IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
NATHANIEL MICHAEL WILLIAMS, JR.,
Defendant-Appellant.

Multnomah County Circuit Court
14CR26865; A158853

Gregory F. Silver, Judge.

Submitted September 6, 2016.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Matthew Blythe, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jeff J. Payne, Assistant Attorney General, filed the brief for respondent.

Before DeHoog, Presiding Judge, and Egan, Judge, and Aoyagi, Judge.

DEHOOG, P. J.

Reversed and remanded.

DEHOOG, P. J.

Defendant appeals his judgment of conviction for second-degree criminal trespass, ORS 164.245, and interfering with a peace officer, ORS 162.247, contending that the trial court erred in denying his request to represent himself at trial. Following a full day of trial in which defendant was represented by court-appointed counsel, defendant sought to discharge his attorney and proceed *pro se*. The court denied defendant's request, and a jury convicted defendant the next day. In defendant's view, the trial court's ruling erroneously denied him his right to self-representation under Article I, section 11, of the Oregon Constitution.[1] The state responds that the trial court was permitted to deny defendant's request, because "evidence of defendant's interruptive and argumentative behavior before and during trial supports the court's implicit conclusion that defendant's self-representation would disrupt the proceedings." We conclude that the trial court erroneously deprived defendant of his right to represent himself. Accordingly, we reverse and remand.

We begin with the applicable law. Article I, section 11, guarantees criminal defendants both the right to counsel and the right to self-representation. *State v. Hightower*, 361 Or 412, 416, 393 P3d 224 (2017). A defendant is not entitled to exercise both rights concurrently. *See State v. Stevens*, 311 Or 119, 124-25, 806 P2d 92 (1991) (Article I, section 11, does not guarantee the right to "hybrid" representation.). A defendant may, however, seek midtrial to waive his or her previously invoked right to counsel and proceed without representation for the remainder of the trial. *Hightower*, 361 Or at 418. At that stage, the right to self-representation is qualified, and the denial of a defendant's midtrial request to proceed *pro se* is appropriate if either of two circumstances is present. First, a trial court *must* deny the request if the defendant's attempt to waive counsel is not knowing and voluntary. *State v. Meyrick*, 313 Or 125, 133, 831 P2d 666 (1992). Second, the court *may* deny such a request if it determines that the defendant's right to self-representation is outweighed by the court's

[1] Article I, section 11, states, in part, that the accused in a criminal prosecution has the right "to be heard by himself and counsel."

"overriding obligation to ensure the fairness and integrity of the trial and its inherent authority to conduct proceedings in an orderly and expeditious manner." *Hightower*, 361 Or at 417-18 (citing ORS 1.010(3)). "For example, a trial court may exercise its discretion to deny a motion for self-representation that is conditioned on the grant of a continuance. Or it may reasonably deny the motion if it has reason to conclude that granting that motion would result in disruption of proceedings." *Id.* at 418.

We review for abuse of discretion a denial of self-representation based on considerations of disruption or delay, *Hightower*, 361 Or at 418, but review any underlying legal conclusions, such as the scope of the right to self-representation, for errors of law, *id.* at 421. On review for abuse of discretion, the record must indicate that "the trial court actually weighed the relevant competing interests involved," *i.e.*, the right to self-representation and the need for an orderly and expeditious trial. *Id.* A court's findings and reasoning need not be express, "so long as the record reveals the reasons for the trial court's actions." However, it is "not sufficient that an appellate court may be able to speculate about what *might* have been the trial court's rationale for its decision." *Id.* (emphasis in original); *see* *State v. Guzek*, 358 Or 251, 269, 363 P3d 480 (2015), *cert den*, ___ US ___, 137 S Ct 1070 (2017) (describing a "functional" standard for determining whether a court's findings and reasoning are sufficiently clear in the record to support the exercise of discretion).

Here, defendant moved to represent himself at the end of the first day of trial, stating that he was dissatisfied with his attorney's preparation for trial and cross-examination of witnesses. Although defendant indicated that he would prefer to have his counsel act as a legal advisor, he explained that, if having an attorney would prevent him from personally questioning witnesses, then he was "going to have to go *pro se*." Defendant assured the court that he had no objection with trial continuing the next day as scheduled.

The trial court denied defendant's motion and cited a number of concerns during an informal colloquy with

defendant. The court observed that defense counsel was providing "excellent representation" and that it would not have been possible for counsel to have accomplished what defendant wished had happened during cross-examination. The court opined that defendant would be "at a severe disadvantage in terms of the outcome of the trial" if he were to dismiss his attorney. The court also stated that defendant's decision, including any request for a legal advisor instead of an attorney, "should have been done long ago."

After defendant argued that he had a constitutional right to represent himself, the court responded:

> "It's your constitutional right to have an attorney represent you in a criminal matter. Whether or not you get to represent yourself is a decision that is made by the Judge. Let me say that based upon what I have observed so far, *** I don't believe that you could adequately represent yourself. *** Because even though we haven't gone though the complete colloquy, you and I, you know, I've been observing you and *** the way that you have been interacting both with your attorney and with me[.]"

As the final word on the matter, the court stated:

> "I do not believe that you are able to represent yourself, and based upon the colloquy that we've had, based upon what I have observed as well as what has been said[,] I can find no reason to remove *** your attorney based on the decisions that I've seen her make, and I don't know what decisions she hasn't made, but based upon what I've seen in terms of her actions in this trial, I have not seen any reason that she cannot continue to far more than adequately represent you, so I am not going to accept your waiver of your right to counsel, and you're going to proceed with [your attorney] through the trial."

