No. 89988-6

(Court of Appeals No. 30961-4)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

MICHELLE LEE BLAIR, Appellant

Appeal from the Superior Court of Spokane County

Appellant's Motion for Discretionary Review

Michelle Lee Blair
Pro-Se - Appellant
9601 Bujacich Road NW
Gig Harbor, WA 98332

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re: Appeal of	)	NO: 30961-4-III
	)	
	)	
	)	MOTION FOR DISCRETIONARY
Michelle Lee Blair, Appellant	)	REVIEW
	)	

I. IDENTITY OF MOVING PARTY

Michelle Lee Blair, Appellant, seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Grant discretionary review of the order denying Michelle Lee Blair's Appeal. The order was filed December 3, 2013, and is attached as Appendix A.

III. FACTS

The Court of Appeals described the facts as follows:

Ms. Blair and two others were charged with the noted offenses following an alleged home invasion on the attack on an acquaintance. The prosecution ultimately alleged that Ms. Blair and co-defendant Andrew Williamson were armed with deadly weapons-a knife and a baseball bat-during the incident.

After jury selection and pretrial motions, Ms. Blair asked to have new counsel appointed. She claimed that her counsel had lied to her about a plea agreement. Counsel explained that his client had given a "free talk" about homicide case, but her information had not been usable and the prosecutor would not offer here a plea deal. He agreed with his client that they did not communicate well and joined her request because he could understand how she had lost faith in him. He was, however, ready for trial. The trial court denied the motion.

Trial testimony established that Mr. Williamson and Ms. Blair robbed the victim in his house. Ms. Blair used a bat to prod the victim in the head and force him across a room. Mr. Williamson threatened to kill him with a large knife. The victim turned over his money and bank cards. When Ms. Blair was arrested, she was in possession of one of those stolen bank cards.

Ms. Blair defended on the theory that she had gone to the victim's house after her car broke down nearby. Mr. Williamson let her in to the house. Later an argument developed when Mr. Williamson demanded money that the victim allegedly owed Ms. Blair. Mr. Williamson used the knife to obtain some money from the victim.

The jury nonetheless convicted Ms. Blair as charged on both counts. By special verdict it found that she was not armed with a deadly weapon, but that her accomplice had been so armed during both offenses. The court imposed a mandatory sentence of life in prison after determining Ms. Blair was a persistent offender. She then timely appealed to this court.

IV. ARGUMENT

A. The trial court erred in denying Ms. Blair's request for New Counsel.

Pursuant to CrR 3.1, "[w]henever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e). "Simple lack of rapport between attorney and client is not a basis for withdrawal of counsel, even where client and attorney agree withdrawal is preferred." *State v. Hegge*, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). "However, a complete breakdown of communication which may lead to an unjust verdict is considered a good and sufficient reason for withdrawal." *Id. at 351*

Further, "[a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *State v. Stenson*, 132 Wn. 2d 668, 734, 940 P.2d 1239 (1997). "Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." *Id.* Denial of a motion to withdraw as counsel is reviewed for an abuse of discretion. Hegge, 53 Wn. App. at 350; *Stenson*, 132 Wn. 2d at 733.

132 Wn. 2d at 734. Ms. Blair understood that the case might still be resolved without proceeding to trial, which according to the State, was incorrect. (RP 17-

23, 25). Mr. Dressler informed the trial court that he had given Ms. Blair inaccurate information regarding a possible resolution of the case. (RP 21, 23). He acknowledged that Ms. Blair had no faith in him. (RP 26).

Ms. Blair informed the trial court she did not feel like she was being represented at all. (RP 18). Mr. Dressler agreed that Ms. Blair had given up on his ability to adequately represent her, and that she would be best represented by someone else. (RP 22). Mr. Dressler told the court he was not ready to represent her, and that the trial would be flawed. (RP 26). While questioning Ms. Blair during the trial regarding the night in question, Mr. Dressler exhibited confusion regarding Ms. Blair's account of the events. (RP 213-214). This clearly demonstrated the complete breakdown in communication between Mr. Dressler and Ms. Blair. Mr. Dressler was not able to effectively question Ms. Blair.

