Supreme Court No. 94296-0
COA No. 48056-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANDRA WELLER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Sandra Weller was the appellant in Court of Appeals No. 48056-5-II, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Ms. Weller seeks review of the decision issued January 31, 2017, motion for reconsideration denied March 2, 2017. Appendices A, B.

C. ISSUES PRESENTED ON REVIEW

1. A sentencing court may not rely on judicial fact finding to impose an exceptional sentence. Here, the sentencing court imposed an exceptional sentence on Sandra Weller based in part on judicial fact finding. Did the court infringe Ms. Weller's Sixth and Fourteenth Amendment rights to a jury trial and to proof beyond a reasonable doubt by imposing an exceptional sentence based in part on judicial fact finding? Did the Court of Appeals err by declining to *re-address* the issue?

2. As part of Ms. Weller's exceptional sentence, did the sentencing court exceed its authority by imposing a no-contact

order regarding the complainants of 45 years, which exceeded the 10 year maximum penalty for the second degree assault, a class B felony? Did the trial court fail to consider the length of the order under the constitutional analysis of In re Rainey?

3. Criminal Court Rule (CrR) 4.7(h)(3) requires defense counsel to maintain exclusive custody of discovery materials, but permits counsel to provide an appropriately redacted copy to the defendant. Should the trial court have allowed defense counsel to provide his client an appropriately redacted copy of the police reports?

4. New counsel is required where there has been a complete breakdown in communication, and the court must inquire thoroughly to determine the matter. Did the trial court abuse its discretion in denying new counsel?

D. STATEMENT OF THE CASE

Following a jury trial, Sandra Weller was convicted of four counts of second degree assault and one count unlawful imprisonment, involving alleged accomplice liability in

encouraging physical abuse of her children by her husband Jeffrey Weller. CP 33. Following trial, the court imposed an exceptional sentence of 240 months based on two aggravating factors found by the jury -- deliberate cruelty and an ongoing pattern of abuse. CP 33.

Ms. Weller appealed, and the Court of Appeals invalidated the exceptional sentence, finding the "ongoing pattern" aggravating factor inapplicable. State v. Sandra Weller, 185 Wn. App. 913, 344 P.3d 695 (2015), petition for review denied, 183 Wn.2d 1010 (2015). The appellate court remanded the case for resentencing, and the trial court entered an order vacating the original sentence. CP 72.

At the commencement of the re-sentencing hearing, Ms. Weller sought new counsel, explaining that she had been unable to communicate with her lawyer, who had been appointed for purposes of the re-sentencing. 8/27/15RP at 3-5. The court concluded that current counsel would remain Ms. Weller's attorney. 8/27/15RP at 6-7.

At the hearing which commenced on August 27 and then continued on September 17 of 2015, the trial court learned from Ms. Weller of her significant rehabilitation in prison including her accomplishments in various classes, and in obtaining positions of responsibility at Washington Corrections Center for Women in Gig Harbor/Bujacich. 8/27/15RP at 14-16. Ms. Weller also expressed her regret over the incidents leading to the charges. 8/27/15RP at 17-18.

Despite this substantial documented progress and the absence of one of the only two aggravating factors that supported the original sentence, however, the court imposed the same length of exceptional sentence of 240 months as it had in 2013. 8/27/15RP at 21-22; CP 74. The court stated it was relying solely on the remaining jury-found aggravating factor; however, as the sentencing court had done at the previous sentencing, the court supplemented the jury's special verdict with further factual findings from the bench. 8/27/15RP at 20-22; 9/17/15RP at 25-26; CP 74, 87-89. The findings were described as being founded on

certain evidence introduced at trial. CP 87, CP 89. The sentencing court found, and entered a conclusion of law to the same effect, that an exceptional sentence based on the single factor of deliberate cruelty was supported by the evidence "admitted at trial and outlined by the trial judge at sentencing." CP 74, CP 89 (Judgment and sentence, including Findings of Fact No. 17 and Conclusion of Law No. 1 in support of exceptional sentence) (Judgment attached as Appendix A).

In addition, the sentencing court entered no-contact orders regarding the two complainants of 45 years, a term which exceeded the 10 year maximum penalty for second degree assault, a class B felony, and which also exceeded the exceptional sentence term of 240 months. 8/27/15RP at 21-22, 9/17/15RP at 27-29.

