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NO. 58662-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Madsen's timely, unequivocal request to proceed pro se on January 24, 2006.

2. The trial court erred in denying Mr. Madsen's timely, unequivocal request to proceed pro se on March 7, 2006.

3. The trial court erred in denying Mr. Madsen's timely, unequivocal request to proceed pro se on May 2, 2006.

4. The trial court erred in failing to engage in a Faretta¹ colloquy after Mr. Madsen unequivocally asked to proceed pro se.

5. The trial court abused its discretion in entering a written finding that Mr. Madsen's third request to proceed pro se was equivocal. CP 21 (Finding of Fact 4).

6. The trial court abused its discretion in entering a written finding that after Mr. Madsen's third request to proceed pro se, the court "engaged in a colloquy with the defendant to ensure that the defendant understood the risks and consequences of self-representation." CP 21 (Finding of Fact 5).

7. The trial court erred in entering a written conclusion that Mr. Madsen's third request to proceed pro se "would have likely necessitated a continuance." CP 22.

¹ Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

8. The trial court erred in entering a written conclusion that Mr. Madsen's third request to proceed pro se was untimely and granting the request would obstruct the orderly administration of justice. CP 22.

9. The trial court abused its discretion in finding that the three counts of felony violation of a no contact order did not constitute the same criminal conduct for purposes of sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant's timely, unequivocal request to proceed pro se must be granted as a matter of law unless the trial court has determined that the defendant is incompetent to stand trial or that his waiver of counsel is not knowing, intelligent and voluntary. Three months before trial Mr. Madsen stated that he did not want to be screened by the Office of Public Defense and instead wanted to proceed pro se. He renewed his motion to proceed pro se two months before trial, and again the day before trial. He never sought a continuance. Did the trial court err in repeatedly denying Mr. Madsen's requests to proceed pro se without finding that he was incompetent or that his waiver was not knowing, intelligent and voluntary? (Assignments of Error 1-8)

2. Multiple offenses count as one crime for purposes of a defendant's offender score if they were committed with the same intent, against the same victim, and at the same time and place. Where Mr. Madsen was convicted of placing three telephone calls, each minutes apart, to the same person, did the sentencing court err in finding the calls did not constitute the same criminal conduct for purposes of sentencing? (Assignment of Error 9)

C. STATEMENT OF THE CASE

On September 2, 2004, Deborah Stuart called 9-1-1 and alleged that Kurt Madsen had telephoned her, in violation of a no-contact order entered a year earlier. 5/8/06 RP 189. According to telephone company employees, the call was placed at 10:32p.m., and lasted three minutes. 5/8/06 RP 175.

Mr. Madsen allegedly called Ms. Stuart back five minutes later, at 10:40p.m., and they talked for around 18 minutes. 5/8/06 RP 168, 176, 190. Mr. Madsen allegedly telephoned again about 18 minutes later. 5/8/06 RP 169, 176, 191-92. This time, a sheriff's deputy who had responded to Ms. Stuart's call spoke with Mr. Madsen. 5/8/06 RP 156. According to the deputy, Mr. Madsen stated that he thought Ms. Stuart was in the process of dropping

the protection order, but that in any event he would not call again.

5/8/06 RP 158.

The State charged Mr. Madsen with one count of felony violation of a no contact order. CP 1. The alleged predicate crimes were violations of a protection order that Mr. Madsen's mother had requested against him after he had visited his grandparents against his mother's wishes. 8/9/06 RP 43; Pretrial Exhibits 4, 8. The prosecutor later amended the information to charge three counts of the same crime, each "of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other." CP 18-19.

On January 24, a hearing was held before the Honorable Jeffrey Ramsdell. The case had not yet been set for trial. 1/24/06 RP 3. Mr. Madsen's then counsel, private attorney Erik Kaeding, sought permission of the court to withdraw. 1/24/06 RP 2. The court permitted withdrawal. 1/24/06 RP 4. The following exchange then occurred:

COURT: Counsel, you're withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to –

MR. MADSEN: Motion –

COURT: proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5.

