

FILED
Court of Appeals
Division II
State of Washington
8/11/2020 8:50 AM
NO. 53606-4-II

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

STATE OF WASHINGTON, Respondent

v.

KENNETH JAY MOORE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00380-8

BRIEF OF RESPONDENT

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INTRODUCTION

In 2016, Leisa Holt lived in her home in the city of Vancouver with her forty-five-year-old son Kenneth Moore. Holt worked at the Hilton Hotel as a waitress. Holt also still provided care for her adult son, but the situation was one of ongoing stress and prevented her from participating in after-work activities with her friends.

It was at work that same year when Holt met, and began a romantic relationship with, Jeff Hesterley. The relationship quickly became serious and the couple spent a lot of time together, which included Hesterley spending time at Holt's home. But Hesterley had never met Moore, however, because Moore stayed in his bedroom with the door locked.

Holt and Hesterley celebrated Valentine's Day in 2017 a day early by going out to dinner on February 13th and staying the night together in a hotel. The next day, Hesterley and Holt enjoyed a lunch with Hesterley's parents. That lunch was the last time Hesterley saw Holt alive.

By February 17th, Hesterley was worried about Holt since she had not been returning his calls or text messages, nor had she shown up for work as scheduled. So Hesterley, who had a key to Holt's home, went over to see if everything was okay. Nobody responded to his knocks so Hesterley unlocked the door and entered only to be confronted by Moore,

who ran at Hesterley with his fists balled up and scratches on his face, and yelled for him to get out. Moore slammed the door and Hesterley called 911 requesting a welfare check.

When responding officers entered the home, they observed Moore in possession of a rifle and watched as he raised, leveled, and pointed the firearm at Vancouver police officer Bill Bailey who had entered the home from the back. The officers retreated and SWAT was called. Eventually, Moore exited the home and was arrested.

Inside the home, officers found the partially dismembered body of Holt. Her legs were in trash bags and the rest of her body was in the bathroom along with a cutting board, a hammer, a drill, a meat cleaver, a hunting knife, and other related items. DNA and fingerprint evidence linked Moore to the tools and weapons. Holt suffered multiple serious injuries, which included two stab wounds to her temple, one of which penetrated her skull, a fracture of the thyroid cartilage horn, suggesting manual strangulation, and a slashing wound to her throat. Holt's body also evidenced other noticeable injuries and numerous superficial wounds on her arms and hands from a sharp object suggesting that she was trying to defend herself. Due to the numerous, significant injuries, Holt's cause of death was considered multi-factorial.

RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence supporting Moore's conviction for Assault in the Second Degree.**
- II. **The trial court did not violate Moore's right to confer privately with his counsel by declining to pay for real time transcription services for attorney-client meetings in the jail since counsel still had the opportunity and ability to meet and communicate with Moore.**
- III. **The trial court properly denied Moore's counsel's motion to withdraw because there was not an irreconcilable conflict or a complete breakdown in communication between Moore and his attorney.**
- IV. **The State concedes that it presented insufficient evidence of the aggravating circumstance that Moore demonstrated an egregious lack of remorse.**
- V. **The State agrees that the trial court erroneously relied on an aggravating circumstance not pleaded or proved to a jury and that this error requires resentencing.**
- VI. **The merit of Moore's claim that he did not receive the effective assistance of counsel at sentencing is dependent on evidence outside of the record. But because a resentencing is required due to other errors this issue is moot.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 22, 2017, Kenneth Jay Moore was charged by information with Murder in the First Degree, for strangling and stabbing to death Leisa Holt, his mother, between February 14, 2017 and February 17,

2017, and with Assault in the Second Degree for pointing a rifle at Vancouver Police Officer Brett Bailey on or about February 17, 2017. CP 7. The murder count included notice that the State would be seeking an exceptional sentence based on the aggravating circumstance of “an egregious lack of remorse,” while the Assault in the Second Degree alleged the aggravating circumstance of committing the crime against “a law enforcement officer who was performing his . . . official duties at the time of the offense” and also included a firearm enhancement. CP 7.

Prior to trial, the parties addressed Moore’s potential competency issues, the need for a real time transcriptionist for court hearings due to Moore’s purported hearing impairment, and Moore’s attorney’s attempt to withdraw from the case. Trial ultimately commenced on June 3, 2019, before the Honorable Daniel Stahnke, and concluded on June 11, 2019 when the jury returned verdicts finding Moore guilty as charged to include the aggravating circumstances and the firearm enhancement. RP 322-1478; CP 331-34. The trial court sentenced Moore to an exceptional sentence totaling 410 months of total confinement by imposing a sentence above the standard range on the murder count and running that sentence consecutive to the enhanced sentence on the assault count. CP 362-63, 373-74. Moore timely filed his notice of appeal. CP 350.

B. STATEMENT OF FACTS

Pursuant to RAP 10.3(b), and for the purposes of this responsive brief only, the State is satisfied with Moore's statement of the case. Generally, Moore's statement of the case accurately summarizes the facts relating to Moore's commission of the crimes of Murder in the First Degree and Assault in the Second Degree. The State will provide additional facts from the record in the argument section, as necessary, to respond to Moore's assignments of error.

