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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JORDAN KNIPPLING, APPELLANT

---

Appeal from the Superior Court of Mason County  
The Honorable Amber L. Finlay

No. 09-1-00119-7

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**BRIEF OF RESPONDENT**

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A. RESPONDENT'S COUNTER STATEMENT OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Prior to his first trial, which resulted in a mistrial because of a hung jury, Mr. Knippling equivocated about proceeding pro se, stating that he did not want to proceed pro se but that he wanted a different attorney. When the court declined to appoint a different attorney, he then said that he wanted to proceed pro se. When the court denied his motion to proceed pro se, he then engaged in disruptive, threatening conduct that forced the trial judge to have him removed from the courtroom on the day of trial. By engaging in disruptive and threatening conduct, did Knippling waive his right to represent himself?
  
2. Mr. Knippling's first trial resulted in a hung jury; therefore, a second jury was sworn, and a second trial then occurred. After the first trial resulted in a hung jury, Knippling did not request to represent himself. At the second trial, Knippling voluntarily waived his own appearance and was therefore absent from the trial. Irrespective of whether Knippling waived or forfeited his right to self-representation at his first trial – by not asserting his right to self-representation at his second trial, or by waiving his appearance and choosing not to appear at the second trial, or both – did Knippling in effect waive his right to represent himself at the second trial?

B. FACTS AND STATEMENT OF THE CASE

Mr. Knippling had a jury trial in this matter on March 2, 2010, before the Honorable Judge Toni Sheldon. RP 248. This trial resulted in a

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mistrial. RP 363. A new trial was commenced on May 12, 2010, before the Honorable Judge Amber Finlay. RP 375. The defendant appeals because his motion to proceed pro se was denied at his first trial.

A pretrial hearing was held in this matter on July 20, 2009. RP 33. After the court stated that it was setting the matter over for one week, Mr. Knippling interrupted to ask whether he could “fire” his attorney. RP 37. After hearing Mr. Knippling’s reasons for wanting to “fire” his attorney, the court stated that it was “not going to take argument on [Mr. Knippling’s] request to have a different attorney or be relieved of having an attorney today.”

The following week, on July 27, 2009, the pretrial hearing resumed. RP 45-63. At this hearing Knippling again requested to “fire” his attorney. RP 48. Knippling did not ask to represent himself; instead, he said: “Well I would like to reiterate. I would – trying to fire my attorney.” RP 57. Trial was scheduled to begin the week of August 11, 2009. RP 56. The court denied Knippling’s “request to fire [his attorney] just prior to trial.” RP 60.

The matter came on for trial status on August 10, 2009. RP 66. At this hearing Knippling protested the proceedings, and in response to

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Knippling's protests the judge told him: "[T]hat is something that has already been decided by a prior judge; the fact that you wanted to represent yourself." RP 83. Knippling responded, "No, I didn't. I – I asked for new counsel." RP 83.

On August 11, 2009, the matter was called for trial. RP 92. Knippling, while represented by counsel, addressed the court directly rather than through counsel and sought to make motions on his own behalf. RP 92-98. The court instructed Knippling that there was no "procedure in Washington State for a defendant to represent himself and also have an attorney represent him." RP 98. In response, Knippling then asked the court for standby counsel. RP 98. Knippling went on to say, "I – I would ask not to go pro se because that would be a stupid thing because without an attorney I would have – I am not good enough to go against the court of law with – by myself." RP 99. Knippling then asked the court to "[P]lease appoint... [his attorney] as standby counsel.... And I as the lead counsel here." RP 99. The trial judge ruled as follows: "[A]t the eve of trial I'm not going to allow the posture to change and to have you represent yourself with standby because that really changes the complexity of what occurs here." RP 109.

