IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LESTER JUAN GRIFFIN, Appellant.	No. 38978-9-II UNPUBLISHED OPINION

HUNT. J. — Lester Juan Griffin appeals his convictions for attempted first degree burglary, with deadly weapon and firearm sentence enhancements, and first degree assault, with a firearm sentence enhancement. He argues that the trial court (1) violated his CrR 3.3 right to a speedy trial by granting defense counsel's motion for continuance over his (Griffin's) objection; (2) denied his constitutional right to represent himself; (3) denied him effective assistance of counsel by forcing him to go to trial with counsel against whom he had filed a bar complaint, thereby creating a conflict of interest; and (4) subjected him to double jeopardy by adding sentence enhancements for firearm possession, which were also elements of the underlying convictions. We affirm.

FACTS

The State charged Lester Griffin with (1) attempted burglary in the first degree, under RCW 9A.28.020(1), (3)(b), RCW 9A.52.020(1)(a) and RCW 9A.08.020(3), while "armed with a deadly weapon, to-wit: a pistol," under RCW 9.94A.602 and RCW 9.94A.533(3). Clerk's Papers (CP) at 64; and (2) assault in the first degree, under RCW 9A.08.020(3), RCW 9A.36.011 and (1)(a), while armed with a firearm, under RCW 9.94A.602 and 9.94A.533(3), "to-wit: a pistol." CP at 64.[1]

Griffin used four different attorneys over the course of his case; the first two withdrew.[2] On September 12, 2008, the trial court appointed a third attorney. On October 6, defense counsel moved for a continuance[3] because he was new to the case and needed more time to prepare Griffin's defense. Griffin himself objected, noting, "I've had three different lawyers, but at the same time, I've been studying my case and I'm willing to pursue it myself if I have to [,] to go on [October] 27th." II Verbatim Report of Proceedings (VRP) at 22. Based, in part, on defense counsel's having "come into the case late," II VRP at 22, the trial court found good cause and continued the trial to December 1.

On November 7, the trial court disqualified defense counsel based on an unforeseen conflict of interest. On November 12, the trial court appointed new defense counsel, Griffin's

[1] Griffin was also charged with attempted robbery in the first degree, but the trial court acquitted him of this charge.

[2] Griffin's first attorney, whom Griffin had privately retained, withdrew because Griffin could not pay him. After Griffin's second attorney was appointed, Griffin filed a motion for new counsel.

[3] The trial court previously set Griffin's trial for October 27, 2008. *See* RP at 13. Griffin had previously waived his CrR 3.3 speedy trial right.

fourth, and continued the trial to January 5, 2009. On December 30, however, newly appointed defense counsel moved for another continuance because he, too, needed more time to prepare Griffin's defense. Again, Griffin objected, noting, "I will defend myself to the—on this case to go on next week, you know, I mean, I feel everybody's had enough—I feel he's had enough time." IV VRP at 47. The trial court granted defense counsel's motion based on "unavoidable, unforeseen circumstances" under CrR 3.3(E)(8), IV VRP at 51, and continued the trial to February 2.

On January 23, 2009, Griffin's fourth defense counsel moved to withdraw because Griffin had filed a complaint against him with the Washington State Bar Association.[4] Initially, Griffin implied that he was prepared to proceed to trial pro se. In response to the trial court's inquiry about whether he planned to represent himself following defense counsel's withdrawal, Griffin said, "[I]f that's what I have to, yes, because I refuse—I'm not—I'm not trying to push back my court date again." V VRP at 58. Later, however, in the same hearing, Griffin remarked,

> My thing is I just ask that if he's gonna represent me, to just do it right. I mean, I'm not saying, you know, I'm—I'm—I want to pull him off the case. My thing is if you're gonna represent me, just please represent me right. I'm looking at 33 years.

V VRP at 60.