ARGUMENT

I. The State presented sufficient evidence supporting Moore's conviction for Assault in the Second Degree.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of

the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

A person commits the crime of Assault in the Second Degree when he or she “assaults another with a deadly weapon.” RCW 9A.36.021(c). An intentional act that places “the victim in reasonable apprehension of bodily harm” is an assault. *State v. Hall*, 104, Wn.App. 56, 62, 14 P.3d 884 (2000) (citations omitted). A firearm, whether loaded or unloaded, is *per se* a deadly weapon. *State v. Speece*, 56 Wn.App. 412, 416-17, 783 P.2d 1108 (1989), *aff’d*, 115 Wn.2d 360, 361-62, 798 P.2d 294 (1990); RCW 9A.04.110(6). And a firearm is defined as a “weapon or device from which a projectile or projectiles *may* be fired by an explosive such as gunpowder.” RCW 9A.41.010(11) (emphasis added).

As Moore notes, most of the case law construing what constitutes a firearm “has involved either the offense of unlawful possession of a firearm pursuant to RCW 9.41.040 or the firearm enhancement under RCW 9.94A.533” rather than in the context of an assault. Br. of App. at 31. Naturally, the unlawful possession of a firearm statute criminalizes the “possession or . . . control” of a firearm by a person prohibited from possessing a firearm, while the firearm enhancement can be added where the defendant “was armed *with* a firearm” when he or she committed a felony crime. RCW 9.41.040(1)(a); RCW 9.94A.533(3) (emphasis added).

And the cases construing what constitutes a firearm in the context of unlawful possession *and* the firearm enhancement have concluded that the State most prove that the firearm “is a ‘gun in fact’ rather than a ‘toy gun.’” *State v. Raleigh*, 157 Wn.App. 728, 734, 238 P.3d 1211 (2010) (quoting *State v. Faust*, 93 Wn.App. 373, 380, 967 P.2d 1284 (1998)); *State v. Crowder*, 196 Wn.App. 861, 872-73, 385 P.3d 275 (2016). A firearm is a “gun in fact” when the device is:

capable of being fired, either instantly or with reasonable effort and within a reasonable time. Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm.

State v. Tasker, 193 Wn.App. 575, 594, 373 P.3d 310 (2016); *Crowder*, 196 Wn.App. at 872-73. Thus, the State is not required to prove that the firearm is “operable at the time of the offense.” *State v. Olsen*, 10 Wn.App. 731, 738, 449 P.3d 1089 (2019).¹

Moore argues a different analysis is required in the context of an assault with a deadly weapon. Br. of App. at 32-35. He argues that the “offense of assault with a deadly weapon, which is a crime of commission, differs significantly from the unlawful possession of a firearm, which is a

¹ *Olsen* finds support for its holding in *Tasker*, *supra*, and *Raleigh*, *supra*, but also notes that the plain language of statute defining “firearm” does not require “that the gun be ‘operational’ at the time of the offense” since it states that a firearm is a weapon “from which a projectile . . . may be fired.” 10 Wn.App.2d at 738 (emphasis in original).

crime of possession” and that in “the context of assault with a deadly weapon, the word ‘with’ has a temporal element, i.e., the device used in the assault must be a functioning firearm at the time of the assault.” Br. of App. at 32-33. But this analysis ignores the fact that case law construing “firearm” for the firearm enhancement, as discussed above, which penalizes offenders “armed *with* a firearm” is in accord with the unlawful possession case law he tries to distinguish. RCW 9.94A.533(3) (emphasis added). Moreover, the above case law should be equally applicable to an assault with a deadly weapon (Assault in the Second Degree), because an inoperable firearm, like an unloaded one, which is *per se* a deadly weapon, “creates the same apprehension in the victim and . . . can be loaded, [or made operable,] during the commission of a crime, and, therefore, has the same potential to inflict violence.” *Faust*, 93 Wn.App. at 381² (citing *State v. Sullivan*, 47 Wn.App. 81, 84, 733 P.2d 598 (1987)); *State v. Faille*, 53 Wn.App. 111, 115, 766 P.2d 478 (1988).

Here, regardless of how “firearm” is defined, the State presented sufficient evidence that Moore committed the crime of Assault in the Second Degree. After entering Moore’s home, multiple officers saw Moore holding what they believed to be a rifle. RP 507-510, 514-16, 518-19, 525, 538-39, 544, 741-43, 748, 750-51. Officer Bailey specifically

² *Faust* notes on the same page that “a malfunctioning gun can be fixed.” *Id.*

testified that he saw Moore “pointing a rifle at my head” and that he was afraid that he was going to be shot. RP 741-43, 748, 750-51.³ In fact, the officers’ belief that Moore was armed with a firearm was the reason they all fled⁴ Moore’s house and called for SWAT. RP 510-11, 538-39, 741-43, 745, 749-751. That the officers also made mention multiple times of observing the barrel of a rifle—Officer Epperson, for example, only observed the “rifle barrel”—is of no matter since all of the officers believed that Moore was armed with a real rifle, rather than just a barrel, and acted accordingly. Br. of App. at 35-36; RP 507-510, 514-16, 518-19, 525, 538-39, 544, 741-43, 748, 750-51. This is especially true when taking the evidence in the light most favorable to the State and considering that trained police officers have a level of familiarity with firearms greater than the average citizen. As a result, the State presented sufficient evidence that Moore assaulted Officer Bailey with a firearm at the time of the crime rather than the barrel of one.

