

NO. 63713-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY MARSTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

THE HONORABLE JAMES ROGERS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2010 DEC -6 PM 1:14

COURT OF APPEALS
JAMES ROGERS
KN

TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED	1
B. STATEMENT OF THE CASE	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	3
3. FACTS RELATING TO ACCESS TO LEGAL MATERIALS	8
C. ARGUMENT	16
1. MARSTON WAS PROVIDED LEGAL MATERIALS NECESSARY TO PREPARE HIS DEFENSE	16
D. CONCLUSION	26

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

<u>Bounds v. Smith</u> , 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).....	18, 19
<u>Lewis v. Casey</u> , 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).....	19
<u>United States v. Wilson</u> , 690 F.2d 1267 (9 th Cir. 1982)	18

Washington State:

<u>State v. Bebb</u> , 108 Wn.2d 515, 740 P.2d 829 (1987).....	18
<u>State v. Canedo-Astorga</u> , 79 Wn. App. 518, 903 P.2d 500 (1995), <u>rev. denied</u> , 128 Wn.2d 1025 (1996).....	21
<u>State v. Fleming</u> , 140 Wn. App. 132, 170 P.3d 50 (2007), <u>rev. denied</u> , 163 Wn.2d 1047 (2008).....	18
<u>State v. Honton</u> , 85 Wn. App. 415, 932 P.2d 1276, <u>rev. denied</u> , 133 Wn.2d 1011 (1997).....	21
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	22
<u>State v. Nicholas</u> , 55 Wn. App. 261, 776 P.2d 1385, <u>rev. denied</u> , 113 Wn.2d 1030 (1989).....	18

<u>State v. Silva</u> , 107 Wn. App. 605, 27 P.3d 663 (2001).....	17, 18, 19
<u>State v. Vermillion</u> , 112 Wn. App. 844, 51 P.3d 188 (2002), <u>rev. denied</u> , 148 Wn.2d 1022 (2003).....	19, 20

Constitutional Provisions

Federal:

U.S. Const., Amend. VI	19
------------------------------	----

Washington State:

Wash. Const. art. I, §22	19
--------------------------------	----

Rules and Regulations

Washington State:

CrR 3.2.....	10
CrR 4.7.....	10
ER 609.....	10
ER 702.....	10
RAP 2.5(a)	21, 22

Other Authorities

11 - 11A Washington Practice,
Pattern Jury Instructions Criminal (3rd ed. 2008) 20

5-5C K. Tegland, Washington Practice,
Evidence (5th ed. 2007) 20

A. ISSUE PRESENTED

A pro se defendant is constitutionally entitled to access to legal materials to use in preparing a defense. This defendant had access to an expansive database through a computer legal research program. He also was instructed in the use of the program. Was that form of access to legal materials constitutionally adequate?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 2, 2008, the defendant, Larry Marston, was charged with assault in the first degree of Paulette Neville, including an allegation that he was armed with a deadly weapon. CP 1-5. The assault was alleged to have occurred on June 29, 2008. CP 1.

At his scheduled arraignment hearing on July 15, 2008, Marston asserted his right to represent himself.

1RP 3.¹ Marston said that he had previously represented himself in a reckless driving case. 1RP 3. He said that he had attended college and was 11 credits short of an associate degree. 1RP 7. Counsel who had been appointed for Marston stated that he had two lengthy conversations with Marston and Marston appeared to be quite intelligent. 1RP 9. After a colloquy, the court granted Marston's request to proceed pro se. 1RP 3-9. Marston then was arraigned on the charge. 1RP 10-11.

Standby counsel was appointed on October 13, 2008, for the purpose of providing access to documents and to provide hardware for Marston to review audio and video recordings provided by the State as part of discovery. 2RP 2-8.

