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No. 96663-0

NO. 76806-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH DAVIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in denying Davis's requests for standby counsel, where Davis has no statutory or constitutional right to standby counsel?
2. Does the record support the trial court's decision to remove Davis on the grounds that he voluntarily absented himself, where Davis repeatedly refused to participate in the trial?
3. Did the trial court err in proceeding with the examination of two witnesses in Davis's absence, where Davis voluntarily absented himself?
4. Assuming the trial court removed Davis from trial based on his disruptive behavior, did the trial court abuse its discretion where it previously considered less restrictive alternatives but Davis's conduct escalated to the most volatile exchange that the judge had seen in 17 years on the bench and Davis repeatedly refused to participate?
5. Assuming the trial court removed Davis from trial based on his disruptive behavior, did the trial court abuse its discretion by proceeding in Davis's absence without a waiver or appointing counsel, where Davis had already waived his right to counsel, the court did not have a duty to reappoint counsel, and Davis's misconduct was part of a calculated ongoing campaign to obtain appointment of standby counsel,

and our Supreme Court has held that a defendant should not be able to obtain through disruption of trial or a refusal to participate what he was otherwise properly denied?

6. Was any error harmless as to count one, where none of the witnesses that testified during Davis's absence supported that charge?

7. Is Davis entitled to a new trial under the cumulative error doctrine where the doctrine does not apply to errors that have little or no effect on the outcome of the trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Keith Davis was charged with two counts of possession of a stolen vehicle and one count of possession of a controlled substance. CP 1-2. Davis waived his right to counsel and proceeded to trial pro se. CP 21. The jury found Davis guilty on all counts. 2 RP¹ 413-14. At sentencing, the court imposed the low end standard range of 43 months, to be served concurrently with a longer prison sentence Davis already imposed on another conviction. CP 116-20; RP 40. Davis appeals. CP 125.

¹ The Verbatim Report of Proceedings are referenced as follows: "RP" refers to the consecutively paginated transcripts produced by Ballard Transcription, and "2 RP" refers to the consecutively paginated transcripts produced by Kevin Moll, CRR, CCP.

2. SUBSTANTIVE FACTS

a. Davis Is In Possession Of Stolen Vehicle #1.

On January 23, 2014, KCSO Deputy Matthew Olmstead was driving through a motel parking lot known for its criminal activity. 2 RP 122-24. He saw an unoccupied red Hyundai and determined that it had been reported as stolen. 2 RP 124-28, 156. Deputy Olmstead entered the motel to determine who had been driving the car. 2 RP 129-30.

Meanwhile, Detective Timothy Gillette, who had arrived as backup, remained in his unmarked car watching the Hyundai in case anyone approached it. 2 RP 130, 144-48, 150. A man, later identified as Davis, walked to the driver's door, scanned the area, and then opened the driver's door and sat in the car. 2 RP 145-46, 151-52, 159. When Davis got out of the car and opened the trunk, Detective Gillette put his green sheriff's jacket on, radioed Deputy Olmstead, and drove toward Davis. 2 RP 151-53, 165. Before Detective Gillette could activate his visor-mounted emergency lights, Davis saw him and immediately threw his hands in the air. 2 RP 153-54, 162-63, 165. Detective Gillette arrested Davis. 2 RP 135, 154.

Deputy Olmstead returned and advised Davis of his constitutional rights. 2 RP 123, 131-32. Davis claimed that a woman drug addict gave him the Hyundai in exchange for Davis introducing her to a man who

exchanged sex for drugs with her. 2 RP 132-33, 139. Davis did not know the woman or man's names. 2 RP 133-34, 139. Davis also could not recall where the transaction took place. 2 RP 134.

b. Two Weeks Later, Davis Is In Possession Of Stolen Vehicle #2 And Crack Cocaine.

On February 11, 2014, at about 1:38 a.m., Federal Way Police Officer Denny Graf saw a Buick parked near a park-and-ride. 2 RP 221-22, 223. He noticed Davis and another man next to the Buick. 2 RP 222. When Davis and his companion recognized that Graf was a police officer, they made quick furtive movements, avoided eye contact, and immediately got into the Buick, setting off the car alarm. Id. Officer Graf followed the vehicle and determined that the Buick had been reported stolen. 2 RP 222-25. Davis pulled over when Officer Graf initiated a traffic stop. 2 RP 225-26.

Officer Justin Antholt, who had arrived as backup, arrested Davis and searched him incident to arrest. 2 RP 188, 190-91, 193-94, 227. He located a checkbook belonging to Jose Rivera, the Buick's registered owner, in Davis's left rear pants pocket, and 2.18 grams of suspected crack cocaine in Davis's shirt pocket. 2 RP 194-95, 197, 231. A field test and subsequent testing by forensic scientist Steven Reid both confirmed

that the crack rocks contained cocaine. 2 RP 197, 211, 214, 261-62, 265, 268.

Officer Graf read Davis his Miranda rights. 2 RP 195-96. Davis told Officer Graf that a prostitute named “Christine” gave him the Buick in exchange for crack cocaine. 2 RP 228-29. Davis did not know how to contact Christine, nor was he able to provide any corroborating information or specifics to support his story. 2 RP 229.

Officer Antholt also spoke with Davis post-Miranda. 2 RP 196. Davis told Officer Antholt that he received the Buick from a prostitute he knew only as “Pink Toe.” 2 RP 196, 350. When Officer Antholt asked why Pink Toe gave him the car, he replied “because she wanted some dick.” 2 RP 196. Davis also stated that he used crack cocaine for the past 35 years. Id.

C. ARGUMENT

1. DAVIS DID NOT HAVE A RIGHT TO STANDBY COUNSEL AND THE TRIAL COURT PROPERLY CONSIDERED HIS MOTION FOR STANDBY COUNSEL.

Davis asserts that the trial court failed to “meaningfully consider” his repeated requests for standby counsel. He argues that in doing so the trial court effectively failed to exercise its discretion and this amounts to an abuse of discretion requiring reversal. Davis’s argument is without

merit. Davis waived his right to counsel; and, he did not have a statutory or constitutional right to standby counsel. Consequently, the trial court was not obligated to consider Davis's request for standby counsel in the detailed manner he exhorts. Moreover, the record establishes that multiple judges did in fact sufficiently consider and deny Davis's repeated requests for standby counsel.

a. Additional Relevant Facts.

On February 6, 2015, Davis moved to proceed pro se. RP 6-11. The court engaged him in a colloquy about the consequences and details of pro se representation. Id. During the colloquy, Davis stated that he would "love standby counsel, if possible." RP 10. Judge Rogers told him that he was unlikely to grant standby counsel, but that he could file a motion requesting it. RP 10-11. Davis also signed a written waiver of counsel, which included an acknowledgment that "the judge is not required to provide me with an attorney as a legal advisor or standby counsel [and] If I later change my mind and decide that I want an attorney to represent me, the judge may require me to continue to represent myself without the assistance of a lawyer." CP 22-23. The court allowed Davis to proceed pro se after it found his waiver of counsel was knowingly, intelligently and voluntarily made. RP 11; CP 22-23.

At a case setting hearing on January 28, 2016, the State declared itself ready for trial and requested a March trial date. RP 16. When asked for his position, Davis responded by asking for standby counsel on the ground that it would be “helpful” to gain access to “a copy machine or a scanner, fax machine, all of these things...” RP 16-17. Judge Lum responded as follows:

JUDGE LUM: Well, Washington law is very clear that, you know, standby counsel’s not required, and in fact, it used to be a practice --

MR. DAVIS: Well, no, I’m --

JUDGE LUM: -- well, hear me out. So, hold on. But it used to be a practice that 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 people 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 not accepting direction, they’re -- they don’t know what they’re doing. And so, they – we had a couple 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 explained up front, is, you know, there’s no right to standby counsel. I mean, certainly 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.

