

FILED  
2-28-17

Court of Appeals  
Division I  
State of Washington



**FILED**  
MAR 09 2017  
WASHINGTON STATE  
SUPREME COURT

Supreme Court No. 94237.4  
COA No. 73324-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JESSICA CARDE,

Petitioner.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Timothy Bradshaw

---

PETITION FOR REVIEW

---

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## **A. IDENTITY OF PETITIONER**

Jessica Carde was the appellant in COA No. 73324-9-I (January 30, 2017), in which the Court of Appeals affirmed her convictions and restitution order, despite the patent and clear violation of her rights to counsel under the Sixth Amendment -- including her right to counsel of her choice where she appeared at the restitution hearing with privately retained counsel.

## **B. COURT OF APPEALS DECISION**

In the decision on which review is sought by Petitioner Carde, the Court of Appeals failed to provide relief for the trial court's error in denying new counsel, and in particular, abused its discretion, as a matter of law, when it denied private counsel's request to represent Ms. Carde because existing appointed counsel was "competent." Appx. A.

## **C. ISSUES PRESENTED ON REVIEW**

1. Did the Court of Appeals decide the case in error where the trial court abused its discretion in denying Ms. Carde's motions for new appointed counsel prior to her trial, where the court assessed existing counsel as competent, but Ms. Carde also demonstrated that there had been a complete breakdown in the attorney-client relationship?

2. Considering the central nature of a defendant's right to counsel of her choice when she is able to retain private counsel, did the Court of Appeals decide the present case in error where, at the restitution hearing, despite it having previously been continued, Ms. Carde's appointed counsel had not sought the documentary evidence and witnesses that Ms. Carde contended would show that the actual dollar amounts owed were dramatically different than the claimants averred. Ms. Carde's effort at the restitution hearing to discharge her appointed counsel (in favor of private counsel of her choice, Mr. Flegenheimer) was her last best chance to be able to challenge the large amounts of money the complainants alleged she obtained wrongfully, where at trial, conviction on the first degree theft counts had merely required proof of value exceeding \$1,500.00. 11/10/15RP at 8-11.

The law is plain - when a defendant can retain counsel, she has a right to be represented not just by competent counsel, but by counsel of her choosing. Did the trial court abuse its discretion in denying the defendant's motion for counsel of her choice under State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), when it relied primarily on its continued assessment that appointed counsel was competent?

3. Was Ms. Carde constitutionally entitled to the protections of a jury trial at her restitution hearing?

#### **D. STATEMENT OF FACTS**

**1. Convictions.** Jessica Carde was convicted of multiple counts of theft and mortgage fraud based on the claims of several home sellers and lenders (individuals and institutions) that she entered into lease-purchase agreements, sometimes using borrowed funds, but failed to complete the purchases and had to be evicted for non-payment of rent and payments toward the sale. The prosecuting attorney alleged that Ms. Carde knew she would be unable to complete the transactions or completely pay back the loans. CP 128-33, CP 1-28; 13RP 1921-33.

**2. Standard for this Supreme Court accepting review.** RAP 13.4(b)(3) allows this Court to grant review where the issues presented are one of significant constitutional magnitude. RAP 13.4(b)(3). The issues presented involve Ms. Carde's fundamental right to counsel. U.S. Const. amend. 6; Wash. Const. art. 1, sec. 22.

**3. Requests for new appointed counsel.** Twice prior to trial, Ms. Carde argued that what little communication had occurred between her and her attorneys regarding strategy was counterproductive to the case

because the lawyers were failing to pursue her viable defenses to the charges. These included the fact of her various re-payments of amounts owed, and the fact that the dollar amounts asserted by the claimants were based on copies of checks to which her photocopied signature had been falsely attached. 1RP 91-105; 2RP 136-46. Ms. Carde was unsuccessful at discharging counsel.

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

5. **Restitution – request to be represented by retained counsel.**

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

11/10/15RP at 3-11.

