Supreme Court No. (to be set)
Court of Appeals No. 48106-5-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Jeffrey Weller
Appellant/Petitioner

Clark County Superior Court Cause No. 11-1-01678-1
The Honorable Judge Barbara D. Johnson (Pro Tem)

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Jeffrey Weller, the appellant in the court below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Jeffrey Weller seeks review of the Court of Appeals published Opinion entered on January 31, 2017. A copy of the Opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: A sentencing court may not rely on judicial factfinding to impose an exceptional sentence. Here, the trial court imposed an exceptional sentence based in part on judicial factfinding. Should the Supreme Court grant review where the trial court infringed Mr. Weller's Sixth and Fourteenth Amendment right to a jury trial and to proof beyond a reasonable doubt by imposing an exceptional sentence based in part on judicial factfinding?

ISSUE 2: CrR 4.7(h)(3) requires defense counsel to maintain exclusive custody of discovery materials, but permits counsel to provide an appropriately redacted copy to the defendant. Should the Supreme Court grant review where the trial court should have considered the defense attorney's request to provide his client an appropriately redacted copy of the police reports?

ISSUE 3: A sentence may not exceed the court's authority, including by issuing a No-Contact Order that exceeds the maximum penalty for the underlying crime. Should the Supreme Court grant review where the trial court issued No-Contact Orders that exceeded the maximum penalty for the crimes?

IV. STATEMENT OF THE CASE

Following a jury trial, Jeffrey Weller, as well as his wife Sandra Weller, were convicted of numerous felony charges and two gross misdemeanors. CP 4-5. The trial court imposed an exceptional sentence based on two aggravating factors found by the jury—deliberate cruelty and an ongoing pattern of abuse. CP 34-54. On appeal, the Court of Appeals remanded for a new sentencing hearing, finding the ongoing pattern of abuse aggravating factor inapplicable. CP 49. The trial court entered an order vacating the original judgment and sentence. CP 1.

During the resentencing hearing, the trial court heard about Mr. Weller's positive accomplishments since the original sentence. RP 13. The court again imposed an exceptional sentence, but reduced Mr. Weller's overall term by ordering that he serve his felony sentence concurrently with gross misdemeanors. RP 13, 19-22; CP 7.[1]

The court supplemented the jury's special verdict with factual findings. CP 17-19. These findings summarized some of the evidence from trial. CP 17-19. The judge found that this evidence "supports the sentence imposed by the Court as an exceptional sentence." CP 19. In a

[1] The court suspended jail time imposed on the gross misdemeanor charges in this matter, but sentences on unrelated gross misdemeanors were allowed to run concurrently. CP 21.

separate finding, the court also found the evidence supported the jury's "deliberate cruelty" special verdict. CP 19.

The trial court also issued no contact orders preventing Mr. Weller from contacting the two now-grown victims of the assault two convictions. The amount of time the no-contact term was to be in effect was set at 30 years. RP 19-22, 28-29; CP 10.

Defense counsel notified the court that Mr. Weller wanted a copy of his police reports, and cited CrR 4.7. RP 31, 34-35. The state objected, and the court refused to allow counsel to provide his client with a copy of discovery:

> At this point I'll deny it as a matter for the trial court. If there is something in the way of a further appeal, then it would be up to the Court of Appeals whether they would grant any records or transcripts in connection with it.
> RP 35.

The Court of Appeals denied Mr. Weller's timely appeal. CP 2; Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the exceptional sentence cannot be based on judicial factfinding. The Court of Appeals decision conflicts with prior case decisions and should be determined by the Supreme Court. RAP 13.4 (b)(3).

Only a fact that has been submitted to a jury and proved beyond a reasonable doubt can increase the penalty for a crime. U.S. Const.

Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.; *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, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Judicial factfinding cannot form the basis for imposition of an enhanced sentence, as that violates an accused person's right to due process and to a jury trial. *Blakely,* 542 U.S. at 303; *Alleyne v. United States*, ---U.S.---, ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Blakely errors may be raised for the first time on review.[2] RAP 2.5(a)(3); *see State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). Here, the trial court supplemented the jury's special verdict with numerous factual findings. CP 17-19. The trial judge specifically relied on certain trial testimony (summarized in these findings) to "support[ ] the sentence imposed by the Court as an exceptional sentence." CP 19.

A court may not impose an exceptional sentence based on judicial factfinding. *Blakely,* 542 U.S. at 303. The sentence here violated Mr. Weller's right to a jury determination beyond a reasonable doubt of the facts listed in the trial court's findings. *Id.* Review is appropriate here in the interests of justice.

[2] In Washington, such errors are not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing art. I, §21).

First, the trial court conducted a new sentencing hearing and imposed a new sentence. RP 3-22. The entire sentence must be subject to appeal. *See, e.g., State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Second, the Court of Appeals' prior decision on this issue is *dicta*. *See Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 239, 328 P.3d 1008 (2014) (defining *dicta*). Having reversed one aggravating factor, sustained the second, and remanded the case for a new sentencing hearing, the appellate court had no need to address the trial court's factual findings, since the court was free to adopt new findings (or no findings at all) upon resentencing.

Third, the Court of Appeals' prior decision reflected an incomplete understanding of the trial court's findings. The court's factual findings explicitly served two purposes. It is true that the trial judge "properly was evaluating the evidence supporting the jury's findings before imposing the exceptional sentences." CP 46. This can be seen in Finding No. 17, CP 19.

But the trial judge also explicitly relied upon "the above summarized trial testimony"—that is, evidence outlined in Findings Nos. 1-16—to "support[ ] the sentence imposed by the Court as an exceptional sentence." *See* Finding No. 16, CP 19. The Court of Appeals' prior

decision did not address this aspect of the trial court's findings. Accordingly, the issue should be revisited in this appeal, notwithstanding the prior decision. RAP 2.5(c)(2).

The trial court's factual findings must be vacated. *Blakely,* 542 U.S. at 303. Mr. Weller's exceptional sentence must be reversed and the case remanded for a new sentencing hearing. *Id.*

B. The Supreme Court should accept review and hold that a defendant must be given redacted copies of discovery when appropriate. The trial court's refusal to consider the Mr. Weller's request for copies of discovery is in conflict with prior decisions of the court. RAP 13.4(b)(1).

Court rules are interpreted in the same manner as statutes, using the tools of statutory construction. *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014), *as amended* (Sept. 30, 2014), *reconsideration denied* (Oct. 1, 2014). The court's objective is to determine and give effect to the intent, as expressed in the rule's plain language. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015).

The use of the word "shall" is presumptively imperative. *State v. Peeler*, 183 Wn.2d 169, 185 n. 9, 349 P.3d 842 (2015). Under the criminal discovery rules, "a defense attorney *shall be permitted* to provide a copy of [discovery] materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court." CrR 4.7(h)(3) (emphasis added).

The rule's use of the word "shall" emphasizes the mandatory nature of this provision. *See Eubanks v. Brown*, 180 Wn.2d 590, 596 n. 1, 327 P.3d 635 (2014). The rule itself does not impose any restrictions on the timeframe when discovery material may be provided.

Here, when defense counsel sought permission to provide a copy of the police reports to his client, the prosecutor objected. RP 34. But the plain language of the rule does not permit the prosecution to thwart counsel's efforts to provide a copy of discovery. CrR 4.7(h)(3). Instead, the prosecution must either approve appropriate redactions or submit the issue to the court. CrR 4.7(h)(3).

The trial court should not have declined to consider Mr. Weller's request for his discovery. CrR 4.7. The Court of Appeals erred when it ruled that because sentencing had been completed, there was no basis to provide the discovery. The appellate court's justification, one not mentioned in the trial court, was that the rule only applied to pretrial proceedings. But Mr. Weller's rights do not end once trial has occurred. The court should accept review and order the trial court to consider Mr. Weller's request for redacted discovery.

