No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH A. DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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I. QUESTION PRESENTED

Where a pro se defendant is absent from a criminal trial, whether due to misconduct or voluntary choice, is the trial court constitutionally required to appoint counsel rather than proceed with an empty defense table?

II. TABLE OF CONTENTS

Page

IV. PETITION FOR WRIT OF CERTIORARI 1

V. OPINIONS BELOW 1

VI. JURISDICTION 1

VII. CONSTITUTIONAL PROVISIONS INVOLVED 1

VIII: STATEMENT OF THE CASE 2

A. The Empty Defense Table 3

B. The Direct Appeal 4

IX. REASONS FOR GRANTING THE WRIT 5

GIVEN THE UNSETTLED STATE OF THE LAW, THIS COURT SHOULD CLARIFY WHEN IT IS CONSTITUTIONALLY PERMISSIBLE TO PROCEED WITH AN EMPTY DEFENSE TABLE IN A CRIMINAL TRIAL. 5

a. The Integrity of Criminal Trial Proceedings Hinges on the Adversarial Process. 6

b. It Remains Unsettled Whether the Sixth Amendment Requires Appointment of Counsel When A Pro Se Defendant Has Been Removed or is Otherwise Absent from the Courtroom. 8

c. Conflicting Caselaw From Around the Nation Reveals Confusion Regarding When It Is Constitutionally Permissible to Proceed with An Empty Defense Table. 11

X. CONCLUSION 26

III. TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Davis,
195 Wash.2d 571, 461 P.3d 1204 (2020).....1, 5, 22, 23, 24, 25

State v. Davis, 6 Wash.App.2d 43, 429 P.3d 534 (2018).....1, 4, 25

State v. DeWeese, 117 Wash.2d 369, 816 P.2d 1 (1991) 17

FEDERAL CASES

Clark v. Perez, 510 F.3d 382 (2d Cir. 2008), cert. denied, 555 U.S. 823, 129 S.Ct. 130 (2008) 17, 23

Davis v. Grant, 532 F.3d 132 (2d Cir. 2008) 6, 9, 13, 20

Faretta v. California, 422 U.S. 806 (1975). 9, 14

Gideon v. Wainwright, 372 U.S. 335 (1963) 5

Herring v. New York, 422 U.S. 853 (1975). 7

Illinois v. Allen, 397 US 337 (1970) 5, 10, 14

Mackey v. Montrym, 443 US 1 (1979) 7

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 10

McKaskle v. Wiggins, 465 U.S. 168 (1984)..... 9, 14

Penson v. Ohio, 488 U.S. 75(1988)..... 7

Pointer v. Texas, 380 U.S. 400 (1965) 5

Strickland v. Washington, 466 U.S. 668 (1984) 7

Thomas v. Carroll, 581 F.3d 118 (3d Cir. 2009). 19

TABLE OF AUTHORITIES CONTINUED

Torres v. U.S., 140 F.3d 392 (2d. Cir. 1998) 16, 18, 23

United States v. Cronic, 466 U.S. 648 (1984)..... 8, 24

United States v. Ductan, 800 F.3d 642 (4th Cir. 2015) 12, 15

United States v. Jennings, 855 F.Supp. 1427 (MD Pa 1994) 16

United States v. Mack, 362 F.3d 597 (9th Cir. 2004) 12, 13, 21

United States v. Margarita Garcia, 906 F.3d 1255 (11th Cir. 2018), cert. denied sub nom. Garcia v. United States, 139 S. Ct. 2027, 204 L. Ed. 2d 229 (2019) 13

United States v. Pina, 844 F.2d 1 (1st Cir.1988) 15

Wheat v. United States
86 U.S. 153, 160 (1988) 7, 24

OTHER JURISDICTIONS

Commonwealth v. Tejada, 188 A.3d 1288 (Pa. Super. 2018)..... 12

Jones v. State, 449 So.2d 253, 257 (Fla.1984)..... 16

People v. Carroll, 140 Cal.App.3d 135, 189 Cal.Rptr. 327 (Ct. App. 1983)..... 12, 21

People v. Cohn, 160 P.3d 336, 343 (Colo. App. 2007);..... 12

People v. Ramos, 5 Cal.App.5th 897, 210 Cal.Rptr.3d 242 (Ct. App. 2016)..... 12

Saunders v. State, 721 S.W.2d 359 (Tex. App.1986)..... 12

State v. Eddy, 68 A.3d 1089 (R.I. 2013)..... 18, 22, 23

TABLE OF AUTHORITIES CONTINUED

State v. Lacey, 364 Ore. 171, 431 P.3d 400 (2018),
cert. denied, 139 S. Ct. 1590, 203 L. Ed. 2d 745 (2019) 21

State v. Menefee, 268 Or.App. 154, 341 P.3d 229 (2014)..... 12, 15

RULES, STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1257 1

U.S. CONT. AMEND. XIV 2

U.S CONST. AMEND. VI 1, 4, 5, 6, 8, 11, 13, 15, 16, 18, 25

INDEX TO APPENDICES

Appendix A Washington Supreme Court Decision on Direct Appeal

Appendix B Washington Court of Appeals Decision on Direct Appeal

Appendix C Superior Court Order: "Findings of Fact and Conclusions of Law Regarding Defendant Voluntarily Absenting Himself from Trial Due to His Disruptive Behavior"

IV. PETITION FOR WRIT OF CERTIORARI

Petitioner Keith A. Davis, though appointed counsel, respectfully requests this Court issue a writ of certiorari to review the judgment of the Washington Supreme Court denying his direct appeal and affirming his conviction.

V. OPINIONS BELOW

The Washington State Supreme Court decision in State v. Davis reported at 195 Wash.2d 571, 461 P.3d 1204 (2020) is attached as Appendix A. The Washington State Court of Appeals decision is reported at 6 Wash.App.2d 43, 429 P.3d 534 (2018) is attached as Appendix B.

VI. JURISDICTION

The Washington Supreme Court issued its decision on April 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

VII. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment, section one, of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII: STATEMENT OF THE CASE

This case presents an important federal question: Under what circumstances is it constitutionally permissible to proceed with an empty defense table when a pro se defendant is either removed or absents himself from the courtroom? The answer to this question remains unsettled by this Court, leading to a multitude of divergent and, at times, conflicting opinions from both federal and state courts across the nation.

A. The Empty Defense Table

Davis moved to proceed pro se in his criminal trial. On numerous occasions, he asked for standby counsel. These requests were uniformly denied. Davis was told that standby counsel was not constitutionally required and raised ethical issues.

Davis represented himself without incident during the first part of his trial, but the situation deteriorated when Davis returned to his table after taking a bathroom break to find his water had been removed. Davis pounded his fists on the table and screamed that he needed the water due to his medical conditions. The court refused to provide water, believing it was causing Davis to use the bathroom too often. Davis worked himself into a tirade, screaming profanities at the court. At one point, an irate Davis yelled "You can hold your trial without me. How's that?"

The Court warned Davis, if he continued, he would be removed from the trial. Davis continued to scream and curse, and the trial judge ordered jail officers to remove him. With an empty defense table, the prosecutor examined two key witnesses

for the State before trial ended that day. Davis was never permitted to cross examine these witnesses.[1]

B. The Direct Appeal

On appeal, Davis asserted he was wrongly denied his Sixth Amendment right to representation when the trial court removed him from the courtroom at a critical stage of his trial and proceeded with an empty defense table. 429 P.3d at 542. The Court of Appeals unanimously held Davis' involuntary removal constituted a forfeiture of his right to self-representation and his right to be present; however, Davis did not forfeit his right to representation and cross-examination. Id. at 544-45. The Court of Appeals noted there were several alternatives the trial court should have explored before proceeding with an empty defense table, and it remanded for a new trial. Id. at 544, n. 7.

In a split decision, the Washington Supreme Court reversed. Id. at 1212. The majority held Davis was not involuntarily removed but, instead, had voluntarily absented himself when he shouted, "You can hold your trial without me.

[1] The King County Superior Court's removal order is attached as Appendix C.

How's that?" Id. at 1211. It concluded Davis also voluntarily waived his right to be present and his right to representation. Id.

By contrast, the dissent concluded Davis' bluster did not constitute a voluntary waiver of his right to be present. Instead, it found the record established Davis was involuntarily removed from the courtroom. Id. at 1213-16. It would have held that the trial court was constitutionally required to consider less restrictive alternatives before proceeding with an empty defense table. Id. at 116-17.

IX. REASONS FOR GRANTING THE WRIT

GIVEN THE UNSETTLED STATE OF THE LAW, THIS COURT SHOULD CLARIFY WHEN IT IS CONSTITUTIONALLY PERMISSIBLE TO PROCEED WITH AN EMPTY DEFENSE TABLE IN A CRIMINAL TRIAL.

The Sixth Amendment's right to counsel, right to confront one's accusers, and right to be present at trial are fundamental to our system of justice. Illinois v. Allen, 397 US 337, 338 (1970); Pointer v. Texas, 380 U.S. 400, 404 (1965); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). These rights are the hallmarks of fair criminal proceedings. Not only do they serve

to protect the defendant's right to challenge the government's case, they also further the government's interest in maintaining the integrity of the truth-finding process and the judiciary's interest ensuring criminal trials appear fair. Davis v. Grant, 532 F.3d 132, 142-44 (2d Cir. 2008).

These rights and interests are jeopardized when the defense table sits empty at a criminal proceeding. Id. Yet, it remains unsettled whether a trial may proceed without counsel or the defendant present after a pro se defendant absents himself (either voluntarily or though misconduct) from his own trial. The caselaw addressing this issue has become a confusing patchwork of varying standards and results. Consequently, guidance from this Court is needed to clarify under what circumstances a criminal trial may be held with an empty defense table and still maintain the fairness envisioned under the Sixth Amendment.

a. The Integrity of Criminal Trial Proceedings Hinges on the Adversarial Process.

A fair trial is an adversarial trial. "The very premise of our adversary system of criminal justice is that partisan

advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). Truth and fairness are best discovered by vigorous representation and by "powerful statements on both sides of the question." Penson v. Ohio, 488 U.S. 75, 84 (1988). The adversary system of criminal justice provides the "best means of ascertaining truth." Mackey v. Montrym, 443 US 1, 13 (1979).

Courts have an independent interest in ensuring that criminal trials are fair and accurate. Wheat v. United States 486 U.S. 153, 160 (1988). "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland v. Washington, 466 U.S. 668, 696 (1984).

A key driver of a robust adversarial process is the right to cross-examination. Any significant diminution of the right to cross examination "calls into question the ultimate integrity of the fact-finding process and requires that the competing interest

be closely examined." Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (internal quotes and citation omitted). "When a true adversarial criminal trial has been conducted…the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." United States v. Cronic, 466 U.S. 648, 656–57 (1984). When either party is absent, this undercuts the integrity of the adversarial system.

Both the Sixth Amendment and society's interest in fair and accurate criminal proceedings appear to weigh heavily against permitting criminal proceedings to go forward with an empty defense table. Yet, this important constitutional issue remains unsettled, and some courts have reasoned otherwise.

b. It Remains Unsettled Whether the Sixth Amendment Requires Appointment of Counsel When A Pro Se Defendant Has Been Removed or is Otherwise Absent from the Courtroom.

When a defendant seeks to represent himself at trial, this often creates a tension between a defendant's interest in personally developing his own defense and society's interests in

ensuring there is a rigorous truth-finding process. Davis, 532 F.3d at142-44. This tension becomes particularly acute when a pro se defendant is no longer present at trial due either to his voluntary absence or his removal for misconduct. Unfortunately, prior decisions from this Court do not indicate whether the constitution requires appointment of counsel under these circumstances.

This Court has provided some constitutional parameters regarding the right to self-representation. Striking a balance between the right to self-representation and society's interest in a strong adversarial process, this Court has explained that a defendant has the right to proceed without the assistance of counsel "provided only that he … is able and willing to abide by [the] rules of procedure and courtroom protocol." McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (emphasis added). Even over objection by the accused, a court may appoint standby counsel to be available to represent the accused where termination of the defendant's self-representation is necessary. Faretta v. California, 422 U.S. 806, 834 (1975).

This Court has recognized the wisdom of appointing standby counsel for pro se defendants as a means of safeguarding society's interest in a fair and reliable fact-finding process. In his concurring opinion in Mayberry v. Pennsylvania, 400 U.S. 455, 468 (1971), Chief Justice Burger noted the trial court had been wise to appoint standby counsel who could step in if the pro se defendant's conduct required his removal from the courtroom. He explains the societal interests that are served by such an appointment:

> In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself. The value of the precaution of having independent counsel, even if unwanted, is underscored by situations where the accused is removed from the courtroom under Illinois v. Allen.

Id.

These prior holdings suggest that once a defendant chooses not to follow procedural rules and courtroom protocol, he may lose his right to self-representation and appointment of

counsel may be necessary to protect the integrity of the truth-finding process. However, one fundamental question remains unanswered: At what point is appointment of counsel required to preserve the adversarial process that lays at the heart of our justice system and is fundamental under the Sixth Amendment?

c. Conflicting Caselaw From Around the Nation Reveals Confusion Regarding When It Is Constitutionally Permissible to Proceed with An Empty Defense Table.

As discussed below, there is much confusion regarding if and when a criminal trial may proceed with an empty defense table. This is an important matter that stretches far beyond Davis' personal interests and strikes at the core of our system of jurisprudence. Hence, this Court's guidance on this issue is necessary to ensure criminal trials are fair and their outcomes are reliable measures of the truth.

