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NO. 53694-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GREGORY MARK SIMON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 19-1-00018-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

A. Did the trial court abuse its discretion by denying Simon's continuance motion to retain counsel where it was not made until the day of trial and where Simon's appointed attorney was prepared for trial and no other attorney appeared in court willing to represent Simon and substitute in as counsel on the case? 2

B. Should this Court affirm the imposition of supervision fees where they were properly imposed by the trial court and where Simon failed to preserve this issue by not objecting below? 2

III. STATEMENT OF THE CASE 2

A. Motion to Continue Trial and Substitute Counsel 2

B. Trial, Verdict, and Sentencing 8

IV. ARGUMENT 11

A. The trial court did not abuse its discretion by denying Simon's continuance motion to retain counsel where it was not made until the day of trial and where Simon's appointed attorney was prepared for trial and no other attorney was present in court willing to substitute in as counsel and represent Simon. 11

1. The standard of review for the trial court's denial of a continuance is abuse of discretion. 11

2. The right to retain counsel of one's choice is not absolute and has limitations. 12

a. The right to counsel of choice does not apply to indigent defendants who require appointed counsel. 13

b. The right to counsel of choice must be timely asserted. 14

3. The trial court properly exercised its broad discretion in denying the continuance motion after considering the relevant factors, including the lack of a retained attorney present in court willing to represent Simon. 18

B. Even if this Court considers the merits of the imposition of supervision fees where Simon failed to preserve the issue by not objecting below, the supervision fees were properly imposed by the trial court. 32

V. CONCLUSION 37

TABLE OF AUTHORITIES

State Cases

State v. Abarca, No. 51673-0-II, 2019 WL 5709517
(Wash. Ct. App. November 5, 2019) 35

State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010)..... 12, 14, 18, 19

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 33

State v. Cameron, 47 Wn. App. 878, 737 P.2d 688 (1987) 30

State v. Chappelle, No. 70337-4-I, 2014 WL 4722775
(Wash. Ct. App. Sept. 22, 2014)..... 17

State v. Chase, 59 Wn. App. 501, 799 P.2d 272 (1990) 14, 15, 18, 23

State v. Clark, No. 52330-2-II, 2020 WL 1651477
(Wash. Ct. App. March 17, 2020)..... 35

State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991) 14

State v. Dillon, 12 Wn. App. 2d 133, 456 P.3d 1199 (2020)..... 35

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004) 11

State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993), *review denied*,
123 Wn.2d 1004, 868 P.2d 872 (1994)..... 14, 16, 18

State v. Estavillo, No. 51629-2-II, 2019 WL 5188618
(Wash. Ct. App. October 15, 2019) 35

State v. Garcia, 92 Wn.2d 647, 600 P.2d 1010 (1979)..... 14

State v. Hampton, 184 Wn.2d 656,
361 P.3d 734 (2015)..... 4, 8, 11, 12, 13, 18, 19, 20, 21, 22, 29, 31

State v. Johnson, 33 Wn. App. 15, 651 P.2d 247 (1982)..... 14

State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018)..... 34

State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) 11

State v. Price, 126 Wn. App. 617, 633, 109 P.3d 27 (2005),
abrogated on other grounds by *Hampton*, 184 Wn.2d 656..... 15, 16, 18

State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986) 11

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 33

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)..... 12

State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994)..... 12, 14, 28, 31

State v. Sanchez, 171 Wn. App. 518, 288 P.3d 351 (2012) 13

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997)..... 19

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) 30

Federal and Other Jurisdications

Miller v. Blacketter, 525 F.3d 890 (9th Cir. 2008) 19

Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610,
75 L.Ed.2d 610 (1983) 12, 19

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed.2d 674 (1984) 12

United States v. Brown, 785 F.3d 1337 (9th Cir. 2015)..... 24

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557,
165 L.Ed.2d 409 (2006) 12, 13, 19, 32

Constitutional Provision

Sixth Amendment 12, 19

Statutes

RCW 10.01.160 ..... 33, 35

RCW 10.01.160(2) 34

RCW 10.01.160(3) 33, 35

RCW 10.05 34

RCW 9.94A.703 36

RCW 9.94A.703(2)(d) 36

RCW 9.94A.760 33

Rules

GR 14.1(a) 17, 35

RAP 2.5 33

RAP 2.5(a) 33

I. INTRODUCTION

On the day of trial, defendant Gregory Simon requested a continuance of the trial in order to retain counsel of his choice. Simon was indigent and had been represented by his court-appointed attorney since charges were filed more than four months earlier. Simon wanted to retain Kent Underwood to represent him and claimed that his "people" were delivering money to Underwood that day. But Underwood was not present in court and did not indicate a willingness to represent Simon or substitute in as counsel on the case. The trial court denied Simon's untimely motion to continue the trial in order to retain counsel.

The trial court did not abuse its discretion in denying Simon's untimely motion made on the day of trial. The trial had previously been continued two times at Simon's request and was 131 days old. Both the State and Simon's attorney were prepared for trial. There was a court and jury available. And there was no showing that Underwood had been retained or was willing to substitute in as counsel on the case—he never appeared in court. The trial court properly exercised its discretion to deny the continuance after balancing the right to counsel of choice against the public's interest in the prompt and efficient administration of justice.

Further, because Simon did not object to the imposition of supervision fees below, he has not preserved this issue for review. This Court should decline to reach the merits of his claim. Even if this Court addresses this unpreserved claim of error, the trial court properly imposed supervision fees as part of the judgment. The supervision fee is not a discretionary cost, but rather a waivable condition that was not waived by the trial court. This Court should affirm the convictions and sentence.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court abuse its discretion by denying Simon's continuance motion to retain counsel where it was not made until the day of trial and where Simon's appointed attorney was prepared for trial and no other attorney appeared in court willing to represent Simon and substitute in as counsel on the case?

