 18, 15-20.

However, the record shows that any request to proceed *pro se* was not "unequivocal," and hence that the court was not required to determine if that request was "voluntary, knowing, and intelligent" by colloquy or otherwise. *See* ***Madsen***, 168 Wn.2d at 504.

Specifically, the record reveals that, on December 26, 2013, Defendant filed a letter with the superior court expressing his dissatisfaction with his assigned trial counsel, stating that there was "a [m]ajor conflict[,]" and "***asking for New Counsel*** that will work effectively on [his] case." CP 12-13 (emphasis added). Defendant made no request to proceed *pro se* in that letter. *See* CP 12-13.

Then at a January 10, 2014 hearing, Defendant, appeared with his court-appointed counsel, and orally moved the court to proceed *pro se*, and to have stand-by counsel, other than his then currently-assigned defense counsel, appointed. 01/10/14 RP 2-9. When asked for the basis of his motion, Defendant mentioned the letter he filed, in which he stated there was a conflict of interest and asked for a new attorney.01/10/14 RP 3. When asked, "[w]hat's the conflict of interest," he explained:

> ***Well, I'm not getting any help.*** We haven't – this is the first time I've seen her. We haven't gone through any kind of strategy over the case or nothing. And I just –I'm not – ***I don't think I'm going to get a fair trial, Your Honor, if I continue with her.***

01/10/14 RP 3 (emphasis added).

Defendant noted that he wasn't a lawyer, but that "I need to do this on my own or with somebody – with a standby, another standby," and again requested that he be able "to go pro se ***with another lawyer***." 01/10/14 RP 3-4.

When asked about the delay that allowing him to proceed with new counsel would cause, Defendant replied, "I mean, ***I can go with another lawyer now and be in the same position***." 01/10/14 RP 6 (emphasis added).

The court ruled as follows:

> If you want to go pro se, I'll let you go pro se, but I'm going to ask [your already-appointed defense counsel] to remain as standby. I'm not letting you shop for standby counsel. If you don't want to accept her advice or assistance, don't.

01/10/14 RP 8.

The court continued

> I'll give you a little bit to think about it, but, you know, you go pro se at your own risk. You, I think, lessen the chance of getting – I mean, it will be a fair trial, but in terms of an effective defense, I think you lessen it if you try to go pro se.
>
> Do you want to think about it?

01/10/14 RP 10. The defendant asked how much time he had to do so, and the court informed him the trial was being continued. 01/10/14 RP 10. The court ultimately stated,

> I'm going to deny the motion without prejudice at this time. Think about it, okay? And "without prejudice" means if you decide in a week that you just got to do it, then you can come back and try to do it. I don't want you to jam yourself up, though, and I think you're getting ready to hurt yourself.

01/10/14 RP 11-12.

On this record, Defendant's request to proceed *pro se* cannot be said to be "unequivocal." ***Madsen***, 168 Wn.2d at 504. He made no written

motion to proceed *pro se*, *see* CP 1-343, and the only document he did file prior to the court's ruling asked the court for "New Counsel that will work effectively on [his] case." CP 12-13. That document made no request to proceed *pro se. See* CP 12-13. Even when Defendant was able to address the court orally himself, he did no more than affirm his counsel's contention that he was asking to proceed *pro se*, and immediately noted "also, I'd like to have a standby[.]" 01/10/14 RP 2-3. When asked why, he told the court, "I'm not getting any help." 01/10/14 RP 3. Thus, while Defendant affirmed he would like to proceed *pro se*, he undercut this affirmation by stating that he wanted to do so because he wasn't "getting any help," and that he wanted standby counsel. 01/10/14 RP 2-9. A reasonable person could easily have interpreted such statements to mean that Defendant was not seeking to represent himself, but to have what he considered to be better counsel represent him more aggressively.

Indeed, even when the court offered to allow him to proceed *pro se* with his current defense attorney functioning as stand-by counsel, Defendant did not accept the offer, but asked how long he had to think about it. 01/10/14 RP 8-10.

Hence, Defendant never made a request that "express[ed] only one meaning[,]" that he wanted to proceed *pro se*, or a request that "carr[ied] no implication of later change or revision[.]" Webster's Third New International Dictionary (2002), p. 2494. As a result, he did not make an "unequivocal" request to proceed *pro se* and the trial court was not required to "determine if the defendant's request is voluntary, knowing, and intelligent... by colloquy" or otherwise. ***Madsen***, 168 Wn.2d at 504.