Several courts have concluded a pro se defendant cannot be permitted to subvert the integrity of the trial process and force an empty defense table through his own misconduct. Instead, once the defendant has forfeited his right to self-representation through misconduct, appointment of counsel is constitutionally necessary. E.g., United States v. Ductan, 800

F.3d 642, 654 (4th Cir. 2015) United States v. Mack, 362 F.3d 597, 601 (9th Cir. 2004); Commonwealth v. Tejada, 188 A.3d 1288, 1290-92 (Pa. Super. 2018); People v. Ramos, 5 Cal.App.5th 897, 210 Cal.Rptr.3d 242 907 n.5 (2016); State v. Menefee, 268 Or. App. 154, 341 P.3d 229, 244-47 (2014); People v. Cohn, 160 P.3d 336, 343 (Colo. App. 2007); Saunders v. State, 721 S.W.2d 359, 363 (Tex.Ct.App.1986); People v. Carroll, 140 Cal.App.3d 135, 137-38, 189 Cal.Rptr. 327 (1983).

Mack exemplifies the typical analytical approach taken in this line of cases. 362 F.3d at 599-601. There, the pro se defendant's behavior at trial was contemptuous and demonstrative of his unwillingness or inability to abide by directions from the district court. Id. The court warned Mack if his misconduct continued, he would be removed from the courtroom, his questioning of witnesses would cease, and he would not be permitted to present argument to the jury. Id. Eventually, the district court removed Mack from the courtroom. Id. Although Mack was permitted to return at some point, he was precluded from questioning witnesses and from presenting closing argument to the jury. Id. "In practical effect, Mack had

been removed as his own counsel and nobody stepped in to fill the gap." Id. at 601.

The Ninth Circuit found Mack had been denied his Sixth Amendment right to representation. Id. It acknowledged that a trial court may properly remove a disruptive defendant. Id. at 600. It then explained, while a contumacious defendant may forfeit his right to self-representation, he does not forfeit his right to representation. Id. at 601-02. The Ninth Circuit ultimately held Mack was denied his Sixth Amendment right to representation, and the error was structural.[2] Id. at 603.

Four years later, the Second Circuit reached the same legal conclusion as Mack but delved more deeply into why a defendant cannot forfeit his right to counsel through his own misconduct. Davis v. Gant, 532 F.3d at 141-50. It explained that an empty defense table jeopardizes the integrity of the fact-finding process and the judiciary's interest in assuring trials appear fear. Id. at 143-44. "We are hard-pressed to think of a circumstance more likely to make an observer question the

[2] Recently, the Eleventh Circuit held that proceeding with an empty defense table is not structural error. United States v. Margarita Garcia, 906 F.3d 1255, 1264 (11th Cir. 2018), cert. denied sub nom. Garcia v. United States, 139 S. Ct. 2027, 204 L. Ed. 2d 229 (2019).

fairness of a trial than the sight of an empty defense table." Id. at 144.

The Second Circuit suggested that this Court's decisions in Illinois v. Allen, 397 U.S. 337 (1970), Faretta v. California, 422 U.S. 806 (1975) and McKaskle v. Wiggins, 465 U.S. 168 (1984), might be read as mandating the appointment of standby counsel when a pro se defendant is removed due to misconduct. Davis, 532 F.3d at 142-43. However, it called out for clarification from this Court. "We believe that the contrasting arguments of the parties in this case, as well as the divergence of thought between courts that have previously considered the issue, indicate that this is an area in which further guidance from the Supreme Court would be useful."[3] Id. at 144.

The Colorado Court of Appeals in People v. Brante, 232 P.3d 204, 208 (Colo. App. 2009), has taken an entirely different approach under McKaskle and Faretta. It reasoned that under those decisions, the constitution may require an empty defense table when a pro se defendant is ejected or absents himself from

[3] Because the issue was considered in the limited scope of review in habeas cases, the Second Circuit affirmed Davis' conviction. However, the court's reasoning remains persuasive, and its call for guidance from this Court is still pertinent.

the courtroom. Id. Placing particular emphasis on the right to self-representation, the Brante court suggested that, unless a defendant expressly requests appointment of counsel during his voluntary absence or removal, a court's sua sponte appointment of counsel may constitute a violation of the defendant's right to self-representation. Id. Given this, it concluded the defendant's Sixth Amendment rights were not violated when the trial proceeded to conviction despite the empty defense table.

The Brante case appears to be an outlier. Indeed, numerous courts have commented on the wisdom of appointing standby counsel to step in if a defendant is absent, thereby avoiding an empty defense table. See, e.g., United States v. Ductan, 800 F.3d 642, 654 (4th Cir. 2015) (recognizing that when a pro se defendant engages in misconduct "the proper course of action is to revoke the defendant's right to self-representation and appoint counsel'); United States v. Pina, 844 F.2d 1, 15 (1st Cir.1988) (suggesting that a trial judge "employ his or her wisdom to appoint standby counsel" to represent a defendant who is removed or discharges counsel); State v. Menefee, 341 P.3d at 246 (explaining, to avoid running afoul of

the Sixth Amendment, "it is advisable for a trial court to appoint advisory counsel for a defendant whom the court suspects will be disruptive so that the court can appoint that lawyer as counsel if the defendant can no longer represent himself"); Jones v. State, 449 So.2d 253, 257 (Fla.1984) (recognizing when a court is faced with a difficult pro se defendant who might disrupt proceedings it is prudent to appoint standby counsel, even over the defendant's objection).[4]

Rather than wrestle with the issue of appointing counsel for an unwilling pro se defendant, several courts have attempted to maintain self-representation and protect the adversarial nature of the trial. These courts have arranged for the pro se defendant to remotely monitor what happens in the courtroom so he or she has an opportunity to cross examine and otherwise present a defense should they choose to return to the courtroom. See, e.g., Torres, 140 F.3d at 402-03 (permitted defendant to listen to proceedings remotely and return if desired); United States v. Jennings, 855 F.Supp. 1427, 1445-46 (MD Pa 1994)

[4] As this case shows, the King County Superior Court generally does not follow this wisdom and disfavors appointment of standby counsel. 429 P.3d at 537.

(affirming conviction of pro se defendant who was removed for misconduct but was able to listen to the proceedings from another location and transmit messages to the court); State v. DeWeese, 117 Wash.2d 369, 816 P.2d 1, 4 (1991) (holding the trial court did not err by proceeding after removing pro se defendant who was placed in an office to monitor the proceedings and was invited to return for cross examination).

On a different tangent, several courts have concluded trial courts must respect a pro se defendant's strategic choice to leave the defense table empty regardless of the societal interest in maintaining a vigorous adversarial process. These courts suggest the adversarial process has not completely broken down because the empty defense table is actually the product of the defendant's self-representation. Thus, as unwise it may be to leave a defense table empty, the pro se defendant's autonomous choice in how to present his or her defense must prevail. See, e.g., Clark v. Perez, 510 F.3d 382 (2d Cir. 2008), cert. denied, 555 U.S. 823, 129 S.Ct. 130 (2008) (finding no error where pro se defendant chose to absent herself as part of a political protest defense and leave an empty defense table); Torres v. U.S., 140

F.3d 392, 402 (2d. Cir. 1998) (same); State v. Eddy, 68 A.3d 1089, 1096-97 (R.I. 2013) (affirming where pro se defendant chose to leave an empty defense table to prevent prejudicing the jury against himself).

The reasoning supporting this line of case is set forth most clearly by the Rhode Island Supreme Court in State v. Eddy. There, the defendant dismissed his attorney and chose to represent himself. 68 A.3d at 1092-96. After the defendant dismissed two more attorneys whom the court appointed as standby counsel, the court denied the defendant's request for appointed of counsel on the morning of trial. Id. In response, the defendant told the court, "I don't want to be in the courtroom so the trial may proceed in my absence.... I ask I be allowed to be removed from the courtroom during this process because I don't want to cause a situation of a forced removal." Id. 68 A.3d at 1096.

The trial court explained to Eddy that he had a Sixth Amendment right to be present and, if he waived that right, he would not be represented by counsel and would also be waiving his right to cross-examination. Id. at 1097. After Eddy assured

the court that he understood the consequences and reiterated his desire to leave, the trial court allowed him to absent himself from trial and proceeded with an empty defense table. Id. at 1096-97.

The Rhode Island Supreme Court determined Eddy had knowingly and voluntarily waived both his right to be present and right to active representation. Id. at 1103-04. It considered this a valid exercise of his self-representation. Id. at 1108. It reasoned that, under these circumstances, proceeding with an empty defense table was no different than having a pro se defendant sit silently at the defense table, which is a pro se defendant's prerogative as director of his own defense. Id.

In contrast, the Third Circuit has indicated it is constitutionally necessary to appoint counsel regardless of whether a pro se defendant chooses to leave the defense table empty. Thomas v. Carroll, 581 F.3d 118, 126 (3d Cir. 2009). Thomas was representing himself. As trial was set to begin, he voluntarily chose to leave the courtroom and forgo a defense. Trial proceeded to conviction with an empty defense table. Id. at 121-22.

Operating within the bounds of its limited scope of review in habeas cases, the Third Circuit affirmed the conviction. However, it expressed its serious concern that the criminal trial proceeded with an empty defense table. Id. at 126-27. Extending the Second Circuit's reasoning in Davis v. Gant into the context of a pro se defendant's voluntary absence, the Third Circuit expressed its concern with what it believed was "a complete breakdown of the adversarial process" at the defendant's trial. Id. at 126. The court signaled that "[i]f this appeal had come before us on a direct appeal from a federal court and presented with a defendant who waived his right to counsel and then absented himself from the courtroom, we might hold differently." Id. at 127.

In his concurring opinion, Judge Pollak took this statement one step further, declaring that "[u]nder the hypothetical circumstances posited by the court, I not only might hold differently, I would hold differently." Id. at 127 (Pollak, J., concurring). Considering the constitutional issues at stake and this Court's previous decisions, he concluded that he would hold judges must appoint counsel when a pro se defendant chooses to

leave the courtroom. Id. Under Judge Pollak's approach, the important societal interest in a vigorous adversarial process may not be held hostage by a pro se defendant who forces an empty defense table either through misconduct or a voluntary absence.

On the other end of the spectrum, the Oregon Supreme Court recently held there is no need to appoint counsel even where a defendant is involuntarily removed for misconduct. State v. Lacey, 364 Ore. 171, 431 P.3d 400, 406-10 (2018), cert. denied, 139 S. Ct. 1590, 203 L. Ed. 2d 745 (2019). The Lacey court held that an unruly pro se defendant may impliedly waive his right to representation if he has been explicitly warned that his misconduct will result in (1) removal and (2) an empty defense table. Id. It held there is no constitutional requirement to appoint counsel under these circumstances, and the trial may proceed without anyone sitting at the defense table. Id.

The Oregon Supreme Court distinguished the Carroll and Mack line of cases "because it does not appear that the defendants in those cases were warned, prior to waiving their right to counsel, that, if they proceeded pro se and were removed

from the courtroom for misconduct, their trials would continue without anyone present to represent them." Id. 409-10. Grounding its reasoning in the Eddy line of cases, the Lacey court asserted, after a pro se defendant has been appropriately warned, the trial court may properly infer a defendant who engages in misconduct has made a tactical choice to proceed without any representation. Id. at 406, 410. Lacey represents a departure from Eddy, however, in that it is implying a waiver from misconduct, where Eddy involved an express waiver after the defendant offered a valid tactical reason for leaving an empty defense table.

In petitioner's case, the Washington Supreme Court has taken a new, and arguably more extreme, approach regarding when it is constitutionally acceptable to proceed with an empty defense table in a criminal proceeding. 461 P.3d at 1210-11. Recasting Davis' involuntary removal as a "voluntary absence," the majority essentially holds that a pro se defendant may waive his right to representation and provoke an empty defense table when, in an irate outburst, he screams, "You can hold your trial without me." Id. However, Davis' bluster did not possess the

hallmarks of a legitimate act of self-representation or a valid waiver.[5]

This case represents a significant departure from those cases in which courts have tolerated an empty defense table as an unavoidable consequence of self-representation. Unlike in Torres and Clark, Davis never suggested he was voluntarily choosing to absent himself for political protest reasons. Unlike in Eddy, the trial court did not engage in a calm, thoughtful, and thorough colloquy, and Davis never revealed a thoughtful reason for leaving the defense table empty. Unlike in Lacey, Davis was not warned before he made the choice to proceed pro se that, if he were removed for misconduct, the trial would proceed with an empty defense table. Unlike in Deweese, Davis was neither provided an opportunity to cool off while observing the trial remotely after removal nor permitted the opportunity to return to the courtroom for cross-examination.

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[5] As the dissent explains, the majority's conclusion that Davis voluntarily absented himself from the courtroom is suspect. 461 P.3d at 1213-15. Instead, the trial court's written findings establish Davis was in fact removed due to his disruptive behavior. Id. Indeed, the trial court itself stated in its written findings that Davis was told upon his return to the courtroom the next day that if he acted out "he would again be removed from the trial court." Appendix C.