B. Should this Court affirm the imposition of supervision fees where they were properly imposed by the trial court and where Simon failed to preserve this issue by not objecting below?

III. STATEMENT OF THE CASE

A. Motion to Continue Trial and Substitute Counsel

On January 3, 2019, the State charged Gregory Simon with attempting to elude a pursuing police vehicle and failure to transfer title. CP 1-5. The day after the State filed charges against Simon, the Department of Assigned Counsel filed a Notice of Appearance and Demand for Discovery appointing Kaaren Harvey as Simon's attorney. CP 97-98.

On January 29th, the trial court granted Simon's request for a continuance of the trial for case investigation, witness interviews, and ongoing negotiations with the State. CP 94. The State did not oppose the continuance. CP 94. On March 12th, the trial court granted the parties' joint request for a trial continuance to complete witness interviews and to prepare for additional charges. CP 95. The court scheduled the jury trial for May 14, 2019. CP 95.

At the April 16th omnibus hearing, the State filed an amended information charging Simon with attempting to elude a pursuing police vehicle, unlawful possession of a firearm in the first degree, unlawful possession of a controlled substance (methamphetamine), and unlawful possession of a controlled substance (cocaine). CP 6-8; *see also* CP 9-12, 2RP 19-20 (correcting date of offenses in subsequent amended information).[1] Prior to the hearing, all discovery had been provided to Simon, and his attorney had reviewed all discovery and met with Simon to discuss the case. CP 101-02. The State's witness list had been filed, and Simon was instructed to file his witness list two weeks prior to trial. CP 99-100, 103. Trial remained scheduled for May 14th. CP 101.

[1] For the Court's convenience, the State is using the same verbatim report of proceedings (RP) citation system as Simon: 1RP—May 14, 2019 (morning session); 2RP—May 14, 2019 (afternoon session), May 15, 2019, May 16, 2019, May 21, 2019, and June 14, 2019; 3RP—May 20, 2019. *See* Br. of App. 2, n.1.

On May 14, 2019, the parties appeared before the presiding judge on the morning of trial. *See* 1RP 1-9. Harvey advised the court that when she met with Simon last week for trial preparation, he advised that he planned on "looking into" hiring private counsel and continuing the trial. 1RP 1-2. Harvey stated that if the court denied Simon's motion to continue trial to hire private counsel, then Simon wanted a different public defender assigned to his case. 1RP 2.

Simon alleged that Harvey withheld photographs on a compact disc (CD) from him until last week and that he had not had time to prepare a defense. 1RP 2, 4. He claimed that he had retained Kent Underwood "to go ahead and fill this issue up" for him because he was not an expert. 1RP 3. When the court inquired why Underwood was not present in the courtroom if he had been retained, Simon informed the court that his "people" were going to bring Underwood money that day. *Id.*

The trial court recognized that it should consider the *Hampton*[2] factors in evaluating his motion to continue to substitute counsel, but noted that the case was scheduled for trial that day. 1RP 3-4. The court explained that it could not analyze many of the *Hampton* factors because Simon did

[2] *State v. Hampton*, 184 Wn.2d 656, 361 P.3d 734 (2015).

not have a private attorney present in court ready to step into the shoes of his appointed attorney and substitute in as counsel on the case. 1RP 3-4.

The court noted that the case was already 131 days old and scheduled to start trial that day. 1RP 4, 6. When Simon continued to assert, "I don't have nothing to prepare my defense," Harvey advised the court that they had reviewed all discovery with Simon, who had been provided with copies of all redacted paper discovery. 1RP 4-5. Harvey explained that after Simon made a separate request to review a CD of photographs "at the very end of last week," she made arrangements for him to review the photographs on a computer with her investigator because CDs are not allowed in the jail. 1RP 5. Simon confirmed that he had reviewed the photographs but was upset that he was not allowed to keep copies in the jail. *See id.*

The trial court explained that this process was not unique to Simon and was consistent with the jail's policy. *See* 1RP 5-6. The court further explained that changing attorneys would not alter this process—he still would not have access to any CDs or a computer in the jail. 1RP 6. Simon reiterated that he should have time to prepare for a defense. 1RP 6.

The trial court again noted that the case was 131 days old and stated, "I don't understand why you say you haven't had any time to prepare your defense." 1RP 6. Harvey informed the court that absent the photographs, all redacted discovery had been provided to Simon "several weeks ago." 1RP

6-7. Both Harvey and the State were prepared to start trial that day. 1RP 7-8. The trial court denied the request to continue trial and substitute counsel. 1RP 7-9.

After the court denied his continuance request, Simon stated that he wanted to "fire" Harvey because he would not get a fair trial. 1RP 7. After the court inquired as to why Simon believed this, the following exchange occurred:

> Simon: I just explained it to you. And it's more, but you said I don't want me to get into my case so I'm not going to go into my case. But I'm not going to get a fair trial with this attorney. So can I please have this attorney dismissed from my counsel? And I don't want the public defender's office to do -- to represent me. I'm going to --
>
> (Indiscernible crosstalk.)
>
> Court: Again, I can't discharge -- I can't discharge Ms. Harvey when there's not an opportunity present --
>
> Simon: Okay. Well, I can go --
>
> (Indiscernible crosstalk.)
>
> Court: -- willing --
>
> Simon: -- pro se then. Then I still [sic] going to get my own attorney to come take care of me.
>
> Court: It doesn't work that way. And -- and in order for the Court to grant a request for someone to represent themselves, there's a colloquy I

> need to engage in. And it --and one of the critical factors is that it has to be an unequivocal request to proceed pro se. And it's clear from the record you've made today that you want an attorney to represent you. You may not want Ms. Harvey to represent you, but you want an attorney to represent you.
>
> And so there's no point in going through that colloquy to reach the conclusion that it's an equivocal request to proceed pro se, which gets us back to the starting point, which is Ms. Harvey prepared to take the case to trial today or not.

Harvey: Yes, Your Honor, I am.

