

FILED
4-27-16

Court of Appeals
Division I
State of Washington

COA No. 73324-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JESSICA CARDE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Timothy Bradshaw

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in violation of the Sixth Amendment in denying Ms. Carde's December 23, 2014, and February 3, 2015 motions for new appointed counsel, before her trial on charges of theft and mortgage fraud. 1RP 105; 2RP 148.

2. The trial court erred in violation of the Sixth Amendment in denying Ms. Carde's motion for counsel of her choice. 11/10/15RP at 8-11.

3. The trial court erred in entering the restitution order of a total of \$221,994.36 where Ms. Carde was not afforded the protections of a jury trial on the restitution claims as required by the Sixth Amendment and Wash. Const. art. 1, sec. 21. Supp. CP ____, Sub # 167 (restitution order).

4. In the absence of jury findings, the court erred in entering the restitution finding (un-numbered) that the three named persons – Dubey, Roberts, and Samuelson -- were “entitled to restitution in the following amounts [set forth].” Supp. CP ____, Sub # 167.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in denying Ms. Carde's

motions for new appointed counsel prior to her trial, where the court assessed existing counsel as competent, but Ms. Carde also demonstrated that there had been a complete breakdown in the attorney-client relationship?

2. At the restitution hearing, despite it having previously been continued, Ms. Carde's appointed counsel had not sought the documentary evidence and witnesses that Ms. Carde contended would show that the actual dollar amounts owed were dramatically different than the claimants averred. Ms. Carde's effort at the restitution hearing to discharge her appointed counsel (in favor of private counsel of her choice, Mr. Flegenheimer) was her last best chance to be able to challenge the large amounts of money the complainants alleged she obtained wrongfully, where at trial, conviction on the first degree theft counts had merely required proof of value exceeding \$1,500.00.

11/10/15RP at 8-11.¹

When a defendant can retain counsel, she has a right to be represented not just by competent counsel, but by counsel of her choosing. Did the trial court abuse its discretion in denying the

¹ The transcripts will be referred to by volume number or date, followed by the page reference.

defendant's motion for counsel of her choice under State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), when it relied primarily on its continued assessment that appointed counsel was competent, where the defendant contended appointed counsel had not employed the prior continuance to obtain the evidence requested, where a further continuance would not unreasonably delay the administration of justice, and where the remaining Hampton factors also weighed in favor of allowing private counsel?

3. Restitution, particularly in these significant dollar amounts, was effectively criminal punishment, and the restitution hearing's result was an order of monetary payment akin to that available only in a full civil trial for damages. Was Ms. Carde constitutionally entitled to the protections of a jury trial at her restitution hearing?

C. STATEMENT OF FACTS

1. Convictions. Jessica Carde was convicted of multiple counts of theft and mortgage fraud based on the claims of several home sellers and lenders (individuals and institutions) that she entered into lease-purchase agreements, sometimes using borrowed funds, but failed to complete the purchases and had to be evicted for non-payment of

agreed rent and payments toward the sale. The prosecuting attorney alleged that Ms. Carde knew she would be unable to complete the transactions or completely pay back the loans. The aggregate sums at issue were well over \$200,000. CP 128-33, CP 1-28; 13RP 1921-33.

2. Requests for new appointed counsel. Twice prior to trial, Ms. Carde argued that what little communication had occurred between her and her attorneys regarding strategy was counterproductive to the case because the lawyers were failing to pursue her viable defenses to the charges. These included the fact of her various re-payments of amounts owed, and the fact that the dollar amounts asserted by the claimants were based on copies of checks to which her photocopied signature had been falsely attached. 1RP 91-105; 2RP 136-46. Ms. Carde was unsuccessful at discharging counsel.