Particularly problematic, the majority shows no concern for the constitutional and societal interests that arise when there is an empty defense table in a criminal proceeding. It does not make even a passing reference to this Court's prior decisions underscoring the judiciary's interest in ensuring that criminal trials are fair and explaining the essential role of the adversarial system in obtaining just and accurate results. E.g., Wheat, 486 U.S. at 160; Cronic, 466 U.S. at 656–57; Chambers, 410 U.S. at 295.

The majority, instead, myopically fixates on the fact that, if counsel had been appointed or if other alternatives were employed, Davis merely would have obtained what he wanted – some form of delay. 461 P.3d at 1211, n. 6. As Chief Justice Stevens points out in her dissent, however, "requiring the trial court to consider alternatives is not about what Mr. Davis sought—it is about what our constitution and precedents require." Id. at 1217, n. 2.

Both Chief Justice Stevens and the Washington Court of Appeals noted there were many alternatives the trial court could have considered before proceeding without someone defending

Davis. Id. at 1216-17; 429 P.3d at 543, n. 7. However, the majority did not even see the need to address such alternatives, failing to appreciate the significant societal interests in fair trials and accurate verdicts that are inherent in our adversarial system. As a result, the Washington Supreme Court's decision in Davis' case represents a low point in the body of case law addressing if and when it is constitutionally permissible to proceed with an empty defense table.

In sum, criminal defendants, the government, the courts, and the public have a strong interest in vigorous advocacy by both parties in criminal proceedings in order to effectuate a reliable and accurate truth-finding process. The Sixth Amendment provides for a robust adversarial system centered around the defendant's right to mount a defense and cross-examine his accusers. This does not happen when neither the defendant nor counsel are present.

Unfortunately, current case law delineating when it is constitutionally permissible to proceed in a criminal trial with an empty defense table consists of a patchwork of doctrinal approaches that has produced inconsistent and uncertain results.

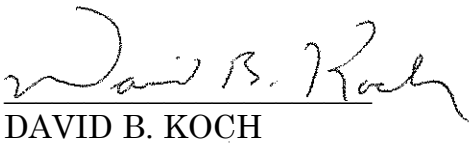
The Washington Supreme Court's decision here represents a low point in this unsettled area of federal law. This Court's guidance on this constitutional issue is necessary to ensure criminal trials both appear and are, indeed, fair. Hence, Davis asks this Court to grant review.

X. CONCLUSION

Davis respectfully requests this Court grant his Petition for a Writ of Certiorari.

DATED this 28th day of July, 2020.

Respectfully submitted,



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Member, Supreme Court
Bar and Counsel of
Record

APPENDIX A

195 Wash.2d 571
Supreme Court of Washington.

STATE of Washington, Petitioner,
v.
Keith Adair DAVIS , Respondent.

No. 96663-0
|
Argued 10/10/2019
|
Filed April 30, 2020

Synopsis

Background: Defendant was convicted in the Superior Court, King County, Julie A. Spector, J., of possession of stolen vehicle and possession of a controlled substance. Defendant appealed. The Court of Appeals, Chun, J., 429 P.3d 534, affirmed in part, reversed in part, and remanded, and the state appealed.

Holdings: The Supreme Court, Madsen, J., en banc, held that:

defendant's insistence throughout trial that he did not wish to be there, as well as his disruptive behavior, demonstrated that he voluntarily and knowingly left the courtroom, waiving his right to be present at trial;

trial court did not abuse its discretion in finding that defendant waived his right to be present at trial; and

trial court did not err when it did not continue proceedings or appoint counsel in defendant's voluntary absence.

Reversed.

Stephens, J., dissented and filed opinion in which McCloud, J., and Fairhurst, C.J., joined.

**1206 Appeal from King County Superior Court, Docket No: 14-1-00794-5, Honorable Julie A. Spector, Judge

Attorneys and Law Firms

James Morrissey Whisman, Ann Marie Summers, Raul Robert Martinez, King County Prosecutor's Office, 516 3rd Ave. Ste. W554, Seattle, WA, 98104-2362, for Petitioner.

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Opinion

MADSEN, J.

*573 ¶1 Keith Davis argues that his right to be present at trial was violated when the trial court found that he voluntarily absented himself, he was removed from the courtroom, and the State proceeded to examine witnesses without Davis in attendance. Because the trial judge did not abuse her discretion in finding that Davis's absence was voluntary, we reverse the Court of Appeals and affirm the trial court.

BACKGROUND

¶2 In January 2014, Keith Davis was arrested for possession of a stolen vehicle. In February 2014, Davis was *574 arrested again for possession of a different stolen vehicle. Police also discovered crack cocaine in Davis's possession after conducting a search incident to arrest. In March 2014, the State charged Davis with two counts of possessing a stolen vehicle and one count of possession of a controlled substance. On February 6, 2015, Davis waived his right to counsel. During his colloquy with the trial judge, Davis asked how he could request standby counsel. The judge informed Davis he could move for standby counsel but the motions were unlikely to be granted. The court then found Davis knowingly and voluntarily waived his right to counsel, and he proceeded pro se.

¶3 Davis obtained an investigator, reviewed discovery materials, and located potential witnesses. The investigator interviewed some of these witnesses and shared his findings with Davis. During pretrial and case setting hearings, Davis continually asked for standby counsel and repeated his frustrations about preparing to defend himself while incarcerated. The court continued to deny standby counsel, noting that such counsel is not constitutionally required and raises ethical issues.

¶4 On February 27, 2017, the parties appeared for trial. Davis renewed his request for a continuance. He stated that he was unprepared based on his significant medical conditions, [1] an incomplete investigation, and the alleged withholding of discovery materials from the State. Regarding his medical issues, the court allowed Davis to break every hour during trial to use the restroom and supplied him with sufficient water to meet his needs. Davis agreed. The judge also spoke with Davis's investigator and heard from the prosecution that both the investigation and discovery were complete. The judge then denied Davis's motion to continue. Davis responded that he was not ready for trial and ***575** renewed his request for standby counsel (what he referred to as "hybrid standby" counsel). 1 Record of Proceedings (RP) (Feb. 27, 2017) at 184, 193, 195-96. The court attempted to clarify if Davis meant he was ****1207** withdrawing as his own counsel and requesting new counsel. Davis stated that he would not go to trial and that the court could "go to trial without [him]"; he said he was "not coming to trial" and "you guys can hold trial without me. Right? You do that? ... Because I'm not coming." *Id.* at 189-92; *see also id.* at 193, 195-98. The presiding judge filed her written ruling denying Davis's motions to continue and to withdraw from representing himself, and did not grant his request for standby counsel. The judge then recused herself after discovering she had previously worked with Davis's sister. The case was reassigned to Judge Julie Spector.

1 Davis suffered from multiple sclerosis, a ruptured hernia, and an obstructed bowel, and was scheduled for several medical procedures. These conditions caused Davis considerable pain and led to dehydration, requiring him to consume large quantities of water and, consequently, to frequently break to use the restroom facilities.

¶5 At the CrR 3.5 hearing, Davis again sought a continuance and attempted to withdraw as his own counsel. The judge denied both motions. In response, Davis became irate. He screamed that he wanted a new judge. The court warned Davis that outbursts and disruptions would lead to his removal. 2 RP (Mar. 2, 2017) at 380-82. [2] Davis said, "You can remove me now. What have we been doing here? I don't even want to be here. So remove me. I don't care. I told you that. You can hold your trial without me." *Id.* at 380; *see also id.* at 382 (the court stated that it would begin with jury selection, and Davis replied, "With or without me. ... I'm not going to be here").

2 The record indicates that the trial judge warned Davis that should he be removed, he would be able to observe proceedings from another location. However, because Davis interrupted proceedings, the court was unable to finish its statement:

> THE COURT: If you are disruptive I will have you removed from the court. You can observe the court proceedings—
>
> MR. DAVIS: You can remove me now.

2 RP (Mar. 2, 2017) at 380. Despite the incomplete statement, Davis appears to accept that the warning occurred. *See* Suppl. Br. of Resp't at 3 ("The trial court warned Davis if he continued to be disruptive, he would be removed to observe the court proceedings elsewhere.").

***576** ¶6 Davis returned to court and represented himself without significant incident until the State commenced its case in chief. The State called two officers involved in Davis's January 2014 arrest for possession of a stolen vehicle. Davis cross-examined the witnesses and eventually asked for a break to use the restroom facilities. After a brief recess, the court reconvened and Davis saw the water on his table had been removed. The court explained that Davis had increased his water intake such that he was using the restroom every 25 minutes instead of every hour as he had agreed. With two witnesses left to examine that day, the court told Davis that he would receive no more water. Davis then began a "tirade of expletives, pounding on the table with his fists, and yelling at an extremely loud volume, ... at one point scream[ing] 'F**k you, Spector!' to the Court." Clerk's Papers (CP) at 141; Tr. of Proceedings (Mar. 7, 2017) (TP) at 200. Davis was warned that "he would be removed from the courtroom" "if he was going to continue to raise his voice and curse." CP at 142.

¶7 The State attempted to proceed with questioning witnesses, but Davis refused to cease his outbursts. The judge temporarily cleared the jury. Davis repeatedly said, "You can hold your trial without me," and the court replied, "I'm going to do that." TP at 205. Davis went as far as to remark, "Thank you. Thank you. Just go ahead with your kangaroo court .... I'm done with it." *Id.* at 205-06. During this exchange, Davis shouted at the "top of his lungs, swearing" and apparently moved to exit the courtroom. *Id.* at 208; CP at 142. The judge stopped Davis in order to make an oral ruling. She found that Davis was voluntarily absenting himself from the proceedings under *State v. Garza*, 150 Wash.2d 360, 365-66, 77 P.3d 347 (2003), noting that Davis intentionally drank more water in order to delay trial with bathroom breaks, often during critical portions of witness testimony. The court's written ruling found that Davis's outbursts grew "so loud that ... the courtroom across the hall ... was forced to recess because the parties ***577** were unable to hear their own witness." CP at 142.

"The volume was such that the Court was unable to speak over [Davis]." *Id.*

¶8 After Davis left the courtroom, the jury returned and the State resumed its direct examination. The State questioned officers involved in Davis's February 2014 arrest, asking about the cocaine discovered in his ****1208** possession and his voluntary statements given after arrest. Davis was not present to cross-examine either witness. He was absent for approximately 50 minutes of trial.

¶9 The following day, Davis returned. The court warned him that any profanity or disruptions would result in his removal. Davis agreed, though he continued to interrupt and ask for standby counsel, which the court denied. Despite Davis's combative behavior, the trial proceeded with Davis present. Davis was convicted on all counts.

¶10 On appeal, Davis argued that the trial court violated his right to be present when it removed him from the courtroom. The Court of Appeals agreed that he was removed but concluded the trial court was not required to consider less restrictive means before removing him. *State v. Davis*, 6 Wash. App. 2d 43, 54-57, 429 P.3d 534 (2018). Davis also asserted he was without representation when the State examined witnesses testifying to his February 2014 arrest and therefore violated his Sixth Amendment right to representation. *Id.* at 62, 429 P.3d 534 . The Court of Appeals agreed and reversed Davis's convictions for possession of a stolen vehicle and possession of a controlled substance, and remanded for a new trial. *Id.* at 62-63, 429 P.3d 534 . The State sought review here, asking us to review whether a defendant may voluntarily absent him- or herself from trial based on disruptive behavior and to clarify the proper standard of review for this inquiry. We granted the State's petition. *State v. Davis*, 192 Wash.2d 1023, 435 P.3d 280 (2019).

***578** ANALYSIS

¶11 The State argues that the trial court did not err in finding that Davis waived his right to be present at trial by voluntarily absenting himself. We agree.

¶12 The Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as article I, section 22 of our state constitution, guarantee the right of the criminal defendant to be present at his or her own trial. *State v. Thurlby*, 184 Wash.2d 618, 624, 359 P.3d 793 (2015) (citing *State v. Thomson*, 123 Wash.2d 877, 880, 872 P.2d 1097 (1994)). This right is not absolute, however. *State v. DeWeese*, 117 Wash.2d 369, 381, 816 P.2d 1 (1991).

¶13 A criminal defendant may waive the right to be present so long as the waiver is knowing and voluntary. *Thurlby*, 184 Wash.2d at 624, 359 P.3d 793 (citing *State v. Rice*, 110 Wash.2d 577, 619, 757 P.2d 889 (1988)). A waiver of the right to be present may be express or implied. *Id.* (citing *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097). If a trial has begun in the defendant's presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present. *Id.* If the court finds this waiver, it is free to exercise its discretion to continue the trial without further consideration. *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097 .

¶14 The United States Supreme Court and this court have held that a defendant's persistent, disruptive conduct can constitute a voluntary waiver of the right to be present. *State v. Chapple*, 145 Wash.2d 310, 318, 36 P.3d 1025 (2001) (citing *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)). The Supreme Court has held that

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on ***579** with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Allen, 397 U.S. at 343, 90 S.Ct. 1057 (footnote omitted). While courts indulge in reasonable presumptions against the loss of constitutional rights, trial judges who are confronted with disruptive, "contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. *No one formula* for

maintaining the **1209 appropriate courtroom atmosphere will be best in all situations." *Id.* (emphasis added).