The court asked Mr. Madsen why he wanted to proceed pro se. 1/24/06 RP 5. Mr. Madsen responded that “the whole charge is just a pathetic joke,” and that he “could resolve the whole issue.” 1/24/06 RP 5. He stated that if the court granted his motion to proceed pro se, he would be able to engage in discovery, move to reduce bail, and investigate whether his predicate convictions were still pending. 1/24/06 RP 5.

The court did not conduct further colloquy and instead ordered counsel be appointed by the Office of Public Defense. 1/24/06 RP 5. The judge indicated that he would entertain the motion to proceed pro se again if Mr. Madsen still wished to do so after consulting with new counsel. 1/24/06 RP 5. The court denied

Mr. Madsen's request to "at least get an order stating that I could do some research on this for the meantime." 1/24/06 RP 6.

On January 31, 2006, a hearing was held before Judge Ramsdell to confirm new counsel. Mr. Madsen asked the court to address a bail issue. 1/31/06 RP 5. When the court refused, the following exchange occurred:

MR. MADSEN: I believe he – my motion, he said he would hear it next time.

COURT: I won't.

MR. MADSEN: And also my pro se, um...

COURT: I won't hear pro se motions if you have an attorney. Either you represent yourself or an attorney represents you. There is no hybrid representation. You can file whatever you want, but as long as you have an attorney represent you, then your attorney will make motions.

1/31/06 RP 5. Mr. Madsen then submitted at least five pro se pleadings to the court, primarily requesting discovery and moving to dismiss the case. CP 79-101.

On March 7, 2006, a hearing was held before Judge Ramsdell on Mr. Madsen's motion to dismiss counsel, Michael McCullough, and proceed pro se. Mr. McCullough stated, "I cannot provide an adequate defense for Mr. Madsen at this point because he simply won't listen." 3/7/06 RP 4. When the court asked Mr.

Madsen what the problem was, he explained that Mr. McCullough felt that way because Mr. Madsen refused to plead guilty. 3/7/06 RP 7.

Mr. Madsen stated, "I think that I'd be better off representing myself." 3/7/06 RP 8. He noted that he had a right to self-representation under Article 1, section 22 of the Washington Constitution. 3/7/06 RP 8. He mentioned that under State v. Silva, the court could appoint standby counsel and address issues of research assistance and the appointment of an investigator. 3/7/06 RP 8-9.

The court stated that instead of proceeding pro se or having Mr. McCullough continue to represent Mr. Madsen, there was an "in between" solution of assigning new counsel. 3/7/06 RP 11. Mr. Madsen insisted that a better "in between" solution would be to allow him to proceed pro se and appoint standby counsel. 3/7/06 RP 11. He then stated, "I'd rather represent myself, Your Honor, honestly." 3/7/06 RP 11. He suggested that whomever the court had in mind to replace his attorney could instead assist him as standby counsel. 3/7/06 RP 12.

The judge then turned to Mr. McCullough and asked if he had any concerns about Mr. Madsen's competency. 3/7/06 RP 12.

Mr. McCullough stated that he did. 3/7/06 RP 12. Mr. Madsen said, "Oh, wow." Mr. Madsen suggested that they hire a psychologist. 3/7/06 RP 13, 16. He stated he would take an IQ test or a psychological exam or "whatever you need." 3/7/06 RP 19. The court declined the offer; no competency evaluation was ever ordered, and no competency determination was ever made.

Mr. Madsen stated:

I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that's what I'm going to move forward with doing, none of this psychologist, all this BS. I want this thing set for trial right now. And you can have any opinion you want of me, your Honor.

3/7/06 RP 13.

Once again, no colloquy was held on the motion. Once again, the court ordered appointment of new counsel and told Mr. Madsen he would entertain the motion to proceed pro se after Mr. Madsen and new counsel had consulted. 3/7/06 RP 16-17. Mr. Madsen objected and noted that the court had made the same ruling the last time he moved to proceed pro se. 3/7/06 RP 17.

On May 2, 2006, trial commenced before the Honorable Michael Heavey. During pre-trial motions, Mr. Madsen stated, "I'd

like to renew my motion to proceed pro se.” 5/2/06 RP 80. He

explained:

Because, obviously, there’s several motions that I’ve been trying to make to the court. . . . The court has told me to address them with [my attorney]. Why would I go through her? I know how to talk, and I know I can represent a fool or whatever, but, hey, I believe that I’d be a lot better off than I am right now.

5/2/06 RP 81. Without conducting a colloquy, the court stated:

I don’t think you are prepared to interview up to fifty jurors tomorrow to see or to know the proper procedures for selecting a jury. I don’t believe you know the rules of evidence. I don’t believe you would know when the prosecutor asked a question that was improper. I think you would put yourself at a very, very serious disadvantage to represent yourself, and I can tell you this, I will not be revisiting anything that we’ve already decided with your attorney here.

5/2/06 RP 82.

Mr. Madsen complained about how his first attorney quit even though he had paid him and that although his current attorney “really does know what she’s doing,” she did not have enough time to prepare. 5/2/06 RP 83. The court asked if Mr. Madsen wanted a continuance so that his attorney could have more time to prepare, and he said, “No, I’m not asking for more time because it’s already too late.” 5/2/06 RP 83.

After Mr. Madsen's attorney told the court about the tasks she still needed to perform, the court said:

Okay. I guess I need to clear this up. Mr. Madsen, you have the right to represent yourself, but only after I ask you some questions. I've already asked you a few of them. It would be very unwise of you to do so, I can tell you that. But do you still wish to represent yourself?

5/2/06 RP 86. Mr. Madsen answered, "at this point I am forced, almost forced into doing that, so I would say yes. Because, I mean, not forced into it, but like I said before, I didn't really get finished what I was saying." 5/2/06 RP 87.

Mr. Madsen then asked if he could briefly discuss some issues in his case and the court allowed it. 5/2/06 RP 87. The court addressed Mr. Madsen's bail issue. 5/2/06 RP 88-89. Then without going back to discuss the renewed motion to proceed pro se, the court summarily stated, "I am going to deny your motion to proceed pro se. I don't feel you are prepared." 5/2/06 RP 89.

The prosecutor felt the court denied the motion to proceed pro se on improper grounds, so he presented findings and conclusions asserting different bases for the denial. 5/3/06 RP 136-39; CP 20-22. The proposed order concluded:

Although the court may find that a defendant's request to proceed pro se is not in his best interests,

this is not a tenable reason for denying a defendant's request. In the present case, regardless of whether defendant's request to proceed pro se is in his best interests, the court finds that defendant's request was untimely, and granting the request would obstruct the orderly administration of justice.

CP 22. The court adopted the proposed findings and conclusions and signed the order on May 4. CP 20-22.

The case proceeded to trial and the jury found Mr. Madsen guilty on all three counts. CP 48-50.

Mr. Madsen moved for a new trial under CrR 7.5, arguing that the trial court violated his state and federal constitutional rights in denying his motion to proceed pro se. CP 62-101; 135-149.

Judge Spearman heard and denied the motion on August 9.² 8/9/06

RP 28. The judge deemed Mr. Madsen's first request, on January 24, equivocal because it was made in connection with the

withdrawal of retained counsel. 8/9/06 RP 22. The judge deemed

Mr. Madsen's second request, on March 7, equivocal because

"once more, it was in the context of being unhappy with his

attorney." 8/9/06 RP 23. The court also noted Judge Ramsdell's

concerns about Mr. Madsen's competency. 8/29/06 RP 24. The

court further found Mr. Madsen's request to proceed pro se

² Judge Heavey recused himself because he had previously stated, "your chances of prevailing on a motion for a new trial is nil." CP 52, 61.

equivocal because he did not renew it at every possible hearing.

8/29/06 RP 25-26.

The court also found the third request equivocal, because Mr. Madsen insisted on discussing his bail issue and then described himself as being forced to proceed pro se. 8/9/06 RP 26-27. The judge then stated that because counsel had not objected to the findings and conclusions on the motion to proceed pro se, he felt constrained to uphold the previous judge's finding that the third request to proceed pro se was not timely and would hinder the due administration of justice if it had been granted. 8/9/06 RP 28.