Although Ms. Blair's request for new counsel was made just prior to the start of the trial, Ms. Blair clearly set forth reasons for her lack of confidence in Mr. Dressler. *Cf. State v. Barton,* 28 Wn. App. 690, 695, 626 P.2d 509 (1981) finding that the trial court did not abuse its discretion in denying the defendant's request for new counsel, where the request was made on the day of trial, and the defendant did not give any reasons for lack of confidence in her present counsel. These reasons are heightened by the fact that Ms. Blair was facing a possible life sentence. (CP 3). Given the high stakes, Ms. Blair should not have had to face trial with Mr. Dressler as her counsel.

The trial court abused its discretion in denying Ms. Blair's request for new counsel. Therefore, she is entitled to a new trial.

B. **The trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used in the crimes, a knife or bat.**

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn. 2d 702, 707, 881 P.2d 231 (1994). "[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal." *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985).

"The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged." *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) citing *Ortega-Martinez*, 124 Wn.2d at 707. "The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support "each" of the alternative means presented to the jury." Ortega-Martinez, 124 Wn.2d at 707. "Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means." *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." *Id.* at 410-11.

The trial court instructed the jury that in order to find Ms. Blair guilty of first degree robbery, it had to find, among other elements, "[t]hat in the commission of these acts and in immediate flight therefrom the defendant, or an accomplice, was armed with a deadly weapon.: (CP 93); see also RCW 9A.56.200 (first degree robbery). The trial court instructed the jury that in order to find Ms. Blair guilty of first degree burglary, it had to find, among other elements, "[t]hat in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon[.]" (CP 98); se also RCW 9A.52.020 (first degree burglary). The jury instructions did not specify a deadly weapon, or require jury unanimity regarding which deadly weapon was used. (CP 93, 98).

The State alleged and argued alternative means for the deadly weapon used in the crimes. The amended information specified the deadly weapon Ms. Blair was armed with as a "knife and/or a bat". (CP 20-21). Prior to jury selection, the trial court read these charges to the venire. (RP 29-31). In its closing argument, the State argued that the jury could find that the bat, in addition to the knife, is a deadly weapon for purposes of both charges. (RP 246, 250, 254, 268-269).

Substantial evidence does not support that the bat, as used here, was a deadly weapon. "A deadly weapon means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Thus, there are two categories of deadly weapons:

(1) Deadly weapons per se, namely "any explosive or loaded or unloaded firearm" and (2) deadly weapons in fact, namely "any other weapon, device, instrument, article, or substance...which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm."

Because the deadly weapons alleged here were not firearms, the jury was only instructed with the definition in the second category. (CP 96). If a device falls under the second category, a deadly weapon in fact, it is a question for the trier of fact to determine whether it is deadly weapon. *State v. Taylor*, 97 Wn. App. 123, 126, 982 P.2d 687 (1999).

Whether a device is a deadly weapon in fact "rests on the manner in which it is used, attempted to be used, or threatened to be used." *Martinez*, 171 Wn. 2d at 366 (citing RCW 9A.04.110(6)). In making this determination, the totality of the circumstances must be evaluated, including "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *Id.* at 367 (internal quotation marks omitted) (quoting *State v. Shilling,* 77 Wn. App. 166, 171, 889, P.2d 948 (1995)).

A rational jury could not have found that the bat, as used here, was a deadly weapon. There was no evidence that under the circumstances in which the bat was used, attempted to be used, or threatened to be used, it was "readily capable of causing death or substantial bodily harm." See RCW 9A.04.110(6). Mr. Garza testified that Ms. Blair used a bat to push him across the room, by putting the bat to his forehead. (RP 107-108, 127-128). He testified that there was no bruising to his forehead, and that it was not harmful or done in a malicious

way. (RP 107, 128-129). Mr. Garza saw the tail-end of the bat as it smashed a lamp in his living room, but he was not even in the room at the time. (RP 113).

Mr. Garza did testify that if someone had hit him with the bat, he could have been seriously injured. (RP 139-140). There was, however, no evidence that the bat was used to hit him, and therefore this testimony does not make the bat a deadly weapon in fact. *See Martinez*, 171 Wn.2d at 366 (citing RCW 9A.04.110(6)).

Mr. Borders testified that Ms. Blair was angry, and that as she asked Mr. Garza for her money, she was smacking the barrel of the bat into the palm of her hand. (RP 162-163). Under the totality of the circumstances, this action alone is not enough to make the bat a deadly weapon. Mr. Borders did not testify that Ms. Blair threatened Mr. Garza with the bat, or tired to hit him with it.

