70337-4

70337-4

NO. 70337-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES CHAPPELLE, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. Whether the trial court conducted a thorough colloquy on the record and properly found that Chappelle had waived his right to counsel after unequivocally asserting his right to represent himself.

2. Whether Chappelle had all of the materials that were reasonably necessary to conduct his *pro se* defense where he had received a redacted copy of discovery from his attorney two months before trial, and where the trial prosecutor made a duplicate copy of the discovery from her own file after Chappelle waived his right to counsel.

3. Whether the attorney who represented Chappelle in bringing a motion for a new trial had an actual conflict of interest that adversely affected her performance based on her failure to raise a frivolous claim based on RPC 1.16(d), which does not govern the dissemination of discovery to criminal defendants.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Charles Chappelle, Jr., with assault in the second degree with a deadly weapon

enhancement for an unprovoked attack on Amr Elshahawany on June 9, 2012. CP 1-5, 53, 60. Approximately two weeks before trial, Chappelle made a motion in the criminal presiding court to discharge his appointed counsel and to obtain substitute counsel. RP (10/26/12) 3-4. When the presiding judge asked Chappelle about the basis for his motion, Chappelle alleged that counsel had not contacted potential defense witnesses. The judge asked counsel about Chappelle's complaint, and counsel explained that he had attempted to contact the witnesses "on numerous occasions" and had "left contact information for them." RP (10/26/12) 4. Accordingly, Chappelle's motion to substitute counsel was denied. RP (10/26/12) 5.[1]

Trial commenced on November 8, 2012 before the Honorable Michael Hayden. Throughout the first day of trial, during which pretrial motions were litigated, there was no mention of any dissatisfaction with defense counsel or any indication that Chappelle wanted to discharge him. RP (11/8/12). On the second day of trial, however, defense counsel informed the court that Chappelle wanted to discharge him or go *pro se*. RP (11/13/12)

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[1] Chappelle also filed a written "Motion of Change of Council" [sic], which also did not articulate a tenable basis to appoint substitute counsel. CP 20-22.

4-5. When the trial court asked Chappelle if that was the case, Chappelle made statements to the effect that he wanted to discharge his attorney, file an affidavit of prejudice against the trial judge, and "sue everybody that's had anything to do with him." RP (11/13/12) 7-10.

The trial court asked Chappelle if he wanted to represent himself, and Chappelle initially said "[n]o." RP (11/13/12) 10. But Chappelle also complained that he was not being allowed to speak in court and that the *pro se* motions he was filing "are never heard." RP (11/13/12) 10. At that point, the trial court correctly noted that Chappelle's statements regarding self-representation were equivocal. RP (11/13/12) 10-11.

The trial court asked Chappelle again if he wanted to represent himself. This time, Chappelle said "[y]es." RP (11/13/12) 11. The trial court then engaged Chappelle in a lengthy colloquy, during which the court informed Chappelle of the charge and the penalties he was facing, of the existence of technical procedural rules that he would be expected to follow, that he would not receive any assistance from the court, that he would not have "co-counsel," and that there would be no continuances and that jury selection would begin immediately. After the colloquy, the trial court found

that Chappelle had waived the right to counsel and had asserted the right to represent himself. Accordingly, defense counsel was discharged and excused from the courtroom. RP (11/13/12) 11-20.[2]

After the next recess, Chappelle again asked the trial court about having "co-counsel," and the court reiterated that Chappelle was representing himself. RP (11/13/12) 23. A courtroom spectator, who identified himself as Jack Murray from the Urban League, stated that he had spoken with Chappelle's mother and that what Chappelle really wanted was a different attorney. RP (11/13/12) 24-27. The trial court explained that that was not the motion that Chappelle had made, but that a motion to substitute counsel clearly would have been untimely in any event. RP (11/13/12) 27. Immediately after this exchange, the jury venire arrived and *voir dire* began.

During the trial, Chappelle complained that he did not have discovery. Accordingly, the trial prosecutor contacted Chappelle's former attorney and verified that Chappelle had received a redacted copy of discovery, and she also copied the discovery materials in

[2] The colloquy is set forth in the first argument section below.

her own file and provided them to Chappelle. RP (11/13/12) 46-47; RP (11/14/12) 5-14.