RP 17-18. Davis reiterated that he wanted standby counsel so that he could gain access to office equipment. Id. He then indicated that he understood his motion was being denied but intended to continue to request it “every day” until March:

MR. DAVIS: Well, even in Thurston County, the capitol, I have standby counsel. One of the judges up there is also one of the State Superior Court judges, so I mean, I understand what you mean. I mean, I know King County has a (inaudible) doing that, but I’m going to -- you know, you have from here to March I’m going to be putting in motions and probably every day for that. You’re going to take a motion (inaudible) because, you know, I have to prepare for this and, you know, I have -- I’m off the scale for having drug charges all my life, and, you know, I don’t need any more charges.

JUDGE LUM: All right. Thank you, sir.

RP 19-20.

Judge Lum listened to Davis continue on with his request for standby counsel, and then he directed the conversation back to the original issue of whether Davis wanted to set the case for trial:

MR. DAVIS: I just, you know, I mean, I’m being charged with Class B felonies, so, I mean, that’s ridiculous.

JUDGE LUM: All right.

MR. DAVIS: But --

JUDGE LUM: All right.

MR. DAVIS: -- I mean, and that’s all prosecution, and I understand, you know -

JUDGE LUM: So let’s -- so let’s talk about --

MR. DAVIS: -- over-charged.

JUDGE LUM: -- sir, let's talk about the -- so, it's on for case setting. Right? So -- so, do you want to set this for trial or do you want to put this over?

MR. DAVIS: Let's put it over for now.

RP 20.

Later in the hearing, Davis again requested standby counsel, and

Judge Lum advised him that he had already denied the motion:

MR. DAVIS: So, actually, that's another reason, standby counsel. I mean, like I say, even the pro se packet mentions standby counsel like, in the instructions, I don't know, a couple hundred times. All -- actually, standby counsel (inaudible). I notice there's a practice, and I can't help but think that it's the way to discourage or try to not help a pro se litigant, but I mean, you know, I'll (sic) just basically asking now, but if I could put in a motion, I guess I'll --

JUDGE LUM: Well, sir, your motion is denied. You've already put in a motion.

MR. DAVIS: Okay. I got you.

RP 22. Judge Lum entered a written order denying Davis's request for standby counsel. CP 25.

At a case setting hearing on February 11, 2016, Davis moved for standby counsel and "hybrid representation" on the basis that he had a limited jail work station, lacked legal knowledge, and had health limitations. RP 25-29. After hearing opposing argument from the State, Judge Lum noted that the court had previously heard and denied the motion, and he reminded Davis that he had chosen to proceed pro se despite knowing that standby counsel was unlikely:

JUDGE LUM: Mr. Davis, I – I’m sure, and in fact I know, and we’ve talked about this before, is --

MR. DAVIS: Of course.

JUDGE LUM: -- and when somebody decides to represent themselves, there are certain things, obligations, they take on, and --

MR. DAVIS: Well, yes.

JUDGE LUM: -- one of them, and we’ve – I’m sure we talked about it, is, you know, you don’t have any legal training,

[...]

JUDGE LUM: -- ergo, it was – it’s a very serious decision for you to go pro se in the first place because we told you in Washington State that’s not favored, standby counsel, because --

MR. DAVIS: Well, they did in Thurston County.

JUDGE LUM: -- okay, so --

MR. DAVIS: It’s just our county that’s changed.

JUDGE LUM: -- well, we’re --

MR. DAVIS: That doesn’t favor it.

JUDGE LUM: -- yes, right, exactly.

MR. DAVIS: But all the rest of the counties do. Yakima --

JUDGE LUM: Right.

MR. DAVIS: -- Spokane --

JUDGE LUM: But most of these -- thank you sir, but most of these --

MR. DAVIS: -- Thurston County --

JUDGE LUM: -- did not --

MR. DAVIS: -- Pierce County --

JUDGE LUM: -- now sir, shall we set this matter for trial, then?

RP 28, 30-31. Judge Lum again signed a written order denying Davis’s motion. CP 27.

At a subsequent omnibus hearing, Davis again moved for standby counsel. See RP 36. Judge Mack denied the motion on the ground that

Davis had previously brought the motion and it had been denied by Judge Lum. Id.

On April 1, 2016, Davis appeared before Judge Spector and again moved for standby counsel on the basis that his “pro se packet” mentioned “hybrid standby counsel.” RP 44. Judge Spector told Davis that pursuant to State v. Romero² he was not entitled to standby counsel. RP 44-45. Davis argued that he had an “implied right [to representation] under the Sixth Amendment” in the event he would become unable to continue pro se. Id. In response, Judge Spector denied his motion for standby counsel, but she gave him the option of having counsel appointed or continuing to proceed pro se. Id. Davis chose to proceed pro se. Id. After addressing several other matters, Judge Spector *sua sponte* returned to the topic of representation. She told Davis that she was continuing the trial date to afford him more time to “seriously consider” whether he wanted her to reassign him counsel. RP 53-55, 58-60. When Davis again asked for hybrid counsel as an “implied right,” Judge Spector made clear that the court had already considered and denied that motion. RP 54-55, 59-60. Davis stated he intended “to keep trying.” RP 59.

On May 10, 2016, Davis appeared before Judge Schubert and again moved for “hybrid standby counsel,” based on his “implied right,”

² 95 Wn. App. 323, 326, 975 P.2d 564 (1999) (no right to standby counsel).

the pro se packet, limited resources, and health condition. RP 70-71.

When Judge Schubert sought to confirm that Davis had chosen to represent himself, Davis stated that he didn't "want an attorney who's got 70,000 clients." RP 71. Davis acknowledged that he had made the same motion for hybrid standby counsel on the same basis to other judges. RP 70-71. Judge Schubert denied the motion on the grounds that the motion had been made previously to the Superior Court in the same case and had been denied, and he was not aware of any change in circumstances that would allow him to revise the prior rulings. RP 72; CP 37.

On February 27, 2017, the parties were sent before Judge Smith to commence trial. During pre-trial hearings, Judge Smith denied Davis's motion for a continuance. See RP 188-206. In response, Davis stated that he was "withdrawing as counsel." Id. When Judge Smith asked Davis if "withdrawing" meant he was requesting an attorney, Davis responded simply "I'm done. I'm done. I quit." RP 190-91. Judge Smith denied Davis's motion to withdraw as counsel finding that it would cause unnecessary delay to the trial, and she told Davis that she would not appoint standby counsel. RP 198; CP 79-80.

The next day, the parties appeared for trial before Judge Spector, and Davis again moved for hybrid standby counsel. RP 231. Judge Spector denied the motion on the basis that she had previously ruled on

the motion.³ RP 231-32. Davis stated that he would continue to request standby counsel. RP 232. Indeed, during opening argument, and despite Judge Spector's prior warning, Davis moved for standby counsel again in front of the jury. 2 RP 114.

b. Davis Did Not Have A Right To Standby Counsel And The Trial Court Was Not Required To Consider His Repeated Requests In The Manner He Asserts.

Criminal defendants have a right to waive assistance of counsel and represent themselves. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). When a defendant requests to represent himself, the trial court must determine whether the request is unequivocal and timely. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). If so, the court must determine if the request is voluntary, knowing and intelligent. Id. at 504. This is usually done by a colloquy. Id. A defendant who makes a valid waiver of counsel assumes the risk of "ineptitude." State v. Canedo-Astorga, 79 Wn. App. 518, 525, 903 P.2d 500 (1995).