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Nevertheless, the trial did not begin as scheduled – first because of a late disclosure of defense witnesses, and then because Knippling’s attorney asked to withdraw due to a breakdown of communication with Knippling. RP 92-128. Knippling again stated his dissatisfaction with his attorney. RP 126. The judge asked Knippling, “Are you going to be making a request for a different attorney or are you... asking to make the request to represent yourself?” RP 128. Knippling interrupted the court to say, “No, I’m... No, I’m...” RP 128. Knippling clarified that he did not want to represent himself, but that he would “love to have another attorney.” RP 129-130.

Knippling’s attorney was allowed to withdraw, a new attorney was appointed, the current trial date was stricken, and a new omnibus date was scheduled. RP 133.

On January 5, 2010, the matter was in court for pretrial hearing, motions, and trial status. RP 180. Knippling filed his own motion even though he was represented by an attorney. RP 189-193. While court was in session, Knippling continued to speak over his attorney. RP 192-196. The court cautioned Knippling, as follows: “Mr. Knippling, I’m going to

ask that you be removed if you don't listen with your ears. It's not time for you to speak. I'll listen to [your attorney] about your issues." RP 196.

On January 22, 2010, the court heard motions in limine. RP 220. At this hearing, Knippling frequently interrupted the orderly progress of the hearing. RP 221-226. Knippling spoke at length rather than defer to his attorney. RP 226-228. The court halted Knippling's lengthy speech and instructed him that he could not represent himself and have his attorney represent him at the same time. RP 228-229. Knippling continued to talk over and interrupt the court while speaking on his own behalf, even though he was represented by counsel. 230-233. At the end of the hearing Knippling stated that he was "filing a motion right now that I'm going to go... go pro se with standby counsel." RP 233. The court directed Knippling to file the motion in writing. RP 233. Knippling's attorney said that he would file the motion for Knippling. RP 233.

The matter was in court again on February 9, 2010. RP 236. The court noted Knippling's prior motion to proceed pro se, and the court noted that "it was not an unequivocal request," as revealed at a prior attempt to hold a hearing on the matter (which was unsuccessful because of a power outage). RP 236. The court stated that "it was clear that it was

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not an unequivocal request; that he really did want counsel. He just did not want to work with [the currently appointed attorney].” RP 236. Knippling then interjected, “I’m going to say that I’m just going to [sic] pro se. I don’t care, I’m just going to go pro se.” RP 236. Knippling added, “It’s not whether I’m firing or not, I’m just going to exercise my right to go pro se.” RP 237. The court denied Knippling’s motion to proceed pro se. RP 237. Trial was scheduled to begin fourteen days later, on February 23, 2010; the final start day for speedy trial purposes was March 10, 2010. RP 244. Knippling’s first appearance in this case had occurred 308 days earlier, on April 7, 2009. RP 5-12.

Knippling then began to challenge the authority of the court and began talking over and interrupting the court. RP 238-239. After a recess, the court again declined to reconsider its ruling in which it declined to permit Knippling to represent himself. RP 240. Following this ruling from the court, Knippling protested at some length without interruption from the court, uttering an obscenity, and spoke out forcefully about various legal concepts. RP 240-243.

The case was called for trial on March 2, 2010. RP 249.

Knippling intermittently spoke out and challenged the court’s command of

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the courtroom. RP 253-258. Knippling again said that he wanted to “go pro se.” RP 255. Knippling’s speech became obscene. RP 258. When addressed by the court about his obscene speech, Knippling addressed the court in return, as follows: “Fuck you, bitch.” RP 258.

After a recess, the court resumed the trial. RP 266. Knippling again began to disrupt the court, challenging the authority of the court and talking over the court. RP 267-271. The court ordered a recess. RP 271.

The trial resumed, and the court attempted to maintain order while protecting Knippling’s right to be present for the trial. RP 271-288.

Knippling engaged in a course of conduct that obstructed the trial and resulted in him being physically restrained and having his mouth taped shut with duct tape. RP 253-277. Knippling chewed through the duct tape. RP 274. Mr. Knippling could not be appeased; so the trial resumed without his presence. RP 278. At the conclusion of the trial, the jury deliberated but was unable to reach a unanimous verdict. RP 363.