1RP 7-8. The court denied the request for a continuance after noting that both Harvey and the State were ready for trial. *See* 1RP 8-9.

On the afternoon of May 14th, trial began in the Honorable Judge Rumbaugh's courtroom. 1RP 9; 2RP 5. The parties advised the court about the motions and rulings from earlier that day. 2RP 5-6. The State noted that Simon had not actually hired Underwood yet, but that it was his request to do so. 2RP 5. The prosecutor misspoke and informed the court that "Underwood *was* in the courtroom to do his motion to substitute and withdraw." *See* 2RP 5 (emphasis added).[3] But it was undisputed below that Underwood never appeared in court on the day of trial—either in the morning or in the afternoon. *See* 1 RP 1-9, 2RP 5-7.

[3] The use of the past tense verb "was" indicates that the prosecutor was referencing the earlier hearing as opposed to discussing the current hearing. *See id.*

Harvey advised the court that Simon wanted her to renew his request for a continuance "in order to hire private counsel of his choice" or, in the alternative, to proceed pro se. 2RP 6. Harvey noted that the presiding judge did not do a specific analysis of the *Hampton* factors because a private attorney was not present in court to substitute in as counsel. 2RP 6-7. The trial court noted that both motions were previously ruled on by the presiding judge and that it was not going to change the court's prior ruling. 2RP 7. Trial commenced. 2RP 7.

B. Trial, Verdict, and Sentencing

The State called six witnesses at trial. CP 106; 2RP 21; *see* 2RP 182-97, 203-309. Milton Police Officer Patrick Donovan testified that on January 2, 2019, at approximately 1:50 a.m., he pulled Simon over for speeding. 2RP 184, 187-90. Officer Donovan approached Simon, who was alone in the vehicle, and observed clear, plastic baggies of substances that appeared to be narcotics. 2RP 190-93. Upon inquiry, Simon claimed it was marijuana. 2RP 193. The officer noted the substance did not smell like marijuana and asked Simon to get out of the car. 2RP 193. Simon said, "No, we don't have to do this, Officer" and drove off. 2RP 193.

Officer Donovan activated his lights and sirens and followed Simon as he fled the scene. 2RP 193-94. Simon drove through red lights at multiple intersections at speeds in excess of 90 miles per hour. 2RP 194-96. The

officer terminated the pursuit for public safety reasons. 2RP 196, 204-05. Within minutes, Officer Donovan located Simon in his vehicle, which had crashed into a bank window, shattering it. 2RP 205-06, 210-14. Simon had driven off the road and went airborne in between trees before hitting a tree and landing on a retaining wall. 2RP 210-11. Simon exited the car through a window because the doors were blocked by trees on both sides. RP 314. A search of the vehicle revealed substances suspected to methamphetamine and cocaine and a firearm located inside of a backpack. RP 223-24, 232-33, 281-82. The substances were subsequently tested and identified as methamphetamine and cocaine. RP 266-70.

Simon testified at trial and admitted that he had been in possession of both "crystal meth and coke." 2RP 312-13. He admitted he was "paranoid" and "scared" and fled because of the drugs. 2RP 313-14, 319; *see* 2RP 327, 338. Simon knew the officer was chasing him and admitted driving through red lights before losing control of the vehicle and running off the road into a ditch and ending up "in" the bank. 2RP 319-22, 338. He denied any knowledge of the firearm and claimed that the backpack belonged to a girl named "Moe." 2RP 316-17.

The jury found Simon guilty of attempting to elude a pursuing police vehicle, unlawful possession of a controlled substance (methamphetamine), and unlawful possession of a controlled substance (cocaine) but found him

not guilty of unlawful possession of a firearm in the first degree. CP 56-59; 2RP 345-48; *see* CP 12, 50-51. On June 14, 2019, the court sentenced Simon to 27 months in prison for the attempting to elude conviction and 12 months+ on each count of possession of a controlled substance, with all counts running concurrent to each other. CP 70-76; 2RP 363-65.

During a colloquy with the court, Simon stated that he did not own any property, that he did not have a job or a bank account, and that he had been receiving Electronic Benefit Transfer (EBT). 2RP 363-64.[4] The trial court determined that Simon was indigent and waived payment of nonmandatory legal financial obligations. CP 73; 2RP 363-64. The court imposed the mandatory $500 victim assessment fee and waived the criminal filing fee and DNA database fee. CP 74; 2RP 364. The court imposed twelve months of community custody. CP 76; 2RP 364. The judgment and sentence included a provision that the defendant shall pay supervision fees as determined by the Department of Corrections (DOC). *See* CP 77, 83. Simon timely appealed. *See* CP 91.

[4] EBT is an issuance method where cash and basic food benefits are electronically sent to Fidelity Information Services and then made accessible to clients using an EBT debit card. https://www.dshs.wa.gov/esa/issuances/electronic-benefit-transfer-ebt#EBT1.

IV. ARGUMENT

A. The trial court did not abuse its discretion by denying Simon's continuance motion to retain counsel where it was not made until the day of trial and where Simon's appointed attorney was prepared for trial and no other attorney was present in court willing to substitute in as counsel and represent Simon.

Simon argues that the trial court violated his constitutional right to counsel of his choice by denying his motion to continue the trial to substitute counsel. The trial court did not abuse its discretion in denying Simon's untimely motion made on the day of trial where the trial had already been continued twice and the appointed attorney was prepared for trial. Further, no other attorney was present in court and willing to substitute in as counsel and represent Simon. This Court should affirm the convictions.

1. The standard of review for the trial court's denial of a continuance is abuse of discretion.

The granting or denial of a motion to continue trial rests within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970); *State v. Purdom*, 106 Wn.2d 745, 748, 725 P.2d 622 (1986); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). This same standard applies to continuances sought to retain or substitute new counsel. *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015).

