SUPREME COURT NO. 95841-6
COA NO. 35543-8-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN E. STUTZKE,

Petitioner.

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

The Honorable John O. Cooney, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Benjamin Stutzke asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Stutzke requests review of the partially published decision in State v. Benjamin E. Stutzke, Court of Appeals No. 35543-8-III (slip op. filed March 22, 2018), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court violated the Sixth Amendment right to counsel in granting assigned counsel's motion to withdraw where the record does not show an actual conflict of interest supported withdrawal?

2. Whether the court violated the Sixth Amendment right to counsel in ruling Stutzke "constructively waived" his right to another attorney because the court never warned him that he would waive this right if he engaged in dilatory tactics?

3. Whether the voyeurism statute requires the viewing to occur without the victim's knowledge or, as held by the Court of Appeals, whether the statute only requires a viewing without consent and, if the former interpretation is correct, is the evidence insufficient to convict?

D. STATEMENT OF THE CASE

a. Pre-trial proceedings culminating in withdrawal of counsel and no substitute counsel appointed.

In 2013, the State charged Stutzke with voyeurism, violation of a protection order, felony stalking and attempted burglary. CP 1-2, 37-38. The judge twice found reason to doubt Stutzke's competency but ultimately found him competent to stand trial. 2RP[1] 3; 4RP 11-12, 20-21, 24; CP 3-14, 16-21, 82-88. In December 2015, Stutzke asked to dismiss his attorney, Mr. Harget. 4RP 38-39. The judge told him another attorney would not be assigned. 4RP 40. The judge asked Stutzke if he wanted to represent himself. 4RP 47. Stutzke said he wanted an attorney. 4RP 47. The judge ruled his current attorney would remain. 4RP 48, 50.

Later that month, Stutzke requested to represent himself. 4RP 56-57, 62. After colloquy, Stutzke said he wanted another attorney. 4RP 61-62. The judge found no basis to substitute attorneys. 4RP 62. The judge warned if he waived his right to an attorney, it was discretionary with the court whether he could withdraw that waiver later. 4RP 63. After further colloquy, the judge found Stutzke waived his right to an attorney. 4RP

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[1] The verbatim report of proceedings is cited as follows: 1RP - 9/11/13; 2RP - 7/11/14; 3RP - one volume consisting of 12/1/14, 12/2/14; 4RP - five consecutively paginated volumes consisting of 2/27/15, 3/4/15, 4/6/15, 7/20/15, 10/23/15, 10/30/15, 12/4/15, 12/15/15, 1/12/16, 1/26/16, 2/11/16, 2/18/16, 5/13/16, 5/19/16, 5/23/16, 5/31/16, 6/1/16, 6/23/16, 8/18/16.

65-66; CP 23-25. Mr. Charbonneau of the Spokane County Public Defender's Office was assigned as standby counsel. 4RP 66-67, 70, 75.

In February 2016, Stutzke requested an attorney. 4RP 143-44. The judge told Stutzke that having a public defender "isn't like a light switch where you can turn it on and off," and that he needed to either have an attorney or proceed pro se. 4RP 144. The judge said, "So what I don't want to happen is for you to choose to have an attorney represent you and then choose to waive that again and ask for another continuance." 4RP 144-45. Stutzke said he needed counsel. 4RP 145. The judge granted Stutzke's request that Charbonneau be appointed as counsel. 4RP 149.

On May 13, Stutzke said he smelled alcohol on Charbonneau's breath. 4RP 159-60. The judge rejected the complaint as unfounded. 4RP 161. Responding to Stutzke's ongoing concerns about delay, the judge noted the delay stemmed from Stutzke going pro se and then later reacquiring an attorney, which necessitated continuances. 4RP 162-63. Charbonneau remained Stutzke's attorney. 4RP 163.

On May 16, Charbonneau told the court that Stutzke was unhappy with his representation. 4RP 172. According to Charbonneau, Stutzke spoke with his supervisor, who told Stutzke that he would not get a new public defender. 4RP 172-73. Stutzke refused to speak with Charbonneau earlier that morning. 4RP 173. Stutzke said he did not ask for a new

attorney in speaking with the supervisor but did raise the concerns aired at the previous hearing. 4RP 174. The judge recounted Stutzke's earlier choice to go pro se and then to later request an attorney, saying "You can't keep turning this on or off." 4RP 177. Stutzke chose to have an attorney, so Charbonneau would remain his attorney. 4RP 177. Stutzke said he would like to defend himself. 4RP 177. The judge reiterated that Charbonneau would remain as attorney. 4RP 177, 179.

On May 26, the prosecutor told the court that Charbonneau would move to withdraw "not only himself but the entire office due to Mr. Stutzke's actions and ethic violation claims by him." 4RP 182. A "Risk Management" investigation had been started, which put the two in an "adversarial" position. 4RP 182-83. Charbonneau said, "At this point it's a clear conflict of interest in my opinion, our office's opinion. I spoke with Mr. Krzyminski[2] on Friday. He does believe the entire case should be out of our office. So this is my motion to withdraw." 4RP 183. Charbonneau said "things" had "risen to a level where there can't be an attorney-client relationship. I can no longer communicate with Mr. Stutzke in any way, shape or form." 4RP 183-84. Charbonneau knew the court was looking "for a more factual basis" but was not sure how specific he could get on the record. 4RP 184.