The trial court denied substitution, reasoning that the hearing

had already been continued so that such evidence could be sought, and that Ms. Carde was bringing the same motion for new counsel as the two motions she raised pre-trial. 11/10/15RP 11. At the restitution hearing, the arguments for private counsel and Ms. Carde's concerns about the restitution case were heard in a somewhat overlapping manner; Ms. Carde's appointed counsel explicitly offered the same, broad arguments as the defense raised at trial, including that certain amounts were gifts, and that Ms. Carde did not have the requisite wrongful *mens rea* for the crimes. 11/10/15RP at 8-11; Supp. CP \_\_\_, Sub # 165. Appointed counsel conceded to the court that these were the same arguments he had advanced at trial and which the jury had rejected, but counsel stated he was asking the court to credit those arguments for purposes of the restitution hearing, "despite that." 11/10/15RP at 9-11. Ms. Carde, while continuing to note her innocence, offered detailed arguments regarding her attorneys' failure to obtain certain witnesses and documentary evidence regarding the falsely, dramatically inflated amounts of money claimed to be owed in restitution. 11/10/15RP at 12-22. The court deferred oral decision and later issued a written restitution order as to the three theft

complainants, awarding the entire amounts specified in the State's memo – Donna Dubey (wife of deceased complainant Neil Dubey, count 1, \$139, 575.00); Kevin Roberts (count 7, \$65,700.00), and Peter Samuelson (count 12, \$16,719.36) (total \$221,994.36).

## E. ARGUMENT

### 1. THE COURT OF APPEALS WRONGLY DECIDED THAT MS. CARDE WAS NOT ENTITLED TO NEW COUNSEL, INCLUDING A CONTINUANCE FOR HER NEWLY RETAINED LAWYER TO TAKE OVER THE CASE FOR PURPOSES OF RESTITUTION.

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

Ms. Carde has a constitutional right to counsel. Criminal defendants are guaranteed this right by the federal, and state constitutions. U.S. Const. amend. 6; Wash. Const. art. 1, sec. 22. This right applied at every stage of the case, including pre-trial, trial, and the sentencing proceeding. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004, 939 P.2d 215 (1997); see also State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (“the setting of restitution is an integral part of sentencing.”).

It is true that an indigent defendant does not have a right to

demand any particular appointed advocate – rather, only incompetence under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a conflict of interest, or a complete breakdown in communication or the relationship between counsel and the defendant, will warrant substitution of appointed counsel. In re Personal Restraint of Stenson, 132 Wn.2d 668, 732, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998)

Nonetheless, under this standard, an indigent defendant can be entitled to substitute counsel, if existing appointed counsel and the defendant are so completely unable to work together, beyond mere dislike of the defendant for counsel, such that counsel fails to pursue the accused's basic defense during the litigation. In re Stenson, 132 Wn.2d at 732; Plumlee v. Del Papa, 426 F.3d 1095, 1107 (9th Cir. 2005).

*(i). December 23, 2014.* Ms. Carde sought new appointed counsel on December 23, 2014. 1RP 91. Ms. Carde noted her grave concerns about present counsel's performance. Since June of 2014, when counsel was appointed, decisions about the basic case strategy had been made without consulting her, and the lawyers were failing to

accede to her request that they seek out certain vital documentary evidence and witnesses. 1RP 96-97. But the law says that a substitution of counsel may be justified when this relationship – as was plainly evident in Ms. Carde’s case - is plagued by a complete breakdown such that that the attorney cannot communicate with or provide his client with basic representation with cooperation between them. See generally, In re Stenson, 142 Wn.2d 724–31; State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

Here, the court merely accepted the representations of counsel, who told the court that the discovery and evidence matters referred to by Ms. Carde were something he deemed not pertinent to his trial strategy. 1RP 94-95, 105. New counsel should have been appointed.

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

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

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

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

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

After trial, at the restitution hearing that was held November 10, 2015, Ms. Carde again sought to discharge appointed counsel, this time in favor of retained counsel, Mr. Flegenheimer. Despite the

hearing having been continued at her behest for the hoped-for purpose of her counsel obtaining evidence crucial to the restitution issues, Ms. Carde argued, in detail, that her attorneys had completely failed to seek out the specified documents and witnesses that would allow her to defend against the false, or at the very least exponentially inflated, monetary claims of the claimants. 11/10/15RP at 5-7, 12-22.

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

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

(Emphasis added.) 11/10/15RP at 6.

In this new context, Ms. Carde's complaints about the basic strategy of the case being pursued were required to be given far more dominant weight than the trial court gave them. In comparison to indigent defendants who are entitled only to an attorney who is not incompetent below the standard of Strickland v. Washington, the right to counsel of choice guarantees a defendant the right to be represented

by a retained attorney who he or she selects precisely because the client may steer strategy with greater specificity than may the indigent represented. The Sixth Amendment guarantees a defendant the right to be represented by retained counsel of choice. Miller v. Blacketter, 525 F.3d 890, 895 (9th Cir. 2008).

