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Court of Appeals
Division III
State of Washington

No. 94681-7

33990-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

JEROME J. CURRY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it allowed Mr. Curry to represent himself despite his equivocation and reluctance to proceed pro se.

2. The trial court erred when it denied Mr. Curry's motion to hold an evidentiary hearing under CrR 3.6(a).

3. The trial court erred when it denied Mr. Curry's motion to introduce the computer assisted dispatch (CAD) report.

4. The Court of Appeals should not award costs if the state substantially prevails on appeal.

II. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in granting Mr. Curry's demand to represent himself after it discussed the issue at length with him at a specially set motion hearing occurring a month before trial?

2. Did the trial court improperly refuse to suppress evidence under CrR 3.6 where Mr. Curry failed to provide the required affidavit, or comparable document, relating the facts that he anticipated would be elicited at the hearing, and where the trial court held a hearing on the suppression issue in any event?

3. Did the trial court abuse its discretion when it sustained a properly placed hearsay and foundational objection to the admission of a computer aided dispatch report (CAD)?

4. Does this Court's general order issued on June 10, 2016, outlining the procedure for requesting a waiver of costs on appeal, apply to this appeal?

III. STATEMENT OF THE CASE

On December 29, 2014, in Spokane County, Mr. Jerome Curry was charged with possession of a controlled substance, heroin, with intent to deliver, and possession of a controlled substance, methamphetamine. CP 4.[1] Prior to trial, in early April 2015, Mr. Curry filed several pro se motions. (4/3/15) RP 7-8. On April 30, 2015, Mr. Curry also filed a motion to proceed pro se. CP 48-58. His attorney's declaration[2] in support of the motion to proceed pro se averred that Mr. Curry was requesting a motion hearing to allow him to represent himself, or, in the alternative, to obtain a new lawyer. CP 49.

---

[1] Mr. Curry was evaluated for competency. The trial court found him competent to stand trial, a finding he does not contest on appeal. (4/3/15) RP 4; CP 34-35.

[2] The declaration was made by Mr. Curry's appointed trial counsel, Mr. Elston.

The declaration and the attachments in support of the motion established that Mr. Curry had previously represented himself in a multi-count felony trial at the superior court level, and, in part, at the appellate level, "with some success." CP 49. One appellate decision[3] attached to the motion to proceed pro se established that Mr. Curry had represented himself at a previous trial, as well as at the resentencing after he prevailed on a sentencing issue in his first appeal. CP 52. Additionally, at the appellate level, Mr. Curry had raised the issue of whether he was denied his right to counsel after the case was remanded to the Superior Court for resentencing where he, again, represented himself.[4]

In the present case, the trial court granted Mr. Curry's request to proceed pro se after engaging in an extensive colloquy with him. (5/7/15) RP 1-20.

Mr. Curry was convicted of the two felony possession of controlled substance charges. CP 127, 128. From these convictions he appeals.

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[3] CP 52-54; *State v. Curry*, 173 Wn. App. 1003, 2013 WL 269029 (2013).

[4] This Court held that he was not denied counsel after he had effectuated his right to represent himself during the earlier trial because he never requested reappointment of counsel at the resentencing. CP 53. *Curry*, 173 Wn. App. 1003, at *2.

IV. ARGUMENT

A. CURRY'S DEMAND TO PROCEED PRO SE WAS UNEQUIVOCAL; THE DEMAND OCCURRED WEEKS BEFORE HIS TRIAL WAS SCHEDULED. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING HIS DEMAND AFTER ENGAGING HIM IN AN EXTENSIVE COLLOQUY REGARDING HIS REQUEST.

Appellate courts review a trial court's grant of a motion to proceed pro se for abuse of discretion. *State v. Modica,* 136 Wn. App. 434, 442, 149 P.3d 446 (2006), *affirmed,* 164 Wn.2d 83, 186 P.3d 1062 (2008).

The United States Constitution and the Washington State Constitution guarantee criminal defendants the right to self-representation. U.S. Const., amend. VI and XIV; Wash. Const., art. I § 22. The Sixth Amendment right to counsel carries with it the implicit right to self-representation, *Faretta v. California,* 442 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), while article I, section 22 of the Washington Constitution creates an *explicit* right to self-representation, *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "This right is afforded a defendant despite the fact that exercising the right will almost surely result in detriment to both the defendant and the administration of justice." *State v. Vermillion*, 112 Wn. App. 844, 850-51, 51 P.3d 188 (2002), *citing State v. Fritz,* 21 Wn. App. 354, 359, 585 P.2d 173 (1978).