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[2] Mr. Krzyminski was in charge of the public defender's office. 4RP 189.

The prosecutor said she would step out if the court wanted to inquire into a "potential attorney-client issue he'd have to make a record on." 4RP 184. The judge declined the offer. 4RP 184. The judge recounted Stutzke's refusal to meet with Charbonneau on May 19 and the alcohol accusation on May 13. 4RP 184. "[B]ecause of the alleged ethical violations or whatever allegations that are being made that Mr. Charbonneau is not able to represent Mr. Stutzke," the judge granted the motion authorizing allowing Charbonneau and the entire public defender office to withdraw as counsel. 4RP 184-85; CP 103-04.

When Stutzke asked about the entire office withdrawing, the judge explained "there's a conflict between the office and you so no one from that office is going to represent you." 4RP 189. The judge asked if he wanted to proceed without an attorney. 4RP 189. Stutzke responded "I'm going to proceed for now. I'm just going to -- I'll make a statement and then we can go from there." 4RP 189. The judge said "The first thing we need to talk about is you not being represented by an attorney" and "Let's figure out this attorney issue first." 4RP 190.

The judge then recited the history of the case, including (1) Stutzke failed to appear at arraignment; (2) he allegedly violated conditions of release; (3) he underwent two competency evaluations; (4) he waived his right to a jury trial and then later decided to rescind the waiver; (5) he had

a conflict with Mr. Harget and was allowed to proceed pro se; (6) he refused to come to court on one occasion while pro se; (7) he refused to meet with the prosecutor on another occasion and refused to attend scheduled interviews; (8) the court appointed Charbonneau as counsel at Stutzke's request, which delayed the trial because he needed time to prepare; (9) on May 13 he accused Charbonneau of being intoxicated; and (10) on May 19 he refused to meet with Charbonneau, which meant the latter wasn't ready for trial. 4RP 190-93. The judge received word that Stutzke refused to come to court that very day. 4RP 193.

The judge then ruled: "at this point, regardless of whether or not you chose to proceed with or without an attorney, the Court's finding that you've constructively waived your right to an attorney. If the Court were to appoint a conflict attorney to represent you, that attorney would need time to prepare." 4RP 193. The case had dragged on for too long, "So regardless of your desire to proceed with or without an attorney, the Court is finding that you've constructively waived that right and you will be proceeding without an attorney." 4RP 193-94. Stutzke subsequently waived his right to a jury and the case proceeded to a bench trial, where the following evidence was produced. 4RP 271-75.

b. Trial

The Stutzke and Townshend families were neighbors for many years. RP 377, 380-83, 522, 528, 613-14. After Stutzke reached adulthood and displayed unwanted behavior, Ms. Townshend obtained a protection order prohibiting him from making contact. 4RP 411-17; Ex. 5. On August 16, 2013, Ms. Townshend awoke around 6:00 a.m. and opened her bedroom blinds and window. 4RP 430-31. Townshend returned to bed, lying on top of the covers naked. 4RP 436, 483, 516. After briefly dozing, Townshend awoke to see Stutzke outside her window, his hands on the windowsill. 4RP 437-39, 447-48, 483, 516-17; Ex. 14. Townshend jumped from her bed and, in attempting to pull the blinds over the window, pulled them off the wall. 4RP 444. Stutzke did not divert his eyes or turn his head. 4RP 517. She twice told Stutzke to go away. 4RP 444-46. She then left her bedroom and called the police. 4RP 447. The court acquitted Stutzke on the burglary count but otherwise found him guilty. CP 52-53.

c. Appeal

On appeal, Stutzke argued (1) the court erred in granting counsel's motion to withdraw; (2) the court erred in ruling that Stutzke constructively waived his right to counsel; and (3) the evidence was insufficient to convict for voyeurism. The Court of Appeals rejected these arguments in the published portion of its decision. Slip op. at 8-14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN GRANTING COUNSEL'S MOTION TO WITHDRAW PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Indigent defendants are guaranteed the right to the assistance of counsel in criminal proceedings. Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The court violated Stutzke's right to counsel when it granted assigned counsel's motion to withdraw based on a purported conflict of interest. This case presents an issue of significant constitutional law warranting review under RAP 13.4(b)(3) because the right to counsel is fundamental to a fair trial and this Court has not yet addressed the propriety of allowing counsel to withdraw in this context.

Stutzke did not request dismissal of counsel. The trial court granted defense counsel's motion to withdraw. The issue, then, is whether the court denied Stutzke the right to assistance of counsel in so doing. The trial court has a duty to determine whether an actual conflict exists before it may grant a motion to withdraw. State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004). Without an actual conflict of interest, it is error to permit withdrawal of counsel. State v. Ramos, 83 Wn. App. 622, 624, 628, 922 P.2d 193 (1996). The record

must show an actual conflict existed. Vicuna, 119 Wn. App. at 32. Counsel's assertion that one exists is not good enough. Id. at 33.

