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Court of Appeals
Division I
State of Washington

NO. 73324-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESSICA CARDE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN
THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where the defendant articulated no legitimate dissatisfaction with her current counsel, the court's own evaluation of counsel indicated that counsel was diligently and zealously representing the defendant, and any substitution would greatly delay a very complex and long-delayed case, did the trial court properly exercise its discretion in denying motions for new appointed counsel that were brought shortly before trial and on the day of trial?

2. Where the defendant received numerous continuances of a restitution hearing to allow her to obtain irrelevant evidence that she subsequently never produced, and then moved on the day of the restitution hearing for yet another continuance to allow substitution of newly retained, unprepared counsel for her currently appointed competent, prepared counsel, arguing that substitution was necessary because current counsel had not assisted her in obtaining some of the irrelevant evidence, did the trial court properly exercise its discretion in denying the motion?

3. Does a defendant's right to trial by jury under the Sixth Amendment and article I, section 21, entitle her to a jury determination of restitution?

4. Where the defendant has asked this Court to forbid the imposition of appellate costs but has provided no argument or citation to the record in support of that request, and where the record contains no evidence of indigence, should this Court decline to address appellate costs?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Jessica Carde, with five counts of theft in the first degree, one count of attempted theft in the first degree, and three counts of mortgage fraud, with each of the nine counts involving a separate victim.¹ CP 128-33. A jury acquitted Carde of two of the first degree theft charges, but found her guilty as charged of the remaining seven charges. CP 231-38. The trial court imposed concurrent standard range sentences totaling 28 months in confinement. CP 250, 252. Carde timely appealed the judgment and sentence. CP 255-67. The trial court later entered a restitution order, which Carde also timely appealed. CP 273. The two appeals were consolidated under this cause number.

¹ An additional charge of theft in the second degree was dismissed just before trial because the victim, who was a necessary witness, had passed away. CP 132; 1RP 153.

2. SUBSTANTIVE FACTS.

Carde's convictions resulted from allegations that, from 2007 to 2012, she engaged in an ongoing scheme to enter and live in residential properties by pretending to be an interested and seemingly qualified potential purchaser. CP 10.² As part of the scheme, Carde typically presented the homeowner with information indicating that she was a successful business owner, that she had a significant line of credit or income, and that she was interested in purchasing the home. CP 10. Having presented herself as a seemingly legitimate negotiating party, she would follow up by claiming that she had been the victim of identity theft and that problems had cropped up preventing her from immediately finalizing a home purchase. CP 10.

Based on that claim, Carde would convince the homeowner to enter into a lease-purchase agreement on the promise that she would pay rent in the meantime and would buy the home once her credit situation was cleared up. CP 10. In some cases, Carde submitted one or more initial payments, but she inevitably stopped making any payments towards her rent. CP 10. To stay in the

² Because the facts underlying Carde's convictions are not directly relevant to the issues raised on appeal, this statement of the facts is drawn from the Certification for Determination of Probable Cause. CP 10-27.

home, Carde would engage in deceptive acts against the homeowner to prevent or delay eviction, which in turn allowed her to maximize her time in the home, rent free, until the homeowner was finally able to evict her. CP 10.

Carde targeted upscale homes in particular, and she often used deception to trick homeowners into believing she had the significant income and credit needed to purchase such homes. CP 11. Carde would at times supplement this impression by deceiving actual mortgage lenders in order to secure conditional "pre-qualification" letters that purported to demonstrate to homeowners that she had access to the necessary funds for the purchase (but for which she did not actually qualify and therefore never secured). CP 11. Carde thereby deceived numerous homeowners into allowing her to enter and remain in homes that she did not have the ability to purchase. CP 11. To support her lifestyle and to make the initial payments that helped maintain the illusion that she was wealthy, Carde also deceived two private individual lenders into lending her large sums of money—loans which she similarly had no means of repaying. CP 11.

Once her victims caught on, Carde retaliated by making false or exaggerated accusations against her victims in order to

shift blame. She accused one of threatening to kill her, another of being a drug dealer who laundered money, a third of having tried to burn his own house down while she was in it, a fourth of embezzling her deposit money, a fifth of burglarizing "her" (his) house, and a sixth of stealing from her. CP 11. Carde's schemes resulted in the mortgage default or financial ruin of many of her victims. CP 11.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING CARDE'S LAST MINUTE MOTIONS FOR NEW APPOINTED COUNSEL.