While courts must carefully consider the waiver of the right to counsel, an improper rejection of the right to self-representation requires reversal. *State v. Madsen,* 168 Wn.2d at 503. Indeed, there are limits on a court's ability to act in the defendant's best interests. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences attendant to that decision. Such a finding must be based on some identifiable fact. *Madsen,* 168 Wn.2d at 504-05.

Here, Curry's overarching argument is that an examination of the record as a whole reveals that his request was equivocal. Curry cites *State v. Luvene,* 127 Wn.2d 690, 903 P.2d 960 (1995), as supporting his argument that his request was equivocal. Appellant's Br. at 13-14. Specifically, he asserts that *Luvene* stands for the general proposition that a request to proceed pro se is equivocal if it is made in order to avoid something that the defendant perceives to be a greater evil - in this case proceeding to trial at a later date. The proposition that Curry suggests is broader than the holding in *Luvene,* and is belied by the holding in *Madsen*.

Of note, in *Madsen,* our supreme court found "[t]he unequivocal request to proceed with counsel is valid even if it was coupled with an alternative remedy to fire Madsen's then counsel." *Id.* at 507, citing *State v.*

Stenson, 132 Wn.2d at 741. Similarly, in *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991), our Supreme Court held that the defendant's request to proceed pro se was unequivocal even though it was motivated by frustration with his attorney. *Id.* at 378-39l. *See also*, *State v. Modica*, 136 Wn. App. at 442 (citing *State v. DeWeese*, 117 Wn.2d 369, 378-79, 816 P.2d 1 (1991)). Importantly, in *State v. Modica*, the court held that the defendant's request to proceed pro se was unequivocal *despite being motivated by frustration with a trial delay*. 136 Wn. App. 434, 149 P.3d 446 (2006).

It is true that the court in *Luvene* denied the defendant's request to proceed pro se, finding that it was actually an expression of frustration only with the potential for trial delay, rather than a true desire to proceed without an attorney. *Luvene*, 127 Wn.2d at 698-99. In *Luvene*, the defendant stated that he would represent himself if necessary and went on to express his anger at how long it was taking to get to trial. *Luvene*, 127 Wn.2d at 698-99. The defendant also equivocated by stating that "I'm not even prepared about that," and "[t]his is out of my league." *Id*. The court held that Luvene's statement indicated a frustration with the delay in going to trial, not an unequivocal assertion of his right to self-representation. *Id.* at 699.

However, a complete examination of the instant record establishes that the trial court properly granted Curry's request for self-representation. While there is no talismanic formula for a *Faretta* inquiry, the differences

between Luvene's situation and Curry's are striking. In contrast to Luvene, who made his request to proceed on his own while his attorney was simultaneously arguing to continue his death penalty case, here, Curry personally requested his attorney set a motion hearing to allow him to argue to the trial court regarding his desire and right to represent himself,[5] and did so long before trial, at least as early as April 24, 2015. CP 49. Thereafter, Curry made his request in writing on April 30, 2015, a full month before trial. CP 48-58. The motion was heard a week later, on May 7, 2015. (5/7/15) RP 1-20. At this point, his right to self-representation existed as a matter of law. *See Madsen*, 168 Wn.2d at 508 (noting that if the demand for self-representation is made "*well before the trial and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law*." (Emphasis the Court's, citing *State v. Baker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). Here, Curry's demand was more than timely.

Additionally, Curry had thought his request through; he had prior experience in this type of request and the law surrounding the request. In direct contrast, Luvene did not establish that he understood the seriousness of the charge, that he was familiar with court rules, or that he was in any way prepared to adequately represent himself. Rather, his request was

[5] Or, in the alternative, to get a new lawyer.

impulsive, confusing, and unreliable. Unlike Luvene, Curry engaged in an intelligent discussion with the court. He unequivocally expressed his desire to represent himself pro se and responded to the trial court's colloquy with an understanding of court procedure and his legal rights. He was advised on the record of the penalties involved,[6] acknowledged that he fully understood them,[7] and knew when his trial dates where scheduled.[8] Thereafter, Curry engaged in the following colloquy with the court regarding prior charges where he had conducted the trial by himself, with some success at the trial level:

> THE COURT: Okay. I was about to ask you about that. You have represented yourself on a prior occasion; is that right?
>
> THE DEFENDANT: Yes.