Because of this broad discretion, "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for

delay'" violates the defendant's right to counsel. *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L.Ed.2d 610 (1983)). An appellate court will not disturb the trial court's decision unless it is manifestly unreasonable or based on untenable reasons. *Hampton*, 184 Wn.2d at 670. A decision is manifestly unreasonable if the court adopts a view "that no reasonable person would take" and makes a decision "outside the range of acceptable choices." *Id.* at 670-71.

2. The right to retain counsel of one's choice is not absolute and has limitations.

The Sixth Amendment to the Constitution guarantees that all criminal defendants have the right to the assistance of counsel for their defense. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). When a defendant retains counsel, the Sixth Amendment generally includes the right to counsel of his or her choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006); *Hampton*, 184 Wn.2d at 662; *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). But the right to retain counsel of choice has limitations. *Hampton*, 184 Wn.2d at 662-63. A defendant may not insist on representation by an attorney he cannot afford or who declines to represent him. *State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000).

a. The right to counsel of choice does not apply to indigent defendants who require appointed counsel.

The right to counsel of choice does not extend to defendants who require appointed counsel. *Gonzalez-Lopez*, 548 U.S. at 144, 151; *State v. Sanchez*, 171 Wn. App. 518, 541-42, 288 P.3d 351 (2012); *Hampton*, 184 Wn.2d at 662-63 ("indigent defendants with appointed counsel do not have the right to their counsel of choice"). Instead, indigent defendants can move to substitute counsel when there is an "irreconcilable conflict" with appointed counsel. *Hampton*, 184 Wn.2d at 663.[5]

Here, the day after the State filed charges against Simon, the Department of Assigned Counsel appointed Kaaren Harvey to represent Simon because he was indigent. *See* CP 97-98; *see also* CP 86 (referencing court order finding Simon indigent on January 3, 2019); *see also* 1RP 2, CP 73, 87-90, 2RP 363-64. As an indigent defendant, Simon did not have the right to counsel of his choice. *See Hampton*, 184 Wn.2d at 662-63.

Although Simon indicated a desire to retain his own attorney on the day of trial, he had not yet retained an attorney when the case was called for trial. *See* 1RP 1-2 (appointed counsel referencing Simon's intention to hire private counsel); *see also* 1RP 3 (Simon's assertion that his "people" were going to bring money to Underwood that day). And Simon made no

[5] Simon does not argue that there was an irreconcilable conflict on appeal.

showing that he had the means to hire a private attorney or that a private attorney was willing to represent him. This "retained" attorney never appeared in court.

b. The right to counsel of choice must be timely asserted.

The right to retain counsel of one's choice must be timely asserted. *State v. Chase*, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). The assertion of such a right must be made within a reasonable time before trial. *State v. Early*, 70 Wn. App. 452, 457, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). The right to choose one's counsel does not permit a defendant to unduly delay the proceedings. *Aguirre*, 168 Wn.2d at 365; *Roth*, 75 Wn. App. at 824. "In the absence of substantial reasons a late request should generally be denied, especially if the granting of such a request may result in delay of the trial." *Chase*, 59 Wn. App. at 506 (quoting *State v. Garcia*, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979)).

A defendant may not manipulate the right to counsel for the purpose of delaying trial. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991); *State v. Johnson*, 33 Wn. App. 15, 22, 651 P.2d 247 (1982) (right to counsel does not include a concurrent right that permits a defendant to delay trial either deliberately or inadvertently because he has made little effort to engage an attorney).

A trial court does not abuse its discretion in denying an untimely request for counsel made on the day of trial. *Chase*, 59 Wn. App. at 506-07. Day-of-trial continuances are not favored. *State v. Price*, 126 Wn. App. 617, 633, 109 P.3d 27 (2005), abrogated on other grounds by *Hampton*, 184 Wn.2d 656.

In *Chase*, this Court held that it was within the trial court's discretion to refuse the defendants' untimely request to retain counsel of their choice. *Chase*, 59 Wn. App. at 506-07. In *Chase*, brothers Brian and Timothy Chase each made a continuance motion after jury selection on the first day of trial in order to retain attorneys of their choice. *Id.* at 505. In concluding that these requests were untimely, the Court explained that Timothy Chase had been represented by court-appointed counsel from the inception of the case and had neither retained a private attorney nor made any showing that he had the means to do so. *Id.* at 506-07. And although Brian Chase alleged that he had retained an attorney, that attorney had not appeared in court or taken any action to associate as counsel. *Id.*

In *Price*, this Court held that the trial court did not abuse its discretion by denying the defendant's request to retain new counsel on the second day of trial where his attorneys were appointed ten months earlier and were prepared for trial and where he had not retained a new attorney who was willing to represent him. *Price*, 126 Wn. App. at 624, 631-34. On

the second day of trial, Price informed the court that he wanted to retain different counsel because his attorneys were not representing him as he wanted. *Id.* at 629. Although Price claimed his mother was willing to help him with finances to retain an attorney, the Court noted that his mother was not present in court and that he offered no other evidence to support this claim. *Id.* at 629-30, 633. The Court explained that counsel was appointed for Price because he was indigent, and there was no evidence that he could afford to hire an attorney and no attorney was prepared to substitute in as counsel. *Id.* at 632-33.

