IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY JOHN PITMAN CARTY, Appellant.	)	No. 62224-2-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: November 2, 2009

AGID, J.—A jury found Anthony John Pitman Carty guilty of second degree assault. On appeal, Carty asserts that the trial court abused its discretion in failing to order that his competency be evaluated before trial. He also contends that the court violated his right to counsel by (1) refusing to appoint a new attorney when his current attorney had an irreconcilable conflict, (2) allowing Carty to proceed pro se after an equivocal waiver of the right to counsel, (3) reappointing counsel before trial, and (4) allowing Carty to represent himself at sentencing. Finally, Carty asserts the trial court erred in holding that the hearing reappointing counsel outside his presence and that cumulative error deprived him of a fair trial. In his statement of additional grounds, Carty raises a number of additional issues. We conclude that Carty's arguments lack

merit and affirm.

FACTS

On May 5, 2008, at 4 a.m., Holly Magnuson woke up and saw her boyfriend, Anthony John Pitman Carty, pacing around her bedroom with a steak knife and a camera. Carty stabbed Magnuson twice with the knife in her left leg and punched her on the back of her head. Eventually, Magnuson was able to calm Carty down. She gave Carty a ride to a bank in Freeland. Later that day, Magnuson went to the police station in Freeland and met with Lieutenant Evan Tingstad in the Citizens Against Domestic Abuse office. The State charged Carty with assault in the second degree with a deadly weapon—domestic violence.

At a hearing before trial, Carty told the court "I'd like to fire my counsel." He said that he wanted the court to appoint a new attorney or let him continue pro se. The court engaged Carty in a colloquy, asking about his level of education and whether he understood the charge. The court also informed Carty that it was not required to give him the attorney of his choice. Carty signed a waiver of trial counsel, stating that he understood the nature of the charge and the consequences of representing himself and that he voluntarily waived his right to an attorney. The court found that "the defendant has knowingly and voluntarily waived his or her right to counsel" and approved Carty's decision to represent himself.

Carty filed two pro se motions to dismiss, arguing that a continuance violated his constitutional right to a speedy trial, Lieutenant Tingstad's testimony was inconsistent, and Lieutenant Tingstad failed to investigate the crime scene. The court found that the

four day delay did not cause Carty any prejudice.

In the motion to dismiss hearing, Carty stated, "Additionally, Your Honor, I feel that I've been prejudiced because I was ordered to represent myself when I requested for other representation than Mr. – Mr. Hall." The court reminded Carty that he did not have the right to choose his appointed lawyer. Carty also argued that the court should dismiss his case because "I'm mentally ill. . . . I slit my wrist with a knife."

When the court denied Carty's motion to dismiss, Carty became very upset and asked, "What about being mentally ill?" According to the court, Carty "went totally berserk" and began yelling and screaming as well as hitting himself and pounding on the table. It took two or three deputies to contain him. Carty continued to be disruptive in jail and spent the night "urinating and defecating on himself."

The next day, the court described Carty's behavior on the record. The judge stated that she had reappointed Hall as counsel. Deputy William Becker testified that Carty had continued to be disruptive in jail and said, "For our safety, we really don't even want to take him out of the room he's in." Deputy Becker said that Carty tried to attack one of the officers and another officer had to use a taser on Carty.

Dr. Michel Rattrey, a clinical psychologist from Compass Health, evaluated Carty. Dr. Rattrey testified, "I observed somebody who was very angry because whatever he wanted to accomplish in Court didn't go his way." Dr. Rattrey did not see any evidence of psychosis or hallucinations but stated that Carty had poor impulse control.

The court called Carty as a witness and asked him whether he would be able to

behave appropriately in court. Carty apologized for his behavior the day before and stated that he would not be a danger to himself or to others. The judge informed Carty that based on his behavior in court, she had reappointed Hall as counsel.

Through his attorney, Carty requested a mental health evaluation. The court denied the request, stating, "there is no valid or credible information that this is affecting anything to do with the trial, with his intent or with ability to cooperate."

At trial, Magnuson testified about the assault and stated that she did not think Carty's actions were accidental. Carty became upset because his attorney was not asking the questions he wanted. The court then warned Carty that if he did not behave, he would be removed from the courtroom. The court allowed Carty to put his questions on the record. The court also allowed Carty's attorney time to ask Magnuson the questions Carty requested so he could decide whether to ask the questions in court.

The jury found Carty guilty of assault in the second degree.

After trial, Carty's attorney filed a motion to withdraw. Hall said that Carty's family accused him of conspiring with the State to get Carty convicted, Carty accused him of ineffective assistance in open court, and he no longer felt that he could objectively represent Carty. Carty did not object, and the court granted Hall's motion to withdraw. The court did not make a finding that there was any conflict of interest.