---

[6] (5/7/15) RP 4-6.

[7]

> THE COURT: Thanks, Counsel. Mr. Curry, that is the jeopardy or punishment that you face potentially on conviction for these matters. Do you understand that, sir?
>
> THE DEFENDANT: Yes, I do.

(5/7/15) RP 6.

[8]

> THE COURT: Okay. When are your trial dates scheduled currently, do you know?
>
> THE DEFENDANT: Pretrial is on the 15th of next week, Friday, and my trial date is June 1st.

(5/7/15) RP 7.

THE COURT: And what was the nature of that case?

THE DEFENDANT: Basically it was part of escape from community custody, fourth degree domestic violence, and a second degree malicious mischief, gave me 54 months and six months of community custody.

THE COURT: Okay. And is it -- did you have a trial then with a jury?

THE DEFENDANT: Yes.

THE COURT: Did you select the jury yourself, from your side of things?

THE DEFENDANT: No, I didn't.

THE COURT: How did that go then? What happened there with the jury selection?

THE DEFENDANT: Basically it was not the way it should have went but, you know, that's why I took over and went pro se.

THE COURT: Okay. So you didn't have a standby attorney, you just did the --

THE DEFENDANT: Yeah.

THE COURT: -- trial all by yourself?

THE DEFENDANT: John Rogers was standby, but I basically had taken over after that.

THE COURT: And when was that, that you had that trial?

THE DEFENDANT: 2009 of -- I think September.

THE COURT: Okay. And were you convicted on all the charges or some of the charges or how did that go?

THE DEFENDANT: No. I was convicted on two charges, the no-contact order violation and second degree malicious mischief. And I had won on appeals twice in Division III, and it was sent back to superior court.

THE COURT: Okay. And so were your convictions reversed in the appeal process?

THE DEFENDANT: It was remanded on part of the community custody.

THE COURT: Okay. Were you satisfied with the final result there, or is some of that still pending?

THE DEFENDANT: That's still pending. That's why I'm fighting right now on the escape from community custody and on racial profiling on the other cases that's involved with the illegal search and seizure.

THE COURT: Okay. And we did talk about the potential punishment you face, and you're aware of that, as the attorneys outlined the standard ranges if you're convicted of all these matters?

THE DEFENDANT: Yes.

THE COURT: You have participated in a trial, as you said. Do you understand that if you are representing yourself, you're on your own? In other words, if you --

THE DEFENDANT: Yes.

THE COURT: -- get stuck and there's an objection from the prosecutor or you might not know how to object, you're not able to ask the judge to step in for you and help you out; do you understand that?

THE DEFENDANT: Yes, I know that.

THE COURT: And are you familiar at all, apart from what you've said, with the rules of evidence? Have you studied those at all?

THE DEFENDANT: Like I said, I'm fairly new. I'm just basically just going for what I know. I know I can get evidence. I've got to present evidence to the court and to the jury. But I'll learn more about that within the next couple, couple weeks.

THE COURT: And do you understand then that as far as rules of evidence are concerned and rules of criminal procedure are concerned, in general, that those are the rules that everybody has to follow in a criminal trial? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And so, even though you are not an attorney, you would still be required to follow the very same rules that the attorney, the prosecutor would have to follow; are you clear on that?

THE DEFENDANT: Yes, yes.

THE COURT: And in presenting your case, do you understand that if you choose to testify, you can't just -

THE DEFENDANT: Yes.

THE COURT: -- narrate; you can't go on and on about, you know, a particular subject without asking yourself a question and then trying to answer that question.

THE DEFENDANT: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, yes. That's what happened to me in my trial so....

> THE COURT: Right. And in that regard, the prosecutor might well object to you presenting your case if you run outside those limitations. Do you understand that?
>
> THE DEFENDANT: Yes. I mean, I have no choice. I mean, there -- the law kind of contradicts itself on certain issues in like my community custody. And that's where I'm here at, for -- I mean, I have none of the evidence that I need, but I see that there's contradictions in some of the -- the good time behavior that you get from being locked up and getting released, you know. So, there are contradictions, well, to -- to my good time and my community custody. This is why I'm having a great deal of issues here. I mean, it would -- on my escape from community custody is -- is basically over. I've got time served on that.

(5/7/15) RP 8-12

The trial court explained to Mr. Curry that it felt the choice to proceed pro se was unwise; Mr. Curry *agreed it was unwise*, but stated that he would rather represent himself, as he had done in the past, than have his case continued past June 1, 2015:

> THE COURT: I can understand that, but what issues do you have with Mr. Elston? Why you think it's better to go yourself without having Mr. Elston?
>
> THE DEFENDANT: Because I basically, I mean, if I've got to sit and wait until the end of June, I might as well go ahead by myself. Because I -- I mean, send me to prison or release me. One of the two. I mean, I ain't got time to sit here. I mean, I have obligations on the streets. I'm losing my home. And if I've got to lose my home, I might as well defend my own self.
>
> THE COURT: Okay. And I recall you saying substantially that earlier. Let's say Mr. Elston informs you and the court and the prosecutor that he is willing and able to do the best

> he can on the current trial dates, what's your response to that?
>
> THE DEFENDANT: For June 1st, there's no way.
>
> THE COURT: I'm not sure I understand your response. You've got trial dates set, right, June 1st, and on all matters, with pretrials of May 15th. So, if your counsel says, yes, he will be ready to represent you on that date, are you saying you still prefer to represent yourself or something else?
>
> THE DEFENDANT: If he's ready on June 1st, we have no problem. But, I mean, there's evidence that we can't get, because we're being delayed on that.
>
> THE COURT: Okay. Let me say this to you, Mr. Curry, sir, I don't think it's a wise choice to represent yourself. You're facing a lot of --
>
> THE DEFENDANT: Well, I know it's not.
>
> THE COURT: You're facing a lot of downside here if convicted, given your points that you currently have, as I understand it, and the danger of being convicted of these matters would result in a lot of prison time. So, I don't think it's a very wise choice, number one. So, with that in mind, if your counsel says he is willing to do the best he can on June 1st, I think I understand you to say that that would be fine with you, and you would prefer to keep Mr. Elston.
>
> THE DEFENDANT: Yes, but at -- if we've got to go past June 1st, I'd rather just do it myself. I mean....
>
> THE COURT: Okay.
>
> THE DEFENDANT: That's all I got is time, so, I'll just learn the law more better.

(5/7/15) RP 13-14.

The court did not abuse its discretion by granting Curry's request. His request was unequivocal. Both the trial court and Mr. Curry fully recognized the risks involved if Mr. Curry represented himself, as he had done in the past. Mr. Curry's choice was unequivocal, he would rather proceed to trial, as scheduled, on June 1, 2015, than to have the case continued for a month.[9]

> THE COURT: Okay. Thank you. And so with that in mind, Counsel -- is there anything further you want to say, Mr. Curry, in terms of why you want to represent yourself?
>
> THE DEFENDANT: No, I don't.
>
> THE COURT: Thank you. Counsel, the court has conducted, I believe, an appropriate colloquy with Mr. Curry about the potential pitfalls and detriments to self-representation in this particular matter. There are minimal benefits to Mr. Curry, from the court's view. It's important that all persons have a good, competent defense, and that's why attorneys work for persons who are accused of criminal matters. In this particular matter, Mr. Curry faces great jeopardy upon conviction. In reference to his background and education and experience, Mr. Curry has not had the benefit of a lot of formal education, however he has represented himself on a prior occasion. It's just the one occasion, right, Mr. Curry, at the trial?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And then in the appellate courts; is that right?
>
> THE DEFENDANT: Yes.

[9] Appointed counsel Mr. Elston informed the trial court the very earliest he could be prepared would be June 29, 2015. (5/7/15) RP 17.

THE COURT: So Mr. Curry -

THE DEFENDANT: Well I also had an appellate attorney in the appeals also.

THE COURT: Okay. So you didn't represent yourself completely in the appellate process, is that what you're saying?

THE DEFENDANT: Yes.

THE COURT: Okay. And to continue on, Mr. Curry has had the benefit of that experience. And it sounds as though, at least as we speak, it's been a partially successful effort on Mr. Curry's part. In reference to representation by counsel, the court is aware of Mr. Elston's background. I know him to be a careful, diligent legal practitioner. I'm confident that he would give his very best effort towards becoming adequately prepared to represent Mr. Curry if that were the outcome here today. **At the same time, Mr. Curry is saying he's -- he would prefer to represent himself given the current dates and time frames of these particular matters before the court. Mr. Curry further indicates that he's aware that there are dangers and pitfalls of self-representation, as I've described. Is that right, Mr. Curry?**

THE DEFENDANT: **Yes.**

THE COURT: Nonetheless, he indicates it's his voluntary and steadfast decision at this time to proceed.