In further proceedings, counsel for Ms. Weller notified the trial court that she desired a copy of her police reports and other discovery, citing CrR 4.7. 9/17/15RP at 31-35. The prosecutor objected. 9/17/15RP at 34-35. The court denied the request to

allow counsel to provide his client with a copy of the discovery, stating:

> At this point I'll deny it as a matter for the trial court. If there is something in the way of a further appeal, then it would be up to the Court of Appeals whether they would grant any records or transcripts in connection with it.

9/17/15RP at 35. Ms. Weller timely filed a notice of appeal. CP 90. The Court of Appeals affirmed, and denied Ms. Weller's Motion for Reconsideration. Appendix A, Appendix B.

E. ARGUMENT

1. REVIEW OF THE ISSUES IS WARRANTED.

1. Review is warranted of whether the sentencing court violated Sandra Weller's Sixth and Fourteenth Amendment rights to a jury trial by imposing an exceptional sentence based on judicial fact finding. The Court of Appeals' decision is in conflict with the decisions of the United States Supreme Court and presents a significant question of constitutional law, as set forth by cases including Blakely v. Washington, infra, warranting review under RAP 13.4(b)(3).

2. Review is warranted of whether the sentencing court erred in imposing a no-contact order of 45 years as part of Ms. Weller's exceptional sentence. The Court's decision is in conflict with the State v. Warren and State v. Armendariz decisions of this Court, infra, warranting review under RAP 13.4(b)(1).

3. Review is warranted of whether the sentencing court was required to allow defense counsel to provide Sandra Weller with an appropriately redacted copy of the materials furnished to her attorney as part of the discovery in the case. The Court's decision to the contrary is in conflict with the Peeler and Eubanks decisions of this Court that establish the mandatory meaning of "shall," infra, warranting review under RAP 13.4(b)(1).

4. Review is warranted of whether the trial court erred in denying Ms. Weller's motion for new counsel where the court failed to adequately inquire whether there had been a breakdown in communication. The Court's decision is in conflict with the In re PRP of Stenson decision of this Court, infra, warranting review under RAP 13.4(b)(1).

2. THE TRIAL COURT INFRINGED MS. WELLER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY DETERMINATION OF ALL FACTS SUPPORTING HER EXCEPTIONAL SENTENCE.

(a). The court may rely only on facts proved to a jury to impose an exceptional sentence. Any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. 6, 14; Wash. Const. art. I, §§ 21, 22; Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence based on judicial fact finding violates an accused person's right to Due Process and to a jury trial. Blakely, 542 U.S. at 303; Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Blakely errors may be raised for the first time on review. RAP 2.5(a)(3); see State v. O'Connell, 137 Wn. App. 81, 89, 152 P.3d 349 (2007).

Here, the trial court supplemented the jury's special verdicts following trial, with numerous additional factual findings. CP 74 (with Findings of Fact (Findings attached as Appendix B). As noted, the trial court specifically relied on its assessment of trial evidence to support the exceptional sentence. CP 74, CP 89.

But a court may not impose an exceptional sentence based on judicial fact finding. Blakely, 542 U.S. at 303. The sentence imposed below violated Ms. Weller's right to a jury determination beyond a reasonable doubt of the facts listed in the trial court's findings. Id.

Importantly, although the Court of Appeals previously addressed this argument in a footnote, State v. Weller, 185 Wn. App. at 928 n. 11, RAP 2.5(c)(2) permitted the Court to review its earlier decision. Review is appropriate here in the interests of justice. First, the trial court conducted a new sentencing hearing and imposed a new sentence. The entire sentence is therefore

subject to appeal. See, e.g., State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Second, the Court of Appeals' prior decision on this issue is *dicta*. See Gabelein v. Diking Dist. No. 1 of Island Cty. of State, 182 Wn. App. 217, 239, 328 P.3d 1008 (2014) (defining dicta). Having reversed one aggravating factor, sustained the second, and remanded the case for a new sentencing hearing, the appellate court had no need to address the trial court's factual findings at sentencing or Ms. Weller's argument that these were improper bases for the sentence, since the lower court was free to adopt new findings (or no findings at all) upon resentencing.