Griffin filed a pro se motion to dismiss, alleging the earlier judge's "Conflict of Interest," "Misguided and Improper Representation," and "Violation of Speedy Trial Rights and Misdating of Legal Documents." *See* CP at 51-59. In response, a new judge ruled that the December 30

[4] Griffin's complaint apparently claimed ineffective assistance of counsel.

hearing judge should have recused based on a conflict of interest. The new judge also reviewed the record, ruled that the December 30 continuance had been proper for the reasons stated by the previous trial court, adopted those findings, and denied Griffin's motion to dismiss. The trial court denied defense counsel's motion to withdraw and Griffin's motion to dismiss defense counsel.[5]

Represented by his fourth defense attorney, Griffin's trial began on February 2. A jury convicted him of attempted first degree burglary, while armed with a deadly weapon and a firearm, and first degree assault, while armed with a firearm.[6]

Griffin appeals.

ANALYSIS

I. Continuance over Griffin's Objection

Griffin argues that the trial court's grant of the December 30 continuance over his objection violated his CrR 3.3 right to speedy trial.[7] But Griffin fails to provide any chronological

---

[5] Anticipating additional briefing, the trial court postponed issuing a formal ruling. Nevertheless, it told Griffin,

> My guess is that just the fact that [defense counsel] doesn't do everything that you want him to do is not going to be enough of a reason for me to [dismiss him].
>
> . . . .
>
> I'll also consider your motion and affidavit for dismissal [of defense counsel] at that time, although a preliminary indication is that it should not be granted.

V VRP at 60.

[6] The jury acquitted Griffin of attempted first degree robbery, Count I.

[7] Griffin argues that only the December 30 continuance—not the earlier continuances—violated his right to speedy trial.

information supporting this assertion. Nor does he support his argument with citations to the record and legal analysis, in violation of RAP 10.3(a)(6). Accordingly, we do not review this claim.[8]

Griffin also argues that the first trial court erred by granting the December 30 continuance because it had a conflict of interest. As a different trial court later ruled, there was no error in granting the December continuance for the reasons the earlier trial court had stated, regardless of any conflict of interest, which had no bearing on the continuance. RP at 66. Furthermore, we review a trial court's decision to grant a continuance beyond the time required under CrR 3.3 under an abuse of discretion standard. *State v. Nguyen*, 131 Wn. App. 815, 823, 129 P.3d 821 (2006). We find no such abuse here.

Griffin has not shown that the trial courts denied his CrR 3.3 right to a speedy trial.

II. Request to Proceed Pro Se

Griffin next contends that three times the trial court denied his constitutional right to represent himself, Br. of Appellant at 21—on October 16, December 30, and January 23. Br. of Appellant at 24. The record does not support these assertions.

"The right to proceed pro se is neither absolute nor self-executing." *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001); *see also State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010). Rather, courts are required to indulge in "'every reasonable presumption' against a

[8] Even were we to review the merits of Griffin's argument, we find no violation of CrR 3.3(E)(8), which allows continuances for "unavoidable or unforeseen circumstances," such as having four new counsel appearing seriatim to represent Griffin, each needing time to become acquainted with Griffin's case to prepare for trial.

defendant's waiver of his or her right to counsel." *Madsen*, at 504 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)). "The request or demand to defend pro se must be knowingly and intelligently made, it must be unequivocal and it must be timely . . . ." *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). We review a trial court's denial of a defendant's request to proceed pro se for abuse of discretion. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002). Griffin never made an "unequivocal" request to forgo representation by counsel and to represent himself.[9]

Rather, as the State correctly notes, all three of Griffin's alleged "request[s]" for self-representation were mere expressions of frustration with the trial delay attributable to his being represented by a sequence of four different attorneys, each of whom needed time to prepare Griffin's defense. Br. of Resp't at 10. For example, on October 16, Griffin stated, (1) "I'm

---

[9] Compare *Madsen*, in which the Supreme Court reversed and remanded for a new trial when the trial court denied defendant Madsen's unequivocal request for self representation, against a backdrop of his counsel's affirmative appraisal of Madsen's competency. *Madsen* at *9. After explaining why he did not want to be represented by his then-counsel, Madsen expressly stated:

> I think that I'd be better off representing myself . . . . Under Article I [Section] 22 [,] I have a right to represent myself.
> . . . .
> I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that's what I'm going to move forward with doing.