3. Trial. Ms. Carde proceeded to trial on count 1 (theft first degree from lender Neil Dubey); count 3 (theft first degree, James Reed); count 4 (theft first degree, Scott Kim); count 6 (attempted theft first degree, Many Ways Lending); count 7 (theft first degree, Kevin Roberts); count 8 (mortgage fraud, Sterling Bank); count 9 (mortgage fraud, Greacen Homes), count 10 (mortgage fraud, John Postma); and

count 12 (theft first degree, Peter Samuelson).²

The jury found Ms. Carde not guilty on counts 3 and 4, but convicted her on the other counts. CP 1-28; CP 128; CP 230; 14RP 2185. She was sentenced to standard range terms, which resulted in her release shortly after the verdicts. CP 230-38; CP 249-56.

4. Restitution – request to be represented by retained counsel.

After trial, hoping to make one last effort to obtain careful scrutiny of the dollar amounts claimed, Ms. Carde sought new counsel at the restitution hearing because current counsel had failed to muster the appropriate evidence. Her new lawyer, Mr. Flegenheimer, told the court he was willing and at hand to represent Ms. Carde if he were able to obtain a continuance to prepare for the restitution matter.

11/10/15RP at 3-11.

The trial court denied substitution, reasoning that the hearing had already been continued so that such evidence could be sought, and that Ms. Carde was bringing the same motion for new counsel as the two motions she raised pre-trial. 11/10/15RP 11. At the restitution

² Throughout the case, the State characterized Ms. Carde as guilty of the crimes charged because she was “the classic [person] wanting champagne on a beer budget” (4RP 576 (pre-trial)) and because she “wanted steak, but all she had was a hamburger budget.” (14RP 2171 (closing argument)).

hearing, the arguments for private counsel and Ms. Carde's concerns about the restitution case were heard in a somewhat overlapping manner; Ms. Carde's appointed counsel explicitly offered the same, broad arguments as the defense raised at trial, including that certain amounts were gifts, and that Ms. Carde did not have the requisite wrongful *mens rea* for the crimes. 11/10/15RP at 8-11; Supp. CP ____, Sub # 165. Appointed counsel conceded to the court that these were the same arguments he had advanced at trial and which the jury had rejected, but counsel stated he was asking the court to credit those arguments for purposes of the restitution hearing, "despite that." 11/10/15RP at 9-11. Ms. Carde, while continuing to note her innocence, offered detailed arguments regarding her attorneys' failure to obtain certain witnesses and documentary evidence regarding the falsely, dramatically inflated amounts of money claimed to be owed in restitution. 11/10/15RP at 12-22.

The court deferred oral decision and later issued a written restitution order as to the three theft complainants, awarding the entire amounts specified in the State's memo – Donna Dubey (wife of deceased complainant Neil Dubey, count 1, \$139, 575.00); Kevin

Roberts (count 7, \$65,700.00), and Peter Samuelson (count 12, \$16,719.36) (total \$221,994.36); Supp. CP ___, Sub # 167 (order); Supp. CP ___, Sub # 169 (State’s restitution memo).

Ms. Carde appeals. CP 257 (notice of appeal); Supp. CP ___, Sub # 168 (notice of appeal of restitution order). Her convictions should be reversed, because she was entitled to substitution, including counsel of her choice for the restitution hearing. In addition, Ms. Carde was entitled under the federal constitution and the Washington State Constitution to the protections of a jury trial at her restitution hearing.

D. ARGUMENT

I. MS. CARDE WAS ENTITLED TO NEW COUNSEL, INCLUDING A CONTINUANCE FOR HER NEWLY RETAINED LAWYER TO TAKE OVER THE CASE FOR PURPOSES OF RESTITUTION.

a. The trial court abused its discretion in denying Ms. Carde’s motions for new counsel, including her final request at the restitution hearing, where she had private counsel of her choice at hand.

Ms. Carde has a constitutional right to counsel. Criminal defendants are guaranteed this right by the federal, and state constitutions. U.S. Const. amend. 6; Wash. Const. art. 1, sec. 22.³ This

³ The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.” And article I, section 22 of the Washington

right applied at every stage of the case, including pre-trial, trial, and the sentencing proceeding. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004, 939 P.2d 215 (1997); see also State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (“the setting of restitution is an integral part of sentencing.”).

