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STATE OF WASHINGTON
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Court of Appeals
Division I
State of Washington
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No._____

Case #: 1036787

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TERRY MATTHEW JAMES KOHL,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 86860-8-I
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 22-1-00303-2
The Honorable Alicia Burton, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Terry Matthew James Kohl, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 1, case number 86860-8, which was filed on November 25, 2024. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to meet its burden of proving that Terry Kohl operated a motor vehicle in a reckless manner, where he drifted out of his lane several times, but was not speeding or violating other traffic laws and there was no evidence of intoxication?

2. Did the trial court violate Terry Kohl's constitutional right to represent himself when it denied him pro se status solely on the improper grounds of judicial efficiency and his lack of legal knowledge and experience?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Terry Matthew James Kohl with eight crimes. In relation to the motor vehicle collision on January 15, 2022, the State charged Kohl with vehicular homicide, vehicular assault, and failure to remain at an accident (counts 1, 2, and 3). (CP 213-14) The State also alleged the sentencing aggravator that the 12-year old pedestrians were particularly vulnerable victims. (CP 213-14) In relation to the landscaping company break-in on that same morning, the State charged Kohl with second degree burglary, unlawful possession of a stolen vehicle, and possession of stolen property (counts 4, 5, and 9). (CP 215-18) In relation to the search of Kohl's home on January 26, 2022, the State charged Kohl with unlawful possession of a firearm and unlawful possession

of a stolen vehicle (counts 6 and 8).[1] (CP 216-17)

The trial court denied Kohl's repeated requests for new representation, and denied his eventual request for *pro se* status. (RP1 5-7; RP2 12-19; MRP 5-6, 9, 17-18; CP 41, 68)[2] The trial court also denied Kohl's motion to sever the charges relating to the events of January 15, 2022, from the charges relating to the firearm and second stolen vehicle. (CP 104-09, 322-24; RP3 68-84; RP10 1124-25) And the trial court denied Kohl's motions to suppress evidence discovered as a result of insufficient search warrants. (CP 110-23, 318-21; RP3 84-104)

The jury found Kohl guilty on all charges. (CP 305-16; RP11 1185-87) The jury also entered special verdicts

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[1] Count 7 of the original Information filed January 27, 2022, was dismissed in the Amended Information filed on July 13, 2023. (CP 7-12, 213-18, 322)

[2] The transcripts labeled Volumes 1 through 12 will be referred to by their volume number (RP#). The transcript of the January 4, 2024 Motion to go Pro Se will be referred to as "MRP."

finding that Kohl operated a motor vehicle both in a reckless manner and with disregard for the safety of others, and that the pedestrians were particularly vulnerable victims. (CP 306, 307, 309, 310; RP11 1185-87)

The trial court imposed the high end of the standard range on all counts, and imposed an exceptional sentence by ordering counts 1, 2, and 3 to run consecutive to each other. (CP 374, 395-99, 400-02; RP12 1229)

Kohl timely appealed. (CP 394) The Court of Appeals affirmed Kohl's conviction and sentence.

B. SUBSTANTIVE FACTS

Around 10:30 AM on January 15, 2022, motorist Heather Brown found herself at a red light, stopped behind a large white truck traveling eastbound on 104th Street in Tacoma. (RP6 410, 411, 412) After the light turned green, the truck proceeded down the roadway,

moving at about 20 miles-per-hour. (RP6 412, 419) Brown observed the truck drift left into the oncoming lane then correct into the proper lane several times. (RP6 412-13, 419, 423) The truck then sped up to about 35 to 40 miles-per-hour, drifted to the left again, overcorrected on to the right shoulder, then corrected into the proper lane of travel. (RP6 413)

That part of 104th Street consists of two lanes, one going in each direction. (RP6 414) To the right of the fog line there is an area of gravel, then the ground slopes down into a shallow drainage ditch and then comes up on the other side to a narrow grassy area. (RP6 414, 418, 438) Brown testified that she saw two young girls walking together on the grassy area to the right. (RP6 414, 418) Then she saw the truck drift to the right again, drive into and up the side of the ditch, strike the girls, then pull back into the lane of travel. (RP6 413)

Brown immediately stopped her car, told her

daughter to call 911, and got out to help the girls. (RP6 415) She saw the truck's break lights illuminate and she assumed the driver was pulling over, so she turned her attention to the girls. (RP6 415) Brown spoke to the 911 operator, then turned around and saw that the truck was gone. (RP6 415; Exh. 3)

Multiple officers responded to the scene. The two girls were 12-year old best friends, I.G. and K.O. (RP6 405, 512) I.G. was found lying in the ditch and K.O. was found lying to the right of the ditch. (RP6 438) I.G. sadly did not survive, but K.O. suffered non-fatal injuries and was transported to the hospital for treatment. (RP6 515-16; RP7 540-41)

Deputy Scott Powers and Deputy James Cowan analyzed the collision scene. Deputy Powers believed that I.G. and K.O. were walking on the gravel area between the fog line and the drainage ditch when they were struck. (RP10 1045-46) He also concluded that the

truck left the paved portion of the roadway completely. (RP10 1050) But Deputy Cowan concluded that, while the truck did fully cross over the fog line, the left-side tires remained on the pavement. (RP7 577-78) The truck's maximum speed was 39 miles-per-hour, which is only slightly over the 35 miles-per-hour posted speed limit for that road. (RP9 893; RP10 1074, 1083)

Surveillance camera footage from a home on the same block of 104th Street showed the white truck driving past just after the collision. (RP6 460, 462; Exh. 7) Still images of the truck were made public.

Kyle Hardtke is the owner of Amazing Landscape Service in Edgewood, Washington. (RP7 661) The business owns a fleet of 12 trucks that are used by employees to travel to worksites and to transport landscaping and gardening equipment. (RP6 665) Each truck is equipped with a GPS tracking device, which records the date, time, and duration of the truck's

location, movements, stops, and speed. (RP6 669; Exh. 143)

In the late afternoon of January 15, Hardtke received a message from a friend who recognized the truck involved in the collision as one possibly belonging to Amazing Landscape. (RP6 671) Hardtke immediately checked the location of the truck in question, and saw that it was not in the parking lot of his business where it was supposed to be. (RP6 669, 671)

Hardtke then met law enforcement officers at the Amazing Landscape property. (RP6 672) The normally-locked gate to the lot was open, and the door to the office had been kicked in. (RP6 627, 674, 676) He estimated that $50,000 to $70,000 in yard and lawn care equipment was missing. (RP6 678, 680-84) Hardtke also noted that several of the company's branded neon reflective vests had been taken. (RP6 667)

Using the GPS data provided by Hardtke,

investigators were able to track the movement of the truck throughout the morning of January 15, and were able to determine the current location of the truck. (Exh. 143; RP7 588-89, RP9 881-82) They found the truck parked near the collision scene, in the driveway of a home on a dead-end residential street. (RP6 486, 503; RP7 588, 589-90) Surveillance video from a neighbor showed the driver park the truck, then get into a second car that arrived a short time later, then leave the area. (Exh. 145; RP6 485-86; RP7 589-90; RP9 853, 881-82; RP10 1075-76)

Investigators were able to find images of the driver before and after the collision using surveillance video collected from various locations where the truck had gone that morning. (RP6 507-08; RP7 699-700, 705; RP9 852-53, 855-56; RP10 1063; Exhs. 20, 45, 141, 142) The male driver was wearing pants emblazoned with a Champion brand logo, heavy work boots, and an Amazing

Landscape neon reflective vest. (RP7 591; RP9 862-63; RP10 1064, 1065, 1075) In one image the driver was seen talking on a mobile phone. (Exh. 141, 142) Several images also showed the truck accompanied by the same car that picked the driver up after the collision. (RP6 507-08; RP7 705; RP10 1068; Exhs. 20, 148)

The GPS data also showed the truck idling on a side road near the area of the collision for about 30 minutes beginning at about 9:30 AM. (RP9 880-81; RP10 1070; Exh. 143) Kenneth Thompson encountered the truck and its driver just before 10:00 AM. (RP6 467) He testified that the truck was partially blocking the road. (RP6 467) He was able to maneuver around the truck, and when he passed he saw that the driver was slumped over the steering wheel. (RP6 470) He approached the truck and banged on the door to see if the driver was all right. (RP6 470) The driver, a man wearing a neon safety vest, sat up and appeared to be awake and not in

distress. (RP6 470, 475, 476) Thompson then left, and saw the truck driving away a short time later. (RP6 477) The GPS data confirms that the truck left the location at that time, and then drove to and past the collision location a few minutes later. (RP9 881, 893; RP10 1071-74)

Investigators eventually received a tip that the driver was Terry Kohl. (RP9 845) A review of social media posts showed that Kohl bore a physical resemblance to the driver seen in the surveillance footage. (RP9 845-46) Investigators obtained a search warrant for Kohl's mobile telephone, and were able to determine that the phone was at Amazing Landscape in the early morning hours of January 15. Then throughout the morning the phone's locations correspond to the Amazing Landscape truck's locations. Both were at the location where the truck was eventually found at around 10:30 AM, then they separated. (9RP 847, 852, 870-82, 885, 890-91, 894, 896; Exh. 239)

Later that same day, Kohl's mobile phone was located at a storage facility in Midland. (RP9 856, 896) Surveillance video shows a man resembling Kohl enter the facility. (RP9 856-59; Exhs. 212-16) Police also found a newly executed rental contract for a storage unit in Kohl's name. (RP9 867-68; Exh. 243)