An actual conflict of interest is "a conflict that affected counsel's performance — as opposed to a mere theoretical division of loyalties." State v. Regan, 143 Wn. App. 419, 427-28, 177 P.3d 783 (2008) (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). Thus, an "attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001) (quoting United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994)).

The record shows no actual conflict of interest in Stutzke's case. The most that can be said is that the conflict involved some sort of alleged ethical violation, perhaps relating to Stutzke's accusation that counsel had alcohol on his breath. 4RP 182-84. Complaints of misconduct do not create actual conflicts. See State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987) (defendant's filing of a formal bar association complaint against his attorney does not create a conflict sufficient to require withdrawal); United States v. Moore,

159 F.3d 1154, 1158 (9th Cir. 1998) (threat to file a malpractice claim does not establish actual conflict).

The trial court had a duty to make an informed decision on whether an actual conflict existed. Vicuna, 119 Wn. App. at 30. "[I]t is not sufficient to rely upon defense counsel's assertion that a conflict exists, even if made in good faith." Id. at 32-33. Options are available to assist the court in making an informed inquiry, such as an *in camera* review with a sealed record. Id. at 33. Indeed, the State offered to step out of the courtroom so that the trial court could make an informed inquiry into the matter. The court declined to do so. 4RP 184. The court's failure to establish through inquiry that an actual conflict existed renders its decision to allow withdrawal improper.

The error in allowing counsel to withdraw left Stutzke without counsel altogether. After granting the motion to withdraw, the court refused to appoint another attorney on the ground that he had waived his right to one. The court would not have made that decision had it properly denied counsel's motion to withdraw based on an insufficient showing of actual conflict. Allowing assigned counsel to withdraw forced Stutzke into the situation where he had to represent himself.

The Court of Appeals did not address this argument other than stating in a footnote "Because Mr. Stutzke's conduct amounted to a waiver

of the right to counsel, the trial court was necessarily authorized to grant defense counsel's motion to withdraw." Slip op. at 14 n.8. The Court of Appeals turned the requisite inquiry backwards in starting with the constructive waiver argument and then dispensing with the withdrawal argument. The trial court did *not* rule Stutzke constructively waived his right to have Charbonneau continue to serve as his attorney. Instead, having first granted Charbonneau's motion to withdraw based on a conflict of interest (4RP 184-85), the court then ruled Stutzke constructively waived his right to *another attorney* going forward. 4RP 193-94. The issue of whether Stutzke constructively waived his right to another attorney is not reached if the court erred in allowing Charbonneau to withdraw in the first place. The proper analytical sequence is to start with whether the trial court erred in allowing assigned counsel to withdraw and, if it did, the analysis ends with reversal of the convictions. The deprivation of the right to counsel can never be treated as harmless error. State v. Silva, 108 Wn. App. 536, 542, 31 P.3d 729 (2001).

2. WHETHER THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN RULING HE "CONSTRUCTIVELY WAIVED" HIS RIGHT TO COUNSEL WARRANTS REVIEW AS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The trial court forced Stutzke to represent himself after ruling he "constructively waived" his right to counsel through his actions. 4RP 193-94. The court violated Stutzke's right to counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Stutzke seeks review under RAP 13.4(b)(3).

A defendant may lose the right to counsel by conduct. City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing United States v. Goldberg, 67 F.3d 1092, 1099-1102 (3rd Cir. 1995)). "If a defendant engages in dilatory tactics or hinders a proceeding, a court may find that the defendant waived his right to counsel by conduct." In re Welfare of G.E., 116 Wn. App. 326, 334, 65 P.3d 1219 (2003). The court must first warn the defendant on the record that his dilatory conduct will be deemed a waiver of the right to an attorney and advise him of the dangers and consequences of proceeding without counsel. City of Seattle v. Klein, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007). The trial court never warned Stutzke that he would lose the right to counsel if he persisted in engaging in dilatory behavior.

The Court of Appeals held he was so warned, but the record does not show it. The Court of Appeals said "the court repeatedly told Mr. Stutzke his options regarding counsel were limited; he could either accept representation by the court's chosen attorney or proceed pro se" and that "[b]y concocting a conflict that effectively pushed his court-appointed

attorney out of the case, Mr. Stutzke selected self-representation." Slip op. at 14. This reasoning represents a watered-down standard for the relinquishment of a fundamental right.

Stutzke did not move to dismiss his attorney, Mr. Charbonneau, at the May 26 hearing at which the trial court granted counsel's motion to withdraw. He did not do so at the previous hearing on May 19, even though he complained about his attorney. The court had told him he could not keep changing his mind about wanting to go pro se or be represented, and that he did not have the right to choose his assigned attorney. When matters came to a head on May 26, Stutzke did not change his mind. Stutzke did not request to proceed pro se. He did not request that Charbonneau be dismissed.

More importantly, the record does not show the court warned him that he would lose the right to counsel if he changed his mind about wanting to represent himself or getting a substitute attorney. The court expressed its displeasure with Stutzke in this regard, but never told him that further action in the same vein would result in loss of counsel. See 4RP 144-45 (February 18, 2016); 4RP 177-79 (May 19, 2016).