¶15 Previous cases analyzing whether an absence was voluntary, and a defendant thus waived the right to be present, have most often arisen when a defendant fails to appear during trial. *E.g.*, *Garza*, 150 Wash.2d at 367, 77 P.3d 347 ; *see also* *Thurlby*, 184 Wash.2d at 624-27, 359 P.3d 793 . To determine whether an absence is a waiver, courts have reviewed a number of factors: inquiring into the circumstances of the failure to appear, making a preliminary finding of voluntariness (when justified), and providing the defendant an adequate opportunity to explain his or her absence when returned to custody and before imposing a sentence. *Garza*, 150 Wash.2d at 367, 77 P.3d 347 (quoting *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097). This provides ample protection of the right to be present because the inquiry ensures that the court will examine circumstances of a defendant's absence and conclude the defendant chose not to be present, as well as providing an opportunity for the defendant to explain his or her disappearance and rebut the finding of voluntariness. *Id.*

¶16 While the factors established in *Garza* and *Thomson* are properly applied to defendants who fail to appear during trial, they are less useful in the present case—that is, when a defendant appears for trial, disrupts court procedure, and announces his wish to leave the courtroom. To be sure, both situations require the court to determine whether a defendant has waived the right to be present; but *580 the circumstances surrounding a disappearing defendant differ from those of a severely disruptive defendant. Unlike a defendant who fails to appear, leaving a trial court to speculate as to why, a combative defendant hardly has need to explain his or her absence upon returning: the court observed firsthand the disruptive behavior or heard the defendant's intention to absent him- or herself. Thus, while the question of whether a defendant's absence was voluntary remains part of the waiver analysis for both types of defendants, the considerations underlying that determination differ. Accordingly, we agree with the Court of Appeals below that the *Garza* and *Thomson* factors are not always applicable: "These factors are *most applicable* to situations where a defendant does not appear for court or does not return to court after a removal. As such, they are not readily applicable to the facts in this case." *Davis*, 6 Wash. App. 2d at 55, 429 P.3d 534 (emphasis omitted).

¶17 ¶18 Nevertheless, *Garza* and *Thomson* provide guidance because they provide the test necessary to answer the primary question before us: whether Davis waived his right to be present. [3] *See* *Garza*, 150 Wash.2d at 367, 77 P.3d 347 ; *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097 . [4] This determination depends on the totality of the circumstances. *Garza*, 150 Wash.2d at 367, 77 P.3d 347 *581 (citing *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097). We review decisions involving waiver of the right to be present for abuse of discretion. *Id.* at 365-66, 77 P.3d 347 ; *see also* *State v. Dye*, 178 Wash.2d 541, 547-48, 309 P.3d 1192 (2013) (trial courts "ha[ve] broad discretion to make a variety of **1210 trial management decisions, ranging from 'the mode and order of interrogating witnesses and presenting evidence,' to the admissibility of evidence, to provisions for the order and security of the courtroom" (footnotes omitted) (quoting ER 611(a))). The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Garza*, 150 Wash.2d at 366, 77 P.3d 347 .

3 The dissent criticizes the majority for not devising a new test. Dissent at 1216 . But a new test is not needed. The inquiry is whether the defendant has waived his right to be present. *Garza*, 150 Wash.2d at 367, 77 P.3d 347 . The test for waiver of presence is whether the defendant knew of his right to be present and that he voluntarily waived that right. That can be determined only by his conduct and words. *See* *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). In this case, Davis did not follow through on his threats to leave—until he did. He was aware of his right to be present; the trial court emphasized the importance of his presence, gave a warning that his conduct would result in a waiver, and invited the defendant to reassert his right to be present whenever he wished to do so. "A person in custody, as any person, can voluntarily choose to be absent." *People v. Gutierrez*, 29 Cal 4th 1196, 1208, 63 P.3d 1000, 130 Cal. Rptr. 2d 917 (2003). As Davis did here.

4 The Court of Appeals' reliance on the foreign decision, *State v. Menefee*, 268 Or. App. 154, 160-64, 341 P.3d 229 (2014), was unnecessary as our own case law provides the necessary guidance. Further, *Menefee* is distinguishable from the current case. In *Menefee* , the defendant asked to leave, then returned to court, and when he argued irrelevant law and was told to stop or be removed, the defendant asked to stay. *See* *id.* at 163, 341 P.3d 229 . Unlike *Menefee* , Davis did not ask to stay—indeed, he asked repeatedly to *leave* the courtroom. *E.g.*,

1 RP (Feb. 27, 2017) at 191-92, 193, 195-98; 2 RP (Mar. 2, 2017) at 380.

¶19 Davis argues that he did not waive his right to be present, he was involuntarily removed, and the trial court erred in failing to consider less restrictive alternatives to removal. *Black's Law Dictionary* defines "involuntary" as "[n]ot resulting from a free and unrestrained choice; not subject to control by the will." BLACK'S LAW DICTIONARY 991 (11th ed. 2019). Unsurprisingly then, the phrase "involuntary removal" means that a defendant is removed against his or her will.

¶20 This definition comports with our case law on defendants removed from trial proceedings based on their disruptive behavior. *E.g.*, *Chapple*, 145 Wash.2d at 320, 36 P.3d 1025 . In *Chapple* , the defendant interrupted the court and became increasingly hostile. *Id.* at 315, 36 P.3d 1025 . He was eventually removed. The court worked with the defense attorney to find a way for Chapple to participate in trial. *Id.* at 316, 36 P.3d 1025 . After hearing testimony from corrections officers on Chapple's "size and extraordinary physical strength," including that he could break handcuffs, the court determined he should be excluded from the remainder of trial. *Id.* at 316-17, 36 P.3d 1025 . But unlike Davis, Chapple did not state that he wished to leave the proceedings. Davis, on the other hand, insisted that he was "done" and "not coming to trial," 1 RP (Feb. 27, 2017) at ***582** 190-91. He knew that proceedings would continue without him and did not want to be there.

¶21 Far from expressing this desire only once in an angry tirade, Davis stated numerous times that he did not plan to be at court and that he wanted to leave. *E.g.*, *id.* at 191-92; *see also id.* at 193, 195-98. For example, prior to jury selection, the court and Davis engaged in the following exchange:

> THE COURT: Mr. Davis, Monday morning, you will have three days—
>
> MR. DAVIS: What about it?
>
> THE COURT: We will pick a jury.
>
> MR. DAVIS: I don't care what you do. I really don't. I'm going to continue to survive with this disease.
>
> THE COURT: If you are disruptive I will have you removed from the court. You can observe the court proceedings —
>
> MR. DAVIS: *You can remove me now. What have we been doing here? I don't even want to be here. So remove me. I don't care. I told you that. You can hold your trial without me. Who cares.*
>
> THE COURT: Well, if you're disruptive we may have to—
>
> MR. DAVIS: Well do that. I don't care. Ask me do I care. I don't care. *You can hold your trial at Woodland Park Zoo. Do that.*
>
> ....
>
> MS. ANDERSON: 9:00 a.m. on Monday, Your Honor?

THE COURT: We will begin jury selection.

MR. DAVIS: *With or without me.*

THE COURT: Correct.

MR. DAVIS: *I'm not going to be here.*

2 RP (Mar. 2, 2017) at 380-82 (emphasis added). Involuntary removal constitutes removal against one's will. But as the record indicates, the defendant here was not removed involuntarily—his removal was purely voluntary. Davis asked to leave the court, and the trial judge granted his ***583** request. Disorderly behavior and consistent requests to leave the courtroom demonstrate that Davis waived his right to be present. We note that while disruptive behavior alone may justify removal, here, Davis's insistence throughout trial that he did not wish to be there, wanted to leave, and indeed at one point physically moved to leave, as well as his disruptive behavior, demonstrates Davis voluntarily and knowingly left the courtroom, waiving his right to be present. [5]

5 The dissent's approach encourages gamesmanship. This defendant did everything in his power to disrupt and delay the trial. He was fully aware of his right to be present and that his conduct would result in his waiver of that right. By reversing his conviction, when he was fully capable of conforming his conduct when he wanted to, the dissent would give Mr. Davis exactly what he sought —further delays in his trial.

****1211** ¶22 Davis relies on *Chapple* to argue that the court erred by failing to consider less restrictive alternatives to removal. In *Chapple* , this court dealt with a disruptive defendant who was involuntarily removed. For such defendants, we have held that courts must make accommodations and consider less restrictive alternatives. *E.g.*, *Chapple*, 145 Wash.2d at 322-24, 36 P.3d 1025 (trial court determined a defendant's strength, potential for violence, and attitude precluded him from utilizing less restrictive alternatives and removed him from the courtroom); *DeWeese*, 117 Wash.2d at 373, 816 P.2d 1 (disruptive defendant was warned and removed to another room to watch the trial on television).

¶23 If the trial judge had made the decision to involuntarily remove Davis based on his disruptive behavior, the right to be present requires the trial court to consider less restrictive alternatives, such as those outlined in *Chapple*, 145 Wash.2d at 322-24, 36 P.3d 1025 , and *DeWeese*, 117 Wash.2d at 373, 816 P.2d 1 . But here, Davis expressed his desire to leave the proceedings himself, and the judge allowed him to do so. Thus, what distinguishes Davis's case from other disruptive defendants is, as our standard of review indicates, voluntariness. *See Thomson*, 123 Wash.2d at 881, 872 P.2d 1097 ("Under the voluntary waiver ***584** approach, the court only need answer one question: whether the defendant's absence is voluntary.").

¶24 In this case, the trial court did not abuse its discretion in finding that Davis waived his right to be present. The record shows that Davis wanted to leave the courtroom and the trial judge accommodated him. Davis asked and later yelled, repeatedly, that he did not "even want to be here. So remove me. I don't care. I told you that. You can hold your trial without me." 2 RP (Mar. 2, 2017) at 380; *see also* TP at 205 ("You can hold your trial without me."). When the trial court found that Davis intended to delay proceedings by increasing his water intake and increasingly using the restroom facilities, Davis became enraged, and he reaffirmed his desire to leave: "Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court .... I'm done with it." TP at 205-06. The court then reminded Davis that he had another of the State's witnesses to cross-examine, but Davis stated again that he was done.

¶25 Although the court would have been justified in taking action based on Davis's disruptive conduct, the totality of circumstances show that Davis's repeated statements that he wished to leave amounted to a waiver. The trial court properly exercised its discretion when it permitted a contumacious and stubbornly defiant defendant who insisted on leaving the courtroom to absent himself from the proceedings. *See Allen*, 397 U.S. at 343, 90 S.Ct. 1057 . Maintaining order in the courtroom is within the discretion of the trial judge, and the judge properly exercised it here. *See DeWeese*, 117 Wash.2d at 380, 816 P.2d 1 (citing *Burgess v. Towne*, 13 Wash. App. 954, 960, 538 P.2d 559 (1975)). Accordingly, we hold that Davis waived his right to be present at trial. [6]

6 Davis further contends that involuntary removal violated his constitutional rights to representation and self-representation by precluding him from cross-examining witnesses. But as we have previously explained, Davis was not removed; he left the courtroom voluntarily. Similar to *DeWeese* , the trial judge here told Davis that he still had witnesses to cross-examine, yet Davis stated he wanted to leave the courtroom. As we stated in *DeWeese* , the right to waive counsel does not include a right to be immune from the consequences of self-representation. 117 Wash.2d at 382, 816 P.2d 1 . Davis knew court would continue without him and nonetheless insisted on leaving. Continuing court or providing counsel to Davis would not only reward his disruptive conduct but also provide him counsel—which he waived. Davis's waiver was found knowing and voluntary, and he presents no reason to doubt that finding here. Therefore, court did not err when it did not continue proceedings or appoint counsel in Davis's absence.

***585** CONCLUSION

¶26 Davis repeatedly stated that he did not want to be in court, that he was done, and ****1212** that he wished to leave. Coupled with his disruptive outbursts that culminated in an abusive shouting match with the trial court, Davis obtained what he consistently told the court he wanted: leaving the proceedings. We hold that Davis waived his right to be present at trial. Accordingly, we reverse the Court of Appeals and affirm the trial court's ruling on voluntary absence.

Johnson, J.

Owens, J.

Wiggins, J.

Gonzáles, J.

Yu, J.

Montoya-Lewis, J., did not participate

Whitener, J., did not participate

STEPHENS, C.J. (dissenting)

¶27 This case is about how trial courts balance respect for the constitutional rights of criminal defendants with the need for orderly proceedings. Keith Davis was defending himself pro se when the King County Superior Court removed him from trial after an abusive outburst. But the trial court allowed the State to continue prosecuting its case against Davis—even as the defense table sat empty—without considering alternatives that would better protect Davis's constitutional rights, which our precedent requires.

¶28 Today's majority affirms the trial court, justifying its decision by recasting Davis's involuntary removal as a voluntary absence. But neither the transcript of the proceedings nor the trial court's written findings support the majority's reading of the record. The majority's analysis ***586** blurs the legal standards for voluntary absence and involuntary removal, bypassing the constitutional protections built into those standards and creating no clear rules for lower courts to follow in the future. Because the trial court removed Davis without considering less restrictive alternatives, it abused its discretion. I respectfully dissent.

ANALYSIS

¶29 Removing a pro se defendant from the courtroom during trial risks undermining the " 'very premise of our adversary system of criminal justice' " by leaving the defense table empty while the State brings its prosecutorial might to bear. *United States v. Cronic*, 466 U.S. 648, 655, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). "A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, ... [as well as article I, section 22 of t]he Washington State Constitution." *State v. Chapple*, 145 Wash.2d 310, 318, 36 P.3d 1025 (2001). But that right is not absolute. *Id.* A defendant can lose the right to be present by "voluntarily absenting himself from proceedings" or by engaging in "disruptive behavior" severe enough to justify removal. *State v. DeWeese*, 117 Wash.2d 369, 381, 816 P.2d 1 (1991). Because the factual circumstances involved in the absence of a defendant versus the removal of a defendant are different, this court has adopted distinct standards for each.