Carde claims that the trial court abused its discretion when it denied motions she brought shortly before trial and on the first day of trial for new appointed counsel. This claim should be rejected. The reasons given for Carde's dissatisfaction with her current counsel were without merit, the trial court's own evaluation of counsel was entirely positive, and any substitution would have enormously delayed a long and complex case that had already been repeatedly delayed by Carde's many changes of attorney and the many months of preparation required each time a new attorney took over the case.

a. Relevant Facts.

Charges were filed against Carde in March 2013. CP 1. She was extradited from Montana for arraignment in October 2013 and public defender Jonathan Newcomb of the Associated Counsel for the Accused ("ACA") division of the Department of Public Defense was appointed to represent her. CP 289; 1RP³ 101. At each of the first two case scheduling hearings, Carde's motion for a continuance to allow for "investigation" was granted. CP 289-90.

In December 2013, prior to the third case scheduling hearing, Carde brought a motion to discharge Newcomb and have new counsel appointed. 3RP 3; CP 291. She told Presiding Judge Ronald Kessler that there was "a breakdown in communication" between her and Newcomb, but complained only that it was difficult to reach him by phone and that "there were several things discussed regarding the [prior] bail hearing that were not performed." 3RP 3. She asserted that she had "a total lack of confidence in [Newcomb]." 3RP 3.

³ The verbatim report of proceedings consists of 17 volumes. The first 15 are consecutively paginated and will be collectively referred to as 1RP. The 16th volume covers the final restitution hearing on November 10, 2015, and will be referred to as 2RP. The 17th volume, which was recently prepared by appellate defense counsel at the State's request, covers an early hearing on December 5, 2013, and will be referred to as 3RP.

After verifying that the complex case was not going to be ready for trial any time soon, Judge Kessler warned Carde that if he granted her motion, it would delay her trial and any future motions for new appointed counsel would not be granted; Carde stated that she understood. 3RP 4-5. He also warned Carde that "as a general rule, . . . public defenders are tough to get ahold of on the phone," and that her new counsel might be similarly difficult to reach. 3RP 5-6. Judge Kessler then granted the motion, citing the fact that "it's sufficiently early in the case," and ordered the appointment of new counsel. 3RP 6.

The Defender Association ("TDA") division of the Department of Public Defense was then appointed to represent Carde. CP 292-97. Between December 2013 and April 2014, Carde went through three different attorneys at TDA.⁴ CP 292-97, 299, 302. The case scheduling hearing was continued a total of seven times due to each new counsel's need to review the thousands of pages of discovery and investigate the case, before a trial date of July 7, 2014, was finally set in May 2014. CP 289-90, 298, 300-01, 303-04.

⁴ These changes in counsel resulted not from formal motions by Carde, but from decisions within the defense agency.

In late June, Timothy Johnson substituted into the case; he was Carde's fourth TDA attorney, and her fifth appointed attorney over all. CP 307. At TDA's request, the court ordered the appointment of a second attorney, and Kristin Shotwell of TDA soon joined the case. CP 30, 306, 308. The July trial date was continued to September 2014 at defense counsel's request, over Carde's objection.⁵ CP 309. The case was continued two more times in September and November 2014 to a final trial date in early February 2015; both continuances were at defense counsel's request over Carde's objection. 1RP 37, 48-49, 79-82.

- i. December 23, 2014, motion for new appointed counsel.

On December 23, 2014, Carde brought a motion before the presiding judge⁶ to discharge Johnson, but made it clear that she wanted to keep Shotwell as her attorney and simply have new co-counsel appointed. 1RP 94, 99-100. Johnson told the court that he and Shotwell had divided the labor of preparing for trial between themselves by count, and that Carde disagreed with their strategy

⁵ The continuance was not due solely to the substitution of new counsel. Carde's previous attorney had told the court shortly before she was replaced by Johnson in June 2014 that she would need at least three more months to prepare for trial. 1RP 8.

⁶ Judge Regina Cahan heard the motion on the criminal presiding judge's behalf. 1RP 128; CP 310.

on one of the counts assigned to him. 1RP 94. Johnson explained that Carde wanted him to spend time investigating the possible existence of discovery that she believed would support a certain strategy, but that after many meetings with Shotwell and Carde about the relevant issue, and after consulting with the prosecution regarding their theory, he had decided that a different strategy, to which the evidence was not helpful, would better serve Carde and the case as a whole. 1RP 94, 104-05. As a result, he had declined to spend his time in the manner requested by Carde. 1RP 94.

The court informed Carde that it was not possible to discharge only one of her attorneys, and offered her some more time to think about the issue. 1RP 95. Carde declined the offer, stating that she had been contemplating moving to replace Johnson "for several months." 1RP 96. She complained that Johnson had been difficult to reach by phone, and had met with her an insufficient number of times. 1RP 96. She stated that decisions had been made without consulting her, that Johnson had failed to obtain evidence that she believed would be helpful at trial, and that she disagreed with Johnson's case strategy. 1RP 97. Carde also complained that Johnson had an "abrasive style" and hadn't asked the right questions in witness interviews, and stated that she

"d[id]n't have confidence in his representation." 1RP 98. However, she reaffirmed that she did not want Shotwell replaced. 1RP 99.

Johnson and Shotwell informed the court that they had nearly completed their preparation for trial, had interviewed the vast majority of the State's 25 witnesses, and had both reviewed the approximately 12,000 pages of discovery. 1RP 103-04. Johnson further informed the court that Carde's case had been his top priority for months. 1RP 103. When consulted by the court, Shotwell confirmed that she agreed with the strategic choice made by Johnson that was the primary source of Carde's unhappiness, and otherwise declined to comment on the motion. 1RP 101, 104.

The court asked the State for a summary of the procedural history of the case. 1RP 101. The prosecutor recounted the prior successful discharge of Carde's first appointed attorney, the many subsequent continuances and changes of counsel, and the fact that the case had not only been filed and set for trial long ago, but dealt with events that had occurred as far back as 2006. 1RP 101-03. The State took no position on the motion for new counsel itself, but vigorously asserted its objection to any further continuances of the trial date, which the replacement of one or both defense attorneys would inevitably require. 1RP 102-03.

The court denied the motion for new appointed counsel. 1RP 105. The presiding judge explained that the appointment of new counsel would require "an extensive delay for new counsel to get up to speed," and found that Johnson had been working diligently on the case. 1RP 105. The court also noted that both Johnson and Shotwell were "very experienced" attorneys who "do an exceptional job," had both reviewed the extensive discovery, and agreed on the strategy with which Carde disagreed. 1RP 105.

At the subsequent omnibus hearing on January 9, 2015, Carde did not renew her motion. 1RP 107-20. However, in making a request for release from custody, she spoke to the court on her own behalf and again referenced her belief that additional evidence existed that would support her defense, and told the trial court that her attorneys had not been able to access it because she needed to be out of custody in order to gather it and give it to them. 1RP 119-20.

- ii. February 3, 2015, motion for new appointed counsel.

The parties appeared for trial before Judge Timothy Bradshaw on February 3, 2015. 1RP 126. Johnson informed the court that Carde now wanted to discharge both him and Shotwell,

and recounted the prior successful motion to discharge her first attorney and the more recent unsuccessful motion to discharge him. 1RP 128. Carde spoke to the court, and primarily complained about the contents of the defense trial brief, claiming that it contained "innumerable errors, misstatements, [and] misrepresentations" (which Carde did not identify with any specificity) that she believed would be held against her. 1RP 135. Carde was also upset that her attorneys had not objected to or requested sanctions for statements in the State's trial brief that Carde believed were improper, such as references to a prior custodial interference case in Minnesota and to Carde's "flight" from Washington when charges were filed. 1RP 137-38.

Carde also renewed her earlier complaint that her attorneys had failed to obtain evidence and procure witnesses that Carde believed were relevant to her case. 1RP 139. She indicated that her attorneys had informed her that the information she wanted them to obtain was no longer available or was not accurate, but claimed that this was untrue, and asserted that she was not receiving "appropriate and fair representation." 1RP 140.

In response, the trial court noted the procedural history of the case, and observed that Carde's current motion was based

largely on her dissatisfaction with the defense trial brief. 1RP 141. The court explained to Carde that the jury would not see the trial brief, and educated her about the division of decision-making responsibility between a defense attorney and a criminal defendant, and how that played out in the context of a trial brief. 1RP 141-42. The court suggested that if Carde felt additional time was needed to communicate with her attorneys in order "to correct something in their understanding of the facts," the court would accommodate that. 1RP 141-42.

Johnson noted that he and Shotwell had spent considerable time talking with Carde about what she thought mattered in the case and had done their best to incorporate her views in forming their defense theories. 1RP 142-43. He stated that they had done their own investigation into the case, and had looked at all the evidence and talked to all the witnesses that they believed were relevant. 1RP 143. Johnson informed the trial court that he and Shotwell were "prepared and competent" and were ready to begin the trial that day as scheduled. 1RP 143. When Carde protested again that her attorneys had not pursued the investigation in the way she wanted them to, the trial court noted that it would not be proper to invade the attorney-client privilege or work product in

order to independently investigate the thoroughness of an attorney's case investigation. 1RP 145.

In ruling, the trial court noted that, having read the defense brief and listened to the representations of Carde and defense counsel, "I could not conclude that somehow the Defense investigation is so lacking as to deprive Ms. Carde of a constitutional right, nor that . . . Defense Counsel [are] not zealously, ethically representing their client." 1RP 145-46. Noting the prior continuances and prior successful and unsuccessful motions by Carde to fire her counsel, the trial court denied Carde's motion for new appointed counsel. 1RP 146. The parties then proceeded with pre-trial motions, jury selection, and trial.

b. The Standard Governing Motions For New Appointed Counsel.

An indigent defendant does not have a constitutional right to the appointed counsel of her choice. State v. Hampton, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015). "To justify appointment of new [appointed] counsel, a defendant 'must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" State v. Varga, 151

Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)). A defendant's general loss of confidence or trust in his counsel is not sufficient to warrant substitution of new appointed counsel, nor is a mere disagreement regarding a strategic decision within defense counsel's control. Stenson, 132 Wn.2d at 734 (loss of confidence not sufficient); State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006) ("mere lack of accord" regarding strategic decision not sufficient). Instead, "[a]ttorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Stenson, 132 Wn.2d at 734.

Whether a defendant's dissatisfaction with his appointed counsel "is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court." Id. When making that determination, Washington courts consider three factors: "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." Id.

A trial court's ruling on a motion for new appointed counsel will not be overturned on appeal absent an abuse of discretion. Varga, 151 Wn.2d at 200. A trial court abuses its discretion when

its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." Hampton, 184 Wn.2d at 670 (internal quotation marks omitted). This occurs only when the trial court's decision rests on facts unsupported in the record or is reached by applying the wrong legal standard, or when the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. Id. at 670-71 (internal quotation marks omitted).

- c. The Trial Court Properly Denied Carde's December 23, 2014, Motion To Replace Johnson.

Each of the three factors set out in Stenson supported the trial court's decision to deny Carde's December 23rd motion to replace Johnson. First, the reasons given for Carde's dissatisfaction with Johnson did not indicate any actual deficient representation by Johnson, but rather reflected Carde's unhappiness with Johnson's decisions regarding strategic matters within his purview. While a criminal defendant "decides the goals of litigation and whether to exercise some specific constitutional rights" such as what plea to enter, whether to testify, and whether to waive jury trial, a defendant's attorney otherwise determines the strategy and trial tactics through which the defendant's goals of

litigation should be pursued. Cross, 156 Wn.2d at 606-07. Thus, decisions such as whether to pursue a mental defense and whether to concede guilt and instead argue for mercy in a death penalty case are properly controlled by defense counsel rather than the defendant. Id. at 606 (mental defense); Stenson, 132 Wn.2d at 732 (concession of guilt in death penalty case).

Here, the record indicates that Carde disagreed with Johnson about what strategy would be most effective, and correspondingly what evidence would be relevant or most helpful, in defending against certain charges.⁷ Like the decision whether to offer evidence of mental health problems, this was a strategic decision within Johnson's control. The record indicates that Johnson, Shotwell, and Carde had many discussions about strategy, and there was no indication that Carde and Johnson were unable to communicate with each other about their strategic disagreements. Moreover, Carde had a good relationship with Shotwell, and explicitly asked to keep her on the case. There was thus no basis in the record for the trial court to conclude that Carde

⁷ Many of Carde's complaints about Johnson, such as not doing things she wanted him to do and being difficult to reach by phone, were markedly similar to her complaints about her first appointed counsel, whom she had been allowed to fire after acknowledging the presiding judge's warning that she would not be permitted to do so again. 3RP 3-6.

and Johnson were "so at odds as to prevent presentation of an adequate defense" by Johnson and Shotwell. Stenson, 132 Wn.2d at 734.

Second, the trial court's own evaluation of counsel also weighed in favor of denying Carde's motion. The court noted that it knew Johnson and Shotwell to be "very experienced" attorneys who "do an exceptional job," and found that they had both been working diligently on the case and were in agreement on the strategic decision with which Carde disagreed. 1RP 105.

Third, the effect of any substitution upon the scheduled proceedings weighed heavily in favor of denying Carde's motion. Appointing a replacement for Johnson (which, as the trial court noted, was not actually in its power to do), or replacing both attorneys by appointing a new defense agency to represent Carde, would have greatly delayed the already long-delayed trial. The case had been filed almost two years earlier, and had been set for trial since before Johnson and Shotwell began representing Carde. Carde had already been permitted to fire her appointed counsel once before, and over the life of the case the defense had requested and received ten continuances. Reviewing the 12,000 pages of discovery, interviewing the 25 or more State witnesses,

and adequately preparing for trial had taken Johnson and Shotwell six months, and there was every reason to believe that a new attorney or attorneys would require a similar amount of time to complete their own preparations. But by the time of Carde's motion, the scheduled trial date was only six weeks away. Any appointment of new counsel would thus have required an extensive additional delay that was unwarranted under the circumstances.

Because all three of the Stenson factors weighed against granting Carde's December 23rd motion for new appointed counsel, the trial court properly exercised its discretion in denying the motion.

- d. The Trial Court Properly Denied Carde's February 3, 2015, Motion To Replace Both Johnson And Shotwell.

By the time Carde moved to replace both of her attorneys on the first day of trial, the Stenson factors weighed even more heavily against her request. Carde again raised the same complaints about her attorneys' strategic decisions that had been the subject of the December 23rd motion. 1RP 139-40. Her primary new complaints were about her disagreement with the way her attorneys had written the trial brief, and with their failure to object to statements in the State's trial brief that Carde felt were improper.

1RP 135-38. The formulation of the defense trial brief was again, as the trial court noted, a strategic decision within the attorney's control, and there is no indication in the record that there was any legitimate basis for defense counsel to object to the contents of the State's brief.

Defense counsel thoroughly described the lengths they had gone to in order to incorporate Carde's preferred strategy as much as possible, and verified that they had investigated all relevant aspects of the case. 1RP 142-43. The information before the trial court thus established that the lines of communication between Carde and her counsel remained open, and that the attorney-client relationship was merely strained by Carde's unwillingness to accept her lack of control over strategic decisions rather than completely broken.

Once again, the trial court's own evaluation of counsel also weighed against granting Carde's motion, with the trial court determining after reviewing the defense trial brief that Johnson and Shotwell were zealously and ethically representing their client. 1RP 146. Moreover, Carde's renewed motion was even more untimely than the previous one, with trial now minutes away from beginning

and her defense counsel at last completely prepared to proceed.
1RP 143.

Given the lack of any meritorious complaint about defense counsel, the court's own positive evaluation of counsel, and the last-minute nature of the motion in a long and extremely complex case, the trial court properly exercised its discretion in denying Carde's February 3rd motion for new appointed counsel.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING CARDE'S MOTION TO CONTINUE THE RESTITUTION HEARING A FOURTH TIME IN ORDER TO SUBSTITUTE NEWLY RETAINED COUNSEL.

Carde contends that the trial court abused its discretion when, after three prior continuances of the restitution hearing at Carde's request, it denied her day-of-hearing request for another continuance so that newly retained private counsel substitute into the case and prepare for the hearing. This claim should be rejected. Because all of the relevant factors weighed against granting Carde's motion, the trial court properly exercised its discretion in denying it.

a. Relevant Facts.

Carde was sentenced on April 2, 2015. CP 253. In August 2015, a restitution hearing was scheduled for September 15, 2015,

but it was later continued to September 25, 2015, at Carde's request. CP 267-68; 1RP 2249. On September 25th, Carde, who was now out of custody and still represented by Johnson and Shotwell, again requested a continuance. 1RP 2243. Through her counsel, she informed the trial court that she wanted more time to gather evidence she believed was relevant to the determination of restitution. 1RP 2244.

However, when she described what she believed the evidence would show, it became clear that the evidence Carde planned to gather went to the arguments she had raised at trial regarding her innocence on the theft and mortgage fraud charges of which the jury eventually convicted her. 1RP 2245-48. It was not relevant to the amount of the victim's losses. At the time, the State was seeking restitution for losses suffered by four victims: Donna Dubey (on behalf of her deceased husband Neil Dubey), Kevin Roberts, John Postma, and Peter Samuelsen. CP 275. Regarding Dubey, Carde's counsel indicated that she was not contesting the amount, but believed that she could show that "the loan was personal to Mr. Dubey," thereby attacking the legal basis for awarding restitution to Neil Dubey's widow. 1RP 2245.

Regarding Roberts, Carde indicated that the argument she intended to make was the same argument the jury had rejected at trial—that her lease-to-buy contract with Roberts did not obligate her to pay any rent until after the sale closed, which never occurred, and therefore she had not committed theft by failing to pay rent. 1RP 2246-47. Carde also believed that she could obtain evidence to show that any rent she owed was due to the Roberts' bankruptcy trustees and not to Roberts himself; in Carde's view, Roberts had no right to collect rent during the relevant period because the bankruptcy trustees were in legal control of the property. 1RP 2245-46. Defense counsel acknowledged that he had advised Carde that the latter argument was unlikely to succeed as a matter of law. 1RP 2247.

Regarding Postma, Carde indicated that she intended to argue that the State could not collect restitution because she was convicted of mortgage fraud rather than theft, but did not indicate a need to obtain additional evidence on that issue. 1RP 2247-48. Regarding Samuelsen, Carde again indicated that the additional evidence she needed to obtain was relevant to an argument the jury had rejected at trial: that she was merely a guest in

Samuelson's home, and therefore her failure to pay rent did not constitute theft. 1RP 2248.

When asked how long she thought she would need to gather the evidence she wanted, Carde indicated that thirty days would be sufficient. 1RP 2249. The State objected to the continuance, pointing out that the hearing had already been continued at Carde's request and that the arguments Carde intended to make were not proper reasons to deny the requested restitution, which was based on the loss amounts the victims testified to at trial. 1RP 2249-50. The trial court granted Carde's motion, but noted that the requested 30 days should be sufficient to obtain the documents Carde had alluded to, and warned her that there would be a "strong presumption" against any future continuances. 1RP 2252-53.

The trial court continued the restitution hearing to October 22, 2015, but shortly before that date the court continued it again to November 10, 2015, at Carde's request due to unspecified medical issues. CP 270, 272; 2RP 3. On November 10th, Carde appeared in court with both her appointed counsel and a private attorney, Barry Flegenheimer, that she had recently retained, and asked the court to continue the restitution hearing and allow Flegenheimer to substitute for Johnson. 2RP 3-4. Johnson indicated that he had

just learned of Carde's desire to substitute new counsel that day, and both he and Flegenheimer emphasized that Carde's request for substitution of counsel was contingent on also receiving a continuance sufficient to allow Flegenheimer to prepare for the hearing. 2RP 3-4.

Flegenheimer did not specify exactly how much time he would need, but stated that Carde had contacted him only recently and had "articulated to me a number of issues that she wishes investigated and presented to the court for the court to determine the proper amount of restitution," which Flegenheimer acknowledged "would take some time." 2RP 4. Carde asked to speak on her own behalf, and explained that her desire to substitute new counsel was due to the fact that some of the evidence she had wanted to obtain for the restitution hearing was obtainable only through subpoena, and that her appointed attorneys had failed to obtain those items for her.⁸ 2RP 5.

The trial court denied the motion for a continuance and substitution of new counsel, noting that the hearing had been continued "a number of times" and always at Carde's request.

⁸ Although Carde claimed only that "some of" the evidence she wished to present had been unobtainable without a subpoena, it became apparent during the subsequent restitution hearing that Carde had obtained no new evidence since the September 25th continuance had been granted. 2RP 5, 9-22.

2RP 6. The court stated that it had granted those prior continuances "to allow full opportunity for investigation and airing of any concerns," and that many of the arguments to which Carde's desired evidence related were the very defenses that had been litigated at trial. 2RP 6. The court noted that appointed defense counsel were competent and had represented Carde at trial, and concluded that there was "no adequate showing" to warrant continuing the hearing to allow the substitution of newly retained counsel. 2RP 6.

Carde interjected and asserted that she was firing her appointed counsel. 2RP 7. When the court informed her that the hearing would proceed, she asked if her "objection" was denied, and proceeded to talk over the court about the existence of evidence to show that the requested restitution amounts were "not accurate" and to show that some of the evidence presented by the State was "fraudulent." 2RP 7. Only then did the trial court reference Carde's pre-trial motions to substitute new appointed counsel. 2RP 7. When Carde asked if she could at least have more time to gather her evidence, the court reminded her that it had granted her a continuance six weeks earlier for precisely that purpose. 2RP 7.

The parties then proceeded with the restitution hearing. The State struck its request for any restitution for John Postma, and Carde's only arguments regarding the remaining three victims were arguments about Carde's innocence that defense counsel acknowledged the jury had rejected at trial. 2RP 9-11. Nevertheless, Carde asked the trial court to disregard the jury's verdicts and find "as a matter of law" that the facts did not support the requested restitution. 2RP 11. The trial court ordered the restitution amounts requested by the State. CP 273.

b. The Standard Governing Motions For New Appointed Counsel.

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel. U.S. CONST. amend. VI; United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). For defendants who do not require appointed counsel, an element of this right is the right to counsel of the defendant's choice. Id. If a trial court improperly denies a defendant his counsel of choice, he is automatically entitled to a new trial, and need not show that the denial prejudiced him. Id. at 150.

However, the right to counsel of choice is not absolute. Id.; State v. Aguirre, 168 Wn.2d 350, 364-66, 229 P.3d 669 (2010). A trial court has wide latitude in balancing the right to counsel of choice against the demands of its calendar, and trial courts must be granted broad discretion on matters of continuances. Id. at 152; Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

A trial court must balance a defendant's right to counsel of her choice against the public's interest in the prompt and efficient administration of justice, and its decision is reviewed for abuse of discretion. Aguirre, 168 Wn.2d at 365. A trial court's denial of a continuance to allow for substitution of newly retained counsel will be overturned on appeal only if it "was 'so arbitrary as to violate due process.'" State v. Hampton, 184 Wn.2d 656, 663, 361 P.3d 734 (2015) (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). Put another way, "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates a defendant's right to counsel of choice. Slappy, 461 U.S. at 11-12; State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005).

Shortly after Carde's restitution hearing, our supreme court clarified in Hampton that, when faced with a motion to substitute new retained counsel that is contingent on a motion for a continuance,

trial courts can consider all relevant information, including the 11 factors described in the most recent edition of the LaFave *Criminal Procedure* treatise:

- (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.

184 Wn.2d at 669-70. Because not all factors will be present in all cases, "a trial court need not evaluate every factor in every case." Id. at 670.

c. The Trial Court Properly Exercised Its Discretion In Denying Carde's Untimely Motion To Substitute Newly Retained Counsel.

The trial court applied the proper standard to Carde's motion by considering any information that was relevant. In this case, all of the relevant factors weighed in favor of denying Carde's last-minute motion for yet another continuance so that she could substitute newly retained counsel.

Carde's request did not come "at a point sufficiently in advance" of the hearing "to permit the trial court to readily adjust its calendar"; instead, it came only on the day of the restitution hearing. Although Carde's newly retained counsel did not specify exactly how much time he was asking for, his admission that the investigation desired by Carde would take "some time," the complexity of the case and the amount of discovery involved, and Carde's statements that some of the information she sought could

be obtained only through subpoenas all indicated that if Flegeneimer was allowed to substitute in he would require not days, but weeks or months, to prepare.

While there were of course no speedy trial considerations at play, the continuance Carde requested, like the continuance she had already received, pushed the restitution hearing beyond that of the 180-day deadline set out by statute. Carde had also received 10 pre-trial continuances and three prior continuances of the restitution hearing, and had previously been warned that additional continuances to seek out the purportedly relevant restitution evidence would likely not be granted.

Carde's request was not made promptly after she first became aware of the grounds advanced for discharging her counsel. Instead, she had been complaining about her counsel's failure to obtain evidence she believed was relevant since before trial. Moreover, given that it was clear at the time of Carde's prior motion for a continuance that the evidence she desired was relevant only to issues that had already been resolved at trial, there is no indication that Carde learned only shortly before her motion that her counsel would not take the time, or did not have a proper basis, to subpoena the documents she desired.

Carde's failure to obtain even the documents for which a subpoena was not necessary, despite having received a six-week continuance for exactly that purpose, shows that her own negligence was responsible for her need for another continuance. As noted above, the evidence Carde hoped to obtain was relevant only to issues of guilt or innocence that had already been determined by the jury, and thus also she had no legitimate cause for dissatisfaction with any reluctance on her counsel's part to spend time attempting to get the requested documents. For the same reason, there was no indication that denial of Carde's motion was likely to result in identifiable prejudice to her case of a material or substantial nature.

Finally, Carde's current counsel was prepared to go forward with the restitution hearing that day, and there was a rational basis for believing that Carde's primary purpose was merely to delay the restitution hearing. The latter was evident from the fact that Carde had obtained none of the previously identified evidence despite being given additional weeks to do so and describing only "some" of it as requiring attorney assistance to obtain, and the fact that she continued to request a continuance to obtain that evidence even after her motion to substitute new counsel was denied.

Because all of the applicable factors weighed in favor of denying Carde's untimely motion to again continue the restitution hearing in order to substitute new counsel, the trial court properly exercised its discretion in denying the motion. Carde's request for reversal of the restitution order should therefore be denied.

3. A CRIMINAL DEFENDANT HAS NO RIGHT TO A JURY DETERMINATION OF RESTITUTION UNDER THE FEDERAL OR STATE CONSTITUTION.

Carde contends that the right to trial by jury in the Sixth Amendment and article I, section 21, of the Washington Constitution entitle her to a jury determination of restitution. This claim should be rejected. The Washington Supreme Court and all circuits of the federal court of appeals have determined that the Sixth Amendment does not grant a right to a jury determination of restitution, and the Washington Supreme Court has determined that article I, section 21, grants no broader protection than the Sixth Amendment when it comes to sentencing.

Although the United States Supreme Court has never directly addressed whether the Sixth Amendment grants criminal defendants the right to a jury determination of the facts on which restitution is based, the Washington Supreme Court and all circuits of the federal court of appeals have concluded that it does not.

State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005);
United States v. Milkiewicz, 470 F.3d 390, 403 (1st Cir. 2006);
United States v. Reifler, 446 F.3d 65, 118-20 (2d Cir. 2006); United States v. Leahy, 438 F.3d 328, 337-38 (3d Cir. 2006); United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 454, 461 (6th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Miller, 419 F.3d 791, 792-93 (8th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); United States v. Wooten, 377 F.3d 1134, 1144-45 (10th Cir. 2004); United States v. Williams, 445 F.3d 1302, 1310-11 (11th Cir. 2006).

Carde suggests that the right to a jury determination of restitution should be inferred under Southern Union Co. v. United States, ___ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), which held that Apprendi⁹ applies to the imposition of criminal fines. However, not only is this Court bound by Kinneman's holding that Apprendi does not apply to restitution until the Washington State or United States Supreme Court says otherwise, but the argument Carde raises has already been rejected by the Ninth Circuit and all

⁹ Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

other circuits that have considered the issue in light of Southern Union. United States v. Green, 722 F.3d 1146, 1149-50 (9th Cir. 2013) (holding Southern Union's extension of Apprendi does not require abandonment of prior circuit precedent that Apprendi does not apply to restitution); United States v. Bengis, 783 F.3d 407, 412-13 (2d Cir. 2015); Day, 700 F.3d at 732; United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985 (2015); United States v. Churn, 800 F.3d 768, 782 (6th Cir. 2015); United States v. Wolfe, 701 F.3d 1206, 1216-18 (7th Cir. 2012); United States v. Thunderhawk, 799 F.3d 1203, 1209 (8th Cir. 2015); United States v. Kieffer, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 135 S. Ct. 2825, 192 L. Ed. 2d 862 (2015).

Carde's contention that article I, section 21, independently provides a right to a jury determination of restitution is similarly ill-founded, as the Washington Supreme Court has held that article I, section 21, does not provide any broader protection than the Sixth Amendment in the context of sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). Carde relies on Sofie v. Fibreboard Corp.¹⁰ and its conclusion that article I, section 21, provides for the jury determination of damages in a civil suit, yet

¹⁰ Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989).

that holding turned on the supreme court's determination that the measure of damages in a civil suit was traditionally within the jury's province at the time the Washington State Constitution was enacted. Sofie, 112 Wn.2d at 645-46.

However, criminal sentencing was not within the jury's province at the time the state constitution was enacted. Smith, 150 Wn.2d at 154, 156. Therefore, neither Sofie nor any other source provides justification for finding a constitutional right under article I, section 21, to a jury determination of restitution.

Because this Court is bound by our supreme court's holdings that there is no Sixth Amendment right to a jury determination of restitution and that article I, section 21, does not provide any broader protection in the context of sentencing, this Court should hold that the trial court's determination of restitution did not violate Carde's state or federal constitutional right to trial by jury.

4. THIS COURT SHOULD NOT ADDRESS APPELLATE COSTS BECAUSE THE ISSUE WAS NOT PROPERLY BRIEFED BY CARDE AND THE RECORD ON APPEAL IS INSUFFICIENT TO ADDRESS IT.

Carde asks this Court to deny the award of appellate costs should the State prevail on appeal. However, she provides no argument or citation to the record to support this request. Carde

does not assert that she is currently indigent, nor does the record on appeal appear to contain any evidence or findings by the trial court regarding Carde's past, current, or future indigence. This Court should therefore decline to address the appropriateness of awarding of appellate costs in this appeal. See State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008) ("RAP 10.3(a)(5) requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. . . . We need not consider arguments that a party has not developed in the briefs.").

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Carde's convictions and restitution order.

DATED this 1st day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the **BRIEF OF RESPONDENT**, in State v. Jessica M Carde, Cause No. 73324-9, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 1st day of August, 2016.

Name:
Done in Seattle, Washington