Once an unequivocal waiver is made, "the defendant may not later demand assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court." State v. DeWeese, 117

³ Although Judge Spector advised Davis that she was required to hold him to the same standard as an attorney, she gave him guidance on multiple occasions during the proceedings. See, e.g., RP 316-22, 357-60.

Wn.2d 369, 376, 816 P.2d 1 (1991). The “[d]iscretion of a trial court is not destroyed by a defendant’s ineptitude, even when the ineptitude has been convincingly demonstrated.” Canedo-Astorga, 79 Wn. App. at 525. The appointment of “standby counsel” is not required under either the state or federal constitutions. State v. Fisher, 188 Wn. App. 924, 928, 355 P.3d 1188 (2015). “There is no Sixth Amendment right to ‘hybrid representation’ through which defendants may serve as co-counsel with their attorneys.” DeWeese, 117 Wn.2d at 379.

Here, the record shows, and Davis does not challenge, that his initial waiver of counsel was valid. RP 11; CP 22-23. Davis waived his right to counsel despite being advised orally and in writing that he was “unlikely to be granted standby counsel.” RP 10-11.

Nevertheless, Davis now contends that his convictions should be reversed because the trial court did not “meaningfully consider” his litany of requests for standby counsel. In support of his assertion, he erroneously relies on three cases: State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005), State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), and State v. O’Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). These case are inapplicable.

Grayson, Garcia-Martinez, and O’Dell all essentially held that while trial judges have considerable discretion under the Sentencing

Reform Act (SRA), they are still required to act within its strictures and principles of due process of law. Id. In particular, the respective trial courts were procedurally required to meaningfully consider whether a mitigating factor or sentencing alternative authorized by the SRA was appropriate in lieu of the SRA's proscribed standard range sentence. Grayson, 154 Wn.2d at 342 ("the trial court categorically refused to consider a statutorily authorized sentencing alternative," i.e., a Drug Offender Sentencing Alternative, and thereby failed to exercise its statutory discretion); Garcia-Martinez, 88 Wn. App. at 330 (the trial court did not categorically refuse to consider a statutorily authorized sentence below the standard range); O'Dell, 183 Wn.2d at 696 (the trial court's failure to consider whether youth diminished the defendant's culpability for his offense, which in turn supported an exceptional sentence below the standard range applicable to an adult felony offender, and thus the case warranted remand for a new sentencing hearing).

The present case is not similar to Grayson, Garcia-Martinez, or O'Dell, where the courts were procedurally required by the SRA statute to consider the defendants' circumstance in light of specific factors to determine the applicability of statutorily authorized sentencing alternatives. Indeed, the courts in the present case were not required by any statutory or constitutional authority to consider Davis's requests in

any particular manner because there is no statutory or constitutional right to standby or hybrid counsel.

In sum, Davis has failed to establish that the trial court had a statutory or constitutional duty to consider his requests for standby counsel in the particularized manner that he prefers, much less that any failure to do so constitutes reversible error.

c. Nevertheless, The Record Establishes That Multiple Judges Did In Fact Consider Davis's Repeated Requests For Standby Counsel.

Davis's argument that he was deprived sufficient consideration also fails because his motions for standby counsel were, in fact, considered and appropriately denied by multiple judges. The record shows that Davis moved for standby counsel *at least* seven times before five different judges (Lum, Schubert, Mack, Davis, Spector), and each motion was denied. See RP 16-20, 22, 25-31; 44-45, 54-55, 59-60, 70-72, 198; 2 RP 112-16; CP 25, 27, 37.⁴ Based primarily on Judge Lum's comments, Davis, nevertheless, argues that Judge Lum did not "meaningfully consider his request in the context of the individual circumstances." Br. of App. at 16. However, the record shows that Judge

⁴ Davis stated on the record several times that he understood his motion was denied but that he intended to continue requesting standby counsel to make a record as a matter of strategy. See RP 19-20, 59.

Lum did consider the individual basis upon which Davis based his motion, and he denied it because the proffered grounds were not sufficient.

Specifically, Davis requested standby counsel because he thought it would provide him with access to office equipment and, thus, make his case preparation more convenient than having to work within the jail's more limited resources. RP 16-17 ("I mean, it could be more expedient [sic] and more, you know, helpful to have standby counsel, because I don't have access to a copy machine or a scanner, fax machine, all of these things that are necessary to prepare for a case.") Judge Lum acknowledged the convenience Davis sought when he responded: "...it used to be a practice that 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." RP 17-18. Davis's assertion that Judge Lum did not consider the individual basis of his motion is contradicted by the record. His comment clearly reflects the court's consideration of the basis of Davis's request.

Additionally, Davis's assertion that the court conducted a "categorical" denial of his motion is not supported by the record. Judge Lum stated that "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 [i.e., defense attorneys previously expressed confusion regarding their responsibilities and limitations] and because of the case law,” RP 17-18. Judge Lum clearly stated that standby counsel *was* occasionally granted, albeit “rarely.”

In sum, multiple judges considered Davis’s repeated motions. Although Davis takes issue with their various bases for denying his motion, he has failed to set forth authority establishing that they did not adequately consider his motion, much less that they committed reversible error.

2. DAVIS WAS EITHER VOLUNTARILY ABSENT FROM TRIAL, OR HE WAS PROPERLY REMOVED DUE TO HIS DISRUPTIVE BEHAVIOR AND THE TRIAL COURT HAD NO OBLIGATION TO INQUIRE MORE, OBTAIN AN EXPRESS WAIVER, OR APPOINT COUNSEL.

Davis argues that he did not voluntarily absent himself from trial, but was instead removed for disruptive behavior and that Judge Spector removed him precipitously. He further argues that the trial court erred in continuing trial in his absence without first securing a waiver of his right to representation or appointing counsel. Davis’s arguments are without merit.

Judge Spector initially granted Davis’s request to leave the proceedings. Any latter ruling does not vitiate the former ruling. Given

that Davis voluntarily absented himself, the court was not required to engage in further consideration of less severe alternatives. Alternatively, even if the court did involuntarily remove Davis based on his misconduct, removal was warranted and Davis himself thwarted the making of a fuller record. Under these circumstances, it was appropriate for the court to proceed in his absence without a waiver or appointing counsel. Davis had waived his right to counsel and the court was not obliged to reappoint counsel. Moreover, Davis's misconduct was part of a calculated ongoing campaign to obtain appointment of standby counsel, and our Supreme Court has held that a defendant should not be able to obtain through disruption of trial or a refusal to participate what he was otherwise properly denied. Alternatively, any error is harmless as to count one.

a. Additional Facts Relevant To Davis's Delay Tactics, Refusal To Participate, And Misconduct.

On February 27, 2017, the parties appeared for trial before Judge Smith. Davis immediately moved for a continuance based on, among other things, his claim that his investigator had not yet completed his investigation. RP 166-68. The State opposed the continuance on the ground that the case had been pending for two and a half years with multiple continuances and Davis's investigator had communicated that he had already followed up with all potential witnesses. RP 169-70. The

court put Davis's investigator under oath and he testified that he had done all that he could. See RP 170-82. When asked if he had an additional basis for his continuance request, Davis replied that he needed more time to prepare for trial. RP 186-87. Judge Smith denied the continuance motion. RP 185-87, 198. Davis then repeatedly stated that he was "withdrawing as counsel" and he would not participate further. See RP 188-206. When Judge Smith asked Davis if "withdrawing" meant he was requesting an attorney, Davis responded simply "I'm done. I'm done. I quit." RP 190-91. At another point, Davis expressed that he would rely on a claim of poor health, as opposed to not being prepared, as a basis for refusing to proceed with trial without a continuance:

MR. DAVIS: I'm not coming to trial. I've already said I'm not going to represent myself. I -- I can no longer continue. I -- my health. Let's go the health route. We'll do that route. I don't know. I'm not done preparing for trial. Of course I'm not going to -- I'm not -- I'm done. There's no -- there's no point in this. There's no point in this. I'm sitting in a cell for 23 hours a day. And you expect me to be ready for trial when -- come one. What is that? What is that?