¶30 When a defendant is absent for unknown reasons, Washington courts use a three-step analysis to determine whether their absence constitutes a waiver of their right to be present. *State v. Garza*, 150 Wash.2d 360, 367, 77 P.3d 347 (2003). (" 'The trial court will (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance

to justify a finding whether the absence was voluntary, (2) ***587** [make] a preliminary finding of voluntariness (when justified), and (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.' " (alterations in original) (internal quotation marks omitted) (quoting *State v. Thomson*, 123 Wash.2d 877, 881, 872 P.2d 1097 (1994))).

¶31 When a defendant who is physically present in the courtroom is removed by the trial court due to disruptive behavior, a different framework applies. *See DeWeese*, 117 Wash.2d at 381, 816 P.2d 1 (distinguishing ****1213** removal and voluntary absence). *Compare Chapple*, 145 Wash.2d at 320, 36 P.3d 1025 (creating involuntary removal standard), *with Thomson*, 123 Wash.2d at 881, 872 P.2d 1097 (creating voluntary absence standard). Before removing a criminal defendant and proceeding in his absence, the trial court must (1) give the defendant an adequate warning that they will be removed if they continue to disrupt proceedings, *Chapple*, 145 Wash.2d at 321, 36 P.3d 1025 , (2) consider whether the severity of the defendant's disruptive conduct is sufficient to justify removal, *Id.* at 322, 36 P.3d 1025 , (3) consider the least severe means of preventing further disruptions in order to preserve the defendant's rights, *id.* at 323, 36 P.3d 1025 , and (4) give the removed defendant the opportunity to return " 'as soon as the defendant is willing to conduct [themselves] consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.' " *Id.* at 325, 36 P.3d 1025 (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

¶32 Before deciding whether a criminal defendant has waived their right to be present, the trial court "must indulge every reasonable presumption against the loss of [the defendant's] constitutional rights." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). This is true for both voluntary absence and involuntary removal. *See State v. Thurlby*, 184 Wash.2d 618, 626, 359 P.3d 793 (2015) ("In performing [the voluntary absence] analysis, the trial court must examine the totality of the circumstances and indulge every reasonable ***588** presumption against waiver" of the defendant's constitutional rights (citing *Garza*, 150 Wash.2d at 367, 77 P.3d 347)); *Chapple*, 145 Wash.2d at 324, 36 P.3d 1025 (While "certain circumstances may warrant the defendant's complete removal," the defendant's "constitutional rights to be present at trial" "should be afforded great protections.").

¶33 The majority decides this case falls in a twilight zone between voluntary absence and voluntary removal because Davis said, "You can hold your trial without me" during his outburst, immediately before the trial court removed him. Tr. of Proceedings (TP) (Mar. 7, 2017) at 205. But the majority's narrow focus on that sentence ignores significant evidence in the record that Davis was not actually waiving his right to be present and that the trial court's decision to remove him had nothing to do with any such waiver. Even if the record supported the majority's view, the majority errs by failing to identify, adopt, or apply any standard to give courts guidance in this twilight zone. I believe the majority's approach risks abandoning the constitutional protections built into our voluntary absence and involuntary removal standards, contradicting the United States Supreme Court's command that trial courts "must indulge every reasonable presumption against the loss of [the defendant's] constitutional rights." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057 (citing *Johnson*, 304 U.S. at 464, 58 S.Ct. 1019). I address each error in turn.

I. The Majority Ignores Significant Evidence That Neither Davis Nor the Trial Court Thought Davis Was Actually Asking To Leave Trial

¶34 The majority's view of the case boils down to a single line in its opinion: "Davis asked to leave the court, and the trial judge granted his request." Majority at 1210. But a thorough examination of the record directly undermines that view.

***589** A. The Full Record Suggests Davis's Statement Was Not a Sincere Request To Leave Trial

¶35 The majority bases its opinion on the idea that Davis's statement, "You can hold your trial without me" constituted a waiver of his right to be present, which the trial court simply granted. To support its theory that the trial court removed Davis pursuant to this alleged waiver—and not because of the rest of his disruptive behavior—the majority points out that Davis "[insisted] throughout trial that he did not wish to be there, wanted to leave, and indeed at one point physically moved to leave." [1] Majority at 1210 . But the ****1214** majority conveniently glosses over the fact that Davis never followed through on any of his prior statements indicating that he would be absent from trial.

1 The record does not clearly indicate that Davis physically moved to leave. Davis was in custody and wheelchair

> bound; he relied on corrections officers to travel to and from the courtroom every day. The majority may be referencing the trial court's admonishment of corrections officers during removal: "I need him present so I can make the record, so don't take him out yet." TP (Mar. 7, 2017) at 206. But that statement does not indicate whether Davis was trying to leave the courtroom of his own accord or corrections officers simply started to remove him too early. And nothing in the trial court's written findings suggests Davis tried to leave the courtroom prior to his removal.

¶36 On February 27, Davis told the trial court, "I'm not coming to trial." 1 Record of Proceedings (RP) (Feb. 27, 2017) at 191. But on February 28, Davis was in his place and ready to proceed. Again on March 2, Davis told the trial court, "You can hold your trial without me." 2 RP (Mar. 2, 2017) at 380. But the next court day, Davis was again present and fully participated in voir dire. Finally, on March 7, in the midst of his abusive outburst toward the trial court, Davis repeated, "You can hold your trial without me." TP (Mar. 7, 2017) at 205. This time, the trial court replied, "I'm going to do that," *id.* , and "You're now removed from the court," *id.* at 208. But yet again, Davis was back at counsel table on March 8, TP (Mar. 8, 2017) at 241, and did not miss another moment of his trial.

***590** ¶37 This pattern of behavior strongly suggests Davis did not intend his statements to effect a voluntary waiver of his right to be present. Had Davis's requests to voluntarily absent himself from trial been sincere, he would have followed through on them the first time. Or the second time. Or the third time. But despite his bluster, Davis never voluntarily absented himself from trial. His only absence came when he was removed by the trial court. When given the choice, Davis always remained present.

¶38 Courts must "indulge every reasonable presumption against the loss of constitutional rights." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057 (citing *Johnson*, 304 U.S. at 464, 58 S.Ct. 1019). When a defendant repeatedly threatens not to attend trial but nevertheless appears and conducts his own defense every day, it is reasonable to presume that his bombast is not intended to constitute a waiver of his right to be present.

¶39 Of course, it is difficult for this court to determine exactly what happened at trial from a cold record. That is why appellate courts give significant deference to the trial courts' view of proceedings. *See* *Garza*, 150 Wash.2d at 366, 77 P.3d at 350 ("[B]ecause the determination of whether a defendant was voluntarily absent from trial is dependent upon an inquiry into the facts and the totality of the circumstances, the trial court is in a better position to pass on the question."). Here, the trial court's own words make clear that it decided to remove Davis because of his disruptive behavior and not because the court believed Davis was voluntarily absenting himself from trial.

B. The Trial Court's Oral and Written Findings Indicate Davis Was Removed for Disruptive Behavior, Not Because He Asked To Leave

¶40 If the majority were correct that the trial court was simply granting Davis's request to leave the court, one would expect the trial court would have said so in its oral or written findings. But it did not.

¶41 Instead, the trial court made clear that it was removing Davis due to his disruptive behavior. *See* TP ***591** (Mar. 7, 2017) at 207 ("This is about you disrupting the trial, delaying the trial."), 208 ("You're now removed from the court."); TP (Mar. 8, 2017) at 244 ("I'm telling you what my orders are, and if you cannot follow them, you will be removed from the courtroom, as you were yesterday."). The trial court invoked the voluntary absence standard this court articulated in *Garza* , but only in passing. And that invocation was undermined by the trial court's very next words, which justified its decision by describing Davis's disruptive behavior. *See* TP (Mar. 7, 2017) at 208 ("I am finding that he is voluntarily absenting himself from the rest of these proceedings under State vs. Garza, G-A-R-Z-A, and the record should reflect that he continues to speak on top of his lungs, swearing, accusing me of all kind[s] of things.").

****1215** ¶42 The trial court's written findings further confirm it removed Davis due to his disruptive behavior, not any request to leave. The trial court even labeled its written summary of the events leading to Davis's removal as "FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEFENDANT VOLUNTARILY ABSENTING HIMSELF FROM TRIAL **DUE TO HIS DISRUPTIVE BEHAVIOR**." Clerk's Papers (CP) at 140 (emphasis added). Those findings describe how the trial court explained "that if [Davis] was going to continue to raise his voice and curse at the Court, then he would be removed from the courtroom." CP at 142. When Davis continued his "tirade," the trial court "ordered the jail officers to remove him from the courtroom[and t]he officers did so." *Id.* The findings also describe how "the Court warned [Davis] about

his behavior" again the next morning and "informed him that if he continued to behave that way, he would again be removed from the courtroom." *Id.* Though the trial court stated that Davis "voluntarily absented" himself, *id.* , the rationale for its decision was based on his disruptive behavior and not on any request to leave the courtroom.

¶43 Nowhere does the trial court say that it removed Davis pursuant to his request to leave the courtroom—the ***592** trial court's findings do not even mention Davis's statement that "You can hold your trial without me." TP (Mar. 7, 2017) at 205. The trial court's only stated rationale for Davis's removal is the severity of his disruptive behavior.

¶44 But even if the majority's view were supported by the record, I could not join its opinion because it fails to identify, adopt, or apply any legal standard to its analysis of Davis's so-called voluntary absence.

II. The Majority Fails To Identify, Adopt, or Apply Any Legal Standard To Govern When or Whether Defendants May Voluntarily Absent Themselves by Their Disruptive Conduct

¶45 The majority's analysis begins with a discussion of the legal standards governing whether a criminal defendant's voluntary absence constitutes a waiver of their right to be present. But the majority quickly abandons the substance of those standards because "the factors established in *Garza* and *Thomson* are properly applied to defendants who fail to appear during trial, [so] they are less useful in the present case —that is, when a defendant appears for trial, disrupts court procedure, and announces his wish to leave the courtroom." Majority at 1209 . Instead, the majority relies on the voluntary absence standards in *Garza* and *Thomson* for "guidance." Majority at 1209 . But the guidance the majority takes from those cases borders on nonexistent:

> Nevertheless, *Garza* and *Thomson* provide guidance because they provide the test necessary to answer the primary question before us: whether Davis waived his right to be present. This determination depends upon the totality of the circumstances.

Id. (footnotes and citations omitted) (citing *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097 ; *Garza*, 150 Wash.2d at 367, 77 P.3d 347). That is it—the majority gleans no further guidance from our precedents ***593** than to look at the totality of circumstances. So it is no surprise that the majority concludes "the totality of circumstances show that Davis's repeated statements that he wished to leave amounted to a waiver." Majority at 1211 .

¶46 To be fair, it is true that the *Garza* and *Thomson* standards direct trial courts to weigh the totality of the circumstances. But this court has identified particular factors trial courts must weigh for a reason: these factors are how Washington courts follow the United States Supreme Court's command to "indulge every reasonable presumption against the loss of constitutional rights." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057 (citing *Johnson*, 304 U.S. at 464, 58 S.Ct. 1019); *see Garza*, 150 Wash.2d at 367, 77 P.3d 347 ("In performing the analysis, the court indulges every reasonable presumption against waiver." (citing *Thomson*, 123 Wash.2d at 881, 872 P.2d 1097)).

¶47 " '[T]he 3-prong voluntariness inquiry ensures the court will examine the circumstances of the defendant's absence and conclude the defendant chose not to be present at the continuation of the trial' " before proceeding ****1216** without the defendant. *Garza*, 150 Wash.2d at 367, 77 P.3d 347 (quoting *Thomson*, 123 Wash.2d at 883, 872 P.2d 1097). This inquiry also " 'provides an opportunity for the defendant to explain [their] disappearance and rebut the finding of voluntary absence before the proceedings have been completed.' " *Id.* (quoting *Thomson*, 123 Wash.2d at 883, 872 P.2d 1097). But today's majority abandons the specific factors this court designed to "indulge every reasonable presumption against the loss of constitutional rights," *Allen*, 397 U.S. at 343, 90 S.Ct. 1057 (citing *Johnson*, 304 U.S. at 464, 58 S.Ct. 1019), undermining the very purpose of our voluntary absence standard.

¶48 Worse, the majority fails to articulate any new standard that could better protect a criminal defendant's constitutional rights in this twilight zone between traditional voluntary absence and involuntary removal. This is despite the fact that the Court of Appeals here relied on foreign decisions because "Washington case law has not yet addressed whether and how a defendant may voluntary ***594** absent himself or herself by requesting to leave the courtroom." *State v. Davis*, 6 Wash. App. 2d 43, 54, 429 P.3d 534 (2018). Given the majority's view of the record, this case would appear to be an ideal

opportunity to provide guidance to lower courts confronting similar situations in the future. But the majority declines to provide needed guidance, reasoning that "our own case law provides the necessary guidance." Majority at 1209 n.4. For the reasons explained above, I disagree.