In *Early*, the Court held that the trial court did not abuse its discretion in denying the defendant's motion for a continuance to substitute counsel that was made on the day of trial. *Early*, 70 Wn. App. at 458-59. Early retained private counsel two days before trial and sought a 30-day trial continuance on the morning of trial. *Id.* at 456. The Court of Appeals explained that at least two prior continuances had been granted, that Early had six months to retain private counsel, that the State's witnesses were available and ready, and that the appointed attorney was prepared for trial. *Id.* at 458. The Court noted that a motion for continuance to secure or replace counsel will routinely be denied where the defendant's lack of representation is attributable to his own lack of diligence in procuring or replacing counsel. *Id.* at 458-59; *see also State v. Chappelle*, No. 70337-4-

I, 2014 WL 4722775 at *10 (Wash. Ct. App. Sept. 22, 2014) (trial court did not abuse its discretion in denying request to substitute court-appointed attorney with retained counsel on the second day of trial where defendant asserted attorneys were willing to represent him but did not identify them by name or inform the court of their availability).[6]

Here, Simon's motion to continue trial in order to retain counsel was untimely. It was not made until the day of trial, which was more than four months after charges had been filed and after the court had previously granted two prior continuances by Simon. *See* CP 94-95; *see also* 1RP 1-4, CP 4-5. As the trial court noted, the case was already "131 days old." 1RP 4, 6. And approximately one month prior to trial, the parties appeared in court and indicated a readiness for the May 14th trial date, as evidenced by entry of the omnibus order. *See* CP 101-03. Simon's appointed attorney was prepared for trial. 1RP 8. The State and all six witnesses were ready and prepared for trial. *See* 1RP 7, 9, 2RP 21. The court was available with a jury. *See* 1RP 9, 2RP 20-22. And there was no private attorney who appeared in court to indicate a willingness to substitute in as counsel on the case. *See* 1RP 3-4, 2RP 5-7.

[6] *Chappelle* is an unpublished opinion that has no precedential value and is not binding on this Court. It is cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

Simon did not make his request within a reasonable time before trial. *See Early*, 70 Wn. App. at 456-59. And he failed to provide sufficient reasons to justify his untimely request to delay the proceedings. *See Chase*, 59 Wn. App. at 506-07. Further, Simon failed to show that he had retained an attorney. Rather, he stated only that his "people" were bringing money to Underwood that day. 1RP 3. It is unknown whether that ever occurred. Similar to *Chase*, although Simon alleged that he had retained an attorney, that attorney did not appear in court or take any action to substitute in as counsel on the case. *See Chase*, 59 Wn. App. at 506-07. And like the defendants in both *Chase* and *Price*, there was no showing that Simon, as an indigent defendant, had the means to retain Underwood. *See id*.; *see also Price*, 126 Wn. App. at 632-33. The trial court did not abuse its discretion when it denied Simon's continuance request on the day of trial in order to retain an attorney who never indicated a willingness to represent Simon or took any action to substitute in as counsel on the case.

3. The trial court properly exercised its broad discretion in denying the continuance motion after considering the relevant factors, including the lack of a retained attorney present in court willing to represent Simon.

The right to counsel of choice has other limitations, particularly when a defendant's desire to choose new counsel affects the public's interest in the prompt and efficient administration of justice. *Hampton*, 184 Wn.2d at 662; *Aguirre*, 168 Wn.2d at 365; *see State v. Stenson*, 132 Wn.2d

668, 733, 940 P.2d 1239 (1997) (defendants do not have an absolute Sixth Amendment right to choose any particular advocate). A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Hampton*, 184 Wn.2d at 666 (quoting *Gonzalez-Lopez*, 548 U.S. at 152).

Trial judges require a great deal of latitude in scheduling trials. *Morris*, 461 U.S. at 11. "Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Id.* Consequently, trial courts must have broad discretion on matters of continuances. *Id.*; *Hampton*, 184 Wn.2d at 663 (review of denial of continuance is whether it was "so arbitrary as to violate due process").

In considering a motion to continue to obtain counsel, the trial court "must weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice." *Aguirre*, 168 Wn.2d at 365. "The resolution of this balancing exercise falls squarely within the discretion of the trial court." *Id.*; *Hampton*, 184 Wn.2d at 663.

The Ninth Circuit has similarly recognized that trial courts have wide latitude in balancing the rights of defendants to choose their own counsel with the demands of the court's calendar. *See e.g. Miller v. Blacketter*, 525 F.3d 890, 895-98 (9th Cir. 2008) (no abuse of discretion to

deny continuance where request was made on the day of trial, the appointed attorney was prepared for trial, defendant had ample opportunity to arrange for different counsel, and a new attorney had not yet been retained with belated funds provided by defendant's father).

In *Hampton*, the Washington Supreme Court provided guidance on what factors trial courts can consider in deciding a motion to continue for the purpose of substituting counsel. *Hampton,* 184 Wn.2d at 669-70. The Court noted that there are no "mechanical tests" for these "highly fact dependent" situations. *Id.* at 669. The Court held that trial courts can consider all relevant information, including the following eleven factors:

> (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;
>
> (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
>
> (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;

> (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
>
> (9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay";
>
> (10) whether the current counsel was prepared to go to trial;
>
> (11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Id. at 669-70. Trial courts are not required to evaluate every factor because not all factors are present in every case. *Id.* at 670.

In *Hampton*, the Court held that the trial court did not abuse its discretion in denying the defendant's motion to continue trial to substitute counsel given that (1) he did not make his request until the day of trial, (2) trial had already been continued once, (3) the victim opposed the continuance, (4) the appointed attorney was prepared for trial, and (4) he did not explain his dissatisfaction with appointed counsel. *Id.* at 660-61, 671-72.

Here, the record shows that the trial court was aware of the *Hampton* factors when it denied Simon's motion to continue trial to retain new counsel. *See* 1RP 3-9. But the court was hindered in its ability to address many of these factors because there was no attorney present in court who

was willing to substitute in as Simon's attorney. *See* 1RP 3-4. Consequently, the court did not know whether the private attorney was willing to represent Simon or whether Simon had the funds to retain him. The court also did not know the length of the continuance that a new attorney would request.

A review of the applicable *Hampton* factors indicates that the trial court did not abuse its discretion in denying Simon's request to delay the trial in order to retain counsel given that (1) he did not make his request until the day of trial, (2) trial had already been continued two times and was 131 days old, (3) both appointed counsel and the State were prepared for trial, (4) all of the State's witnesses were available and ready for trial, (5) both a court and jurors were available, and (6) there was no retained attorney present in court willing to substitute in as counsel. *See* 1RP 1-9; 2RP 5-7, 20-22; CP 94-95.