RP 191. Judge Smith told Davis that she would not be appointing standby counsel. RP 198. Davis stated that he would continue to request a continuance and that he would otherwise not be participating in the trial.

RP 205-06.

The next day, trial began before Judge Spector.⁵ Davis requested a continuance based on his health condition and pending appointments. RP 233-34. After the court heard from the jail's counsel and a supervising sergeant,⁶ it determined that Davis did not have any pending urgent appointments and denied the continuance motion. RP 233-40, 288-89.

After the CrR 3.5 hearing, Davis again requested a continuance based on his health claims. RP 371-75. Judge Spector advised him that his motions for a continuance and his effort to withdraw as counsel had previously been addressed by the court and by Judge Smith and they were denied. RP 373, 375. Davis screamed, among other things, that he intended to continue to make the motion "again and again and again." RP 375-77. Judge Spector warned Davis he would be removed from the courtroom and forced to watch the proceedings from a different location if he continued to be disruptive, and Davis replied that it did not matter because he did not want to be there:

THE COURT: Mr. Davis, Monday morning, you will have three days --

⁵ The previous day, Davis disclosed that his sister was Judge McCullough's bailiff, and he moved to "contest a statement with [his] sister." See RP 220-23. This caused Judge Smith, who was familiar with Judge McCullough's bailiff, to recuse herself (presumably to avoid any appearance of impropriety). *Id.* Davis subsequently attempted to further delay the trial by disqualifying Judge Spector on the basis that she was a colleague of Judge McCullough. RP 378-79. Judge Spector denied his motion, citing lack of any potential conflict. *Id.*

⁶ Davis repeatedly interrupted the jail's counsel, prompting Judge Spector to caution him not to interrupt the proceedings. RP 237.

MR. DAVIS: What about it?

THE COURT: We will pick a jury.

MR. DAVIS: I don't care what you do. I really don't. I'm going to continue to survive with this disease.

THE COURT: If you are disruptive I will have you removed from the court. You can observe the court proceedings --

MR. DAVIS: **You can remove me now. What have we been doing here? I don't even want to be here. So remove me. I don't care. I told you that. You can hold your trial without me. Who cares.**

THE COURT: Well, if you're disruptive we may have to --

MR. DAVIS: **Well do that. I don't care. Ask me do I care. I don't care. You can hold your trial at Woodland Park Zoo. Do that.**

THE COURT: It's your trial.

MR. DAVIS: **It doesn't matter to me. It's not my trial. It's the state's trial. It's a trial full of crap.**

THE COURT: If you disrespect the proceedings I will have you removed --

MR. DAVIS: -- you can call it what you want to call it --

THE COURT: -- from the trial.

MR. DAVIS: You can call it what you want to call it.

Whatever. This whole proceeding is disrespectful.

Considerably.

THE COURT: Do you have anything else?

MR. DAVIS: No.

THE COURT: All right. We will begin jury selection --

MR. DAVIS: -- **didn't want to come here today.** I'm trying to deal with my pain --

THE COURT: -- jury selection on Monday morning. You have 3 days to recover. Good luck.

MR. DAVIS: Well, good. I don't think that's going to happen Dr. Spector since you're a urologist now, aren't you.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

MR. DAVIS: Dr. Spector.

MS. ANDERSON: 9:00 a.m. on Monday, Your Honor?

THE COURT: We will begin with jury selection.

MR. DAVIS: **With or without me.**

THE COURT: Correct.

MR. DAVIS: **I'm not going to be here.**

RP 380-82 (Emphasis added).

On Monday, Davis was brought to the courtroom and the parties engaged in voir dire. 2 RP 8-90. During the process, Davis commented in front of the prospective jurors that “Judge Julie” had rushed him into trial and had not allowed him to prepare. 2 RP 47. Despite being ordered by the judge to simply raise his hand when he needed a bathroom break, he interrupted the proceedings by shouting out “I’m leaking” in front of the jury. RP 155; 2 RP 63, 103, 119. During opening argument, Davis again told the jury that he was “leaking” and in pain. 2 RP 103, 119. After the jury was removed, Judge Spector admonished Davis for repeatedly violating her pre-trial order prohibiting him from discussing his medical condition in front of the jury. 2 RP 103-04. When the jury returned, Davis proceeded to violate Judge Spector’s ruling again, but she allowed him to continue. 2 RP 104-05.

On Tuesday, Judge Spector instructed the jury to disregard Davis’s continuing comments during opening statements that he was unprepared due to Judge Spector’s rulings regarding his requests for counsel. 2 RP 107-08. Thereafter, Davis drew sustained objections and warnings from Judge Spector for talking to the jury about his medical condition, asserting

that Judge Spector was a former prosecutor that was colluding with the State's prosecutor against him, moving for standby counsel, asserting that a conviction would be costly for the State and the taxpayers on the jury, and stating that Judge Spector was going to "cut my head off eventually." 2 RP 112-16. When Davis asserted that it was unfair that the penalty for his conviction would be 54 months despite the fact that he was not a sexual predator or rapist, Judge Spector told him he was not to talk about a penalty. 2 RP 116-17. Davis defiantly replied, "I probably will." 2 RP 117. Judge Spector excused the jury and told Davis that his opening was over based on his repeated rule violations. 2 RP 118. She advised him that he was alienating the jury and that he would be required to stay within the rules of evidence on cross-examination or she would cut-off his examination. 2 RP 117-19. Judge Spector offered Davis the opportunity to use the bathroom, but Davis declined. 2 RP 119.

On the same day, Davis increased his water intake dramatically. CP 140-41. He consumed multiple pitchers of water during the morning session. CP 141. He would then frequently announce his urgent need to use the bathroom. Id. This started to occur every 20 minutes instead of every hour, and during critical parts of witnesses' testimony. Id. For example, when Judge Spector offered Davis the opportunity to cross-examine the first witness, Davis stated "I'm leaking. I gotta go... Sorry.

Blame it on the State.” 2 RP 135. The court excused the jury and gave Davis a bathroom break. Id. Prior to cross-examining the second witness, Davis similarly stated “Sorry, folks. Gotta go leak.” 2 RP 158. Again, Judge Spector excused the jury and gave Davis a bathroom break. Id. When the afternoon session began, Davis asked for more water, and the prosecutor provided him with the additional pitcher of water that was on her side of the table. CP 141. Shortly thereafter, during the State’s direct examination of the third witness, Davis interrupted by saying “leaking.” 2 RP 199; CP 141. The jury was brought back into the jury room and the jail officers took the defendant to the restroom. Id.

