

No. 96663-0

NO. 76806-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH DAVIS,

Appellant.

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

The Honorable Gregory P. Canova, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to exercise its discretion and give meaningful consideration to appellant's request for standby counsel.

2. The trial court erred in completely removing appellant from the courtroom during a critical stage of the trial without first considering whether there were less restrictive alternatives.

3. The trial court violated appellant's Sixth Amendment right to representation when he was pro se and the court removed him from the courtroom due to disruptive conduct and proceeded without appointing counsel or obtaining a knowing waiver of representation.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant elected to proceed pro se. He repeatedly requested the assistance of standby counsel. It is within the trial court's discretion to appoint standby counsel. However, rather than considering the individual merits of appellant's request, the trial court appeared to be following a countywide norm that denies standby counsel. Did the trial court fail to exercise its discretion and thereby abuse its discretion?

2. Before a trial court removes an obstreperous defendant from the courtroom, thereby denying him his right to be present, it must consider whether there are less severe alternatives. During trial, appellant was completely removed from the courtroom due to disruptive behavior. This was particularly significant because at the time, appellant was representing himself and had been denied standby counsel. The trial court failed to consider whether there were any less restrictive alternatives. Appellant was not present while the State examined two witnesses whose testimony went to establishing elements of the charges. Did the trial court err in not considering less severe alternatives before completely removing appellant from a critical stage of the trial?

3. The Sixth Amendment guarantees the right to representation at all critical stages of a proceeding. After appellant was removed from the courtroom due to disruptive conduct, the defense table sat empty because he was representing himself and had been denied standby counsel. During this time, the State presented the testimony of two witnesses. There was no one to object on appellant's behalf and there was no cross-examination of these witnesses. After the appellant returned to court the next day,

he had to continue with his defense (including presenting a summation) without having heard the testimony of these witnesses. Was appellant denied his right to representation and was this structural error requiring reversal?

4. Did the cumulative effect of the errors outlined above deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On May 19, 2014, the King County prosecutor charged appellant Keith Davis with two counts of possession of a stolen vehicle and one count of possession of cocaine. CP 1-10. The case was transferred to Drug Court, but later transferred back. CP 18-19. After many delays, the trial took place in early March 2017, with a jury finding Davis guilty as charged. CP 81-83. Davis was sentenced 43 months of confinement. CP 116-24. He timely appeals. CP 125.

2. Substantive Facts

In the late morning of January 23, 2014, King County Sheriff Deputy Mathew Olmstead was checking the license plates of cars

parked at a SeaTac Motel 6. 2RP 121-24.¹ He discovered a red Hyundai that had been reported stolen. 2RP 125. An undercover officer was called in to watch the car. 2RP 147, 150. Soon after, this officer observed Davis walk up to the car, look around, get into the driver seat, go out to the trunk, and then go back to the driver seat. 2RP 152. Officers arrested Davis. 2RP 132, 153-55.

Davis told officers he did not steal the car. 2RP 132. Davis explained at trial that his friend Kelly drove the car and he was permitted to stay in the car instead of being homeless and left on the street. RP 347-49, 355-57. Davis testified that he had no reason to believe the car was stolen.² 2RP 350.

After Davis was released from custody on February 10, 2014, his friend – who goes by the name of “Pink Toe” – picked him up. 2RP 350, 358. Pink Toe arrived in a Buick, and Davis believed she had permission to use it. 2RP 359. Pink Toe allowed Davis to use the car for a while. 2RP 351, 359.

¹ The transcripts will be referred to as follows: 1RP refers to the transcripts produced by Ballard Transcripts L.L.C., and 2RP refers to the transcripts produced by Kevin Moll, CSR.

² Officer Olmstead testified that upon his arrest, Davis had said that he was permitted to use the car in exchange for setting up a drug deal for a prostitute. 2RP 133.

Officer Denny Graf later observed Davis drive past him in the Buick. 2RP 221-22. He saw Davis and his passenger make what the officer believed were “furtive movements.” 2RP 222. Graf noted the license plate on the Buick and called it in to dispatch. 2RP 222. He learned the car had been reported stolen. 2RP 223. Graf stopped the car and arrested Davis. 2RP 224, 227.