Investigators obtained a search warrant for Kohl's home and the storage unit. (RP8 753, 774, 786; RP9 931-32) They found many of the items that had been taken from Amazing Landscape. (RP7 684, 687, 688; RP8 770-73; RP9 934-38, 954-59) They also found clothing similar to that worn by the suspect in the surveillance video, wrapped in a bag inside a garbage can. (RP8 765, 792-93; Exhs. 169, 170) The officers located a mobile phone, but the contents had been erased. (RP8 769; RP9 916-17)

They also discovered an operable firearm in the garage of the home, sitting on a workbench about 10 feet

away from where Kohl was standing when they contacted him. (RP8 754, 789, 790; RP9 943, 946; Exh. 153) Forensic testing on the firearm revealed DNA from four potential contributors. (RP10 1023) There was "strong support" for including Kohl as one potential contributor. (RP10 1023)

Officers also noted a Nissan pickup truck parked on the street in front of Kohl's driveway. (RP8 787; RP9 904, 977; Exhs. 156, 157) The ignition appeared to have been damaged. (RP9 978) James Cho is the owner of the Nissan truck. (RP9 919, 978) He testified that his truck was stolen sometime in January of 2022, and that he filed a stolen vehicle report. (RP9 919, 920, 977)

Kohl was interviewed and acknowledged that he was involved in the theft of Amazing Landscape's truck and equipment. (RP9 901-02) He also acknowledged that he was driving the truck when it struck I.G. and K.O. (RP9 908) He did not acknowledge any involvement with

the theft of the Nissan truck, but did state that he rode as a passenger in the truck when someone named Breanna picked him up. (RP9 904)

V. ARGUMENT & AUTHORITIES

The issues raised by Kohl's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. INSUFFICIENT EVIDENCE SUPPORTS KOHL'S CONVICTIONS FOR VEHICULAR HOMICIDE AND VEHICULAR ASSAULT BY RECKLESSNESS.

The State failed to prove that Kohl drove the truck in a reckless manner, and therefore did not establish the more culpable alternative means of committing vehicular homicide and vehicular assault. By finding sufficient proof of this crime, the Court of Appeals improperly relieved the State of its constitutional burden of proof beyond a reasonable doubt. (Opinion at 3-4)

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.[3]

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[3] A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal as a due process violation. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Insufficient evidence supports the jury's finding that Kohl operated a motor vehicle in a reckless manner. There are three distinct means by which vehicular homicide and vehicular assault may be committed: (1) driving a vehicle while under the influence of alcohol or drugs, (2) driving in a reckless manner, or (3) driving with disregard for the safety of others. RCW 46.61.520; RCW 46.61.522; *State v. Roggenkamp*, 153 Wn.2d 614, 626, 106 P.3d 196 (2005). Kohl was charged with and found guilty of operating a motor vehicle in a reckless manner and with disregard for the safety of others. (CP 213-14,

259, 261, 306, 309)

Driving a vehicle with "disregard for the safety of others" involves "an aggravated kind of negligence, falling short of recklessness, but more serious than ordinary negligence." *State v. Jacobsen*, 78 Wn.2d 491, 498, 477 P.2d 1 (1970). During closing arguments, defense counsel conceded that Kohl's driving likely met this standard. (RP10 1155, 1159) But counsel did not concede, and the State's evidence did not establish, that Kohl drove in a reckless manner.

Driving in a reckless manner, for purposes of the vehicular homicide statute, means "'driving in a rash or heedless manner, indifferent to the consequences.'" *Roggenkamp*, 153 Wn.2d at 621-22 (quoting *State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960)). To drive in a reckless manner requires far more than ordinary negligence or even disregard for others' safety. *State v. Brobak*, 47 Wn. App. 488, 736 P.2d 288 (1987).

For example, in *Roggenkamp*, the defendant drove over 70 miles-per-hour in a 35 miles-per-hour zone. He attempted to pass another car, which was also speeding. 115 Wn. App. at 927. Roggenkamp braked when he saw a car turn into the upcoming intersection and pull over. The brakes on Roggenkamp's car locked and his vehicle skidded into another car coming into the intersection, resulting in the death of the car's occupant. The court found Roggenkamp drove in a reckless manner.

Similarly, in *State v. Baker*, the defendant drove 30 to 35 miles-per-hour through a very crowded intersection, where a police officer was directing traffic. 56 Wn.2d 846, 862, 355 P.2d 806 (1960). Baker's car swerved across the center line and struck and killed the officer. 56 Wn.2d at 862. On review, the Court held the evidence was sufficient if believed by the jury, to support a finding of driving in a reckless manner. 56 Wn.2d at 862.