Placing Defendant's December 26, 2013 letter and the January 10, 2014 hearing "in the context of the record as a whole[,]" ***Mehrabian***, 175 Wn. App. at 691, only strengthens the conclusion that any attempt to waive his right to counsel made by Defendant was not unequivocal.

Rather it indicates further equivocation.

On January 24, 2014, Defendant filed an "Affidavit in Support of Motion to proceed Pro Se." CP 27. While he noted in this affidavit that he wanted to proceed *pro se*, CP 27, he did not file an actual motion to do so, set the matter for a hearing of such a motion, or ever again orally move to proceed *pro* se at any subsequent hearing. *See* CP 1-343; 03/11/14 RP 1-10; 04/14/14 RP 1-21; 04/16/14 (Cuthbertson) RP 1-13; 04/16/14

(Johnson) RP 1-5; 05/01/14 RP 1-10; 06/17/14 RP 1-14; 06/25/14 RP 1-50; RP 1-696.

Rather, on April 25, 2014, Defendant filed another letter with the superior court, again "asking for New Counsel[,]" rather than to proceed *pro se*. CP 147-51. Then, at a May 1, 2014 hearing, the date on which trial was set, CP 344, the court heard and denied Defendant's motion to be "appointed new counsel[,]" 05/01/14 RP 4-9.

Hence, while Defendant indicated he wanted to proceed *pro se* at one point, this indication was proceeded and succeeded by requests that the court appoint new counsel. In other words, Defendant's requests, even "in the context of the record as a whole[,]" ***Mehrabian***, 175 Wn. App. at 691, did not "express[] only one meaning[,]" that he wanted to proceed *pro se*, or "carr[y] no implication of later change or revision[.]" Webster's Third New International Dictionary (2002), p. 2494. Thus, Defendant did not make an "unequivocal" request to proceed *pro se* and the trial court was not required to "determine if the defendant's request [wa]s voluntary, knowing, and intelligent... by colloquy" or otherwise. ***Madsen***, 168 Wn.2d at 504.

Indeed, this case is analogous to that of ***U.S. v. Kienenberger***, in which the Court of Appeals for the 9th Circuit held that, where a defendant, "on numerous occasions, requested that he be 'counsel of record,'" but these "requests were always accompanied by his insistence that the court appoint 'advisory' or 'standby' counsel to assist him on procedural matters," those "requests to represent himself were not unequivocal." 13 F.3d 1354, 1356 (9th Cir. 1994). *Cf.* ***Mehrabian***, 175 Wn. App. at 692.

Here, while Defendant *may* have "on numerous occasions, requested that he be 'counsel of record,'" those "requests were always accompanied by his insistence that the court appoint 'advisory' or 'standby' counsel to assist him," and hence "were not unequivocal." ***Kienenberger***, 13 F.3d at 1356.

Because Defendant did not make an "unequivocal" request to proceed *pro* se, the trial court was not required to "determine if the defendant's request is voluntary, knowing, and intelligent... by colloquy" or otherwise, ***Madsen***, 168 Wn.2d at 504, and could not have abused its discretion by failing to do so or by otherwise denying such a request.

Therefore, Defendant's conviction and sentence should be affirmed.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE AFFIDAVIT FOR SEARCH WARRANT ESTABLISHED, *INTER ALIA,* A NEXUS BETWEEN THE CRIMINAL ACTIVITY AND THE ITEM TO BE SEIZED AND A NEXUS BETWEEN THE ITEM TO BE SEIZED AND THE PLACE TO BE SEARCHED, AND HENCE, ESTABLISHED PROBABLE CAUSE FOR THE SEARCH WARRANT BASED THEREON.

Article I, section 7 of the Washington State Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be sear4ched, and the persons or things to be seized."

"Probable cause [for a search warrant] exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in

criminal activity and that evidence of the crime can be found at the place to be searched." ***State v. Thein***, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Therefore, "probable cause requires a nexus between criminal activity and the item to be seized, and also ***a nexus between the item to be seized and the place to be searched***." ***Thein***, 138 Wn.2d at 140 (emphasis added).