The Court of Appeals latched onto Stutzke's complaint about his attorney, which "effectively pushed" his attorney out of the case. Slip op. at 14. But Stutzke was never warned that if he continued to complain

about his assigned attorney, then he would lose his right to counsel. Neither the Court of Appeals, nor the State in its brief, cites to anywhere in the record where such a warning was given.

In State v. Afeworki, 189 Wn. App. 327, 347, 358 P.3d 1186 (2015), review denied, 184 Wn.2d 1036, 380 P.3d 407 (2016), the record established the defendant "engaged in misconduct that caused the court to warn him that, *if he engaged in further misconduct that caused his attorney to seek to withdraw*, he would be required to proceed pro se." Id. at 347. That kind of warning nowhere appears in the record in Stutzke's case. The court never told him that he would be forced to go pro se if he continued to cause problems for his assigned attorney. Without the requisite warning, there is no waiver by conduct. Klein, 161 Wn.2d at 562.

The Court of Appeals cited United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983) for the proposition that "a persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a knowing and voluntary waiver of counsel." The defendant in Moore was never warned his conduct could waive his right to counsel, so that case is inconsistent with Washington precedent. Further, Stutzke did not demand that his appointed attorney be dismissed.

"[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial

unless counsel is provided for him." Gideon, 372 U.S. at 344. Stutzke was a difficult and frustrating litigant, almost certainly stemming from his mental health problems. See CP 82-88 (competency evaluation and accompanying diagnosis). But such litigants are just as entitled to have their fundamental rights honored as those that are better behaved. The complete denial of counsel requires automatic reversal. State ex rel. Schmitz v. Knight, 142 Wn. App. 291, 297, 174 P.3d 1198 (2007); Goldberg, 67 F.3d at 1103.

3. THE SUFFICIENCY OF EVIDENCE ARGUMENT, PREDICATED ON THE MEANING OF THE VOYEURISM STATUTE, PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Under Stutzke's interpretation of the voyeurism statute, the State needed to prove he viewed Townshend without her knowledge for more than a brief period of time in order to convict. The Court of Appeals interpreted the statute to mean the State need only prove he viewed Townshend without her consent. Stutzke seeks review under RAP 13.4(b)(4). A decision that potentially affects numerous proceedings in the lower courts warrants review as an issue of substantial public interest. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The Court of Appeals' interpretation of the statute defining voyeurism will inevitably affect other cases brought at the trial level.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The sufficiency of evidence in the present case turns on the meaning of the voyeurism statute. RCW 9A.44.115(2) provides:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly *views*, photographs, or films:
> (a) *Another person without that person's knowledge and consent* while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or
> (b) *The intimate areas of another person without that person's knowledge and consent* and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

"Views" is defined as "the intentional looking upon of another person *for more than a brief period of time*, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity." RCW 9A.44.115(1)(e).

Courts "employ traditional rules of grammar in discerning the plain language of a statute." State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). In deciding against Stutzke, the Court of Appeals focused on the prepositional phrase in the statute. The preposition at issue here is

"without." [3] The objects of that preposition are "knowledge" and "consent." The prepositional phrase is "without knowledge and consent."[4] RCW 9A.44.115(2). That phrase modifies the verb "views," as defined in RCW 9A.44.115(1)(e).

The plain language of the voyeurism statute requires the person to intentionally view another person "without that person's knowledge *and* consent." RCW 9A.44.115(2). That viewing must be "for more than a brief period of time." RCW 9A.44.115(1)(e). The word "and" conveys a conjunctive meaning. Ahten v. Barnes, 158 Wn. App. 343, 352 n.5, 242 P.3d 35 (2010). Court must give a literal and strict interpretation to criminal statutes, assuming the legislature "means exactly what it says." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). The voyeurism statute uses "and," not "or." "We thus read the 'and' as simply being an 'and'. The Legislature would have used the word 'or' if it had intended to convey a disjunctive meaning." Ski Acres, Inc. v. Kittitas

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[3] "A preposition is an uninflected function word or phrase linking a noun element (the preposition's object) with another part of the sentence to show the relationship between them." Bryan A. Garner, The Chicago Guide to Grammar, Usage, and Punctuation 139 (2016).

[4] A prepositional phrase usually modifies a preceding subject, and the preposition shows the relationship between that subject and the object of the preposition. Jackson on behalf of Sorenson v. Options Residential, Inc., 896 N.W.2d 549, 555 (Minn. Ct. App. 2017) (citing The Chicago Manual of Style 5.162, .167, .168 (15th ed. 2003)).

Cnty., 118 Wn.2d 852, 857, 827 P.2d 1000 (1992). Applying this principle, the voyeurism statute requires not only viewing another without that person's *consent* for more than a brief period of time, but also viewing another without that person's *knowledge* for more than a brief period of time. This interpretation accords with the recognized legislative intent to protect against "*the surreptitious viewing* of [another] for purposes of sexual gratification." State v. Diaz-Flores, 148 Wn. App. 911, 917, 201 P.3d 1073 (2009) (emphasis added).