It is true that an indigent defendant does not have a right to demand any particular appointed advocate – rather, only incompetence under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a conflict of interest, or a complete breakdown in communication or the relationship between counsel and the defendant, will warrant substitution of appointed counsel. In re Personal Restraint of Stenson, 132 Wn.2d 668, 732, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir.1998); Frazer v. United States, 18 F.3d 778, 785 (9th Cir.1994)).

Nonetheless, under this standard, an indigent defendant can be entitled to substitute counsel, if existing appointed counsel and the defendant are so completely unable to work together, beyond mere

Constitution provides that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

dislike of the defendant for counsel, such that counsel fails to pursue the accused's basic defense during the litigation. In re Stenson, 132 Wn.2d at 732 (citing Moore, 159 F.3d at 1158); Plumlee v. Del Papa, 426 F.3d 1095, 1107 (9th Cir. 2005).

i. The court should have granted Ms. Carde's pre-trial motions for new appointed counsel on December 23 and February 3, 2015.

(1) December 23, 2014. Ms. Carde sought new appointed counsel on December 23, 2014. 1RP 91. Ms. Carde noted her grave concerns about present counsel's performance. Since June of 2014, when counsel was appointed, decisions about the basic case strategy had been made without consulting her, and the lawyers were failing to accede to her request that they seek out certain vital documentary evidence and witnesses. 1RP 96-97. As Ms. Carde indicated,

Decisions have been made without even consulting me, which is the same with certain evidence which has been requested. I've asked for more witnesses, none of which is being responded to [and] [t]here's been total disagreement about case strategy.

1RP 97-98.⁴

The trial court denied Ms. Carde's motion, stating that defense

⁴ Ms. Carde understood that her motion for new counsel would require removal of both of her current appointed attorneys. 1RP 94-95.

counsel had been working hard for months and were competent lawyers pursuing a chosen strategy in the case. 1RP 105. This was error and new counsel should have been appointed.

On appeal, the Court of Appeals reviews a trial court's decision not to appoint new counsel for an abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court can abuse its discretion by making a decision which is “manifestly unreasonable.” State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

Jessica Carde’s right to counsel was violated because it was made clear to the trial court that there had been a complete breakdown in the attorney-client relationship. A substitution of counsel may be justified when this relationship – as was plainly evident in Ms. Carde’s case - is plagued by a complete breakdown such that that the attorney cannot communicate with or provide his client with basic representation with cooperation between them. See generally, In re Stenson, 142 Wn.2d 724–31; State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

Here, Ms. Carde set forth her complaints about counsel and counsel’s inability to maintain a working relationship with her. She

noted that when she asked that certain matters be pursued, her counsel responded with abrasiveness and told her that she could “go pro se if I wanted.” 1RP 97-98. But the court merely accepted the representations of defense counsel, who told the court that the discovery and evidence matters referred to by Ms. Carde were something he deemed not pertinent to his trial strategy. 1RP 94-95, 105.

Ms. Carde described a complete breakdown in communication which resulted in an attorney-client relationship that was, as she put it, affirmatively “counterproductive” to the case. 1RP 98. This is the opposite of what Ms. Carde was entitled to. New counsel should have been appointed.

(2) February 3, 2015. In addition, new counsel should have been appointed on February 3, 2015. On that date, Ms. Carde asked for new counsel and her request was denied. 2RP 135-146.

The trial court abused its discretion in this instance, when it failed to recognize that there was a complete breakdown, and that the specific alleged failures of counsel stemmed from a larger failure to communicate and pursue the defendant’s basic defense.

Defense counsel failed to collect certain evidence and disregarded Ms. Carde's defenses to the charges, instead filing a trial brief which contained "innumerable errors, misstatements, and misrepresentations" and left her "totally without evidence, without witnesses." 2RP 136-40. The trial court told Ms. Carde that this did not matter, because the attorneys' legal briefs were not materials that were presented to the jury at trial. 2RP 148.