Third, the Court of Appeals' prior decision reflected an incomplete understanding of the trial court's findings. The trial court's factual findings explicitly served two purposes. It is true that the trial judge "properly was evaluating the evidence supporting the jury's findings before imposing the exceptional sentences." Weller, 185 Wn. App. at 928 n. 11. This can be seen in Findings Nos. 16 and 17 wherein the court reasoned that the

exceptional sentence based on deliberate cruelty was supported by the evidence admitted at trial and outlined by the trial judge at sentencing. CP 74, CP 89 (Judgment and sentence, including Findings of Fact Nos. 16 and 17 and Conclusion of Law No. 1 in support of exceptional sentence). The Court of Appeals' prior decision did not address this aspect of the trial court's findings. Accordingly, the issue should be revisited in this appeal, notwithstanding the prior decision. RAP 2.5(c)(2).

(b). The sentence must be vacated. The trial court's factual findings must be vacated. Blakely, 542 U.S. at 303. Ms. Weller's exceptional sentence must be reversed and the case remanded for a new sentencing hearing. Id.

3. MS. WELLER IS ENTITLED TO AN APPROPRIATELY REDACTED COPY OF "[A]NY MATERIALS FURNISHED TO [HER] ATTORNEY" AS PART OF THE DISCOVERY IN THIS CASE.

Court rules are interpreted in the same manner as statutes, using the tools of statutory construction. State v. Hawkins, 181 Wn.2d 170, 183, 332 P.3d 408 (2014), as amended (Sept. 30, 2014), reconsideration denied, (Oct. 1, 2014). The court's objective is to

determine and give effect to the intent of the rule, as expressed in the rule's plain language. State v. Larson, No. 91457-5, 2015 WL 9460073, at *2 (Wash. Dec. 24, 2015).

The use of the word "shall" is presumptively imperative. State v. Peeler, 183 Wn.2d 169, 185 n. 9, 349 P.3d 842 (2015). Under the criminal discovery rules,

> a defense attorney shall be permitted to provide a copy of [discovery] materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(CrR 4.7(h)(3). The rule's use of the word "shall" emphasizes the mandatory nature of this provision. See Eubanks v. Brown, 180 Wn.2d 590, 596 n. 1, 327 P.3d 635 (2014).

The rule does not impose any restrictions on the timeframe when discovery material may be provided. Here, when defense counsel sought permission to provide a copy of the police reports to his client, the prosecutor objected. 9/17/15RP at 34-35. But the plain language of the rule does not permit the prosecution to thwart counsel's efforts to provide a copy of discovery. CrR 4.7(h)(3). Instead, the prosecution must either approve

appropriate redactions or submit the issue to the court. CrR 4.7(h)(3).

The trial court should therefore not have declined Ms. Weller's request. CrR 4.7. This Court should reverse the trial court's decision and remand the case to permit defense counsel to provide his client with a copy of the discovery, including any police reports. If defense counsel and the prosecutor cannot agree on appropriate redactions, the issue must be submitted to the court for an order under CrR 4.7(h)(3).

4. THE NO-CONTACT ORDERS EXCEEDED THE COURT'S AUTHORITY AND VIOLATED RAINEY.

Here, although the court ordered that the sentences for second degree assault and unlawful imprisonment be served consecutively as an exceptional sentence of 240 months, Ms. Weller argues that the court exceeded its statutory authority in two ways under the Sentencing Reform Act (SRA), chapter 9.94A RCW, by imposing a no-contact order of 45 years that exceeded the 10 year maximum penalty for second degree assault, a class B felony. 8/27/15RP at 21-22, 9/17/15RP at 27-29; Supp. CP ___

(Sub # 136) (post-conviction no-contact order, 9/17/16); see RCW 9A.36.021(2)(a).

Under RCW 9.94A.505(8), a trial court may impose a no-contact order for the maximum term of a conviction. State v. Armendariz, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007); see also State v. Navarro, 188 Wn. App. 550, 556, 354 P.3d 22 (2015), review denied, 184 Wn. 2d 1031, 364 P.3d 119 (2016).

Ms. Weller objected below by asking the court to "bifurcate" the no-contact period. 8/27/15RP at 26. In any event, a defendant cannot waive a challenge to the legality of sentencing conditions, which can only be authorized by statute. State v. Armstrong, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998).

