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STATE OF WASHINGTON
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NO. 96663-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEITH ADAIR DAVIS,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES

1. Did the trial court act within its discretion when it permitted Davis to leave court after he repeatedly said he wanted to leave and that he did not care if the trial was conducted in his absence?

2. If Davis was, arguendo, removed from his trial instead of leaving voluntarily, did the trial court properly take testimony from two witnesses in his absence where Davis knew that trial would resume with neither he nor a lawyer present?

B. STATEMENT OF THE CASE

On May 19, 2014, Keith Adair Davis was charged with two counts of possessing a stolen vehicle and a single count of possession of a controlled substance. CP 1-8. On February 6, 2015, he waived his right to counsel and invoked his right to represent himself. CP 21; RP (2/6/15) 1-13.[1] CP 23 ("Waiver of Counsel").[2]

Davis brought many pretrial motions concerning his case preparation and pro se status. See Appendix A and CP 25 (RP (1/28/16));

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[1] The State will cite to the verbatim report of proceedings by date and page number, "RP (date) page." "1RP" indicates the reports prepared by Ballard Transcriptionists; "2RP" indicates the reports prepared by court reporter Kevin Moll.

[2] Davis has at least twice before represented himself against a felony charge in superior courts in Washington. See 1RP (2/6/15) 9, 12 (King County); CP 23, lines 10-11; 1RP (1/28/16) 18-19, 1RP (2/11/16) 30 (Thurston County). In at least one of those cases, Davis was disruptive at trial and then challenged on appeal the trial court's rulings on his pro se status. State v. Davis, 2016 WL 7217260 (December 13, 2016).

CP 27 (RP (2/11/16) 15-24); CP 27 (RP (2/11/16) 25-34); CP 37 (RP (5/10/16) 63-93); CP 41 (RP (8/22/16) 95-104); CP 49-50 (9/29/16). See Appendix A. His motions were generally denied.

On February 27, 2017, 32 months after charging and over one year after he returned to King County from litigating matters in another county, this case was assigned for trial to the courtroom of the Honorable Lori K. Smith. 1RP (2/27/17) 149. Davis had medical conditions that required periodic breaks and, after consulting with counsel for the jail, Judge Smith entered an agreement with Davis whereby he would be allowed a break each hour to use the bathroom. He agreed that this would be sufficient to meet his needs. 1RP (2/27/17) 155-57.

When Judge Smith later denied Davis's motion to continue trial, he became frustrated and told the court that he would withdraw from the case and "You'll go to trial without me." 1RP (2/27/17) 184-88. When the court tried to proceed, Davis said again, "You just go to trial without me." 1RP (2/27/17) 189. When the court tried to clarify the comment, Davis repeated himself with even greater precision and emphasis: "I'm not -- I'm done. I -- I quit. I'm done representing myself. ... I'm not doing it anymore." 1RP (2/27/17) 190. He continued:

> I'm done. I'm done. I quit. ... 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.

1RP (2/27/17) 191 (emphasis added). He also showed that he expected trial to continue without him and without representation.

> So, you guys can hold trial without me. Right? You do that? ... Because I'm not coming. ... It'll last for an hour and you guys can be done with it. And do what you do.

1RP (2/27/17) 191-92. Davis made the following comments all in the same vein. 1RP (2/27/17) 193 ("I quit."); 195 ("Yeah, well, we can call it what we want to call it. I'm done."); 196 ("I am ... not going to continue" and "You hold trial without me. ... That's what you do."); 197 ("I'm done with it."); 198 ("I'm done with it. So you ... I'm not coming. So you're going to be doing your trial without me. ... That's what you do.").

Judge Smith recused herself at the end of the day after she discovered Davis was related to her friend, but she filed a written ruling memorializing her decisions. 1RP (2/27/17) 220; CP 77-80. Several rulings obviously call into question the credibility of representations Davis made to the court. CP 78 (rulings 3, 4, 6, 7).

The case was re-assigned to the Honorable Julie Spector on February 28, 2017. 1RP (2/28/17) 225. Judge Spector had read Judge Smith's rulings. 1RP (2/28/17) 234. Judge Spector had also dealt with Davis earlier in the case on pro se and discovery issues. CP 41, 49-50.

From the outset of proceedings on the 28th, Davis peppered Judge Spector with motions related to his pro se status. 1RP (2/28/17) 225. When warned about interrupting, he remarked, "You going to hold me in contempt? I don't care. ... [I]t doesn't matter to me." 1RP (2/28/17) 237.