C. The Supreme Court should accept review and hold that a trial court can only issue terms of a sentence, including a No Contact Order, consistent with that court's authority as to the underlying crime.

The Court of Appeals action in affirming the trial court's 30 year orders conflicts with prior case decisions. RAP 13.4(b)(1).

The trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) by imposing a no-contact order of 30 years. This term exceeded the 10 year maximum penalty for second degree assault, a class B felony. RP 21-22, 27-29; CP 10; RCW 9A.36.021(2)(a).

Under RCW 9.94A.505(8), a trial court may impose a no-contact order for the maximum term of a conviction. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007); see also *State v. Navarro*, 188 Wn. App. 550, 556, 354 P.3d 22 (2015), *review denied*, 184 Wn. 2d 1031, 364 P.3d 119 (2016). A defendant cannot waive a challenge to the legality of sentencing conditions, which can only be authorized by statute. *State v. Armstrong*, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998).

A trial court's sentencing authority is limited to that expressly found in the statutes. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). RCW 9.94A.505(8) permits a court to enforce crime-related prohibitions as part of any sentence. A no-contact order is a crime-related prohibition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010). The

statutory maximum for the most serious convictions, second degree assault, is 10 years. RCW 9A.20.021(1)(b).

This means that the maximum length of time a no-contact order can last is ten years. RCW 9.94A.505(8); *Rainey*, 168 Wn.2d at 375. Further, the trial court failed to consider the length of the no-contact orders in the context of Mr. Weller's fundamental right to a relationship with his children, a right that survives even though there has occurred a termination under RCW 13.34, because this right survives their adulthood. *Rainey*, 168 Wn.2d at 381-382; *Standberg v. City of Helena*, 791 F.2d 744, 748 n.1 (9th Cir. 1986); *see also Growing Pains: The Scope of Substantive Due Process Rights of Adult Children*, 57 Vand. L. Rev. 1883, 1903 (2004).

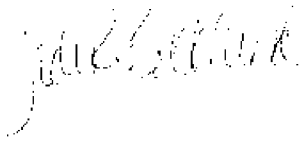
The Court of Appeals erred when it held that consecutive terms of no-contact orders could justify the trial court's ruling. The court should accept review and reverse the term of the no-contact orders.

VI. CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse the sentence and remand for further action regarding the duration of the No Contact Order and provision of the discovery to Mr. Weller.

Respectfully submitted March 27, 2017.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and I sent an electronic copy to:

Clark County Prosecutor at:
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CntyPA.GeneralDelivery@clark.wa.gov

Attorney for Sandra Weller at:
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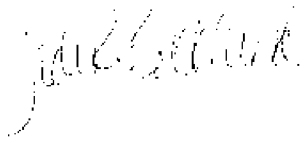
through the Court's online filing system, with the permission of the recipient(s).

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 27, 2017.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SANDRA DOREEN WELLER, aka SANDRA GRAF; JEFFREY WAYNE WELLER, Appellants.	No. 48056-5-II Consolidated with No. 48106-5-II PART PUBLISHED OPINION

WORSWICK, J. — Sandra and Jeffrey[1] Weller appeal their exceptional sentences following a resentencing hearing. In the published portion of this opinion, we hold that the sentencing court did not exceed its statutory authority by imposing no-contact orders of 45 and 30 years on Sandra and Jeffrey, respectively. In the unpublished portion of this opinion we consider and reject the Wellers' arguments regarding the sentencing court's imposition of exceptional sentences, the denial of the Wellers' request for discovery material, and the denial of Sandra's request for new counsel at resentencing. We affirm.

[1] Because the co-appellants have the same last name, we refer to them by first name for clarity. We intend no disrespect.