Evidence obtained in violation of Article I, section 7 and/or the Fourth Amendment is not admissible in court. ***Mapp v. Ohio***, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961); ***State v. Afana***, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

"[A]t the suppression hearing the trial court acts in an appellate-like capacity," and its review of an affidavit of probable cause for a search warrant "is limited to the four corners of the affidavit supporting probable cause." ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009)(*citing* ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (*quoting* ***State v. Reid***, 98 Wn. App. 152, 156, 988

P.2d 1038 (1999)). This Court "do[es] not review credibility determinations on appeal, leaving them to the fact finder," ***State v. Gibson***, 152 Wn. App. 945, 951, 219 P.3d 964 (2009), and "[u]nchallenged findings of fact are treated as verities on appeal." ***State v. Afana***, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

Appellate courts "review conclusions of law from an order pertaining to the suppression of evidence de novo," *Id.*, ***State v. Louthan***, 158 Wn. App. 732, 740, 242 P.3d 954 (2010), ***State v. Lee***, 147 Wn. App. 912, 916, 199 P.3d 445 (2008)("[w]hether the trial court derived correct legal conclusions from those facts is a question of law that [appellate courts] review de novo"), and "can uphold the trial court on any valid basis." ***Gibson***, 152 Wn. App. at 948, 958.

Appellate courts "generally review the issuance of a search warrant only for abuse of discretion." ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, "the trial court's assessment of probable cause is a legal conclusion we review de novo." ***Neth***, 165 Wn.2d at 182.

In the present case, Defendant argues that there was an insufficient "nexus... between the item to be seized and the place to be searched," Br. of App., p. 21, 20-24, specifically, the residence located at 3301 80th Street Court South, No. 63 in Lakewood, Washington. *See, e.g.,* RP 350-52; CP 67-126. The record and law show otherwise.

In ***Thein***, the Washington State Supreme Court rejected the notion that the nexus between the item to be seized and the place to be searched "is established when there is evidence [only that] a person is engaged in drug dealing and the person resides in the place to be searched." ***State v. McReynolds***, 104 Wn. App. 560, 17 P.3d 608 (2000).

Instead, the affidavit for the warrant "must contain specific facts tying the place to be searched to the crime." ***State v. G.M.V.,*** 135 Wn. App. 366, 144 P.3d 358 (2006). In ***G.M.V.***, police served a search warrant on the house belonging to the parents of G.M.V. after making "a couple of controlled buys from G.M.V.'s boyfriend[, Ivan Longoria]." ***G.M.V.***, 135 Wn. App. at 369. The police "watched Mr. Longoria leave G.M.V.'s house for a meeting with a confidential informant... followed him to the buy location and then back to the house." *Id.* "Mr. Longoria came to a second buy from a different direction, but again returned to the house" after that buy. *Id.* "Mr. Longoria testified that he stayed at the house a lot but did not live there." *Id.* Though in the context of an ineffective assistance of counsel claim, G.M.V., similar to Defendant here, cited ***Thein*** and challenged "the nexus between Mr. Longoria's criminal activities and her parent's house." *Id.* at 372. The Court found that, unlike in ***Thien***, where "a warrant to search a drug dealer's home was based solely on evidence of drug activity elsewhere," the fact that Longoria "left

from and returned to [the home] before and after he sold drugs.... was a nexus that established probable cause that Mr. Longoria had drugs in the house." *Id.* at 372.

The same holds true in the present case, and hence this case is controlled by ***G.M.V.*** Here, as in ***G.M.V.***, two controlled buys were arranged between a confidential informant and a suspect. *Compare* CP 108-110 (p. 1-3 of complaint for search warrant) *with* ***G.M.V.***, 135 Wn. App. at 369. Here, as in ***G.M.V.***, police watched that suspect leave from the residence in question, drive directly to the location of the controlled buy where the drug delivery was completed, and return directly to the residence afterwards. *Compare* CP 108-10 *with* ***G.M.V.***, 135 Wn. App. at 369-70. This happened during each of the controlled buys in this case. CP 108-10. Thus, one could infer that he kept the methamphetamine he was selling in the residence that was the subject of the search warrant, or, in other words, that there was "a nexus between the item to be seized and the place to be searched," ***Thein***, 138 Wn.2d at 140. Moreover, because the suspect emerged from the residence after the telephone calls from the confidential informant setting up the buys in question were complete, CP 108-10, one could infer that Defendant made the agreements to deliver drugs from within the residence at issue.