Because substantial evidence does not support each alternative means, a knife or a bat, as the deadly weapon used in the crimes, Ms. Blair was deprived of her constitutional right to a unanimous jury verdict. *See Emery*, 161 Wn. App. at 198 (citing *Ortega-Martinez*, 124 Wn. 2d at 707); Kitchen, 110 Wn.2d at 410-11. Thus, trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used in the crimes. This court should order a new trial.

Conclusion

The trial court abused its discretion in denying Ms. Blair's request for new counsel. The evidence would not support finding that a bat was used as a deadly weapon in the commission of the crimes, so the trial court erred in failing to give unanimity jury instruction regarding which deadly weapon was used. For both reasons, Ms. Blair is entitled to a new trial.

By: 

Michelle Lee Blair
Pro-Se Appellant

IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

THE STATE OF WASHINGTON)
COUNTY OF PIERCE) ss.

DECLARATION OF MAILING

I, Michelle Lee Blair, state that on this 13th day of February, 20 14, I deposited in the mail of the United States of America a properly stamped envelope containing a copy of the following described documents:

Motion for Discretionary Review - Appeal

I further state that I sent these copies to the following addresses:

1) State of WA - Supreme Court: 415 12th Ave SW
PO Box 40929, Olympia, WA 98504-0929
2) Spokane County Prosecuting Attorney:
909 W. Mallon, Spokane, WA 99260

Dated: 2/13/14

Michelle Blair
Signature

Michelle Blair 946191
Print Name & DOC
Washington Corrections Center for Women
9601 Bujacich Rd NW
Gig Harbor WA 98332

FILED
DEC 3, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MICHELLE LEE BLAIR, Appellant.	)	No. 30961-4-III UNPUBLISHED OPINION

KORSMO, C.J. — Michelle Blair appeals her first degree robbery and first degree burglary convictions, and resulting persistent offender sentence, on two grounds. We conclude her arguments lack merit and affirm.

FACTS

Ms. Blair and two others were charged with the noted offenses following an alleged home invasion attack on an acquaintance. The prosecution ultimately alleged that Ms. Blair and co-defendant Andrew Williamson were armed with deadly weapons—a knife and a baseball bat—during the incident.

After jury selection and pretrial motions, Ms. Blair asked to have new counsel appointed. She claimed that her counsel had lied to her about a plea agreement. Counsel explained that his client had given a "free talk" about a homicide case, but her

information had not been usable and the prosecutor would not offer her a plea deal. He agreed with his client that they did not communicate well and joined her request because he could understand how she had lost faith in him. He was, however, ready for trial. The trial court denied the motion.

Trial testimony established that Mr. Williamson and Ms. Blair robbed the victim in his house. Ms. Blair used a bat to prod the victim in the head and force him across a room. Mr. Williamson threatened to kill him with a large knife. The victim turned over his money and bank cards. When Ms. Blair was arrested, she was in possession of one of those stolen bank cards.

Ms. Blair defended on the theory that she had gone to the victim's house after her car broke down nearby. Mr. Williamson let her in to the house. Later an argument developed when Mr. Williamson demanded money that the victim allegedly owed Ms. Blair. Mr. Williamson used the knife to obtain some money from the victim.

The jury nonetheless convicted Ms. Blair as charged on both counts. By special verdict it found that she was not armed with a deadly weapon, but that her accomplice had been so armed during both offenses. The court imposed a mandatory sentence of life in prison after determining Ms. Blair was a persistent offender. She then timely appealed to this court.

ANALYSIS

This appeal presents claims that the trial court erred in denying the request to remove counsel and in failing to give a unanimity instruction regarding which deadly weapon was used to commit the crimes. Each claim will be addressed in turn.[1]

Request for New Counsel

Ms. Blair initially argues that the trial court erred in denying her request for new counsel. She contends that her relationship with counsel was broken and that her timely request should have been granted. The trial court did not err.

"Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e). If a criminal defendant is dissatisfied with appointed counsel, the defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *State v. Stenson,* 132 Wn.2d 688, 734, 940 P.2d 1239 (1997) (*Stenson* I). This court reviews a denial of a request for new counsel for abuse of discretion. *Id.* at 733. Typically, discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*,

[1] Ms. Blair also notes that the judgment and sentence erroneously indicates that she was convicted by guilty plea rather than by a jury verdict. The trial court is directed to correct that scrivener's error. We do not otherwise address the argument.

79 Wn.2d 12, 26, 482 P.2d 775 (1971). A reviewing court considers the following factors in deciding whether the trial court abused its discretion in denying a request to remove counsel: "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *In re Pers. Restraint of Stenson,* 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (*Stenson* II).