¶49 Today's decision departs from our precedents, provides no clear guidance to lower courts, and will have particularly dire consequences for pro se defendants. When a pro se defendant is deemed to have waived their right to be present, their removal necessarily jeopardizes other rights—including the right to confront witnesses against them. As the United States Supreme Court has observed:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.*

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (emphasis added) (citations and internal quotation marks omitted) (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Pointer v. Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Berger v. California*, 393 U.S. 314, 315, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969)).

¶50 Here, Davis's removal significantly undermined his right to confront the witnesses against him. The trial court removed Davis without giving any consideration to alternatives ***595** that could preserve that right. Immediately after removing Davis, the trial court directed the State to continue presenting its witnesses in Davis's absence. These witnesses testified to crucial elements of the State's case against Davis arising from his February 2014 arrest, including details of his behavior, his statements to officers, the nature of the evidence against him, and more. Davis had no opportunity to cross-examine these witnesses "to test the[ir] perception, memory, and credibility." *State v. Darden*, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citing *State v. Parris*, 98 Wash.2d 140, 144, 654 P.2d 77 (1982)). The majority's analysis does not even acknowledge this significant impact on Davis's constitutional rights.

¶51 I would hold that the trial court abused its discretion by removing Davis without considering any alternatives that could better protect Davis's constitutional rights, including his right to confront the witnesses against him. Alternatives may have existed. The trial court could have, for example, placed Davis "in a room with a video monitor which allowed him to follow the case so that he would be able to return to court to conduct cross examination of prosecution witnesses." ****1217** *DeWeese*, 117 Wash.2d at 381, 816 P.2d 1 . "Since *Allen* , many courts have managed to maintain contact between a disruptive defendant and [ongoing proceedings] through various forms of technology, including interactive video and telephone systems." *Chapple*, 145 Wash.2d at 324, 36 P.3d 1025 (citing *State v. Gillam*, 629 N.W.2d 440 (Minn. 2001) (giving defendant option of using room with interactive video capabilities); *United States v. Ives*, 504 F.2d 935, 938 (9th Cir. 1974) (utilizing special phone system connecting defense counsel with defendant's cell), *vacated on other grounds* , 421 U.S. 944, 95 S. Ct. 1671, 44 L. Ed. 2d 97 (1975); *United States v. Munn*, 507 F.2d 563, 567 (10th Cir. 1974) (allowing defendant to hear trial through broadcast system)). I would hold the trial court's failure to consider such ***596** alternatives constitutes an abuse of discretion. [2] Accordingly, I would remand for a new trial on the charges arising from Davis's February 2014 arrest.

2 The majority claims that requiring the trial court to consider such alternatives "would give Mr. Davis exactly what he sought—further delays in his trial." Majority at 1211 n.5. But requiring the trial court to consider alternatives is not about what Mr. Davis sought—it is about what our constitution and precedents require. *See Chapple*, 145 Wash.2d at 323, 36 P.3d 1025 . A short delay while the trial court considers alternatives to complete removal is a small price to pay to protect the fundamental rights of the criminally accused.

CONCLUSION

¶52 The trial court did not believe it was granting Davis's voluntary request to be absent from trial—it removed him for disruptive behavior. *See* CP at 140 ("[T]he defendant was removed from the courtroom due to his behavior."). The Court of Appeals recognized as much. *See Davis*, 6 Wash. App. 2d at 54, 429 P.3d 534 ("Davis asserts the trial court removed him from trial for disruptive behavior. ... We agree with Davis."). Because the trial court clearly explained it removed Davis due to his disruptive behavior, I would hold it to that standard.

And because the trial court's removal order does not meet the applicable constitutional minimums, I would hold it abused its discretion. Accordingly, I respectfully dissent.

Gordon McCloud, J.

Fairhurst, J.

All Citations

195 Wash.2d 571, 461 P.3d 1204

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APPENDIX B

6 Wash.App.2d 43
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Keith Adair DAVIS, Appellant.

No. 76806-9-I
|
FILED: November 5, 2018

Synopsis

Background: Defendant was convicted, following jury trial, in the Superior Court, King County, Julie A. Spector, J., of possession of a stolen vehicle and possession of a controlled substance. Defendant appealed.

Holdings: The Court of Appeals, Chun, J., held that:

trial court adequately considered defendant's requests for standby counsel;

trial court abused its discretion in finding that defendant voluntarily absented himself from courtroom and therefore waived his Sixth Amendment right to be present during trial;

trial court did not abuse its discretion in completely removing defendant from courtroom, without considering less severe alternatives;

trial court's decision to proceed with trial after removing defendant violated defendant's Sixth Amendment right to representation; and

trial court's violation of defendant's Sixth Amendment right to representation was structural error requiring remand.

Affirmed in part, reversed in part, and remanded for new trial.

****536** Appeal from King County Superior Court, Docket No: 14-1-00794-5, Honorable Julie A. Spector, Judge

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PUBLISHED OPINION

Chun, J.

***46** ¶ 1 Defendant appeals a judgment convicting him of two counts of possession of a stolen vehicle and one count of possession of a controlled substance. He assigns error to the trial court's decisions to (1) deny his motions for standby counsel, (2) remove him from the courtroom during trial, and (3) proceed with trial in his absence while he was self-represented.

¶ 2 The trial court did not abuse its discretion in denying Keith Davis's requests for standby counsel. Nor did the trial court abuse its discretion in removing Davis from the courtroom during trial, after it warned him, due to his disruptive behavior. The court, however, allowed two material witnesses to testify in Davis's absence, with an empty defense table, and it did not afford him an opportunity to cross-examine either witness. For the reasons set forth below, we conclude this decision violated Davis's Sixth Amendment right to representation, U.S. CONST. amend. VI.

¶ 3 We affirm Davis's criminal judgment and sentence as to count 1 (possession of stolen vehicle). However, as the portion of the trial held in Davis's absence included testimony to support counts 2 (possession of a stolen vehicle) and 3 (possession of a controlled substance), we reverse as to those counts and remand.

I.

BACKGROUND

¶ 4 On January 23, 2014, Sergeant Timothy Gillette of the King County Sheriff's Office arrested Davis for possession of a stolen Hyundai vehicle.

**537 *47 ¶ 5 Two and a half weeks later, on February 11, 2014, Officer Danny Graf of the Federal Way Police Department observed a Buick parked near a park-and-ride and saw Davis standing outside the car, making furtive movements. As Davis got into the car to drive away, Officer Graf recorded the license plate. The owner had reported the vehicle as stolen. Officer Graf then initiated a traffic stop and arrested Davis for possession of a stolen vehicle - the Buick. Officer Justin Antholt, also of the Federal Way Police Department, arrived as backup and conducted a search incident to arrest. He discovered 2.18 grams of crack cocaine in Davis's shirt pocket.

¶ 6 On May 19, 2014, the State charged Davis with two counts of possession of a stolen vehicle and one count of possession of a controlled substance. On February 6, 2015, Davis moved to proceed without legal counsel. The court granted the motion. During the trial court's colloquy to assure a proper waiver, Davis requested standby counsel. The court warned Davis it would likely not grant such a request but told him he could file a motion.

¶ 7 Davis moved for standby counsel at a case setting hearing on January 28, 2016.[1] The court explained to Davis that he did not have a right to standby counsel and ordering such counsel could raise ethical and practical concerns. Davis then elaborated on his reasons for requesting standby counsel, namely access to office equipment and unfamiliarity with the judicial process. The trial court denied Davis's motion.

1 The case was significantly delayed because the trial court originally transferred it to Drug Court. Additionally, during Davis's release in this matter, he was arrested in Thurston County, charged with assault, and convicted there.

¶ 8 At another case setting hearing on February 11, 2016, Davis again moved for standby counsel. Davis stated he needed standby counsel because "there aren't any resources *48 available and they're limited to my health[2] as well. I may not be able to proceed." The trial court stated Washington law does not favor standby counsel. The court denied the motion.

2 Davis suffers from several medical conditions, including active multiple sclerosis, a ruptured hernia, and an obstructed bowel. Davis used a wheelchair during the trial.

¶ 9 On April 1, 2016, Davis renewed his motion for standby counsel. Citing State v. Romero, 95 Wash. App. 323, 975 P.2d 564 (1999), the trial court reiterated to Davis that he did not have a right to standby counsel. Davis claimed an "implied right" to standby counsel in the event he could not continue representing himself. The court declined to order standby counsel and stated Davis must choose between having counsel and representing himself. Davis chose to proceed without a lawyer.

¶ 10 Davis made another motion for standby counsel on May 10, 2016. The trial court asked if Davis's circumstances had changed since his last motion for standby counsel. In response, Davis referenced "doctor appointments" and being a "layperson." Seeing no change in circumstances, the trial court denied Davis's motion.

¶ 11 On February 27, 2017, the parties appeared for pretrial hearings. Davis moved for a continuance. The trial court denied the request, as trial was set to begin the next day and the case had already been significantly delayed.[3] Davis then stated that he wanted to "withdraw" as his counsel and that the court could go to trial without him. The court attempted to clarify Davis's statements and asked him if he was requesting counsel when he said he wanted to withdraw, but Davis just repeated he would not come to trial and cited health issues. The trial court denied Davis's motion to withdraw as counsel because it would unnecessarily delay trial. The court also declined to appoint standby counsel.

3 The court had already continued the case considerably to allow Davis to hire an investigator and prepare for trial.

*49 ¶ 12 Trial started the next day, and Davis moved for standby counsel and a continuance. The court denied both motions because it had already ruled on them. The case proceeded to trial.

**538 ¶ 13 After a CrR 3.5 hearing, Davis claimed he could not continue with the trial because of excessive pain. Davis again moved for a continuance, and the trial court told him it had already denied the motion. Davis stated he was "unable to continue as [his] own counsel." The court reminded Davis it had denied that motion as well. In an attempt to advise Davis of what was expected at trial, the court warned Davis it would

remove him if he acted disruptively. Davis said that he did not care and that the court could hold trial without him.

¶ 14 Davis appeared for trial on March 7, 2017. In the middle of the afternoon, during the State's examination of Officer Antholt, the court excused Davis for a restroom break. When Davis returned, he noticed the water had been removed from his table. He began banging his fists on the table, screaming he needed water. The court told Davis the water was removed because Davis took restroom breaks every 25 minutes. The court noted that Davis had consumed twice as much water as the day before and that the proceeding would soon adjourn for the day. The court tried to proceed with trial. The State attempted to continue its examination of Officer Antholt, but Davis repeatedly interrupted to make comments about the water. The trial court temporarily retired the jury, and the following exchange took place:

THE COURT: I'm going to take the jury back now.

THE DEFENDANT: Thank you. You can hold your trial without me. How's that?

THE COURT: I'm going to do that.

THE DEFENDANT: Do that. Thank you. Thank you. Thank you. Just go ahead with your kangaroo court and your ridiculous charges, and your little games and that you do that. Load ***50** somebody else up in the prison system. Get your next victim lined up. I'm done with it. I could care less.

THE COURT: All right. Wait a minute. Mr. Davis, you have one more--

THE DEFENDANT: What do you want? I need water. I'm done talking. What's there to talk about? You're playing a game. I'm done playing your games.

THE COURT: All right. The record's going to reflect--

THE DEFENDANT: All right. The record this -- all right, for the record this. I said that, I mean that. I'm not going to continue to be a gentleman and polite. I could care less what you say. I'm done with it.

THE COURT: I'm going to find that you are voluntarily absenting yourself--

THE DEFENDANT: Whatever. Do whatever you want.

THE COURT: --from these proceedings.

THE DEFENDANT: You're going to deny me water when I need water, whatever.

THE COURT: I need him present so I can make the record, so don't take him out yet.

THE DEFENDANT: I don't care about your record.

THE COURT: Well, I do.

THE DEFENDANT: I don't. And I know your buddies up at the appellate court ain't gonna give a shit either, so fuck the record.

THE COURT: So the record should reflect that Mr. Davis has been given twice as much water as he had yesterday and, therefore, he's--

THE DEFENDANT: So what?

THE COURT: Had to use the restroom twice as much.

THE DEFENDANT: I had to use the restroom because I had a digestive dysfunction. I piss a lot. Ask the god damn -- the officers. I piss.

THE COURT: Can you keep your voice down?

THE DEFENDANT: No, I'm not. Freedom of expression. You don't want to listen then shut your ears.

***51** THE COURT: So at about -- ten after 3:00 he was brought back here and I've explained to him that--

THE DEFENDANT: We gonna do this, we gonna play the kangaroo game. I don't care, either. You can keep playing, play with yourself. Stop playing with me. Who cares?

THE COURT: This is not about the--

****539** THE DEFENDANT: I don't care.

THE COURT: This is about you disrupting the trial, delaying the trial.

THE DEFENDANT: Doesn't matter what it's about. What it's really about, nothing.

THE COURT: Screaming at the top of his lungs, the jury--

THE DEFENDANT: And I'm going to continue to scream. Where's my fucking water?

(Defendant screaming simultaneously with court)

> THE COURT: I need to proceed with the trial, and I am finding that he is voluntarily absenting himself from the rest of these proceedings under State v. Garza[, 150 Wn.2d 360, 77 P.3d 347 (2003)] G-A-R-Z-A, and the record should reflect that he continues to speak on top of his lungs, swearing, accusing me of all kinds of things.
>
> THE DEFENDANT: You're being an asshole, and I can be one, too.
>
> THE COURT: You're now removed from the court.
>
> THE DEFENDANT: Good. And fuck you very much, asshole. Fuck this kangaroo court shit.