The facts Defendant notes in an attempt to distinguish ***G.M.V.*** are simply irrelevant to the analysis. Knowing the name of the owner of the residence or of the car, the name of the suspect, or where the suspect actually resided, *see* Br. of App., p. 23, would have added or changed nothing in the analysis.

Regardless of who owned the trailer or the car, who drove from the trailer to the controlled buys, or where that person lived, police still knew that this person was agreeing to make drug deals in, and leaving from and returning to that same residence to conduct those drug deals. These are the relevant facts that establish the requisite nexus. These were the facts present here and in ***G.M.V.*** but missing in ***State v. Goble***, 88 Wn. App. 503, 945 P.2d 263 (1997), upon which Defendant relies.

Because, here, as in ***G.M.V.***, the suspect "left from and returned to [the home] before and after he sold drugs," ***G.M.V.***, 135 Wn. App. at 372, there was "a nexus between the item to be seized and the place to be searched," ***Thein***, 138 Wn.2d at 140, "that established probable cause that [the suspect] had drugs in the house." ***G.M.V.***, 135 Wn. App. at 372.

Because Defendant does not challenge the existence of the "nexus between criminal activity and the item to be seized," ***Thein***, 138 Wn.2d at 140, *see* Br. of App., p. 1-38, and the complaint for search warrant

supports this nexus, CP 67-126, the search warrant in this case was supported by probable cause. *See* ***Thein***, 138 Wn.2d at 140.

Therefore, Defendant's motion to suppress evidence seized during service of that warrant was properly denied and Defendant's conviction and sentence should be affirmed.

3. DEFENDANT FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO COMPEL DISCOVERY OF POLICE REPORTS REGARDING PREVIOUS CONTROLLED BUYS BECAUSE THOSE REPORTS WERE NOT RELEVANT TO THE CHARGED CRIME AND HENCE, NOT DISCOVERABLE UNDER CrR 4.7, AND DEFENDANT FAILED TO OTHERWISE SHOW THEY WERE FAVORABLE TO HIM AND MATERIAL TO GUILT OR PUNISHMENT.

"In [Washington S]tate, the criminal discovery provisions of the Superior Court Criminal Rules, CrR 4.7, guide the trial court in the exercise of its discretion over discovery." ***State v. Yates***, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

Among those rules is CrR 4.7(c)(1), which provides that

> ***[e]xcept as otherwise provided as to matters not subject to disclosure*** the prosecuting attorney shall, upon request of the defendant, disclose any ***relevant*** material and information regarding:
>
> (1) Specified searches and seizures[.]

(Emphasis added).

CrR 4.7(f) specifically provides for two "Matters Not Subject to Disclosure," one of which is "Informants." That rule states, in relevant part, that

> [d]isclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.

CrR 4.7(f)(2).

"A defendant's constitutional due process right to disclosure relates only to evidence which is favorable to the defendant and ***material to guilt or punishment.***" ***State v. Blackwell***, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993)(emphasis added). Thus, "[i]f an accused requests disclosure beyond what the prosecutor is obliged to disclose, he or she must show that the requested information is material to the preparation of his or her defense." ***Blackwell***, 120 Wn.2d at 828. "'The mere *possibility* that an item of undisclosed evidence *might* have helped the defendant or

might have affected the outcome of the trial... does not establish 'materiality' in the constitutional sense.'" *Id.*

"Discovery decisions based on CrR 4.7 are within the trial court's sound discretion," ***State v. Vance***, 184 Wn. App. 902, 911, 339 P.3d 245 (2014)(*citing* ***State v. Hutchinson***, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998)), "and the decisions of the trial court will not be disturbed absent a manifest abuse of that discretion." ***Yates***, 111 Wn.2d at 797. "A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons." ***Vance***, 181 Wn. App. at 911 (*citing* ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)(*quoting* ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002))).