THE DEFENDANT: Well, it's not voluntary.

THE COURT: Pardon me?

THE DEFENDANT: It's not voluntary. It's I have no choice in the matter.

THE COURT: Well, it's either your freewill choice of doing this, or somehow there's been some pressure put

> **on you. And the only pressure I recall you saying is the time pressure; that is, that you believe you don't have a choice because you don't want an extension of the trial date, since you have other affairs that you believe you need to take care of. And you'd rather have an outcome quicker rather than later on. That's what I understand you to say. Is that accurate?**
>
> **THE DEFENDANT: That's -- that's accurate.**
>
> THE COURT: Okay. So, with all that, the court finds it is appropriate to permit Mr. Curry to represent himself. The court will appoint standby counsel, given the issues here that have been discussed, and so I do appoint Mr. Elston as standby counsel in these matters currently set for the dates again referenced. I'll sign that order, Counsel, and I would ask that you prepare that, please, Mr. Lindsey.

(5/7/15) RP 17-19 (emphasis added).

Curry was unequivocal about his desire to represent himself. After being fully informed of (1) the nature of the charges against him, (2) the possible penalties, and (3) the disadvantages of self-representation, Curry unequivocally expressed his desire to waive assistance of counsel.

Mr. Curry's right to represent himself "is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503 (citations omitted). Mr. Curry unequivocally demanded he be allowed to represent himself, rather than continue his case. His request was timely, voluntary,

unequivocal, and made with a full understanding of the consequences. *See Madsen*, 168 Wn.2d at 504-05:

> A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); RCW 10.77.060(1)(a).

Madsen, 168 Wn.2d at 505.

Discretion is abused if a decision is manifestly unreasonable or "rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). As shown by the record, the special and timely-set hearing, wherein the trial court conducted an extensive colloquy with Curry, supports the finding that Curry unequivocally exercised his fundamental right to self-representation and the trial court did not abuse its discretion in making that determination.

B. THE TRIAL COURT CONDUCTED A CrR 3.6 HEARING AND COMMITTED NO ERROR BY NOT TAKING LIVE TESTIMONY WHERE MR. CURRY FAILED TO PROVIDE THE REQUIRED AFFIDAVIT OR DOCUMENT OF THE FACTS THAT HE ANTICIPATED WOULD BE ELICITED AT THE HEARING.

The defendant claims on appeal that "the trial court erred when it denied Mr. Curry's motion to hold an evidentiary hearing under CrR 3.6(a)." Appellant's Br. at 1 (assignment of error); 14-16 (argument). More precisely, the defendant claims the trial court denied the defendant his "constitutionally guaranteed rights to confrontation and to a fair and impartial trial" by not holding an evidentiary hearing on his suppression motion. Appellant's Br. at 1, 16.

The State provided an affidavit/declaration of facts[10] as follows in response to the defendant's motion to suppress evidence:

> On 12/28/14 at approximately 2248 hours, I (Deputy J. Hunt) was on a perimeter position reference a robbery (SP140432869) that the Spokane Police was working on. I was advised that the robbery suspect was a described as a black male wearing blue jeans, a dark jacket. The complainant advised the suspect was last seen running westbound in the area of 2nd Avenue and Freya Street.
>
> I was near the intersection of Sprague Avenue and Haven Street when I observed a black male wearing jeans and a dark jacket that had a large bulge under it.
>
> I contacted the male in the parking lot of the Double Eagle Pawn at 3030 E. Sprague Avenue and advised him the reason

[10] The State also provided a memorandum of authorities. CP 80-84.

> for the contact. The male was verbally identified as Jerome J. Curry (D.0.B. 04/23/69). I had communications run a drivers check on Jerome and they advised he two confirmed felony warrants out of Spokane. While talking with Jerome the victim who was in a patrol car was driven by and advised that Jerome was not the male who robbed her of her purse.
>
> I advised Jerome of the warrants and that he was under arrest. During a search of his person incident to arrest a plastic bag containing six smaller plastic bags was located in the zippered chest pocket of his coat. Inside the smaller plastic baggies was a brown tar like substance. When I was looking at the bag Curry stated that he thought it was "hash" and that he had recently bought it. Though (sic) my training and experience I recognized the substance to be consistent with heroin that was packaged for sales.
>
> Deputy J. Wang was on scene to transport Curry to the Spokane County Jail. When he conducted a search of Curry's pant pockets he located another small plastic bag that contained a white crystal like substance.