Likewise, in *State v. Hill*, the court affirmed a

conviction for vehicular assault, concluding the defendant drove in a reckless manner when she drove the wrong way on the freeway. 48 Wn. App. 344, 348, 739 P.2d 707 (1987). Hill did not attempt to avoid oncoming traffic and was intoxicated. 48 Wn. App. at 348.

In *State v. Kenyon*, the defendant drove 15 to 30 miles-per-hour faster than the posted speed limit, at night on a slippery wet road, with two overinflated tires and one flat tire. 123 Wn.2d 720, 722, 71 P.2d 144 (1994). He lost control of the car, fishtailed, and collided with a minivan, killing his passenger and injuring himself and others. 123 Wn.2d at 722. The Court affirmed his convictions saying, "given the evidence presented regarding Kenyon's speed, the road conditions, the condition of the [car's] tires, and Kenyon's erratic accelerations and decelerations, we find with substantial assurance that the elemental factor of reckless driving more likely than not flowed from the proved fact of

Kenyon's excessive speed." 123 Wn.2d at 724.

Here, none of the defining actions of driving in a "rash or heedless manner, indifferent to the consequences" are present. Kohl only exceeded the speed limit by a few miles-per-hour. (RP6 421; RP9 893; RP10 1083) In fact, Brown and her daughter joked about how slow Kohl was driving at first. (RP6 412) Kohl did drift into the opposite lane, but at no time were there other oncoming vehicles in that lane. (RP6 420-21)

The State argued that Kohl was reckless because he knew he was not able to stay awake at the wheel, as evidenced by his being found asleep in the truck shortly before the accident. (RP10 1130-31) But pulling over to nap when you are too tired to drive indicates caution, not recklessness. And Thompson, the motorist who roused Kohl, was not concerned enough to stop Kohl from driving, and he did not see anything remarkable about how Kohl drove away. (6RP 477)

Kohl's driving was obviously negligent, but it was not reckless. The State failed to prove that Kohl drove in a "rash or heedless manner, indifferent to the consequences." The jury's finding that Kohl operated a motor vehicle in a reckless manner must be vacated.

There are sentencing consequences for a conviction based on recklessness versus disregard for the safety of others. Vehicular homicide and vehicular assault are assigned seriousness levels 11 and 4, respectively, when based on driving in a reckless manner. These same crimes are assigned seriousness levels 7 and 3 when based on disregard for the safety of others. See RCW 9.94A.515. This results in higher standard ranges for each conviction. See RCW 9.94A.510.

Because the standard range for a vehicular homicide or vehicular assault conviction based on reckless driving is higher than for driving with a disregard for the safety of others, Kohl's case should be remanded

for resentencing. *See State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007) (a reduced standard range requires resentencing) (citing *State v. Argo*, 81 Wn. App. 552, 915 P.2d 1103 (1996)).[4]

B. THE TRIAL COURT'S REFUSAL TO GRANT KOHL'S REQUEST FOR PRO SE STATUS VIOLATED KOHL'S RIGHT TO SELF-REPRESENTATION.

The Court of Appeals' holding that the trial court did not abuse its discretion by denying Kohl's motion to waive counsel and represent himself in the proceedings below, even though Kohl unequivocally stated his desire to represent himself rather than continue with his appointed counsel, violated Kohl's constitutional right to represent himself. (Opinion at 7-9)

Criminal defendants have an explicit right to self-

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[4] Remand is required even though the trial court imposed an exceptional sentence because the "[i]mposition of an exceptional sentence is directly related to a correct determination of the standard range." *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263 (1992).

representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); U.S. Const. amend. 6; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

The trial court's denial of the right to self-representation is reviewed for abuse of discretion. *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). A trial court abuses its discretion if its "decision is manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal

standard.'" *Madsen*, 168 Wn.2d at 504 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

"A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel." *Madsen*, 168 Wn.2d at 505. Rather, the trial court may only deny a motion to proceed pro se when the request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05.

First, the defendant's request to proceed pro se must be unequivocal. *State v. Stenson*, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997). A request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal. *Stenson*, 132 Wn.2d at 740 (citing *Johnstone v. Kelly*, 808 F.2d 214,

216, n. 2 (2d Cir.1986)). "The request to represent oneself may be stated in the alternative of a request for new counsel. However, in such a situation where the request is conditional, the request must be unequivocal." *Stenson*, 132 Wn.2d at 741.

Here, Kohl's request was conditional, but his desire to go pro se if he was not given new counsel was clearly unequivocal. The trial court specifically tells Kohl, "I need you to tell me, unequivocally, what you're asking me to do." (MRP 6) Kohl succinctly replies, "If I can't get new counsel, to go pro se." (MRP 6) Kohl's wish to proceed pro se rather than with his appointed counsel is unequivocal.