Officers testified that Davis had told them he received the car from Pink Toe in exchange for some crack. 2RP 196, 228. Searching Davis, officers discovered he had the keys to the car. 2RP 233. However, they also found that he had a Viagra bottle containing a white substance that was later determined to be cocaine. 2RP 194, 197, 296.³

C. ARGUMENT

I. THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION WHEN IT DID NOT MEANINGFULLY CONSIDER DAVIS’ REQUEST FOR STANDBY COUNSEL AND INSTEAD APPLIED A CATEGORICAL APPROACH TO THE ISSUE.

Davis chose to proceed pro se, but he repeatedly requested appointment of standby counsel. These requests were consistently denied – not based on individualized consideration of the merits but apparently based on a norm within the King County Superior Court.

As explained below, while Davis possessed no constitutional right to appointed standby counsel, he was still entitled to have his request meaningfully considered based on the individual circumstances of his case. Hence, the trial court failed to exercise its discretion and, thus, abused its discretion.

(i) Relevant Facts.

On February 6, 2015, Davis moved to proceed pro se. 1RP 6-11. Judge Rogers was presiding and undertook the necessary colloquy to assure a knowing waiver. 1RP 6-11. During the colloquy, Davis asked for standby counsel. 1RP 10. Judge Rodgers told Davis he could file a motion, but he informed Davis that he would not grant it and it was unlikely anyone else would. 1RP 10-11. Judge Rodgers concluded Davis voluntarily waived his right to appointed counsel and elected to represent himself instead. 1RP 11; CP 22-23.⁴

Davis was provided a packet that is given to King County inmates who are proceeding pro se. 1RP 16. He read it carefully

³ Further facts specifically relevant to the legal arguments are laid out in detail below.

⁴ Notably the signed waiver, which enumerates the potential consequences of electing to represent one's self, does not notify the defendant that he may have to proceed without any representation or defense if he should be removed during his own trial due to disruptive conduct. CP 23. This also was not addressed during the colloquy. 1RP 6-11

and discovered that the packet mentions standby counsel many times as a way of accessing the court and marshalling one's defense. 1RP 16.

During a case setting hearing that occurred on January 6, 2015, Davis again asked for standby counsel. 2RP 17. The following exchange between Judge Lum and Davis occurred:

Judge Lum: [I]t used to be a practice in many cases, standby counsel was ordered, frankly, for the convenience of the various parties. But, you know, about five years ago, that practice kind of stopped. Because what happened is, you people⁵ ran into an ethical grey area that made the deal, or that we talked about that, where the attorney doesn't know, you know, so then we have a – a problem about the attorney not knowing what they're bound – what boundaries are, and essentially there being no distinction between somebody whose represented and somebody who's pro se, because then the attorney is not giving directions, they're accepting direction, they're not accepting direction, they're – they don't know what they're doing.

And so, they - we had a couple of cases in Washington which – our appellate courts have said standby counsel was clearly not constitutionally required. So, we very rarely now appoint standby counsel, because of those various issues and because of the case law. So – so one of the consequences of deciding to represent yourself is that you won't have an attorney. And that -- that is clearly

⁵ From the record, it appears the reference to "you people" was generalized to defendants who proceed pro se and not to Davis more specifically.

explained up front, is, you know, there's no right to standby counsel. I mean somebody could ask for one, but, you know, it's something –

MR. DAVIS: Oh, yeah, with all due respect, Your Honor, I'm aware of that.

JUDGE LUM: -- sure. Yeah, okay.

MR. DAVIS: I'm basically requesting, -- I mean in Thurston County just recently I had standby counsel.

JUDGE LUM: Right.

1RP 17-18. Davis went on to explain the hardships he was facing as a pro se defendant without standby counsel. 1RP 18-20. Judge Lum let him finish and then, without comment or consideration of the matter, moved on to the question of setting the case for trial. 1RP 20. Afterward, Judge Lum entered a written order summarily denying Davis' request for standby counsel. CP 25.