When Davis returned, he complained that he did not have water to drink. 2 RP 199. Judge Spector advised him that he would not be provided any more water, as he had already had a substantial amount, he was taking restroom breaks every 20 minutes and was thus causing a substantial delay to the trial, and it was 3:10 p.m. and they were nearly finished for the day and Davis could soon return to the jail and have all the water he liked. 2 RP 199-201; CP 141. Davis began to pound his fists on the table and demand that he be provided water. 2 RP 200-02; CP 141. Judge Spector ordered the jury back into the courtroom and the prosecutor attempted to examine the witness, but Davis continued to interrupt by arguing that he needed water for his medical condition and accusing Judge

Spector of “barbaric behavior” that violated his constitutional rights. 2 RP

202-05; CP 141. Judge Spector sent the jury to the jury room. 2 RP 205.

As the jury was walking out, Davis yelled that he would no longer participate in the trial:

THE DEFENDANT: I’ve got to drink water. I don’t care. I’m talking about my health now.

THE COURT: I’m going to take the jury back now.

THE DEFENDANT: **Thank you. You can hold your trial without me. How’s that?**

THE COURT: I’m going to do that.

THE DEFENDANT: **Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court and your ridiculous charges, and your little games and that you do that.** Load somebody else up in the prison system. Get your next victim lined up. **I’m done with it. I could care less.**

2 RP 205-06 (Emphasis added). Judge Spector then began to offer Davis one more chance to remain, but he expressly declined to participate:

THE COURT: **All right. Wait a minute. Mr. Davis, you have one more --**

THE DEFENDANT: What do you want? I need water. **I’m done talking.** What’s there to talk about? You’re playing a game. **I’m done playing your games.**

THE COURT: All right. The record’s going to reflect --

THE DEFENDANT: All right. The record this – **all right, for the record this. I said that, I mean that. I’m not going to continue to be a gentleman and polite. I could care less what you say. I’m done with it.**

2 RP 206 (Emphasis added). Judge Spector found that Davis was “voluntarily absenting” himself from the trial. Id.

Before she removed Davis, Judge Spector tried to make an oral record to support his removal, but Davis elevated his misconduct to an explosive tirade of expletives and yelling at an extremely loud volume:

THE COURT: I need him present so I can make the record, so don't take him out yet.

THE DEFENDANT: **I don't care about your record.**

THE COURT: Well, I do.

THE DEFENDANT: I don't. And I know your buddies up at the appellate court ain't gonna give a shit either, so fuck the record.

THE COURT: So the record should reflect that Mr. Davis has been given twice as much water as he had yesterday and, therefore, he's --

THE DEFENDANT: So what?

THE COURT: Had to use the restroom twice as much.

THE DEFENDANT: I had to use the restroom because I had a digestive dysfunction. I piss a lot. Ask the God damn -- the officers. I piss.

THE COURT: Can you keep your voice down?

THE DEFENDANT: No, I'm not. Freedom of expression. You don't want to listen, then shut your ears.

THE COURT: So at about -- ten after 3:00 he was brought back here and I've explained to him that --

THE DEFENDANT: We gonna do this, we gonna play the kangaroo game. I don't care, either. You can keep playing, play with yourself. Stop playing with me. Who cares?

THE COURT: This is not about the --

THE DEFENDANT: I don't care.

THE COURT: This is about you disrupting the trial, delaying the trial.

THE DEFENDANT: Doesn't matter what it's about. What it's really about, nothing.

THE COURT: Screaming at the top of his lungs, the jury --

THE DEFENDANT: And I'm going to continue to scream. Where's my fucking water?

(Defendant screaming simultaneously with court)

THE COURT: I need to proceed with the trial, and I am finding that he is voluntarily absenting himself from the rest

of these proceedings under State vs. Garza, G-A-R-Z-A, and the record should reflect that he continues to speak on top of his lungs, swearing, accusing me of all kind of things.

THE DEFENDANT: You're being an asshole, and I can be one, too.

THE COURT: You're now removed from the court.

THE DEFENDANT: Good. And fuck you very much, asshole. Fuck this kangaroo court shit.

2 RP 206-08; CP 141-42 (Emphasis added). Davis's volume was so loud that the court was unable to speak over him. CP 142. The court found that the jury undoubtedly heard his tirade, and the courtroom across the hall (which was in session in a murder trial) was forced to recess because the parties were unable to hear their own witness due to the defendant's volume. Id. Davis continued to yell as the officers escorted him out of the courtroom and down the hallway. Id.

The Court ordered the trial to continue in Davis's absence, based on its finding that he had voluntarily absented himself. Id. The prosecutor completed her direct examination of the officer that testified to finding cocaine in Davis's possession, and the officer who arrested Davis in the stolen Buick. 2 RP 209-35. The officers were not cross-examined. Id. After testimony was concluded for the day, Judge Spector advised the jail officers that she wanted Davis brought back the following morning. 2 RP 235. The jail officer responded that he would "let the court know if

[Davis] declines the opportunity.” 2 RP 236. Judge Spector indicated that she might need to swear the officer in. Id.

The next day, Davis was brought back to trial. 2 RP 241. Judge Spector warned him that she would not tolerate any disruptions or he would be removed. 2 RP 241-48. She also told him that he would be provided with one water bottle and bathroom breaks would occur only every hour, as he had done earlier in the trial. 2 RP 242-43. She also pointed out that in the beginning days of the trial, Davis had not drunk nearly as much water and did not have nearly as many bathroom breaks. 2 RP 243; CP 142-43; see also RP 252-53; 2 RP 63, 103, 135, 158, 199. She noted that he doubled his water intake and that his bathroom urgency increased from every hour to every 20 minutes. Id. Judge Spector advised Davis that she had found that his announcements that he needed a bathroom break would always occur either during a critical part of a witness’s testimony or when it was his time to cross examine a witness. Id. And she told him that she had found that he intentionally did this to delay the proceedings and that this was a tactical decision by him to do everything he could to delay the trial. Id. Although Davis continued to make disrespectful remarks to the court and violate rulings in front of the jury, he managed to be present for the rest of the trial without extreme disruptions.

b. Davis Voluntarily Absented Himself From The Proceedings; Therefore, The Court Was Free To Proceed In His Absence Without Further Consideration.

i. Voluntary absence.

The record shows that the trial court's finding that Davis voluntarily absented himself were supported by Davis's express refusals to participate any further in the proceedings.

A trial court's decision regarding whether a defendant is voluntarily absent from trial, thereby waiving the Sixth Amendment right to be present at trial, is reviewed for abuse of discretion. State v. Garza, 150 Wn.2d 360, 365-66, 77 P.3d 347 (2003).

A defendant has a fundamental constitutional right to be present at trial. Garza, 150 Wn.2d at 367-68; State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). However, the defendant may waive this right. Garza, at 367-68; State v. Thomson, 123 Wn.2d at 880. The waiver must be voluntary and knowing. Id. Once trial has begun in the defendant's presence, a subsequent voluntary absence operates as an implied waiver, and the trial may continue without the defendant. Garza, at 367; Thomson, at 880-81; CrR 3.4(b). The bright-line rule that a defendant who is present during the swearing of a jury and voluntarily refuses to attend the trial may be tried in absentia serves to: 1) assure that any

waiver of the right to be present at trial is indeed knowing, and 2) ensure that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused. State v. Brown, 178 Wn. App. 70, 76-77, 312 P.3d 1017 (2013) (defendant who fled the state may be convicted in absentia by a jury not sworn in his presence).

The determination of whether the defendant's absence is voluntary depends upon the totality of the circumstances. Garza, at 367. If the trial court finds a waiver of right to be present after trial has begun, the court is free to exercise its discretion to continue trial without further consideration. Thomson, at 872.