The court made an attorney available to Carty for sentencing, but Carty appeared without the attorney. Carty said that he told the attorney, "I wasn't quite sure if I really wanted representation yet and I wanted to think about it." Carty represented

himself at sentencing. With an offender score of 9, the court gave Carty a sentence at the top of the standard range of 84 months.

Carty appeals.

ANALYSIS

Competency Evaluation

Carty asserts that the trial court violated his right to due process by proceeding to trial without adequate procedural safeguards to determine his competency. Carty specifically contends that, based on his outburst in court and his request for a mental health evaluation, the court should have ordered a formal hearing to determine his competence before trial.

The conviction of a legally incompetent person violates due process.[1] "The constitutional standard for competency to stand trial is whether the accused has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and to assist in his defense with 'a rational as well as factual understanding of the proceedings against him.'"[2]

RCW 10.77.050 provides: "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect."[3] Under RCW 10.77.060(1), if there is a reason to doubt a defendant's competence, the court must appoint at least two qualified experts to examine and report on the defendant's mental condition. "Before a determination of competency is required by RCW 10.77.060, the court must make the threshold

[1] Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).

[2] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (internal quotation marks omitted) (quoting Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)).

[3] RCW 10.77.010(14).

determination that there is a reason to doubt competency."[4] Factors the court should consider are the defendant's (1) apparent understanding of the charge and consequences of conviction, (2) apparent understanding of the facts underlying the charge, and (3) ability to relate the facts to his attorney to help prepare the defense.[5] We review the trial court's determination of whether to order a competency examination for abuse of discretion.[6]

Here, Carty appeared to understand the charge and consequences of his conviction when he asked the court to allow him to represent himself at trial. It was only after his motions to dismiss were denied that he began his disruptive behavior. Carty told the court that he was mentally ill and began hitting himself and pounding on the table. The court responded, "[A]s far as being mentally ill . . . You were not doing this before. It's a choice you're now making." Carty was evaluated by a mental health professional, Dr. Rattrey. Carty told Dr. Rattrey he would bang his head on the desk and do everything he could to show he was mentally ill. In his report, Dr. Rattrey stated that it was his clinical opinion that Carty was "trying to manipulate the system" and force the court to send him to a state hospital and dismiss or lower the charges.

Aside from the time he acted out in apparent frustration over the trial court's rulings, the record supports the conclusion that Carty understood the charge against him and the facts underlying the charge and was able to assist his attorney in his defense. The record also supports the trial court's conclusion that Carty was

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[4] City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985).

[5] Id. at 442.

[6] In re Fleming, 142 Wn.2d at 863.

attempting to fake mental illness in order to delay the trial proceedings. Even Carty admitted at sentencing that he was competent. He stated, "I'm aware that I'm competent. I believe I'm competent, too, Your Honor. But I believe that the risk assessment and the mental evaluation can show the better sides of me, Your Honor." The trial court properly concluded that it did not need to order a competency evaluation before trial.

Irreconcilable Conflict

Carty asserts that the trial court violated his right to counsel by refusing to appoint new counsel even though he had an irreconcilable conflict with Mr. Hall.

A criminal defendant does not have an absolute Sixth Amendment right to choose a particular advocate. If dissatisfied, the defendant must show good cause to warrant substitute counsel, such as "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."[7] "Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court."[8] When inquiring into the nature of the conflict, the court examines "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives."[9] That the defendant loses confidence or trust in his attorney is not a sufficient basis on which to substitute new counsel.[10]

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[7] State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

[8] State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

[9] In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

[10] Stenson, 132 Wn.2d at 734.

Carty asserts that he alleged an irreconcilable conflict with counsel below. But the record demonstrates that Carty objected to his attorney's law firm, not to Mr. Hall specifically, in alleging there was a conflict of interest. When the court asked Carty why he did not want an attorney, Carty said, "I didn't want the Pacher firm to be involved in this case, and I told Don Mason that when I was being screened. He made no effort to notify Pacher's office that I had a possible conflict of interest from the get-go." In his waiver of trial counsel, Carty stated that he did not want an attorney because "Darren Hall cursed me out. I feel he did not have interest in defending my case/me. I would love an attorney, if possible and respectfully requested, I ask for an attorney outside Pacher Firm as to there is a conflict of interest." Carty did not specify what the alleged conflict was, and the court did not make a finding that there was any conflict of interest.