A complete breakdown in the working relationship with counsel, such that new counsel is required, is more than a mere general loss of confidence in counsel. State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015 (2008).

This case presents the complete breakdown that made substitution of appointed counsel warranted and an abuse of discretion if denied. See Varga, 151 Wn.2d at 200; see Stenson, 132 Wn.2d at 734. The trial court's decision was manifestly unreasonable under the circumstances.

ii. At the restitution hearing, where Ms. Carde had privately-retained counsel at hand to represent her, the court abused its discretion by failing to apply the correct legal standard under State v. Hampton and the Sixth Amendment, when it relied on existing counsel being “competent” as its primary basis for denying the motion, and a continuance of the post-trial restitution hearing would cause no unreasonable delay.

After trial, at the restitution hearing that was held November 10, 2015, Ms. Carde again sought to discharge appointed counsel, this time in favor of retained counsel, Mr. Flegenheimer. Despite the hearing having been continued at her behest for the hoped-for purpose of her counsel obtaining evidence crucial to the restitution issues, Ms. Carde argued, in detail, that her attorneys had completely failed to seek out the specified documents and witnesses that would allow her to defend against the false, or at the very least exponentially inflated, monetary claims of the claimants. 11/10/15RP at 5-7, 12-22.

However, the trial court denied the request simply because existing appointed counsel was able and competent. The court ruled that the case had already been continued, and,

This Court knows these defense counsel still of record to be competent and served in that capacity at trial. In other words, there’s no adequate showing or good cause before this Court to grant the request to substitute private counsel.

11/10/15RP at 6. This was not the correct legal analysis under Hampton where Ms. Carde was now requesting that she be represented by *retained* counsel.

In this new context, Ms. Carde's complaints about the basic strategy of the case being pursued were required to be given far more dominant weight than the trial court gave them. In comparison to indigent defendants who are entitled only to an attorney who is not incompetent below the standard of Strickland v. Washington, the right to counsel of choice guarantees a defendant the right to be represented by a retained attorney who he or she selects precisely because the client may steer strategy with greater specificity than may the indigent represented. The Sixth Amendment guarantees a defendant the right to be represented by retained counsel of choice. Miller v. Blacketter, 525 F.3d 890, 895 (9th Cir. 2008) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932)); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 144-50, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)).

The right to select retained counsel of one's choice has been deemed the root meaning of the Sixth Amendment's constitutional guarantee. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994).

Here, when Ms. Carde's family was finally able to secure funds to hire private counsel Flegenheimer who would pursue the defense strategy of Ms. Carde's, it was legal error and thus an abuse of discretion for the court to refuse the motion by relying on its assessment of the competence of existing appointed counsel. The court appeared to characterize this new motion as being "the same request" as Ms. Carde's earlier February 3 and December 23 motions for new counsel.

But where a defendant presents with a retained attorney, it is not adequate to rely on the same assessments of general competence that provide a basis to deny substitution of appointed counsel. United States v. Brown, 785 F.3d 1337, 1347-48 (9th Cir. 2015) (error for court to focus on considerations of competence of appointed counsel rather than the broader right to counsel of choice) (stating that district court wrongly placed its "focus[]" on considerations pertinent to the right to

constitutionally adequate counsel, rather than to the right to choice of counsel Brown actually enjoyed.”). The court below applied the wrong legal standard when it relied so substantially on the base competence of existing appointed counsel to deny Ms. Carde’s motion. Employing the wrong legal standard is an abuse of discretion. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). No requirement of irreconcilable differences, or a complete breakdown in communication, was required, and competency was not a baseline basis to deny the motion, as it is when a defendant seeks a different appointed lawyer. A defendant with retained counsel at hand and seeking a reasonable continuance is effectively asking the court to protect her core Sixth Amendment right to not be required to make do with mere competence. Brown, 785 F.3d at 1347-48; Gonzalez–Lopez, 548 U.S. at 144.