First, as previously discussed, Simon's continuance motion was not made until the day of trial and was untimely. It was not made "*sufficiently in advance of trial* to permit the trial court to readily adjust its calendar." *See Hampton*, 184 Wn.2d at 669, 671 (emphasis added). Simon argues that the court could have adjusted its calendar "to accommodate a relatively short delay". Br. of App. 13. But nothing in the record suggests that only a "short delay" was needed. This is pure speculation. A private attorney did not appear to answer the court's questions about the length of the requested

continuance and whether it would go beyond the time for trial. 1RP 3-4. It is disingenuous for Simon to claim that the trial court "failed to even inquire how much time was needed" when the court explicitly stated that it was prevented from making such an inquiry because the attorney was not present in court. *See* Br. of App. 13; *see also* 1RP 3-4. As the trial court explained to Simon:

> Well, today's the day for trial. You don't actually have an attorney present ready to step in the shoes of Ms. Harvey. And I would be asking that attorney, "Are you ready to go to trial or not?" because I would have to an [sic] analysis of those [*Hampton*] factors. Can't even engage in that conversation because I don't have another attorney here.
>
> So I'm not today going to grant a motion to withdraw and substitute counsel because I don't have another attorney here to substitute. It doesn't work that way.

1RP 3-4. Of note, neither Simon nor his attorney disputed the fact that an attorney was not present in court to substitute in as counsel. *See id.*

Not only was Underwood not present in court, but there was no indication that he had received or reviewed any discovery, interviewed any witnesses, or met with Simon. In fact, Simon fails to show that he had retained Underwood to represent him. Other than Simon's vague assertion that "people" were delivering money to Underwood that day, nothing in the record shows that Underwood agreed to represent Simon or substitute in as counsel on the case. *See* 1RP 3-4, 2RP 5-7; *see also Chase*, 59 Wn. App. at 506-07 (trial court does not abuse its discretion denying a continuance to

retain counsel when new counsel had either not been retained or had taken no action to associate as counsel).

Simon's reliance on *United States v. Brown*, 785 F.3d 1337, 1349-50 (9th Cir. 2015) is misplaced. *See* Br. of App. 13. In *Brown*, the defendant filed the motion to substitute counsel two and a half weeks prior to trial, and the court did not cite delay as a reason for denying the motion. *Brown*, 785 F.3d at 1349. Rather, the court expressed willingness to continue the case for "whatever time" the attorney needed and made no effort to ascertain how long the new attorney—who was present in court—would need to prepare for trial. *Id.* Under these facts, *Brown* concluded that the court did not deny the request because of concerns for its calendar. *Id.* at 1349-50. Contrary to *Brown*, the trial court in Simon's case was clearly concerned with the delay and repeatedly noted that the case was already "131 days old." *See* 1RP 4, 6. And Simon's request was made on the day of trial—not two and a half weeks prior to trial—where the State and Simon's attorney were prepared for trial and both a courtroom and jury were available.

Simon argues on appeal that "he and Underwood had developed a defense strategy." Br. of App. 8 (citing CP 13-17). But the record does not support this claim. Rather, Simon informed the court on the morning of trial that he was still in the process of delivering payment to Underwood. *See*

1RP 3. Nothing in the record shows that they had any meetings or worked on a defense strategy together.

Simon acknowledges that the trial court's ruling was largely based on the fact that Underwood was not present in court and had not indicated a willingness to substitute in as counsel. *See* Br. of App. 8. Simon also acknowledges that he explained to the court why Underwood was not present in court. *See* Br. of App. 8; *see also* Br. of App. 15 (arguing that the continuance should have been granted "to allow Simon's retained counsel of choice *to appear* and represent him") (emphasis added).

Despite repeatedly acknowledging the fact that Underwood was not present in court, Simon focuses on the prosecutor's misstatement that Underwood "was" in court to do his motion to substitute. *See* Br. of App. 13-14. Simon then claims that Underwood was "available to answer [the court's] questions." *See* Br. of App. 13. This argument is disingenuous. The record is clear based on statements from the court and both parties, including Simon himself, that Underwood was not present in court, that he was not available to answer the court's questions, and that he never indicated a willingness to substitute in as counsel on the case. *See* 1RP 3-4, 2RP 5-7. Simon acknowledged below that Underwood was not present in court. 1RP 3.

And contrary to Simon's assertion that delivery of the money "appears to have been accomplished by the time Simon renewed his motion" before the trial judge, nothing in the record supports this speculation. Simon relies on the misstatement of the prosecutor to support this claim by improperly suggesting that Underwood was in court to file a substitution notice when he renewed his motion. *See* Br. of App. 14 (citing 2RP 5). He was not. The prosecutor's statement was not a comment on who was currently present before the court. *See* 2RP 5. Not even Simon or his attorney alleged that Underwood was ever present in court. *See* 2RP 5-7.

Second, Simon incorrectly asserts that his request to substitute counsel "did not include a contemporaneous request for a continuance." *See* Br. of App. 13. On the contrary, the record is replete with references to Simon's request to continue the trial. *See e.g.* 1RP 1 ("I understand the Court doesn't typically like motions to continue on the day of trial."); 1RP 1 ("Last week during our trial prep appointment, Mr. Simon had requested a continuance of the trial date."); 1RP 2 ("Should the Court deny Mr. Simon's motion for the continuance to hire private counsel…"); 1RP 2, 4-7 (Simon's repeated assertions that he has not had time to prepare his defense); 1RP 9 (court's ruling to "deny the request for continuance"); 2RP 6 (counsel advising the trial judge that Simon is "renewing his request for a continuance in order to hire private counsel of his choice"); 2RP 7

(counsel's understanding was that the State had no objection to "Simon requesting a continuance"). In light of this record, it is disingenuous for Simon to now claim that he did not request a continuance.