Therefore, the court declared a mistrial. RP 363.

A new jury was convened and a second attempt at trial commenced on May 12, 2010. RP 376-483. Knippling was present when the trial commenced but voluntarily left once the jury venire was sworn-in. RP

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376-413. No citation to the record has been located where Knippling asked to represent himself after the first trial. At the second trial, Knippling protested various legal theories and declared as follows: “I really don’t want to be here. There’s really no reason for me to be here.” Knippling went on to say, “my presence here, I don’t – I don’t – you know what I’m saying, it messes with my time.” RP 386. After the jury was sworn, Mr. Knippling was allowed to leave. RP 411. At the conclusion of the trial, the jury found Knippling guilty as charged. RP 482.

Knippling now appeals, claiming that he was denied the right to represent himself.

C. STANDARD OF REVIEW

The standard of review of a trial-court's denial of a request for self-representation is for abuse of discretion. Discretion is abused if the trial-court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

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D. ARGUMENT

1. Prior to his first trial, which resulted in a mistrial because of a hung jury, Mr. Knippling equivocated about proceeding pro se, stating that he did not want to proceed pro se but that he wanted a different attorney. When the court declined to appoint a different attorney, he then said that he wanted to proceed pro se. When the court denied his motion to proceed pro se, he then engaged in disruptive, threatening conduct that forced the trial judge to have him removed from the courtroom on the day of trial. By engaging in disruptive and threatening conduct, did Knippling waive his right to represent himself?

Trial-courts are required to presume against a defendant's waiver of the right to counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). However, the unjustified denial of the defendant's right to proceed pro se requires reversal. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714.

When a defendant requests to proceed pro se, the trial-court must determine whether the request is timely and unequivocal. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). A request to proceed pro se is not per se untimely merely because it is made 12 days before trial. *State v. Breedlove*, 79 Wn. App. 101, 109, 900 P.2d 586 (1995). A request to

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proceed pro se is not per se equivocal merely because it is coupled with, or closely follows, a request for alternative counsel. *State v. Madsen*, 168 Wn.2d 496, 507, 229 P.3d 714 (2010). However, where the entirety of the record is considered, a pattern of coupling the requests may indicate that a request to proceed pro se is not unequivocal. See, e.g., *State v. Stenson*, 132 Wn.2d 668, 740-741, 940 P.2d 1239 (1997).

To protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant's request to proceed pro se must be unequivocal. While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, *Johnstone v. Kelly*, 808 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal. [Citations omitted].

*Id.* However, *Stenson* was cited in a more recent decision of the Washington Supreme Court to support reversal of a conviction on similar facts, as follows:

We have previously stated that an unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. See *Stenson*, 132 Wash.2d at 741, 940 P.2d 1239. The argument that Madsen's request was equivocal because it was coupled with an alternative request is fallacious and ignores this court's precedent. Madsen twice invoked and cited, by article and section, his state constitutional right to represent

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himself. There was no equivocation. Madsen's inclusion of an alternative remedy is irrelevant to whether Madsen's request was unequivocal.

*State v. Madsen*, 168 Wn.2d 496, 507, 229 P.3d 714, 719 (2010).

A “defendant’s request to proceed pro se must be unequivocal in the context of the record as a whole.” *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001), citing *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

In the instant case, when denying Knippling’s request to proceed pro se, the trial-court stated for the record as follows:

Mr. Knippling’s matter is item number 4 coming on today for pretrial. I know that when he was last before the court we took a brief recess and we lost our power, not just in the courthouse, but all around the city of Shelton.... So Mr. Knippling went back to his current location for housing and is back today to complete that hearing and the pretrial.

The court had heard a motion to allow Mr. Knippling to proceed pro se, and had had a discussion, or we call it a colloquy with Mr. Knippling. And it was clear that it was not an unequivocal request; that he really did want counsel. He just did not want to work with [the attorney appointed to him].

RP 236. The court then denied Knippling’s request that the court reconsider its prior ruling.

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With the exception of his seemingly unequivocally blunt demand to proceed pro se that was made shortly before trial on February 9, 2010, consideration of the entire record shows that Knippling remained constantly equivocal about his request to proceed pro se. Taken in the context of the entire record it appears that Knippling was not motivated by a true desire to proceed pro se but was instead motivated by a desire to pursue tactics and defenses that would be disallowed by the trial-court regardless of who he had as an attorney or whether he represented himself.

The right to proceed pro se is not absolute. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). However, a trial “court may not deny pro se status merely because the defendant is... obnoxious. Courts must not sacrifice constitutional rights on the alter of efficiency.” *Id.* at 509.

In the instant case, Knippling had already delayed one trial by causing the withdrawal of his attorney. RP 92-128. Knippling was more than merely obnoxious. He was actively obstructing the administration of justice and the quest for truth. RP 180-237. After the trial-court denied Knippling’s motion to proceed pro se, Knippling then escalated his

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disruptive behavior and became verbally abusive toward the judge. RP 258.

The right to proceed pro se is not a license to obstruct justice or to defy rules of procedure or substantive law. *State v. Fritz*, 21 Wn. App. 354, 363, 585 P.2d 173, 179 (1978), citing *Faretta v. California*, 422 U.S. 806, 834-35 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

“Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Fritz* at 363, quoting *Faretta v. California*, 422 U.S. at 834-35 n. 46, 95 S.Ct. at 2541.

Knippling’s primary demonstrations of obstructive conduct occurred after the court denied his request, made shortly before trial, to represent himself. RP 249-277. It is clear, however, that notwithstanding the court’s preemptive ruling, Knippling would not defer to the court’s authority to declare the law and to maintain the fair progress of the trial, and it was clear that the trial-court, therefore, did not abuse its discretion when denying Knippling’s request to proceed pro se. It is also clear that Knippling could not represent himself while restrained in “a spit hood that’s ordered to keep him from spitting on other people” and with duct

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tape covering his mouth. RP 274. This is a factual circumstance that Knippling voluntarily caused by his own disruptive and threatening behaviors.

By purposefully engaging in conduct that was in conflict with the right to self-representation, Knippling effectively waived the right to self-representation. “Even when the right [to self-representation] is unequivocally asserted... it may still be subsequently waived by words or conduct.” *State v. Fritz*, 21 Wn. App. 354, 360, 585 P.2d 173, 177, citing *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir. 1976), *cert. denied*, 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976). By engaging in conduct that first required him to be restrained and that then required his removal from the courtroom, Knippling waived his right to self-representation.

A criminal defendant has a constitutional right to be present in the courtroom and to defend in person. U.S. Const. amend VI; Wash. Const. art. I, § 22. A defendant can waive this right through disruptive behavior, and “great deference is to be given to a trial judge’s decision that a defendant had waived his right to testify through his or her conduct.” *State v. Chapple*, 145 Wn.2d 310, 328, 36 P.3d 1025 (2001). It is a

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reasonable extension of this rule of law to argue that a defendant who has through disruptive conduct waived his right to be present for the trial has also waived his right to self-representation.

However, a full and fair legal analysis of the facts of the instant case requires the State to make certain factual concessions, to apply the recent decision of *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010), to those facts, and to point out the distinguishing facts, circumstances, and analyses between *Madsen* and the instant case. The State asserts that when the facts of the instant case are applied to the legal reasoning, logic, and holding of *Madsen*, and when considered in light of other precedent, such as *State v. Hemenway*, 122 Wn. App. 787, 95 P.3d 408 (2004), the court should deny Mr. Knippling's appeal and sustain his conviction.

