71409-1

71409-1

No. 71409-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

YASIN MOHAMED,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Mr. Mohamed was charged with violating an order of protection. He waived his right to counsel and represented himself at trial. Over Mr. Mohamed's objection, several recordings of phone calls Mr. Mohamed made from the jail were admitted at trial despite the fact they were irrelevant and extremely prejudicial. After a jury convicted Mr. Mohamed, the court reappointed counsel. Mr. Mohamed filed several pro se motions based on errors he alleged occurred at trial. He requested to be heard on these motions pro se but to receive the assistance of counsel at his sentencing hearing. The court denied Mr. Mohamed's request, requiring him to represent himself at sentencing in order to be heard on his pro se motions. Despite Mr. Mohamed's repeated requests for counsel at his sentencing hearing, the trial court accepted his acquiescence to represent himself as a valid waiver of counsel.

B. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Mohamed his right to counsel at sentencing when it improperly accepted Mr. Mohamed's decision to be heard on his post-verdict motions as a valid waiver of counsel.

2. The trial court abused its discretion when it admitted irrelevant and highly prejudicial recordings of phone calls Mr. Mohamed made from the jail.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 22, a criminal defendant has the right to assistance of counsel and the right to reject that assistance and represent himself. Mr. Mohamed waived his right to counsel and proceeded pro se at trial. Where the trial court required Mr. Mohamed to proceed pro se at sentencing if he wished to continue to represent himself on his post-verdict motions, did the court violate Mr. Mohamed's right to counsel at sentencing?

2. The Rules of Evidence prohibit the admission of evidence that is not relevant and evidence that is substantially more prejudicial than probative. The court admitted the recordings of five phone calls made by Mr. Mohamed from the jail over his objection without considering the fact that they were not relevant and substantially more prejudicial than probative. Because these recordings should have been excluded, and their admission likely had a material effect on the verdict, is Mr. Mohamed entitled to a new trial?

D. STATEMENT OF THE CASE

The State charged Yasin Mohamed with violating an order of protection after he visited his cousin, Fahmo Ali, at her apartment.[1] CP 1; Ex. 3. At the time of Mr. Mohamed's visit, Ms. Ali had a valid protection order prohibiting Mr. Mohamed from contacting her and excluding him from her residence. Ex. 3.

Ms. Ali did not testify at trial. Instead, the State proceeded against Mr. Mohamed using a 911 recording in which Ms. Ali told the dispatcher, through a Somali interpreter, that a man entered her home. Ex. 20. She explained that she ran out of the apartment after he entered because she feared he would assault her, but that her infant daughter was still in the apartment with the man. Id.

The officers who responded to the call testified that they spoke with Ms. Ali in the hallway of the building and then went to her apartment and knocked on the door. 10/1/13 RP 33, 47. Mr. Mohamed answered and they placed him under arrest. 10/1/13 RP 32-33. While Mr. Mohamad was in jail, he made several phone calls, including three

[1] Although Ms. Ali was repeatedly referred to as Mr. Mohamed's sister during trial, she indicated in the 911 call that Mr. Mohamed was her cousin, and a Somali interpreter testified that it was common in Somali culture to refer to a peer as "sister" or "brother" regardless of any blood relationship. Ex. 20; 10/1/13 RP 87.

phone calls to a number listed as Ms. Ali's and two phone calls to a bail bondsman. 10/1/13 RP 70; Exs. 14 & 16. Over Mr. Mohamed's objection, the recordings of all five calls were admitted at trial, and translated transcriptions of portions of the calls allegedly made to Ms. Ali were published to the jury and admitted as illustrative exhibits. Exs. 21, 22, & 23; 10/1/13 RP 67, 97-99. In the calls to Ms. Ali, Mr. Mohamed questioned her about whether she called the police, and directed her not to cooperate with law enforcement. Exs. 21, 22, & 23.

Mr. Mohamed elected to represent himself at trial. 8/13/13 RP 4, 12. After a jury convicted Mr. Mohamed of violating the protection order, the court reappointed counsel for sentencing. 11/8/13 RP 3. Mr. Mohamed filed several pro se motions requesting dismissal of the charge and a new trial. CP 110-39. He repeatedly requested to represent himself on these motions, but to have counsel represent him at sentencing. 11/8/13 RP 18; 11/25/13 RP 3; 12/6/13 RP 4. The trial court denied this request, requiring Mr. Mohamed to represent himself at sentencing if he wanted to be heard on his pro se motions. 11/25/13 RP 4-5; 12/6/13 RP 3. Faced with only these alternatives, Mr. Mohamed agreed to continue pro se. 11/25/13 RP 5; 12/6/13 RP 5. At sentencing, the trial court imposed a Drug Offender Sentencing

Alternative (DOSA) of 19 months incarceration and 19 months of community custody.

Additional relevant facts are set forth in the argument section below.

E. ARGUMENT

1. Mr. Mohamed was denied his constitutional right to counsel at sentencing.

a. Mr. Mohamed had the constitutional right to effective assistance of counsel and any waiver of that right must be knowing, intelligent, and voluntary.

The Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 22, afford a criminal defendant both the right to assistance of counsel and the right to reject that assistance and represent himself. State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001) (citing Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Kolocotronis, 73 Wn.2d 92, 97, 436 P.2d 774 (1968)). These rights extend to the sentencing phase of trial. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174 (1997) ("A defendant has a right to counsel at every critical state of the case, and sentencing is such a stage."); State v. James, 138 Wn. App. 628, 635, 158 P.3d 102 (2007) ("A defendant has the constitutional right to represent himself at trial and at sentencing.").

b. Mr. Mohamed did not unequivocally request to represent himself or knowingly, intelligently, and voluntarily waive his constitutional right to counsel.

On November 8, 2013, Mr. Mohamed appeared in court with counsel, who the court had reappointed following the jury's guilty verdict. 11/8/13 RP 3. Mr. Mohamed's case was scheduled for sentencing the following week, but he had filed several pro se motions in the interim, requesting dismissal of the charge and a new trial. Id. Initially, Mr. Mohamed informed the court he wished to represent himself at sentencing, but upon additional questioning by the court, Mr. Mohamed explained that he was making the request to appear pro se only in order to argue the post-verdict motions he had filed. 11/8/13 RP 9. He wanted to argue the motions himself because, having represented himself at trial, he was more familiar with the issues than his attorney. Id. Following a colloquy, Mr. Mohamed told the court, "I want him to represent me at the sentencing, but this motion is right now – I want to represent myself." 11/8/13 RP 18. Based on this statement, the court decided to leave appointed defense counsel in place and allow counsel to present any post-verdict motions.[2] 11/8/13 RP 19-20.

[2] The record shows defense counsel initially requested funds from the Office of Public Defense to have the trial transcribed so that he could review the

On November 25, 2013, Mr. Mohamed appeared in court with appointed counsel. 11/25/13 RP 3. For the second time, Mr. Mohamed requested the opportunity to proceed pro se on his motions and asked that defense counsel be appointed only to represent him at sentencing. Id. When defense counsel argued this was permissible under the law and requested the opportunity to submit additional briefing on the issue, the trial court responded:

> No. I'm really clear on this, okay? He has the right to represent himself. And as I said last time we had this hearing, if he wants to represent himself for all purposes post-trial, including sentencing, that's fine. And I'd likely make you standby counsel, but only standby counsel. I told Mr. Mohamed, however, that if I retained you as his attorney, that you would have to make the determination about what motions to submit to the Court.
>
> Case law is express that there is no right to be co-counsel, which is what's being requested here, nor will I continue to have Mr. Mohamed go back and forth for the purpose of filing some motions and having the Court, I guess, rule on the sentencing when you're representing him.

11/25/13 RP 4.

The court then informed Mr. Mohamed that he was required to appear pro se at sentencing if he elected to proceed pro se on the

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proceedings and bring a motion for a new trial. CP 62. This request was denied and it does not appear defense counsel pursued it further. CP 46.

motions. 11/25/13 RP 5. Given the choice between abandoning his due process right to be heard on his post-verdict motions and his right to counsel at sentencing, Mr. Mohamed agreed to represent himself at sentencing. Id.

Shortly after, on December 6, 2013, Mr. Mohamed appeared in court to request counsel at sentencing for the third time. 12/6/13 RP 3. The court acknowledged that Mr. Mohamed had properly filed his motions and the court was waiting on the State's response. Id. However, it instructed Mr. Mohamed that if it appointed counsel, the attorney would decide whether to proceed with any motions. Id. Mr. Mohamed responded that he had worked hard on the motions, properly served them, and wanted to represent himself until he obtained a ruling. 12/6/13 RP 4. Mr. Mohamed also expressed frustration that as soon as he indicated to counsel he wanted representation at sentencing, a hearing had been set to address his request, despite the fact he wished to obtain a ruling on his motions prior to requesting the appointment of counsel. 12/6/13 RP 4-5. The judge informed Mr. Mohamed such a timeline could not be accommodated because the motion hearing and

sentencing would take place on the same day.[3] 12/6/13 RP 5. Once again, the court required Mr. Mohamed to choose between being heard on his post-verdict motions and exercising his right to representation at sentencing. Mr. Mohamed again chose to represent himself. Id.

c. Mr. Mohamed's waiver was not valid because the trial court misapprehended his request and forced him to choose between abandoning his motions for a new trial and having counsel at sentencing.

Mr. Mohamed did not validly waive his right to counsel at sentencing. He repeatedly requested representation for his sentencing hearing, and agreed to appear pro se only when the court required him to choose between having his post-verdict motions heard and being represented by counsel at sentencing. A defendant may not be compelled to choose one constitutional right at the expense of another. Woods, 143 Wn.2d at 584; State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980). Yet this is exactly what the court was requiring of Mr. Mohamed: it was forcing him to choose between his right to due process and his right to counsel at sentencing.

[3] Despite the court's pronouncement, the court heard, and swiftly denied, Mr. Mohamed's post-verdict motions on December 16, 2013, and held a sentencing hearing four days later, on December 20, 2013. 12/16/13 RP 3; 12/20/13 RP 11.

The court imposed this choice on Mr. Mohamed after it inaccurately determined he was requesting to act as his own co-counsel. "Hybrid representation" occurs when "both the defendant and an attorney actively participate in the presentation and share the duties of managing a defense." State v. Buelna, 83 Wn. App. 658, 661, 922 P.2d 1371 (1996). Despite the court's characterization, this was not Mr. Mohamed's request. He clearly and repeatedly articulated that he wished to continue to represent himself until the sentencing hearing, at which point he wished to have appointed counsel represent him. This involved neither hybrid representation, where Mr. Mohamed would act as co-counsel with his attorney, nor a "back and forth" arrangement, in which Mr. Mohamed would alternate between representing himself and having counsel represent him. Mr. Mohamed was simply asking to continue to represent himself until sentencing, at which point he wished to exercise his right to counsel.

This case stands in stark contrast to those in which the trial court has required an indigent defendant to continue with his appointed counsel or represent himself. See e.g. State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991). When a defendant requests new counsel multiple times, the court must consider issues of fairness and efficient

judicial administration. DeWeese, 117 Wn.2d at 375. Otherwise, a defendant could continue the proceedings indefinitely by refusing to represent himself while also refusing to accept his current counsel. Thus, if an indigent defendant fails to provide legitimate reasons for the assignment of new counsel, the court may require the defendant to continue with his current counsel or represent himself. Id. at 376.

In this case, Mr. Mohamed's request did not hinder judicial efficiency or raise issues of fairness. Indeed, defense counsel's request for funds to obtain a transcript of the trial, in order to bring any post-verdict motions on Mr. Mohamed's behalf, demonstrates that allowing Mr. Mohamed to continue to represent himself until sentencing was the most efficient course of action. CP 62. Even if the court wished to hold the sentencing proceedings immediately after ruling on Mr. Mohamed's motions, counsel could have been appointed for that purpose in advance, and the sentencing hearing could have proceeded without delay.

The court's denial of Mr. Mohamed's request to continue to represent himself on the post-verdict motions and reappoint counsel had no basis in the law. Given that Mr. Mohamed represented himself at trial, it made sense that he would continue to proceed pro se on his

motions for a new trial. The requirement the court imposed on Mr. Mohamed to choose between his due process right to be heard on his post-verdict motions and representation at sentencing denied Mr. Mohamed his right to counsel.

d. Mr. Mohamed's conviction must be reversed and remanded for a new trial.

Counsel is so fundamental to the right to a fair trial that the erroneous deprivation of that right is not subject to a harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed .2d 35 (1999); Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Silva, 108 Wn. App. at 542. Mr. Mohamed's constitutional right to counsel was violated when the court forced him to proceed pro se without a knowing, intelligent, and voluntary waiver. His conviction must be reversed and remanded for a new trial. Acrey, 103 Wn.2d at 212.

2. The trial court abused its discretion when it admitted the recordings of the jail phone calls.

a. Irrelevant evidence is inadmissible, and evidence that is substantially more prejudicial than probative should be excluded.

The Rules of Evidence prohibit the admission of evidence that is not relevant. ER 402. Furthermore, even relevant evidence may be

excluded if it is substantially more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if "its effect would be to generate heat instead of diffusing light, or … where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." Smith, 106 Wn.2d at 776 (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

The proponent of the evidence has the burden to show its proper purpose. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court's ruling to admit evidence is reviewed for an abuse of discretion. State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if the court fails to

adhere to the requirements of the rule. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

b. The jail phone calls should have been excluded because they were irrelevant to the charges and substantially more prejudicial than probative.

Over Mr. Mohamed's repeated objections, the trial court granted the State's request to admit the recordings of five phone calls made by Mr. Mohamad from the jail. Ex. 16; 10/1/13 RP 67; 10/2/13 RP 16. A document entitled "Call Detail Results," which provided information about the calls, was also admitted. Ex. 14. This document showed Mr. Mohamed made three calls to a number listed as Ms. Ali's and two phone calls to a bail bondsman. Ex. 14. In the phone calls made to Ms. Ali, the parties spoke to each other almost entirely in Somali, so the State also provided written translations of portions of these calls, which were admitted as illustrative exhibits and published to the jury. Ex. 14, 21, 22, & 23.

The trial court explained the basis for admission of the jail calls as follows:

> Secondly, with regard to the tapes and calls that were recorded at the jail, which you have challenged mostly in your motion to dismiss, I will tell you there is another well-established rule of evidence that says statements of the defendant can be used against him by the State always.

> That's a basic rule of evidence. In fact, we view those statements as nonhearsay. When somebody picks up the phone in the jail and the recording warns them that they're going to be recorded if they call anyone other than their lawyer, and they go right ahead and make the call, they run the risk that those statements might be used against them by the same agency that put them in jail. The State. That's just the way it is under the rules of evidence.
>
> I know you are very smart, but you are not a lawyer, and perhaps you are not as used to that rule of evidence as all the rest of us are. So that's pretty basic.
>
> And I will say that the statements that I heard that you made in the phone calls, and they're clearly your voice – I have heard you in court enough to recognize it – were made to the same phone number that's listed as the alleged victim's in this case, at least the first one was.
>
> And the statements made in context sound exactly like you talking to the alleged victim about the fact that she got you in jail by calling the police, which is itself a violation of the no-contact order to contact her, and which is, I will point out, something that indicates that you were, in fact in violation of the order on the day you were arrested.

10/2/13 RP 16-18.

The basis for the trial court's ruling was manifestly unreasonable and based on untenable grounds. See Thang, 145 Wn.2d at 630. First, it only addressed the relevance of the phone calls made to

Ms. Ali. It failed to consider the calls to the bail bondsman, which had absolutely no relevance to the charge against Mr. Mohamed. In fact, it appears that the State's only purpose in admitting the calls to the bail bondsman was to show that, in his second call, Mr. Mohamed requested the bondsman call the phone number associated with Ms. Ali. Ex. 16, Track 5 at 4:48. Despite this limited purpose, the court admitted both phone calls to the bail bondsman in their entirety.

While evidence of a call to a bail bondsman is, in itself, prejudicial, the calls contained extremely prejudicial information. The first call to the bondsman revealed:

- Mr. Mohamed had used the bondsman's services to bail out of jail before. Ex. 16, Track 4 at 2:50, 7:30.
- His bail in this case was set at $250,000. Ex. 16, Track 4 at 3:42.
- He failed to appear in court and a warrant issued. Ex. 16, Track 4 at 3:50.
- He violated his probation. Ex. 16, Track 4 at 4:15.
- He was unsure whether he had additional open charges. Ex. 16, Track 4 at 5:30.

In the second call, the bondsman stated that it appears Mr. Mohamed was released a few days ago and then placed back in custody shortly after. Ex. 16, Track 5 at 2:48.

While the threshold for admitting evidence under ER 401 is low, it must make the existence of a fact "that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401; State v. Briejer, 172 Wn. App. 209, 225, 289 P.3d 698 (2012). These phone calls made no fact of consequence to the ultimate determination any more or less probable. They were entirely irrelevant to the charge against Mr. Mohamed and extremely prejudicial.

While the State may argue that information contained in the phone calls to the bail bondsman supported its allegation that Mr. Mohamed called Ms. Ali from the jail, this allegation was irrelevant to the charge against Mr. Mohamed. As the State conceded at trial, it was not alleging Mr. Mohamed violated the order of protection when he called Ms. Ali. 10/3/13 RP 12. The State alleged only that Mr. Mohamed violated the order of protection when he visited her residence. Id.

In the phone calls to Ms. Ali, Mr. Mohamed asked her if she had called the police, he told her he was in jail for "[her] case" and instructed her not to speak with the police. Exs. 21, 22, & 23. He also revealed damaging information entirely unrelated to the case, including

that he was recently in court "for drinking." The trial court's analysis that the recordings were admissible because of the "basic rule" that "statements of the defendant can be used by the State always" failed to consider whether the evidence was admissible under ER 402 and ER 403. It never performed the balancing test required under ER 403. Because most of the evidence in the recordings was irrelevant, and all of it was highly prejudicial with no probative value, the jail phone calls should have been excluded.

c. The remedy is reversal and remand for a new trial.

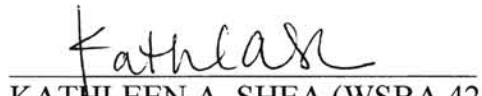
When evidence is erroneously admitted, the case must be remanded if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 433 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Although the judge, sua sponte, instructed the jurors during the State's closing that they were only permitted to convict Mr. Mohamed based on the events occurring on the date of the alleged visit to the apartment, the jury heard extensive information about repeated, uncharged violations of the protection order and were only instructed during the course of the State's closing, with no written jury instruction, that they were not to

F. CONCLUSION

The trial court denied Mr. Mohamed his right to counsel at sentencing and he is, at a minimum, entitled to a new sentencing hearing. In addition, because the court admitted irrelevant and extremely prejudicial recordings of phone calls, his conviction should be reversed and his case remanded for a new trial.

DATED this 14th day of August, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71409-1-I
v.	)	
	)	
YASIN MOHAMED,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF AUGUST, 2014.

X_____

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