Furthermore, under State v. Hampton, 184 Wn.2d 656, 669-70, 361 P.3d 734 (2015), which allows the court to consider all relevant circumstances in deciding on a motion to substitute retained counsel along with a continuance, the trial court still abused its discretion by

employing the wrong legal standard. State v. Hampton, 184 Wn.2d at 662, 670 (but ruling that there was no error in denial of counsel of choice where defendant did not make his request until day of trial, trial had already been continued once, victim/witness opposed the continuance, and defendant did not explain his dissatisfaction with appointed counsel). Nothing in Hampton, including its 11-factor non-exclusive list of considerations, allows a trial court to rest a denial of private counsel primarily on the competence of existing appointed counsel in such a way that fails to protect the root guarantee of the Sixth Amendment:

As part of the Sixth Amendment right to the assistance of counsel, defendants with private attorneys generally have the right to the counsel of their choice. [Aguirre, 168 Wn.2d at 365]; Gonzalez-Lopez, 548 U.S. at 144, 126 S.Ct. 2557. In contrast, indigent defendants with appointed counsel do not have the right to their counsel of choice. Gonzalez-Lopez, 548 U.S. at 151, 126 S.Ct. 2557 (“the right to counsel of choice does not extend to defendants who require counsel to be appointed for them”). Instead, indigent defendants can move to substitute counsel when there is an “irreconcilable conflict” with appointed counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723–24, 16 P.3d 1 (2001). As noted by the Court of Appeals, that “irreconcilable conflict” standard relates only to defendants with appointed counsel and does not apply to defendants retaining private attorneys.

Hampton, at 662-63. As can be seen, distinguished from the right to merely effective appointed counsel, the root guarantee of the Sixth Amendment is the right to retain counsel of one's choice, who will defend the case consistent with the defendant's strategy. Cf. United States v. Sinclair, 770 F.3d 1148, 1156 (7th Cir. 2014), cert. denied, 136 S. Ct. 399, 193 L. Ed. 2d 312 (2015) (court did not rely on federal defender's mere competence in violation of Sixth Amendment right to counsel of choice, simply by probing defendant's dissatisfactions with appointed lawyer, where defendant "was cagey on this subject" and would not have a basic informational discussion about reasons).

Ms. Carde's request should have been granted under Hampton. A court's decision may be an abuse of discretion if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision "outside the range of acceptable choices." State v. Rohrich, at 654 (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

Hampton begins by stating the rule that where the request to substitute retained counsel requires a continuance, the trial court considers the public's interest in the prompt and efficient

administration of justice, but weighs it against the defendant's important Sixth Amendment right to retain a lawyer she has privately retained. State v. Hampton, 184 Wn.2d at 663 (citing Aguirre, 168 Wn.2d at 365).

When faced with a defendant's request to adjourn even a full criminal trial to permit the retention of a privately retained lawyer, the trial court should begin with “a presumption in favor of a defendant's counsel of choice,” and the court should not indulge a rote insistence upon expeditiousness. United States v. Sinclair, 770 F.3d at 1154 (citing Carlson v. Jess, 526 F.3d 1018, 1024-25 (7th Cir.2008) (denial of private attorney two days before full criminal trial violated Sixth Amendment), and United States v. Sellers, 645 F.3d 830, 834, 837 (7th Cir.2011) (denial of private counsel three business days before trial violated Sixth Amendment)).

Consistent with the dignity of the core Sixth Amendment right, the court, under Hampton, should consider all relevant information, including the 11 factors described in the most recent edition of the LaFave Criminal Procedure treatise. State v. Hampton, 184 Wn.2d at 669-70 (citing 3 WAYNE R. LAFAVE ET AL., CRIMINAL

PROCEDURE § 11.4(c) at 718–20 (3d ed.2007)); see, e.g., United States v. Sinclair, 770 F.3d at 1156 (denial of continuance to obtain private counsel did not violate Sixth Amendment where defendant's plan to hire private attorney was at best preliminary and highly contingent, defendant made request on the eve of trial, court weighed costs to calendar of 40 people involved in case, and defendant did not offer any reason for waiting until the last minute).