A trial court's sentencing authority is limited to that expressly found in the statutes. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). RCW 9.94A.505(8) permits a court to

enforce crime-related prohibitions as part of any sentence. A "crime-related prohibition" is a court order "prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A no-contact order is a crime-related prohibition. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 376, 229 P.3d 686 (2010). The statutory maximum for Ms Weller's most serious crime of second degree assault, as a class B felony, is 10 years. RCW 9A.20.021(1)(b).

Therefore, the maximum no-contact order per RCW 9.94A.505(8) is 10 years in the instant case. In re Rainey, 168 Wn.2d at 375. The case of State v. France, 176 Wn. App. 463, 474, 308 P.3d 812 (2013), review denied, 179 Wn.2d 2015, 318 P.3d 280 (2014), is not to the contrary, because in that case there was no challenge to a consecutive running of no-contact orders.

Further, the trial court failed to consider the length of the no-contact orders in the context of Ms. Weller's fundamental right to a relationship with her offspring, a right that survives

now despite the subsequent Title 13 termination order as to her children, and which right survives their adulthood. In re Rainey, 168 Wn.2d 367, 381-382, 229 P.3d 686 (2010); Standberg v. City of Helena, 791 F.2d 744, 748 & n.1 (9th Cir. 1986); see also Growing Pains: The Scope of Substantive Due Process Rights of Adult Children, 57 Vand. L. Rev. 1883, 1903 (2004). Ms. Weller asks that this Court reverse and vacate her judgment and sentence with respect to the no-contact orders.

5. THE TRIAL COURT FAILED TO INQUIRE INTO BREAKDOWN AND ABUSED ITS DISCRETION IN DENYING MS. WELLER'S REQUEST FOR NEW COUNSEL FOR SENTENCING.

A trial court's determination of whether a defendant's dissatisfaction with court appointed counsel warrants appointment of substitute counsel is discretionary, but will be overturned on appeal in the event of an abuse of discretion. State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679, review denied, 118 Wn.2d 1003, 822 P.2d 287 (1991). A defendant does not have an absolute right to choose any particular advocate but the Sixth Amendment does protect the right to adequate counsel.

State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (citing State v. DeWeese, 117 Wn.2d 369, 375–76, 816 P.2d 1 (1991)), cert. denied, 523 U.S. 1008 (1998); U.S. Const. amend. 6. The defendant can justify appointment of new counsel, where she shows 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. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (citing Stenson, 132 Wn.2d at 734).

Here, the trial court denied Ms. Weller's request for new sentencing counsel, in which she explained to the trial court that she had been unable to effectively communicate with her present counsel for purposes of determining the defense position to be presented at the hearing, and he had repeatedly screamed at her and stated he did not wish to represent her. 8/27/15RP at 5-7.

The trial court was not amenable to the prosecutor's suggestion that the court conduct further inquiry, into breakdown. 8/27/15RP at 6-7. The court relied on present

counsel's statements that the relationship was adequate and that he had prepared for the hearing. 8/27/15RP at 3-6.

Notably, to advocate for a lower sentence, Ms. Weller had to detail her own rehabilitation efforts and admirable conduct while in prison; no report or pre-sentencing memorandum was prepared by counsel. 8/27/15RP at 14-18. Defense counsel merely, and briefly, urged the court to consider reducing the previous sentence by half, based on the remaining aggravating factor. 8/27/15RP at 14.

The court's denial of new counsel was error. In determining whether a motion to discharge and substitute counsel was properly denied, a reviewing court will examine (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 (Stenson 2), 142 Wn.2d 710, 723–24, 16 P.3d 1 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158 n. 3 (9th Cir.1998)). Consistent with Moore, a trial court should conduct a thorough examination of the defendant's allegations in order to decide

whether different counsel must be appointed. See State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982), review denied, 99 Wn.2d 1023 (1983) (trial counsel motion).

Ms. Weller's grave concerns indicated that hers was not a mere claim that she had lost confidence in her counsel, which is an insufficient reason to justify appointing new counsel. See Varga, 151 Wn.2d at 200. The apparent breakdown required a more penetrating inquiry by the trial court before denying Ms. Weller's motion. This Supreme Court should reverse the sentence and remand for re-sentencing.

F. CONCLUSION

Based on the foregoing, Sandra Weller argues that this Supreme Court should accept review.

Respectfully submitted this 23 March, 2017.