In *Madsen*, the defendant's requests to proceed pro se were not equivocal. Two months before trial, he stated: "Under Article I [section] 22[,] I have a right to represent myself." *Madsen*, 168 Wn.2d at 501. "Madsen explicitly and repeatedly cited article I, section 22 of the Washington Constitution" and "never wavered from his demand for self-representation." *Madsen*, 168 Wn.2d at 506. Knippling, however, was consistently equivocal, stating that he wanted a different attorney rather

than to represent himself, and it was only when it became apparent two weeks before trial that he could not obtain new counsel that he then said he wanted to “go pro se.” RP 233-237.

In *Madsen*, the defendant was “‘extremely disruptive,’ ‘repeatedly addressed the court at inopportune times,’ and ‘consistently showed an inability to follow or respect the court’s directions.’” *Madsen*, 168 Wn.2d at 502-203 (quoting Clerk’s Papers). In the instant case, Knippling also was disruptive, interrupted the court and parties repeatedly, and signaled an unwillingness or inability to follow the rules and directives of the court. However, Knippling’s conduct was more than merely obnoxious or disruptive; instead, as the entire record reveals, Knippling’s conduct was obstructive and threatening to the extent that it risked preventing the administration of justice. In fact, Knippling’s conduct appears to have been designed for that very purpose: to prevent or obstruct the administration of justice.

There is only one (pretrial) request by Knippling to represent himself that can be viewed as unequivocal, and that is his request that occurred on February 9, 2010, two or three weeks before the expected trial date. RP 236-237. (As argued elsewhere, however, the State avers

that even this request, in light of the entire record, was equivocal in that it appeared to be a tactical response to the court's denial of a second substitution of counsel and because it appeared that the request was designed to serve as a further opportunity for Knippling to obstruct the administration of justice). The record of the trial-court's reasoning and findings of fact is sparse, but it is clear that the court denied Knippling's request for self-representation. RP 237. Up to this point Knippling's behavior might be comparable to the defendant in *Madsen*, in that one might fairly consider from the record that Knippling's behavior was obnoxious and disruptive. It was not until after his request for self-representation had been denied that Knippling became obstructive and defiant to the point of becoming threatening. RP 249-277.

*Madsen* stands for the proposition that "[a] court may not deny a motion for self-representation based on... concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel." *Madsen*, 168 Wn.2d at 505. Additionally, the *Madsen* court reasoned as follows:

Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained

in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

*Madsen*, 168 Wn.2d at 509. The court then commented, in a footnote, that the trial-court may “terminate pro se status if a defendant is sufficiently disruptive or if delay becomes the chief motive.” *Madsen*, 168 Wn.2d at 509, n.4.

In the instant case, the trial-court did not “terminate” Knippling’s self-representation after he became “sufficiently disruptive,” since there was no self-representation to terminate, because the court had already denied Knippling’s motion to proceed pro se. The State urges, however, that it was unnecessary, and would be unreasonable, to force the trial-court to first allow Knippling to represent himself in order to then allow him some improper indulgence that would then allow the court to terminate his self-representation.

*Madsen* is clear that “a trial court’s findings of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.” *Madsen*, 168 Wn.2d at 507. This reasoning by the *Madsen* court can be applied to the facts of the instant case, where the trial-court denied self-

representation to Knippling before, rather than wait until after, his worst examples of obstructive, threatening conduct had occurred. However, the circumstances are distinguishable.

The trial-court judge had Knippling before her in the courtroom. She was able to observe his demeanor and his body language, to hear the tone of his voice, and to assess his behaviors in a way that the reviewing court cannot. Knippling's behaviors were more than merely obnoxious, disruptive, or interruptive as described in *Madsen*. Knippling's behavior did more than to merely threaten the "efficient and orderly" progress of the trial or to create "difficulty" as described in *Madsen*. *Madsen*, 168 Wn.2d at 505, 509. Knippling's behaviors were irrational, defiant, and obstructive to the point that he threatened the fact-finding process itself and created the risk that the quest for justice would be obstructed to the point that it would be halted. Still more, as hindsight revealed, there was reason to be concerned for the security of all persons present in the courtroom. While it can be argued that hindsight should not be applied to the court's preemptive ruling, Knippling's subsequent conduct does demonstrate that his prior motive was to disrupt the proceedings by any means available.