On the next court day, March 2nd, when continuances were denied again, Davis screamed at the judge about on-going investigations. 1RP (3/2/17) 376. Davis also repeatedly made statements to Judge Spector indicating that he did not want to remain in court. In preparing for jury selection, Judge Spector warned Davis that he would be removed if he was disruptive, and he replied that he did not want to be present anyway.

> COURT: If you are disruptive I will have you removed from the court. You can observe[3] 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.

RP (3/2/17) 380. When the court reminded Davis that it was his trial, he retorted, "It doesn't matter to me. It's not my trial. It's the state's trial. It's a trial full of crap." 1RP (3/2/17) 381. When the court told him that jury selection would begin Monday morning at 9 a.m., Davis said, "With or without me...I'm not going to be here." 1RP (3/2/17) 382.

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[3] It appears the trial court was attempting here to advise Davis that he could observe proceedings remotely after removal, but he interrupted the court midsentence.

Pretrial motions were litigated on March 1st and 2nd and voir dire occurred on March 6th. 1RP (3/1-2/17) 302-80; 2RP (3/7/19) 1-90. Openings were delivered on March 7th. RP (3/7/17) 96-103. The defendant's opening was cut short because he frequently made disrespectful comments and refused to comply with the court's orders. 2RP (3/7/17) 105-18. Witnesses Olmstead, Gillette, and Thuberg then testified. RP (3/7/17) 121-86. Witness Antholt was called to the stand for direct examination in the afternoon. RP (3/7/17) 188.

At 3:10 in the afternoon, with only 50 minutes of court time left in the day, Davis returned from one of many recesses and he saw that the trial court had removed his water pitcher. RP (3/7/17) 199-201. He was irate, swore at the court ("F**k you Spector"), pounded the table, and screamed so loudly that he disrupted proceedings in adjacent courts. CP 142; RP (3/7/17) 200-01.

The trial court found as a matter of fact that Davis had "increased his water intake dramatically" and "consumed multiple pitchers of water during the morning session" such that he then demanded bathroom breaks every 20 minutes instead of every hour. CP 141 (FOF #3); RP (3/7/19) 199. The court found that this was done intentionally and tactically by the defendant in order to delay the proceedings. CP 143 (FOF #14, 15).

It appears Davis was at this point trying to physically leave the courtroom, but the judge directed corrections officers to stay.

> DEFENDANT: ... We're all done.
>
> COURT: Now, Officers, we're going forward with the jury.
>
> OFFICER: I'm sorry. I thought we were out of here. I understand. I apologize.

RP (3/7/17) 200. The court noted that they would finish this witness and the jury returned to the courtroom. RP (3/7/17) 201-02.

Davis continued to disrupt trial in front of the jury, said the judge did not care about him, and referred to the judge derisively as "former prosecutor, former State prosecution." 2RP (3/7/17) 202. After Davis interrupted the proceedings several more times and after the court several more times ordered in vain that he desist, the court ordered the jury removed from the courtroom. 2RP (3/7/17) 205. The defendant immediately said, "Thank you. You can hold your trial without me. How's that?" 2RP (3/7/17) 205. The court replied, "I'm going to do that." 2RP (3/7/17) 205. Davis replied,

> 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.

2RP 205-06. It appears that Davis again tried to leave court.

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

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.

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

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.

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

DEFENDANT: Whatever. Do whatever you want.

COURT: -- from these proceedings.

DEFENDANT: You're going to deny me water when I need water, whatever.

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

DEFENDANT: I don't care about your record.

COURT: Well, I do.

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 attempts to review the sequence of events]

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?

COURT: This is not about the –

DEFENDANT: I don't care.

2RP (3/7/17) 206-07 (italics added).

The court then stated, "I need to proceed with the trial, and I am finding that he is voluntarily absenting himself from the rest of these proceedings." 2RP (3/7/17) 208. The court's written findings show that the defendant had voluntarily absented himself. CP 142 (FOF #11). The court also made alternative findings justifying removal of Davis against his will, specifically, that he had deliberately increased water consumption as an excuse to take frequent breaks and thereby disrupt the proceedings at strategic times. CP 140-43; 2RP 243-45. Davis did not assign error to these very specific findings of fact. Brief of Appellant, at 1.

