

**FILED**

IAN 17 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30961-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHELLE L. BLAIR, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Blair's request for new counsel.
2. The trial court erred in failing to give a unanimity jury instruction regarding which deadly weapon was used in the crimes, a knife or a bat.
3. The judgment and sentence erroneously indicates that Ms. Blair was found guilty by guilty plea.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ABUSE ITS DISCRETION BY REFUSING TO GRANT THE DEFENDANT A NEW DEFENSE COUNSEL REQUESTED ON THE FIRST DAY OF TRIAL?
- B. IS A UNANIMITY INSTRUCTION REQUIRED (OR EVEN NEEDED) IN THIS CASE?
- C. DOES THE JUDGMENT AND SENTENCE CONTAIN AN ERROR?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT DID NOT ERR IN REFUSING THE DEFENDANT'S REQUEST TO REPLACE HER COUNSEL.

The defendant raised this issue just as the court was going to bring in the jury for selection. RP 18. The major thrust of the defendant's arguments was that there was some sort of misunderstanding between the parties. RP 18. Then the defendant stated to the trial judge that there really was not an agreement but then she changed her position and indicated that the prosecutor would "help" her. RP 18-19. The prosecutor told the trial court that the defendant had been involved in a "free talk" pertaining to a different case. RP 20.

The prosecutor mentioned to the trial court that he had witnesses being held on material witness warrants and he wanted to move forward. RP 21. The defense counsel then joined in the discussion and claimed that he might have "...led her down a path that she shouldn't have been taken down." RP 22.

As the prosecutor noted, the defense counsel had appeared fully prepared and stated that he was ready for trial. RP 22. The defense counsel had interviewed witnesses, examined jury instructions and there had been a pre-trial conference. RP 22.

The trial judge noted that there was a jury lined up and the court had already done some pre-trial motions. RP 24. The trial court held that the request

was late. RP 23. A delay in order to procure new defense counsel would have caused a delay in actually securing counsel and then an extended delay while new counsel prepared for trial.

The Court in *State v. Brett*, 126 Wn.2d 136, 198–99, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996), held that a defense attorney gives inadequate service only if (1) the defense attorney's performance was deficient, *i.e.*, fell below an objective standard of reasonableness based on a consideration of all the circumstances, and (2) such deficient performance prejudiced the defendant, *i.e.*, there is a reasonable probability that the outcome would have been different had the representation been adequate. *Brett, supra* at 705-06.

“A trial court has discretion when deciding whether an indigent defendant's dissatisfaction with his court-appointed counsel merits the appointment of substitute counsel.” *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Although a complete breakdown in attorney-client communication is a sufficient reason to substitute counsel, “[s]imple 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, 350-51, 766 P.2d 1127 (1989).

Even if the trial court had erred in denying the change of defense counsels, any hypothetical error was harmless. There is nothing in the record that indicates

that appointed defense counsel performed in a sub-standard manner as a result of any communication or confidence problems.

B. THERE IS NO REQUIREMENT OF UNANIMITY AS CLAIMED BY THE DEFENDANT.

The defendant claims that the trial court erred in not submitting a unanimity instruction. The defendant claims that a unanimity instruction was required because the amended information charged the deadly weapon element of First Degree Burglary as a “bat and/or a knife.” CP 20-21.

RCW 9A.52.020 states: “(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon ....” The alternative types of deadly weapons given by the State in the charging document do not create an alternative means of committing the crime.

The defendant spends much time arguing that the bat could not have been a “deadly weapon.” Nowhere in any language is there a requirement for the State to prove that both charged items could be “deadly weapons.” There was no need for a jury instruction for jury unanimity and therefore no error at trial.



C. THE JUDGMENT AND SENTENCE CONTAINS A SINGLE WORD MISTAKE.

The defendant was convicted following a jury verdict. The Judgment and Sentence issued in this case indicates that the verdict was the result of a guilty plea. This scrivener's error should be corrected.

The defendant asks that the entire Judgment and Sentence be returned for a correction of the "error." Returning the Judgment and Sentence would certainly cure the problem, but the State suggests that this court instruct the State to submit a corrected Judgment and Sentence page, rather than an entire Judgment and Sentence.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 17<sup>th</sup> day of January, 2013.

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