At a hearing on February 11, 2016, Davis moved for "hybrid representation" and standby counsel. 1RP 25-29. He explained that due to limited resources in jail and his medical limitations he needed such assistance.⁶ 1RP 25-29. Judge Lum responded that

⁶ Throughout the course of the case, Davis suffered from several serious medical conditions. He had active multiple sclerosis, a ruptured hernia, and a significantly obstructed bowel. 1RP 230-34. He was dealing with significant chronic pain. 1RP 234. By the time of trial, even his wheelchair needed to be upgraded due to the deterioration of his health. 1RP 232. Jail health officials

Davis had been informed that Washington State does not favor standby counsel. 1RP 30. Davis informed the Court again that Thurston County and many other counties provide standby counsel. 1RP 30. He surmised that it was just King County that chose not to do so. 1RP 30. Judge Lum affirmed that that was “right, exactly.” 1RP 30. Judge Lum again did not meaningfully consider the merits of the matter and denied the request. 1RP 30-31; CP 27.

Davis renewed his motion for standby counsel when in front of Judge Spector on April 1, 2016. 1RP 44. He explained that the pro se packet he was given mentioned the use of standby counsel 17 times. 1RP 44. Judge Spector stated that under State v. Romero,⁷ he was not entitled to standby counsel. Davis claimed there was an implied right under the Sixth Amendment so that he would have representation just in case he was unable to continue pro se. 1RP 45. Judge Spector responded by making Davis choose between the only two options she would make available to him – being completely represented by counsel or proceeding pro

confirmed Davis required many accommodations, he was seeing several providers at Harborview, and he had been approved for a new wheelchair (although the paperwork was causing delay). 1RP 288.

⁷ Presumably, she was referring to State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564, 566 (1999), which acknowledged there is no right to standby counsel.

se. 1RP 45. Given that choice, Davis affirmed he wanted to proceed pro se. 1RP 45.

On May 10, 2016, the parties appeared before Judge Shubert. 1RP 63. Davis again moved for appointment of standby counsel or hybrid representation, citing the difficulties with his medical condition, the handicaps he faced in preparing his defense, and the fact that the pro se packet mentioned the use of standby counsel to assist in technical matters. 1RP 69-71. Judge Shubert did not address the substance of his request, instead explaining she was going to stick with the prior rulings because she did not see a change in circumstances. 1RP 72; CP 37.

As he tried to prepare for trial, Davis made several motions for word processing access, technical assistance, more phone access, and more contact with his investigator. CP 38-40, 44-48, 51-58. He said they were necessary since he had no standby counsel assistance and medical limitations. Id. These motions were denied. CP 41-47, 49-50, 59-74.

On February 27, 2017, a day before the trial was to begin, Davis moved to withdraw as counsel unless he could have a continuance. 1RP 159, 184. Judge Smith denied the request. 1RP 186-87. Davis suggested he would quit representing himself

and would not come to trial. 1RP 190-91. Judge Smith responded that Davis was not getting a continuance and would not be appointed standby counsel. 1RP 198.

The trial began the next day in front of Judge Specter, and Davis again moved for standby counsel. 1RP 231. Judge Specter denied the motion on the basis that the request had already been ruled upon. 1RP 232. Davis proceeded to trial with no standby counsel. 1RP 243.

After the CrR 3.5 hearing but before the jury was selected, Davis informed the trial court he was unable to represent himself because the trial process and courtroom environment was aggravating his medical conditions and pain level. 1RP 371-75. Judge Specter denied his motion for a continuance and his effort to withdraw as counsel. 1RP 373, 375. Davis screamed he wanted a new judge. 1RP 376, 379. Judge Specter warned Davis he would be thrown out of the courtroom if he continued to be disruptive. 1RP 380. Davis stated he did not care if she held the trial without him. 1RP 380. However, the next court day, Davis returned to the courtroom to represent himself the best he could without standby counsel. 2RP 3.

(ii) Legal Argument

While there is no absolute right to standby counsel, a pro se defendant is entitled to ask the trial court to consider a request for one and to have the individual merits of the request meaningfully considered. See, State v. Garcia–Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (holding, while no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative meaningfully considered).

Washington law recognizes that the trial court has the discretion to appoint a pro se defendant standby counsel. See, State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). When a request is made, it is therefore incumbent upon the trial court to exercise that discretion based on the individual circumstances before it. See, State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (finding the trial court failed to exercise discretion when it categorically refused to consider the individual merits of defendant's DOSA request). The failure to exercise such discretion is itself an abuse of discretion subject to reversal. State v. O'Dell, 183 Wn. 2d 680, 697, 358 P.3d 359, 367 (2015).