Furthermore, that Moore’s rifle was later found on his bed disassembled into three pieces is more interesting than relevant. RP 643-45, 861, 916-922. For one, SWAT arrived about an hour after the officers

³ Officer Epperson, on the other hand, stated that “when the rifle came up I thought it was pointed – pointing at Officer Schaffer.” RP 544

⁴ Officer Bailey testified that “[e]ven though I saw *the rifle* I wanted to get out of there and let other people know what’s going on. . . .” RP 749 (emphasis added).

who initially entered Moore's home exited, and even more time elapsed before Moore himself exited the house and was taken into custody. RP 540-41, 766, 769-770, 785, 792-93, 838, 840, 854, 856-57. Thus, there was at least an hour between when Moore pointed his rifle at Officer Bailey and when Moore exited the house; plenty of time for him to go into his bedroom where his toolbox was located and disassemble his rifle. RP 643-45, 880-82, 916-922. Additionally, the rifle was operable even when not fully reassembled. RP 1210-15. The State's firearms expert testified that a bullet could be fired from the rifle by holding just two of the pieces together and without the associated screws. RP 1210-15.

Accordingly, the evidence presented at trial established that Moore's rifle was a gun in fact, and that it was "capable of being fired, either instantly or with reasonable effort and within a reasonable time." *Tasker*, 193 Wn.App. at 594; *Olsen*, 10 Wn.App.2d at 738. Moreover, the State presented evidence that the rifle appeared to be "a real gun" and was "wielded in committing a crime," which, as a matter of law, "is sufficient circumstantial evidence that" Moore possessed a firearm when he assaulted Officer Bailey. *Id.* This Court should affirm his conviction for Assault in the Second Degree.

II. The trial court did not violate Moore’s right to confer privately with his counsel by declining to pay for real time transcription services for attorney-client meetings in the jail since counsel still had the opportunity and ability to meet and communicate with Moore.

Moore’s situation as it related to his purported need for an interpreter, or something akin to one, is unique. For six months, from March 3, 2017 when Moore made his first appearance to a hearing on August 23, 2017 at which an order for a competency evaluation was entered, Moore was speaking and hearing in court. RP 1-18. On September 26, 2017, however, things begin to change because, for the first time, Moore requested headphones in an attempt to hear better and began wanting to communicate by writing notes. RP 21-24. By October 18, 2017, Moore acted in a manner such that the trial court was unsure if Moore was hearing impaired. RP 30-34. As a result, the trial court ordered the real time transcription of Moore’s court hearings so that Moore could follow along by reading from a computer screen. RP 30-34.

Shortly thereafter, on November 13, 2017, Moore was transferred to Western State Hospital (WSH) for his competency evaluation. CP 36-46. Moore primarily communicated with WSH staff by writing notes but was observed “verbally communicating” with others including “interacting verbally with peers (indicating he is able to hear and speak).” CP 40, 43-44. The competency evaluation report also contains

observations by Clark County jail and medical staff that Moore was verbal and “denie[d] hearing impairment” as late as October 30, 2017. CP 38-40.

Nonetheless, by December 15, 2017 and Moore’s return to Clark County, all the court hearings took place with a real time transcriptionist. CP 27; RP 41-322. And though the State requested that the trial court “resolve th[e] issue in regards to [] whether or not Mr. Moore is in fact hearing impaired” and argued that there was “ample evidence that he . . . is not hearing impaired” and was, instead, “selectively choosing to ignore people when they are talking to him,”⁵ the trial remarked that it did not “know if he’s feigning hearing loss or [] not” and refused to make any finding as to the status of Moore’s ability to hear. RP 36-39, 76.

At that same December 15, 2017 hearing, the purpose of which was to discuss Moore’s competency⁶, Moore’s counsel, Louis Byrd, brought up the idea of having a real time transcriptionist available in jail for his meetings with Moore. RP 46-50. The trial court at first stated that it

⁵ In a hearing on April 13, 2018, even defense counsel Louis Byrd remarked that “there is an assumption that Mr. Moore can’t hear and I don’t know what that’s based upon – only potentially it’s the result of his own statements. However there’s no factual record that suggests that he can’t hear.” RP 74; *see also* CP 52; RP 89-90 (Byrd stating on September 7, 2018, that he was “refrain[ing] from discussing the specifics of our [(Byrd and Moore)] interactions outside of the courtroom relative to alleged malingering or deafness” and remarking that his “on-going representation of the Defendant could be viewed as an endorsement of a continuing fraud upon the court.”

⁶ The trial court did not enter an order finding Moore competent until April 13, 2018. RP 77.

was “not wading into that,” but ultimately indicated that it was “not ordering them [(the State)] to pay for a private jail meeting transcriptionist” and that Byrd would “have to go through your coordinator [(the Clark County indigent defense coordinator)] to get the funds to hire that.” RP 46-47, 50.⁷ The issue was never re-raised. *See* RP 51-322.