Chappelle cross-examined all of the State's witnesses. RP (11/14/12) 30-38, 47-50, 71-87, 102-05; RP (11/15/12) 33-35, 50-54, 76-82, 97-112, 132-36, 148-50; RP (11/19/12) 18-24, 30-34, 52-59. Chappelle also called a defense witness and testified on his own behalf. RP (11/19/12) 65-109. At the conclusion of the trial, the jury convicted Chappelle of assault in the second degree as charged, but rejected the deadly weapon allegation. CP 126-27; RP (11/20/12) 3-6.

Prior to sentencing, the trial court granted Chappelle's motion to appoint a lawyer to assist him in filing a motion for a new trial. RP (2/1/13) 2-7. Chappelle's new attorney, who worked for the same public defense firm as his original attorney, filed a motion for a new trial alleging two claims: 1) that Chappelle's waiver of counsel was not knowing, intelligent, and voluntary; and 2) that the State's failure to provide discovery in a timely manner deprived Chappelle of a fair trial. CP 131-71. The State filed a thorough response, which included transcripts of the relevant proceedings and information regarding the trial prosecutor's efforts to ensure

that Chappelle had been provided with all of the discovery. CP 173-242.

At the hearing on Chappelle's motion for a new trial, the trial prosecutor asked if Chappelle would be waiving a potential conflict of interest, given that Chappelle had originally asserted that his first attorney was not providing effective representation. RP (4/30/13) 3. In response, Chappelle's new attorney stated that there was no potential conflict of interest because Chappelle was not alleging ineffective assistance of counsel as a basis for his motion for a new trial. RP (4/30/13) 4. The trial court attempted to ask Chappelle if he wished to go forward with an attorney from the same firm as his original attorney, but the new attorney persisted in arguing that no potential conflict existed. Ultimately, Chappelle stated that he was comfortable going forward. RP (4/30/13) 5-6. After hearing testimony and arguments, the trial court rejected Chappelle's claims that his waiver of counsel was inadequate and that he was deprived of discovery and a fair trial. RP (4/30/13) 7-18, 21-25.

The trial court imposed a standard-range sentence of 57 months in prison. CP 272-80; RP (5/10/13) 8-9. Chappelle now appeals. CP 281-90.

2. SUBSTANTIVE FACTS

On June 8-9, 2012, Amr Elshahawany and a group of his friends went out for an evening of fun and celebration in the Belltown neighborhood in downtown Seattle. RP (11/14/12) 9. They had reserved a VIP booth at a nightclub called Tia Lou's, and they had booked a room in a nearby hotel for the night. RP (11/14/12) 10. The group enjoyed themselves at Tia Lou's until closing time, and then they began walking to the hotel. RP (11/14/12) 11-14.

Heather Hansen had to be at work very early that morning, so she was going to drive home instead of going to the hotel. RP (11/14/12) 86. The group walked Hansen to her car, but it would not start. The group mingled near the car while several people tried to figure out what was wrong with it. RP (11/14/12) 94. Meanwhile, Elshahawany and Mahmoud Abdo went into the nearby alley to urinate. RP (11/14/12) 63-64. Abdo left the alley first. RP (11/14/12) 64.

Elshahawany noticed Chappelle standing nearby, staring at him. RP (11/14/12) 16-17. Elshahawany asked Chappelle what he was looking at, and words were exchanged. At that point, "[s]omething came out of [Chappelle's] hand and then he hit"

Elshahawany in the face.[3] RP (11/14/12) 17. Elshahawany did not feel anything initially, but he "saw a lot of blood coming out" and "freaked out." RP (11/14/12) 17.

Elshahawany came out of the alley covered in blood, and Chappelle came running out of the alley behind him. RP (11/14/12) 63-64. Abdo took his shirt off and used it to try to stop the bleeding. RP (11/14/12) 63. Abdo and several of Elshahawany's friends then chased Chappelle and fought with him. RP (11/14/12) 68-69. Alaa Al-Jelaihawi called 911 and stayed with Elshahawany until the police arrived. RP (11/15/12) 64. Arriving officers called for aid and broadcast a description of Chappelle. RP (11/15/12) 42-43.