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Filed
Washington State
Court of Appeals
Division Two

January 31, 2017

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SANDRA DOREEN WELLER, aka SANDRA GRAF; JEFFREY WAYNE WELLER, Appellants.	No. 48056-5-II Consolidated with No. 48106-5-II PART PUBLISHED OPINION

WORSWICK, J. — Sandra and Jeffrey[1] Weller appeal their exceptional sentences following a resentencing hearing. In the published portion of this opinion, we hold that the sentencing court did not exceed its statutory authority by imposing no-contact orders of 45 and 30 years on Sandra and Jeffrey, respectively. In the unpublished portion of this opinion we consider and reject the Wellers' arguments regarding the sentencing court's imposition of exceptional sentences, the denial of the Wellers' request for discovery material, and the denial of Sandra's request for new counsel at resentencing. We affirm.

[1] Because the co-appellants have the same last name, we refer to them by first name for clarity. We intend no disrespect.

FACTS

Following a jury trial, Sandra and Jeffrey were convicted of several felony crimes involving abuse of their children. Sandra was convicted of four counts of second degree assault and one count of unlawful imprisonment. Jeffrey was convicted of five counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault of a child. All counts were domestic violence offenses. The jury found the Wellers' conduct manifested deliberate cruelty to the victims. The jury also found the offenses were part of an ongoing pattern of abuse. Based on the jury's finding of the two aggravators, Sandra and Jeffrey were sentenced to exceptional sentences of 20 years and 20 years plus one year, respectively.

The Wellers appealed their convictions and sentences. In *State v. Weller*, 185 Wn. App. 913, 931, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015) we affirmed their convictions, but reversed the jury's finding of the ongoing pattern of abuse aggravating factor and remanded for resentencing.

At the resentencing hearing, the sentencing court imposed exceptional sentences on Sandra and Jeffrey of 20 years based on the jury's finding that the offenses manifested deliberate cruelty. Sandra's four counts of second degree assault and one count of unlawful imprisonment ran consecutively to each other. Jeffrey's sentence included two counts of second degree assault running consecutively to each other and to three additional counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault, which ran concurrently.

The sentencing court imposed no-contact orders between Sandra and the victims for 45 years, and between Jeffrey and the victims for 30 years. Sandra requested that the sentencing

court impose a 10-year no-contact order. The sentencing court denied Sandra's request, explaining that the victims requested a no-contact order and did not desire any contact, but noted that in the future the victims could request a modification if they wanted to.

ANALYSIS

The Wellers argue that the sentencing court exceeded its statutory authority by imposing no-contact orders in excess of the maximum penalty for their most serious offense. We disagree.

A sentencing court may impose crime-related prohibitions, including no-contact provisions, when sentencing an offender for a felony conviction. *State v. Armendariz*, 160 Wn.2d 106, 119, 156 P.3d 201 (2007); former RCW 9.94A.505(8) (2010). We review a sentencing court's imposition of crime-related prohibitions for abuse of discretion. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). However, the key question here is whether the duration of the crime-related prohibition exceeded the sentencing court's statutory authority. Consequently, we review this issue de novo. *See State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

Generally, the crime-related prohibition may not be for a period of time longer than the statutory maximum sentence for the crime. *Warren*, 165 Wn.2d at 32. However, when imposing an exceptional sentence the court has discretion to sentence defendants to the statutory maximum of each individual crime and run multiple convictions consecutively.[2] *See State v.* Cubias, 155

[2] We recognize that this discretion is not unlimited. For instance, an exceptional sentence may be reversed because it is clearly excessive.

Wn.2d 549, 556, 120 P.3d 929 (2005); RCW 9.94A.589(1)(a). In such a situation, the total maximum allowable sentence exceeds the statutory maximum for each individual conviction.

The Wellers contend that the duration of the no-contact orders exceeded the sentencing court's authority. However, the jury's finding of an aggravating factor triggered the sentencing court's statutory authority to impose exceptional sentences on the Wellers. *See* RCW 9.94A.535, .589. The sentencing court issued exceptional sentences by imposing standard range sentences for each individual conviction and running them consecutively. So, while a single conviction of second degree assault (the Wellers' most serious crime) has a statutory maximum sentence of 10 years, the statutory maximum for the exceptional sentences at issue here is equal to the sum total of the statutory maximums for the consecutively run convictions.