The testimony of Officer Antholt resumed after Davis was removed. 2RP (3/7/17) 208. Officer Graf then testified. 2RP (3/7/17 220-35. The court told the corrections officer at the end of the day to bring Davis back to court at 8:30 the next morning to see whether he wished to attend the rest of the trial. RP (3/7/17) 235. The court instructed the prosecutor to prepare findings on voluntary departure pursuant to "State v. Garza." RP (3/7/17) 236.

Davis was brought to court the next day and the court gave him another chance to attend trial. RP (3/8/17) 241. Davis seemed somewhat less voluble and, although he continued to interrupt and to make rude,

sarcastic and inappropriate comments during the trial and closing arguments, he did not disrupt proceedings to the extent he had done before, nor did he demand to leave. 2RP 241-413. There is no evidence in the record that he continued to gulp unusual amounts of water. He was ultimately convicted as charged and then appealed.

The court of appeals issued four holdings in the case. State v. Davis, 6 Wn. App. 2d 43, 429 P.3d 534 (2018). It held that the trial court properly denied standby counsel. Davis, 6 Wn. App. 2d at 52-54. It held that the trial court improperly concluded that Davis had voluntarily waived his presence. Davis, at 54-56. It held that the trial court properly removed Davis from court for misbehavior. Id. at 56-57. Ultimately, however, the court reversed concluding that the trial court erred by failing to take additional steps before conducting trial in Davis's absence. Id. at 57-63.

The State moved to reconsider, the motion was denied, and the State filed a petition for review. Davis did not answer the petition or seek review on either the standby counsel issue or the court's holding that Davis was properly removed from court. This Court granted review. State v. Davis, 192 Wn.2d 1023 (2019).

C. ARGUMENT

The court of appeals erred in holding that Davis did not voluntarily absent himself from trial and that the trial court should have taken additional steps to ensure a defense for Davis after he was removed from court.[4] These holdings are predicated on mistakes of law and fact and should be reversed. The trial court found that Davis's absence was voluntary, that finding is a verity on appeal, and the ruling cannot be considered an abuse of discretion under these facts. Even if one considers Davis's absence to be involuntary, however, the trial court did not err in proceeding without further inquiry where Davis refused to answer the court's questions and he was well-aware that he would be unrepresented.

1. THE TRIAL COURT'S UNCHALLENGED FINDING OF VOLUNTARY ABSENCE IS SUPPORTED BY THE RECORD AND SHOULD BE AFFIRMED.

A defendant has state and federal constitutional rights to be present at his own trial. WA. CONST. art. I, § 22; U.S. CONST. Sixth Amend. (Confrontation Clause) and Fifth and Fourteenth Amend. (Due Process Clauses). Still, a pro se defendant "may voluntarily absent himself or herself and thereby waive the right to be present." Davis, at 54 (citing State v. Thompson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994)).

[4] The scope of review is limited to the issues raised in the petition for review and the answer to the petition. RAP 13.4(d); State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002); State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000).

> A voluntary absence operates as an implied waiver of the right to be present. If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration.

Thompson, 123 Wn.2d at 881. See also State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991) and State v. Eddy, 68 A.3d 1089 (R.I. 2013). When considering whether a waiver exists, the trial court should consider the totality of the circumstances and its focus should be on a single question: "whether the defendant's absence is voluntary." Id.

The question of voluntary waiver of the right to be present appears to have arisen in Washington appellate decisions mainly where defendants fail to appear once trial has commenced. See, e.g., State v. Garza, 150 Wn.2d 360, 77 P.3d 347 (2003). In that context, this Court has held that a trial court should indulge every reasonable presumption against waiver, but the trial court's decision will be reversed only upon an abuse of discretion. Garza, 150 Wn.2d 366. The court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. Id.

The presumption against waiver makes particular sense where a defendant disappears during trial, because in that circumstance, the trial court must determine whether the absence is voluntary from evidence originating outside of court. Given the importance of the right to be

present, it is appropriate that trial courts err on the side of caution when drawing an inference of voluntary waiver from bits and pieces of evidence supplied to the court.

However, where a defendant stands before the court and repeatedly says directly to the judge that he wants to leave, the inference of voluntariness is far more straightforward. The trial court need not speculate about why the defendant has disappeared, but may directly assesses the totality of the circumstances, including the defendant's words, his body language, his demeanor, the volume and tone of his voice, and other relevant events occurring in court—earlier and at present—that bear on a finding of intent. It is questionable whether a presumption is needed at all in such circumstances. Still, even if a presumption against waiver applies, the presumption is much more easily overcome where the defendant is literally standing before the court. A reviewing court should be reticent to find an abuse of discretion in such a case.