FACTS

Following a jury trial, Sandra and Jeffrey were convicted of several felony crimes involving abuse of their children. Sandra was convicted of four counts of second degree assault and one count of unlawful imprisonment. Jeffrey was convicted of five counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault of a child. All counts were domestic violence offenses. The jury found the Wellers' conduct manifested deliberate cruelty to the victims. The jury also found the offenses were part of an ongoing pattern of abuse. Based on the jury's finding of the two aggravators, Sandra and Jeffrey were sentenced to exceptional sentences of 20 years and 20 years plus one year, respectively.

The Wellers appealed their convictions and sentences. In *State v. Weller*, 185 Wn. App. 913, 931, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015) we affirmed their convictions, but reversed the jury's finding of the ongoing pattern of abuse aggravating factor and remanded for resentencing.

At the resentencing hearing, the sentencing court imposed exceptional sentences on Sandra and Jeffrey of 20 years based on the jury's finding that the offenses manifested deliberate cruelty. Sandra's four counts of second degree assault and one count of unlawful imprisonment ran consecutively to each other. Jeffrey's sentence included two counts of second degree assault running consecutively to each other and to three additional counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault, which ran concurrently.

The sentencing court imposed no-contact orders between Sandra and the victims for 45 years, and between Jeffrey and the victims for 30 years. Sandra requested that the sentencing

court impose a 10-year no-contact order. The sentencing court denied Sandra's request, explaining that the victims requested a no-contact order and did not desire any contact, but noted that in the future the victims could request a modification if they wanted to.

ANALYSIS

The Wellers argue that the sentencing court exceeded its statutory authority by imposing no-contact orders in excess of the maximum penalty for their most serious offense. We disagree.

A sentencing court may impose crime-related prohibitions, including no-contact provisions, when sentencing an offender for a felony conviction. *State v. Armendariz*, 160 Wn.2d 106, 119, 156 P.3d 201 (2007); former RCW 9.94A.505(8) (2010). We review a sentencing court's imposition of crime-related prohibitions for abuse of discretion. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). However, the key question here is whether the duration of the crime-related prohibition exceeded the sentencing court's statutory authority. Consequently, we review this issue de novo. *See State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

Generally, the crime-related prohibition may not be for a period of time longer than the statutory maximum sentence for the crime. *Warren*, 165 Wn.2d at 32. However, when imposing an exceptional sentence the court has discretion to sentence defendants to the statutory maximum of each individual crime and run multiple convictions consecutively.[2] *See State v.* Cubias, 155

[2] We recognize that this discretion is not unlimited. For instance, an exceptional sentence may be reversed because it is clearly excessive.

Wn.2d 549, 556, 120 P.3d 929 (2005); RCW 9.94A.589(1)(a). In such a situation, the total maximum allowable sentence exceeds the statutory maximum for each individual conviction.

The Wellers contend that the duration of the no-contact orders exceeded the sentencing court's authority. However, the jury's finding of an aggravating factor triggered the sentencing court's statutory authority to impose exceptional sentences on the Wellers. *See* RCW 9.94A.535, .589. The sentencing court issued exceptional sentences by imposing standard range sentences for each individual conviction and running them consecutively. So, while a single conviction of second degree assault (the Wellers' most serious crime) has a statutory maximum sentence of 10 years, the statutory maximum for the exceptional sentences at issue here is equal to the sum total of the statutory maximums for the consecutively run convictions.

Because Sandra was convicted of four counts of second degree assault (10 year maximum/count) and one count of unlawful imprisonment (5 year maximum), and the sentencing court ran all five sentences consecutively, the maximum allowable exceptional sentence was 45 years. Jeffrey's sentence included two counts of second degree assault running consecutively to each other and to three other counts of second degree assault, one count of unlawful imprisonment, and one count of third degree assault, which ran concurrently, for a total maximum allowable exceptional sentence of 30 years. Thus, the sentencing court did not exceed its statutory authority by imposing the no-contact orders against Sandra for 45 years and against Jeffrey for 30 years.