The case proceeded to sentencing, and Mr. Madsen argued that the applicable standard range was 12 months and a day to 14 months, because the three counts constituted the same criminal conduct. 8/9/06 RP 42, 44-45. The court found that they were three separate incidents that did not constitute the same criminal conduct, leading to a range of 15 to 20 months. 8/9/06 RP 49-50. The court imposed a sentence of 18 months. 8/9/06 RP 51; CP 126.

Mr. Madsen appeals. CP 150.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. MADSEN'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHEN IT DENIED HIS TIMELY, UNEQUIVOCAL REQUESTS TO PROCEED PRO SE.

a. The state and federal constitutions guarantee criminal defendants the right to represent themselves. The Washington Constitution expressly guarantees the right of self-representation: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel" Wash. Const. art. 1, § 22; See State v. Breedlove, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995). "In this state, a defendant may conduct his entire defense without counsel if he so chooses." State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931).

The Sixth Amendment to the United States Constitution implicitly provides the right to proceed pro se.³ Faretta v. California, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although the constitution includes safeguards – like the right to counsel – designed to protect the

³ The amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. 6.

accused, “to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.” Faretta, 422 U.S. at 815 (internal citations omitted). Thus, “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” Id. at 834 (internal citations omitted).

Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

Breedlove, 79 Wn. App. at 110-111 (internal citations omitted).

b. A timely, unequivocal request to proceed pro se must be granted as a matter of law. A defendant’s request to proceed pro se must be (1) timely made and (2) stated unequivocally. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). If the demand for self-representation is made well before the trial and unaccompanied by a motion for a continuance, the trial court must grant the request as a matter of law. State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). The trial court does not have the

discretion to deny the request unless it is made just before or during trial. Id. “Where a court is put on notice that the defendant wishes to assert his right to self-representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request. Breedlove, 79 Wn. App. at 109.

Even if the request is made just before trial, the trial court may deny the request only if (1) the motion is made for improper purposes, i.e., for the purpose of unjustifiably delaying the trial, or (2) granting the request would obstruct the orderly administration of justice. Breedlove, 79 Wn. App. at 107-08. “When the lateness of the request and even the necessity of a continuance can be reasonably justified, the request should be granted.” Id. at 110.

Once the accused makes a timely, unequivocal request to represent himself, the court must engage in a colloquy to determine whether the defendant is waiving his right to counsel knowingly, intelligently, and voluntarily. Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. In order to make this determination, the trial court must apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-representation. Woods, 143 Wn.2d at 587-88. Unless the court finds the waiver is

invalid, it must grant a timely, unequivocal motion to proceed pro se. Barker, 75 Wn. App. at 241.

c. The trial court improperly denied Mr. Madsen's timely, unequivocal requests to proceed pro se. Mr. Madsen's request to proceed pro se was timely and unequivocal. Accordingly, the trial court was required to grant the request after ensuring that the waiver of counsel was knowing, intelligent and voluntary. The trial court failed to do this, and therefore Mr. Madsen's convictions must be reversed and his case remanded for a new trial.

Mr. Madsen first asked to proceed pro se on January 24, 2006. 1/24/06 RP 3. His request was clearly timely because it was made before his case had even been set for trial and over three months before his trial actually commenced. 1/24/06 RP 3.

Mr. Madsen's request was also unequivocal. After his retained counsel was allowed to withdraw, the following exchange occurred:

COURT: Counsel, you're withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5. The court denied the motion, stating that Mr. Madsen could renew his motion after discussing it with new counsel. 1/24/06 RP 5.

At the later hearing on Mr. Madsen's motion for a new trial, the judge deemed this demand to proceed pro se equivocal because it was made in connection with the withdrawal of counsel. 8/9/06 RP 22. But that is not the test. A defendant can only proceed pro se if his counsel withdraws, so withdrawal of counsel does not render an unequivocal request for self-representation equivocal. See, e.g., Breedlove, 79 Wn. App. at 105 (defense attorney asked to withdraw due to "complete breakdown in communications" and defendant moved to proceed pro se; court of appeals reversed conviction because trial court improperly denied defendant's request to proceed pro se).

