NO. 72305-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN WARSAME,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES

1. A criminal defendant has a qualified right to choose his lawyer, but the trial court must balance the right against the interest in ensuring a fair trial conducted according to the ethical standards of the profession. Abdirahman Warsame requested midtrial that a newly-hired private lawyer complete the trial, but the new lawyer conceded that she could not provide effective representation and the trial court found that there was "absolutely no way [substitute counsel] [could] be prepared to be an effective advocate." Did the trial court properly deny Warsame's request to substitute counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Abdirahman Warsame by amended information with second-degree assault, fourth-degree assault, and felony harassment with the Good Samaritan aggravating factor. CP 107-08. The Honorable Judge Jean Rietschel presided over the jury trial. 1RP 12.[1] The jury found Warsame guilty as charged and found the aggravating factor. 3RP 87-88; CP 54-58.

[1] The State adopts the numbering system of the appellant to refer to the verbatim report of proceedings. Br. of App. at 2.

Post-trial, Warsame's appointed counsel sought a new trial, alleging that Warsame did not testify because he was threatened. 3RP 95; CP 98-102. New counsel was appointed because resolution of the motion required trial counsel's testimony. 3RP 95-98. Trial counsel Lucas Garrett testified that throughout his representation of Warsame the plan was that Warsame would testify that he acted in self-defense. 3RP 106-08. Six days after Warsame was convicted he told Garrett that he did not testify because he had been threatened. 3RP 112-13. At the motion hearing, Warsame testified that an unknown male, whose race and appearance he could not describe, had threatened him near the courthouse. 3RP 126-37. The trial court did not find Warsame's testimony credible and denied the motion. 3RP 146-48.

At sentencing, the State did not seek an exceptional sentence above the standard range, but recommended 14 months, the high-end of the standard range. 3RP 153-55. Warsame sought an exceptional sentence below the standard range based on a failed claim of self-defense, which he testified to at sentencing. 3RP 158-71. The court denied Warsame's request, finding his testimony not credible. 3RP 173-75. The trial court imposed concurrent standard range sentences of 14 months for second-

degree assault, 12 months for felony harassment, and 364 days for fourth-degree assault. 3RP 173-75; CP 118-29.

2. SUBSTANTIVE FACTS.

Warsame assaulted Idris Ali and Dahir Osman in an unprovoked altercation outside of a collection of Somali shops on Martin Luther King, Jr. Way South. 1RP 114, 139-40; 2RP 64. Ali suffered a significant orbital bone fracture as a result. 2RP 19-20. Osman was not injured. 2RP 81.

The incident began at about 11:00 a.m. on January 21, 2014, when Abubakar left one of the shops. 1RP 78-79, 84-85. Warsame, whom she knew as a former customer, appeared drunk and asked her, "Why are you looking at me?" 1RP 85. Abubakar left the area. 1RP 85.

About half an hour later, Idris Ali stopped at the same shops. 1RP 104, 109-11. He was exiting his cab when Warsame, whom Ali did not know, came out of the Assabr mini-market and angrily asked him, "Why are you looking at me?" 1RP 106, 112. Ali replied that he was not, and Warsame punched him in the eye. 1RP 114. Ali tried to defend himself and hit Warsame, but Warsame immediately fell backwards. 1RP 114. Ali presumed

Warsame was drunk. 1RP 114. Ali's eye immediately swelled and he had double-vision. 1RP 114-15.

An elderly woman and a younger woman tried but failed to prevent Warsame from assaulting Ali again. 1RP 116-18. Warsame grabbed Ali from behind. 1RP 118. Ali spun around and tried to defend himself. 1RP 118-19. Both fell to the ground. 1RP 119. An unknown man intervened and Ali escaped. 1RP 119. Ali returned to his cab and called 911. 1RP 119-20.

While Ali spoke to the 911 operator, Warsame opened Ali's cab door, grabbed Ali by the shirt, and tried to pull him out of the car. 1RP 128-29. Warsame took Ali's phone and car keys. 1RP 128-29. The 911 call recorded Warsame telling Ali that he would take Ali's phone. 1RP 127-28.

The owner of the mini-market, Dahir Osman, heard screams for help and exited his store. 2RP 58. Warsame then punched Osman; Osman responded by pushing Warsame up against a wall. 2RP 64. Warsame threatened Osman, "I'm going to kill you and I'm going to get my gun." 2RP 68. Warsame then asked the younger woman to give him his car keys so that he could get his gun. 1RP 140. After hearing this, Osman went to Ali's cab and they drove to the back of the building to escape. 1RP 140-43.