Officers Crumpton and Bonesteel heard the suspect description on the radio and quickly spotted Chappelle near 7th and Pike. They noticed that Chappelle had blood on him. RP (11/15/12) 143-44. They detained Chappelle while another officer transported witnesses Jasmina Merdanovic and Al-Jelaihawi to their location for a show-up identification. RP (11/14/12) 99-100. They identified Chappelle. RP (11/14/12) 100; RP (11/15/12) 66.

After Chappelle was arrested, an officer took samples of the blood on his hands, which was then submitted for DNA testing

[3] The weapon Chappelle used to cut Elshahawany's face was never found.

along with a reference sample from Elshahawany. RP (11/19/12) 28, 44-45. The blood on Chappelle's right hand contained the DNA profile of a male other than Elshahawany. RP (11/19/12) 49. The blood on Chappelle's left hand contained a mixture of two DNA profiles, the major component of which was a match to Elshahawany's DNA profile. The random match probability was 1 in 100 quintillion. RP (11/19/12) 49-51.

Elshahawany suffered a deep laceration on his face as a result of the assault and was transported to Harborview for treatment. RP (11/19/12) 7-10. The cut went through the side of his face and penetrated to the inside of his mouth. RP (11/19/12) 10. Elshahawany lost three liters of blood at the hospital before medical personnel were finally able to stop the bleeding and repair the wound. RP (11/19/12) 12-15.

Chappelle testified that he was just walking down the street when he was accosted and beaten by a bleeding man and his friends. RP (11/19/12) 77-78. Chappelle asserted that he was "the real victim" in this case. RP (11/19/12) 107.

C. ARGUMENT

1. THE TRIAL COURT CONDUCTED A THOROUGH COLLOQUY AND CORRECTLY FOUND THAT CHAPPELLE HAD WAIVED HIS RIGHT TO COUNSEL AND HAD ASSERTED HIS RIGHT TO REPRESENT HIMSELF.

Chappelle first argues that the trial court erred in finding that he had validly waived his right to counsel and asserted his right to represent himself. Brief of Appellant at 9-24. This claim is without merit. The record demonstrates that Chappelle unequivocally asserted the right to represent himself, and that the trial court conducted a thorough colloquy to ensure that Chappelle's waiver of counsel was knowing, intelligent, and voluntary. Therefore, this Court should affirm.

A criminal defendant has the constitutional right to represent him- or herself at trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). To be valid, a defendant's waiver of the right to counsel must be made knowingly, voluntarily, and intelligently. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). A colloquy on the record is the preferred method to determine whether a defendant should be allowed to proceed *pro se*:

> While there are no steadfast rules for determining whether a defendant's waiver of the right to assistance of counsel is validly made, the preferred procedure for determining the validity of a waiver involves the trial court's colloquy with the defendant, conducted on the record. This colloquy should include a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense.

Modica, 136 Wn. App. at 441.

The fact that a defendant's waiver of the right to counsel occurs after the trial court has denied the defendant's motion for substitution of appointed counsel does not render the waiver of counsel invalid. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The decision whether to grant an indigent defendant's motion to appoint substitute counsel is a matter within the trial court's discretion. DeWeese, 117 Wn.2d at 376. When an indigent defendant is dissatisfied with court-appointed counsel, but "fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant either continue with current appointed counsel or to represent himself." Id. Put another way, "[i]f the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be

represented by counsel, and may represent a valid waiver of that right." Id. In order to ensure that a defendant's waiver of counsel is not "capricious" and "to protect trial courts from manipulative vacillations by defendants regarding representation," the defendant's request to proceed *pro se* must be unequivocal. Id. That is precisely what occurred in this case.

In this case, Chappelle asked the presiding judge for substitute counsel approximately two weeks before trial. When the presiding judge asked Chappelle to explain the basis for his motion, Chappelle alleged that counsel had not contacted potential defense witnesses. RP (10/26/12) 4. When the court asked counsel to respond, counsel stated that he had "on numerous occasions attempted to contact these witnesses" and that he had "left contact information for them." RP (10/26/12) 4. Accordingly, the presiding judge properly denied Chappelle's motion for substitute counsel. RP (10/26/12) 5.