The trial court here expressly found in oral and written findings that Davis was voluntarily choosing to leave court. 2RP (3/7/17) 206, 208; CP 142. Both its oral and written rulings refer to State v. Garza, a voluntary absence case. Davis never challenged the finding on appeal, so it is a verity. State v. Scherf, 192 Wn.2d 350, 429 P.3d 776, 789 (2018).

The finding is certainly supported by substantial evidence. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) ("Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding."). Over the course of five trial days, Davis had repeatedly said to both Judge Spector and Judge Smith that he no longer wanted to be pro se, did not want to be in court, and did not care if the trial occurred without him. When the court ruled that Davis was attempting to delay trial by increasing his water intake, Davis flew into a rage, screamed at the court, and repeated his desire to have trial proceed without him. Since Davis was in custody, he could not leave on his own accord, although he appears to have tried. Looking at the totality of the circumstances, it simply cannot be said that this decision was manifestly unreasonable, or exercised on untenable grounds, even if different judges might have ruled differently.[5]

Yet the appellate court here seems not to have deferred to the trial court at all. Instead, the appellate court cited to and then discounted a single statement by Davis suggesting he wanted to leave. Davis, 6 Wn. App. 2d at 55 (referring to the statement "You can hold your trial without me."). There were, however, many other statements and actions,

[5] Once the trial court found a voluntary waiver of the right to be present, it had no obligation to inquire further. Davis, 6 Wn. App. 2d at 60 n.6 (citing DeWeese, 117 Wn.2d at 379 and Eddy, 68 A.3d at 1092 (R.I. 2013)).

including those to Judge Smith, which strongly support Judge Spector's finding that absence was voluntary. The appellate court's analysis failed to consider the totality of the circumstances and failed to properly apply the abuse of discretion standard.

The court of appeals also erred in relying on State v. Menefee, 268 Or. App. 154, 341 P.3d 229 (2014), because that case is easily distinguished. Menefee was pro se and at one point said that he wanted to leave trial, but he returned on his own accord. Menefee, 341 P.3d at 233. He then argued irrelevant jurisdictional points and when the judge told him to stop he said, "Well, you're going to have to bar me from the Court." Id. at 235. The trial court removed Menefee and ruled that he had adopted a strategy designed to thwart moving forward in the case and, thus, his absence was voluntary. Id. at 237. Menefee challenged that finding on appeal and the appellate court reversed, holding that the trial court was required to take additional steps after barring Menefee from court. Id. But Menefee is inapposite on the question of *voluntary* absence because Menefee had unequivocally asked to *stay*. In contrast, Davis asked to *leave.* The court of appeals erred in relying on Menefee to analyze a finding of voluntary absence.

In short, the court of appeals failed to consider the totality of the circumstances, did not respect the trial court's exercise of discretion,

treated the presumption against waiver as a trump card, and erroneously relied on Menefee. The decision of the court of appeals should be reversed for these reasons alone.[6]

2. THE TRIAL COURT DID NOT ERR BY TAKING TESTIMONY FROM TWO WITNESSES AFTER DAVIS WAS REMOVED FOR DISRUPTIVE BEHAVIOR; FURTHER INQUIRY WAS NEITHER POSSIBLE NOR REQUIRED.

The court of appeals also held that once the court removed Davis, it had a duty to either secure a waiver of representation from him or to obtain counsel. Davis, 6 Wn. App. 2d at 57-63. The decision relied in part on State v. Lacey, 282 Or. App. 123, 385 P.3d 1151 (2016), and the court noted that it was unaware of any contrary authority. Lacey has since been reversed by the Oregon Supreme Court, which held that "a trial court is not prohibited from proceeding with a trial if a pro se defendant makes a voluntary choice to engage in conduct that he knows will result in his removal and leave him without anyone present to represent him." State v. Lacey, 364 Or. 171, 431 P.3d 400 (2018), cert. denied, 139 S. Ct. 1590 (2019). The decision of the Oregon Supreme Court is clear, logical, and persuasive, and Petitioner respectfully asks this Court to adopt its reasoning.

[6] If this Court reverses the court of appeals on this basis, it need not reach the next issue.

First, a special inquiry as required by Davis is inconsistent with Washington law. In State v. DeWeese, this Court held that a pro se defendant could not demand counsel once he waived that right, even after he had been removed from court.

> 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 cannot 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.

117 Wn.2d at 380. This Court further observed that a defendant should not be permitted to obtain, through disruption, a right that he had previously waived.