In the present case, Defendant argues that the State was obligated to provide police reports pertaining to two controlled buys that proceeded the service of the search warrant in this case and "that the trial court abused its discretion when it denied the motion to compel discovery of th[ose] reports[.]" Br. of App., p. 25-31. The law and record require otherwise.

CrR 4.7(c)(1), upon which Defendant relies for his argument, Br. of App., p. 25, imposes an obligation only to provide "***relevant*** material

and information." CrR 4.7(c)(1) (emphasis added). However, the reports at issue here were not "relevant." *Id.*

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

However, the controlled buys at issue were uncharged crimes that proceeded the incident charged in this case. Hence, the reports detailing them could have no "tendency to make the existence of any fact that is of consequence to the determination of th[is] action more probable or less probable than it would be without the evidence." ER 401. Therefore, they were not relevant to the present case.

In fact, Defendant, in his motion to compel their discovery, admitted as much. *See* 03/11/14 RP 2-5, 7, 9. He admitted that the State "[wa]s not intending on calling the confidential informant" who purchased the drugs in the controlled buys, that he himself "[wa]s not charged with the buys," that he was "not intending to use any of [the information from the reports] at trial," and knew that he could not use it at trial. 03/11/14 RP 2-5. In other words, Defendant admitted the reports would have no

"tendency to make the existence of any fact that is of consequence to the determination of th[is] action more probable or less probable than it would be without the evidence." ER 401. Therefore, the reports at issue were not relevant to the present case.

Because they were not "relevant," CrR 4.7(c)(1) could not have imposed an obligation to provide them, and the court could not have abused its discretion by denying a motion to compel their discovery.

Given that the State was not obligated by CrR 4.7 to provide the reports, Defendant was, in fact, "request[ing] disclosure beyond what the prosecutor [wa]s obliged to disclose," and was required to "show that the requested information [wa]s material to the preparation of his or her defense" by showing that it was "favorable to the defendant and material to guilt or punishment." ***Blackwell***, 120 Wn.2d at 828.

Defendant failed to make this showing to the court below. He indicated that he hoped to glean information from the reports, including "how long the confidential informant has worked with Officer Martin, whether or not this person is getting paid or working off a case, those types of things." 03/11/14 RP 2-3. Thus, he argued that the material in the reports "would just be used in terms of any argument as to the search

warrant." 03/11/14 RP 3. However, this is an insufficient for at least two reasons.

First, any argument concerning the validity of the search warrant must be made to the court before trial, *see* CrR 3.6, not to the jury during trial. In fact, Defendant admitted that he was "not intending to use any of the information from [the reports] at trial," 03/11/14 RP 2-5, and made no showing that the information contained in the reports would be "material to guilt or punishment." ***Blackwell***, 120 Wn.2d at 828.

Second, even assuming *arguendo* that the issue of whether there was probable cause to support a search warrant is an issue concerning "guilt or punishment," Defendant did not show that the reports at issue were "favorable to [him] and material to guilt or punishment." ***Blackwell***, 120 Wn.2d at 828.

He simply argued that he "h[ad] to look into... the basis for the search warrant request, which was the veracity of the confidential informant." 03/11/14 RP 3. He never stated, much less demonstrated, that these reports would undercut that veracity or otherwise be "favorable" to him. He showed no more than "[t]he mere *possibility* that an item of undisclosed evidence *might* have helped [him] or *might* have affected the

outcome of the trial," and therefore, "d[id] not establish 'materiality' in the constitutional sense.'" ***Blackwell***, 120 Wn.2d at 828.

Because Defendant failed to "show that the requested [reports were] material to the preparation of his... defense," ***Blackwell***, 120 Wn.2d at 828, he was not entitled to discovery of those reports, and the trial court could not have abused its discretion in denying his motion to compel such discovery.

Nor did denial of that motion leave Defendant in a situation in which he could not review and attack the search warrant's validity. "A defendant confronted with incriminating evidence obtained pursuant to a search warrant is entitled to examine the affidavit supporting the search warrant." ***State v. Mathiesen,*** 27 Wn. App. 257, 259, 616 P.2d 1255 (1980). Here, Defendant was given a copy of that affidavit, *see* 03/11/14 RP 2, 4-5; CP 67-126, and, in fact, made a motion to suppress the evidence found pursuant to the warrant. CP 34-60; 04/14/14 RP 2-9, 13-16.