Because Sandra was convicted of four counts of second degree assault (10 year maximum/count) and one count of unlawful imprisonment (5 year maximum), and the sentencing court ran all five sentences consecutively, the maximum allowable exceptional sentence was 45 years. Jeffrey's sentence included two counts of second degree assault running consecutively to each other and to three other counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault, which ran concurrently, for a total maximum allowable exceptional sentence of 30 years. Thus, the sentencing court did not exceed its statutory authority by imposing the no-contact orders against Sandra for 45 years and against Jeffrey for 30 years.

In each of their SAGs, Sandra and Jeffrey also argue that the lengthy no-contact orders violate their constitutional right to parent. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377,

229 P.3d 686 (2010). "A defendant's fundamental rights limit the sentencing court's ability to impose sentencing conditions." *Rainey*, 168 Wn.2d at 377. The Wellers' argument is meritless because their parental rights to the parties protected by the no-contact order have been terminated. *See In re Interest of E.J.W.*, No. 47545-6-II, slip op. at 3 n.1 (Wash. Ct. App. July 26, 2016) (unpublished), http://www.courts.wa.gov/opinions. Consequently, their fundamental right to parent is not implicated.

We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

At the resentencing hearing, Sandra requested a new attorney. Sandra told the sentencing court that her counsel was prejudiced against her, was ineffective, and refused to communicate with her. Sandra's defense counsel explained that he had reviewed the materials from the prosecution and the court, the court of appeals' opinion, evidence, and case law. He also explained that he had met with Sandra once in court and spoken to her a few times on the phone. After inquiring into Sandra's counsel's qualifications, the sentencing court denied Sandra's request for new counsel.

Sandra and Jeffrey both argued for a reduction in their original sentences based on our prior opinion striking one of the two aggravating factors. Nonetheless, the sentencing court imposed exceptional sentences on Sandra and Jeffrey of 240 months based on the jury's finding

that the offenses manifested deliberate cruelty. The sentencing court entered findings of fact and conclusions of law for the imposition of the exceptional sentences, noting that the jury's finding of deliberate cruelty was supported by evidence admissible at trial, and as such the court had the authority to order exceptional sentences.

At the end of the resentencing hearing, the Wellers both requested copies of the police reports and other discovery, citing CrR 4.7. The State objected, arguing the Wellers were not entitled to copies of discovery given the status of the case, and suggested the Wellers file a public records request for such documents. The sentencing court denied the Wellers' requests.

ADDITIONAL ANALYSIS

II. JUDICIAL FACT FINDING

The Wellers argue that the sentencing court violated their Sixth and Fourteenth Amendment rights to a jury determination of all facts by imposing exceptional sentences based on judicial fact finding. Sandra and Jeffrey urge us to reconsider our earlier decision "in the interests of justice" pursuant to RAP 2.5(c)(2). Br. of Appellant (S.W.) at 9; Br. of Appellant (J.W.) at 5. Because our previous decision was correct, we decline to readdress the issue.

An exceptional sentence may be imposed if the sentencing court finds there are "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. An exceptional sentence above the standard range must be based on a statutorily recognized aggravating factor. RCW 9.94A.535(2), (3). A sentencing court may not impose an exceptional sentence based on judicial fact finding. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Whether an aggravating factor exists is a factual question for

jury determination. RCW 9.94A.535, .537(6). The sentencing court must enter written findings of fact and conclusions of law if it imposes an exceptional sentence. RCW 9.94A.535.

Here, the jury unanimously found that Sandra and Jeffrey's conduct during the commission of their offenses manifested deliberate cruelty to the victims beyond a reasonable doubt, as required by RCW 9.94A.537. In its findings of fact and conclusions of law, the sentencing court recognized the jury's special verdict and outlined the trial testimony to demonstrate that the jury's finding of deliberate cruelty was supported by the evidence. The sentencing court's findings and conclusions are not "judicial fact-finding" as argued by the Wellers. Rather, the sentencing court was complying with the requirements of RCW 9.94A.535 and .537. Thus, we hold that the Weller's argument that the sentencing court engaged in improper fact finding fails.

III. Discovery Requests

The Wellers argue that the court erred by denying their requests for redacted copies of discovery materials pursuant to CrR 4.7.[3] Because CrR 4.7 applies to "procedures prior to trial," we disagree.