The first day of trial proceeded without incident. RP (11/8/12). On the second day of trial, however, defense counsel informed the trial court that Chappelle wanted to file a motion to discharge him or to proceed *pro se*. RP (11/13/12) 4-5. When the trial court initially asked Chappelle to explain,

Chappelle's response was largely nonresponsive, although he did state at one point that "[w]itnesses on my behalf weren't called in" by his attorney. RP (11/13/12) 7-9. The trial court then began questioning Chappelle as to whether he wanted to represent himself. Chappelle initially said "[n]o," but he also complained that he had not had "a chance to speak" in court and that his "motions are never heard." RP (11/13/12) 10. At that point, the trial court correctly observed that Chappelle's request to proceed *pro se* was equivocal. RP (11/13/12) 10-11.

The trial court persisted in attempting to ascertain what Chappelle wanted to do, and the following exchange ensued.

> THE COURT: Are you asking to represent yourself?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You – yes. You want to go without counsel?
>
> THE DEFENDANT: If I have to go with an intern, whatever I have to do. I'm trying here.
>
> THE COURT: A what?
>
> THE DEFENDANT: If I have to get help, yes, I represent myself too. I have been representing myself the whole time basically.

THE COURT: I wouldn't say [sic] that's still a pretty equivocal statement, counsel. Are you attempting to discharge –

THE DEFENDANT: Yes.

THE COURT: -- Mr. Gonzales, and to represent yourself pro se in this case?

THE DEFENDANT: Yes.

THE COURT: You understand that if I allow Mr. Gonzales to be discharged, you will be by yourself through the entire case representing yourself?

THE DEFENDANT: Yes.

THE COURT: You will be required to follow appropriate –

THE DEFENDANT: Yes.

THE COURT: And when I make motions [sic] and in limine rulings you will be required to abide by them.

THE DEFENDANT: Yes.

THE COURT: This is your uncle here? Apparently he is part of your support system.

THE DEFENDANT: Yes.

RP (11/13/12) 11-12. After briefly involving Chappelle's uncle in the inquiry, the colloquy continued as follows.

THE DEFENDANT: Okay. Yes, sir. I want to go forward. I want to go pro se. I do want co-counsel.

THE COURT: There is no co-counsel.

THE DEFENDANT: No co-counsel?

THE COURT: You go pro se, you represent yourself.

THE DEFENDANT: Okay. Well, that's fine.

THE COURT: You represent yourself, you are up here, you make all your own decisions. You have no lawyer.

THE DEFENDANT: Okay.

THE COURT: You understand that? You are facing a – I'm told that if convicted you will have an offender score of a seven. You will have a standard range of 43 to 57 months, plus enhancement for the deadly weapon.

THE DEFENDANT: That's fine. I never had a deadly weapon.

THE COURT: Let me finish. So you are looking at a range of 55 to 69 months and a $10,000 fine.

THE DEFENDANT: Okay.

THE COURT: With maximum sentence of 120 months.

THE DEFENDANT: Okay.

THE COURT: You ever study anything about the law?

THE DEFENDANT: Just incarcerated.

THE COURT: You have been incarcerated, but never formally studied the law?

THE DEFENDANT: No.

THE COURT: Have you ever represented yourself in the past?

THE DEFENDANT: No, I have not.

THE COURT: Have you ever attempted to represent anyone in a court of law?

THE DEFENDANT: I have not. I have attempted but . . .

THE COURT: You know you are charged with assault in the second degree, which is a more [sic] serious offense, which is also a strike offense?

THE DEFENDANT: Yes.

THE COURT: I already told you what the potential sentences are; do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You understand you represent yourself? I will not tell you how to try the case or involve in any way [sic], give you legal advice?

THE DEFENDANT: Yes.

THE COURT: You are required to follow with [sic] the Rules of Evidence.

THE DEFENDANT: Yes.

THE COURT: You are – huh? Why don't you tell me what hearsay is.

THE DEFENDANT: Hearsay means that something that's said by someone else that is not proven by evidence.

THE COURT: Well, not exactly. I suggest you do not know the Rules of Evidence. The statement made out of court by a person offered for the truth of the matter asserted. That can be somebody else. Can be your statement. Can be anyone else's statement. It's offered for the matter of the truth asserted [sic]. Do you know any other Rules of Evidence?