The Hampton factors, as applied to Ms. Carde's case, are:

(1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar; (2) the length of the continuance requested; (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act; (4) whether the court had granted previous continuances at the defendant's request; (5) whether the continuance would seriously inconvenience the witnesses; and (9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay."

Hampton, supra. Here, the request was for new counsel at the restitution hearing. Ms. Carde was originally charged in March of 2013, and her trial proceeded through to sentencing on April 2, 2015. The restitution hearing, which the prosecutor originally noted for August 25 and then re-noted for September 25 (stating in each instance, "[o]ur office did not attempt to resolve the restitution matter prior to setting

this hearing date due to time restrictions”), did not involve trial witnesses, and the trial court indicated that the hearing would likely be limited to 30 minutes. Supp. CP ___, Sub # 159 (Notice of restitution hearing); Supp. CP ___, Sub # 160 (Notice of restitution hearing).

The prosecutor commented that on September 25 there was a continuance to October 22 at the defendant’s request so that her counsel could muster evidence, and there was then a continuance for “medical good cause” found by the trial court thereafter, before the day’s date of November 10 (Ms. Carde was in a wheelchair during the proceedings). 11/10/15RP at 3; see Supp. CP ___, Sub # 162 (minutes of 11/25/15); Supp. CP ___, Sub # 163 (order continuing hearing to October 22); Supp. CP ___, Sub # 164 (waiver of statutory deadline and order allowing hearing to be held on or before November 30); Supp. CP ___, Sub # 165 (October 19, 2015 order setting written briefing deadline of October 27 and November 3, 2015).

However, the trial court did not state that a continued restitution hearing would create inconveniences for witnesses or in the court adjusting its calendar. See United States v. Brown, 785 F.3d at 1347–50 (holding that a district court abused its discretion in part

because the record did not indicate that the trial court denied the defendant's motion because of the demands of its calendar).

Importantly, the continuance Ms. Carde sought for her counsel to muster evidence had *not*, in her assessment, been even minimally employed by counsel for that purpose. This was the very reason she needed to retain private counsel -- which she had now been able to do.

Hampton also includes the consideration factors of:

(6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel; and (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel.

Here, Ms. Carde's effort to have her counsel seek out the evidence that would defend her against the monetary sums alleged was prompt – it began early, indeed before trial. Ms. Carde was indigent, but later in the case as it became clear she was stuck with appointed counsel who were ignoring her directives, family members were able to pay for a private attorney. Although her need for different counsel became clear to her early in the process, her ability to obtain private counsel only later in the case is “unsurprising” in the context of criminal trials. See State v. Hampton, 182 Wn. App. 805, 826-27, 332 P.3d 1020 (2014)

(overruled on other grounds by State v. Hampton, supra); 11/10/15RP at 5-6 (attorney Flegenheimer, explaining circumstances of family just having become able to provide funds).

Further Hampton considerations include:

(8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; and (10) whether the current counsel was prepared to go to trial.

Ms. Carde had highly legitimate cause for dissatisfaction with appointed counsel. The trial court, when denying her pre-trial motions for substitution, implicitly deemed her complaints about appointed counsel as ‘falling short’ of incompetence. But on November 10, a different standard applied and Ms. Carde possessed highly legitimate bases for dissatisfaction with counsel in favor of Mr. Flegenheimer, who would pursue her strategy. Ms. Carde detailed existing counsel’s failings at length. 11/10/15RP at 5-22. Ms. Carde’s dissatisfactions were legitimate, and of the highest order.

Finally, Hampton endorses the consideration of:

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant’s case of a material or substantial nature.

The present case squarely presents identifiable prejudice. For purposes

of conviction, the State was only required to prove that the values taken were greater than \$1,500, per RCW 9A.56.030(1)(a) (first degree theft). CP 128-33, CP 1-28; 13RP 1921-33.