However, because the police reports regarding the controlled buys were not relevant to the charged crime, and hence, not discoverable under CrR 4.7, and Defendant failed to otherwise show that they were favorable

to him and material to guilt or punishment, the trial court could not have abused its discretion in denying his motion to compel their discovery.

Therefore, Defendant's conviction and sentence should be affirmed.

4. DEFENDANT FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR A CONTINUANCE TO SECURE THE TESTIMONY OF OFFICER CONLON.

RCW 10.46.080 provides that:

> [a] continuance may be granted in any case on the ground of the absence of evidence ***on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it***; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.

(Emphasis added).

"In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, ***diligence***, ***redundancy***, due process, ***materiality***, and maintenance of orderly procedure." ***State v. Downing***, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) (emphasis added).

Thus, a trial "court d[oes] not abuse its discretion nor deny [a defendant] a fair trial by failing to grant [a] continuance" to secure the testimony of a witness where "the testimony the absent witness would have given was merely repetitious of that given by several other witnesses." ***State v. Jennings***, 35 Wn. App. 216, 220, 666 P.2d 381 (1983).

"In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court," and "[s]ince 1891, [Washington appellate] court[s] ha[ve] reviewed trial decisions to grant or deny motions for continuances under an abuse of discretion standard." ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)(*citing, inter alia,* ***Skagit Ry. & Lumber Co. v. Cole***, 2 Wash. 57, 62, 65, 25 P. 1077 (1891)). Under that standard, an appellate court "will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.'" *Id.* (*citing* ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)(*citing* ***McKay v. McKay***, 55 Wn.2d 344, 347 P.2d 1062 (1959))).

In the present case, Defendant argues that "The Trial Court Abused Its Discretion By Denying A Continuance so Officer Conlon Could be Brought To Testify." Br. of App., p. 31-35. The record shows otherwise.

It shows that, because the trial court properly did or could have relied on "factors, including... ***diligence***, ***redundancy***, [and] ***materiality***," in denying the motion for continuance, ***Downing***, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004), it did not abuse its discretion.

With respect to diligence, the record showed that, despite the facts (1) that the present case was filed on November 21, 2013, CP 1-2, (2) that trial itself began on June 23, 2014, RP 3, and (3) that the parties selected a jury on June 24, 2014, RP 292, Defendant did not issue a subpoena until June 24, 2014, and did not serve Conlon with that subpoena until June 25, 2014. CP 272-73. Moreover, he did not serve that subpoena until after he was notified by the State that Conlon was on vacation and unavailable to testify. *Compare* RP 125-27 *with* CP 272-73.

Failing to issue a subpoena or be aware of a witness's absence until after the trial of a case has commenced cannot "satisfy the statutory requirement of due diligence," ***State v. Turner***, 16 Wn. App. 292, 297, 555 P.2d 1382 (1976); *see* RCW 10.46.080, and the court would not have

abused its discretion in denying Defendant's motion for continuance on this basis alone. *See* ***Downing***, 151 Wn.2d at 273.

However, the trial court here seemed to rest its decision to deny Defendant's motion to continue on grounds of "redundancy" and "materiality," by finding that Conlon's testimony would not be material because Defendant made "no showing that the evidence he would provide is anything different than what's in front of the jury already... or would counter anything that the jury has already [heard or] that the jury is entitled to hear." RP 558. *See* RP 523-26.

The trial court was correct. Conlon's testimony would have been redundant in that it would have been merely repetitious on all material points of the testimony of two other witnesses.

Investigator Martin had already testified that Conlon found the cooler that contained the methamphetamine at issue inside the utility room of the residence. RP 368-70, 428, 436.

Officer James had also testified that Conlon found the cooler in this same room of the same residence. RP 539.

No witness provided contrary testimony, and Defendant at no time presented any offer of proof that Conlon would have added anything material to this testimony or testified differently on any material point.[5]

Thus, even were the court to have recessed or somehow continued the trial to allow Conlon to appear, his testimony would have been redundant to that already presented by two other witnesses, and because redundant, not material.