Next, in order to determine whether a defendant's proposed waiver of the right to counsel is knowing, voluntary, and intelligent, the trial court must engage the defendant in a colloquy on the record. *State v. Burns*, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019). To

determine whether a defendant understands the risks of self-representation the trial court should discuss with the defendant the nature of the charges, the maximum penalty, and the technical and procedural rules the defendant must follow. *Burns*, 193 Wn.2d at 203. The trial court may also discuss "education, experience with the justice system, mental health, and competency[,]" as well as evaluate "the defendant's behavior, intonation, and willingness to cooperate with the court." *Burns*, 193 Wn.2d at 203.

In this case, the trial court asked Kohl if he understood the risks inherent in representing himself without counsel when facing such serious charges. (MRP 13-16) Kohl repeatedly confirmed that he did understand the risks and challenges of self-representation, but that risk was preferable to being represented by current appointed counsel. (MRP 13-16) When asked about his legal knowledge and experience, Kohl acknowledged that

he would need to familiarize himself with the law and the court rules. (MRP 13-14)

The trial court then explained its reason for denying Kohl's request:

> I also find that his request to proceed pro se is ill-advised and is going to interfere with the administration of justice, given the fact that this trial is forthcoming. Although there's a new DPA being assigned, the older case is 400 days old at this point. His requests are denied. [Appointed counsel] are remaining on this case. These charges are significant. There's already been an enormous amount of taxpayer money and effort expended to prepare these cases to the point they are. And I cannot justify going through, with the colloquy and the analysis with this, based upon Mr. Kohl's utter and complete lack of preparation and lack of understanding of the Rules of Evidence and the Rules of Criminal Procedure, understanding of a criminal defense attorney's role, of letting him proceed pro se, so it's denied.

(MRP 71-18)

The trial court denied Kohl's request to represent himself due to the serious nature of the charges, because it might delay the start of trial, and because Kohl did not

have what the court believed was an adequate working knowledge of the criminal and evidence rules.[5] But a court may not deny a motion to proceed pro se solely because it is detrimental to the defendant's case or because courtroom proceedings would be less efficient or orderly. *Madsen*, 168 Wn.2d at 505. And questions about the defendant's legal experience and education are only meant to determine if the defendant understands the consequences of waiving counsel, and "are not to be used to "determine whether [the defendant] has sufficient technical skill to represent himself." *Vermillion*, 112 Wn. App. at 857.

The trial court did not identify any fact in the record indicating that Kohl's waiver of counsel was not knowing, intelligent, and voluntary. The trial court's decision to

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[5] Notably, trial was likely to be delayed anyway, as a new Deputy Prosecutor was being appointed to try the case and she was expected to request a continuance. (MRP 11)

deny Kohl his right to represent himself was an abuse of discretion. The improper denial of the right to proceed pro se requires reversal, regardless of whether or not the defendant was prejudiced as a result. *Vermillion*, 112 Wn. App. at 851; *Stenson*, 132 Wn.2d at 737 ("The unjustified denial of this [pro se] right requires reversal"). Accordingly, Kohl's convictions should be reversed and his case remanded for a new trial.

VI. CONCLUSION

Kohl requests that this Court accept review. The jury's finding that Kohl drove recklessly should be vacated and his case remanded for resentencing on the lesser charge. Alternatively Kohl's convictions should be reversed and remanded for a new trial because the trial court violated his right to self-representation.

I hereby certify that this document contains 4,559 words, excluding the parts of the document exempted from the word count, and therefore complies with RAP 18.17.

DATED: December 5, 2024

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Attorney for Petitioner Terry Kohl

APPENDIX

Court of Appeals Opinion in *State v. Terry Kohl*, No. 86860-8-I

FILED
11/25/2024
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Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERRY MATTHEW JAMES KOHL, Appellant.	No. 86860-8-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Terry Matthew James Kohl killed a pedestrian and injured another, both 12-year old girls, when the truck he was driving veered off the road and struck them. In the ensuing investigation, police discovered in his garage a firearm that he could not lawfully possess and a stolen vehicle parked in front of his home. On appeal, Kohl argues that insufficient evidence supports his convictions for vehicular homicide, vehicular assault, unlawful possession of a firearm in the first degree, and unlawful possession of a stolen vehicle and that the trial court abused its discretion in denying his motions to waive counsel and sever offenses. We affirm.

I

In the early morning of January 15, 2022, Kohl broke into a landscaping business, Amazing Landscape Services (Amazing Landscape), and stole several items of property, including a truck (the landscaping truck). Around 10:30 a.m., Kohl was driving the landscaping truck on a residential street when he veered off the road and struck two pedestrians, both children, killing one and injuring the other. Police later identified Kohl as a suspect and arrested him at his home. During the arrest and search of Kohl's home, police discovered a handgun in his garage and a stolen Nissan pickup truck (the Nissan truck) parked on the street in front of Kohl's home.