THE DEFENDANT: No.

THE COURT: I didn't think so. You understand that the Rules of Evidence will govern what evidence is admitted, and you must abide by those rules, and I will rule on those? Objections by counsel, and even though you don't understand the Rules of Evidence I will still apply them; do you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand the rules of criminal procedure?

THE DEFENDANT: Somewhat but I don't know.

THE COURT: Somewhat. What's a 3.6 motion?

THE DEFENDANT: That's evidentiary hearing [sic].

THE COURT: To do what?

THE DEFENDANT: To suppress evidence.

THE COURT: What's a 3.5?

THE DEFENDANT: That's a motion – I don't know. To dismiss. I'm not sure.

THE COURT: Anyone put pressure on you to waive right [sic] to counsel?

THE DEFENDANT: No.

THE COURT: Finally, is it your desire to be without an attorney in this case?

THE DEFENDANT: Yes.

THE COURT: You understand we are going to immediately start picking a jury?

THE DEFENDANT: Yes.

THE COURT: There are no continuances.

THE DEFENDANT: My motion going [sic] to go forward, right?

THE COURT: What? What motions?

THE DEFENDANT: My motions.

THE COURT: What motions?

THE DEFENDANT: Right here.

RP (11/13/12) 13-18. The trial court then explained to Chappelle that although he could file whatever motions he wanted to for the record, the court would not entertain arguments related to a lawsuit against the police department or other irrelevant topics; rather, the

court was concerned only with going forward with the trial.

RP (11/13/12) 16. The colloquy continued as follows.

> THE COURT: I have already made my rulings on pretrial issues.
>
> THE DEFENDANT: Okay. That's fine.
>
> THE COURT: Are you ready to start picking a jury?
>
> THE DEFENDANT: Yeah. Start picking a jury today?
>
> THE COURT: Yeah.
>
> THE DEFENDANT: Okay.
>
> THE COURT: As soon as we have got jurors.
>
> [. . .]
>
> MR. GONZALES [defense counsel]: And, your Honor, am I excused? I'm on standby on another case, I don't know if you wanted me to . . .
>
> THE COURT: I'm not having standby.[4]
>
> MR. GONZALES: So inform 1201 I'm ready for my next trial?
>
> THE COURT: You're ready for your next trial if his ultimate decision is unequivocal that he intends to

[4] Although defense counsel used the word "standby" in the previous sentence, meaning that he had another case waiting on the trial calendar, the context of the entire colloquy demonstrates that the trial court's statement "I'm not having standby" meant that the court would not be appointing standby counsel for Chappelle and that defense counsel would be excused if Chappelle succeeded in waiving his right to counsel.

represent himself, and he intends to stick by that decision throughout the whole trial and abide by my rulings. We are not going to hear anything about your claims against the police department and some other incidents.

THE DEFENDANT: No. It's not about claiming. I'm going to court for assault two, right? That's what I'm charged with?

THE COURT: That's right. Assault two with –

MS. WORLEY [prosecutor]: Deadly weapon.

THE COURT: Deadly weapon.

THE DEFENDANT: Okay. Yup.

THE COURT: I will tell you it is a – you may be very bright. You may think you are doing the right thing. I would strongly advise against what you are doing. I think any judge who heard you would strongly advise against what you are doing, but you have a constitutional right to do it. And so long as you make the unequivocal decision to proceed pro se I am required to allow it. Now, is that your decision?

THE DEFENDANT: That's my decision.

THE COURT: Mr. Gonzales, you are hereby discharged.

MR. GONZALES: Thank you, your Honor.

RP (11/13/12) 17-19.

This record amply demonstrates that Chappelle's waiver of counsel was made knowingly, intelligently, and voluntarily. First, although there was initially some confusion as to whether

Chappelle wanted to represent himself or not, upon further questioning by the trial court Chappelle unequivocally stated that he wanted to proceed without a lawyer. During the ensuing colloquy, the trial court explained the seriousness of the charge, the possible penalties for the charge and the enhancement, and the existence of technical procedural rules that Chappelle would be expected to follow. In addition, the trial court explained in no uncertain terms that there would be no "co-counsel" to assist Chappelle, that there would be no continuances, and that Chappelle would be expected to be ready to pick a jury as soon as a sufficient number of jurors were available. Chappelle stated unequivocally that he understood all of these things, and that he still wished to discharge his appointed counsel and proceed *pro se*. Indeed, as the trial court observed, it likely would have been reversible error if the trial court had *not* allowed Chappelle to represent himself given this record. RP (4/30/13) 11.