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The *Madsen* court cites *State v. Hemenway*, 122 Wn. App. 787, 95 P.3d 408 (2004), for its holding that a trial-court’s decision to deny a request for self-representation is reviewed for an abuse of discretion. *Madsen*, 168 Wn.2d at 504. Thus, the *Madsen* court was aware of *Hemenway* but did not give any signal indicating that *Hemenway* was overruled or limited by its decision in *Madsen*.

As in *Hemenway*, the trial-court in the instant case did not abuse its discretion when it denied Knippling’s motion for self-representation. “[A] defendant can waive self representation by disruptive words or conduct.” *Hemenway*, 122 Wn. App. at 793 (further citations omitted). The facts of *Hemenway* are similar to the facts of the instant case, in that the defendant in *Hemenway*, similar to Knippling, engaged in persistent disruptions of the court, equivocal requests for new counsel, and made accusations of misconduct. *Hemenway*, 122 Wn. App. at 795. “Considering *Hemenway*’s consistent disruptive behavior, the court did not err in denying his self representation request.” *Hemenway*, 122 Wn. App. at 795.

“Further, a defendant can waive his right to self representation through subsequent misconduct.” *Hemenway*, 122 Wn. App. 795. Thus,

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irrespective of whether the trial-court record on review is sufficient to explain the trial-court judge's denial of Knippling's request for self-representation, the record from below contains abundant facts that establish that Knippling waived his right to self-representation by engaging in misconduct that did more than to merely hinder or delay the administration of justice. Instead of merely hindering or delaying, Knippling's conduct threatened to entirely halt the administration of justice and was such that reasonable minds would be justified in feeling alarm for courtroom security. When Knippling, through his misconduct, forced himself to be gagged, restrained, and removed from the courtroom, he engaged in conduct that was inconsistent with self-representation. Thus, when "considering... the totality of the circumstances...", including his willful conduct that occurred before his motion for self-representation was denied, together with his willful misconduct that occurred after the motion was denied, the facts of this case show that Knippling voluntarily waived his right to self-representation. *Hemenway*, 122 Wn. App. at 795-796; *Madsen*, 168 Wn.2d at 509, n.4.

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2. Mr. Knippling's first trial resulted in a hung jury; therefore, a second jury was sworn, and a second trial then occurred. After the first trial resulted in a hung jury, Knippling did not request to represent himself. At the second trial, Knippling voluntarily waived his own appearance and was therefore absent from the trial. Irrespective of whether Knippling waived or forfeited his right to self-representation at his first trial – by not asserting his right to self-representation at his second trial, or by waiving his appearance and choosing not to appear at the second trial, or both – did Knippling in effect waive his right to represent himself at the second trial?

The State asserts that on the facts of this case the trial-court correctly denied Mr. Knippling's request to represent himself; however, if Mr. Knippling were unjustifiably denied the right to represent himself, the remedy would be a new trial. *State v. Madsen*, 168 Wn.2d 496, 510, 229 P.3d 714; *State v. Breedlove*, 79 Wn. App. 101,111, 900 P.2d 586 (1995).

Because Knippling's first trial resulted in a hung jury, a mistrial was declared, and a new trial was ordered. RP 363. The State continues to assert that based upon the facts of this case the trial-court correctly exercised its discretion and denied Knippling's motion for self-representation at the first trial; however, irrespective of whether the trial-

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court's denial of Knippling's motion was correct, the issue is made moot by the fact that Knippling obtained the remedy of a new trial in any event because of the hung jury in the first trial.

No case was located that is directly on point, but the State asserts that, irrespective of any prior assertion or waiver of rights at the initial trial, retrial following a mistrial results in a revival of the defendant's rights, including both the right to be represented by counsel and the right to proceed pro se. *See, e.g., Wilson v. Horsley*, 137 Wn.2d 500, 509-511, 974 P.2d 316, 321-322 (1999) (retrial after a mistrial results in restoration of defendant's right to a jury trial after prior waiver of jury trial); *but cf., State v. Madsen*, 168 Wn.2d 496, 507, 229 P.3d 714 (2010) (in the context of a single trial, "[t]here is no requirement that a request to proceed pro se be made at every opportunity").