The State charged Kohl with (1) vehicular homicide, (2) vehicular assault, (3) failure to remain at an accident resulting in death, (4) burglary in the second degree, (5) unlawful possession of a stolen vehicle (relating to the landscaping truck), (6) unlawful possession of a firearm in the first degree, (7) possession of a stolen firearm, (8) unlawful possession of a stolen vehicle (relating to the Nissan truck), and (9) possession of stolen property in the first degree. The State dismissed count 7 before trial. The jury convicted Kohl of the remaining eight counts. Kohl appeals.

II

A. Sufficiency of the evidence

Kohl argues the State presented insufficient evidence to support his convictions for vehicular homicide, vehicular assault, unlawful possession of a firearm in the first degree, and unlawful possession of a stolen vehicle (the Nissan

truck). To determine whether sufficient evidence supports a jury's verdict, we must assess "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In reviewing the evidence, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Additionally, "Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence." *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010). With this legal framework, we turn to Kohl's challenged convictions and conclude sufficient evidence supports each of them.

1. Vehicular homicide and vehicular assault

While Kohl concedes that he drove the landscaping truck "with disregard for the safety of others," he argues insufficient evidence supports his convictions for vehicular homicide and vehicular assault while operating a vehicle "in a reckless manner." The distinction between driving "with disregard for the safety of others," which Kohl concedes, and driving "in a reckless manner," which Kohl contests, is significant because driving "in a reckless manner" carries a higher seriousness for sentencing purposes. *See* RCW 9.94A.510, .515. On this issue, the jury was instructed, "To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences."

Before the collision, the vehicle Kohl was driving crossed the center line into the oncoming lane of traffic four times. After Kohl crossed the center line the fourth

time, he overcorrected the vehicle and drove off the right side of the road, through a drainage ditch and signpost, and into the two pedestrians. At the time of the collision, Kohl was driving 39 mph (the speed limit was 35 mph), and he did not brake before impact. About a half-hour before the collision, a witness encountered Kohl asleep behind the wheel of the landscaping truck while parked in the middle of a road—suggesting that he was sleep deprived when he drove the vehicle. Because this evidence, viewed favorably to the prosecution, is sufficient to persuade a rational fact finder that Kohl drove the vehicle in a rash or heedless manner, indifferent to the consequences, sufficient evidence supports Kohl's convictions for vehicular homicide and vehicular assault while operating a vehicle "in a reckless manner."

2. Unlawful possession of a firearm in the first degree

Kohl asserts there is insufficient evidence that he possessed the firearm found in his garage. The jury was given the following instruction regarding the possession element for this offense:

> For purposes of Count 6, possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from

> possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

The possession issue thus turns on whether Kohl had actual o*r* constructive possession of the firearm, where constructive possession considers all of the relevant circumstances showing dominion and control.

Sufficient evidence establishes constructive possession. When police arrested Kohl inside the garage attached to his residence, multiple officers observed the firearm—a semi-automatic handgun—located on a workbench six to ten feet away from Kohl. Additionally, Kohl's DNA was recovered from the handle of the firearm. While Kohl points to other evidence negating possession, such as the presence of three other persons' DNA on the firearm and the fact that the workbench was cluttered with other items, Kohl's argument ignores the controlling standard of review, which requires us to defer to the jury on the persuasiveness of the evidence and to draw all reasonable inferences from the evidence in the State's favor and most strongly against him. *See Raleigh*, 157 Wn. App. at 736-37. Because the above evidence is sufficient to persuade a rational fact finder that Kohl constructively possessed the firearm found in his garage, there is sufficient evidence supporting his conviction for unlawful possession of a firearm in the first degree.

3. Unlawful possession of a stolen vehicle

Kohl claims there is insufficient evidence that he possessed the stolen Nissan truck. Similar to our analysis of whether Kohl constructively possessed the firearm, whether Kohl constructively possessed the stolen Nissan truck turns on

whether he had dominion and control over it. *See State v. Lakotiy*, 151 Wn. App. 699, 713-14, 214 P.3d 181 (2009). Here, the State presented evidence that the Nissan truck was stolen from one of Kohl's neighbors, James Cho, in January 2022. A few days later, Cho observed the Nissan truck parked at a house at the end of the street on which he and Kohl resided. Kohl also admitted to police that "Breanna" picked him up in the Nissan truck after the burglary at Amazing Landscape on January 15.[1] And when police arrested Kohl at his residence on January 26, they found the Nissan truck parked on the street in front of Kohl's residence.

Kohl contends the State only established his "proximity" to the Nissan truck, which he claims is insufficient evidence that he possessed it. This argument views the evidence too narrowly. A police officer observed that the Nissan truck was parked "[d]irectly" in front of Kohl's residence such that "it was basically blocking in front of the house, in front of the driveway." Another police officer testified that someone had damaged the Nissan truck's ignition cylinder "[s]o they could bypass it" and "start it without a key." This evidence, viewed favorably to the State, is sufficient to persuade a rational fact finder that Kohl maintained dominion and control over the stolen Nissan truck and, thus, constructively possessed it. Accordingly, sufficient evidence supports Kohl's conviction for unlawful possession of a stolen vehicle.

[1] At trial, Kohl identified "Breanna" solely by her first name. While not critical to our holding here, the sentencing record reveals that "Breanna" is Briana Tennison, Kohl's fiancé and mother of his child.

B. Denial of motion to waive counsel

Kohl argues the trial court abused its discretion by denying his motion to waive counsel and represent himself in the proceedings below. We disagree.

Our review of a trial court's ruling denying a defendant's request to waive counsel is deferential. While criminal defendants have a right to self-representation under both the United States and Washington Constitutions, this right exists in tension with the defendant's constitutional right to the assistance of counsel. *State v. Burns*, 193 Wn.2d 190, 201-02, 438 P.3d 1183 (2019). Consequently, courts indulge in every reasonable presumption against a defendant's waiver of their right to counsel. *Id.* at 202. Additionally, we review a trial court's denial of a defendant's request to waive counsel for an abuse of discretion because trial judges "have more experience with evaluating requests to proceed pro se and have the benefit of observing the behavior, intonation, and characteristics of the defendant during a request." *Id.*

In evaluating a defendant's request to proceed pro se, the trial court must first determine whether the request is "unequivocal and timely." *Id.* at 203. If so, the court must then determine whether the request is "knowing, voluntary, and intelligent." *Id.* This determination should be made through a colloquy on the record that includes "a discussion of the nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case." *Id.* Ultimately, the trial court "must evaluate all of the information in front of it and use its discretion to determine whether the waiver is knowing, voluntary, and intelligent,

and to ensure a waiver is made with an understanding of the consequences and the seriousness of the charges." *Id.* at 203-04. On appeal, we will not disturb a trial court's denial of a defendant's request to proceed pro se "[s]o long as a trial court conducted an adequate inquiry into a defendant's request and there is a factual basis for the court's finding that the waiver of counsel was not knowing, intelligent, and voluntary." *Id.* at 204.

For purposes of this appeal, we assume Kohl's request to waive counsel was unequivocal and timely. Nevertheless, the record provides a tenable basis for the trial court's determination that Kohl's request was not knowing, intelligent, and voluntary and was not made with an understanding of the consequences and the seriousness of the charges. Kohl's charges were serious; he was charged with one class A felony and seven class B felonies. In discussing the maximum sentence Kohl could receive if convicted as charged, which the prosecutor estimated to be "right around 80 or 90 years of potential prison time," Kohl remarked that his appointed counsel "told me there is no defense to my case, so at that point ain't I facing the same thing?" Kohl appears to have believed he would receive the maximum possible sentence regardless of whether he proceeded pro se or with counsel, and he did not appear to understand that having "no defense" to a crime at trial does not automatically result in being convicted on every charge and receiving the maximum possible sentence. Moreover, Kohl was not familiar with the rules of evidence or criminal procedure, and he apparently believed the Freedom of Information Act governed his criminal proceedings. Lastly, the extensive trial court colloquy also revealed that the defense had not yet interviewed

any of the State's witnesses. On this record, the trial court did not abuse its discretion in denying Kohl's motion.

C. Denial of motions to sever offenses

Kohl argues the trial court abused its discretion in denying his motions to sever counts 6 (unlawful possession of the firearm) and 8 (unlawful possession of the stolen Nissan truck) from the remaining counts. We disagree.

A trial court may sever offenses if it determines that severance "will promote a fair determination of the defendant's guilt or innocence of each offense." *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (quoting CrR 4.4(b)). But while a trial court may sever offenses in appropriate cases, "Separate trials have never been favored in this state." *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982) (quoting *State v. Herd*, 14 Wn. App. 959, 963 n.2, 546 P.2d 1222 (1976)). Thus, a defendant seeking to sever offenses bears the burden of "demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, 114 Wn.2d at 718.

To determine whether the potential for prejudice requires severance, a trial court must consider four factors: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." *State v. Russell*, 125 Wn.2d, 63, 882 P.2d 747 (1994). Additionally, "any residual prejudice must be weighed against the need for judicial economy." *Id.* We review a trial court's denial of a defendant's motion to sever offenses for a manifest abuse of discretion. *Bythrow*, 114 Wn.2d at 717.

Even if the trial court abuses its discretion in denying a defendant's motion to sever offenses, we will not grant a new trial if the error is harmless. *State v. Watkins*, 53 Wn. App. 264, 273, 766 P.2d 484 (1989).