Here, the trial court properly found that Davis was voluntarily absent. On the first day of his trial, Davis made it clear that he did not want to be present. He repeatedly stated that he was "withdrawing as counsel" and that he would not participate further. See RP 188-206. In response to Judge Smith's inquiry if "withdrawing" meant he was requesting an attorney, Davis responded, "I'm done. I'm done. I quit." RP 190-91. When the court insisted that trial would proceed, Davis changed tack and stated that he would "go the health route," i.e., claim poor health, as a basis for refusing to proceed with trial. See RP 191. When Judge Smith told Davis that she would not appoint standby counsel,

Davis insisted that he would continue to request a continuance and that he would otherwise not be participating in the trial. RP 198, 205-06.

Davis made his intentions clear on the next day before Judge Spector. He again sought to prevent the trial from proceeding. He moved for a continuance on the basis that he had urgent pending health related appointments – a claim that was discredited when the court questioned the jail’s counsel and a supervising jail sergeant regarding Davis’s pending health appointments. RP 232-40, 288-89. After the CrR 3.5 hearing, Davis again sought to prevent the trial from going forward by requesting a continuance based on his health claims. RP 371-75. When Judge Spector denied his motion, Davis screamed, among other things, that he intended to continue to make the motion “again and again and again.” RP 375-77. When Judge Spector warned Davis that he would be removed from the courtroom if he continued to be disruptive, Davis repeatedly and expressly replied that removal did not matter to him because he did not want to be there:

THE COURT: If you are disruptive I will have you removed from the court. You can observe the court proceedings --

MR. DAVIS: **You can remove me now. What have we been doing here? I don’t even want to be here. So remove me. I don’t care. I told you that. You can hold your trial without me. Who cares.**

THE COURT: Well, if you’re disruptive we may have to –

MR. DAVIS: Well do that. I don't care. Ask me do I care. I don't care. You can hold your trial at Woodland Park Zoo. Do that.

THE COURT: It's your trial.

MR. DAVIS: It doesn't matter to me. It's not my trial. It's the state's trial. It's a trial full of crap.

[...]

THE COURT: All right. We will begin jury selection --

MR. DAVIS: -- **didn't want to come here today.** I'm trying to deal with my pain

[...]

THE COURT: We will begin with jury selection.

MR. DAVIS: **With or without me.**

THE COURT: Correct.

MR. DAVIS: **I'm not going to be here.**

RP 380-82 (Emphasis added).

Davis's desire to absent himself culminated after opening statements and the examination of several witnesses, and after it was clear that his water trick was not going to work. He unequivocally stated that he refused to participate in the trial. Specifically, as the jury was walking out, Davis yelled that the court could hold its trial without him and he was "done with it":

THE DEFENDANT: Thank you. You can hold your trial without me. How's that?

THE COURT: I'm going to do that.

THE DEFENDANT: Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court and your ridiculous charges, and your little games and that you do that. Load somebody else up in the prison system. Get your next victim lined up. I'm done with it. I could care less.

2 RP 205-06. When Judge Spector began to offer Davis one more chance to remain, Davis left no remaining doubt that he was “done with it,” i.e., declining to participate; leaving Judge Spector with no choice but find that Davis was “voluntarily absenting” himself from the trial:

THE COURT: All right. Wait a minute. Mr. Davis, you have one more --

THE DEFENDANT: What do you want? I need water. I'm done talking. What's there to talk about? You're playing a game. I'm done playing your games.

THE COURT: All right. The record's going to reflect --

THE DEFENDANT: All right. The record this -- all right, for the record this. I said that, I mean that. I'm not going to continue to be a gentleman and polite. I could care less what you say. I'm done with it.

THE COURT: I'm going to find that you are voluntarily absenting yourself --

THE DEFENDANT: Whatever. Do whatever you want.

THE COURT: -- from these proceedings.

2 RP 206. Judge Spector's finding that Davis voluntarily and knowingly waived his right to be present at trial is amply supported by the record. Davis's assertion that he did not voluntarily absent himself must be rejected because it completely ignores his own repeated and explicit statements that he refused to participate.⁷

Davis seeks to take the focus off of his express refusal to participate by misdirecting the focus to his profane tirade *after* Judge Spector found that he had absented himself. See 2 RP 206-08. However,

⁷ He also ignores that his excess consumption of water and increasing bathroom breaks were themselves intentional and tactical ploys to delay the proceedings, thus, evidencing a desire not to participate. CP 142-43.

the fact that Davis increased the intensity of his disruptiveness after the court found he voluntarily absented himself and was attempting to make a record does not vitiate the court's initial finding that he had voluntarily absented himself.

Davis claims that the court ordered him removed, rather than him removing himself. This argument ignores the obvious fact that a defendant in custody who refuses to participate cannot simply walk out on his own accord. It was necessary, as a practical matter, for Judge Spector to grant Davis's wish and have him removed. She did just that. Characterizing this as an involuntary removal is disingenuous.

Davis seems to argue that only an out of custody defendant can be voluntarily absent. He is mistaken. Garza happens to involve an out of custody defendant, but Davis has not cited any authority establishing that a defendant in custody cannot voluntarily absent himself from proceedings related to the charge for which he is held. See Garza, at 373 (noting only that "most courts in other jurisdictions which have considered the matter have held that a defendant *in custody on other charges* cannot waive his or her right to be present at trial as a matter of law because he or she "is not free to make a voluntary decision about whether or not ... [to] attend the court proceedings...") (emphasis added); see also People v. Epps, 37 N.Y.2d 343, 350, 372 N.Y.S.2d 606, 334 N.E.2d 566 (1975) (upheld

waiver of right to be present where a defendant refused to attend trial as part of an inmate-wide boycott of the courts); see also State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889, 912 (1988) (defendant knowingly and voluntarily waived his right to be present at return of verdict in capital case by attempting suicide, resulting in his hospitalization, where there was no evidence that defendant was incompetent). In Rice, our Supreme Court expressly rejected the assertion that an in custody defendant should not be allowed to waive their right to be present in a capital case in order to protect them from themselves and in deference to absolute fairness.

Rice, at 617-18. In doing so, the court explained that:

We find this rationale unpersuasive. Its paternalistic assumptions about the incapacity of defendants to determine their own affairs are long outdated. Moreover, this rule would allow a defendant to indefinitely postpone the return of verdict by refusing to appear, feigning illness or in other ways purposely disrupting the proceedings.

Id.

In sum, the record shows that Davis voluntarily absented himself from any further proceedings. This was an express waiver.⁸

⁸ Moreover, after Davis explicitly stated that he did not wish to further participate, his subsequent extreme misconduct was properly treated under the circumstances as an *implicit* request to be removed.

ii. Proceeding with trial was appropriate after Davis absented himself.

Because Davis's absence was voluntary, the trial court operated well within its discretion in completely removing him without consideration on the record of less severe alternatives, and without appointing counsel. No further analysis is required.

If the trial court finds a waiver of right to be present after trial has begun, the court is free to exercise its discretion to continue trial without further consideration. Thomson, *supra*, 123 Wn.2d at 872; *see also State v. Irby*, 187 Wn. App. 183, 189, 347 P.3d 1103 (Div. 1 2015), review denied, (Feb. 10, 2016) (pro se defendant waived both his right to be present during trial and his right to representation; jury trial was convened in his absence).

Davis appears to concede that "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." Br. of Appellant at p. 29, fn. 18 (citing, e.g., Clark v. Perez, 510 F.3d 382, 396 (2nd 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 absents himself and one who is removed by the court)).