Nonetheless, Chappelle argues that his waiver of counsel was not valid because the trial court "ignored" his request for substitute counsel, and because the trial court did not adequately inform him of the dangers of self-representation. Brief of Appellant at 17-23. These arguments are without merit. First, the record

demonstrates that Chappelle did not provide either the presiding court or the trial court with any valid basis to appoint substitute counsel. Rather, Chappelle's issues with appointed counsel amounted to complaints about trial strategy, and matters of trial strategy "must rest in the attorney's judgment," not the defendant's. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006) (quoting State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). In addition, given that the trial had already begun when Chappelle moved to discharge counsel in the trial court, a request for substitute counsel was not timely and would be properly denied on that basis as well. *See* State v. Stenson, 132 Wn.2d 668, 736, 940 P.2d 1239 (1997) (trial court did not abuse its discretion in denying a motion to substitute counsel after the trial proceedings had commenced).

Furthermore, in addition to informing Chappelle of the charge and the enhancement that he was facing and the penalties for each, the trial court further explained that there were rules that he would be expected to follow even though he did not know them, that he would not receive any legal assistance from the court, that he would not have "co-counsel," and that self-representation was a very bad idea. In short, the trial court's colloquy was more than

adequate to inform Chappelle of the dangers of self-representation and to establish that Chappelle had validly waived his right to counsel and asserted his right of self-representation in spite of those dangers.

Lastly, Chappelle suggests that what transpired *after* he waived the right to counsel renders the waiver invalid. More specifically, Chappelle points to his later renewed request for substitute counsel and some remarks from a courtroom spectator as calling his waiver into question. Brief of Appellant at 15-16; RP (11/13/12) 23-25. But as the trial court stated when these issues arose, Chappelle had already waived the right to counsel, and requesting substitute counsel "as the jury is proceeding [into] the courtroom" is plainly untimely. RP (11/13/12) 26-27.

In sum, the record demonstrates that Chappelle made an unequivocal request to discharge his appointed attorney and to represent himself, and the ensuing colloquy by the trial court established that Chappelle's waiver of counsel was made knowingly, intelligently, and voluntarily. This Court should reject Chappelle's arguments to the contrary, and affirm.

2. BOTH CHAPPELLE'S FORMER ATTORNEY AND THE TRIAL PROSECUTOR PROVIDED CHAPPELLE WITH THE MATERIALS HE NEEDED TO REPRESENT HIMSELF AT TRIAL.

Chappelle next argues that he was not provided with the materials he needed to represent himself at trial. Brief of Appellant, at 24-30. This claim should be rejected. Chappelle was provided with a redacted copy of discovery well in advance of trial and, once the trial had begun, the trial prosecutor copied and provided Chappelle with all of the witness interview transcripts, police reports, medical records, and other documents from her file. The record demonstrates that Chappelle made effective use of these materials in presenting his defense, and the record further demonstrates that Chappelle's repeated complaints to the trial court that he did not have discovery were unfounded. This Court should affirm.

An incarcerated *pro se* defendant has "a right of reasonable access to state-provided resources that will enable him to prepare a meaningful *pro se* defense." State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). However, what constitutes "reasonable access" must be decided on a case-by-case basis in the discretion of the trial court:

> What measures are necessary or appropriate to constitute reasonable access lies within the sound discretion of the trial court after consideration of all the circumstances, including, but not limited to, the nature of the charge, the complexity of the issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of judicial resources (*i.e.,* an accused is not entitled to greater resources than he would otherwise receive if he were represented by appointed counsel), legitimate safety and security concerns, and the conduct of the accused.