The cases Carty cites are distinguishable because in those cases there was a total breakdown of communication between the defendant and counsel.[11] Although at times Carty and Hall disagreed about trial strategy, the record does not support Carty's contention that there was a complete breakdown of communication between them before the trial was over. When Carty objected to Hall's decision not to ask specific questions, Hall conducted more discovery to determine whether the questions would harm Carty's case. It was not until after trial that Hall informed the court that he no longer felt that he could objectively represent Carty, and the court granted Hall's motion

[11] United States v. Nguyen, 262 F.3d 998, 1004 (9th Cir. 2001) ("By the time of trial, the defense attorney had acknowledged to the Court that Nguyen 'just won't talk to me anymore.'"); United States v. Moore, 159 F.3d 1154, 1159 (1998) (attorney testified that the defendant "threatened to sue him and that he felt apprehension of physical harm").

to withdraw. Under these circumstances, the trial court did not abuse its discretion by refusing to appoint new counsel.

Self-Representation

Carty asserts that the trial court made multiple errors affecting his right to represent himself. First, he contends that he did not make a knowing and intelligent waiver of his right to counsel because his waiver was equivocal. Carty also asserts that the trial court erred in reappointing counsel before trial based on his behavior. He further argues that the trial court erred by allowing him to represent himself at sentencing without engaging him in a second colloquy to determine whether he knowingly, intelligently, and voluntarily waived his right to counsel at sentencing.

Criminal defendants have a Sixth Amendment right "to waive assistance of counsel and to represent themselves at trial."[12] "The trial court must establish that a pro se defendant who has relinquished his or her right to counsel made a knowing and intelligent waiver."[13] The waiver must be unequivocal.[14] "There is no formula for determining a waiver's validity, but the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense."[15]

Here, the court engaged Carty in a colloquy, asking about Carty's level of education and whether he understood the charge. Carty informed the court orally and in writing that he understood the nature of the charge and the consequences of representing himself and he voluntarily waived his right to an attorney. The waiver of

[12] DeWeese, 117 Wn.2d at 375; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
[13] State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987).
[14] State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).
[15] Id. (footnote omitted).

trial counsel form asked, "Now, in light of the penalty that you might suffer if you are representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?" Carty responded, "[N]o, I[']d like a different firm if possible otherwise: yes." While the colloquy should have been more thorough, nothing in the record supports Carty's assertion that he did not knowingly and intelligently waive his right to counsel. And, although Carty stated a preference for the court to appoint a new attorney, he did unequivocally waive his right to counsel orally and through the waiver of counsel form.

Carty next contends that the trial court erred in reappointing Hall as trial counsel because he did not make a knowing and intelligent waiver of his right to self-representation. His argument misses the point.

"The right of self-representation does not include the right to disrupt the orderly administration of justice."[16] A court may deny a defendant's request to represent himself if the defendant engages in disruptive behavior.[17] "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[18]

Here, after the court denied Carty's motions to dismiss, Carty "went totally berserk," yelling and screaming, and required two or three deputies to contain him. Deputy Becker testified that when Carty returned to the jail, he was uncooperative and he "smeared feces all over himself, urine all over himself. He's spitting. Yelling and screaming. Punching the walls." When Carty objected to Hall's being reappointed as

[16] State v. Bolar, 118 Wn. App. 490, 517, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027 (2004).
[17] State v. Hemenway, 122 Wn. App. 787, 795, 95 P.3d 408 (2004).
[18] Faretta, 422 U.S. at 834 n.46.

his counsel, the court told Carty, "based upon the type of behavior that I saw from you yesterday and the fact that your behavior in the Jail was very bad over the night, plus some threats that you've made as to taking an officer's gun, that you would not be able to adequately represent yourself in Court." The trial court did not abuse its discretion in terminating Carty's self-representation based on his disruptive behavior in court and in jail after he was forcibly removed from the court.

Carty further contends that the trial court did not establish that he knowingly, intelligently, and voluntarily waived his right to counsel when he proceeded pro se at sentencing. "In the absence of a colloquy, the record must somehow otherwise show that the defendant understood the seriousness of the charges and knew the possible maximum penalty."[19]

Here, the court engaged Carty in a colloquy the first time he asked to represent himself. The court was satisfied that Carty made a knowing, intelligent, and voluntary waiver of his right to counsel at that point. In his written and oral waiver of his right to counsel, Carty demonstrated that he understood both the seriousness of the charge against him and the possible maximum penalty. The same charge and penalty were at issue at sentencing. By appearing without counsel even though the court had appointed new counsel for sentencing, Carty demonstrated that, except when the court required Mr. Hall to represent him, he continued to waive his right to counsel. The trial court did not err by allowing Carty to continue to proceed pro se at sentencing.

[19] Acrey, 103 Wn.2d at 211.