Madsen at 501.

> Based on these, and other assertions, the Supreme Court noted,
> Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution—the provision protecting Madsen's right to represent himself.

Madsen at 506.

> Madsen twice invoked and cited, by article and section, his state constitutional right to represent himself. There was no equivocation.

Madsen at 507. In contrast, as we note in our analysis, Griffin's *requests* for self representation were expressions of frustration with trial delays, laden with equivocation; and he never invoked or cited his constitutional right to represent himself.

willing to pursue it myself if I have to [,] to go on [October] 27th," II VRP at 22; (2) on December 30, "I—I will defend myself to the—on this case to go on next week," IV VRP at 47-48 (December 30); and (3) on January 23, in response to the trial court's inquiry about whether he was prepared to proceed pro se, Griffin said he planned to do so following defense counsel's withdrawal, saying,

> [I]f that's what I have to, yes, because I refuse—I'm not—I'm not trying to push back my court date again.
> . . . .
> My thing is I just ask that if he's gonna represent me, to just do it right. I mean, I'm not saying, you know, I'm—I'm—I want to pull him off the case. My thing is if you're gonna represent me, just please represent me right. I'm looking at 33 years.

V VRP at 58, 60, respectively.

At best, these statements indicated that Griffin was considering representing himself if being represented by counsel meant postponement of his trial date. But none of Griffin's statements were unequivocal assertions or demands to represent himself. Particularly telling is Griffin's final comment about self-representation on January 23: "I'm not saying, you know, I'm—I'm—I want to pull him off the case. My thing is if you're gonna represent me, just please represent me right. I'm looking at 33 years." V VRP at 60. This final comment clearly shows that Griffin preferred to go forward with counsel's representation.

We hold that because Griffin never made an unequivocal request to proceed to trial without representation by counsel, he never called on the trial court to exercise its discretion in ruling on such a request. Therefore, concerning the issue of self-representation, there is no trial court action for us to review.

III. Effective Assistance of Counsel

Griffin also contends that the trial court denied him effective assistance of counsel by "forc[ing] him to go to trial with an attorney who had a conflict of interest." Br. of Appellant at 26. Again, the record does not support this assertion.

At the outset, we note that Griffin's bar association grievance against defense counsel is not available in the record before us on appeal. Nevertheless, we infer that Griffin filed the complaint because he disagreed with defense counsel's motions for trial continuances.[10] It is well established that a trial court may grant a continuance over a defendant's objection to allow counsel additional time to prepare for trial. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) ("Counsel was properly granted the right to waive trial in 60 days, over defendant's objection, to ensure effective representation and a fair trial."); *see also Woods*, 143 Wn.2d at 580-81. Because newly appointed defense counsel needed to continue the trial in order to provide Griffin an adequate defense, the trial court did not abuse its discretion in refusing to dismiss defense counsel on the *conflict* ground that Griffin asserts.

IV. Double Jeopardy

Finally, Griffin argues that the State unconstitutionally subjected him to double jeopardy[11] by imposing firearm possession sentencing enhancements when possession or use of a firearm or deadly weapon are also elements of the underlying crimes charged. It is well established under

[10] *See* Griffin's pro se motion objecting to defense counsel's request for a continuance, which was contrary to Griffin's express wishes and their supposed agreement. CP at 51-59.

[11] Wash. Const. art. I, § 9 provides: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

Washington law that imposition of firearm enhancements in this way does not violate double jeopardy.[12] *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010) (imposition of a firearm enhancement does not violate double jeopardy when use of a firearm is an element of the underlying offense). *Kelley* controls; therefore Griffin's argument fails.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Van Deren, J.

[12] Before Griffin filed his appellate brief, the Supreme Court had granted review of our decision in *State v. Kelley*, 146 Wn. App. 370, 189 P.3d 853 (2008), *review granted* March 3, 2009. After Griffin filed his brief, the Supreme Court affirmed *Kelley* in a published opinion. 168 Wn.2d 72, 226 P.3d 773 (2010).