No citation to the record was discovered in the instant case where Knippling asserted his desire to proceed pro se after the mistrial.

Still more, Knippling engaged in conduct that was inconsistent with self-representation. As previously argued, Knippling's most dramatic demonstrations of misbehavior occurred after his motion for self-representation was denied by the trial-court prior to his first trial. These

misbehaviors, however, occurred prior to the second trial. Thus, had Knippling requested to represent himself at the second trial, the second trial-court would not have been put into a position of being perceived on review as having based its rulings on future behavior, because the second trial-court had the benefit of Knippling's past behavior with which to justify its ruling. However, the second trial-court was not put into a position to rule on the self-representation issue because Knippling did not assert his right to self-representation at the second trial. The second trial-court was correct, in the absence of a request for self-representation by Knippling, to presume against a waiver of the right to counsel. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Even if Knippling would have asserted his right to proceed pro se at the second trial, his prior misconduct that resulted in him being justifiably gagged, restrained and ultimately removed from the courtroom was evidence that the "defendant is sufficiently disruptive" so that denial of the right of self-representation was also appropriate. *State v. Madsen*, 168 Wn.2d 496, 509, n.4, 229 P.3d 714 (2010).

Finally, Mr. Knippling voluntarily absented himself from the second trial after the jury was sworn-in. RP 411. Knippling could not

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both represent himself and absent himself from the proceedings. His voluntary choice to be absent from the trial forestalled his right to self-representation.

D. CONCLUSION

The facts of this case support the trial-court's denial of Knippling's motion for self-representation. The pretrial record is sparse in regard to the court's findings and reasoning, but Knippling's conduct during the trial shows that the court's ruling was correct and in the interests of justice.

Knippling's request to proceed pro se was equivocal when considered in the context of the entire record. He had made numerous attempts to delay the proceedings by objecting to his counsel, requesting new counsel, and making accusations against his counsel and other parties. He succeeded in delaying one trial by forcing his attorney's withdrawal. He tried to delay the second attempt at trial by objecting to his attorney and by interrupting the proceedings, acting as his own attorney, while stating that he did not wish to proceed pro se. When he was unable to cause the removal of his attorney and it appeared that the matter was

proceeding to trial nonetheless, he then claimed that he wished to represent himself. When Knippling's request to proceed pro se did not result in further delay, because the judge denied Knippling's request and set a trial date, Knippling then became combative, defiant, and sufficiently disruptive that it was impossible to preserve the safety of the courtroom or conduct a fair trial. Knippling's voluntary, unprovoked conduct forced the trial-court to have Knippling gagged, restrained, and ultimately removed from the courtroom.

Knippling was tried in absentia, but the jury was unable to unanimously agree. Thus, a mistrial was declared.

A second trial was commenced. Knippling did not assert his right to self-representation at the second trial. Instead, he voluntarily absented himself from the proceedings.

On these facts Knippling's appeal should be denied and his conviction sustained.

Knippling, through his own misconduct, voluntarily waived his right to self-representation at his first trial. His request to proceed pro se was ambiguous and equivocal because it appeared, in light of the entire record, to be designed to obstruct the quest for justice.

Irrespective of how the issue of self-representation might or could have been resolved at his first trial, Knippling had a second trial, rendering the issue regarding the right to self-representation at his first trial moot.

Knippling, through his own misconduct as demonstrated at his first trial, voluntarily waived his right to self-representation at his second trial.

By not seeking self-representation prior to the second trial, after the mistrial was declared, Knippling through his own choices voluntarily waived his right to self-representation at his second trial.

Knippling, through his own choices, voluntarily absented himself from the second trial; by doing so Knippling voluntarily waived his right to represent himself.

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