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

The court appeared to characterize this new motion as being “the same request” as Ms. Carde's earlier February 3 and December 23 motions for new counsel. But where a defendant presents with a retained attorney, it is not adequate to rely on the same assessments of general competence that provide a basis to deny substitution of appointed counsel. United States v. Brown, 785 F.3d 1337, 1347-48 (9th Cir. 2015).

***(iv). The Court of Appeals examined the criteria of Hampton but failed to apply the broader, fundamental difference in the right to counsel where privately retained counsel is at hand .***

Under State v. Hampton, 184 Wn.2d 656, 669-70, 361 P.3d 734

(2015), which allows the court to consider all relevant circumstances in deciding on a motion to substitute retained counsel along with a continuance, the trial court still abused its discretion by employing the wrong overall legal standard. State v. Hampton, 184 Wn.2d at 662, 670. As can be seen, distinguished from the right to merely effective appointed counsel, the root guarantee of the Sixth Amendment is the right to retain counsel of one's choice, who will defend the case consistent with the defendant's strategy.

Ms. Carde's request should have been granted under the core meaning of Hampton. Hampton's core is that the prompt administration of justice must be weighed it against the defendant's important Sixth Amendment right to retain a lawyer she has privately retained. State v. Hampton, 184 Wn.2d at 663 (citing Aguirre, 168 Wn.2d at 365).

When faced with a defendant's request to adjourn even a full criminal trial to permit the retention of a privately retained lawyer, the trial court should begin with "a presumption in favor of a defendant's counsel of choice," and the court should not indulge a rote insistence upon expeditiousness. United States v. Sinclair, 770 F.3d at 1154

(citing Carlson v. Jess, 526 F.3d 1018, 1024-25 (7th Cir.2008), and United States v. Sellers, 645 F.3d 830, 834, 837 (7th Cir.2011)).

Here, the request was for new counsel at the restitution hearing. Ms. Carde was originally charged in March of 2013, and her trial proceeded through to sentencing on April 2, 2015. The restitution hearing, which the prosecutor originally noted for August 25 and then re-noted for September 25 (stating in each instance, “[o]ur office did not attempt to resolve the restitution matter prior to setting this hearing date due to time restrictions”), did not involve trial witnesses, and the trial court indicated that the hearing would likely be limited to 30 minutes.

The prosecutor commented that on September 25 there was a continuance to October 22 at the defendant’s request so that her counsel could muster evidence, and there was then a continuance for “medical good cause” found by the trial court thereafter, before the day’s date of November 10 (Ms. Carde was in a wheelchair during the proceedings). 11/10/15RP at 3.

However, the trial court did not state that a continued restitution hearing would create inconveniences for witnesses or in the

court adjusting its calendar. See United States v. Brown, 785 F.3d at 1347–50 (holding that a district court abused its discretion in part because the record did not indicate that the trial court denied the defendant's motion because of the demands of its calendar).

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

Ultimately in this case, Ms. Carde's effort to have her counsel seek out the evidence that would defend her against the monetary sums alleged was prompt. 11/10/15RP at 5-6 (attorney Flegenheimer, explaining circumstances of family just having become able to provide funds).

Ms. Carde had highly legitimate cause for dissatisfaction with appointed counsel. The trial court, when denying her pre-trial motions for substitution, implicitly deemed her complaints about appointed counsel as 'falling short' of incompetence. But on November 10, a different standard applied and Ms. Carde possessed highly legitimate bases for dissatisfaction with counsel in favor of Mr. Flegenheimer, who

would pursue her strategy. Ms. Carde detailed existing counsel's failings at length. 11/10/15RP at 5-22. Ms. Carde's dissatisfactions were legitimate, and of the highest order.

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

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

On appeal, deprivations of the right to counsel are structural

error, thus there is no requirement of showing specific prejudice (see Part D(1)(b), infra). However, compared to a case where a defendant feels she is being deprived of private counsel who would strike a different defense ‘theme’ at trial and thus gain acquittal, Ms. Carde was speaking of a reasonably ascertainable monetary difference in a restitution hearing, wherein the loss would be shown to be little at most. Because it is likely quantifiable – by private counsel directed to do so – the possibility of this discernible loss in Ms. Carde’s case must be viewed as per se “identifiable prejudice.”

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

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

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

In Washington, restitution is both punitive and compensatory. State v. Kinneman, 155 Wn. 2d 272, 279-80, 119 P.3d 350 (2005) (citing, *inter alia*, State v. Ewing, 102 Wn. App. 349, 352–53, 7 P.3d 835 (2000)). The Sixth Amendment’s right to a jury guarantees the right to have a jury find every fact essential to punishment, and to do so beyond a reasonable doubt. U.S. Const. amend. 6; Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In Southern Union, the Court specifically recognized that Apprendi and Blakely principles apply where a punishment is based upon “the amount of the defendant’s gain or the victim’s loss.” Southern Union Co. v. United States, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2344, 2350-51, 183 L. Ed. 2d 318 (2012). That is how restitution is determined under RCW 9.94A.753, Washington’s restitution statute.