In each of their SAGs, Sandra and Jeffrey also argue that the lengthy no-contact orders violate their constitutional right to parent. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377,

229 P.3d 686 (2010). "A defendant's fundamental rights limit the sentencing court's ability to impose sentencing conditions." *Rainey*, 168 Wn.2d at 377. The Wellers' argument is meritless because their parental rights to the parties protected by the no-contact order have been terminated. *See In re Interest of E.J.W.*, No. 47545-6-II, slip op. at 3 n.1 (Wash. Ct. App. July 26, 2016) (unpublished), http://www.courts.wa.gov/opinions. Consequently, their fundamental right to parent is not implicated.

We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

At the resentencing hearing, Sandra requested a new attorney. Sandra told the sentencing court that her counsel was prejudiced against her, was ineffective, and refused to communicate with her. Sandra's defense counsel explained that he had reviewed the materials from the prosecution and the court, the court of appeals' opinion, evidence, and case law. He also explained that he had met with Sandra once in court and spoken to her a few times on the phone. After inquiring into Sandra's counsel's qualifications, the sentencing court denied Sandra's request for new counsel.

Sandra and Jeffrey both argued for a reduction in their original sentences based on our prior opinion striking one of the two aggravating factors. Nonetheless, the sentencing court imposed exceptional sentences on Sandra and Jeffrey of 240 months based on the jury's finding

that the offenses manifested deliberate cruelty. The sentencing court entered findings of fact and conclusions of law for the imposition of the exceptional sentences, noting that the jury's finding of deliberate cruelty was supported by evidence admissible at trial, and as such the court had the authority to order exceptional sentences.

At the end of the resentencing hearing, the Wellers both requested copies of the police reports and other discovery, citing CrR 4.7. The State objected, arguing the Wellers were not entitled to copies of discovery given the status of the case, and suggested the Wellers file a public records request for such documents. The sentencing court denied the Wellers' requests.

ADDITIONAL ANALYSIS

II. JUDICIAL FACT FINDING

The Wellers argue that the sentencing court violated their Sixth and Fourteenth Amendment rights to a jury determination of all facts by imposing exceptional sentences based on judicial fact finding. Sandra and Jeffrey urge us to reconsider our earlier decision "in the interests of justice" pursuant to RAP 2.5(c)(2). Br. of Appellant (S.W.) at 9; Br. of Appellant (J.W.) at 5. Because our previous decision was correct, we decline to readdress the issue.

An exceptional sentence may be imposed if the sentencing court finds there are "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. An exceptional sentence above the standard range must be based on a statutorily recognized aggravating factor. RCW 9.94A.535(2), (3). A sentencing court may not impose an exceptional sentence based on judicial fact finding. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Whether an aggravating factor exists is a factual question for

jury determination. RCW 9.94A.535, .537(6). The sentencing court must enter written findings of fact and conclusions of law if it imposes an exceptional sentence. RCW 9.94A.535.

Here, the jury unanimously found that Sandra and Jeffrey's conduct during the commission of their offenses manifested deliberate cruelty to the victims beyond a reasonable doubt, as required by RCW 9.94A.537. In its findings of fact and conclusions of law, the sentencing court recognized the jury's special verdict and outlined the trial testimony to demonstrate that the jury's finding of deliberate cruelty was supported by the evidence. The sentencing court's findings and conclusions are not "judicial fact-finding" as argued by the Wellers. Rather, the sentencing court was complying with the requirements of RCW 9.94A.535 and .537. Thus, we hold that the Weller's argument that the sentencing court engaged in improper fact finding fails.

III. Discovery Requests

The Wellers argue that the court erred by denying their requests for redacted copies of discovery materials pursuant to CrR 4.7.[3] Because CrR 4.7 applies to "procedures prior to trial," we disagree.