¶ 15 At this point, it was after three o'clock in the afternoon. In Davis's absence, the State continued questioning Officer Antholt, who testified as to finding crack cocaine in Davis's pocket. The State then examined Officer Graf, who had identified the stolen Buick, initiated the traffic stop, and arrested Davis. Officer Graf also testified as to Davis's alleged statements about how he had obtained the Buick. The court did not give Davis an opportunity to cross-examine either officer.

¶ 16 Davis returned to court the next morning. The trial court noted Davis's outburst on March 7 amounted to one of ***52** the worst it had seen. The court again warned Davis it would remove him if he raised his voice or used profanity. In its findings, the court indicated Davis's outburst also disrupted trial in the courtroom down the hall. The court noted Davis "did not have any further behavior issues of significance," and he attended the remainder of the trial.

II.

ANALYSIS

A. Standby Counsel

¶ 17 While Davis concedes he lacks a constitutional right to standby counsel, he claims the trial court abused its discretion by categorically denying his requests for such counsel. He mischaracterizes the record. The trial court properly considered Davis's requests for standby counsel.

¶ 18 An appellate court reviews a decision to deny standby counsel for an abuse of discretion. State v. DeWeese, 117 Wash.2d 369, 379, 816 P.2d 1 (1991). A trial court abuses its discretion when its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Garza, 150 Wash.2d 360, 366, 77 P.3d 347 (2003).

¶ 19 Defendants may waive their Sixth Amendment right to assistance of counsel and decide to represent themselves at trial. Romero, 95 Wash. App. at 326, 975 P.2d 564. If a defendant chooses self-representation, he or she does not have a right to standby counsel. DeWeese, 117 Wash.2d at 379, 816 P.2d 1. "The right to self-representation in a criminal matter ... is an all-or-nothing process." Romero, 95 Wash. App. at 326, 975 P.2d 564.

¶ 20 Nevertheless, a defendant may request standby counsel, and the trial court must exercise its discretion in considering the request. See State v. Stearman, 187 Wash. App. 257, 265, 348 P.3d 394 (2015). A court abuses its discretion when it fails to exercise its discretion. State v. Flieger, 91 Wash. App. 236, 242, 955 P.2d 872 (1998).

***53** ¶ 21 Davis contends that because two judges told him obtaining standby counsel was unlikely, no judge meaningfully considered his requests for standby counsel. The record does not support this argument.

¶ 22 The court heard Davis's motions for standby counsel in at least six separate hearings before five different judges. Initially, the trial court engaged in a colloquy with Davis ****540** to ensure he made a knowing and voluntary waiver of his right to counsel. Indeed, Davis does not challenge the validity of his waiver. The court told Davis he could submit a motion for standby counsel but warned it would not likely grant it.

¶ 23 At the next hearing, Davis presented his reasons for requesting standby counsel. He referenced issues such as lack of access to office equipment and unfamiliarity with legal processes. The trial court explained at some length its view as to why Washington courts disfavor standby counsel. The court also told Davis that though he could request standby counsel, such requests were rarely granted. The record shows the court considered his motion and denied it because, in its view, the appointment of standby counsel could give rise to ethical and practical concerns, and Davis failed to demonstrate his need for standby counsel overcame these concerns.

¶ 24 Davis moved for standby counsel several more times. Each time, the trial court allowed him to be heard. The court

also explained to Davis the reasons it denied his requests. The court afforded Davis opportunities to argue whether his circumstances had changed since the court denied his original motion. Concluding Davis's responses did not justify granting standby counsel, the court denied his motions.

¶ 25 The court considered each of Davis's numerous requests for standby counsel. Nothing in the record suggests the court believed it did not need to exercise its discretion. The record also does not suggest the court refused to exercise its discretion in denying the motions. The trial ***54** court adequately considered Davis's requests for standby counsel.

B. Voluntary Absence

¶ 26 Davis asserts the trial court removed him from trial for disruptive behavior. The State counters Davis voluntarily absented himself. We agree with Davis.

¶ 27 Appellate courts review a trial court's finding of voluntary absence for an abuse of discretion. Garza, 150 Wash.2d at 365-66, 77 P.3d 347.

¶ 28 The Sixth Amendment grants defendants the right to be present at their trial. State v. Thomson, 123 Wash.2d 877, 880, 872 P.2d 1097 (1994). However, a defendant may voluntarily absent himself or herself and thereby waive the right to be present. Thomson, 123 Wash.2d at 881, 872 P.2d 1097. Notably, the court should "indulge[ ] every reasonable presumption against waiver." Garza, 150 Wash.2d at 367, 77 P.3d 347.

¶ 29 The State argues Davis's statement "You can hold your trial without me" indicates he voluntarily absented himself. Washington case law has not yet addressed whether and how a defendant may voluntary absent himself or herself by requesting to leave the courtroom. Our voluntary absence cases consider only scenarios in which the defendant either does not appear for court or does not return after removal.

¶ 30 Under Washington law, "the court only need answer one question: whether the defendant's absence is voluntary." Thomson, 123 Wash.2d at 881, 872 P.2d 1097. When deciding whether a defendant's absence qualifies as voluntary, courts consider the totality of the circumstances. Thomson, 123 Wash.2d at 881, 872 P.2d 1097. Specifically, appellate courts look to whether the trial court "(1) [made] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) [made] a preliminary finding of voluntariness, when justified, and (3) [gave] the defendant an adequate opportunity to explain his absence ***55** when he is returned to custody." Garza, 150 Wash.2d at 367, 77 P.3d 347. These factors are most applicable to situations where a defendant does not appear for court or does not return to court after a removal. As such, they are not readily applicable to the facts in this case. In particular, the first and third factors assume the defendant failed to appear without first explaining his or her absence to the court.

¶ 31 Given the lack of Washington case law on the question, we turn to decisions from other jurisdictions for guidance. The facts here resemble those of State v. Menefee, an Oregon case. In State v. Menefee, a self-represented ****541** defendant made improper arguments during his opening statement and refused to confine the scope of his presentation. 268 Or. App. 154, 160-64, 341 P.3d 229 (2014). When the defendant began arguing with the court, it warned the defendant it would remove him if he did not behave properly. Menefee, 268 Or. App. at 163-68, 341 P.3d 229. When the defendant continued his unruly behavior, the court stated the defendant intentionally undermined the trial and concluded this constituted a voluntary absence. Menefee, 268 Or. App. at 166-68, 341 P.3d 229. Though the trial court characterized the defendant's departure as a voluntary absence, the Oregon appellate court concluded the record showed the trial court removed the defendant for misconduct. Menefee, 268 Or. App. at 182, 341 P.3d 229.

¶ 32 Similarly, here, the trial court found Davis intentionally undermined the trial, and stated he voluntarily absented himself and "was removed from the courtroom due to his behavior."[4] Although Davis made the statement "You can hold your trial without me," he made it in an irate state, claiming he needed water for medical reasons. As mentioned above, Washington law requires the court to indulge every reasonable presumption against waiver, which must be knowing and voluntary to be effective. ***56** Neither his statements nor his misconduct amounted to his voluntarily absenting himself. Thus, his absence from trial is more properly categorized as one due to removal rather than waiver. We next examine whether the court abused its discretion in removing Davis.

4 The trial court did so in its May 26, 2017 Findings of Fact and Conclusions of Law Regarding Defendant Voluntarily Absenting Himself from Trial Due to His Disruptive Behavior.

C. Removal

¶ 33 Davis contends the trial court erred by removing him from the courtroom without first considering less severe alternatives. The State argues the trial court was not required to do so. We agree with the State.

¶ 34 Trial judges facing disruptive defendants must be given sufficient discretion to maintain order in their court. DeWeese, 117 Wash.2d at 380, 816 P.2d 1. An appellate court reviews a trial court's decision to remove a defendant for an abuse of discretion. DeWeese, 117 Wash.2d at 380, 816 P.2d 1. A trial court abuses its discretion when its " 'decision is manifestly unreasonable, or is exercised on untenable reasons, or for untenable grounds, or for untenable reasons Garza, 150 Wash.2d at 366, 77 P.3d 347.

¶ 35 The Washington Supreme Court listed several guidelines to aid courts in deciding whether to remove a defendant. State v. Chapple, 145 Wash.2d 310, 320, 36 P.3d 1025 (2001). First, a trial court should warn the defendant that continued disruptions could lead to removal. Chapple, 145 Wn.2d at 320, 36 P.3d 1025. Second, the defendant's obstreperous behavior must be severe enough to justify removal. Chapple, 145 Wash.2d at 320, 36 P.3d 1025. Third, the Court stated a *preference* for the least severe alternative that will prevent interferences with the trial. Chapple, 145 Wash.2d at 320, 36 P.3d 1025. Finally, if the defendant assures the court his or her conduct will improve, he or she must be allowed to reclaim the right to be present. Chapple, 145 Wash.2d at 320, 36 P.3d 1025. These instructions "are not meant to be constraints on trial court discretion, but rather to be relative to the exercise of that discretion such that the defendant will be afforded a fair trial while maintaining the safety and decorum of the proceedings." Chapple, 145 Wash.2d at 320, 36 P.3d 1025.

***57** ¶ 36 Davis bases his challenge on only the third factor and argues the court erred in completely removing him from trial without considering less severe alternatives. Davis says that because the record does not show he behaved severely enough to warrant complete removal, the court should have instead allowed him to watch the proceedings from a video monitor in another room, allowed him to return to the trial sooner than the following day, or provided him with transcripts of the proceedings for his closing argument.

¶ 37 Here, the trial court warned Davis he risked removal if he continued to interrupt the proceedings. Nevertheless, Davis continued to act disruptively and disregard court ****542** orders. The court tolerated much of Davis's inappropriate behavior and finally removed him following an outburst in which Davis repeatedly screamed, banged on the table, and used profanity in the courtroom. Davis yelled so loudly that proceedings in the courtroom across the hall recessed. Such conduct warrants removal from the courtroom.

¶ 38 When considering the least severe alternative, the trial court can best assess both the technological limitations of its courthouse and the defendant's impending threat to disrupt the proceedings. Chapple, 145 Wash.2d at 324, 36 P.3d 1025. Here, the record does not show the court considered having Davis attend trial in some other way, such as through video monitoring. But this is not mandated. Because there exists only a preference, as opposed to a requirement, for trial courts to use the least severe means, nothing in the record shows the trial court did not act within its discretion when removing Davis from the courtroom.

D. Right to Representation

¶ 39 Davis maintains, even if the trial court properly removed him, it violated his Sixth Amendment right to representation by allowing the State to examine two of its witnesses in his absence and not affording him an opportunity ***58** to cross-examine the witnesses. Relying on DeWeese, the State contends Davis had waived his right to counsel and the court had no obligation to reappoint counsel or obtain a waiver from Davis of his right to representation. [5] Washington cases have not yet addressed the propriety of going forward with trial after a court properly removes a self-represented defendant for disruptive behavior. After a review of cases from other jurisdictions, we conclude that in this case, proceeding with trial in Davis's absence violated his Sixth Amendment right to representation.

5 The State points to DeWeese to argue the trial court did not need to obtain a waiver of the right to representation or appoint counsel after it removed the defendant. However, DeWeese does not apply on this issue, as it involved very different facts. In DeWeese, the defendant watched the State's examination of a witness from a television monitor in another room after the court removed him for violating its rulings. 117 Wash.2d at 373, 816 P.2d 1. The court then invited the defendant to return to cross-examine the witness, but the defendant declined. DeWeese, 117 Wash.2d at 374, 816 P.2d 1. The court warned the defendant of the consequences of absenting himself from court, but the defendant continued to refuse to participate and asked to return to jail. DeWeese, 117 Wash.2d at 374, 816 P.2d 1. The

trial court allowed the State to present the remainder of its case in the defendant's absence and proceeded to closing arguments after the defendant chose not to return. DeWeese, 117 Wash.2d at 374, 816 P.2d 1. Because the defendant voluntarily absented himself, the Supreme Court upheld the trial court's decision not to appoint counsel for the defendant during his absence. DeWeese, 117 Wash.2d at 379, 816 P.2d 1.

¶ 40 Appellate courts review de novo whether a trial court violated a defendant's right to representation. State v. Jones, 168 Wash.2d 713, 719, 230 P.3d 576 (2010). Several state appellate courts and the Ninth Circuit have addressed legal questions similar to the one before us.

¶ 41 In People v. Carroll, the defendant chose to represent himself but later requested an attorney. 140 Cal.App.3d 135, 137-38, 189 Cal.Rptr. 327 (Ct. App. 1983). The court declined to appoint counsel and then removed the defendant several times during the trial for mentioning his lack of representation in front of the jury. Carroll, 140 Cal.App.3d at 138-39, 189 Cal.Rptr. 327. Specifically, the court removed the defendant during portions of jury selection, his opening statement, and the testimony of three witnesses. Carroll, 140 Cal.App.3d at 139, 189 Cal.Rptr. 327. For two of the witnesses, the court gave the defendant ***59** an opportunity to cross-examine, but he declined. Carroll, 140 Cal.App.3d at 139, 189 Cal.Rptr. 327.