Kohl has not disputed on appeal or at trial that the second prejudice factor—the clarity of his defenses—and third prejudice factor—the trial court's instructions to the jury that "[y]ou must decide each count separately" and "[y]our verdict on one count should not control your verdict on any other count"—both weigh against severance. Thus, at the very least, the trial court's ruling is supported by two of the four factors for determining whether the potential for prejudice outweighs judicial economy and requires severance. While Kohl argues the first and third prejudice factors weigh in favor of severance, his arguments do not establish a manifest abuse of discretion here.

As to the first prejudice factor—the strength of the State's evidence on each count—evidence is sufficiently strong if a rational juror could convict the defendant of each offense independently. *State v. Bryant*, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998). Here, Kohl correctly observes that the evidence for counts 1-5 and 9 was strong, given that Kohl confessed to burglarizing Amazing Landscape and driving the vehicle that struck the two victims and the State discovered stolen property from Amazing Landscape in Kohl's storage unit and residence. As Parts II.A.2-3 above show, the evidence on counts 6 and 8 is also sufficiently strong to separately convict Kohl of each offense. Thus, contrary to Kohl's argument, the first prejudice factor weighs against severance.

Turning to the fourth prejudice factor, Kohl argues the evidence of the events on January 15, 2022 (when Kohl burglarized Amazing Landscape and struck two pedestrians with the stolen landscaping truck) and the evidence of the events of January 26, 2022 (when police arrested Kohl at his residence and discovered the stolen Nissan truck and firearm) would not have been cross-admissible in separate trials. We disagree with Kohl's argument as it relates to the stolen Nissan truck because the evidence of that offense and the evidence of the January 15 offenses would have been cross-admissible "res gestae" evidence, as it "completed the story of the crime on trial by proving its immediate context of happenings near in time and place" and "depicted a complete picture for the jury." *State v. Grier*, 168 Wn. App. 635, 647, 278 P.3d 225 (2012) (quoting *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004)) (cleaned up). Kohl admitted to police that "Breanna" (identified in footnote 1 above) picked him up in the Nissan truck after the burglary on January 15. And when police arrested Kohl and searched his residence on January 26 in connection with their burglary and vehicular homicide investigation, they discovered the stolen Nissan truck parked in front of Kohl's driveway.

As to the firearm, we agree with Kohl that evidence showing he possessed a firearm and evidence pertaining to the January 15 offenses would not have been cross-admissible res gestae evidence because these offenses are entirely unrelated. *See State v. Trickler*, 106 Wn. App. 727, 732-34, 25 P.3d 445 (2001) (evidence of other stolen property found in defendant's possession was not admissible as res gestae evidence at trial on charge of possessing a stolen credit

card). However, this lack of cross-admissibility does not require severance because no one prejudice factor is dispositive in the severance analysis. *State v. Warren*, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989). Consistent with this multi-factor framework, our Supreme Court has emphasized, "The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." *State v. Kalakosky*, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993) (citing *Bythrow*, 114 Wn.2d at 720; *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992)). Instead, "our primary concern is whether the jury can reasonably be expected to 'compartmentalize the evidence' so that evidence of one crime does not taint the jury's consideration of another crime.'" *Bythrow*, 114 Wn.2d at 721 (quoting *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987)).

Here, the jury could reasonably be expected to compartmentalize the evidence because the State presented a clear timeline of events separating the January 15 crimes from Kohl's possession of a firearm on January 26. The dispositive issue relating to the latter offense was straightforward: whether Kohl possessed the firearm when police arrived at his residence. Moreover, none of the evidence relating to the January 15 offenses suggested that Kohl committed them using a firearm. Thus, Kohl has not shown the necessary prejudice to warrant severance of the offenses. *See Kalakosky*, 121 Wn.2d at 538-39 (trial court did not abuse its discretion in denying motion to sever five rape offenses because, even though evidence was not cross-admissible, the State's evidence was strong and the jury was instructed to consider each count separately); *see*

also Watkins, 53 Wn. App. at 273 (erroneous ruling that evidence was cross-admissible was harmless because the outcome of a trial on the severable offenses would not have been different given the strength of the State's evidence).

Lastly, even if Kohl could show there was at least *some* prejudice resulting from the trial court's denial of his severance motion, "any residual prejudice must be weighed against the need for judicial economy." *Russell*, 125 Wn.2d at 63. If the trial court had granted Kohl's severance motion, numerous witnesses would have been required to testify in two (or three) separate trials. For example, the same police officers who arrested Kohl and searched his residence in connection with the burglary and vehicular homicide investigation would have also been required to testify in a separate trial on the counts relating to the firearm and stolen Nissan truck that they observed and seized as part of that investigation. Balancing the minimal risk of residual prejudice against the need for judicial economy, we are unable to conclude that the trial court manifestly abused its discretion in denying Kohl's motions to sever counts 6 and 8 from the remaining counts.

Affirmed.

Feldman, J.

WE CONCUR:

Chung, J.

Smith, C.J.

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