Courts have even deemed requests to proceed pro se unequivocal where the trial court denied the defendant's request for new counsel and limited the defendant's choices to current counsel or self-representation. See, e.g., Barker, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new

counsel); DeWeese, 117 Wn.2d at 372 (grant of request to proceed pro se affirmed even though defendant's first choice was appointment of new counsel). Even a defendant's "remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver." Id. at 378. Mr. Madsen did not even make such claims, so if Mr. DeWeese's request to proceed pro se was unequivocal, Mr. Madsen's certainly was. It is difficult to imagine a more unequivocal request than "I want a pro se order, Your Honor. You want to proceed pro se? Pro se. Yes. Exactly." 1/24/06 RP 4-5. Mr. Madsen's request to proceed pro se was unequivocal.

Because his request was timely and unequivocal, Mr. Madsen was entitled to proceed pro se as a matter of law unless the trial court determined, after a proper colloquy, that his waiver of counsel was not knowing, intelligent, and voluntary. Barker, 75 Wn. App. at 241; Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. The trial court did not engage in such a colloquy – nothing in the record reveals that Judge Ramsdell advised Mr. Madsen of the nature of the charges or the possible penalties before denying his

request on January 24. 1/24/06 RP. Nor did Judge Ramsdell find that Mr. Madsen's waiver was not knowing, intelligent, and voluntary. 1/24/06 RP. There is no legal basis for the court's requirement that Mr. Madsen give new counsel a chance before being allowed to proceed pro se. 1/24/06 RP 5. Mr. Madsen's request was timely and unequivocal, so he was entitled to represent himself as a matter of law. Because Mr. Madsen's right to self-representation was violated, his convictions must be reversed and his case remanded for a new trial. Breedlove, 79 Wn. App. at 110; Vermillion, 112 Wn. App. at 848.

Although the January 24th violation of Mr. Madsen's right to proceed pro se provides a sufficient independent basis for reversal, it is worth noting that the two subsequent denials of his request to represent himself were also improper. On March 7, 2006, Mr. Madsen moved to dismiss counsel and again requested to proceed pro se. 3/7/06 RP 4. Mr. Madsen stated, "I think that I'd be better off representing myself." 3/7/06 RP 8. He went on, "According to the Washington Constitution I have a right to represent myself. Under Article 1, Section 22 I have a right to represent myself." 3/7/06 RP 8. He mentioned that under State v. Silva, the court could appoint standby counsel and address issues of research assistance and

the appointment of an investigator. 3/7/06 RP 8-9 (citing State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001)).

The court stated that instead of proceeding pro se or having Mr. McCullough continue to represent Mr. Madsen, there was an “in between” solution of assigning new counsel. 3/7/06 RP 11. Mr. Madsen insisted that a better “in between” solution would be to allow him to proceed pro se and appoint standby counsel. 3/7/06 RP 11. He then stated, “I’d rather represent myself, Your Honor, honestly.” 3/7/06 RP 11. He suggested that whomever the court had in mind to replace his attorney could instead assist him as standby counsel. 3/7/06 RP 12.

For all of the reasons discussed above with respect to the January 24th request to proceed pro se, the March 7th request was also unequivocal. Yet the trial court once again denied the request and once again stated that Mr. Madsen would have to discuss it with new counsel first. 3/7/06 RP 16-17.

The March 7th denial did contain one new twist: the court raised a concern about Mr. Madsen’s competency. 3/7/06 RP 12. This was a red herring. It is true that a defendant must be competent to waive the assistance of counsel and proceed pro se, but the standard for competency in this context is the same as that

for standing trial or pleading guilty: the accused must merely possess the capacity to understand the proceedings and to assist counsel in his defense. Godinez v. Moran, 509 U.S. 389, 391, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). A court is required to make a competency determination if and only if it has reason to doubt the defendant's competence. Id. at 402 n.13.