The Court of Appeals held this interpretation of the statute was flawed because "'Without knowledge and consent' is one prepositional phrase that modifies the verb 'views' by requiring the defendant's act of viewing be without the combination of knowledge and consent. Based on the wording of the statute, *if either knowledge or consent is absent*, then the combination is not present and the statute is satisfied." Slip op. at 11.

The general rule is that "and" does not mean "or." Ski Acres, 118 Wn.2d at 857. The words "and" and "or" may sometimes be substituted for each other but only "if it is clear from the plain language of the statute that it is appropriate to do so." Bullseye Distrib., LLC v. Gambling Comm'n, 127 Wn. App. 231, 239, 110 P.3d 1162 (2005). Thus, the word "and" can be interpreted to mean "or" where doing so is necessary to avoid absurd results. State v. Keller, 98 Wn.2d 725, 729, 657 P.2d 1384 (1983).

The Court of Appeals' interpretation substitutes the disjunctive "or" for the conjunctive "and" without that substitution being clearly required by legislative intent. Courts should not change the language of a statute unless it is "imperatively required to make it a rational statute." State v. Taylor, 97 Wn.2d 724, 729, 649 P.2d 633 (1982) (quoting McKay v. Dep't of Labor & Indus., 180 Wash. 191, 194, 39 P.2d 997 (1934)). No such imperative requires interpreting "without knowledge and consent" to mean "without knowledge or consent."

Even if the statute were susceptible to different reasonable interpretations, Stutzke's interpretation prevails. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The Court of Appeals ignored the rule of lenity.

The Court of Appeals said its decision was consistent with State v. Fleming, 137 Wn. App. 645, 648, 154 P.3d 304 (2007), where a divided court held the evidence showed more than a brief view and affirmed a voyeurism conviction. Slip op. at 11-12. Fleming is factually similar but did not address the theory that the viewing must be not only without consent but also without the person's knowledge for more than a brief period of time. See In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869

P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue.").

The evidence is insufficient to convict if Stutzke's interpretation is correct. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Townshend did not know how long Stutzke was in proximity to her. 4RP 468. Her interaction with Stutzke lasted anywhere from seconds to a few minutes upon becoming aware of Stutzke's presence. 4RP 468-71, 488. But she did not know how long he viewed her without her knowledge and no other evidence established such viewing was for more than a brief period of time. The voyeurism conviction must therefore be reversed.

F. CONCLUSION

For the reasons stated, Stutzke requests that this Court grant review.

DATED this 23rd day of April 2018.

Respectfully submitted,

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APPENDIX A

FILED
MARCH 22, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. BENJAMIN E. STUTZKE, Appellant.	)	No. 35543-8-III OPINION PUBLISHED IN PART

PENNELL, J. — Benjamin Stutzke was charged with voyeurism, violation of a protection order, felony stalking, and attempted residential burglary. After Mr. Stutzke vacillated between exercising his rights to appointed counsel and self-representation, the court determined Mr. Stutzke had waived the right to counsel through conduct. Mr. Stutzke then proceeded to represent himself during a bench trial. He was convicted of all charges with the exception of residential burglary. Mr. Stutzke now appeals, arguing: (1) insufficient evidence supports the voyeurism conviction, and (2) the court deprived him of the right to counsel. He also raises some technical issues with respect to his sentence. We affirm Mr. Stutzke's convictions, but remand for resentencing.

FACTS[1]

Offense conduct

The Stutzke and Townshend families were longtime neighbors. After Mr. Stutzke reached adulthood, he began exhibiting unwanted attention toward Ms. Townshend. Ms. Townshend eventually obtained an antiharassment protection order. The order prohibited Mr. Stutzke from making contact with Ms. Townshend or coming within 50 feet of her property.[2] The order was set to expire in 2015.

Things between Mr. Stutzke and Ms. Townshend came to a head on August 16, 2013. Ms. Townshend awoke around 6:00 a.m. and opened her bedroom blinds and window. She then returned to bed and laid on top of the covers while naked. After briefly dozing off, Ms. Townshend awoke to see Mr. Stutzke standing at the open window, his hands resting on the window sill while he stared at her. Ms. Townshend immediately went to close the blinds but, in her haste and fear, she pulled the blinds from

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[1] Mr. Stutzke does not challenge any of the trial court's findings of fact from his bench trial, making them verities on appeal. *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004). The factual background here is drawn from the trial court's unchallenged findings. The procedural background is drawn from other parts of the record.

[2] Ms. Townshend actually obtained two separate no-contact orders, covering different time periods. Only the second order, entered during March 2013, is pertinent to this appeal.

the wall. Ms. Townshend shouted at Mr. Stutzke to leave, but he did not. Mr. Stutzke never turned away or averted his gaze. He did not appear frightened or nervous when Ms. Townshend caught him. Mr. Stutzke remained fixated on Ms. Townshend until she retreated to an area of the room that was out of Mr. Stutzke's range of sight.

Ms. Townshend called the police to report Mr. Stutzke's behavior. Mr. Stutzke was arrested shortly thereafter.