Davis nonetheless contends that the trial court's decision to conduct examination of two witnesses in his absence or without any defense attorney constituted structural error, requiring reversal per se. For this proposition, he relies primarily on United States v. Mack, 362 F.3d 597, 600 (9th Cir. 2004). Mack is not on point because it involved a pro se defendant *involuntarily* removed from the courtroom. Id., supra, 362 F.3d at 600-02. The Mack holding is thus limited to only those situations in which a defendant has chosen to represent himself and then is removed from the courtroom, involuntarily, while the trial continues in his absence, without counsel present. It does not extend to cases, like the present case, where the defendant clearly chooses to represent himself and then voluntarily, and on the record, refuses, both in word and deed, to participate in his trial.

c. Assuming Davis Was Removed Due To Disruptive Behavior, Complete Removal Was Proper; And, It Was Appropriate To Proceed In His Absence Without A Waiver Or Appointment Of Counsel; Alternatively, Any Error Was Harmless As To Count One.

i. Complete removal due to disruptive behavior was proper.

Even if the court involuntarily removed Davis based on his conduct, the record shows that the trial court considered lesser remedial measures, but Davis prevented the trial court from fulfilling its duty by his explosive behavior and relentless screaming.

“A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Once lost, that right can be reclaimed if the defendant is willing to conduct himself with decorum and respect. Id.

The “appropriate method for dealing with a disruptive defendant should be left to the discretion of the trial judge” State v. Chapple, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001). Trial courts have wide discretion to meet the circumstances of the case:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and can not be tolerated....We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

DeWeese, 117 Wn.2d at 380. A “defendant’s persistent, disruptive conduct can constitute a voluntary waiver of the right to be present in the courtroom.” State v. Thompson, 190 Wn. App. 838, 843, 360 P.3d 988 (2015). The Washington Supreme Court has set guidelines to assist trial courts:

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, this court has expressed a preference for 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.

Id. at 320 (citing DeWeese, *supra*, at 380).

“No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations” but courts have at least three options in handling a disruptive defendant. Allen, 397 U.S. at 343. The Court may: (1) bind and gag the Defendant in the courtroom throughout the trial; (2) cite him for contempt (a remedy that may be futile when the defendant is determined to disrupt the proceedings, or where he is charged

with a serious crime); or (3) remove him from the courtroom until he promises to conduct himself properly. DeWeese, at 380. The court's decision to physically restrain a defendant must be based on evidence indicating that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom. State v. Turner, 143 Wn.2d 715, 726, 23 P.3d 499 (2001). Multiple warnings are not required prior to a defendant's removal from the courtroom. Chapple, 145 Wn.2d at 321.

In the present case, Davis asserts that the court erred by completely removing him from the proceedings without first considering whether there were less severe alternatives. Davis's argument fails because the record shows that the court considered and attempted less severe alternatives. The day before Davis's tirade, Davis responded to Judge Spector's denial of his continuance motion by screaming, among other things, that he intended to continue to make the motion "again and again and again." RP 373, 375-77. Before Davis interrupted her, Judge Spector began to warn Davis that if he continued to be disruptive she would remove him from the courtroom and he would have to observe the proceedings from a different location. RP 380-82 (COURT: "If you are

disruptive I will have you removed from the court. You can observe the court proceedings --” DAVIS: “You can remove me now...[omitted].”)

Indeed, after the court found that Davis had voluntarily absented himself, Davis escalated his disruptions. Judge Spector tried to offer Davis one more chance, but he cut her off. 2 RP 206 (“you have one more...”). She also tried to make an oral record before she removed Davis, but he continually interrupted her with an explosive tirade of expletives and screaming at an extremely loud volume. 2 RP 206-08; CP 141-42. In its findings of fact, the court noted that, in addition to pounding on the table, Davis’s screaming volume was so loud that the Court was unable to speak over him, the jury undoubtedly heard his tirade, and the courtroom across the hall (which was in session in a murder trial) was forced to recess because the parties were unable to hear their own witness due to the defendant’s volume. CP 142. Further, Davis continued to scream as the officers escorted him out of the courtroom and down the hallway. *Id.* The court found that Davis’s disturbance was “one of the worst exchanges I’ve had in 17 years on the bench.” 2 RP 242; CP 143.

Given the extreme level of disturbance that took place, it is disingenuous for Davis to now assert that there was not “a record showing that such a severe method of controlling Davis’s misconduct was necessary before completely removing him.” Br. of Appellant at 23. The

fact that Davis's conduct after the court found that he had absented himself could hardly have been more egregious was sufficiently captured on the record. Although Davis now suggests that the trial court could have provided him with a monitor to observe the proceedings, he certainly would not have abided any such offer at the time. He ignores that he was physically pounding the table and could be heard screaming in other courtrooms. Further, he continued screaming after he was led into the hallway, thus indicating that he was not going to conform his behavior no matter where else he might be placed. Additionally, Davis ignores the fact that he repeatedly said that he did not wish to participate in the proceedings, thus calling into question the effectiveness of putting Davis into a room with a monitor. Given Davis's ferocity and his unequivocal and repeated refusal to participate, it is self-evident from the record that the trial court had no other reasonable alternative but to remove Davis altogether. Moreover, Davis fails to recognize that, although our courts have held that consideration of the least severe remedy to accomplish the result is "preferable," "[t]he manner of maintaining order in the courtroom is within the trial judge's discretion," because the trial court is in the best position to assess the defendant's disrespectful behavior and any impending threat. DeWeese, at 380; Chapple, at 323. Our Supreme Court held that it "prefers" trial courts consider the least restrictive alternative,

not that a trial court must endure a fusillade of profanity and aggression simply to create an oral record.

In sum, although the trial court did not, on the day of the removal, make an explicit record of its consideration of least restrictive alternatives (likely because Davis was removed after he voluntarily absented himself and no further consideration was required), the record makes several important facts evident. The court had been considering least restrictive options the day before. On the day Davis was removed, the court had no other reasonable alternative when presented with the most volatile exchange the judge had faced in 17 years on the bench and Davis's repeated refusal to participate further. Under the circumstances, it was a proper exercise of the court's discretion to completely remove Davis.

ii. It was appropriate to proceed in Davis's absence without a waiver or appointment of counsel.

Assuming the trial court involuntarily removed Davis based on his misconduct, it was appropriate to proceed in his absence without a waiver or appointing counsel.

Davis waived his right to counsel and the court was not obliged to reappoint counsel for a defendant who had already validly waived the right to counsel. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). This Court held in

Modica that the trial court was not required to *sua sponte* engage the defendant in a second full colloquy when the information was amended, approximately one week before the jury was empaneled, to add a charge of witness tampering. Id. at 440, 446. The trial court also did not abuse its discretion by denying the defendant's request for reappointment, made a day after the jury was empaneled. Id. at 440, 444. "The burdens imposed upon the trial court, the jurors, the witnesses, and the integrity of the criminal justice system increase as trial approaches or when trial has already commenced." Id. at 443. Thus, "the degree of discretion reposing in the trial court is at its greatest when a request for reappointment of counsel is made after trial has begun." Id. at 443-44. No lawyer would be ready to proceed to trial immediately, meaning that further delay in this case – already pending 2 ½ years – was inevitable.

Davis's argument to the contrary relies on Mack, supra, which is neither factually analogous to the present case nor binding precedent. In Mack, a defendant chose to proceed pro se and was subsequently involuntarily removed from trial for "obnoxious behavior." Id. at 599, 601. When he was returned to the courtroom, the court precluded him from examining witnesses or making a closing argument. Id. On appeal, the Ninth Circuit held it was error to exclude the pro se defendant from the trial. Id. at 601. In ruling, the court explained:

True it is that it does not appear that anything of significance went on in Mack's absence, but when he was allowed to return, he was required to remain silent and was even told that no objection of his would have any effect whatsoever on the proceedings. In practical effect, he had been removed as his own counsel and nobody stepped in to fill the gap.