A trial court's discovery decision will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Pawlyk*, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). CrR 4.7 applies to "procedures prior to trial." We interpret court rules the same way we interpret

[3] Sandra also makes this argument in her SAG.

statutes giving effect to the plain language. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016). The purpose behind discovery disclosure is to protect against surprise that might prejudice the defense. *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014).

Here, the Wellers did not request copies of discovery materials until the very end of the resentencing hearing. The sentencing court denied their request given the status of the case at that time. The Wellers' trial and sentencings had concluded. Because CrR 4.7 applies to procedures before trial, CrR 4.7 did not apply. Therefore, the sentencing court did not manifestly abuse its discretion by denying their request.

IV. Request for New Counsel

Sandra also argues that the sentencing court abused its discretion by denying her request for new counsel at resentencing. We disagree.

"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). Importantly, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *Stenson*, 132 Wn.2d at 734. The right to choose one's counsel does not permit a defendant to unduly delay the proceedings. *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

We review a trial court's refusal to appoint new counsel for an abuse of discretion. *State v. Lindsey*, 177 Wn. App. 233, 248, 311 P.3d 61 (2013). A trial court abuses its discretion when

its decision is manifestly unreasonable or based on untenable grounds. *Lindsey*, 177 Wn. App. at 248-49. A decision is based on untenable grounds if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Lindsey*, 177 Wn. App. at 249. When reviewing a trial court's refusal to appoint new counsel, we consider (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. *Lindsey*, 177 Wn. App. at 249.

None of these factors show an abuse of discretion here. Sandra's counsel and Sandra gave contradictory accounts of their working relationship to the court. Sandra contended that her counsel was severely prejudiced against her and refused to communicate with her. She claimed he had screamed at her, told her he did not want to represent her, and told her "there is no game plan." Verbatim Report of Proceedings (VRP) at 7. Contrastingly, Sandra's counsel explained that since he had been appointed to Sandra's case he had prepared for the resentencing hearing by reviewing the case materials and relevant case law, and had met with Sandra in court and spoken to her a couple of times on the phone and once in the jail. Sandra's counsel told the sentencing court that he was prepared for resentencing and felt "very comfortable in [his] abilities to handle this matter and represent her accordingly." VRP at 4.

The sentencing court heard from both Sandra and her counsel as to the alleged conflict, and inquired as to counsel's ability to represent Sandra. The sentencing court explained that Sandra's counsel was appointed as the most qualified available to represent her, and noted that "this had been quite an extended period of time, and I think we do need to move ahead with it." VRP 6.

The sentencing court listened to Sandra's request for new counsel, evaluated the reasons she wanted new counsel, stated its own evaluation of Sandra's counsel's competence and ability to represent Sandra, and considered that a late substitution of counsel would delay the scheduled resentencing hearing. Thus, in light of the *Lindsey* factors above, we hold that the sentencing court did not abuse its discretion in denying Sandra's motion for new counsel.

V. APPELLATE COSTS

Jeffry filed a supplemental brief requesting that, if the State substantially prevails in this appeal, we decline to impose appellate costs on him because he claims he is indigent. The State did not respond. We exercise our discretion and decline to impose appellate costs.

Under former RCW 10.73.160(1) (1995), we have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *Sinclair*, 192 Wn. App. at 389.

It appears that Jeffrey does not have the present ability to pay appellate costs, and it is questionable whether he will have the future ability to pay. The sentencing court found Jeffrey indigent at trial, and counsel was appointed to represent Jeffrey on appeal. There are no facts in the record and the State does not provide any argument to support a conclusion that Jeffrey's indigent status is likely to change. RAP 15.2(f).

Under the specific circumstances of this case, we decline to impose appellate costs on Jeffrey. [4]

We affirm.

Worswick, J.

We concur:

Maxa, A.C.J.

Sutton, J.

[4] Sandra did not submit a supplemental brief on the issue.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two
March 2, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SANDRA DOREEN WELLER, aka SANDRA GRAF; JEFFREY WAYNE WELLER, Appellants.	No. 48056-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Sandra Weller moves for reconsideration of the court's January 4, 2017 opinion. Upon consideration, the court denies the motion. However, the court will refer the matter of appellate costs to a commissioner of this court under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Sutton

FOR THE COURT:

Maxa, A.C.J.
ACTING CHIEF JUDGE

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 48056-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

☒ Jodi Backlund - Attorney for other party
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MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 23, 2017

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