Procedural background

Initial phase of proceedings

The State charged Mr. Stutzke with voyeurism, violation of a civil antiharassment protection order, stalking, and attempted residential burglary. Mr. Stutzke was originally released from custody pending trial. But he violated his release terms and was remanded back into custody.

For approximately two years, Mr. Stutzke was represented by the same appointed attorney. Disposition of the case was delayed to allow for two separate competency evaluations. Mr. Stutzke was ultimately deemed competent to stand trial. During the period the case was continued for the competency evaluations, Mr. Stutzke waived his jury trial rights, but then rescinded the waiver.

In early December 2015, Mr. Stutzke appeared in court and asked to dismiss his assigned counsel. Mr. Stutzke explained he wanted to be released from custody so he could find a job and hire a private attorney. Mr. Stutzke claimed the passage of time was a reason for his release, since he had likely already overserved any potential sentence. The court denied Mr. Stutzke's release request, explaining the passage of time was not a relevant consideration. The court informed Mr. Stutzke his choice was to either go forward with existing counsel or proceed pro se. The court then began to advise Mr. Stutzke of the dangers and disadvantages of waiving counsel, but Mr. Stutzke equivocated. He stated he wanted an attorney, just not the one currently assigned. The court ultimately ruled Mr. Stutzke's current attorney would remain on the case as there was no basis for appointing substitute counsel.

Waiver of counsel and self-representation

On December 15, 2015, Mr. Stutzke filed a motion to proceed pro se. The court engaged Mr. Stutzke in a full colloquy regarding the potential consequences of a conviction and the dangers and disadvantages of waiving the right to counsel. Mr. Stutzke again asked to be released so he could hire private counsel. This was denied. The court again informed Mr. Stutzke his choice was either to remain with his current counsel or proceed pro se. Mr. Stutzke opted for the latter. The court warned Mr.

Stutzke that once he waived his right to counsel, his waiver could apply for the entire case, even if Mr. Stutzke grew to have second thoughts. Mr. Stutzke indicated he understood. The court then permitted Mr. Stutzke to represent himself and also appointed standby counsel.

Mr. Stutzke's conduct as a pro se litigant was poor. At one point, he had to be brought to court in restraints after refusing to come voluntarily. He also refused to meet with the prosecutor to exchange discovery. The trial court decided to hold regular status conferences with Mr. Stutzke in order to ensure his case moved forward.

During his pretrial status conferences, Mr. Stutzke continued to request release from custody. The court repeatedly denied Mr. Stutzke's requests, explaining Mr. Stutzke posed a risk of nonappearance and that the passage of time did not change this circumstance. In addition to repeatedly asking for release, Mr. Stutzke asked for continuances to allow for adequate preparation. The trial court worked with Mr. Stutzke regarding his trial preparation requests. Trial was set for February 29, 2016.

Rescission of self-representation and appointment of new counsel

On February 18, 2016, Mr. Stutzke appeared in court for a pretrial conference. He indicated he would like to have appointed counsel represent him at trial. The trial court expressed concern Mr. Stutzke was delaying the proceedings by vacillating on the issue

of counsel. But the court ultimately decided to appoint counsel out of an abundance of caution. Mr. Stutzke's standby attorney was appointed as full legal counsel. Trial was then continued to May 23, 2016. Mr. Stutzke renewed his request for pretrial release based on the passage of time. Once again, that request was denied.

Shortly after receiving appointed counsel, Mr. Stutzke began to complain about his attorney's performance. The accusations started on May 13 when Mr. Stutzke alleged his attorney smelled of alcohol. The court determined this complaint was unfounded. Three days later, Mr. Stutzke came back to court. His attorney reported Mr. Stutzke had refused an attorney-client meeting and requested the attorney's supervisor appoint new counsel. Mr. Stutzke continued to criticize his attorney's conduct and, at this point, requested self-representation. The court passed over this request and ordered Mr. Stutzke's current attorney to stay on the case. The court informed Mr. Stutzke he could not keep changing his mind regarding appointment of counsel. The court concluded the hearing after Mr. Stutzke became verbally disruptive.

Waiver of counsel by conduct

On May 23, 2016—the date scheduled for trial—Mr. Stutzke's attorney brought a motion requesting leave to withdraw. Counsel advised the court that Mr. Stutzke had persisted in his alcohol allegations, Spokane County Risk Management was now

involved, and an investigation was imminent. Mr. Stutzke's attorney and counsel for the State both expressed concern that Mr. Stutzke's actions placed him in an adversarial position not only with his current attorney but the entire public defender's office. Mr. Stutzke's attorney informed the court that things had risen to a level such that there could no longer be an attorney-client relationship between himself and Mr. Stutzke.

The court granted defense counsel's request to withdraw. The court reiterated that Mr. Stutzke's complaints against his attorney were unfounded.