Right to be Present

Carty asserts the trial court violated his right to be present at all critical stages of trial by holding a portion of the hearing reappointing counsel outside his presence. "Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to attend all critical stages of his trial."[20] When the right of confrontation is not at issue, whether the hearing was a critical stage of the proceedings depends on "(1) whether the subject of the hearing related purely to a legal matter; (2) and if so, whether absence of the defendant nevertheless bore a reasonably substantial relation to the fullness of his or her opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence."[21] We need not decide whether this was a critical stage of the proceeding because any error was harmless.[22] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[23]

Here, when Carty objected to the court's decision to reappoint Hall, the court explained that based on his disruptive behavior, his desire to represent himself was no longer paramount. The court's decision was based solely on the need to stop disruptive behavior and restore order to the trial. The result of the representation hearing would have been the same if Carty had been present. And the decision to proceed with counsel present had no discernable effect on the outcome of the trial. In

[20] State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008).
[21] State v. Berrysmith, 87 Wn. App. 268, 273-74, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998).
[22] In re Pers. Restraint of Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998).
[23] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

fact, given the damaging questions Carty wanted his counsel to ask, it likely improved his chances in front of the jury. Any error in excluding him was harmless.

Cumulative Error

Carty asserts that even if the individual errors are harmless, the cumulative effect of the errors deprived him of a fair trial. "[R]eversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless."[24] Because the trial court did not err, there was no cumulative error.

Statement of Additional Grounds

Carty makes a number of arguments in his statement of additional grounds. He first asserts that the trial court violated his right to a speedy trial by granting the State's request for a continuance. A trial court's decision to grant a continuance under CrR 3.3 will not be disturbed absent a showing of manifest abuse of discretion.[25] Here, the trial court granted the State's motion for a continuance because Lieutenant Tingstad was going to be on vacation. The court found that an officer's vacation is grounds for a continuance, and the four day delay did not cause Carty any prejudice. The trial court did not abuse its discretion in granting the continuance.

[24] State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

[25] State v. Williams, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001).

Carty also asserts that he received ineffective assistance of counsel at trial. To demonstrate ineffective assistance of counsel, Carty must show that defense counsel's representation fell below an objective standard of reasonableness and that the deficient representation prejudiced him.[26] The court will not find ineffective assistance of counsel if the attorney's actions are based on trial tactics or the defense theory of the case.[27]

The crux of Carty's argument is that Hall should have asked Magnuson a list of questions that he provided. He believes these questions would have proved his innocence. At trial, Carty's attorney said that he would not be able to ask the questions because they were not relevant, and he believed some of the questions would be harmful to Carty's case in front of the jury. The prosecutor agreed that if Carty's attorney were to ask the questions, "I anticipate objections that I would anticipate having sustained." The court told Carty that several of the questions were not relevant to whether he assaulted Magnuson. The court allowed Carty's attorney time for discovery to ask Magnuson the questions Carty requested and learn the answers before deciding whether to ask the questions in court. Defense counsel's decision not to ask Magnuson these questions was clearly legitimate trial strategy.

Carty also asserts that he received ineffective assistance of counsel because Hall failed to object to Deputy Becker's testimony about Carty's behavior in jail and Hall used a "general denial" defense instead of arguing that the stabbing was an accident. But Carty does not explain how Deputy Becker's testimony prejudiced him. In addition,

[26] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).
[27] State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

in light of Magnuson's testimony that the stabbing was not accidental, a general denial defense was a legitimate trial strategy. Carty's counsel was not ineffective.

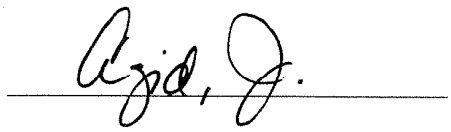
Carty contends that there was insufficient evidence to support the trial court's decision to shackle Carty at trial. We review a trial court's decision to shackle a defendant for abuse of discretion.[28] "Restraints have been viewed historically as an extreme measure to be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape."[29] Here, the record demonstrates that Carty "went totally berserk" and began yelling and screaming as well as hitting himself and pounding on the table. We have catalogued Carty's disruptive, violent behavior earlier in this opinion. Based on his action both in court and in the jail, the trial court was justified in its concern for the safety of all involved if Carty was not restrained. The trial court did not abuse its discretion in deciding this was the only way to prevent further disorderly conduct at trial.

Finally, Carty asserts that the judgment and sentence was invalid because it did not include information about the deadly weapon charge and it was not signed by the clerk. Under RCW 9A.36.021(1)(c), a person is guilty of assault in the second degree if he assaults another with a deadly weapon. The charge that Carty assaulted Magnuson "with a deadly weapon" was an element of assault in the second degree, the charge on which the jury found him guilty. In addition, the judgment and sentence provides that it

[28] State v. Turner, 143 Wn.2d 715, 724, 23 P.3d 499 (2001).
[29] State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

can be signed by the deputy clerk, as it was here. There is no error in the judgment and sentence.

We affirm.



WE CONCUR: