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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SPENCER DOUGLAS GRANT, Appellant.	No. 46734-8-II UNPUBLISHED OPINION

WORSWICK, P.J. — A jury returned verdicts finding Spencer D. Grant guilty of failure to register as a sex offender and bail jumping. Grant appeals his convictions, asserting that (1) the trial court abused its discretion by denying his request to represent himself at trial, (2) the trial court violated his public trial right by permitting counsel to exercise peremptory challenges in writing, and (3) defense counsel was ineffective for failing to object to testimony that he had been classified by the Department of Corrections (DOC) as a highly violent offender. In his statement of additional grounds (SAG) for review, Grant (1) repeats his appellate counsel's claim that the trial court abused its discretion by denying his self-representation request and (2) asserts, for the first time on appeal, that the State failed to prove that he is the person named in the State's charging documents. We affirm.

FACTS

On February 6, 2013, the State charged Grant with one count of failure to register as a sex offender. The State later amended its charges to add one count of bail jumping, alleging that Grant failed to appear at a March 4, 2013 hearing. Before the start of trial, Grant requested to

terminate his defense counsel's representation and to proceed pro se. At the July 1, 2014 hearing addressing Grant's request, Grant stated that he was dissatisfied with his defense counsel's representation due to a lack of communication and that he "*thought* [he] would represent [him]self pro se." Report of Proceedings (RP) (July 1, 2014) at 2-3 (emphasis added). In response, defense counsel stated that the only issue he had was communicating with Grant's wife, who had attempted to file numerous motions and witness lists purportedly on Grant's behalf.

The trial court entered into a lengthy colloquy with Grant to discuss the risks of waiving his right to counsel and proceeding pro se. During the colloquy, the following exchange took place:

> [Trial court]: Now, again, what I am trying to do is keep you from making a mistake. And you have a right to represent yourself, but it's kind of like me deciding I will take my appendix out by myself.
>
> [Grant]: Yes, I understand.
>
> [Trial court]: It's a bad choice.
>
> [Grant]: It is a bad choice, and I made a lot of bad choices in my life, but I don't see any other outcome; either get convicted through him or be convicted by myself.
>
> [Trial court]: But at least even if that were the case, you would know that you have the ability to preserve the record for any errors that you think were made. And you may not be able to do that if you are just acting on your own. So you don't want to mess that part up in the process, do you?
>
> [Grant]: I don't.
>
> [Trial court]: So do you want to rethink this about having him at least available for you as your attorney?
>
> [Grant]: As standby counsel?
>
> [Trial court]: Well, I am saying you have him available as your attorney, and then you can accept or reject what he is suggesting for you.
>
> . . . .
>
> [Grant]: There is no—we have no defense, according to him.
>
> [Defense counsel]: Your Honor, I have had my investigator talk to him. We are crafting a defense. My investigator has talked to him two or three times.
>
> . . . .

> [Trial court]: Well, you can always change your mind later, but for now, it seems better to have everything available to you. You haven't come to the trial yet. You haven't talked to the investigator since [defense counsel] has got them working on it, and you need to talk to both the investigator and [defense counsel] to see how it's going and then make a decision based on some information that you have specifically.
>
> [Grant]: I spoke to the investigator last week, Your Honor.
>
> [Trial court]: All right. Well, that's a step in the right direction.
>
> [Grant]: I asked him that we could stop our conversation because he said he had to report back to [defense counsel] and I said I didn't feel like talking about my case with him any further until I speak to you, Your Honor.

RP (July 1, 2014) at 11-14. The trial court then denied Grant's request to proceed pro se, stating:

> All right. I am going to do this: I am [going to] deny your motion without prejudice which means you can raise it again if you have something specific that suggests that [defense counsel] needs to be removed.
>
> But for now, strikes me you are better off, and I think you have some thought that you might be better off, at least for now, to have him available for you.

RP (July 1, 2014) at 14. Later during the hearing, Grant asked about his ability to renew his motion to dismiss his defense counsel and proceed pro se, and the following exchange took place:

> [Trial court]: You can [renew your motion]. But I am going to want something specific. I don't want to just hear, you know, "I don't like him. He is not working hard." I need—
>
> [Grant]: I know that.
>
> [Trial court]: —a better defense. But I would put my efforts into thinking about how to defend the State's charges as opposed to how to get rid of [defense counsel]. That's a waste of your effort. Put your time to good use, not to poor use.

RP (July 1, 2014) at 16.

At the next pretrial hearing on August 5, 2014, defense counsel stated that he spoke with Grant and that Grant did not want to renew his request to proceed pro se. Grant also did not renew his motion at the following August 7 pretrial hearing, during which defense counsel indicated that he was communicating with Grant.

Grant renewed his motion to proceed pro se on the morning of trial. Grant stated that he believed defense counsel was a good attorney but that he had a disagreement with defense counsel about what legal defenses were available to him, specifically with regard to whether he was required to register as a sex offender during the charging period. The trial court again entered into a lengthy discussion with Grant regarding the risks of self-representation. During the discussion, Grant acknowledged that his wife had been filing numerous motions on his behalf and had been providing him with legal advice. But Grant stated that the decision to proceed pro se was his own and not his wife's. Following this discussion, the trial court denied Grant's motion, finding that the motion was untimely and was unduly influenced by Grant's wife.

Later that same day before a different trial court judge, Grant again renewed his motion to proceed pro se. After hearing Grant's arguments, the trial court stated it would adhere to the trial court's earlier ruling denying his motion to proceed pro se.

During jury selection, counsel exercised their peremptory challenges in writing while in open court. The paper upon which counsel exercised their peremptory challenges was filed and made part of the record.

At trial, the State called as a witness Grant's community corrections officer, Jonathan Casos. The State asked Casos, "Are home checks something that you do as a part of your supervision?" RP (August 21, 2014) at 169. Casos responded:

> Yes. He is—if I remember correctly, he's a highly violent offender classified under [the Department of Corrections]; therefore, I have to do two home checks per month minimum, and also one collateral check, aside from one office check.

RP (August 21, 2014) at 169. Defense counsel did not object to this testimony. The jury returned verdicts finding Grant guilty of failure to register as a sex offender and guilty of bail jumping. Grant appeals his convictions.

ANALYSIS

I. SELF-REPRESENTATION

Grant first contends that the trial court abused its discretion when it denied his July 1 and August 19 requests to represent himself at trial. We disagree.

A. *Standard of Review*

The State and Federal Constitutions provide criminal defendants with the right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503. But the right to self-representation is neither absolute nor self-executing. *Madsen*, 168 Wn.2d at 504. To grant a defendant's request for self-representation, the trial court must first find that the request was timely and unequivocal. *Madsen*, 168 Wn.2d at 504. If the defendant's request for self-representation was timely and unequivocal, the trial court must also find that it was voluntary, knowing, and intelligent before granting the request. *Madsen*, 168 Wn.2d at 504. And the trial court must "'indulge in every reasonable presumption' against a defendant's waiver of his or her right to counsel." *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)).

We review a trial court's ruling on a criminal defendant's request for self-representation for an abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014), *cert.*

denied, 135 S. Ct. 1444 (2015). The trial court's level of discretion exists on a continuum, depending on the timeliness of the self-representation request:

> If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self-representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

Madsen, 168 Wn.2d at 508 (quoting *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)) (emphasis omitted). Because a waiver of the right to counsel and to proceed pro se at trial involves a "fact-specific analysis" that is "best assigned to the discretion of the trial court," we will reverse the trial court's ruling only if the ruling is "'manifestly unreasonable,' relies on unsupported facts, or applies an incorrect legal standard." *Coley*, 180 Wn.2d at 559 (quoting *Madsen*, 168 Wn.2d at 504).

B. *July 1 Request*

Viewed in the context of the record as a whole, Grant's statements at the July 1 hearing was not an unequivocal request for self-representation and, thus, the trial court did not err by denying the request.[1] Grant's July 1 request to represent himself at trial was not free from doubt

[1] Grant argues in his opening brief that the trial court did not find that his request for self-representation was equivocal. Although the trial court did not explicitly state that it denied Grant's request because the request was equivocal, the trial court's statement that "I think you have some thought that you might be better off, at least for now, to have [counsel] available for you," suggests that the trial court found Grant's request to be equivocal. RP (July 1, 2014) at 14. Regardless of whether the trial court found Grant's request to be equivocal, we examine the record as a whole when determining whether a defendant's self-representation request was equivocal. *See, e.g.*, *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001) ("The defendant's request to proceed pro se must be unequivocal in the context of the record as a whole.").

and appeared to stem from his issues with his assigned counsel's representation rather than from an earnest desire to represent himself at trial. At the outset of the hearing, Grant complained about his counsel's lack of communication and lack of defense strategy. After expressing his frustrations with counsel, Grant stated, "And if the Court would let me, *I thought* I would represent myself pro se." RP (July 1, 2014) at 3 (emphasis added). This statement by Grant suggests that he was merely contemplating self-representation in light of his frustrations with counsel, rather than affirmatively asserting the right.

Grant also expressed doubts about self-representation at the July 1 hearing, stating, "I do need help. I am not saying that I don't need help." RP (July 1, 2014) at 7. Grant also acknowledged that self-representation was a "bad choice." RP (July 1, 2014) at 11. And when the trial court attempted to determine whether Grant understood the risks of self-representation, Grant did not answer in the affirmative and instead responded with his concerns about defense counsel's representation:

> [Trial court]: And, for instance, if there are mistakes made and you don't know how to preserve them for appeal, they may be lost because you don't know what you are doing? Have you thought about that?
> [Grant]: Yes, I have.
> [Trial court]: And you don't care, or that doesn't worry you?
> [Grant]: I got two weeks before trial starts. There is no kind of communication with this man.

RP (July 1, 2014) at 6-7. Finally, despite the trial court's invitation to renew his self-representation request after giving the matter more thought, Grant expressly declined to do so at his subsequent August 5 hearing. Viewing the circumstances and wording of Grant's equivocal July 1 self-representation request in the context of the record as a whole, and considering the

presumption against a waiver of the right to counsel, we hold that the trial court did not err by denying his July 1 request.

Grant's comparison of his request to that in *State v. Breedlove*, 79 Wn. App. 101, 105, 900 P.2d 586 (1995) is unpersuasive. In *Breedlove*, the defendant expressly requested that the trial court permit him "'to proceed as pro se counsel'" and to "'handle [his] own defense,'" whereas here Grant stated that he "*thought* I would represent myself pro se." 79 Wn. App. at 105; RP (July 1, 2014) at 3 (emphasis added).[2] And, unlike the defendant in *Breedlove*, Grant's request contained statements of doubt about proceeding pro se.

Grant's reliance on *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002) is similarly unavailing. Although the defendant in *Vermillion* had initially stated "that he 'would prefer to represent' himself because he felt inadequately informed of the charges against him," this statement was followed by three later self-representation requests that clearly and unequivocally invoked the self-representation right under our state and federal constitutions and did not contain doubt. 112 Wn. App. at 852. And, although Vermillion's initial request was similar to Grant's equivocal July 1 request in that it appeared to be motivated by frustrations with counsel rather than an earnest desire for self-representation, the *Vermillion* court stated that "even if we were to agree with this characterization [of Vermillion's second request being

[2] In holding these statements by Breedlove represented clear and unequivocal requests for self-representation, we noted that his earlier request stating that "the accused would be better off going to trial as pro-se counsel for his defense with pro-counsel at hand" was not a clear and unequivocal self-representation request. 79 Wn. App. at 104.

equivocal], we must review the record as a whole, and there was nothing equivocal about Mr. Vermillion's three [later] requests" for self-representation. 112 Wn. App. at 856.

Grant's self-representation request, which expressed some doubt about proceeding pro se and largely concerned his frustrations with defense counsel, does not resemble the clear and unequivocal invocations of the self-representation right expressed by the defendants in *Breedlove* and *Vermillion*. Rather, Grant's request is more similar to that held to be equivocal in *State v. Stenson*, 132 Wn.2d 668, 741-42, 940 P.2d 1239 (1997), where the defendant's request for self-representation concerned his desire for new counsel. Accordingly, the trial court did not err by denying his request.

C. *August 19 Request*

Viewed in the context of the record as a whole, the trial court did not abuse its discretion by finding that Grant's August 19 self-representation request was unduly influenced by his wife and was therefore involuntary. Accordingly, it did not err by denying his self-representation request on that basis.

When determining whether a defendant's request for self-representation is knowing, voluntary, and intelligent, "the trial court examines the facts and circumstances and the entire record." *State v. Hemenway*, 122 Wn. App. 787, 791, 95 P.3d 408 (2004). Here, the record before the trial court at the August 19 hearing showed that Grant's wife had attempted to file numerous motions on Grant's behalf, which motions included complaints about defense counsel's representations and indicated a desire for Grant to represent himself at trial. And Grant acknowledged at the August 19 hearing that his wife had filed such motions and was providing him with legal advice. The record also showed that Grant's wife had been disruptive during the

July 1 hearing.[3] Although Grant asserted that the decision to represent himself at trial was his own and not his wife's decision, it was for the trial court to determine the credibility of his assertion. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Because evidence in the record supports the trial court's finding that Grant's wife was unduly influencing his request for self-representation, it did not abuse its discretion by denying his request on the basis that it was not voluntary. Accordingly, we affirm the trial court's ruling.

II. PUBLIC TRIAL RIGHT

Next, Grant contends that the trial court violated his public trial right by directing counsel to exercise their peremptory challenges in writing. Again, we disagree.