¹ The Verbatim Record of Proceedings will be cited in this brief in the same manner as in the Appellant's Brief, as follows: 1RP – volume including 7/15/2008 and 8/6/2008; 2RP – 10/13/2008; 3RP – 1/5/2009; 4RP – volume including 1/21/2009, 1/30/2009, 2/6/2009, 2/19/2009 (proceedings included under this date actually are a duplicate copy of the hearing on 4/1/2009), 4/1/2009 and 4/10/2009; 5RP – 3/2/2009; 6RP – volume including 4/24/2009 and 5/11/2009; 7RP – 5/12/2009; 8RP – 5/18/2009; 9RP – 5/19/2009; 10RP – 5/20/2009; 11RP – 5/26/2009; 12RP – 5/27/2009; 13RP – 6/19/2009; 14RP – 9/11/2009.

The charges were amended to add two counts of nonfelony harassment, also of Paulette Neville. CP 47-48, 88-89. Count II alleged a threat to cause bodily injury in May of 2008 and Count III alleged a threat to cause property damage in early June of 2008. CP 88-89.

Marston was tried in King County Superior Court, the Honorable James Rogers presiding, beginning on May 11, 2009. 6RP 1, 53. A jury found Marston guilty as charged on all counts. CP 90-93. The trial court imposed a standard range sentence on the assault in the first degree conviction. CP 114-22.

2. SUBSTANTIVE FACTS

Paulette Neville lived at the same home in Seattle for many years, and in March 2008 she rented an upstairs room to Marston. 8RP 23-25. Neville and Marston both were crack cocaine addicts. 8RP 20-21, 47; 11RP 159. Marston knew Neville previously, had used drugs with her before, and believed the house was a crack house when he moved in. 8RP 20-21; 11RP 64-68, 151-52.

Marston soon became irritated with the situation. 8RP 29-30; 11RP 62-63. He was irritated with Neville because she allowed another man to move in without talking to Marston about it, and that man was very messy and inconsiderate. 11RP 63 154-55.

Marston went into Neville's upstairs bedroom early one morning in May to confront her about his milk.² 8RP 32. Neville had taken the milk into her bedroom and fallen asleep. 8RP 32. In a rage, Marston kicked in Neville's door and put his fist in her face. 8RP 32. Neville was afraid that Marston would beat her up but when she asked him what he was going to do to her, Marston backed away and apologized. 8RP 32. This incident was the factual basis for the harassment charge in Count II.³

After that incident, Neville left the house and stayed with a friend for two or three days. 8RP 33; 10RP 142. Then she returned to her home but moved into the

² Marston consumed a lot of milk every day and it was important to him. 11RP 64-65.

³ Marston testified that although he did talk to Neville about his milk while Neville was in her bedroom, each of those conversations was benign. 11RP 65-66.

basement, which is a separate unit from the upstairs of the house. 8RP 33-34, 36.

Marston claimed that before he moved in to Neville's house, Neville promised him that she would be getting a washer and dryer. 11RP 70. Marston became upset in early June because he heard that Neville had been given money for that purpose but used it for cocaine. 11RP 70-71. He stewed about it for a couple of days, then went downstairs to confront Neville. 11RP 71-72.

Neville was in the basement with four other people when they heard Marston banging on the door, yelling. 8RP 35. After Neville let him in, Marston said that he was going to pour alcohol over the floor upstairs and set the house on fire. 8RP 35. Daniel Stevens testified that he was there and that Marston was angry at Neville and threatened to burn the house down. 10RP 80-84. This incident was the factual basis for the harassment charge in Count III.⁴

Neville told Marston to move out. Neville testified that this occurred before the milk confrontation, while Marston

⁴ Marston testified that he was upset and simply observed that it would be best if alcohol were poured all over the place and set on fire, but that he did not threaten to do so. 11RP 75-76.

testified that it was soon after his reference to the house burning down. 8RP 32-33, 103; 11RP78-79. Stevens remembered that at the time Marston threatened to burn down the house, Neville was trying to have Marston evicted. 10RP 98.

Neville and the owner of the home in which she lived obtained a temporary protection order against Marston on June 17th, directing him to stay away from the house. 8RP 41-44. Police served the order on Marston that night; Marston refused to leave then but agreed to be out by the end of the month. 8RP 43-44, 144-45; 10RP 138-41.

Marston testified that Neville was harassing him, trying to get under his skin, including stealing his property, and that he was perturbed. 11RP 84-86, 12RP 33-36.