See Ewing, 102 Wn. App. at 352–53 (stating that restitution is primarily punitive and partly compensatory). Southern Union, 132 S. Ct. at 2354; see also Pasquantino v. United States, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) (“The purpose of awarding restitution in this action is . . . to mete out appropriate criminal punishment for that conduct”);

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

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

may not impose any amount absent the prescribed factual determination. Because that factual determination results in an increase in punishment, it must be made by the jury.

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

The Washington Constitution guarantees defendants a jury determination of damages. Ms. Carde draws her state right to a jury trial on the substantive crimes, on any aggravating factors, and on punishment, including monetary sanction, from the same provision as do civil litigants. Article I, section 21. The Supreme Court has said that this constitutional assurance, guaranteeing that the jury right will “remain inviolate,” requires a jury determination of monetary damages before they can be ordered. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, 780 P.2d 260 (1989). The Sofie Court reasoned that the jury’s function as fact finder at the liability trial could not be divorced from the ultimate remedy provided. “The jury’s province includes determining damages [and] this determination must affect the remedy. Otherwise, the constitutional protection [of the jury trial right] is all shadow and no substance.” Sofie, 112 Wn.2d at 661.

Thus in Sofie the Court ruled that the Legislature could not remove this traditional function from the jury by means of a statute that capped non-economic damages. Similarly, nothing permits any Legislative effort to remove this same damage-finding function from the jury simply by terming such damages “restitution” in a criminal case. Restitution is limited to the loss, i.e., damages causally connected to the offense. RCW 9.94A.753. The damages at issue in Ms. Carde’s case are no different than the damages at issue in Sofie -- the value of the loss suffered as a result of the acts of the Defendant. To preserve inviolate her right to a jury trial, Article I, section 21 must afford Ms. Carde a right to a jury determination of such damages.

#### **F. CONCLUSION**

Based on the foregoing, Ms. Carde asks that this Court reverse her judgments of conviction, and reverse the restitution order.

Respectfully submitted this 28th day of February, 2017.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

|                            |   |                                   |
|----------------------------|---|-----------------------------------|
| STATE OF WASHINGTON,       | ) | No. 73324-9-1                     |
|                            | ) | (Consolidated with No. 74228-1-1) |
| Respondent,                | ) |                                   |
|                            | ) | DIVISION ONE                      |
| v.                         | ) |                                   |
|                            | ) |                                   |
| JESSICA CARDE              | ) |                                   |
| AKA JESSICA HARTMAN        | ) | UNPUBLISHED OPINION               |
| AKA JUANITA HOFSETH-LAMMER | ) |                                   |
| AKA JUANITA HOFSETH        | ) |                                   |
| AKA JUNITA FRYE,           | ) |                                   |
|                            | ) |                                   |
| Appellant.                 | ) | FILED: January 30, 2017           |

SCHINDLER, J. — A jury convicted Jessica Carde of three counts of theft in the first degree, one count of attempted theft in the first degree, and three counts of mortgage fraud. Carde seeks reversal of her convictions and the order of restitution.<sup>1</sup> Carde challenges denial of two pretrial motions to substitute appointed counsel. Carde also challenges denial of her request to continue the restitution hearing to allow her to replace appointed counsel with private counsel. Because the trial court did not abuse its discretion by denying the pretrial motions to substitute appointed counsel and the motion to continue the restitution hearing, we affirm.

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<sup>1</sup> Carde filed an appeal of the judgment and sentence and the order of restitution. This court consolidated the appeals.

Charges Against Carde

In March 2013, the State filed 12 charges against Carde that involved 10 victims: four counts of theft in the first degree, one count of attempted theft in the first degree, two counts of theft in the second degree, two counts of securities fraud, and three counts of mortgage fraud. The State alleged that over a period of five years, Carde engaged in a pattern and practice of deception by presenting herself as a legitimate prospective buyer of a series of upscale homes, persuading sellers to allow her to move into the homes, securing lease-to-purchase agreements under false pretenses, and living in each of the homes for as long as possible while making minimal or no payments.