Shortly after Grant filed his opening brief in this appeal, our Supreme Court issued its decision in *State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015). In *Love*, our Supreme Court held that written peremptory challenges conducted in open court "are consistent with the public trial right so long as they are filed in the public record," concluding that this procedure does not amount to a courtroom closure. 183 Wn.2d at 607. That is what occurred here. Accordingly, Grant fails to demonstrate a violation of his public trial right.

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[3] At the July 1 hearing, the trial court addressed a spectator in the courtroom, stating: "[S]it down, please. I am referring to a lady in the audience who's standing up and gesticulating wildly. And I don't need to hear from her at the moment." RP (July 1, 2014) at 10. Grant then asked to address the spectator, stating:

> [Grant]: Julie, please stop. I asked if I can address her. May I?
> [Trial court]: Yes, you may.
> [Grant]: Stop, please. Stop. They are gonna kick you out if you don't stop, please. Thank you, Your Honor.

RP (July 1, 2014) at 11.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Grant contends that his defense counsel was ineffective for failing to object to Casos's testimony that the DOC had classified Grant as a "highly violent offender." RP (August 21, 2014) at 169. Because Grant cannot meet his burden to show the absence of any conceivable legitimate tactical reason supporting defense counsel's decision not to object to this testimony, we disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To succeed in his claim of ineffective assistance of counsel, Grant must demonstrate both that (1) his counsel's performance was deficient and (2) this deficiency prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Grant's failure to satisfy either prong will defeat his claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We strongly presume that counsel's performance was reasonable and, "[t]o rebut this presumption, the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Grant asserts that there is not a legitimate tactical reason supporting defense counsel's decision not to object to Casos's testimony. But "[t]he decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Here, Casos briefly remarked

that Grant had been classified by the DOC as a "highly violent offender" to explain why he was required to conduct a minimum of two home checks per month on Grant. RP (August 21, 2014) at 169. It is conceivable that defense counsel chose not to object to this testimony to avoid emphasizing the evidence to the jury. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) ("[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence."), *review denied*, 179 Wn.2d 1026 (2014); *see also State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 ("The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective."), *review denied*, 180 Wn.2d 1017 (2014). Because a legitimate tactical reason supported defense counsel's decision not to object to Casos's testimony, Grant's ineffective assistance of counsel claim fails.

IV. SAG

Grant raises two claims in his SAG. He first claims that the trial court erred by denying his requests for self-representation. We addressed and rejected that claim as argued by appellate counsel and need not readdress it here.

The nature of Grant's second claim is less clear. He argues that the State violated his rights under the United States and Washington Constitutions because it failed to prove that he is the person named in the State's charging documents and arrest warrant, "Spencer Daniel Grant," because his name is Spencer *Douglas* Grant.

To the extent that Grant is challenging the adequacy of the State's charging document, his claim fails. Where, as here, the adequacy of a charging document is challenged for the first time on appeal, we liberally construe the documents in favor of validity. *State v. Goodman*, 150 Wn.2d 774, 787, 83 P.3d 410 (2004). We apply this liberal construction in such instances "because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge." *State v. Kjorsvik*, 117 Wn.2d 93, 103, 812 P.2d 86 (1991). In applying this liberal construction and determining whether the challenged charging document is valid, we engage in a two-pronged inquiry that asks, "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wn.2d at 105-106. There is simply no evidence in the record to support that Grant was not sufficiently notified that the State was charging him with failure to register as a sex offender and bail jumping based on the document's use of the name "Spencer Daniel Grant" as opposed to "Spencer Douglas Grant." Accordingly, this claim fails.

To the extent that Grant is claiming insufficient evidence supports his convictions for lack of evidence identifying him as the person alleged to have failed to register as a sex offender and bail jumping, this claim also fails. Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414,

420-21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71.

At trial, Andrea Shaw, a Pierce County Sheriff's Department employee assigned to the sex offender registration unit, identified Grant as matching the photograph of the "Spencer Grant" associated with her registered sex offender file. And, when testifying in his defense, Grant admitted that he had been previously convicted of a sex offense and three subsequent failure to register as a sex offender convictions, and he admitted that he knew he had a registration obligation. This is sufficient evidence to show that the defendant was the person charged by the State despite the apparent scrivener's error with regard to his middle name. Accordingly, we reject Grant's argument regarding the sufficiency of evidence as it relates to his identity.

Finally, to the extent that Grant is challenging the validity of his arrest warrant based on the warrant's use of an incorrect middle name, we do not address the issue because it concerns matters outside the appellate record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Here, no record has been developed with regard to the validity of Grant's arrest warrant because he did not raise this issue at trial. Accordingly, we affirm Grant's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Melnick, J.