IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28190-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
KENNY RAY LOOMIS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Kenny Loomis was charged with two counts of unlawful imprisonment, second degree assault, harassment, and interfering with the reporting of a domestic violence crime. Mr. Loomis refused to be represented by his court-appointed attorney. He also refused to sign a speedy trial waiver to give substitute counsel time to prepare for trial. He, therefore, proceeded to trial pro se. A jury found Mr. Loomis guilty of the above charges, except harassment, and the court sentenced him to 70 months' incarceration and 18 to 36 months' community custody.

On appeal, Mr. Loomis asserts (1) he did not knowingly and voluntarily waive his right to counsel, (2) the charging documents for unlawful imprisonment omitted an

essential element of the crime, and (3) the sentence imposed was in excess of the statutory maximum.

We conclude that Mr. Loomis knowingly waived his right to counsel, that the defining term used in the elements for an offense need not be included in the charging document, and the sentence issue is moot. Accordingly, we affirm the convictions.

FACTS

Scott Okuda was staying in the home of Kenny Loomis and Jennifer Meyerstein. On March 28, 2009, he saw them fighting. Mr. Loomis was on top of Ms. Meyerstein, hitting her with a closed fist in the face. When Mr. Okuda tried to call the police, he discovered that the house telephones were missing from their normal locations. Mr. Okuda then attempted to go out the back door and found it padlocked. He climbed out the bathroom window and went to a neighbor's house, where he called the police. The police arrested Mr. Loomis.

During a pretrial status hearing on May 20, Mr. Loomis asked the court for different counsel. He stated that his appointed attorney was rude to his family, and he believed his attorney was being untruthful with him. The court initially appointed a new attorney, but Mr. Loomis was not willing to sign a continuance in order to give his new attorney time to prepare. Because the trial was scheduled for June 3, the court decided

that allowing the original attorney to proceed was in Mr. Loomis's best interest. Hearing this, Mr. Loomis stated that he would rather represent himself.

The court asked Mr. Loomis if he had ever represented himself in a jury trial. He answered that he had done so twice. The court then asked Mr. Loomis if he was familiar with the rules of evidence and advised Mr. Loomis that he would have to follow them. Mr. Loomis said that he was not familiar with the rules. The court also informed Mr. Loomis that he would be looking at a substantial amount of jail time if he was convicted. Mr. Loomis responded that he understood, and that he did not think there would be much of a trial. Mr. Loomis stated that he intended to "get up there and . . . say what I got to say," then Ms. Meyerstein would have her say, and then it would be in the jury's hands. Report of Proceedings (RP) (May 20, 2009) at 9. The State informed Mr. Loomis that it intended to call an expert witness. Because Mr. Loomis was adamant about proceeding to trial on June 3, the court appointed Rick Hansen as stand-by counsel and allowed Mr. Loomis to represent himself.

On June 1, the trial court scheduled a status review hearing to make sure Mr. Loomis had not changed his mind about representing himself. Mr. Loomis informed the court that he needed an attorney. However, Mr. Loomis remained adamant that he was unwilling to sign a continuance. Once again, the court gave Mr. Loomis the choice

between being appointed a new attorney with a continuance or proceeding to trial on June 3 with stand-by counsel. Mr. Loomis chose the latter.

On the morning of June 5, the second day of the trial, the prosecutor brought to the court's attention that for a valid waiver, a pro se defendant must understand the seriousness of the charges, the maximum possible penalty, and the existence of technical procedures. The court asked Mr. Loomis if he remembered the previous conversations with the court about the rules of evidence and the risks in representing himself. The court also asked if Mr. Loomis had any questions about representing himself. He responded "no,"[1] and said that he still wished to represent himself. Based on this and the previous colloquies, the court entered a finding that Mr. Loomis knowingly and voluntarily waived his right to counsel. At the end of the trial, the jury returned verdicts of guilty on all charges, except harassment.

Mr. Loomis was sentenced June 15, 2009. The court ordered that Mr. Loomis serve his confinement for the various convictions concurrently. It also imposed community custody.

[1] RP (June 5, 2009) at 151.