With assigned counsel released from his duties, the trial court informed Mr. Stutzke it needed to determine what to do regarding counsel. The court recapped the history of Mr. Stutzke's case. Over the course of three years' litigation, Mr. Stutzke: (1) missed an arraignment, (2) violated release conditions, (3) was the subject of two competency evaluations, (4) waived jury trial and then rescinded the waiver, (5) fired his first public defender in order to proceed pro se, (6) refused to come to court multiple times despite being warned he must do so, (7) refused to meet with the prosecutor or attend scheduled witness interviews he asked for despite being informed he must do so, (8) asked for and received a new public defender, thus delaying trial, and then (9) alleged the new public defender was intoxicated in court and refused to meet with him. Based on these circumstances, and out of concern for Ms. Townshend to have this case resolved,

the trial court found Mr. Stutzke had "constructively waived" his right to an attorney and would be proceeding without one. Report of Proceedings (RP) (May 23, 2016) at 193-94.

Trial and disposition

The case proceeded to a bench trial after Mr. Stutzke waived his jury trial rights for the second time. The court found Mr. Stutzke guilty of all charges except attempted residential burglary. For the violation of a protection order conviction, the trial court imposed 364 days of confinement and 24 months of community custody. On the stalking conviction, Mr. Stutzke was sentenced to 18 months of community custody for a violent offense. The trial court also entered a sexual assault protection order for Ms. Townshend, with the order to expire on August 18, 2026.

Mr. Stutzke appeals his convictions and sentence.

ANALYSIS

Voyeurism conviction

Mr. Stutzke contends insufficient evidence supports his conviction for voyeurism. Because his arguments turn on the proper interpretation of the voyeurism statute, our review is de novo. *State v. Diaz-Flores*, 148 Wn. App. 911, 915, 201 P.3d 1073 (2009). When embarking on statutory interpretation, we focus on the language used by the

legislature. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). If the meaning of a statute is plain on its face, we will not resort to tools of construction such as legislative history. *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994). Instead, we will give effect to the statute's plain meaning. *Schneider*, 173 Wn.2d at 363.

The legislature has defined the crime of voyeurism (now first degree voyeurism) through a single sentence, containing several component parts. The controlling sentence at the time of the offense conduct stated:

> (2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly *views*, photographs, or films:
> (a) *Another person without that person's knowledge and consent* while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or
> (b) *The intimate areas of another person without that person's knowledge and consent* and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

Former RCW 9A.44.115(2) (2003) (emphasis added).[3]

The verb "views," as used in the voyeurism statute, has a special meaning. RCW 9A.44.115(1)(e). It does not include a momentary or casual observation. Instead,

[3] The trial court found Mr. Stutzke guilty under both alternatives.

in order to "view" something for purposes of voyeurism, a defendant's act of observation must last "for more than a brief period of time."[4]

Understanding the meaning of the sentence used to define voyeurism involves analyzing its grammatical structure.[5] The subject of the sentence is the individual charged with the offense. Pertinent to this appeal, the verb is the word "views." The verb has two possible direct objects: either "[a]nother person" or the "intimate areas of another person." Former RCW 9A.44.115(2)(a), (b). The verb is also modified by the prepositional phrase "without knowledge and consent." At issue in this appeal is the significance of this prepositional phrase.

Mr. Stutzke contends that because the prepositional phrase has two objects—knowledge and consent—each object serves to independently modify the verb "views." In other words, he claims the crime of voyeurism is committed when an individual views another person without their knowledge and also views that person without their consent. Under Mr. Stutzke's reading, if an individual merely views the victim without the

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[4] The full definition of "views" is as follows: "the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity." RCW 9A.44.115(1)(e).

[5] Because voyeurism is confined to a single statute, our analysis is not guided by related statutory provisions or other context. *Cf. Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 13, 43 P.3d 4 (2002).

victim's consent, but does not also view them without their knowledge, then there is no crime.

The flaw in Mr. Stutzke's reasoning is that it confuses the existence of a two-word prepositional object ("knowledge" and "consent") with the existence of two prepositional phrases ("without knowledge" and "without consent"). "Without knowledge and consent" is one prepositional phrase that modifies the verb "views" by requiring the defendant's act of viewing be without the combination of knowledge and consent. Based on the wording of the statute, if either knowledge or consent is absent, then the combination is not present and the statute is satisfied. An analogy would be RCW 46.16A.030(2), which prohibits operating a vehicle without proper "registration and displaying license plates." A violation occurs so long as one component of the registration and license plate combination is missing. There is no requirement that both be absent.

Our case law has previously interpreted voyeurism in this manner. In *State v. Fleming*, 137 Wn. App. 645, 647-48, 154 P.3d 304 (2007), we found the defendant committed voyeurism when he was caught peering down at a woman who was seated inside of a bathroom stall. Given the only witnesses were the woman and the defendant, there was no third party evidence of how long the defendant had been looking at the

victim prior to being caught. However, the defendant continued to look at the victim as she yelled at him, told him she had a cell phone, yelled for help, and then ran out of the stall. We held that the defendant's conduct, all of which occurred with the victim's knowledge but not consent, was sufficiently prolonged to fall under the verb "views" and thus the statute was met. It did not matter that the State failed to present evidence indicating the defendant viewed the woman for an appreciable period of time without her knowledge.

Here, the State presented more than sufficient evidence to satisfy the plain terms of the voyeurism statute. The evidence showed Mr. Stutzke began watching Ms. Townshend's naked body while she was lying on her bed. Mr. Stutzke then continued to observe Ms. Townshend as she looked up at him, yelled at him to leave, rushed to her window, and tried to close the blinds. The entire episode lasted more than a brief period of time. It was never consensual. Sufficient evidence supports Mr. Stutzke's conviction.