Once there is reason to doubt the competency of a defendant, the procedures outlined in the competency statute, RCW 10.77, must be followed. In re the Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). As soon as a party or the court raises doubts as to the defendant's competency, the court must order an evaluation of the defendant by proper experts. RCW 10.77.060. Upon completion of the evaluation, the court must then determine the individual's competency to stand trial, plead guilty, or waive counsel. Fleming, 142 Wn.2d at 863. "It is the responsibility of the trial court to determine a defendant's competency intelligently to waive the services of counsel and act as his own counsel." State v. Vermillion, 112 Wn. App. 844, 857-58, 51 P.3d 188 (2002).

But here, despite Mr. Madsen's offers to be tested, the court did not order a competency evaluation as required under RCW

10.77 and Fleming, and did not make a competency determination. Nor did the prosecutor or any of Mr. Madsen's attorneys request a competency evaluation, which is something they would have been ethically obligated to do if there was a question of Mr. Madsen's competency. ABA Criminal Justice Standard 7-4.2,⁴ see also Fleming, 142 Wn.2d at 867 ("When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot

⁴ Standard 7-4.2 provides:

Responsibility for raising the issue of incompetence to stand trial

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to stand trial at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of defendant's competence to stand trial whenever the prosecutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information that has come to the prosecution's attention relative to defendant's incompetence to stand trial.

(c) Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt that the defendant is competent to stand trial and that it is not filed for purposes of delay. The motion should also set forth the specific facts that have formed the basis for the motion.

(e) In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation, or to delay the proceedings against the defendant.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

excuse failure to raise competency at any time so long as such incapacity continues”).

The State was permitted to prosecute Mr. Madsen and Mr. Madsen’s not-guilty pleas were accepted without anyone ever mentioning competency again. If Mr. Madsen were truly incompetent, the court could not have allowed him to be tried. While the court could have denied a request to proceed pro se upon a finding of incompetence, it cannot violate the accused’s constitutional right to self-representation based upon a hunch. Because Mr. Madsen made another timely and unequivocal request to proceed pro se, and because the trial court never found him to be incompetent, the trial court erred in denying Mr. Madsen’s March 7th request to represent himself, just as it erred in denying his January 24th request.

Despite his frustration with the court’s repeated insistence that he keep trying new counsel, Mr. Madsen again asked to proceed pro se on May 2, 2006, during pretrial motions. 5/2/06 RP 80. Although at this point the case was on the verge of voir dire, the request was timely because it was a renewal of two previous requests that the trial court had denied. See Breedlove, 79 Wn.

App. at 109 (where trial court had denied earlier motion to proceed pro se, motion renewed during trial was considered timely).

The May 2nd request was also unequivocal. Although this time Mr. Madsen did say he was “almost forced” into representing himself because his counsel hadn’t fully prepared, such language does not render a request to proceed pro se equivocal. DeWeese, 117 Wn.2d at 378.

Once again, the court did not engage in a Faretta colloquy. The judge just said, “It would be very unwise of you to do so, I can tell you that. But do you still wish to represent yourself?” 5/2/06 RP 86. The court did not advise Mr. Madsen of the nature of the charges or the possible penalties, and did not enter a finding that the waiver of counsel was not knowing, intelligent and voluntary.

Rather, the trial judge improperly denied the May 2nd request on the basis that he thought Mr. Madsen did not know the proper procedures for selecting a jury or the rules of evidence. 5/2/06 RP 82. But “ the right to self-representation does not require a showing of technical knowledge. If a person is competent to stand trial, he is competent to represent himself.” Vermillion, 112 Wn. App. at 848.

The prosecutor recognized this problem and attempted to retrofit the ruling into a different set of grounds. 5/3/06 RP 136-39;

CP 20-22. But the prosecutor's grounds were also legally improper, not to mention factually inaccurate. The order stated, "In the present case, regardless of whether defendant's request to proceed pro se is in his best interests, the court finds that defendant's request was untimely, and granting the request would obstruct the orderly administration of justice." CP 22.