From December 15, 2017, to when trial began in June of 2019, the record supplies little information about the quantity or quality of the jail meetings between Moore and Byrd or Moore and eventual co-counsel Greg Schile, save for the fact by January of 2019 transcripts were utilized and written notes passed, though Moore complained about Byrd and Byrd about Moore, *infra* argument section III. RP 128-29, *see also generally* RP 51-322. The record does establish, however, that as of September 7, 2018 that Moore refused to meet with Byrd on July 10, 2018, July 27, and August 9, and that the two had a five minute meeting on August 16 and met for approximately one hour and thirty minutes on August 24, 2018. RP 86, 94, 96. We also know that at times Moore was “minimally cooperative” or uncooperative during other out-of-court proceedings and that at times, while in court, Byrd needed and requested additional time to

⁷ When later in the hearing the trial court was asked if it ruled on the request for a real time transcriptionist for jail meetings, the court responded “I don’t know what they do at the jail.” RP 50.

discuss legal issues with Moore. RP 52-53, 80, 103, 105-06, 112-14, 119, 823-25, 1350-52.

A defendant has the constitutional right to the assistance of counsel, which “unquestionably includes the right to confer privately with his or her attorney.” *State v. Fuentes*, 179 Wn.2d 808, 818-19, 318 P.3d 257 (2014) (citation omitted). A defendant also has the right to an interpreter, which is “based on the Sixth Amendment . . . right to confront witnesses and the right inherent in a fair trial. . . .” *State v. Teshome*, 122 Wn.App. 705, 709-710, 94 P.3d 1004 (2004) (citation and internal quotations omitted). Similarly, “[i]t is also Washington’s policy to secure and protect the constitutional rights of hearing-impaired, speech-impaired, and non-English speaking persons by having qualified interpreters available to assist them during legal proceedings.” *State v. Gonzales-Morales*, 91 Wn.App. 420, 423, 958 P.2d 339 (1998), *aff’d*, 138 Wn.2d 374, 979 P.2d 826 (1999) (citing RCW 2.42.010⁸).

But when a defendant’s claim “rests on ‘evidence or facts not in the existing trial record,’ filing a personal restraint petition is the appropriate step.” *In re Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17

⁸ “It is hereby declared to be the policy of this state to secure the constitutional rights of deaf persons and of other persons who, because of impairment of hearing or speech, are unable to readily understand or communicate the spoken English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.” RCW 2.42.010

(2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). In other words, the “proper avenue for bringing claims based on evidence outside the record is through a personal restraint petition, not an appeal.” *State v. We*, 138 Wn.App. 716, 729, 158 P.3d 1238 (2007) (citation omitted). Thus, on direct appeal a reviewing court “will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012) (quoting *Barker v. Weeks*, 182 Wn. 384, 391, 47 P.2d 1(1935)).

The record here does not support Moore’s contention the trial court’s December 2017 decision not to order a real transcriptionist for private jail meetings between him and his attorneys constituted error let alone effectively denied him his right to privately confer with counsel. For one—without addressing whether Moore was actually hearing impaired or mute—the fact that a mute, hearing impaired person who does not know ASL may need real time transcription in order to receive a fair trial does not necessitate that real time transcription is needed for that same person to communicate with his attorney during private jail meetings. During a trial, there undoubtedly will be rapid back and forth discussions between attorneys from each side and the judge and lengthy answers by witnesses punctuated by objections and argument. In this setting, it cannot be

contested that absent a real time transcriptionist that a mute, hearing impaired person who did not know ASL would be unable to follow or meaningfully participate in the proceedings.

The private, one-on-one meeting setting is substantially different. Despite the mute, hearing impaired person still being limited in his or her mode of communication, the attorney can (1) present to his client pre-written materials to review; (2) handwrite notes; and (3) bring a laptop or table computer in order to communicate by typing. This situation is in stark contrast to one in which a defendant does not speak English; an attorney who shows up at the jail without an interpreter in such a situation is *not able* to effectively communicate. On the contrary, this situation is more akin to one in which a defendant does not speak English but has an interpreter present for a jail meeting; effective communication can occur but is slower or delayed—by the note writing or interpreting, respectively.

Accordingly, there is no *per se* violation of a mute, hearing impaired defendant's right to counsel when he or she is not provided a real time transcriptionist for jail meetings with his or her attorney. The same can be said for Moore, who may or may not have been mute or hearing impaired. RP 36-39, 74, 89-90; CP 52. And the fact that Byrd requested additional time to discuss issues with Moore as they arose or that some matters had not been fully discussed—events that happen in almost every

serious trial regardless of how cooperative or obstinate a defendant is or whether interpreter services are needed or not—sheds little light on the claim that there was a *need* for a real transcriptionist for jail meetings let alone whether the denial of one constituted a denial of the right to counsel. That Byrd did not renew his request for a real time transcriptionist in the year and a half between the initial discussion and trial suggests the opposite; that a real time transcriptionist for jail meetings would not have been a panacea for the difficulties between Moore and his attorneys. This Court should reject Moore's argument otherwise.

Nonetheless, presuming the denial of a real time transcriptionist can constitute error, a defendant must still establish the claim with evidence in the record. *Hutchinson*, 147 Wn.2d at 206-07. And that error also cannot be predicated on the assumption that because Byrd and Moore did not, at times, communicate well in court or get along that the lack of a real time transcriptionist is to blame. *Jasper*, 174 Wn.2d at 123-24. For the majority of time that this lengthy case was pending we simply do not know how frequently Moore met with his attorneys, the duration of these meetings, how relatively successful these meetings were in communicating about the case, and, if not successful, how much blame could be placed on the lack of real time transcriptionist. For Moore to make a successful claim on this basis he must supplement the record and,

therefore, a personal restraint petition is the proper vehicle for him to raise the claim. *We*, 138 Wn.App. 716, 729. Consequently, this Court should deny Moore’s claim that he was denied his right to privately confer with counsel.

III. The trial court properly denied Moore’s counsel’s motion to withdraw because there was not an irreconcilable conflict or a complete breakdown in communication between Moore and his attorneys.

Moore argues that the trial court improperly denied his attorney, Louis Byrd’s motion to withdraw as counsel or, in the alternative, his own motion to substitute counsel. *Compare* Br. of App. at 1-2, 48 *with* Br. of App. at 41-42.⁹ The trial court, however, properly denied these motions because Moore did not—and still cannot—show “good cause” sufficient to warrant substitution of counsel “such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication,” significant enough “as to prevent presentation of an adequate defense.” *Davis*, 3 Wn.App.2d at 790 (citations and internal quotations omitted).

Beginning on April 13, 2018, Moore sought to replace Byrd as his attorney and Byrd sought to withdraw from representing Moore. RP 73-

⁹ Whether the challenge is characterized as the denial of Moore’s own motion to substitute counsel or the denial of Byrd’s motion to withdraw is irrelevant; the legal analysis remains the same. *See State v. Davis*, 3 Wn.App.2d 763, 790-91, 418 P.3d 199 (2018) (affirming the trial court’s denial of defendant’s motion to substitute counsel); *State v. Thompson*, 169 Wn.App. 436, 457-464, 290 P.3d 996 (2012) (affirming the trial court’s denial of counsel’s motion to withdraw).

77. At that hearing, after Byrd complained to the trial court about his difficulty communicating with Moore, Moore wrote a note asking the court to “replace Mr. Byrd.” RP 73-74. Byrd responded by stating “I would join in that request your honor.” RP 74. Byrd based this request on the need, in court, to pass “handwritten notes back and forth” and claimed that because of this he would risk providing “ineffective assistance of counsel.” RP 74.

The trial court denied the joint request to replace Byrd and, instead, offered to appoint a second attorney to assist in Moore’s defense. RP 75-77, 83. As the trial court explained, “[a] second attorney sitting next to you while you’re focused on your oral arguments may be able to assist and make sure he’s [(Moore)] getting all the transcribed discussions that we are having.” RP 77. At that point, Byrd did not accept the offer of a second attorney, and he and Moore conferred, agreed to waive speedy trial, and continued the trial date into October. RP 80-83.

The parties returned to court on September 7, 2018 on Byrd’s motion to withdraw as counsel. CP 50-53; RP 85-108. That motion documented that (1) Moore refused to meet with Byrd on July 10, 2018, July 27, and August 9, that the two had a five minute meeting on August 16, and met for approximately one hour and thirty minutes on August 24, 2018; (2) Byrd worried about “being exposed to a claim of ineffective

assistance of counsel” due to difficulties in dealing with Moore’s “insistence of nonverbal communication”; and (3) Byrd doubted Moore’s competency. CP 51; RP 85-90, 94-96. The trial court listened to Byrd, engaged in discussion with him on the issues, asked Moore to weigh in, concluded that “there’s some merit to the . . . claim that he [(Moore)] is choosing not to assist his attorney but that’s his choice,” denied the motion, and appointed a second attorney (Greg Schile) to represent Moore and assist Byrd. RP 91-97, 101-03, 106-07.

On September 28, 2018, the parties were in court for an omnibus hearing and defense’s motion to continue. RP 110. As before, Byrd complained about Moore’s lack of cooperation and specifically that Moore refused to cooperate “with any of the appointed investigators and/or experts.” RP 112-14, 119 (Byrd characterized Moore as “refusing to participate” in the case), 122. When the trial court gave Moore the opportunity to discuss what was going on, Moore responded that “he had asked that this lawyer be fired,” objected to the continuance, and refused to sign a waiver of speedy trial. RP 120-24. The trial court granted Byrd’s motion to continue over Moore’s objection. RP 120-24.

Four months later, on January 31, 2019, defense requested another continuance. RP 125. Once again, despite a large number of outstanding witness interviews, Moore requested to proceed to trial. RP 127-28. A

continuance was granted. RP 133. Additionally, Byrd updated the trial court on his communications with Moore, explaining that “we have to go into the jail and provide transcripts to him and . . . attempt to get some type of dialog on the transcripts,” that the attorneys had “given him all the transcripts that we have received,” and that “[a]ll communication is by note passing.” RP 128-29. Despite this, Byrd claimed that he had “no idea what Mr. Moore’s interpretations of the transcripts are.” RP 129.

The next readiness hearing occurred on May 30, 2019 and the case was called ready for trial. RP 314. After the case was called ready and some day-of-trial procedures were discussed, Moore requested new counsel. RP 320. When the trial court asked Moore why he wanted a new lawyer, Moore responded for a “bunch of reasons.” RP 320. So the trial court asked Moore for “more specificity.” RP 320. Moore commented that he did not “want his [(Byrd)] lies representing me in [m]otions or at trial.” RP 320-22. The trial court denied the motion. RP 321-22. Moore did not complain about Schile. RP 321-22.

Finally, on the first day of trial, June 3, 2019, Byrd renewed his motion to withdraw. That said, it appears as if Byrd believed that he needed to renew the motion so that the denial of his original motion to withdraw would be preserved for appeal. RP 323-24. Next, the jury venire came into the courtroom and the trial court began reading its opening

instructions when Moore held up a note on yellow paper to the venire that said “I asked to represent myself.” RP 336-38. But Moore had not previously asked to represent himself. RP 340. The jury was immediately excused and after a brief colloquy between Moore and the trial court, the trial court denied Moore any relief. RP 337-341. The trial continued without incident until its completion.

a. Standard of Review

Appellate courts review a “trial court’s decision not to appoint new counsel” under the abuse of discretion standard. *Davis*, 3 Wn.App.2d at 791; *In re Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). An abuse of discretion occurs when “no reasonable person would adopt the trial court’s view.” *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (citations omitted).

b. Substitution of counsel

Preliminarily, “[m]ultiple requests to dismiss assigned counsel, without more, does not justify substitution of new counsel.” *State v. Schaller*, 143 Wn.App. 258, 177 P.3d 1139 (2007). Nor may a defendant “rely on a general loss of confidence or trust alone to justify appointment of a substitute new counsel.” *Id* at 268. Even agreement between the “client and attorney [that] withdrawal is preferred” is not an acceptable

basis to permit withdrawal or substitution of counsel. *State v. Hegge*, 53 Wn.App. 345, 350, 766 P.2d 1127 (1989).

Instead, “[t]o warrant substitution of counsel the defendant must show “‘good cause,’ such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication,” significant enough “as to prevent presentation of an adequate defense.” *Davis*, 3 Wn.App.2d at 790 (citations and internal quotations omitted). The three factor test for determining whether a trial court erred in denying a motion for substitution of counsel assesses “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” *Stenson*, 142 Wn.2d at 723-24.

1. Extent of the Conflict

Inquiring into the alleged conflict requires an examination of “both the extent and nature of the breakdown in communication between attorney and client and the breakdown’s effect on the representation the client actually receives.” *Id.* at 724. Importantly, if the representation “is adequate, prejudice *must* be shown.” *Schaller*, 143 Wn.App. at 270 (emphasis added). Moreover, because the “purpose of providing assistance of counsel is to ensure that criminal defendants receive a fair trial, the appropriate inquiry focuses on the adversarial process, not on the

accused's relationship with his lawyer as such." *Stenson*, 142 Wn.2d at 725 (citing *Wheat v. U.S.*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). This is because "[s]ubstitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay." *State v. Fualaau*, 155 Wn.App. 347, 359, 228 P.3d 771 (2010) (citation and internal quotation omitted). In other words, courts will not reward a defendant who intentionally creates an "irreconcilable conflict" or a "complete breakdown in communication" by refusing to meet or communicate with his or her attorneys with a substitution of counsel. *Id.* at 359-361; *Schaller*, 143 Wn.App. at 271; *Thompson*, 169 Wn.App. at 457-58.

Here, the record suggests there was, at times, a breakdown in communication between Byrd and Moore, but there is no evidence that Byrd, despite his evident frustration, ever gave up attempting to communicate with Moore. On the contrary, Byrd complained to the trial court about Moore's refusal to participate in his defense to include with his investigator, psychologist, and mitigation expert, all of which Byrd had appointed to assist in Moore's case, and Byrd reported to the trial court that he was providing Moore with transcripts, meeting with him, and that communication was attempted by the passing of notes. RP 52-55, 73-77, 83, 111-14, 117-19, 122, 128-130. Notably, Moore also refused, in total,

to communicate with the aforementioned three experts assigned to his case. RP 52-55, 122. And Moore never articulated a reason for his dissatisfaction with Byrd nor did he even attempt to justify his non-participation with his experts. *See* RP 21-322. Thus, the extent and nature of the breakdown in communication between Byrd and Moore was at times significant, but only because of Moore's refusal to participate in his own defense. Such actions, as a matter of law, do not warrant the substitution of counsel.

Additionally, there is little evidence that the conflict between Moore and his Byrd had a negative "effect on the representation the client actually receive[d]". *Stenson*, 142 Wn.2d at 724. Byrd (1) sought and received an investigator, a psychologist, and a mitigation expert for Moore's case; (2) proposed the use of a real time transcriptionist for court hearings and for Moore's benefit; (3) continuously challenged the court's determination that Moore was competent; (4) filed a CrR 3.6 motion in which he argued at length that some of the evidence found in Moore's home should have been suppressed; (5) moved for multiple mistrials, including immediately following Moore's decision to hold up the "I asked to represent myself" sign; (6) vigorously represented Moore at trial by, among other things, actively participating in the voir dire process, filing motions in limine, successfully excluding Moore's statements as part of

the CrR 3.5 hearing, and frequently objecting when he believed it was needed; and (7) moved to dismiss the egregious lack of remorse aggravating circumstances twice before closing arguments and still argued after the verdict that it did not apply. RP 52-55, 122, 139-314, 341, 456-473, 833, 1323-24, 1332-36, 1390-1395, 1429, 1502-05; CP 131-144, 336-342.

But perhaps the best evidence that the extent of the conflict was not substantial enough to warrant substitution, however, is that even now Moore does not allege that he received the ineffective assistance of counsel at trial¹⁰ or argue that whatever conflict existed prevented him from getting a fair trial. Instead, and to his credit, despite complaining about Byrd's representation Moore acknowledges that "on this record, it is impossible to say whether Mr. Moore was prejudiced at trial by deficient performance." Br. of App. at 55. Because Moore cannot establish "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication," significant enough "as to prevent presentation of an adequate defense" he cannot show that the trial court abused its discretion when it denied Byrd's motion to withdraw or Moore's motion to substitute counsel. *Davis*, 3 Wn.App.2d at 790 (citations and internal quotations omitted). Therefore, his claim fails.

¹⁰ Moore's allegation of ineffective assistance of counsel is limited to counsel's performance at sentencing. Br. of App. at 54.

2. *Adequacy of the Trial Court's Inquiry*

When a defendant files a motion to substitute counsel, the trial court has an “obligation to inquire thoroughly into the factual basis of the defendant’s dissatisfaction.” *Thompson*, 169 Wn.App. at 462 (citation and internal quotation omitted). The same holds true when an attorney seeks to withdraw. *Id.* at 462-64. The purpose of the inquiry is to provide the trial court with a “sufficient basis for reaching an informed decision.” *Id.* (citation and internal quotation omitted). Accordingly, a trial court’s inquiry is adequate when it allows “the defendant and counsel to express their concerns fully.” *Schaller*, 143 Wn.App. at 271. In fact, a formal inquiry is not even necessary “where the defendant otherwise states his reasons for dissatisfaction on the record.” *Id.* at 271-72 (citation omitted).

Here, the trial court, in response to Byrd’s motions to withdraw and Moore’s motions to substitute counsel, allowed both the opportunity to express their concerns and address the communication issues. RP 51-55, 73-77, 83, 85-108, 111-14, 117-19, 120, 320-24. And Byrd accepted these opportunities to expound at length. RP 73-77, 83, 85-108. Moore was reticent when given the chance to address the court, but that fact is irrelevant in determining whether the trial court inquired thoroughly enough to make an informed decision on Moore’s request. *Thompson*, 169 Wn.App. at 462; RP 74-77, 120, 320-22.

The trial court's inquiry was sufficient because it received Byrd's written motion and heard from both Byrd and Moore. RP 106, CP 50-53. Nothing more is required by the law. That the trial court ultimately did not agree with Byrd's claims regarding the extent of the conflict with Moore, or vice versa, does not mean that the inquiry into those concerns was insufficient. This factor, thus, supports the conclusion that the trial court did not abuse its discretion.

3. Timeliness of the Motion

Where a motion for substitution of counsel "comes during the trial, or on the eve of trial" a trial court may reject the motion as untimely. *Stenson*, 142 Wn.2d at 731-32. On the other hand, that granting a motion for substitution of counsel would result in the continuance of a trial date does not necessarily mean that the motion is untimely. *U.S. v. Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998).

Here, Byrd's and Moore's initial motions were timely as they occurred months before the scheduled trial date. And while the substitution of counsel, even at the time of the initial motion(s), likely would have required a continuance, this fact does not weigh heavily against Moore. The same cannot be said for Moore's request for a new attorney after the case was finally called ready or his last-ditch effort to

delay the trial by holding up a sign in front of the jury venire falsely claiming that he asked to represent himself. These motions were untimely and do weigh heavily against Moore.

When looking at the extent of the conflict, the adequacy of the inquiry, the timeliness of the motions, and the fact that any conflict was not significant enough “as to prevent presentation of an adequate defense” the trial court correctly exercised its discretion when it denied Moore’s motions to substitute counsel and Byrd’s attempts to withdraw. *Davis*, 3 Wn.App.2d at 790. This Court should affirm the trial court.

IV. The State concedes that it presented insufficient evidence of the aggravating circumstance that Moore demonstrated an egregious lack of remorse.

Pursuant to RCW 9.94A.535(3)(q), the State can seek a sentence outside the standard sentencing range if it proves beyond a reasonable doubt that the defendant “demonstrated or displayed an egregious lack of remorse” regarding the crime for which the defendant was convicted. But as Moore persuasively argues, sufficient evidence of this aggravating circumstance generally only exists where the defendant’s statements or conduct *after* the crime is cruel, makes light of the crime, blames others for the crime, or causes increased suffering for surviving family members.

Br. of App. 49-52; WPIC 300.26¹¹; *State v. Crutchfield*, 53 Wn.App. 916, 925-27, 771 P.2d 746 (1989) *overruled on other grounds by State v. Chadderton*, 119 Wn.2d 390, 397, 832 P.2d 481 (1992); *State v. Ross*, 71 Wn.App. 556, 563-64, 861 P.2d 473 (1993); *State v. Fisher*, 188 Wn.App. 924, 355 P.3d 1188 (2015).¹² As a result, the concealment of the crime or the denial of culpability cannot, by themselves and with the exception of RCW 10.95.020(9)¹³, constitute evidence sufficient to prove the relevant aggravating circumstance. *Crutchfield*, 53 Wn.App. at 925-27; *State v. Russell*, 69 Wn.App. 237, 251, 848 P.2d 743 (1993).