Third, the trial court had previously granted two continuances at Simon's request. *See* CP 94-95. Simon's first continuance was for case investigation, witness interviews, and ongoing negotiations with the State. CP 94. The State did not oppose the continuance. CP 94. The second continuance was made by both Simon and the State in order to complete witness interviews. CP 95. As the court noted, the case was already "131 days old" when Simon requested a third continuance on the day of trial. *See* 1RP 4, 6.

Because the case had been pending for more than four months, the trial court expressed difficulty understanding Simon's claim that he had not "had any time" to prepare his defense. 1RP 6. And although Simon is correct that "no one objected" to a continuance, the State's position on the continuance is unknown. *See* Br. of App. 13. Simon's appointed attorney stated that it was her "understanding" that the State had no objection to Simon requesting a continuance. 2RP 7. But the State neither confirmed nor denied this. *See* 2RP 5-7; *see also* 1RP 1-9. Rather, the State merely advised the court it was ready for trial. 1RP 7. Simon's request for a third

continuance was not a "justifiable request for delay." *See Roth*, 75 Wn. App. at 824.

Fourth, Simon's appointed attorney had been involved in the case for more than four months and advised the court that she was prepared for trial. 1RP 8; *see also* CP 97-98. The State was ready for trial. 1RP 7. All six of the State's witnesses were available for trial. *See* 2RP 21. And there was a courtroom available with a judge and a jury. 1RP 9; *see* 2RP 5-7, 20-22.

Fifth, the trial court considered whether Simon had "some legitimate cause for dissatisfaction" with his appointed attorney and concluded that he did not. *See* 1RP 2-9. Simon's dissatisfaction with his assigned attorney appeared to be based on his claim that she did not show him some photographs until close to the trial date. *See* 1RP 2-7. Harvey explained that they had the opportunity to review all discovery with Simon and that he had been provided with all of the redacted discovery "several weeks ago." 1RP 4-5, 7. After Simon made a separate request to review a CD of photographs "at the very end of last week," Harvey made arrangements for Simon to review the photographs on a computer with her investigator in the jail. 1RP 5. Simon confirmed that he had reviewed the photographs but was upset that he was not allowed to keep copies of the photographs in the jail. *See* 1RP 5. The court explained that this was consistent with the jail's policy

and that changing attorneys would not alter this process—he still would not have access to any CDs or a computer in the jail. 1RP 5-6.

When Simon continued to assert that he did not have time to prepare for his defense, the court stated, "Well, the case is 131 days old. I don't understand why you say you haven't had any time to prepare your defense." 1RP 6. After Simon asserted that he did not want Harvey to represent him and that he would not get a "fair trial," the court inquired as to the reasons for this belief. 1RP 7. Simon responded, "I just explained it to you." *Id.* He would not elaborate further. *Id.* He stated that he was "not going to go into my case" and reiterated that he would not get "a fair trial with this attorney." *Id.* Similar to the defendant in *Hampton,* Simon did not explain his dissatisfaction with counsel. *See Hampton,* 184 Wn.2d at 660-61.

At some point on the day of trial, Simon filed a handwritten "pro se" motion to substitute counsel alleging "irreconcilable conflicts and complete breakdowns in communications" with Harvey. CP 13-17. The motion provided no information to support these conclusory claims. *See id.* It is unclear from the record whether Simon filed this motion before either of the hearings held on the first day of trial. *See* 1RP 1-9, 2RP 5-7. But Simon appeared to disagree with Harvey on trial strategy. *See* CP 13-17. Disputes over trial strategy or general dissatisfaction with counsel's performance are generally insufficient reasons to appoint new counsel. *State v. Varga,* 151

Wn.2d 179, 200-01, 86 P.3d 139 (2004); *State v. Cameron*, 47 Wn. App. 878, 882-83, 737 P.2d 688 (1987). Regardless of the timing of the filing of this motion, the presiding judge gave Simon ample opportunity to explain his dissatisfaction with appointed counsel and determined it was not justified. And Simon does not raise any challenge on appeal involving an irreconcilable conflict with appointed counsel that warranted a substitution of counsel.

Finally, Simon has not shown any "identifiable prejudice…of a material or substantial nature." His only claim is that he did not agree with his attorney's trial strategy, which "may have prevented him from presenting all evidence beneficial to his case." Br. of App. 15. But the only issue Simon identified involving trial strategy dealt with potential witnesses to testify about who owned the backpack with the firearm. *See* CP 13-17; *see* 2RP 49-52; *see also* 2RP 316-17 (Simon's trial testimony that a girl named "Moe" owned the backpack). But Simon was acquitted of the unlawful possession of a firearm charge. CP 57. And Simon essentially admitted to committing all other charged crimes when he testified at trial. *See* 2RP 312-22, 327, 338.

At trial, Simon admitted that he possessed "crystal meth and coke" at the time of the traffic stop. 2RP 312-13. And he admitted that he knowingly fled from the officer while driving through red lights before

losing control of the car, running off the road into a ditch, and crashing into the bank. 2RP 313-14, 319-22, 338. There was substantial evidence of his guilt at trial. *See e.g.* 2RP 184, 187-96, 204-14, 223-24, 232-33, 266-70, 281-82, 312-14, 319-22, 327, 338.

Further, Simon's attorney reiterated at sentencing that Simon "essentially took accountability for both the elude and the possession of controlled substances" when he testified. 2RP 359. She explained that Simon had been willing to plead guilty to these charges without a trial and that the main reason the case went to trial was because the parties could not reach an agreement on the firearm charge. 2RP 359; *see also* 3RP 32-33 (Simon's closing argument noting that his drug possession was not in dispute). Given the undisputed and overwhelming evidence of Simon's guilt on the charges he was convicted of, and the jury's "not guilty" verdict on the only charge he contested, Simon cannot show prejudice where he received the exact trial result he wanted.