But restitution was sought by the State, and ordered by the court, in an amount well over \$200,000 in this case. The rule is that restitution, provided for by RCW 9.94A.753, allows the trial court broad discretion to order payment of amounts shown to have been lost by the crime, subject to a preponderance of the evidence standard. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Ms. Carde's arguments for private counsel were that various documents and checks, and witnesses who could testify to the various agreements, would make clear to the court that the actual amount of loss suffered by the complainants was far attenuated monetarily.

On appeal, deprivations of the right to counsel are structural error, thus there is no requirement of showing specific prejudice (see Part D(1)(b), infra). However, compared to a case where a defendant feels she is being deprived of private counsel who would strike a different defense 'theme' at trial and thus gain acquittal, Ms. Carde was

speaking of a reasonably ascertainable monetary difference in a restitution hearing, wherein the loss would be shown to be little at most. In the analogous context of whether constitutional error is “manifest” and thus warrants review on appeal without an objection, identifiable prejudice exists where the circumstances show that the error would have practical, identifiable consequences in the context of the case. See State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007) (discussing the RAP 2.5(a)(3) requirements including identifiable prejudice); State v. McFarland, 127 Wn.2d 322, 333–34, 899 P.2d 1251 (1995) (same). Because it is likely quantifiable – by private counsel directed to do so – the possibility of this discernible loss in Ms. Carde’s case must be viewed as per se “identifiable prejudice.”

The right to counsel of one's own choice is not absolute and therefore does not permit a defendant to unduly delay the proceedings. State v. Roth, 75 Wn. App. at 881. In no way in this case was Ms. Carde seeking to unduly delay the proceedings. Ms. Carde wanted counsel who would defend her case, she wanted that as soon as possible, and she had been wanting it -- as soon as possible -- for months. This was no new complaint. What had changed was Ms. Carde’s ability to

finally retain counsel of her choice, placing her request for substitution of counsel on a different constitutional plane – that of Hampton.

Although the trial court may have heard Ms. Carde’s exasperated tone at the restitution hearing as merely a repeat of her ongoing upset with her lawyers, the proper legal test at that juncture had changed. The trial court abused its discretion, for this reason and the reasons argued herein.

b. Reversal is required. Violations of the right to counsel require reversal. When a court unlawfully deprives an individual of her Sixth Amendment right to counsel, reversal is required. “[T]he erroneous denial of counsel bears directly on the ‘framework within which the trial proceeds’ – or indeed on whether it proceeds at all.” Gonzalez-Lopez, 548 U.S. at 150 (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 112 L.Ed.2d 302 (1991)). As such it constitutes structural error. Gonzalez-Lopez, 548 U.S. at 150. The violation of Ms. Carde’s right to counsel requires reversal of her convictions and sentence, or in the alternative, requires reversal of the restitution order.

2. THE FEDERAL AND STATE CONSTITUTIONS REQUIRED THAT MS. CARDE BE AFFORDED THE PROTECTIONS OF A JURY TRIAL AT THE RESTITUTION HEARING.

Ms. Carde's restitution hearing was her last best chance to demand an accurate accounting of the actual amounts she allegedly obtained wrongfully. At the hearing, the dollar amounts mattered – or would matter, in a cogent defense -- because the State, at trial, had only been required to prove the small sums necessary for the theft charges - guilt required proof merely of sums greater than \$1,500. RCW 9A.56.030(1)(a). Because restitution is punishment, the federal and state constitutions required that Ms. Carde be given the protections of a jury trial on restitution.

a. The Sixth Amendment bars the court from imposing restitution based on loss that was not found by a jury.

In Washington, restitution is both punitive and compensatory. State v. Kinneman, 155 Wn. 2d 272, 279-80, 119 P.3d 350 (2005) (citing, inter alia, State v. Ewing, 102 Wn. App. 349, 352–53, 7 P.3d 835 (2000)). The Sixth Amendment's right to a jury guarantees the right to have a jury find every fact essential to punishment, and to do so beyond a reasonable doubt. U.S. Const. amend. 6; 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, 298, 124 S. Ct. 2531, 159 L. Ed.
2d 403 (2004).