Id. at 622-23 (footnotes omitted). In Silva, for example, the defendant (who, unlike Chappelle, moved to proceed *pro se* early in the pretrial proceedings) was provided with a redacted copy of discovery,[5] access to basic legal materials, copying and postage, notary and subpoena services, and an opportunity to interview witnesses. Id. at 623-25. This Court found that these resources were reasonable for an incarcerated defendant who had exercised the right to represent himself well in advance of trial.

In this case, however, Chappelle did not decide to exercise the right of self-representation until the second day of trial, just before jury selection. RP (11/13/12) 4-5, 11-20. The trial court explicitly warned Chappelle that there would be no continuances, and that Chappelle would be expected to begin selecting a jury as

[5] The witnesses' addresses and telephone numbers were redacted, as was true in this case as well. Silva, 107 Wn. App. at 668.

soon as there were enough jurors available. RP (11/13/12) 16-17. Nonetheless, the record shows that Chappelle was provided with a redacted copy of discovery two months before the trial started. RP (4/30/13) 13. In addition, when Chappelle stated that he did not have the discovery materials, the trial was recessed early at the trial prosecutor's request so that she could ensure that Chappelle was provided with those materials. RP (11/13/12) 46-50. This occurred the same day that Chappelle discharged his lawyer, before the State's first witness was cross-examined. RP (11/13/12) 46-51. The record also shows that Chappelle had copies of the transcripts of the witness interviews that were conducted by his former attorney's investigator, and that Chappelle used those transcripts to cross-examine the State's witnesses. *See, e.g.,* RP (11/14/12) 47-48, 77-80; RP (11/15/12) 76-81, 97-102.

Nevertheless, Chappelle continued to claim that he had not been given discovery, both during and after trial. RP (11/15/12) 5; RP (4/30/13) 21.[6] The record shows otherwise. The trial prosecutor ensured that Chappelle had received discovery from his

[6] During his testimony at the hearing regarding his motion for a new trial, Chappelle claimed that he was "never given" discovery. RP (4/30/13) 21. This testimony contradicts the record, as demonstrated during the prosecutor's cross-examination. RP (4/30/13) 22.

former attorney, she provided duplicate copies of all of the police reports from her own file, and she provided copies of the victim's medical records and the DNA report well before those expert witnesses testified. RP (11/15/12) 5-14. Chappelle cross-examined every witness that the State called. RP (11/14/12) 30-38, 47-50, 71-87, 102-05; RP (11/15/12) 33-35, 50-54, 76-82, 97-112, 132-36, 148-50; RP (11/19/12) 18-24, 30-34, 52-59. Chappelle also called a defense witness, Leonard Kelly, and exercised his own right to testify. RP (11/19/12) 65-109.

In sum, in light of the fact that Chappelle did not decide to represent himself until the second day of trial, Chappelle was provided with the materials that were reasonably necessary to conduct his defense. Specifically, he was provided with all of the discovery materials, and, because his former attorney had already conducted an investigation, Chappelle had the transcripts from the defense interviews of the State's witnesses. Chappelle conducted competent cross-examinations of all of the State's witnesses, and he presented a defense case. Ultimately, although the jury found Chappelle guilty of second-degree assault as charged, the jury rejected the deadly weapon enhancement; thus, Chappelle's *pro se*

defense was partially successful. Chappelle's claim is without merit.

Nonetheless, Chappelle argues that he was not provided with discovery in a timely manner, that he was not provided with legal materials, that he was not appointed standby counsel or an investigator, and thus, that he was deprived of his right to present a meaningful *pro se* defense. Brief of Appellant at 25-30. But these issues primarily stem from the fact that Chappelle discharged his attorney on the second day of trial rather than well in advance of trial, as was the case in Silva.

Chappelle was provided discovery in as timely a manner as possible given the circumstances. Moreover, the trial court specifically warned Chappelle that he was putting himself at a great disadvantage by discharging his attorney after trial had already begun, but that the trial would be moving forward in any event. RP (11/13/12) 11-20. Chappelle chose to discharge his attorney in spite of those warnings. RP (11/13/12) 11-20. Furthermore, there is no right to standby counsel. DeWeese, 117 Wn.2d at 379. In addition, there was no need to appoint an investigator because an investigation had already been conducted by Chappelle's former attorney.