Because a trial court does not abuse its discretion or deny a defendant a fair trial by denying a continuance based on lack of diligence, redundancy, or lack of materiality, ***Downing***, 151 Wn.2d at 273, 87 P.3d 1169 (2004)(emphasis added), or where "the testimony the absent witness would have given was merely repetitious of that given by several other witnesses," ***Jennings***, 35 Wn. App. at 220, the trial court here could not have abused its discretion in denying Defendant's motion to continue.

Therefore, Defendant's conviction and sentence should be affirmed.

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[5] Moreover, given Defendant had access to the residence, the precise location of that cooler *within* the residence was irrelevant to the present charge.

5. BECAUSE THE SENTENCING COURT DOES NOT SEEM TO HAVE MADE AN INDIVIDUALIZED INQUIRY INTO DEFENDANT'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IT IMPOSED A DISCRETIONARY LEGAL FINANCIAL OBLIGATION, THE MATTER SHOULD BE REMANDED SOLELY TO ALLOW THE COURT TO MAKE SUCH AN INQUIRY.

There are mandatory court costs and fees, which sentencing courts *must* impose, including a criminal filing fee, a crime victim assessment, and a DNA database fee. RCW 36.18.020(h); RCW 7.68.035; RCW 43.43.7541.

Trial courts *may* also require a defendant to pay costs associated with bringing a case to trial, such as recoupment for a publicly-provided defense, through in Pierce County, the Department of Assigned Counsel, pursuant to RCW 10.01.160.

There are two limitations in the statute to protect defendants:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. ***In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.***

> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160 (emphasis added).

"RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes L[egal]F[inancial]O[bligations]." ***State v. Blazina***, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). "This inquiry also requires the court to consider important factors, such as [those listed in the comment to GR 34,] incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay" ***Blazina***, 182 Wn.2d at 838-39. This "means the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838. Where the court does not engage in such an individualized inquiry, the case must be remanded so that it may do so. *See Id.* at 839.

In this case, Defendant argues that the sentencing court failed to conduct the requisite "individualized inquiry," and asks this Court to remand so that the court may conduct that inquiry. Br. of App., p. 35-37.

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review," ***Blazina***, 182 Wn.2d at 832, *see* ***State v. Lyle***, ___, Wn. App. ___, ___ P.3d ___ (2015)(WL 4156773). However, Defendant in this case did object to their imposition, arguing that he was "indigent," and "unable to pay any of these for quite a bit of time" given that he was going to be in confinement. RP 691-92.

While the court did impose a lesser DAC recoupment then requested by the State because that amount "seem[ed] excessive in this particular case[,]" it did impose discretionary court-appointed attorney fees and defense costs in the amount of $500. RP 689, 693; CP 329.

However, the court did not explain why $1,300 was excessive and $500 was not. *See* RP 691-93; CP 325-38. Nor does "the record... reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before [it] impose[d] L[egal]F[inancial]O[bligations]," as is required by RCW 10.01.160(3). ***Blazina***, 182 Wn.2d at 839.

Because it does not, the matter should be remanded solely to allow the sentencing court to "make an individualized inquiry into [D]efendant's

current and future ability to pay," ***Blazina***, 182 Wn.2d at 830, the court-appointed attorney fees and defense costs at issue here.

D. CONCLUSION.

Defendant failed to show that the trial court abused its discretion in denying his motion to proceed *pro se* because that motion was not unequivocal.

The trial court properly denied Defendant's motion to suppress evidence because the affidavit for search warrant established, *inter alia*, a nexus between the criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched, and hence, established probable cause for the search warrant based thereon.

Defendant failed to show that the trial court abused its discretion in denying his motion to compel discovery of police reports regarding previous controlled buys because those reports were not relevant to the charged crime, and hence, not discoverable under CrR 4.7, and Defendant failed to otherwise show that they were favorable to him and material to guilt or punishment.

Defendant failed to show that the trial court abused its discretion in denying his motion for a recess or continuance to secure the testimony of Officer Conlon.

Therefore, Defendant's conviction and sentence should be affirmed.

However, because the sentencing court did not make an individualized inquiry into Defendant's current and future ability to pay before it imposed a discretionary LFO, the matter should be remanded solely to allow the court to make such an inquiry.

DATED: July 31, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
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.

7/31/15
Date Signature

PIERCE COUNTY PROSECUTOR

July 31, 2015 - 10:08 AM

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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