On appeal, defendant argues that the court lacked a valid reason to deny his request to represent himself. That is, defendant argues that the trial court did not find, and could not have found based on the record, that defendant's attempt to waive his right to counsel was not knowing and voluntary or that the potential for disruption outweighed defendant's interest in representing himself. In response, the state does not contend that the court could have found that defendant's attempt to waive counsel was not knowing

and voluntary. The state argues, however, that the court did not abuse its discretion in denying defendant's request because it implicitly determined that what the state characterizes as his "interruptive and argumentative behavior before and during trial" would disrupt the orderly progress of trial. To support that implicit finding, the state notes that, before trial, defendant spoke up repeatedly during a motion hearing. At the hearing, the court mildly admonished defendant twice, once for interrupting the prosecutor and once for speaking to his attorney while the court was ruling on the motion; defendant apologized both times. The state also points out a somewhat more contentious exchange that took place following jury selection, in which defendant objected to the racial composition of the jury and told the court that he disagreed with his attorney's intended trial strategy. As the court discussed defendant's concerns with him, he spoke over the court several times, leading the court to again admonish defendant about interrupting:

> "THE COURT: Sir, this is not a discussion, okay? I let you make—
>
> "THE DEFENDANT: But you ruled against it, sir. You said it was up—
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> "*****
>
> "THE COURT: Sir, will you let me speak? When I'm speaking, sir, you don't.
>
> "THE DEFENDANT: I'm just saying you forced—it was—
>
> "THE COURT: You're saying much more already than most defendants will say who are represented in a trial (inaudible) to the Judge so I'm letting you have your say ***.
>
> "THE DEFENDANT: She said she—
>
> "THE COURT: So that—Sir, I said don't speak while I'm speaking.
>
> "THE DEFENDANT: I know, but you—
>
> "THE COURT: Which part of that don't you understand?
>
> "THE DEFENDANT: I understand, sir, but you're basically saying—

> "THE COURT: Then don't say anything. If you understand, then act like it and don't say anything. I am making a record at this point. You don't get to jump in. You had your chance to make the record. I am just putting on the record what I heard and saw and observed, and your attorney is going to get the chance in just a minute."

Defendant interrupted the court once more after that exchange but immediately apologized without prompting. As a final example of defendant's "disruptive" behavior, the state notes that he personally objected on hearsay grounds to a question asked by the prosecutor. Defense counsel immediately acknowledged that defendant's objection was not well taken, and the court directed defendant to raise any further concerns through his attorney.

It is not necessary for us to decide whether the exchanges highlighted by the state would have warranted denying defendant's request,[2] because, notwithstanding those occurrences, nothing in the record indicates that the court "actually weighed the relevant competing interests involved." *Hightower*, 361 Or at 421. That is, in refusing defendant's request to represent himself, the trial court never mentioned the earlier conduct that the state points to or other potential sources of disruption or delay; notably, defendant made it clear to the court that his request would not result in delay. *Cf.* *State v. Fredinburg*, 257 Or App 473, 484, 308 P3d 208, *rev den*, 354 Or 490 (2013) (concluding that the trial court implicitly found that the defendant's request to represent himself would delay the progress of trial, where request was made during a hearing on a motion for continuance). Moreover, the court's comments to defendant do not reflect an awareness that it was required to balance any such concerns against defendant's right to self-representation. Indeed, the court's statement that, unlike the right to counsel, the question of self-representation "is a

[2] *Compare* *State v. Kinney*, 264 Or App 612, 618-19, 333 P3d 1129, *rev den*, 356 Or 517 (2014), *cert den*, ___ US ___, 135 S Ct 1856 (2015) (not abuse of discretion to deny pretrial motion to proceed *pro se* where the defendant disrupted proceedings to such a degree that the court warned that if the defendant did not stop, he could not be present in courtroom during trial), *with State v. Verna*, 9 Or App 620, 627 & n 4, 498 P2d 793 (1972) (error to deny pretrial motion to proceed *pro se* despite the defendant's insistence that he did not know or care about the rules of evidence and would pursue a legally irrelevant defense).

decision that is made by the Judge" suggests that the court may not have understood that the right to self-representation is constitutionally protected. In any event, the record does not demonstrate, expressly or implicitly, that the trial court engaged in the required balancing of defendant's right to self-representation against the need for an orderly and expeditious trial. *See Hightower*, 361 Or at 421 (requiring that balancing). Accordingly, there is no basis on which to conclude that the court's ruling was a proper exercise of its discretion.[3]

Reversed and remanded.

[3] As noted, the state does not contend that the trial court properly denied defendant's request on the ground that his attempted waiver of counsel was not knowing and voluntary. Moreover, to the extent that the court's focus on defense counsel's performance, together with its view that defendant could not "adequately" represent himself or would not be "able" to do so, suggests a decision on that basis, the state's apparent concession would seem to be well taken. *See State v. Miller*, 254 Or App 514, 524, 295 P3d 158 (2013) (error to deny right to self-representation based on the defendant's "best interest"); *State v. Ormsby*, 237 Or App 26, 29, 238 P3d 421 (2010) (agreeing with the state's concession that "the trial court's finding that defendant lacked the knowledge and skill to take his case to trial was not sufficient to deny defendant his constitutional right to represent himself"). For those reasons, we do not consider whether the trial court lawfully could have denied defendant's request to represent himself on that alternative basis.