At trial, Ali, Osman, and Abubakar testified, but each was reluctant to do so. 1RP 18, 28-29, 69-70, 93, 165; 2RP 74-75. Osman admitted that Somali elders had told him not to attend court, urging him to handle the matter outside of court. 2RP 74-75. The State had difficulty securing their presence and notified the court of the issues throughout the trial. 1RP 18, 28-29, 69-70, 195; 2RP 8-9, 29-30.

Warsame did not testify in his own defense, although he apparently had planned to testify. 2RP 166-67; 3RP 108, 125.

3. FACTS RELATED TO MOTION TO SUBSTITUTE COUNSEL.

Appointed counsel Lucas Garrett represented Warsame from shortly after arraignment through trial. Supp CP __ (sub 4, initial arraignment, filed 2/27/2014); Supp CP __ (sub 10, notice of appearance, filed 3/3/2014). On May 21, 2014, appointed counsel requested a one week continuance of trial to complete two remaining witness interviews; both witnesses required Somali interpreters. 1RP 6-10. Warsame objected. 1RP 7-9. The court granted a six day continuance. 1RP 10.

On May 27, 2014, trial began and the parties completed pretrial motions. 1RP 12-53. On May 28, 2014, *voir dire* was

conducted, a jury impaneled, and the parties made opening statements. 1RP 53, 62. On May 29, 2014, immediately before the State was to present its witnesses, Warsame requested that the court discharge his appointed counsel. 1RP 67. Warsame explained that he did not believe his attorney had previously told him that the second-degree assault victim had suffered a fracture and that he disagreed with his attorney's selection of one of the jurors. 1RP 67-68. Appointed counsel stated that he was prepared, ready and "happy" to proceed to trial, but said that his client's first complaint "may be characterized as a strong strategic disagreement." 1RP 68.

Warsame told the court that he would "[s]tarting as of now" look for a private attorney. 1RP 68. When asked if he had actually retained an attorney, Warsame said that he had spoken to an attorney and could "pay now." 1RP 70. He did not name the attorney or say that he had actually retained the attorney. 1RP 70. The State objected to substitution of counsel because it would delay the trial. 1RP 69. The State explained that the three civilian witnesses were outside ready to testify, each had been very reluctant to appear and it had taken great effort to secure their presence with a Somali interpreter. 1RP 69. The court denied

Warsame's motion, finding that it was solely a request to delay the trial and that appointed counsel had performed well. 1RP 70-71.

Witness Abubakar testified and then Ali, the second-degree assault victim, began his testimony. 1RP 78, 104. After the lunch recess, Warsame informed the court that he had hired counsel and that she would arrive in approximately 30 minutes. 1RP 131-33. The court declined to hear the motion until a lawyer appeared who was ready and able to take over the case. 1RP 133. Ali's testimony continued. 1RP 136-63. After the afternoon recess at 3:10 p.m. and while Ali was still testifying, Warsame's newly-hired attorney arrived. 1RP 164. The court declined to hear the motion until Ali's testimony concluded and court recessed at 4:00 p.m. 1RP 164, 177-89.

After trial concluded for the day, the court heard Warsame's motion to substitute attorney Teri Rogers Kemp, who appeared by phone because she could not stay until trial recessed. 1RP 164, 190. The court asked Rogers Kemp if she was ready, willing, and able to take over the case midtrial when trial resumed Monday—this was a Thursday afternoon and trial was not held on Friday. 1RP 72, 191. Rogers Kemp replied:

> Your Honor, I had a discussion with [Warsame] and while I am an experienced trial and felony attorney and I could very well be willing, ready and able to step in on [Warsame's] case I have expressed that I do not believe this is in the best interest, that his present counsel in whatever state is more versed in these matters, he has been familiar with this matter, the facts, the interviewing of the witnesses, the contents of the witness interviews, et cetera and et cetera. He is in present state more able. If [Warsame] is willing to have an attorney who is – because of the timing just not as competent as present counsel and if there is understanding that this is the case then yes I would be ready, willing, and able to step in as counsel. But I do not believe that is in his best interests. I think that his present counsel is more familiar with this case than I am.

1RP 191.

> The prosecutor then asked:
>
> I guess perhaps if the Court could ask Ms. Rogers Kemp, so regardless of her opinions as to whether it's in the best interests of the defendant, is Ms. Rogers Kemp saying that she would be prepared to continue this trial on Monday and actually *provide effective assistance of counsel*?"

1RP 192 (emphasis added). Rogers Kemp candidly replied:

> *And that is the issue.* I am an experienced felony attorney. I believe that I can pick up a file and I can walk into a courtroom and do a trial. But I have – I'm familiar with the facts of the case because I spoke with my potential client 3 months ago. That's the extent, though. I've only read the [certification] for probable cause. *I have not interviewed any witnesses, I have not read any supplemental follow-up police reports, I haven't spoken with any of the police officers.*

> I believe that the accused has a right to choice of counsel but I also believe that the accused would be able to, if you will, consent to the type of defense that he would have. I am sensitive to the accused's position. I can do a trial and I can be as prepared as possible, but I don't think I would be as competent. And so I don't want to say no I wouldn't do it; I just want to say I don't believe it's a good idea. *And I haven't had a chance to have a full on discussion with [Warsame] about this.* I just don't think it would be a good idea.
>
> But I can do a trial. Hand me a file and I can do a trial. That's essentially what would be happening. I haven't interviewed any witnesses, I haven't read any police reports or any follow-up report[s].

1RP 192-93 (emphasis added). The prosecutor then clarified with Rogers Kemp all she had missed in the trial:

> DPA: I also just want the record to reflect, and, Ms. Rogers Kemp, just ask for your agreement on this, because we don't have a record of this yet, *you did not sit through opening statements or any of the witness testimony so you couldn't speak for the demeanor of the witnesses as they testified and you would not be able to assess that from simply listening to a recording because you have not been present at this trial throughout any of the testimony today; is that correct*?
>
> Rogers Kemp: *Yes.*

1RP 193 (emphasis added).

> Finally, the prosecutor clarified:
>
> I guess because this is an area, as the Court's aware, that is ripe for appeal and I just want to make sure. It

> sounds like what we're hearing from Ms. Rogers Kemp that she is saying that because she has not interviewed any witnesses, she did not appear for testimony, and didn't – wasn't able to assess the credibility of witnesses that she would have a difficult time as of Monday resuming this trial and providing effective assistance of counsel. Is that correct, Ms. Rogers Kemp?
>
> Rogers Kemp: Yes.

1RP 194.

Warsame told the court that he felt that it was his choice and that if he felt comfortable with different counsel, then he should have that choice. 1RP 194.

The court denied Warsame's motion. 1RP 194. The court explained that Warsame had the choice of counsel if he had exercised the right earlier, but that it could not allow the substitution midtrial. 1RP 194-95. The court noted that substitute counsel had not been at the trial, not observed the witnesses, could not argue the witnesses' testimony, had not read the discovery, and could not be prepared to try the case in two days. 1RP 194. It found that in the circumstances there was "absolutely no way" substitute counsel could provide effective assistance of counsel. 1RP 194-95.

The trial continued the following Monday, June 2, 2014, and ended on Wednesday, June 4, 2014. 2RP 6, 150; 3RP 5, 84. Warsame did not again raise his request to substitute counsel.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED WARSAME'S MIDTRIAL MOTION TO SUBSTITUTE COUNSEL BECAUSE NEW COUNSEL COULD NOT HAVE PROVIDED CONSTITUTIONALLY EFFECTIVE REPRESENTATION.

This case presents the question of whether the defendant's right to counsel of choice includes the right to choose a lawyer who will admittedly provide deficient representation. The answer is no. The trial court retains the authority to deny a midtrial motion to substitute counsel where the trial court found and counsel of choice conceded that she could not provide effective representation. Trial courts have an independent duty to ensure that trials are conducted fairly, ethically, and that the proceedings appear fair to all who observe them.

An appellate court reviews the trial court's denial of a defendant's motion to substitute counsel for abuse of discretion. Wheat v. United States, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Even if the reviewing court would not have

made the same decision as the trial court, it will reverse only when the "decision is 'manifestly unreasonable or based on untenable grounds or untenable reasons.'" State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). A discretionary decision is based on untenable grounds or made for untenable reasons if it is unsupported by the facts in the record or was based on an incorrect legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

In United States v. Gonzalez-Lopez, the Supreme Court held that when a defendant is erroneously deprived of his right to counsel of choice, the error is structural and a new trial is required. 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The fact that the defendant may have ultimately received a fair trial cannot render the error harmless. Id.

Gonzalez-Lopez explained the fundamental nature of the right. 548 U.S. at 147-48. "The right to select counsel of one's choice. . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." Id. The Court characterized it as "the right to a particular lawyer regardless of

comparative effectiveness," as distinguished from "the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." Id. Yet because the government conceded in Gonzales-Lopez that the defendant was erroneously denied counsel of choice, the case only indirectly addressed when a trial court must grant a defendant his choice of counsel. Id. at 149. Thus, this Court must look elsewhere for guidance.

In Wheat, the Supreme Court recognized that the right to counsel of choice is not absolute. 486 U.S. at 159. Wheat held that the trial court acted within its discretion by denying the substitution of counsel based on an irreconcilable conflict of interest, even where the defendant waived the conflict. 486 U.S. at 164. Wheat also mentioned other limitations on the right to counsel. Id. at 164. A defendant does not have the right to a lawyer who is not a member of the bar, or a lawyer he cannot afford, or a lawyer who for other reasons declines to represent the defendant, or to a lawyer who has a previous or ongoing relationship with the opposing party. Id.

Wheat affirmed the trial court's ability to deny a defendant's chosen counsel in certain circumstances because trial courts have

an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Id. at 160. The trial court also has an interest in protecting its decisions from future attacks on appeal. Id. at 161.

Thus, the trial court in Wheat acted within its substantial discretion by denying the substitution of counsel. 486 U.S. at 163. The trial court was stuck in the untenable position of either agreeing to the questionable multiple representation, and the defendant then claiming on appeal that he received ineffective assistance of counsel, or, denying multiple representation and facing the defendant's claim that he was denied his counsel of choice. 486 U.S. at 161-62. A waiver would not have insulated the case from a later claim of ineffective assistance. Id. While the trial court had to recognize a presumption in favor of the defendant's counsel of choice, that presumption was overcome by the potential for a serious conflict. Id. at 164.

In rare cases, such as Wheat, the defendant's right to counsel of choice conflicts with the trial court's interest in ensuring trials are conducted fairly and ethically. Warsame's case is also one of these rare cases. It has long been recognized that the trial

court has a duty to ensure that the accused has counsel who can, under the circumstances, effectively represent him. See e.g. Powell v. Alabama, 287 U.S. 45, 58-59, 71, 53 S. Ct. 55, 77 L. Ed. 158 (1932). The right to counsel is an empty shell unless counsel has a reasonable opportunity to assist and defend the accused. See e.g. Powell, 287 U.S. at 58-59, 72 (defendants denied right to counsel where counsel appointed immediately before trial and had no opportunity to investigate or prepare the case); United States v. Cronic, 466 U.S. 648, 659-60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (denial of counsel presumed prejudicial and reversal required if circumstances would prevent even a competent lawyer from providing effective assistance).

Indeed, "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate. . . ." Wheat, 486 U.S. at 159. Even Gonzalez-Lopez recognized that the right to counsel may be limited by the need for a fair trial. 548 U.S. at 162 n.3 ("It is one thing to conclude that the right to counsel of choice may be limited by the need for a fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair.").

The trial court may also consider the applicable Rules of Professional Conduct in determining whether to grant the substitution of counsel. See Wheat, 486 U.S. at 160. The Washington Rules of Professional Conduct require counsel to provide competent and diligent representation. RPC 1.1; RPC 1.3. Competent representation is defined as "the legal knowledge, skill, thoroughness and *preparation reasonably necessary* for the representation." RPC 1.1 (emphasis added). Under this rule, counsel should not agree to representation when she cannot be competent.

In Warsame's case, the trial court was faced with granting his midtrial substitution of counsel and Warsame later claiming ineffective assistance of counsel, or, denying the midtrial substitution and facing the claim that Warsame was denied his counsel of choice. The issue for the trial court was not the comparative effectiveness of counsel, it was whether Warsame *could receive effective representation at all* if counsel took over midtrial. Because the trial court had an independent duty to ensure the trial was conducted fairly and ethically, and because prospective counsel admitted she could not provide effective

assistance, the trial court acted well within its discretion by denying the substitution of counsel.

Warsame made the motion to substitute counsel on the third day of trial; after the jury had been impaneled, the prosecutor and his appointed counsel had made opening statements, two witnesses had testified, and an additional reticent witness and interpreters were standing by. 1RP 16, 55, 62-66, 78, 104, 131-33, 164-65, 190. Although newly-retained counsel, Teri Rogers Kemp, stated that she was willing to take over the case, she agreed that she could not provide effective assistance in the circumstances. 1RP 191-94.

Given Rogers Kemp's candid admission, the trial court properly denied the motion. The trial court addressed Warsame and explained:

> Sir, while it is undoubtedly your choice if you had made this choice a while ago, it is simply not your choice when we are midtrial. I cannot allow competent, prepared, effective counsel to be substituted by a counsel who I have utmost respect for, but one who had not been at this trial, not observed the witnesses, cannot argue about what the witnesses testified, has no ability in two days to do all the things your lawyer has, has not read the police report, has not done witness interviews. *There is absolutely no way she can be prepared to be an effective advocate. And I cannot substitute an*

advocate who is not in a position to give you effective assistance of counsel.

1RP 194-95 (emphasis added).

The trial court's finding that Rogers Kemp could not provide a baseline level of effective representation is supported by the record and entitled to deference on appeal. See Dye, 178 Wn.2d at 554. Rogers Kemp had missed the beginning of the trial, including the crucial testimony of Ali, the victim of the most serious charge. She would have been unable to speak to the demeanor and credibility of Ali or of witness Abubakar. Rogers Kemp could not have overcome this deficiency by reviewing the audio-recording of the testimony, a fact which she acknowledged. 1RP 193. Ultimately, Warsame's appointed counsel argued extensively in closing that the State's witnesses lacked credibility due to their demeanor and manner of answering questions. 3RP 54-76.[2] Rogers Kemp could not have done the same.

Nor could Rogers Kemp have fully reviewed all of the materials, discussed all of it with Warsame, investigated potential

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[2] For example, Warsame's appointed counsel argued in closing:

> Mr. Ali went round and round about whether he admitted this in an interview earlier and things like that. Mr. Ali didn't want to talk about that. He decided he doesn't remember. You're not getting the full story from Mr. Ali.

3RP 66-67.

other witnesses, formulated a defense strategy, and prepared for examining witnesses and closing argument in *three days*, even assuming that she had no duties to other clients during that time. The discovery consisted of the police statements of the three civilian witnesses, medical records from the emergency physician, reports of four police officers, and the fingerprint expert report. There were also at least four defense witness interviews, in-car video footage, and a 911 call to review. In these circumstances it is hard to conceive how Rogers Kemp could have met the Rules of Professional Conduct standard of competent representation. Certainly, the trial court could infer that Rogers Kemp could not meet that standard.

Because these facts support the trial court's factual finding that there was "absolutely no way" Rogers Kemp could provide effective representation, the trial court's decision was not based on untenable grounds or made for untenable reasons. 1RP 194-95. The trial court's decision was also based on the correct legal standard because it balanced the defendant's right to counsel of choice against the trial court's own duty to ensure that trials are conducted fairly and within the ethical standards of the profession.

See Wheat, 486 U.S. at 161. The trial court did not abuse its discretion.

Warsame, however, claims that his right to counsel of choice was absolute and that the trial court erred by comparing the effectiveness of his appointed and retained counsel. He suggests that the Supreme Court's decision in Gonzalez-Lopez makes his right to retained counsel a paramount consideration, such that a trial court must bend to the defendant's choice no matter the timing. See Gonzalez-Lopez, 548 U.S. at 151-52. Warsame misconstrues the effect of Gonzalez-Lopez and the record in this case.

The Supreme Court in Gonzalez-Lopez emphasized that its decision did not alter traditionally recognized bases to deny counsel of choice:

> Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. . . . Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. . . . We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness. . . . The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.

Id. at 151-52 (citations omitted). By specifically noting that a court may deny counsel of choice based on the court's independent interest in ensuring fair and ethical trials, the Supreme Court has made clear that Gonzalez-Lopez does not require courts to allow a defendant carte blanche to change horses midstream.

Many appellate court decisions since Gonzalez-Lopez also make this clear. In United States v. Ensign, 491 F.3d 1109, 1115 (9th Cir. 2007), for example, the court held as follows:

> [A]s the consolidated trial of Ensign and four other defendants had already started and was scheduled to continue for a number of weeks, the addition of Stilley [new counsel] at the counsel table would likely have engendered considerable confusion. . . . Jurors could be distracted by the sudden inclusion of a new attorney. . . . Accordingly, the district court's denial of Ensign's motion was a reasonable exercise of its wide latitude in balancing the right to counsel . . . in an effort to maintain the fair, efficient and orderly administration of justice. See Gonzalez-Lopez, 126 S. Ct. at 2565-66.

See also Howell v. State, 357 S.W.3d 236 (Mo. Ct. App. W.D. 2012) (request to retain counsel on first day of trial properly denied).

Part of the trial court's consideration may include new counsel's ability to provide constitutionally effective representation considering the constraints of the trial schedule.

See Hyatt v. Branker, 569 F.3d 162, 172-73 (4th Cir. 2009) (trial court properly denied motion to substitute counsel during jury selection based on its implicit finding that substitute counsel would require a continuance to provide effective representation); United States v. Jones, 733 F.3d 574, 588 (4th Cir. 2013) (trial court properly denied request to substitute counsel in part due to concern about amount of time counsel would need to prepare for trial); Cole v. State, 284 Ga.App. 246, 248-49, 643 S.E.2d 733 (2007) (request to substitute counsel five days prior to trial properly denied because new counsel could not be adequately prepared for trial). Thus, following Gonzalez-Lopez trial courts retain broad discretion to deny substitute counsel who is not prepared, especially just before or during trial.

This Court's decision in State v. Hampton does not compel a different result. 182 Wn. App. 805, 827-28 (2014). Hampton reversed the trial court's denial of a continuance and substitution of counsel because the trial court considered the legitimacy of the defendant's dissatisfaction with his current attorney and whether his current attorney would ultimately provide constitutionally effective assistance. 182 Wn. App. at 822-25. Hampton held that these considerations were inappropriate after Gonzalez-Lopez. 182 Wn.

App. at 822-25. Yet Hampton acknowledged that the right to counsel of choice may be denied in certain circumstances, such as the demands of the court's calendar. 182 Wn. App. at 826.

Here, the trial court did not deny the motion simply because Garrett was as good as Rogers Kemp; the trial court denied the motion because Rogers Kemp agreed she could not provide the baseline minimum level of representation. 1RP 192-95. The trial court did not delve into the legitimacy of Warsame's dissatisfaction with Garrett or reason that because Warsame would receive a fair trial with Garrett his request to substitute counsel should not be granted. Instead, it accepted newly-hired counsel's candid admission that while she was experienced and would be as prepared as possible, she could not provide constitutionally effective representation in the circumstances. The trial court's conclusion that Warsame could not receive effective representation with substitute counsel was well within its discretion and does not conflict with the holdings of Gonzalez-Lopez or Hampton.

Warsame also asserts that the fact that his appointed counsel sought an additional continuance of six days to complete two interviews suggests that Rogers Kemp could have been prepared in the three day recess. Br. of App. at 14-15. Such a

comparison fails. Appointed counsel had the case since shortly after Warsame was arraigned, he had reviewed all discovery and had met several times with Warsame well in advance of trial. 3RP 103-07. All that remained was completion of two witness interviews and final trial preparation. 1RP 6-8. Rogers Kemp was starting from scratch.

Warsame suggests that perhaps the "deteriorated relationship" with his appointed counsel resulted in Warsame's failure to testify and Garrett's "belated preparation." Br. of App. at 14. But the record reveals that Warsame ultimately was quite pleased with Garrett's representation. Warsame testified at the motion for a new trial that Garrett thoroughly prepared him to testify and that the only reason he did not testify was due to a threat. 3RP 125-38. The trial court did not find Warsame's testimony regarding the threat credible. 3RP 148. Clearly, Warsame's opinions of his counsel changed depending on the day and the outcome of the proceedings.

Finally, it would have been proper to deny this motion because Rogers Kemp had not fully discussed with Warsame the consequences of her assuming representation midtrial. 1RP 191-92 ("I can do a trial and I can be as prepared as possible, but I

don't think I would be competent. . . .And I haven't had a chance to have a full on discussion with [Warsame] about this.").[3] She appeared to suggest that Warsame could have waived his right to effective assistance, but Warsame made no such waiver. 1RP 191-92. He could not have waived such a right without, at a minimum, having full knowledge and understanding of its consequences. See State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991) (defendant's waiver of right to counsel must be made knowingly and intelligently). Even so, there would be no guarantee that an appellate court would accept such a waiver.

Under these facts, the trial court properly denied the motion to substitute counsel on the third day of a six-day trial.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Warsame's conviction.

DATED this _____ day of May, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

[3] The appellate court can affirm on any ground supported by the record. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Brief of Respondent, in State v. Abdirahman Warsame, Cause No. 72305-7, 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 21st day of May, 2015.

Name:
Done in Seattle, Washington