A trial court's discovery decision will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Pawlyk*, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). CrR 4.7 applies to "procedures prior to trial." We interpret court rules the same way we interpret

[3] Sandra also makes this argument in her SAG.

statutes giving effect to the plain language. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016). The purpose behind discovery disclosure is to protect against surprise that might prejudice the defense. *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014).

Here, the Wellers did not request copies of discovery materials until the very end of the resentencing hearing. The sentencing court denied their request given the status of the case at that time. The Wellers' trial and sentencings had concluded. Because CrR 4.7 applies to procedures before trial, CrR 4.7 did not apply. Therefore, the sentencing court did not manifestly abuse its discretion by denying their request.

IV. Request for New Counsel

Sandra also argues that the sentencing court abused its discretion by denying her request for new counsel at resentencing. We disagree.

"A criminal defendant who is dissatisfied with appointed counsel 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. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Importantly, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *Stenson*, 132 Wn.2d at 734. The right to choose one's counsel does not permit a defendant to unduly delay the proceedings. *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

We review a trial court's refusal to appoint new counsel for an abuse of discretion. *State v. Lindsey*, 177 Wn. App. 233, 248, 311 P.3d 61 (2013). A trial court abuses its discretion when

its decision is manifestly unreasonable or based on untenable grounds. *Lindsey*, 177 Wn. App. at 248-49. A decision is based on untenable grounds if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Lindsey*, 177 Wn. App. at 249. When reviewing a trial court's refusal to appoint new counsel, we consider (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. *Lindsey*, 177 Wn. App. at 249.

None of these factors show an abuse of discretion here. Sandra's counsel and Sandra gave contradictory accounts of their working relationship to the court. Sandra contended that her counsel was severely prejudiced against her and refused to communicate with her. She claimed he had screamed at her, told her he did not want to represent her, and told her "there is no game plan." Verbatim Report of Proceedings (VRP) at 7. Contrastingly, Sandra's counsel explained that since he had been appointed to Sandra's case he had prepared for the resentencing hearing by reviewing the case materials and relevant case law, and had met with Sandra in court and spoken to her a couple of times on the phone and once in the jail. Sandra's counsel told the sentencing court that he was prepared for resentencing and felt "very comfortable in [his] abilities to handle this matter and represent her accordingly." VRP at 4.

The sentencing court heard from both Sandra and her counsel as to the alleged conflict, and inquired as to counsel's ability to represent Sandra. The sentencing court explained that Sandra's counsel was appointed as the most qualified available to represent her, and noted that "this had been quite an extended period of time, and I think we do need to move ahead with it." VRP 6.

The sentencing court listened to Sandra's request for new counsel, evaluated the reasons she wanted new counsel, stated its own evaluation of Sandra's counsel's competence and ability to represent Sandra, and considered that a late substitution of counsel would delay the scheduled resentencing hearing. Thus, in light of the *Lindsey* factors above, we hold that the sentencing court did not abuse its discretion in denying Sandra's motion for new counsel.

V. APPELLATE COSTS

Jeffry filed a supplemental brief requesting that, if the State substantially prevails in this appeal, we decline to impose appellate costs on him because he claims he is indigent. The State did not respond. We exercise our discretion and decline to impose appellate costs.

Under former RCW 10.73.160(1) (1995), we have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *Sinclair*, 192 Wn. App. at 389.

It appears that Jeffrey does not have the present ability to pay appellate costs, and it is questionable whether he will have the future ability to pay. The sentencing court found Jeffrey indigent at trial, and counsel was appointed to represent Jeffrey on appeal. There are no facts in the record and the State does not provide any argument to support a conclusion that Jeffrey's indigent status is likely to change. RAP 15.2(f).

Under the specific circumstances of this case, we decline to impose appellate costs on Jeffrey. [4]

We affirm.

Worswick, J.

We concur:

Maxa, A.C.J.

Sutton, J.

[4] Sandra did not submit a supplemental brief on the issue.

BACKLUND & MISTRY
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