Based on the trial court's consideration of the relevant *Hampton* factors, a further delay of the trial to accommodate Simon's last-minute desire to substitute counsel was not warranted. The court's decision to deny the motion was not an "unreasoning and arbitrary insistence upon expeditiousness in the face of justifiable request for delay." *See Roth*, 75 Wn. App. at 824.

Simon argues that he is entitled to a new trial because the denial of his right to counsel of choice is "structural error" requiring reversal under *Gonzalez-Lopez*. *See* Br. of App. 6. But *Gonzalez-Lopez* is inapplicable because Simon was not *erroneously* deprived of the right to counsel of choice. *See Gonzalez-Lopez*, 548 U.S. at 148-50. Thus, there was no "structural error" or any other error. Further, in *Gonzalez-Lopez*, the government conceded that the court erroneously deprived the defendant of his counsel of choice. *Id.* at 144, 152.

The trial court properly exercised its discretion to deny the continuance after balancing the right to counsel of choice against the public's interest in the prompt and efficient administration of justice. The trial court did not abuse its discretion when it denied Simon's continuance motion to retain new counsel. This Court should affirm the convictions.

B. Even if this Court considers the merits of the imposition of supervision fees where Simon failed to preserve the issue by not objecting below, the supervision fees were properly imposed by the trial court.

For the first time on appeal, Simon raises an objection to the trial court's requirement that he "pay supervision fees as determined by DOC." Because he has not preserved this issue for review, this Court should decline to reach the merits of his claim.

It is well settled that an appellate court may refuse to review any claim of error that was not raised in the trial court. *State v. Blazina*, 182

Wn.2d 827, 832, 344 P.3d 680 (2015); RAP 2.5(a). The purpose of this rule is to give the trial court the opportunity to correct any error and to give the opposing party an opportunity to respond. *Blazina*, 182 Wn.2d at 832-33. A defendant who fails to object to the imposition of discretionary legal financial obligations (LFOs) at sentencing is not automatically entitled to review. *Id.* at 832.

Simon did not object below to the imposition of supervision fees in his judgment and sentence. He has not preserved this issue for review, and this Court should decline to reach the merits of his claim. *See Blazina*, 182 Wn.2d at 830.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. *Blazina*, 182 Wn.2d at 830. Should this Court exercise its discretion to reach the merits of Simon's unpreserved claim, it should deny his request to strike the provision requiring him to pay supervision fees as determined by DOC.

The State does not dispute that the law now prohibits the imposition of discretionary "costs" on indigent defendants. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Similarly, RCW 9.94A.760 now provides that the trial court may not order an indigent defendant to pay "costs" as described in RCW 10.01.160. But costs are

limited to "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." RCW 10.01.160(2).

During a colloquy with the court, Simon stated that he did not own any property, that he did not have a job or a bank account, and that he had been receiving EBT. 2RP 363-64. The trial court determined that Simon was indigent and waived nonmandatory LFOs. CP 73. The court imposed the mandatory $500 victim assessment fee and waived the criminal filing fee and DNA database fee. CP 74; 2RP 364. The court imposed twelve months of community custody and ordered Simon to pay supervision fees as determined by DOC. CP 76-77, 83.

In dicta, this Court noted that costs of community custody are discretionary legal financial obligations (LFOs). *See State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). But the supervision fee is not a discretionary "cost" merely because it is a discretionary LFO. Rather, the supervision fee fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecute a defendant or in administering a deferred prosecution program or pretrial supervision.

Based on this reasoning, this Court has repeatedly held in unpublished decisions that supervision fees were properly imposed by the

trial court. *See e.g. State v. Clark*, No. 52330-2-II, 2020 WL 1651477 at *5 (Wash. Ct. App. March 17, 2020) ("Because the supervision assessment is not a cost under RCW 10.01.160, the trial court was not required to conduct an inquiry into Clark's ability to pay under RCW 10.01.160(3)."); *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517 at *1, 10-11 (Wash. Ct. App. November 5, 2019) (holding that the community custody supervision assessment was properly imposed because it was not a cost subject to the recent amendments and the court was not required to inquire into the defendant's ability to pay before imposing the assessment); *State v. Estavillo*, No. 51629-2-II, 2019 WL 5188618 at *5-6 (Wash. Ct. App. October 15, 2019).[7] Thus, the trial court properly imposed supervision fees in Simon's case.

However, in *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), Division I remanded to strike the supervision fees after concluding that the record indicated that the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of its location in the judgment and sentence, which it described as "buried in a lengthy paragraph on community custody." The Court relied on the trial

[7] *Clark*, *Abarca*, and *Estavillo* are unpublished cases that have no precedential value and are not binding on this Court. They are cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

court's statement that it would waive the DNA fee, the filing fee, and "simply order $500 victim penalty assessment, which is still truly mandatory, as well as restitution, if any." *Id.*

Here, the record does not contain a similar intent to impose only "truly mandatory" costs. And although the provision requiring Simon to pay for supervision fees is located in a similar paragraph, it is also separately listed as one of the conditions of community custody outlined in Appendix F. *See* CP 77, 83. And Simon did not object to the imposition of this condition. The record does not indicate that the trial court "inadvertently imposed" the supervision fees.

Further, the condition imposed was not a "discretionary" condition, but rather a "waivable" condition. And the trial court did not waive the condition. The community custody statutory provisions provide for mandatory conditions, waivable conditions, discretionary conditions, and special conditions. RCW 9.94A.703. The provision requiring defendants to pay supervision fees is a "waivable" condition—not a "discretionary" condition. *See* RCW 9.94A.703(2)(d). The provision is listed under "waivable conditions" and provides, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to…[p]ay supervision fees as determined by the department." RCW 9.94A.703(2)(d). Here, the trial court did not waive the imposition of the supervision fees.

CP 77, 83. Thus, the supervision fees were properly imposed as part of the judgment and sentence.

V. CONCLUSION

For the foregoing reasons, this Court should affirm Simon's convictions and sentence.

RESPECTFULLY SUBMITTED this 14th day of May, 2020.

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5/14/20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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