"Constructive waiver" of right to counsel & motion to withdraw

An individual accused of a crime has a constitutional right to the assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. But this right does not permit a defendant to deliberately or inadvertently delay trial by refusing to engage with counsel. *City of Tacoma v. Bishop*, 82 Wn. App. 850, 856, 859, 920 P.2d 214 (1996);

see also State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) ("A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial."). A defendant can lose the right to counsel in three ways: (1) waiver, (2) forfeiture, or (3) waiver by conduct. *Bishop*, 82 Wn. App. at 858-59; *see also United States v. Goldberg*, 67 F.3d 1092, 1099-1103 (3rd Cir. 1995). The focus here is waiver by conduct.

Prior to finding a defendant has waived the right to counsel by conduct, the trial court must provide two types of warnings. First, the court must advise a defendant of the consequences of proceeding without counsel, as contemplated by the *Faretta*[6] standard. *Bishop*, 82 Wn. App. at 860. Second, the court must warn the defendant that the right to counsel will be lost if the defendant engages in dilatory tactics or misconduct. *Id.*; *City of Seattle v. Klein*, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007); *see also Goldberg*, 67 F.3d at 1101. The court's warnings need not be timed to closely precede the defendant's misconduct. *State v. Afeworki*, 189 Wn. App. 327, 346, 358 P.3d 1186 (2015). Nor must the court's warnings follow a particular formula or script. *See Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).

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[6] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The trial court provided Mr. Stutzke with both types of requisite warnings before declaring waiver of counsel by conduct. There is no real dispute that the court provided full *Faretta* warnings. This happened when Mr. Stutzke originally waived his right to counsel on December 15, 2015. In addition, the court took care to warn Mr. Stutzke that his conduct could result in waiver of the right to counsel. Specifically, the court repeatedly told Mr. Stutzke his options regarding counsel were limited; he could either accept representation by the court's chosen attorney or proceed pro se. Through his conduct, Mr. Stutzke made his choice clear. By concocting[7] a conflict that effectively pushed his court-appointed attorney out of the case, Mr. Stutzke selected self-representation. He was not entitled to a third option. *State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742 (1986); *United States v. Moore*, 706 F.2d 538 (5th Cir. 1983) ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a knowing and voluntary waiver of counsel."). The trial court's finding of waiver by conduct was fully warranted.[8]

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[7] The trial court made a factual finding that Mr. Stutzke's accusations against trial counsel were unfounded. We will not disturb that finding on appeal.

[8] Because Mr. Stutzke's conduct amounted to a waiver of the right to counsel, the trial court was necessarily authorized to grant defense counsel's motion to withdraw.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Sentencing issues & scrivener's error

Mr. Stutzke alleges several sentencing errors. We accept the State's concession as to all asserted errors and therefore keep our discussion brief.

Merger of conviction for violation of a civil antiharassment order

Mr. Stutzke's stalking charge was elevated from a misdemeanor to a felony because it was committed in violation of a preexisting antiharassment protection order. RCW 9A.46.110(5)(b)(ii). Given this circumstance, the offenses of stalking and violation of the harassment order merged. *See State v. Whittaker*, 192 Wn. App. 395, 399, 415-16, 367 P.3d 1092 (2016); *State v. Parmelee*, 108 Wn. App. 702, 710-11, 32 P.3d 1029 (2001). Remand is required so the conviction for violating a protection order can be vacated and the related community custody term stricken.

18-month community custody term on stalking conviction

Because stalking is a crime against the person, not a crime of violence, the court should have limited the term of community custody for Mr. Stutzke's stalking conviction

to 12 months. RCW 9.94A.411(2)(a), .701(3)(a). This correction shall be made on remand.

Sexual assault protection order

Upon conviction for a sex offense, a trial court may enter a sexual assault protection order that restricts the defendant's ability to have contact with the victim. RCW 7.90.150(6)(a). When such an order is entered in conjunction with a criminal prosecution, the order shall remain in effect for a period of two years "following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150(6)(c). On remand for resentencing, the trial court shall modify the length of the sexual assault protection order to comply with the terms of RCW 7.90.150(6)(c).

Scrivener's error

The judgment and sentence correctly indicates Mr. Stutzke was convicted of felony stalking under RCW 9A.46.110(5)(b)(ii). But the judgment and sentence also incorrectly indicates that a conviction under that subsection is for domestic violence. Domestic violence stalking is RCW 9A.46.110(5)(b)(i), not (5)(b)(ii). This scrivener's error can be corrected during resentencing. *See State v. Munoz-Rivera*, 190 Wn. App. 870, 895, 361 P.3d 182 (2015).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Stutzke has filed a statement of additional grounds for review, but does not identify any specific basis for relief. We decline consideration pursuant to RAP 10.10(c).

CONCLUSION

Mr. Stutzke's convictions are affirmed. This matter is remanded for resentencing and correction of a scrivener's error.

Pennell, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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