CP 86.

After reading the materials submitted and hearing oral argument,[11] the trial court made the following findings and ultimately denied the defendant's motions to suppress.

> **CASE # 14-1-03135-2**
>
> In this matter Defendant is charged with Possession of Controlled Substance with Intent to Deliver (Heroin) and Possession of Controlled Substance (Methamphetamine). Defendant was stopped near the scene of a reported robbery as a possible suspect. He was detained and identified. An arrest warrant was discovered to exist, and controlled substances were discovered on his person pursuant to arrest. He now asserts that

[11] (05/28/15) RP 1-12.

> his detention was improper based on racial profiling and lack of articulable suspicion to detain.
>
> CrR 3.6(a) provides:
>
> > RULE 3.6
> > SUPPRESSION HEARINGS--DUTY OF COURT
> >
> > (a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.
>
> While the defendant files a memorandum in which he generally complains about the circumstances of his arrest, he did not comply with the rule. Although this court may grant some leeway to *pro se* defendant (sic) in these circumstances, **it cannot waive the rule altogether**. Even if the court were to consider his oral arguments in the form of an affidavit, he still does not make out a case for suppression. The facts on file appear to support a generalized suspect description, which is not unusual. Defendant's detention appears to be brief and only ripened into an arrest when a warrant was discovered upon routine identification. The fact that he was eventually eliminated as a robbery suspect does not abrogate those facts. Accordingly his assertion does not meet the criteria for an evidentiary hearing and his motion fails.

CP 89 (emphasis added).

The defendant does not assign error to the trial court's findings of fact; instead, the defendant, citing *State v. Radka*, 120 Wn. App. 43, 47-48,

83 P.3d 1038 (2004), asserts generally that "strict compliance [to the Court Rules] should not [be] required where nothing in the motion prejudiced the court's ability to address the issue." Appellant's Br. at 16. *Radka* does not stand for the proposition that a trial court *must* disregard the court rules; rather, it voices the proposition that under the circumstances of that case the trial court did not abuse its discretion when it "ruled that it would decide this constitutional issue even if it was untimely." *Radka*, 120 Wn. App. at 47. Moreover, in *Radka*, the State was the appellant and it objected to the trial court's findings on appeal. *Id*. Here, Curry does not assign error to the trial court's findings of fact and they are are treated as verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Indeed, an appellate court reviews only those facts to which the appellant has assigned error. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Moreover, substantial evidence supports the trial court's findings.[12] Even after

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[12] The sequence of the discovery of the felony warrants is outlined in Deputy Hunt's declaration:

> I contacted the male in the parking lot of the Double Eagle Pawn at 3030 E. Sprague Avenue and advised him the reason for the contact. The male was verbally identified as Jerome J. Curry (D.O.B. 04/23/69). I had communications run a drivers check on Jerome and they advised he two confirmed felony warrants out of Spokane. While talking with Jerome the victim who was in a patrol car was driven by and advised that Jerome was not the male who robbed her of her purse.

considering his oral arguments as "evidence," the court found that Curry's "detention only ripened into an arrest when a warrant was discovered upon his routine identification." CP 89. Again, no exception is taken to this finding.

Finally, the defendant's claim here is that he was denied his right of confrontation and his right to a fair trial. Neither claim was raised below or is manifest from the record. A party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5. Moreover, no citation to authority or analysis is contained in the defendant's argument supporting his attack on these two constitutional fronts. Without argument or authority to support it, an assignment of error is waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *see also State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). This Court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *King*, 106 Wn.2d at 451-52; RAP 10.3(a)(6) (appellate brief should contain argument supporting issues

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> I advised Jerome of the warrants and that he was under arrest.

CP 86.

presented for review, citations to legal authority, and references to relevant parts of the record).

The trial court did not err when it denied the defendant's motion to suppress and entered its ruling to that effect.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE OBJECTION TO THE ADMISSION OF THE CAD REPORT.

Standard of Review

Appellate review of a trial court's decision to admit a business record is for an abuse of discretion. *State v. Garrett*, 76 Wn. App. 719, 722, 887 P.2d 488 (1995).

Argument

The defendant attempted to introduce the contents of a city police computer aided dispatch report (CAD) into evidence at trial, during his direct examination of himself. (6/17/15) RP 66.[13] The State objected on two

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[13] Q: [Of the defendant by the defendant]: Did you receive the police CAD report?

A: Yes. I did receive a CAD report.

Q: If you look at 1049 –

MR. TREPPIEDI [Prosecutor]: Your Honor, I'll object to hearsay. It's not -- or, foundation as well. This report is not prepared by him.

THE COURT: I'll sustain the objection.
Sir, that appears to be contained hearsay statements.

grounds, the first was that he document was hearsay, and secondly, because Mr. Curry had not laid any foundation for the introduction of the report or information from the report. RP 66. On appeal, defendant claims the trial abused its discretion by not allowing the defendant to introduce the city police CAD report, arguing that the report was admissible at trial "for two reasons: first, to show he was illegally seized and second, that the search was illegal." Appellant's Br. at 18.

The trial court properly denied the admission of the city police CAD report. First, the rationale for the admission of this evidence at trial - to show that the search and/or seizure of the defendant was unlawful - is inconsistent with established principles of jurisprudence. Here, the charged crimes involved the possession of controlled substances. The validity of the arrest has no bearing on whether these crimes were committed, and the legality of the arrest is within the proper province of the trial court. It has long been "established in this state that the validity of an arrest and the lawfulness of a search are determinations for *the court* to make." *State v. Hoffman*, 116 Wn.2d 51, 97, 804 P.2d 577 (1991) (emphasis the court's).

MR. CURRY: Okay.

THE COURT: So you can't read from that document.

Secondly, the defendant failed to provide any foundation for the introduction of this evidence. If the record he sought to introduce was a proper CAD report, a business record, it would require a custodian or other qualified witness to testify as to its identity and the mode of its preparation. RCW 5.45.020. It is not necessary that the person who actually made the record provide the foundation, since testimony by one who has custody of the record as a regular part of his or her work or has supervision of its creation will suffice. Reviewing courts broadly interpret the statutory terms "custodian" and "other qualified witness,"[14] However, here, the defendant provided *no foundation* whatsoever.

Lastly, the record itself may not have been relevant. Defendant wanted to establish that the *police* CAD did not contain a call by the sheriff deputies to police communications. However, Curry was arrested by Spokane County Sheriff Deputies who were *assisting* the Spokane City Police in maintaining a perimeter around the area in which a robbery suspect may have run. The deputies and the police do not have the same communications systems. The defendant more than likely had the wrong CAD for searching what communications were made by the Sheriff's deputies. In any event, the trial court did not abuse its discretion in

[14] *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

sustaining the objection to the defendant testifying to items that may have been contained in a city police CAD report.

D. APPELLATE COSTS.

Mr. Curry requests that this court not impose costs normally associated with the appeal because the lower court did not address the defendant's ability to pay. CP 373; (12/10/15) RP 126. The trial court was not required to address the defendant's ability to pay because the trial court only imposed the mandatory costs[15] that are exempt from that inquiry. *See State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (these legal financial obligations must be imposed regardless of the defendant's ability to pay).

This Court issued a general order on June 10, 2016, outlining the procedure for requesting a waiver of costs. That is the proper method the defendant should follow in in his attempt to procure a waiver of his appellate costs.

V. CONCLUSION

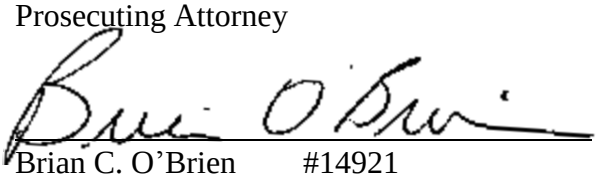
Mr. Curry demanded to proceed pro se and did so without equivocation. He was not denied his right of confrontation when he did not properly support his motion to suppress. The the trial court considered his

[15] CP 372-373 ($500 victim assessment, $200 filing fee, $100 DNA fee).

argument as testimony and found that the deputy sheriff received the report of outstanding warrants prior to searching him. Mr. Curry's claim that the trial court abused its discretion by not allowing admission of the police CAD report is without basis. The State respectfully requests this court affirm the defendant's judgment and conviction.

Dated this 15 day of November, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Respondent/Appellant

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

STATE OF WASHINGTON, Respondent, v. JEROME CURRY, JR., Appellant.	NO. 33990-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 15, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley
marietrombley@comcast.net

11/15/2016	Spokane, WA	
(Date)	**(Place)**	**(Signature)**