Id. at 601-02. The court distinguished between a right to counsel, right to representation and right to be present, and it held that it was structural error to forbid a pro se defendant from cross-examining witnesses, making objections, or presenting a closing argument, even where the defendant was disruptive and contemptuous of the court. Id. at 601-03. The facts in the present case are not sufficiently analogous to those in Mack. Davis's situation is different because he was not prohibited from examining witnesses or making a closing argument after he returned, and was thus not precluded from continuing his defense. See United States v. Bell, 770 F.3d 1253, 1257 (9th Cir. 2014) (distinguishing Mack as follows: "[i]n support of his Sixth Amendment challenge, Bell cites United States v. Mack, ..., which holds that the district court's decision to remove a disruptive criminal defendant from the courtroom throughout trial violated the defendant's Sixth Amendment right to counsel because he was precluded from (1) calling and examining witnesses and (2) making a closing argument to the jury. *But Bell's situation is different because he was not precluded from making a closing argument.*") (Emphasis added).

Moreover, even if Mack is sufficiently analogous, it is not binding precedent and this Court should decline to follow it under the facts of the present case. Here, Davis engaged in a calculated ongoing campaign to obtain appointment of standby counsel via various delay strategies. This included complaining that he lacked sufficient jail resources, that his investigation was incomplete, and that he had urgent health related appointments. When these various attempts failed, he changed strategies and attempted to disrupt the proceedings so that the court would tire of him and appoint counsel for the sake of expediency. His various attempts included repeatedly and flagrantly violating the courts *in limine* rulings, mocking the judge in front of the jury, and repeatedly indicating that he was “done” and would no longer participate. When all of these approaches failed to garner the delay and appointment of counsel that he sought, he resorted to purposely overconsuming water in order to accelerate the frequency of his bathroom breaks during key moments of the trial. When the court identified his ruse, Davis again resorted to a flat refusal to participate in the proceedings. And, finally, when the court began to offer him another chance to participate, making it apparent to Davis that his refusals might not be enough to cause an appointment of counsel or delay the trial, Davis resorted to the most incendiary outburst that the court had witnessed in 17 years on the bench. Davis now comes

before this court and argues that his misconduct should have resulted in the trial court appointing him the counsel he sought.

In DeWeese, supra, the defendant's first counsel withdrew due to developing conflicts with the defendant. Id. at 372. The defendant then discharged his second appointed attorney, Mr. Baum. Id. The court later reinstated Mr. Baum. Id. The defendant again discharged him and requested a third appointed attorney. Id. The trial court denied his request and ruled that he could continue with Mr. Baum or proceed pro se. Id. at 372-73. After several equivocal requests to proceed pro se, the defendant finally unequivocally requested to proceed pro se. Id. at 373. Still, when the defendant disrupted the trial through a series of outbursts that included prejudicial remarks referring to excluded evidence and remarks about being forced to represent himself, the judge removed the defendant from the courtroom, and the trial proceeded in his absence without counsel. Id. at 380. When the trial court invited the defendant to return to court if he could cease disruption, he refused unless his demand for counsel was met. Id. at 373, 381. While in jail, he threatened to physically resist any attempts to bring him back to the courtroom (without counsel first being appointed). Id. at 374. On appeal, our Supreme Court addressed the issue of "whether the trial court erred in removing Mr. DeWeese from the courtroom and continuing trial in his absence." Id. at 374. The court

noted that “there is no absolute right of the pro se defendant to standby counsel...[citation omitted] [m]oreover, there is no Sixth Amendment right to “hybrid representation” through which defendants may serve as co-counsel with their attorneys.” Id. at 379. The court then found that the defendant was not entitled to a new appointed counsel because he had caused the problem by his continued disruptions. Id. at 379. It reasoned that

Mr. DeWeese’s renewed demand that the court appoint him a third attorney during trial was properly denied for the same reason as before trial. **What the defendant cannot obtain because of a lack of valid reason, that defendant should not be able to obtain through disruption of trial or a refusal to participate.** A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial.

Id. (Emphasis added.) The court also warned against self-representation and the risks it entails:

After a defendant’s valid Faretta waiver of counsel under these circumstances, the trial court is not obliged to appoint, or reappoint, counsel on the demand of the defendant. The matter is wholly within the trial court’s discretion. Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant’s detriment, must nevertheless be borne by the defendant.

Id. Thus, a court is not required to appoint new counsel for a defendant who has been removed as a result of his disruptions.

Here, Davis's and DeWeese's conduct mirror each other. Both waived counsel and then subsequently demanded that counsel be reappointed. When the trial courts did not conform to their demands, both Davis and DeWeese sought to coerce the judges into ceding to their demands through disruption and refusal to participate. As the DeWeese court held, Davis should not be able to obtain through disruption of trial or a refusal to participate what he was otherwise properly denied. Put another way, this Court should reject Davis's calculated attempt to manufacture the appearance of a one-sided sham trial through his refusal to participate and acting out until he was excluded from the courtroom. It should also reject Davis's disingenuous assertion that he was unfairly denied representation at trial. Davis had a choice, and he chose to reject the assistance of an experienced defense attorney who had been appointed, he chose to refuse to participate, and he chose to engage in misconduct. Davis waived his right to counsel and his right to be present, and the trial court did not abuse its discretion by refusing to cede to Davis's attempted manipulation. Given his choices, Davis received as fair a trial as he allowed the court to give him.

d. Alternatively, Any Error Was Harmless As To Count One.

Assuming Davis was removed for improper conduct and it was error to proceed in his absence, it was harmless error as to count one. A violation of a constitutional right is harmless beyond a reasonable doubt where the “untainted” evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Pruitt, 145 Wn. App. 784, 788, 187 P.3d 326 (2008) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); In re Pers. Restraint of Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (violation of the right to be present is subject to the harmless error analysis)).

Here, Davis was only absent for some or all of the testimony of two witnesses: the officer that testified to finding crack cocaine in Davis’s possession, 2RP 209-19; and, the officer that arrested Davis for possessing the stolen Buick. 2RP 220-28. These witnesses pertained only to count two, possession of a stolen motor vehicle involving the Buick, and count three, possession of controlled substance. CP 1-2. None of the evidence pertaining to count one, possession of a stolen vehicle involving the Hyundai, was tainted or otherwise affected by Davis’s absence.

3. CUMULATIVE ERROR DOES NOT APPLY WHERE FEW ERRORS HAVE LITTLE OR NO EFFECT ON THE OUTCOME OF THE TRIAL.

Finally, Davis asserts that the cumulative error doctrine applies to the trial court's denial of standby counsel, complete removal of Davis from the courtroom, and proceeding with trial for the duration of two witnesses in Davis's absence. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, "the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." Id. As discussed above, Davis did not have a statutory or constitutional right to standby counsel, he was properly removed because he voluntarily absented himself and then engaged in egregious conduct that left the court with no other reasonable alternative, and the court properly proceeded with trial because Davis's absence was of his own volitional doing. Accordingly, Davis has failed to prove any instances of misconduct, and he has failed to show how each alleged instance of misconduct materially affected the outcome of his trial. Similarly, notwithstanding Davis's bald conclusory assertion, he has not indicated how or which of these combined instances of misconduct

affected the outcome of his trial. As a result, Davis's cumulative error doctrine claim fails in this case.

D. CONCLUSION

For the reasons set forth above, Davis's convictions should be affirmed.

DATED this 11th day of January, 2018.

Respectfully submitted,

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