> 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. at 379 (italics added). These sound holdings should be applied here.

The court of appeals distinguished DeWeese on the basis that DeWeese listened to a witness on closed circuit television and then voluntarily chose not to return to court. Neither of these distinctions is material. DeWeese's decision to remain away from court was just as

voluntary as Davis's decision to engage in conduct that he knew would get him excluded, where he plainly knew trial would proceed in his absence.

Requiring the trial court to obtain new counsel for Davis after he has exercised his right to represent himself in a manner that results in removal simply gives him what he wanted all along—delay of the trial. The same is true of a recess, which the court of appeals also suggested. The rule announced in Davis creates incentives for pro se defendants to act out—exactly what DeWeese sought to avoid.

The Oregon Supreme Court's recent decision in Lacey is consistent with DeWeese. Lacey openly defied the trial court's orders, was held in contempt, and was eventually removed from court. Lacey, 431 P.3d at 402-03. The Oregon Supreme Court began its analysis by noting that the case touched on three aspects of the Sixth Amendment, i.e., the right to counsel, the right to self-representation, and the right to be present during court proceedings. Lacey, 431 P.3d at 405. It correctly noted that the right to self-representation was rooted in a defendant's autonomy and must be respected even though self-representation might undercut an effective defense. Id. at 405-06 (citing Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The court observed that a pro se defendant may adopt any number of self-defeating strategies, including leaving court, yet that is not a basis to deprive him his

right to represent himself. Lacey, at 406-07 (citing Eddy, 68 A.3d 1103-08; Torres v. United States, 140 F.3d 392 (2nd Cir. 1998), cert. denied, 525 U.S. 1042 (1998); and Clark v. Perez, 510 F.3d 382 (2nd Cir. 2008), cert. denied, 555 U.S. 823 (2008)).

The right to presence can be waived by misbehavior "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 ... that his trial cannot be carried on with him in the courtroom." Lacey, 431 P.3d at 407 (quoting Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

Lacey argued that he had a "right of representation" such that once removed, the trial could not proceed without a formal waiver of this right, or a substitute lawyer. Lacey, 431 P.3d at 408. The Davis court accepted this reasoning, as had the court of appeals in Oregon, but the Oregon Supreme Court rejected it, as should this Court.

A pro se defendant who misbehaves in the face of removal warnings is exercising his right to conduct his defense (albeit poorly) just as surely as the defendant who walks out of court. Id. As long as he knows that nobody will defend him in his absence, the trial court is not required to do more. Id. He is permitted to engage in conduct that will leave the defense table empty, but he must choose that conduct knowing

the table will be empty. Lacey, 431 P.3d at 409. The trial court *can* revoke pro se status if it chooses, but it is not *required* to do so. Id. at 408.

A number of cases have reversed convictions where a defendant is removed and further inquiry is not conducted, but the defendants in those cases did not know the defense table would be empty, because they had not been warned. Lacey, 431 P.3d at 409-10 (citing People v. Carroll, 40 Cal. App. 3d 135, 189 Cal.Rptr. 327, cert. denied, 464 U.S. 820 (1983) and United States v. Mack, 362 F.3d 597, 601 (9th Cir. 2004)).

These decisions stem from the court's desire to protect "the structural integrity of the criminal justice system" ... because "[w]here a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable." Davis, 6 Wn. App. 2d at 61 (citing Lacey, 385 P.3d at 1151). This rationale is inconsistent with Faretta. Many pro se defendants undermine the integrity of the criminal justice system as much or more than an empty table would, especially where the defendant is abusive, profane, mentally ill, or argues nonsense or politics to the jury. Yet, the Supreme Court held in Faretta that these defendants, too, have a right to represent themselves, to a point. An empty defense table is not obviously worse than the pro se defendant who argues a theory that

profoundly undercuts his defense. This rationale cannot justify a special rule against waiver.

The record here supports affirmance under Lacey. Warnings are given to ensure knowledge. Davis was repeatedly warned that if he misbehaved he would be removed. Although he was not specifically warned that trial would continue without a representative, the record shows that he knew it. 1RP (2/27/17) 184-88 ("You'll go to trial without me."); 1RP (2/27/17) 191-92 ("So, you guys can hold trial without me. Right? You do that? ... It'll last for an hour and you guys can be done with it."); 196 ("You hold trial without me. ... That's what you do."); 2RP (3/7/17) 205 ("Thank you. You can hold your trial without me. How's that?"). Davis's conduct waived his right to "representation," which is indistinct from the already-waived right to counsel, so the trial court was not required to obtain a separate waiver or arrange for substitute counsel.