The timeliness of a request to remove counsel is an important factor. A trial court does not abuse its discretion when it denies a motion to have new counsel assigned after jury selection has occurred. *State v. Shelton,* 71 Wn.2d 838, 839-40, 431 P.2d 201 (1967). In *Shelton*, the defendant argued that the court erred by denying his request after jury selection to have his counsel resign because he could not put his confidence in the defense counsel. *Id.* Because the defendant "gave no reason for his lack of confidence in his counsel; pointed to no area of disagreement between them; and failed to point out wherein counsel had in any way failed or refused to adequately advise or aid him" there was no abuse of discretion. *Id.* at 839. The court also noted that counsel had prepared for trial, and there was "no suggestion that counsel did not discharge his duty . . . in an efficient manner." *Id.* at 840.

The Washington Supreme Court has explicitly recognized that requests to have new counsel assigned on the eve of trial are untimely. In *Stenson* II, it stated that "'where the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain

new counsel and therefore may reject the request.'" *Stenson* II, 142 Wn.2d at 732 (quoting *United States v. Williams*, 594 F.2d 1258, 1260-61 (9th Cir. 1979)).

The trial court did not abuse its discretion in denying Ms. Blair's request to have new counsel assigned on the day of trial because it was not timely. We also agree that Ms. Blair did not make a showing that would have justified removal of counsel. Similar to *Shelton*, Ms. Blair's counsel had stated that he was prepared for trial and defended the case with his typical style. There was no actual breakdown in communications between client and counsel. Ms. Blair was understandably disappointed that her "free talk" had not resulted in a favorable plea offer from the prosecutor and may have thought counsel expected a better outcome, but the evidence showed that the two were communicating about the case. There simply was not the utter lack of interaction that is required to justify replacing counsel.

For both reasons, the trial court did not err in rejecting the motion.

Unanimity Instruction

Ms. Blair also argues that the court erred in failing to require the jury to unanimously identify which weapon was used during the incident. However, the jury was not required to unanimously agree on which weapon the accomplice was armed with at the time of the crime. Also, any error would have been harmless in light of the verdicts.

Ms. Blair argues that the multiple weapons alleged to have been used during the incident were alternative means of committing the crime. She cites no specific authority for that proposition, and we are not aware of any such authority. Alternative means of committing a crime exist when the legislature, in defining a crime, creates alternative ways the offense can be committed. *E.g., State v. Arndt*, 87 Wn.2d 374, 378-86, 553 P.2d 1328 (1976). The legislature, however, has not defined the deadly weapon enhancement in terms of multiple ways of commission. There are many potential deadly weapons, but only one method of committing this enhancement—being "armed" with a deadly weapon. There was no need for a unanimity instruction on this topic.

Although that is sufficient to resolve the claim, we write further to clarify Ms. Blair's basic argument. She accurately quotes from a Division Two case that there is a "right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged." *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). *Emery*, however, is incorrect on this point. *Emery* cites to *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994), which in fact discusses this issue in the context of evidentiary sufficiency. When there is insufficient evidence to support one of the means of committing an offense, *Ortega-Martinez* recognized that there must be a method of ensuring that the jury unanimously based its verdicts on means that were supported by the evidence. *Id.* at 707-08.

To the extent that *Emery* can be read in support of the proposition that unanimity must be assured in every alternative means case, it is incorrect. Although all jurors must agree that the crime has been committed, they are not required to be in agreement on the means by which the crime occurred. *See State v. Whitney*, 108 Wn.2d 506, 511-12, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wn.2d 816, 822-24, 639 P.2d 1320 (1982); *Arndt*, 87 Wn.2d at 376-78. Instead, the concern for unanimity arises only when one of the means on which the jury was instructed is insufficient. At that point the conviction must be reversed unless there is a special verdict or other guarantee that all members of the jury returned the verdict on a basis supported by the evidence. *Franco*, 96 Wn.2d at 824.

As this is not an alternative means case, our discussion is at an end. However, even if Ms. Blair had established error in this regard, it would have been harmless because the convictions on the underlying offenses created her persistent offender status. The deadly weapon enhancements, even if erroneous, did not affect her sentence.

For the noted reason, the convictions and sentence are affirmed. The trial court is directed to correct the scrivener's error in the judgment form.

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

Korsmo, C.J.

WE CONCUR:

Brown, J.

Fearing, J.