December 2013 Request To Appoint New Counsel

After Carde was extradited from Montana in October 2013, the court appointed public defender Jonathan Newcomb to represent her. Two months later, in December 2013, Carde asked the court to appoint new counsel. Carde asserted there was a "breakdown in communication" with Newcomb, he was difficult to reach by telephone, and matters she and counsel "discussed" about the bail hearing were "not performed." Carde said she lacked confidence in Newcomb. The court told Carde that as a general rule, public defenders are difficult to reach by telephone. The court advised Carde that if the court granted her motion, "it's not going to happen again." Because it was "sufficiently early in the case," the court granted Carde's request to appoint new counsel.

The court appointed The Defender Association (TDA) to represent Carde. After continuing the case scheduling hearing several times to allow counsel to investigate and

review thousands of pages of discovery, the court set a trial date of July 7, 2014. In June 2014, TDA attorney Timothy Johnson assumed responsibility for Carde's case. At the request of TDA, the court appointed Kristin Shotwell as co-counsel. At the request of defense counsel and over the objection of Carde, the court continued the July 2014 trial date three times. In September 2014, the court granted the defense motion to dismiss both counts of securities fraud. The State filed an amended information without the two dismissed charges.<sup>2</sup>

#### December 2014 Motion To Discharge Counsel

On December 23, 2014, approximately six weeks before the scheduled trial date, Carde asked the court to substitute appointed counsel. Carde wanted to replace Johnson but retain Shotwell as her attorney. Johnson explained to the court that he and Shotwell had divided trial preparation by charges and Carde disagreed with the defense strategy. Johnson said Carde wanted to explore and investigate a different theory, but he and Shotwell "decided . . . to take a different course" based on a strategy that they believed was "sound" and would better serve Carde's "legal interests."

The court explained that granting the request would result in the discharge of both defense attorneys. The court offered Carde more time to weigh her options. Carde declined. Carde said she was in "total disagreement" with the defense strategy and claimed Johnson failed to obtain evidence that would help her case in a "tremendous number of ways." Carde also said Johnson met with her only 10 times, he was difficult to reach by telephone, and he had an "abrasive" style. Carde complained the defense made "[d]ecisions" without consulting her, she lacked "confidence" in

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<sup>2</sup> The amended information also changed one count of theft in the second degree to theft in the first degree. Just before trial, the State dismissed one count of theft in the second degree on its own motion based on the death of the victim.

Johnson's representation, and Johnson was "undermining" and "counterproductive" to the case. However, Carde reiterated she did not want the court to replace Shotwell.

Johnson and Shotwell confirmed they had performed extensive work on the case. The attorneys had interviewed the majority of the State's approximately 25 potential witnesses, reviewed and indexed approximately 12,000 pages of discovery, and nearly completed trial preparation. Johnson said Carde's case had been his "top priority" for several months. Shotwell confirmed there had been many meetings about strategy and she and Johnson were in agreement as to trial strategy.

The court denied the motion. The court noted the ongoing concern expressed by Carde that she had already been in custody for 17 months and appointing new counsel would result in "extensive delay." The court found both attorneys were experienced and competent and the attorneys had been diligently preparing for trial. The court also noted counsel were in agreement as to the strategy with which Carde disagreed.

#### February 2015 Motion To Discharge Counsel

On the first day of trial, February 3, 2015, Carde renewed her request to discharge counsel. This time, Carde sought to replace both attorneys. Carde asserted the defense trial brief contained "innumerable . . . misstatements [and] misrepresentations." Carde claimed she had no opportunity to review the briefing or motions before filing. Carde also blamed her attorneys for an inadequate response to statements included in the State's trial brief that she believed were improper, including reference to a prior custodial interference charge in Minnesota and her flight from Washington after charges were filed. Carde renewed her complaint that her attorneys

failed to obtain relevant evidence. She claimed the attorneys' conduct left her without a defense and without "appropriate and fair representation."

The court explained the purpose of a trial brief was to provide context for the motions, the trial brief was not evidence, and it would not be considered by the jury. The court explained that decision-making authority is between a client and an attorney in a criminal case. To the extent Carde was concerned her attorneys did not adequately understand her view of the facts, the court offered to give her additional time to meet with the attorneys. Johnson informed the court that he and Shotwell had spent considerable time discussing the evidence with Carde and had done their best to incorporate her views into the defense strategy. Johnson stated that he and Shotwell had conducted a thorough independent investigation and were prepared for trial.

The court observed it would be inappropriate to invade attorney client privilege or work product to evaluate independently the manner and thoroughness of the investigation. The court denied Carde's motion. The court stated that after reading the 47-page defense trial brief and listening to defense counsel, "what I've read and seen does not equal a lack of investigation."

[B]ased on this record, I could not conclude that somehow the Defense investigation is so lacking as to deprive Ms. Carde of a constitutional right, nor that it is the case that Defense Counsel is not zealously, ethically representing their client.

Twenty witnesses testified during the 10-day trial. The jury acquitted Carde of two counts of theft in the first degree. The jury found Carde guilty of three counts of theft in the first degree, one count of attempted theft in the first degree, and three counts of mortgage fraud. The court imposed concurrent standard range sentences for a total

sentence of 28 months confinement. Following a restitution hearing, the court ordered restitution for three victims.

Denial of Motions To Substitute Appointed Counsel

Carde challenges the decision to deny her motions to substitute appointed counsel claiming there was a "complete breakdown" in her communication and relationship with counsel.

The Sixth Amendment to the United States Constitution guarantees that in "all criminal prosecutions, the accused shall . . . have the assistance of counsel for [her] defense." A defendant " 'does not have an absolute, Sixth Amendment right to choose any particular advocate.' " State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997)). The essential aim of the Sixth Amendment is to guarantee an effective advocate for a criminal defendant "rather than to ensure that a defendant will inexorably be represented by the lawyer whom [s]he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

A defendant who seeks to substitute appointed counsel must show good cause " 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' " Varga, 151 Wn.2d at 200 (quoting Stenson, 132 Wn.2d at 734). A general loss of confidence in defense counsel by itself is not sufficient cause for substitution. Stenson, 132 Wn.2d at 733-34. The attorney and the defendant must be "so at odds as to prevent presentation of an adequate defense." Stenson, 132 Wn.2d at 734.

A disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the defendant to

substitute counsel because decisions on those matters are properly entrusted to defense counsel, not the defendant.

State v. Thompson, 169 Wn. App. 436, 459, 290 P.3d 996 (2012).

Whether dissatisfaction with court-appointed counsel justifies the appointment of new counsel is a matter within the trial court's discretion. Varga, 151 Wn.2d at 200; Stenson, 132 Wn.2d at 733. A court abuses its discretion when its decision adopts a view no reasonable person would take or is based on untenable grounds or untenable reasons. State v. Sisouanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

On appeal, we consider (1) the extent of any conflict between the defendant and counsel, (2) the adequacy of the trial court's inquiry into the grounds for the motion, and (3) the timeliness of the motion and potential effects on the trial schedule. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). In examining the extent of conflict between a defendant and her attorney, we consider the extent and nature of the breakdown in the relationship and its effect on the representation. State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007).

Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only on the defendant's relationship with [her] lawyer.

Schaller, 143 Wn. App. at 270.

The court did not abuse its discretion in denying Carde's December 2014 motion to appoint new counsel. First, the record does not indicate a breakdown in communication or irreconcilable conflict affecting the adequacy of Carde's representation. Carde disagreed with counsel over strategy and evidence she believed was helpful. Defense counsel has wide latitude to control trial strategy and tactics. In

re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). Disagreement about defense strategy does not establish a complete collapse of communication between counsel and client. See Cross, 156 Wn.2d at 606-09. Here, the record does not suggest Carde and her counsel were unable to communicate. To the contrary, Carde obviously engaged in discussions with her attorneys about strategy and the evidence. There was no basis for the court to conclude that Carde and her attorneys were "so at odds as to prevent presentation of an adequate defense." Stenson, 132 Wn.2d at 734.

Second, Carde does not challenge the adequacy of the inquiry. Nevertheless, the record reflects the court allowed Carde to explain fully the reasons for her dissatisfaction with counsel, and the trial court had before it the information necessary to assess the merits of her request. See Schaller, 143 Wn. App. at 271; Varga, 151 Wn.2d at 200-01. "[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." Schaller, 143 Wn. App. at 271.

Third, the timing of Carde's request and the effect on the trial schedule also supports the court's decision. Granting the request to appoint new counsel would have resulted in additional significant delay of an already long-delayed and complicated case. By December 23, 2014, six weeks before trial, Johnson and Shotwell had nearly completed preparation for trial, including review of more than 10,000 pages of discovery and interviews of approximately 20 State witnesses. Further, Carde was equivocal about further delay. While she expressed dissatisfaction with Johnson, she also complained about the considerable time she had spent in custody and raised concerns

about previous continuances and her right to a speedy trial. The trial court did not abuse its discretion in denying the December 2014 motion to appoint new counsel.