Here, Moore made no admissible statements about the murder of his mother. Nor is there evidence of conduct related to his mindset about the crime, such as, for example, attendance at a party. Instead, the conduct Moore engages in—the partial dismemberment of his mother’s body, the placement of her legs in trash bags, and the location of his mother’s

¹¹ The WPIC fully defines an “egregious lack of remorse” to mean “that the defendant’s words or conduct demonstrated extreme indifference to harm resulting from the crime or were affirmatively intended to aggravate that harm. In determining whether the defendant displayed an egregious lack of remorse, you may consider whether the defendant’s words or conduct (a) increased the suffering of others beyond that caused by the crime itself; (b) were of a belittling nature with respect to the harm suffered by the victim []; or (c) reflected an ongoing indifference to such harm.”

¹² *Fisher* is a part-published opinion by this Court. Pursuant to GR 14.1(a), this Court may accord the unpublished portion of *Fisher* as much “persuasive value” as it “deems appropriate.”

¹³ The aggravated murder statute includes as an aggravating circumstance that “[t]he person committed the murder to conceal the commission of a crime. . . .” RCW 10.95.020(9).

body—suggests, even when viewing the evidence in the light most favorable to the State, that Moore was attempting to conceal evidence of his crime.

Moore is correct that the facts of his case are most like those in *Fisher* because in both cases the defendant killed his parent and tried to conceal the body, except in *Fisher* the victim’s body was never found—the defendant claimed that he burned it—and the defendant there also financially exploited his father after the murder. Br. of App. at 50-52. Under those facts, this Court held that the defendant “did not appear to be particularly remorseful,” but held that his lack of remorse was not “of an aggravated or egregious nature.” *Fisher* 188 Wn.App. at ¶ 63-64. Pursuant to *Fisher* and the other above cited cases, the State concedes that it did not present sufficient evidence that Moore displayed an egregious lack of remorse after the murder of his mother.

V. The State agrees that the trial court erroneously relied on an aggravating circumstance not pleaded or proved to a jury and that this error requires resentencing.

RCW 9.94A.537(1) provides that “[a]t any time prior to trial . . . if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range” and that this “notice shall state aggravating circumstances upon which the requested sentence will be based.” When seeking an exceptional sentence

based on one of the aggravating circumstances found in RCW 9.94A.535(3), the “facts supporting [the] aggravating circumstance[] shall be proved to jury beyond a reasonable doubt” and the jury’s verdict on the aggravating circumstance “must be unanimous, and by special interrogatory.” RCW 9.94A.537(3).

Here, on the charge of murder, the State provided notice to Moore that it would be seeking an exceptional sentence based solely on the aggravating circumstance of egregious lack of remorse, and that was the only aggravating circumstance for which the jury received instructions, a special interrogatory, or heard argument. CP 7, 324-25, 331. At sentencing, however, the trial court found that Moore “manifested deliberate cruelty to the victim,” acknowledged that this was “this court’s own finding,” and based the exceptional sentence it imposed for the murder, at least in part, on that aggravating circumstance. RP 1519-1522; CP 373-74; *see also* CP 362.

The aggravating circumstance of “deliberate cruelty to the victim” is one of the aggravating circumstances found in RCW 9.94A.535(3) for which the jury is required to make the finding by special interrogatory. RCW 9.94A.537(3); RCW 9.94A.535(3)(a). Furthermore, Moore did not receive notice of this aggravating circumstance. RCW 9.94A.537(1). Therefore, the trial court erred when it found and imposed an exceptional

sentence based on an aggravating circumstance for which Moore did not receive notice and which the State did not plead or prove to a jury despite the statutory requirement. As a result, this Court should remand Moore’s case to strike the “deliberate cruelty” finding and for a resentencing hearing.

VI. The merit of Moore’s claim that he did not receive the effective assistance of counsel at sentencing is dependent on evidence outside of the record. But because a resentencing is required due to other errors this issue is moot.

Moore claims that he received the ineffective assistance of counsel at sentencing based on the claim that “Mr. Byrd made a decision early in this case not to explore mitigation.” Br. of App. at 55. But we know that Byrd sought a mitigation expert and received one. RP 122. We also know that the mitigation expert attempted to communicate with Moore to no avail. RP 122. Unfortunately, little else appears in the record regarding attempted mitigation, though Byrd did tell the trial court that “the documentation is available.” RP 122. Thus, Moore’s claim more properly “rests on evidence or facts not in the existing trial record” and should not be considered on merits as part of his direct appeal. *Hutchinson*, 147 Wn.2d at 206-07; *Jasper*, 174 Wn.2d at 123-24.

Moreover, because the conceded sentencing errors require a resentencing, Moore’s claim of ineffective assistance of counsel at

sentencing is moot. Reviewing courts consider an issue moot where one party seeks the court “to answer questions that are no longer in controversy,” i.e., any answer is “purely academic.” *State v. Gentry*, 125 Wn.2d 570, 616-17, 888 P.2d 1105 (1995). Here, the relief Moore seeks for his claim is a resentencing, but because whether he should be resentenced is “no longer in controversy” any answer as to whether he received the ineffective assistance of counsel at sentencing is “purely academic.” *Id.*

CONCLUSION

For the reasons argued above, this Court should affirm Moore’s convictions, but remand this case for the trial court to strike its finding of the aggravating circumstance of deliberate cruelty and to conduct a resentencing.

DATED this 11th day of August, 2020.

Respectfully submitted:

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August 11, 2020 - 8:50 AM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Kenneth J. Moore, Appellant
Superior Court Case Number: 17-1-00380-8

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