For example, because the historical function of the jury included determining the value of a financial penalty or fine, the United States Supreme Court has recently made clear that criminal fines are subject to the rule of Blakely. Southern Union Co. v. United States, ___ U.S. ___, 132 S. Ct. 2344, 2354, 183 L. Ed. 2d 318 (2012); see also Pasquantino v. United States, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) (“The purpose of awarding restitution in this action is . . . to mete out appropriate criminal punishment for that conduct”); but see Kinneman, 155 Wn. 2d at 281 (holding that although restitution is punishment, it does not require jury fact-finding under Blakely) (relying on Booker v. United States, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)).

In Southern Union, the Court specifically recognized that Apprendi and Blakely principles apply where a punishment is based upon “the amount of the defendant’s gain or the victim’s loss.” Southern Union, 132 S. Ct. at 2350-51. That is how restitution is

determined under RCW 9.94A.753, Washington's restitution statute. See Ewing, 102 Wn. App. at 352–53 (stating that restitution is primarily punitive and partly compensatory).

However, the Kinneman Court reasoned that restitution did not trigger the Sixth Amendment's protections because, while RCW 9.94A.753 requires a court to impose restitution, it permits a court to forego restitution in extraordinary circumstances, nor does the restitution statute set out a maximum amount. Kinneman, 155 Wn.2d at 282.

But these facts do not distinguish Washington's restitution scheme from punishment requiring jury findings. First, the statute does indeed require that restitution amounts be proved by the State to a level of certainty of easily ascertainable damages, and it sets out an additional cap when it provides "restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3). The fact that the State bears the burden of proving the amount of restitution illustrates that a court may not impose any amount absent the prescribed factual

determination. Because that factual determination results in an increase in punishment, it must be made by the jury.

Thus, before a court may impose any amount of restitution, the Sixth Amendment necessarily requires the State to prove the damages resulting from the loss to a jury beyond a reasonable doubt. See Southern Union, 132 S. Ct. at 2350-51.

b. The Washington Constitution guarantees a jury determination of damages.

The Washington Constitution guarantees defendants a jury determination of damages. Ms. Carde draws her state right to a jury trial on the substantive crimes, on any aggravating factors, and on punishment, including monetary sanction, from the same provision as do civil litigants. Article I, section 21 of the Washington Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Supreme Court has said that this constitutional assurance, guaranteeing that the jury right will “remain inviolate,” requires a jury determination of monetary damages before they can be ordered.

Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, 780 P.2d 260 (1989). The Sofie Court reasoned that the jury’s function as fact finder at the liability trial could not be divorced from the ultimate remedy provided. “The jury's province includes determining damages [and] this determination must affect the remedy. Otherwise, the constitutional protection [of the jury trial right] is all shadow and no substance.” Sofie, 112 Wn.2d at 661.

Thus in Sofie the Court ruled that the Legislature could not remove this traditional function from the jury by means of a statute that capped non-economic damages. Similarly, nothing permits any Legislative effort to remove this same damage-finding function from the jury simply by terming such damages “restitution” in a criminal case. Restitution is limited to the loss, i.e., damages causally connected

to the offense. RCW 9.94A.753. The damages at issue in Ms. Carde's case are no different than the damages at issue in Sofie -- the value of the loss suffered as a result of the acts of the Defendant. To preserve inviolate her right to a jury trial, Article I, section 21 must afford Ms. Carde a right to a jury determination of such damages.

E. CONCLUSION AND APPELLATE COSTS PRAYER

Based on the foregoing, Ms. Carde asks that this Court reverse her judgments of conviction, and reverse the restitution order. Further, in the event that Ms. Carde does not substantially prevail on appeal, she asks this Court, under its discretionary authority, to deny any award of appellate costs. State v. Sinclair, __ Wn. App. __, 2016 WL 393719 (Jan. 27, 2016).

Respectfully submitted this 27 day of April, 2016.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73324-9-I
)	
JESSICA CARDE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF APRIL, 2016.

X _____
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