Moreover, the suggestions made by the court of appeals below are either impossible to implement or would have been fruitless. See Davis, 6 Wn. App. 2d at 62 n.7. Davis refused to answer even the most basic questions posed by the trial court, so obtaining any further waiver would have been impossible, and Davis was highly unlikely to waive anyway. Obtaining transcripts and arranging video conferencing would necessarily have delayed trial, and there is no reason to believe Davis would have

accepted either proposal. Continuing the case until Davis cooled down would have given him the delay he sought and there was no guarantee that he would suddenly change his approach. Restraining Davis would have only aggravated an already bad situation and appointing him a lawyer would have caused significant delay. These options might be appropriate in some cases, and judges certainly have discretion to employ them, but they are not compelled, and the court did not abuse its discretion by failing to adopt them here.

Finally, it should be noted that, although standby counsel is often recommended by appellate courts, it is no panacea and, in fact, often creates more problems than it solves. The role of standby counsel is notoriously ill-defined. This often leads to conflict between the lawyer and the defendant over discovery, investigation, witnesses, subpoenas, trial tactics and ethics. Moreover, because standby counsel's role is limited, such counsel is often not as fully equipped to try the case as she or he would be if they were full counsel. If asked to take over a case mid-trial, standby counsel may not be prepared, and will likely ask for a continuance or a mistrial. If not granted, issues of ineffective assistance of counsel will arise. And, there is also the enormous cost to the judicial system and local budgets if standby lawyers are routinely appointed. A standby lawyer occasionally can make a difference as to a long trial with a

pro se defendant who appears volatile, and a trial court certainly has the discretion to appoint one in such circumstances. But it is relatively rare that a pro se defendant is ejected from court (as is evident from the few cases on the subject). Routinely appointing a standby lawyer to avoid a rare event is not compelled by law and simply does not make sense

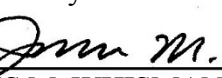
D. CONCLUSION

Davis voluntarily absented himself from the proceedings. At a minimum, he acquiesced in the trial court's order to remove him. Even if he did not volunteer to leave, the trial court had no duty to obtain a waiver of counsel or appoint a new lawyer because Davis knew that trial would continue without him. For any of the above reasons, the court of appeals decision should be reversed and Davis's convictions should be affirmed.

DATED this 10th day of June, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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APPENDIX A

KEITH ADAIR DAVIS

S. CT. # 96663-0

To be attached to the Supplemental Brief of Petitioner filed 6/10/19

Volume / Reporter / Date	Page	Stage / Motion	Judge
Vol 1 (Ballard)			
FEBRUARY 6, 2015	6	Pro se motion	Rogers
JANUARY 28, 2016	15	Dx + standby counsel	Lum
FEBRUARY 11, 2016	25	Trial set + standby	Lum
APRIL 1, 2016	36	Mtn. D/M + standby counsel	Spector
MAY 10, 2016	63	DPD/Investigator/ standby	Schubert
JUNE 17, 2016	95	Continuance / Investigator	Spector
NOVEMBER 8, 2016	106	In Camera Review Investigator	Ramsdell
FEBRUARY 10, 2017	135	Subpoenas/dx	Lum
FEBRUARY 27, 2017	149	Trial (1:49 p.m.)	Smith
Vol. 2 (Ballard)			
FEBRUARY 27, 2017	204	Trial (3:07 p.m.)	Smith
FEBRUARY 28, 2017	225	Trial (1:49 p.m.)	Spector
MARCH 1, 2017	302	Trial – CrR 3.5	Spector
MARCH 2, 2017	371	Trial – CrR 3.5 9:00-9:16 a.m.	Spector
APRIL 28, 2017	382	[Sentencing]	Spector
Vol. 3 (Moll)			
March 6, 2017	1-90	Trial / Voir dire	Spector
Vol 4 (Moll)			
March 7, 2017	93-236	Opening Stmt. / Tx / Olmstead Gillette / Thunberg / ***Δ departs*** / Antholt / Graf	Spector
Vol 5 (Moll)			
March 8, 2017	238-325	***Δ back*** / Tx. Reid, Rivera	Spector
Vol 5 (Moll)			
March 9, 2017	328	Testimony / Δ wit. / Closing	Spector

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Appendix A to be attached to our Supplemental Brief of Petitioner just filed. Sorry, but was not attached in the original filing. Thanks.

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