In sum, Chappelle was provided with the resources that were reasonably necessary to conduct his defense, particularly in light of the fact that he decided to waive his right to counsel and to represent himself after the trial had already begun. This Court should reject Chappelle's claim, and affirm.

3. THE ATTORNEY WHO REPRESENTED CHAPPELLE IN MAKING A MOTION FOR A NEW TRIAL DID NOT HAVE A CONFLICT OF INTEREST.

Lastly, Chappelle argues that he was denied his right to effective assistance of counsel for purposes of making the motion for a new trial because the attorney who represented him for purposes of that motion had a conflict of interest. Brief of Appellant at 30-38. This claim should also be rejected. The argument that Chappelle alleges should have been made on his behalf in support of the motion for a new trial – *i.e.,* that Chappelle's original attorney was "unethical" because he did not give Chappelle his entire file when Chappelle discharged him[7] – is completely baseless. Accordingly, Chappelle has not shown that the second attorney had

[7] Notably, this is a different basis for an alleged conflict of interest than the allegation of ineffective representation that the trial prosecutor brought up at the hearing on the motion for a new trial. *See* RP (4/30/13) 3.

a conflict of interest that adversely affected her performance or that prejudice resulted from her failure to raise a baseless claim.

A criminal defendant has the right to be represented by a conflict-free attorney. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). To obtain reversal based upon a conflict of interest, however, "the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance." Id. at 572. The mere possibility of a conflict will not suffice. Id.

Chappelle's claim of a conflict of interest is premised upon RPC 1.16(d), which provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

RPC 1.16(d). As support for the proposition that this rule requires appointed counsel in a criminal case to give his or her file to a defendant who asserts the right to proceed *pro se*, Chappelle cites

In re Disciplinary Proceeding Against Eugster, 166 Wn.2d 293, 209 P.3d 435 (2009). But this case is readily distinguishable.

In Eugster, the attorney in question was hired by an elderly client to assist with contentious estate planning and family law issues. In re Eugster, 166 Wn.2d at 301. The client became dissatisfied with the attorney's representation, and she hired a different attorney to perform the services she needed. Id. at 302-03. The first attorney not only refused to provide the client file to the new attorney, but he also filed a guardianship action against his former client, alleging that she was no longer capable of acting in her own best interests. Id. at 303-07. Although the guardianship action was ultimately dismissed, the client spent $13,500 to defend herself and incurred additional expenses because her new attorney had to recreate her client file "and attendant estate planning documents." Id. at 310.

Unlike the client file in Eugster, which consisted of the client's own estate planning documents, discovery in criminal cases does not consist of the defendant's personal papers. Moreover, criminal discovery is governed by CrR 4.7, which expressly provides in pertinent part as follows:

> *Custody of Materials*. Any materials furnished to an attorney pursuant to these rules *shall remain in the exclusive custody of the attorney* and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the 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) (emphasis supplied). There is no exception to this rule for *pro se* defendants. Furthermore, Chappelle has provided no other authority to support his argument that an attorney, once discharged, is obligated to turn over his or her entire file to a *pro se* criminal defendant, or that the failure to do so is a valid basis for a motion for a new trial.

In sum, Chappelle alleges a conflict of interest on the basis of the second attorney's failure to make an argument that contradicts the express terms of the court rule governing discovery and for which there is no other supporting authority. Chappelle has not met his burden of proving an actual conflict of interest that adversely affected the attorney's performance based on the failure to raise a frivolous claim. Accordingly, Chappelle is not entitled to a

remand to re-litigate the motion for a new trial or the reversal of his conviction.[8]

D. CONCLUSION

For the reasons set forth above, this Court should affirm Chappelle's conviction for assault in the second degree.

DATED this 28th day of March, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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[8] Chappelle's brief states that his case should be "remanded for a hearing on his motion for new trial with conflict-free counsel" (Brief of Appellant at 31), but also states in a topic heading that his "conviction must be reversed" (Brief of Appellant at 37). Although Chappelle's claim is without merit in any event, remand for a new hearing on the motion for a new trial would be the correct remedy if the claim were meritorious.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CHARLES CHAPPELLE, JR., Cause No. 70337-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

3/28/14
Date

Done in Seattle, Washington