Nor did the trial court abuse its discretion by denying the request to appoint new counsel on the first day of trial. The court again conducted an adequate inquiry by allowing Carde and her attorneys to fully air their concerns. Carde's attorneys told the court they had discussed strategy and evidence with Carde numerous times, had attempted to incorporate her views, and were prepared to proceed to trial.

As to the nature and extent of the conflict, the only new issue Carde raised was her dissatisfaction with the defense trial brief and the response to aspects of the State's brief. The defense submitted an extensive brief that included numerous motions to exclude areas of testimony, documents, and e-mail messages. Carde did not specifically state how the brief was deficient. As to Carde's particular objections to the State's brief, her attorneys expressly addressed those concerns by moving to exclude all evidence related to the Minnesota criminal charge, Carde's alleged flight from Washington, and extradition.

While the record reflects a disagreement about strategic decisions, the record does not demonstrate a complete breakdown in communication or in the relationship or an irreconcilable conflict that affected the adequacy of representation. The court did not abuse its discretion in denying Carde's renewed motion for new appointed counsel on the first day of trial.

#### Restitution Order

Carde contends she is entitled to reversal of the restitution order. Carde argues the trial court violated her right to retain counsel of her choice by denying her motion to

continue the restitution hearing.

The restitution hearing was scheduled for September 15, 2015. At Carde's request, the court continued the hearing until September 25. On September 25, Carde requested another continuance to obtain additional information. The record shows Carde wanted additional time to obtain evidence that she was not guilty of the crimes, not to challenge the amount of restitution. The record also shows the arguments Carde intended to raise were largely the same ones the jury rejected at trial.

For instance, as to one of the victims, who was deceased by the time of trial, Carde wanted to present evidence showing the loans were personal and the victim did not intend that Carde repay his family members.

With regard to another victim, Carde intended to argue, as she had at trial, that the lease-to-purchase agreement did not obligate her to pay any rent until the sale closed. Since the sale never occurred, Carde wanted to argue she did not commit theft by failing to pay rent. Carde also maintained the victim had no right to collect rent because bankruptcy trustees controlled the property.

As to a third victim, Carde wanted to obtain additional evidence to support her argument that she lived in the home as a guest and was not obligated to pay rent. Again, the jury rejected the same argument at trial.

Carde said she needed 30 days to gather information to support her claims. The State opposed the continuance. The State argued the information Carde intended to present was not relevant to the amount of restitution. The court stated, "I think the strong presumption is there wouldn't be any additional continuance since there's been two, and at this point we'll have all the relevant information that's been alluded to." But

the court granted the motion and continued the hearing to October 22. At Carde's request and due to unspecified medical issues, the court continued the hearing to November 10.

Carde appeared at the restitution hearing on November 10 with her appointed counsel and private attorney Barry Flegenheimer. Carde asked the court to substitute private counsel for her appointed counsel. The request was contingent on granting a continuance. Flegenheimer told the court that Carde's family had "recently" secured funds to hire him and Carde had described a "number of issues" that she wanted him to investigate for the restitution hearing. Flegenheimer did not indicate how long of a continuance would be required but acknowledged he would need "some time" to prepare. Appointed counsel Johnson stated he learned about the motion only that day and did not oppose it.

Carde informed the court that "some" material she wished to present at the restitution hearing could be obtained only by means of a subpoena and her attorneys had failed to assist her in this regard. She claimed there was evidence that could "exonerate" or at least "attenuate" restitution. But Carde did not identify or describe the evidence.

The court denied the motion.

As accurately stated earlier, this restitution matter has been continued a number of times, always at the Defense request. And I granted that so as to allow full opportunity for investigation and airing of any concerns. Moreover, and this is a very general statement, but it was my understanding that many of the arguments against the requested restitution amounts involved the very defenses that were forwarded thoroughly at trial.

This court knows these Defense Counsel still of record to be competent and served in that capacity at trial. In other words, there's no

adequate showing or good cause before this Court to grant the request to substitute private counsel. Motion is denied.

Carde interrupted to argue she needed more time to show the State was relying on "fraudulent" information. The court reminded Carde it had granted a continuance six weeks earlier precisely to allow her the full opportunity to obtain the evidence necessary to challenge the amount of restitution. Yet in the six weeks since the last continuance, Carde had not obtained any new information to present to the court.

The State initially sought restitution for four victims. At the November 10 hearing, the prosecutor told the court the State was no longer requesting restitution for one of the victims. Relying on the same arguments asserted at trial, Carde's counsel objected to restitution for each of the three victims. Defense counsel asked the court to disregard the jury verdict and find "as a matter of law" that the facts did not support the requested restitution. The court imposed restitution in the amount requested by the State of approximately \$220,000.