As discussed above, the request was not untimely, and therefore the court should not reach the question of the orderly administration of justice. Even if it had been untimely, there is no basis for the finding that granting the request would obstruct the orderly administration of justice. Indeed, the trial court asked Mr. Madsen if he wanted a continuance and he stated that he did not. 5/2/06 RP 83. To the extent Mr. Madsen was disruptive, it was because he was trying to represent himself and the judge had to tell him to be quiet and let his attorney represent him. Thus, granting the motion would have improved the orderly administration of justice, contrary to court's finding. The D.C. Circuit has addressed the circularity of the reasoning employed by the State here:

We begin by rejecting the Government's approach of using "disruptive" incidents following the denial of the pro se motions as reasons to support that denial. This is like using the fruit of an unreasonable search to provide a cause making the search reasonable.

Nearly all of the incidents cited by the Government concerned assertions of the right to self-representation. It would be anomalous to hold that the denial of one's rights can be justified by reference to the nature of subsequent complaints protesting that denial.

United States v. Dougherty, 473 F.2d 1113, 1126 (D.C. Cir. 1972).

In sum, all three denials of Mr. Madsen's requests to proceed pro se were improper. Each violation independently requires reversal here. Thus, even if this Court finds that one or two of the denials were justified, Mr. Madsen must be granted a new trial.

d. Because he was improperly denied his right to represent himself, Mr. Madsen must be granted a new trial. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. Breedlove, 79 Wn. App. at 110. Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. Vermillion, 112 Wn. App. at 848. Because Mr. Madsen was denied his constitutional right to proceed pro se, his convictions must be reversed and his case remanded for a new trial.

2. MR. MADSEN'S CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF DETERMINING HIS OFFENDER SCORE.

a. Current offenses constitute the same criminal conduct for SRA scoring purposes when they involve the same victim, occur at the same time and place, and share the same criminal intent. The Sentencing Reform Act ("SRA") provides for the structured sentencing of felony offenders through standard sentence ranges derived from the seriousness of the offense and the defendant's offender score. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is calculated by adding points from the defendant's criminal history as well as other current offenses. RCW 9.94A.589(1)(a). However, multiple current offenses count as only one crime if they constitute the "same criminal conduct." Id. "Same criminal conduct" . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

"The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). As to the "same time" requirement, simultaneity is not

required. State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Indeed, “there is one clear category of cases where two crimes will encompass the same criminal conduct – the repeated commission of the same crime against the same victim over a short period of time.” Id. at 181. A trial court’s determination of what constitutes the same criminal conduct for purposes of calculating an offender score will be reversed upon a showing of misapplication of the law or abuse of discretion. Tili, 139 Wn.2d at 122.

b. Mr. Madsen placed three telephone calls with the same intent, to the same person, in the same place, in a short time span. Mr. Madsen argued that the three telephone calls constituted the same criminal conduct and should be counted as one point, leading to a standard sentencing range of 12+ to 14 months. 8/9/06 RP 42-46. The court found that they did not constitute the same criminal conduct because they “were three separate incidents, and, as pointed out, were separated by several minutes.” 8/9/06 RP 49. The court reasoned that because “each call was clearly terminated,” the “same intent” prong was not satisfied: “each time the defendant formulated the intent to commit a new and different crime.” 8/9/06 RP 49.

The court erred in its application of the “same time” and “same intent” inquiries. “Same time” means not only simultaneous events but also sequential, repeated commission of the same crime over a short period of time. Porter, 133 Wn.2d at 181. For example, where a defendant sold methamphetamine to a buyer and 10 minutes later sold marijuana to the same buyer, the Supreme Court reversed the trial court’s finding that the crimes did not constitute the same criminal conduct. Id. at 180.

Here, the first two calls were separated by only 5 minutes and the time between the second and third calls was only 18 minutes. 5/8/06 RP 168-69, 176, 190-92. Thus, at a minimum, the first two calls satisfy the “same time” element, because only half as much time elapsed between those calls as elapsed between drug transactions in Porter. The third call should also be considered to have occurred within the “same time” for sentencing purposes, because 18 minutes is not a significantly longer break than 10 minutes, and all three calls were part of the same “scheme or plan” – to talk to Ms. Stuart and invite her over to his house that evening. See Porter, 133 Wn.2d at 185-86 (a sequence of separate events occurred at the “same time” for purposes of sentencing because they were all part of the same “scheme or plan” – to sell drugs).