¶ 42 The California Court of Appeal held the court violated the defendant's Sixth Amendment right when it "deprived him not only of his own presence, but of legal representation." Carroll, 140 Cal.App.3d at 140, 189 Cal.Rptr. 327. As an alternative to removal, the court noted the trial court could have appointed counsel, instituted contempt proceedings, or restrained the defendant. Carroll, 140 Cal.App.3d at 141, 189 Cal.Rptr. 327. The California Court of Appeal has since reaffirmed Carroll's holding. See People v. Ramos, 5 Cal.App.5th 897, 907 n.5, 210 Cal.Rptr.3d 242 (Ct. App. 2016) (holding when a ****543** trial court removes a self-represented defendant, the defendant is necessarily deprived of the Sixth Amendment right to representation during the absence); People v. Soukomlane, 162 Cal.App.4th 214, 75 Cal.Rptr.3d 496 (Ct. App. 2008) (noting the court's removal of a defendant during the direct examination of a state's witness violated the Sixth Amendment right to counsel). Other courts have come to the same conclusion. See People v. Cohn, 160 P.3d 336, 343 (Colo. App. 2007) (determining the court violated the pro se defendant's right to counsel when it removed him during segments of his trial).

¶ 43 The Ninth Circuit addressed a similar issue in United States v. Mack, where the trial court warned a disruptive defendant it would remove him and not permit him to question witnesses if he continued his behavior. 362 F.3d 597, 599 (9th Cir. 2004). After the defendant's inappropriate behavior continued, the court removed the defendant during his case. Mack, 362 F.3d at 599. Once the defendant returned, the court did not allow him to continue to put on his defense. Mack, 362 F.3d at 601. Instead, it halted the questioning of any witnesses and did not allow closing argument by either side. Mack, 362 F.3d at 599. "In practical effect, [the defendant] had been removed as his own counsel and nobody stepped in to fill the gap." Mack, 362 F.3d at 601.

***60** ¶ 44 The Mack court acknowledged a trial court may properly remove a disruptive defendant. Mack, 362 F.3d at 600. The court held, however, that while a self-represented defendant's disorderly conduct may forfeit his or her right to represent themselves and the right to be present, he or she does not forfeit the right to representation. Mack, 362 F.3d at 601. [6] Though a court may remove a defendant for disrupting trial, "leaving [a defendant] without representation is still far from appropriate." Mack, 362 F.3d at 601. The court stated a trial court commits structural error when it prevents a self-represented defendant from cross-examining witnesses, even if the defendant was contemptuous of the court. Mack, 362 F.3d at 601-603.

6 We note proceeding with trial in Davis's absence would not have been error if he had voluntarily absented himself. See DeWeese, 117 Wash.2d at 379, 816 P.2d 1. Though DeWeese does not address the effect of a voluntary absence on the right to representation, the issue was recently before the Rhode Island Supreme Court. In State v. Eddy, a defendant dismissed his attorney and chose to represent himself. 68 A.3d 1089, 1092 (R.I. 2013). After the defendant then dismissed two more attorneys whom the court appointed as standby counsel, the court denied the defendant's request for appointed counsel on the morning of trial. Eddy, 68 A.3d at 1092-96. In response, the defendant told the court, "I don't want to be in the courtroom so the trial may proceed in my absence.... I ask I be allowed to be removed from the courtroom during this process because I don't want to cause a situation of a forced removal." Eddy, 68 A.3d at 1096. The court explained to the defendant he had a Sixth Amendment right to be present and, if he waived that right, he would not be represented by counsel and would also be waiving his right to cross-examination. Eddy, 68 A.3d at 1097. The court allowed the defendant

to leave after he stated he understood the consequences and still did not want to attend. Eddy, 68 A.3d at 1096-97. The Rhode Island Supreme Court agreed the defendant knowingly and voluntarily waived both his right to be present and right to representation, because he insisted on leaving trial after the trial court explained all the rights he would be abandoning. Eddy, 68 A.3d at 1103-04.

¶ 45 In Menefee, the Oregon Court of Appeals followed Mack. 268 Or. App. at 183, 341 P.3d 229. As discussed above, the trial court in Menefee characterized the removal of the defendant as a voluntary absence because it found the defendant intentionally acted disruptively to undermine the trial. See Menefee, 268 Or. App. at 168, 341 P.3d 229. In the defendant's absence, the State examined two witnesses. Menefee, 268 Or. App. at 169, 341 P.3d 229. The Oregon court reversed the defendant's conviction, concluding the trial court violated the Sixth Amendment by ***61** failing to appoint counsel or have the defendant waive his right to representation before continuing without him. Menefee, 268 Or. App. at 185, 341 P.3d 229.

¶ 46 Shortly after Menefee, the Oregon Court of Appeals reaffirmed its holding that removing a self-represented defendant from a courtroom without first appointing an attorney violates the right to representation. See State v. Lacey, 282 Or. App. 123, 127, 385 P.3d 1151 (2016). There, the trial court warned the defendant that, if he disrupted ****544** the trial, it would proceed in his absence. Lacey, 282 Or. App. at 125, 385 P.3d 1151. The appellate court rejected the argument that disruptive conduct, in light of such a warning, led to a proper waiver of the right to representation. Lacey, 282 Or. App. at 130, 385 P.3d 1151. It held instead that, to find a valid waiver, the court should have informed the defendant of his ongoing right to representation, even if removed for misconduct. Lacey, 282 Or. App. at 130, 385 P.3d 1151. Additionally, it ruled the trial court should have advised the defendant he could have an attorney appointed to represent him during his absence. Lacey, 282 Or. App. at 130, 385 P.3d 1151. The court stated that, if the trial court cannot obtain a valid waiver, "the court may have to appoint counsel for a defendant who previously elected to proceed pro se, notwithstanding the awkwardness of doing so mid-trial." Lacey, 282 Or. App. at 126-27, 385 P.3d 1151. The court explained its approach as one to protect the structural integrity of the criminal justice system. Lacey, 282 Or. App. at 126, 385 P.3d 1151. "Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who ... work the hardest to undermine it." Lacey, 282 Or. App. at 126, 385 P.3d 1151.

¶ 47 Earlier this year, the Superior Court of Pennsylvania concluded a defendant cannot forfeit his right to representation through misconduct. Commonwealth v. Tejada, 2018 PA Super 145, 188 A.3d 1288, 1290-92 (2018). In Tejada, the trial court removed a self-represented defendant from trial ***62** after he acted disruptively during jury selection. Tejada, 188 A.3d at 1291. Following the line of cases from California, the Ninth Circuit, and Oregon, the appellate court held "[T]he issue of removal is distinct from the right of representation by counsel, and the related right of self-representation." Tejada, 188 A.3d at 1293. Concluding the defendant did not waive his right to representation, the court reversed the conviction and remanded for a new trial. Tejada, 188 A.3d at 1300.

¶ 48 In this case, Davis chose to represent himself and then behaved obstreperously throughout the court proceedings. The court finally removed him and allowed the State to examine Officers Antholt and Graf before recessing for the day.[7] Davis went unrepresented during these testimonies and was not given the opportunity to cross-examine the two officers. He did not knowingly and voluntarily waive his right to representation and agree to have an empty defense table while the State questioned two critical witnesses. This remains the case despite his decision to represent himself. As reflected above, cases from other jurisdictions support this conclusion. We are unaware of authority supporting a contrary result.

7 We are mindful of the difficult situation posed by Davis's conduct, especially where there was no directly applicable Washington case law. We note that trial courts can explore a number of alternatives in such situations, including the following: engaging in a colloquy regarding the right to representation, as the court did in Eddy, to see whether there is a waiver of the right to representation; recessing, to give the defendant time to calm down (suggested in Menefee, 268 Or. App. at 185-86, 341 P.3d 229); having the defendant attend trial via video conference or providing the defendant with a recording or transcript of the missed testimony and allowing the defendant the opportunity to cross-examine the witnesses (proposed in Lacey, 282 Or. App. at 137, 385 P.3d 1151 (citing Cohn, 160 P.3d at 343)); restraining defendant in the courtroom (allowed under Chapple, 145 Wash.2d 310 at 315, 36 P.3d 1025); or

appointing the defendant counsel (advanced in Carroll, 140 Cal.App.3d at 141, 189 Cal.Rptr. 327).

¶ 49 Accordingly, we conclude leaving Davis without representation at trial violated his Sixth Amendment right to representation. Because this error is structural, we remand for a new trial on counts 2 and 3. See Mack, 362 F.3d at 601-603; ***63** State v. Wise, 176 Wash.2d 1, 14, 288 P.3d 1113 (2012) ("Structural error ... is not subject to harmlessness analysis."). [8]

8 Because we find the trial court committed only a single error, we reject Davis's cumulative error argument.

¶ 50 Davis missed the testimony of Officers Antholt and Graf, who arrested and searched Davis in relation to his February 11, 2014 arrest for possessing a stolen Buick vehicle ****545** and crack cocaine (counts 2 and 3). These officers, however, did not participate in Davis's January 23, 2014 arrest for possessing a stolen Hyundai vehicle (count 1). Since Davis was absent only for testimony pertaining to counts 2 and 3, we see no error and affirm as to count 1.

¶ 51 We affirm in part, reverse in part, and remand for a new trial.

Mann, A.C.J., and Verellen, J., concur.

Opinion

Reconsideration denied November 20, 2018.

Review granted at 192 Wn.2d 1023 (2019).

All Citations

6 Wash.App.2d 43, 429 P.3d 534

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APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH ADAIR DAVIS, Defendant.	No. 14-1-00794-5 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEFENDANT VOLUNTARILY ABSENTING HIMSELF FROM TRIAL DUE TO HIS DISRUPTIVE BEHAVIOR

A jury trial was held before Honorable Judge Julie Spector on February 28, 2017 through March 9, 2017. On March 7, 2017, the defendant was removed from the courtroom due to his behavior and the trial proceeded despite his absence. The Court made the following findings of fact and conclusions of law:

1. At the outset of the trial, the defendant had requested to have frequent bathroom breaks due to his medical condition. The Court informed him that he would be able to take necessary bathroom breaks as needed. The defendant was also provided with a full water pitcher and paper cups.
2. As the trial commenced, the defendant would frequently announce his need to use the bathroom. This would typically occur every hour. At that time, the defendant appeared to be drinking a normal amount of water.

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3. On March 7, 2017, the defendant increased his water intake dramatically. He consumed multiple pitchers of water during the morning session. The defendant would then frequently announce his urgent need to use the bathroom. This started to occur every 20 minutes instead of every hour. This would also occur at critical parts during witnesses' testimony.
4. When the afternoon session began on March 7, 2017, the defendant asked for more water. The prosecutor provided him with the additional pitcher of water that was on the prosecutor's side of the table. Shortly thereafter, the defendant again loudly announced his urgent need to use the restroom. The jury was brought back into the jury room and the jail officers took the defendant to the restroom.
5. When the defendant returned, the Court informed the defendant that he would not be provided any more water, as he had already had a substantial amount and there was only one witness remaining for the day.
6. Further, the Court informed the defendant that taking restroom breaks every 20 minutes was causing a substantial delay to the trial and that because there was only one witness remaining, trial would be done for the day very soon and the defendant would be able to return to the jail and have all the water he would like.
7. The defendant began an explosive tirade of expletives, pounding on the table with his fists, and yelling at an extremely loud volume. While yelling at top volume, the defendant accused the Court of violating the 8th Amendment and that he needed water due to his medical condition. He also repeatedly used curse words and at one point screamed, "F**k you, Spector!" to the Court.

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8. The Court warned him that if he was going to continue to raise his voice and curse at the Court, then he would be removed from the courtroom.

9. The defendant continued to interrupt the Court, yell at the top of his lungs, curse, and pound the table. The volume was such that the Court was unable to speak over him. The volume was also so loud that the jury undoubtedly heard the defendant's tirade. Further, the courtroom across the hall (which was in session in a murder trial) was forced to recess because the parties were unable to hear their own witness due to the defendant's volume.

10. The Court then ordered the jail officers to remove him from the courtroom. The officers did so. The defendant continued to yell at top volume as the officers escorted him out of the courtroom and down the hallway.

11. The Court ordered the trial to continue in his absence finding that he had voluntarily absented himself. The prosecutor finished up the witness's testimony and the Court recessed for the afternoon.

12. The defendant was brought down for trial the next morning and the Court warned him about his behavior. The Court informed him that if he continued to behave that way, he would again be removed from the courtroom and trial would proceed in his absence.

13. The Court found that the defendant deliberately doubled his water intake. The Court pointed out that his bathroom urgency increased from every hour to every 20 minutes. The Court pointed out that in the beginning days of the trial, the defendant did not drink nearly as much water and did not have nearly as many bathroom breaks.

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14. The Court also found that when the defendant would announce he needed a bathroom break, this interruption would always occur either during a critical part of a witness's testimony or when it was his time to cross examine a witness.

15. The Court found that the defendant intentionally did this to delay the proceedings and that this was a tactical decision by the defendant. The Court found that the defendant had done everything he could to delay the trial.

16. The Court also pointed out that the defendant's behavior was one of the worst exchanges the Court had seen. The Court again warned him that he had one more opportunity to participate in his own trial and there would be no more disruptions. The defendant stated he understood and did not have any further behavior issues of significance. Trial was able to proceed in the defendant's presence.

In addition to the above written findings and conclusions, the Court incorporates by reference its oral findings and conclusions regarding all materials herein.

Signed this 26 day of May 2017.

JUDGE

Presented by:

Rhyan C. Anderson, WSBA# 46974
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