Carde claims the court's decision to deny her motion to substitute private counsel is contrary to the Washington State Supreme Court decision in State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), cert. denied, 136 S. Ct 1718, 194 L. Ed. 2d 816 (2016).

A defendant who does not require appointed counsel generally has a Sixth Amendment right to counsel of choice. Hampton, 184 Wn.2d at 662. However, this right is not absolute. Hampton, 184 Wn.2d at 663. When a court considers a continuance for the purpose of allowing a defendant to retain counsel of her choice, it may balance that right against the demands of its calendar and the public's interest in the prompt and efficient administration of justice. Hampton, 184 Wn.2d at 663. " 'The

resolution of this balancing exercise falls squarely within the discretion of the trial court.’ ” Hampton, 184 Wn.2d at 663 (quoting State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010)). We review a trial court’s decision to deny a continuance to determine whether the denial was “ ‘so arbitrary as to violate due process.’ ” Hampton, 184 Wn.2d at 663 (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)).

In Hampton, the court identified 11 factors the trial court should consider in determining whether to grant a continuance to allow substitution of private counsel:

- (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."

Hampton, 184 Wn.2d at 669-70 (quoting 3 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.4(c), at 718-20 (3d ed. 2007)).

The court acknowledged that "these situations are highly fact dependent" and the court is not required to apply any mechanical test. Hampton, 361 P.3d at 669. Further, "[n]ot all factors will be present in all cases, and thus a trial court need not evaluate every factor in every case." Hampton, 184 Wn.2d at 670.

Although the Supreme Court issued its decision in Hampton nine days after the trial court ruled on Carde's request for a continuance, the record shows the trial court considered many of the 11 factors set forth in Hampton, and virtually all of the factors support the trial court's decision to deny Carde's last-minute request for another continuance.

At Carde's request, the court had granted three previous continuances. Carde's request for a fourth continuance on the date of the restitution hearing was untimely. On the day of the restitution hearing, Carde's appointed counsel Johnson was prepared to proceed. Although neither Carde nor retained counsel Flegenheimer stated the exact length of the continuance needed, the restitution hearing had already been continued beyond the 180-day statutory deadline and granting Carde's request would have resulted in substantial further delay.

Carde expressed no legitimate cause for dissatisfaction with appointed counsel. Carde cited counsel's unwillingness to obtain subpoenas as the reason to retain new counsel. But as the trial court observed, Carde was seeking to present evidence

relevant to arguments the jury rejected at trial and not relevant to the amount of restitution. Accordingly, denial of Carde's motion resulted in no identifiable prejudice of a material or substantial nature.

Carde also offers no explanation as to why she did not obtain documentation or information despite the previous six-week continuance. And according to Carde, only some documents she wanted to obtain required a subpoena.

Consistent with the factors identified in Hampton, the trial court did not abuse its discretion in denying Carde's motion for a continuance of the restitution hearing to allow newly retained counsel to represent her. The denial of Carde's request was not arbitrary and did not violate her right to due process.

Carde also contends that under the Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution, she is entitled to a jury determination of the amount of restitution. We disagree. In State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005), the Washington Supreme Court held, "There is no right to a jury trial to determine facts on which restitution is based under RCW 9.94A.753."

Carde also characterizes restitution as "damages" and claims she is entitled to a jury determination under Sofie v. Fibreboard Corp., 112 Wn.2d. 636, 771 P.2d 711, 780 P.2d 260 (1989). But Sofie is inapposite.<sup>3</sup>

#### Statement of Additional Grounds

Carde filed a statement of additional grounds challenging the trial court decisions denying her requests for new appointed counsel. Because appellate counsel's briefing

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<sup>3</sup> No authority supports Carde's argument that the analysis in Sofie applies in a criminal setting to the determination of restitution.

adequately addresses this argument, we need not address it. See State v. Gomez, 152 Wn. App. 751, 754, 217 P.3d 391 (2009). To the extent she also alleges fraud and unethical conduct on the part of the prosecutor or ineffective assistance of counsel, her claims appear to involve matters outside the trial record. Accordingly, we cannot consider them on direct appeal. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We affirm the judgment and sentence and the order of restitution.<sup>4</sup>

Schindler, J.

WE CONCUR:

Cox, J.

Becker, J.

2017 JAN 30 AM 9:00

<sup>4</sup> Carde asks this court to deny appellate costs. After considering the nonexclusive factors in State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), we exercise our discretion to not award costs.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73324-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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