Nor did the intent change between calls. In Walden, this Court ruled that one count of second degree rape and one count of attempted second degree rape constituted the same criminal conduct even though one count involved forcing the victim to masturbate and then perform fellatio on the defendant and the other count involved a failed attempt at anal intercourse. Walden, 69 Wn. App. at 184. This Court held that “the criminal intent of the conduct comprising the two charges is the same: sexual intercourse.” Id. at 188. Similarly here, the criminal intent of the conduct comprising the three charges is the same: telephone contact.

In Porter, even though the defendant sold a different drug to the buyer in a separate transaction 10 minutes after the first transaction, the court found that the “same intent” prong was satisfied because the delivery of each drug furthered the single criminal objective of “selling drugs in the present,” as opposed to selling one in the present and possessing the other with intent to deliver in the future. Porter, 133 Wn.2d at 184-85. Similarly here, each call furthered the single criminal objective of talking to Ms. Stuart in the present.

In Tili, the court found the defendant acted with the “same intent” when committing each crime because of an “unchanging pattern of conduct, coupled with an extremely close time frame.” 139 Wn.2d at 124. The same is true here. As discussed previously, the time frame was extremely close. Furthermore, there was an “unchanging pattern of conduct” – Mr. Madsen picked up the telephone and called Ms. Stuart each time. This pattern is exactly the same, unlike the conduct in Walden, Porter, or Tili. Thus, if the “same intent” prong was satisfied in those cases, it was certainly satisfied here. Mr. Madsen contacted the same person, in the same place, using the same device, within a short time span. Mr. Madsen’s case falls within the “one clear category of cases where [multiple] crimes will encompass the same criminal conduct – the repeated commission of the same crime against the same victim over a short period of time.” Porter, 133 Wn.2d at 181. Accordingly, the trial court erred in finding that the three telephone calls did not constitute the same criminal conduct for sentencing purposes.

c. Mr. Madsen’s case should be remanded for resentencing based on the correct offender score. Because the sentencing court incorrectly determined that the three calls were not the same criminal conduct, it found the standard sentencing range was 15 to

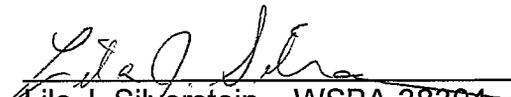
20 months instead of 12+ to 14 months. 8/9/06 RP 50; CP 124. Mr. Madsen's sentence must be vacated and his case remanded for a sentence within the correct standard range. Tili, 139 Wn.2d at 128.

E. CONCLUSION

Because Mr. Madsen's constitution right to represent himself was violated, his convictions must be reversed and his case remanded for a new trial. In the alternative, his sentence should be vacated and his case remanded for resentencing because the three convictions constituted the same criminal conduct.

DATED this 17th day of April, 2007.

Respectfully submitted,


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

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STATE OF WASHINGTON,)
)
 Respondent,) NO. 58662-9-1
)
 v.)
)
 KURT MADSEN,)
)
 Appellant.)

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 17TH DAY OF APRIL, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------------------------|-----------------------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY | <input checked="" type="checkbox"/> | U.S. MAIL |
| APPELLATE UNIT | <input type="checkbox"/> | HAND DELIVERY |
| KING COUNTY COURTHOUSE | <input type="checkbox"/> | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| <input checked="" type="checkbox"/> KURT MADSEN | <input type="checkbox"/> | U.S. MAIL |
| NO MAILING ADDRESS | <input type="checkbox"/> | HAND DELIVERY |
| | <input checked="" type="checkbox"/> | <u>APPELLANT TO PICK-UP</u> |
| | | <u>IN PERSON</u> |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF APRIL, 2007.

X _____ *grl*

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