Davis asked numerous times that the court consider his individual circumstances and make an individualized determination regarding the appointment of standby counsel. Davis put before the court the circumstances of his individual need for standby counsel. He cited the fact that he had limited resources and avenues through the jail and that the jail's own handbook often encouraged the use of standby counsel for many of the functions he was having trouble with.⁸ 1RP 18-20, 25-29, 44, 69-71. Davis also tried to explain that his medical conditions slowed him down in preparing for trial.⁹ 1RP 25-29, 70-71, 232-34; CP 46. Davis explained that he needed standby counsel to help him technically and to be there in case he was unable to represent himself throughout the trial.

Davis was entitled to have a judge actually consider these circumstances and to exercise his or her discretion and actually consider the merits of his request for standby counsel. Yet at each

⁸ A copy of the pro se packet can be found at <http://www.kingcounty.gov/~media/courts/superior-court/docs/criminal/criminal-forms/1-pro-se-packet-criminal-pdf-web.ashx?la=en> (last accessed 9-14-17). This is the 2013 handbook and Counsel was unable to find one more recent. The 2017 online criminal manual includes a link to a pro se packet, but the link is broken. See, <http://www.kingcounty.gov/courts/scforms/criminal.aspx> (last accessed 9-14-17). Hence, counsel does not know if there is a more recent handbook. Nevertheless, the 2013 handbook does establish that it mentions the use of standby counsel in various contexts.

step, he was informed that there was essentially no chance for him to receive stand by counsel in King County.

Davis was repeatedly told in response to his request that he had no right to standby counsel. However, that was not a sufficient answer. Just because a defendant is not absolutely entitled to something does not mean the trial court need not exercise its own discretion. See, Garcia-Martinez, 88 Wn. App.at 330 (recognizing that even though defendant had no right to an exceptional sentence below the standard range, he was entitled to the trial court's meaningful consideration of the circumstances of his individual case).

Davis was also told that, while other counties might appoint standby counsel, as of five years ago King County does not follow that practice. No policy or rule was cited. Indeed, the "King County Superior Court Criminal Department Manual" includes a section on pro se defendants but does not mention anything about standby counsel.¹⁰ However, the facts of this case suggest there exists a recently developed norm within that court that supports the categorical rejection of standby counsel requests based on systemic considerations rather than on consideration of the

individual facts of the case before the court. Yet, countywide norms are not a substitute for a judge's exercising his or her own discretion and giving individual consideration of a request for standby counsel.

The failure to meaningfully consider and potentially appoint standby counsel was not harmless. As shown in greater detail below, without standby counsel, there was a complete absence of any representation during a critical stage of the trial after Davis was removed. Indeed, numerous courts have commented on the wisdom of appointing standby counsel to avoid this very kind of trial defect.¹¹

¹⁰<http://www.kingcounty.gov/~media/courts/superior-court/docs/criminal/criminal-manual.ashx?la=en> (last accessed 9-14-17).

¹¹ See, e.g., Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (C.J. Burger, concurring) (noting the trial court had been wise to appoint standby counsel in case where pro se defendant cited for contempt); United States v. Ductan, 800 F.3d 642, 654 (4th Cir. 2015) (recognizing that when a pro se defendant engages in misconduct "the proper course of action is to revoke the defendant's right to self-representation and appoint counsel"); United States v. Mack, 362 F.3d 597, 601 (9th Cir.2004) ("A defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding."); United States v. Pina, 844 F.2d 1, 15 (1st Cir.1988) (suggesting that a trial judge "employ his or her wisdom to appoint standby counsel" to represent a defendant who is removed or discharges counsel); State v. Menefee, 268 Or. App. 154, 185 n. 13, 341 P.3d 229 (2014) (to avoid running afoul of the Sixth Amendment "it is advisable for a trial court to appoint advisory counsel for a defendant whom the court suspects will be disruptive so that the court can appoint that lawyer as counsel if the defendant can no longer represent himself"); Jones v. State, 449 So.2d 253, 257 (Fla.1984)(when court is faced with an "obstreperous defendant who might well attempt to disrupt and obstruct the trial proceedings," it is prudent to appoint

In sum, Davis asked numerous judges to appoint standby counsel. While he was not constitutionally entitled to such counsel, it was within the trial court's discretion to appoint one. Hence, Davis was entitled to have a judge meaningfully consider his request in the context of the individual circumstances and exercise its discretion to determine whether in his case standby counsel should be appointed. The trial court never exercised such discretion here. The court's failure to do so amounted to an abuse of discretion and requires reversal.

II. THE TRIAL COURT ERRED WHEN IT COMPLETELY REMOVED DAVIS FROM THE PROCEEDINGS WITHOUT FIRST CONSIDERING WHETHER THERE WERE LESS SEVERE ALTERNATIVES.

(i) Relevant Facts

During the second day of trial, Davis returned to his table after taking a bathroom break to find that all water had been removed.¹² 2RP 199. Judge Specter said she had removed it

standby counsel, even over defendant's objection, "to represent defendant in the event it became necessary ... [to remove] him from the courtroom").

¹² Davis was experiencing uncontrollable digestive problems that required him to take frequent bathroom breaks in order not to soil himself. 1RP 155-57, 162, 230-31. Because he was in a wheelchair and wore a diaper, he needed to go somewhere with accommodation to be able to take care of himself, which was time consuming. 2RP 156-57. Before trial, the parties agreed to take hourly bathroom breaks and for Davis to signal if he needed to go sooner than that. 1RP 155.

because he was requesting to use the bathroom too much. 2RP 199. Davis said that he needed water because one side effect of his medication was dehydration and without regular water he became extremely constipated. 2RP 199-200. Davis emphasized his need for water by screaming and pounding his fist on the table. 2RP 200.

Judge Specter noted it was 3:10 in the afternoon and informed Davis he was done with water for the day. 2RP 200-01. She said Davis drank twice as much water as the day before and had to go to the bathroom twice as often. 2RP 201. Davis complained that he would dehydrate and end up with more of a bowel obstruction. RP 202.

The jury was brought into the courtroom, but Davis continued to argue as the prosecutor attempted to examine an officer. RP 202-05. Judge Specter removed the jury. As they were walking out, Davis yelled, "You can hold your trial without me. How's that?" 2RP 205. Judge Specter said: "I'm going to do that." 2RP 205. She started to give Davis one more chance to collect himself, but he said he was done playing the court's game and being a gentleman. 2RP 206. Judge Specter said she was finding

that Davis was “voluntarily absenting” himself from the proceedings. 2RP 206.

Before she removed Davis, Judge Specter made an oral record to support his removal. She found the defendant was manipulating the trial by drinking a lot of water and then having to take excessive bathroom breaks and that this was disrupting and delaying the trial. 2RP 207. During the ruling, Davis yelled and swore at the court. 2RP 208. Noting his conduct, Judge Specter said that, “under State v. Garza,” Davis had voluntarily absented himself from the rest of the proceedings.¹³ 2RP 208. She then ordered Davis removed from the proceedings, without considering any other options that would permit him to observe. 2RP 208; CP 142.

With an empty defense table, the prosecutor finished her direct examination of the police officer that testified to finding crack cocaine in Davis’ possession upon arrest. 2RP 209-19. There was no cross examination of this officer. 2RP 220. Davis was not present during the entire direct examination of Officer Graf, who identified the Buick that Davis was driving as stolen, initiated the traffic stop, and arrested Davis. 2RP 220-28. Officer Graf also

testified to Davis' alleged statements as to how he came to possess the car. 2RP 228-29. Again, there was no cross examination. RP 235.

The next day, Davis was brought back before the trial court. 2RP 241. Judge Specter warned Davis that if he did not follow her orders he would be "removed" like he was the day before. 2RP 243-44. Davis was present for the rest of the trial.

(ii) Legal Argument.

Under the Sixth Amendment, a criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause. The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." WASH. CONST. art. I, § 22. The right to be present during trial is not absolute, however. A defendant's persistent, disruptive conduct may constitute a waiver of this right. Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); State v. DeWeese, 117 Wn.2d 369, 381, 816 P.2d 1 (1991).

In analyzing this issue, it is first necessary to establish whether Davis voluntarily absented himself or whether he was

¹³ The trial court asked the State to make findings under State v. Garza. 2RP

removed due to misconduct because there is a different legal analysis for each situation. Although the trial court characterized Davis' removal as voluntary absenting himself (2RP 206; CP 140), the record shows the trial court involuntarily removed Davis due to his disruptive conduct. 2RP 206; CP 140. Indeed, Judge Specter acknowledge that she ordered jail officers to remove Davis from the courtroom. CP 142; 2RP 208.

Judge Specter claimed Davis had voluntarily absented himself under State v. Garza, 150 Wn.2d 350, 77 P.3d 347 (2003), but the facts of this case were nothing like those in Garza where there was truly a voluntary absence. Garza failed to appear after the trial had begun, and the question before the trial court was whether he had voluntarily absented himself. Id. at 367-69. Garza simply did not involve the involuntary removal of a defendant due to obstreperous conduct. Hence, Garza is not applicable because this case does not involve a voluntary absence and instead involves the involuntary removal of a defendant who was present.

The Washington Supreme Court has laid out guidelines for trial courts when faced with the prospect of removing a defendant due to disruptive conduct. First, the defendant should be warned

that his conduct could lead to removal. Second, the defendant's conduct must be severe enough to justify removal. Third, the trial judge should use the least severe alternative that will prevent the defendant from disrupting the trial. Finally, the defendant must be allowed to reclaim his right to be present upon assurances that the defendant's conduct will improve. State v. Chapple, 145 Wn. 2d 310, 320, 36 P.3d 1025, 1030 (2001).¹⁴

The third factor is at issue here. The trial court did not consider less severe alternatives before excluding Davis entirely from the proceedings. The Washington Supreme Court has cautioned that a defendant should be afforded great protection to ensure his constitutional right to be present at trial, and his complete removal should be a last resort. Chapple, 145 Wn.2d at 323-24. Indeed, in this case, such caution was particularly important because Davis was proceeding pro se and had never been provided standby counsel. Thus, his removal would also impact his right to representation and to present a defense.

¹⁴ By contrast, the test for determining whether a defendant's absence is voluntary requires the trial court to: (1) make sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) make a preliminary finding of voluntariness (when justified), and (3) the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed. Garza, 150 Wn.2d at 367.

The trial court should have explored alternative options that would have permitted Davis an opportunity to continue with his defense. For example, in State vs. DeWeese, the pro se defendant was removed from the courtroom due to disruptions. However, Deweese was permitted to follow the proceedings (direct examination of State witnesses) on a video monitor so he would be able to return to court to conduct cross examination of prosecution witnesses. Deweese, 117 Wn.2d at 381. The Washington Supreme Court found this to be a reasonable method of balancing courtroom control while protecting the pro se defendant's right to present a defense. Id. Yet, the trial court never considered such an alternative here.

Another option would have been to call Davis back in sooner to reclaim his rights. In Davis v. Grant, 532 F.3d 132 (2008), the trial court removed a pro se defendant due to his obstreperous behavior and he was effectively left without representation. After the direct examination of a prosecution witness was complete, the trial court offered the defendant a chance to conduct cross-examination. Unfortunately, the defendant continued his misconduct and was removed again. The Government examined three more witnesses that day while the defendant was absent.

Although the defendant was not able to cross examine these witnesses, the trial court provided him with transcripts of the testimony so he could use it to cross examine other witnesses and prepare his summation upon his return. Id. at 137-38.

Here, Davis was never given the chance to reclaim his right in time to cross examine the two officers who testified in his absence. Davis was also never provided a recording or transcripts so he could be informed of the testimony when executing the rest of his defense upon his return. The trial court in Davis's case gave no consideration to such options here.

Indeed, the trial court failed to make a record showing that such a severe method of controlling Davis' misconduct was necessary before she completely removed him. By contrast, in Chapple, the trial court explored the possibility of using a video monitor as a means of preserving the defendant's right to be present. However, officers testified that Chapple was extraordinarily strong and aggressively defiant. The officers said there was no way to guarantee safety and control even if Chapple watched the trial on a video monitor. Chapple, 145 Wn.2d at 323. While the trial court ultimately excluded Chapple completely from trial, it did so only after establishing there were no other options.

The Supreme Court concluded that the trial court had adequately considered technological alternatives and properly exercised its discretion in declining to opt for them given the impending threat of the defendant. Id. at 324.

In contrast to Chapple, the trial court made no such efforts to explore alternatives here. Moreover, this record does not show the same kind of circumstances that foreclosed technological alternatives for Chapple. Davis was confined to a wheelchair and ailing. He was not particularly violent or physically aggressive. There was no testimony establishing the fact that officers could not maintain security if Davis were permitted to follow the trial on a video monitor. Instead, the record simply shows the trial court did not give any consideration to technological alternatives.

The failure of the trial court to consider alternatives was not inconsequential. Davis was completely excluded during a critical stage of the trial. Indeed, Davis' right to present his defense was uniquely impacted here because he had no representation during a critical phase of the trial. Davis did not have the opportunity to listen to the complete testimony offered against him by two officers whose testimony was offered to establish elements of the charged

crimes. Davis had no opportunity to make objections.¹⁵ He had no opportunity to cross examine these officers. Moreover, he had to formulate a closing argument against the State's case without having heard all the testimony that was presented against him. Thus, the trial court's error was not harmless.

In sum, the trial court had an obligation to consider less severe alternatives to managing Davis' truculent conduct before completely removing him from the trial. It did not do so. There was simply no legitimate reason why the trial court failed to consider alternatives. Moreover, complete removal left Davis without representation or any defense during a critical stage of the trial. As such, the trial court committed reversible error.

III. THE TRIAL COURT ERRED IN CONTINUING TRIAL IN DAVIS' ABSENCE WITHOUT FIRST SECURING A WAIVER OF HIS RIGHT TO REPRESENTATION OR APPOINTING COUNSEL.

Although Davis was involuntarily removed from the courtroom for misconduct, this did not constitute a forfeiture of his right to representation under the Sixth Amendment. Hence, the trial court was obligated either to obtain a valid waiver of all representation or appoint counsel before it continued the trial in

¹⁵ When present, Davis was capable of timely objecting to testimony and having these objections sustained. 2RP 306-307.

Davis' absence. It did neither, thus, denying Davis his right to representation. As explained below, this was structural error and requires reversal.

The question presented here is whether, under the federal constitution, a trial court may proceed in the absence of a pro se defendant after it has removed the defendant for his disruptive behavior.¹⁶ This question raises complex constitutional issues because it implicates three related but distinct Sixth Amendment rights: (1) the right to be present at trial; (2) the right to self-representation; and (3) the right to representation. Menefee, 268 Or. App. at 184-85. While the first two rights may be lost by misconduct that requires the defendant's complete removal from the proceedings,¹⁷ the last right may not be so forfeited. Mack, 362 F.3d at 601; Menefee, 268 Or. App. at 186; People v. Cohn, 160 P.3d 336 (Colo.Ct.App.2007); People v. Carroll, 140 Cal. App. 3d 135, 141, 189 Cal. Rptr. 327, 331 (Ct. App. 1983); Saunders v. State, 721 S.W.2d 359, 363 (Tex.Ct.App.1986).

Even a pro se defendant maintains a right to representation despite being removed from the courtroom due to truculent

¹⁶ This appears to be an issue of first impression in Washington.

behavior. In Mack, 362 F.3d at 597, the defendant elected to represent himself, but he was removed from the courtroom for his disruptive behavior. There was no standby counsel and the case proceeded with an empty defense table.

On appeal, the Ninth Circuit held the trial court violated Mack's right to representation under the Sixth Amendment. It noted that defendants have a right to be present at trial, but that right may be forfeited by misconduct. Id. at 600–01. Defendants also have the right to proceed pro se, but that right may also be taken away if the defendant engages in misconduct. Id. However, “[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding.” Id. at 601 (relying on the direction offered in Faretta, 422 U.S. at 834, n. 46).

The Ninth Circuit recognized that, when the trial court removed Mack, he was left with no one to represent him and that, “[i]n practical effect, he had been removed as his own counsel and nobody stepped in to fill the gap.” Id. The result was that the defendant was deprived of representation, which also deprived him of other fundamental trial rights. Id. at 602–03.

¹⁷ Allen, 397 U.S. at 342–43; Faretta v. California, 422 U.S. 806, 834 n. 46, 95

The Ninth Circuit concluded effectively leaving the pro se defendant without representation constituted structural error. Id. at 603. One of the primary rationales for this conclusion was the damage done to the structural integrity of the trial process. Id. It explained, “[N]o matter how vexed [a court] becomes with a defendant’s noisome nonsense,” the Sixth Amendment does not permit the court to “eliminate important elements of a trial.” Id. Where a criminal case is tried against a vacant defense table during a critical stage of the trial, the adversarial process breaks down and the outcome is presumptively unreliable. Id. at 601; see also, Davis, 532 F.3d at 144 (recognizing that when a pro se defendant is removed from the courtroom because of his disruptive conduct and the trial continues without counsel, not only are the personal rights of the defendant compromised but so is the judiciary’s and government’s interest in a fair accurate trial that comes from rigorous adversarial testing).

This does not mean that a court must tolerate an obstreperous defendant’s presence in the courtroom. The trial may proceed in the defendant’s absence if the trial judge either secures the defendant’s waiver of his right to any representation or appoints

S.Ct. 2525, 45 L.Ed.2d 562 (1975).

counsel (even over the defendant's objection). Mack, 362 F.3d at 601 (quoting Faretta, 422 U.S. at 834-35 n. 46); see also, U.S. v. Duncan, 800 F.3d 642, 654 (4th Cir. 2015) (J. Diaz concurring); Davis, 532 F.3d at 143; State v. Lacey, 282 Or. App. 123, 126 (2016); Menefee, 268 Or. App. at 184-85; Cohn, 160 P.3d at 343.¹⁸

In this case, the trial court removed Davis because he was being disruptive, but it did so without considering Davis' right to representation. The trial court continued the trial in his absence, allowing the prosecutor to examine two witnesses whose testimony went to elements of the crimes charged before recessing for the day. The trial court erred in doing so because Davis had not forfeited or waived his right to any representation, and the trial court failed to appoint counsel.

While it may have been awkward to appoint counsel mid-trial, this could have been avoided if the trial court had appointed standby counsel. As indicated above, numerous courts have advised trial courts to appoint standby counsel to avoid these exact

¹⁸ By contrast, case law suggests that if a pro se defendant absents himself from trial of his or her own volition (for example to make a political protest defense, then the trial court is not required to appoint counsel because it is a tactical choice that comes with the freedom to direct one's own defense. E.g., Clark v. Perez, 510 F.3d 382, 396 (2d Cir.2008); State v. Eddy 68 A.3d 1089, 1105-07 (2013) (reviewing the case law that establishes the difference between a pro se defendant who voluntarily absences himself and one who is removed by the court).

circumstances. Supra, n. 12. Unfortunately, that was not an avenue that could be taken here because the trial was in King County where apparently standby counsel is regularly denied to pro se defendants.

In sum, Davis may have – through his misconduct – lost his right to proceed pro se and his right to be present at trial, but he did not forfeit his right to representation. As such, the continuation of the trial in his absence and without anyone at the defense table was constitutional error. Davis' right to present a complete defense to the charges was also compromised. This in turn tainted the adversarial process of this trial. As such, the error was structural and requires reversal.

IV. CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

Davis asserts that the individual errors identified above each supports reversal. However, if this Court should disagree, reversal is still required under the cumulative error doctrine. The cumulative error doctrine applies where multiple trial errors combine to deny the accused a fair trial, even if the errors individually would not warrant reversal. In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012).

Here, the trial court erred when it: (1) categorically denied standby counsel; (2) completely removed Davis from the courtroom without first considering less severe alternatives; and (3) failed to afford Davis his right to representation while he was removed. The combined effect of the trial court's errors was to deny Davis his right to be represented at all critical stages of the trial and to fully defend himself. As such, the errors combined to undermine the adversarial process such that Davis was denied his right to a fair trial. Hence, reversal is required.

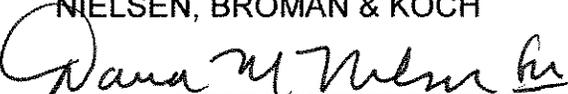
D. CONCLUSION

For the reasons stated above, this Court should reverse Davis' convictions.

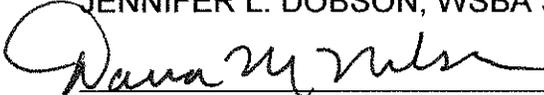
Dated this 20th day of September 2017

Respectfully submitted

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