ANALYSIS

Waiver of Right to Counsel. The right to counsel during a criminal proceeding is guaranteed under article I, section 22 of the Washington Constitution and amendment VI of the United States Constitution. Similarly, the accused is also guaranteed the right to refuse counsel and present his or her own defense at criminal proceedings. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). However, waiver of the right to counsel must be knowing, intelligent, voluntary, and unequivocal. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

In *Faretta*, our Supreme Court determined that defendants "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed 268 (1942)). In *Acrey*, the Supreme Court held that at a minimum, the defendant must have been informed of "the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case." *Acrey*, 103 Wn.2d at 211. To determine whether the defendant was actually aware of the dangers of self-representation, the court on review will consider

all the evidence in the record as a whole. *Id*; *see also In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999); *State v. James*, 138 Wn. App. 628, 636, 158 P.3d 102 (2007).

The standard of review of the decision of a trial court accepting a defendant's request to proceed pro se is an abuse of discretion. *James*, 138 Wn. App. at 636; *State v. Vermillion*, 66 Wn. App. 332, 340, 832 P.2d 95 (1992).

Here, the court had several on-the-record colloquies with Mr. Loomis about waiving his right to counsel. At the first colloquy, the court informed Mr. Loomis that he would be bound by the rules of evidence, that he would be looking at a substantial amount of jail time if convicted, and that by representing himself, he would be at a disadvantage. At the June 1 colloquy, Mr. Loomis was told that while he had been appointed stand-by counsel, he would be conducting his defense and questioning witnesses. During the final colloquy, the court reaffirmed that Mr. Loomis understood that he was bound by the rules of evidence and informed him of the trial procedure. These three colloquies establish that Mr. Loomis was informed of the technical rules that exist in presenting a defense. However, the colloquies do not address either the nature of the charges or the maximum penalties upon conviction. In the absence of an adequate colloquy, this court looks to the whole record to determine if the defendant was made

aware of the nature of the charges and the maximum penalties. *Acrey*, 103 Wn.2d at 211.

A defendant must be read and furnished with a copy of the State's information during arraignment. CrR 4.1(f). On April 6, 2009, during the arraignment, the court read the amended information out loud to Mr. Loomis and verified that Mr. Loomis had a copy. The amended information listed all five counts and listed the classification and maximum penalty for each crime. Mr. Loomis signed an acknowledgement that he was advised of his rights, and he entered a plea of not guilty. The court asked Mr. Loomis if he had gone over this form with his attorney and whether he understood the document. Mr. Loomis acknowledged that he had read the document with his attorney.

Here, the proceedings and written acknowledgement show that Mr. Loomis was informed of the maximum penalties if convicted. In addition, during Mr. Loomis's first appearance on March 30, the court read to Mr. Loomis four charges, laying out the nature of the charges and maximum penalty upon conviction. Mr. Loomis was furnished with the amended information during arraignment, which added an additional charge of unlawful imprisonment.

We conclude that Mr. Loomis was informed of the nature of the charges, the maximum penalties, and that he made a knowing, intelligent, and voluntary waiver of his right to counsel.

Essential Element of Crime. A charging document must allege facts which support every element of the offense and must adequately identify the crime charged. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). If the defendant only challenges the charging documents after a verdict has been entered, the charging documents shall be construed liberally in favor of being valid. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The standard of review when determining the adequacy of a charging document is de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

The necessary facts must be contained in the charging document, either in matter of fact language or by fair construction. *Kjorsvik*, 117 Wn.2d at 105-06. Even if a liberal reading of the document cannot be construed as giving notice of the essential elements of the crime, the defendant must show that he was actually prejudiced by the language that caused a lack of notice. *Id.* at 106. In this case, the pertinent portions of counts III and IV within the charging document read as follows:

> KENNY RAY LOOMIS . . . did knowingly restrain another person, to wit: [the victims]; contrary to Revised Code of Washington 9A.40.040 and 9A.40.010(1).

Clerk's Papers at 9. RCW 9A.40.040 provides that the crime of unlawful imprisonment occurs when a defendant "knowingly restrains another person." RCW 9A.40.010(1) defines "restrain" as "to restrict a person's movements without consent and without legal

authority in a manner which interferes substantially with his liberty." The fact that the charging document does not *define* the words of every element that the State is required to prove, does not render the document inadequate. *State v. Rhode*, 63 Wn. App. 630, 635, 821 P.2d 492 (1991). In this case, the amended information cites directly to the statute which defines "restrain" as being "without legal authority" even though "restrain" is not defined in the charging document itself. The definition of "restrain" established how a restraining can occur rather than creating an additional element to the crime of unlawful imprisonment.

Mr. Loomis's contention that his sentence exceeds the statutory maximum is moot following the trial court's resentencing.

We affirm the convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.