On June 29th, Neville turned off the main circuit breaker to the house in order to secure a piece of bare wiring that had come loose in the basement. 8RP 54. Marston was upstairs; when his light went out, he immediately believed that Neville was trying to irritate him. 11RP 120. Marston came downstairs, broke through the locked door to the basement, and went directly to the

electrical panel. 8RP 55. Neville walked toward Marston to explain what she was doing and Marston grabbed her, smiled, and stabbed her in the ribs, slicing a hole in her heart. 8RP 55-56; 10RP 120, 126-27. Marston continued to attack Neville with the knife; he pushed her down and stabbed her in the face and hands as she tried to defend herself. 8RP 56-57. At that time, Neville was about 53 years old, 5 feet 6 inches tall and 115 pounds. 8RP 19, 39-40. Marston was over 6 feet tall and over 250 pounds. 8RP 40.

Marston testified that he did not attack Neville, but that she attacked him. He claimed that Neville came up behind him and hit him in the head, dazing him and knocking him to the floor. 11RP 124-28. When he recovered, he explained, Neville was lunging at him with a knife and they struggled. 11RP 128-29. Marston said he did not know how Neville was stabbed in the heart. 11RP 191. Although the floor near the electrical panel was filthy was dog waste and standing water, Marston's clothing was not dirty after the attack and he had no injuries other than a bump on his forehead. 8RP 108-09; 9RP 90-92, 144-45; 10RP 162-65,

188; 11RP 189. Neville had, in addition to the stab to her heart, cuts to her face and neck and cuts to her hands and forearm characterized as typical defensive wounds. 8RP 72-75; 10RP 173-77.

Marston stopped attacking Neville when she crawled under a table. 8RP 57. She called 911 and police responded, detaining Marston outside the house. 8RP 59-63; 10RP 19-20. While sitting alone in the patrol car, Marston was videotaped saying repeatedly, "I hope she dies," and stating "She knew not to fuck with me." 7RP 25, 30; 9RP 103-07.

3. FACTS RELATING TO ACCESS TO LEGAL MATERIALS

At his arraignment on July 15, 2008, Marston requested unlimited access to the "jailhouse legal computer." 1RP 13. The court denied unlimited access but stated that he should be allowed more than one hour a week, which Marston asserted was the standard allowance. 1RP 13-14.

At a scheduling hearing on August 6th, Marston said that he had used the law library. 1RP 18. As the

participants were scheduling a trial date, Marston stated that he was "not real computer literate," and that he would like to download a rule book but it was not available on the computer. 1RP 22. He explained, "You can dig through there and find different rules and stuff" but he wanted a book. 1RP 22. These requests were not addressed by the court; Marston was informed that he needed to file motions for the court to consider his requests. 1RP 28.

In a set of more than a dozen motions and requests for subpoenas filed on October 6, 2008, Marston included a motion for a Washington Court Rules book, declaring that he "is not provided enough paper to down [sic] it from the jail law library computer." CP 166. In the same motion, he asserted that he was not being given enough time on the "jail legal library computer." CP 166.

At a motion hearing on October 13th, the court ordered the appointment of standby counsel and granted Marston's motion for funds for an investigator. 2RP 6-8. Marston referenced his request for a rule book but did not argue that motion, stating that he probably could get it from his standby counsel. 2RP 11.

On November 11th, the trial date was continued to allow Marston more time to prepare. CP 177.

On December 8, 2008, Marston filed another set of motions. CP 178-215. In a motion requesting appointment of a paralegal, he asserted that as of October 26, he had had access to Westlaw ten times, complaining that the printer was inoperable three times, "making the session ineffective." CP 194. His six discovery motions cited CrR 4.7, his motion to exclude prior convictions cited ER 609 and the self defense statute, his motion for expert services cited ER 702, his motion for release cited CrR 3.2; all of these citations were to rules relevant to the respective motions. CP 180, 189, 199, 205, 206, 209, 211, 212, 214. His motion requesting a rule book again justified the request by stating that the jail did not provide enough paper to download the rule book from the jail legal computer. CP 213.

At a motion hearing on January 5, 2009, Marston's request for supplies included an additional ream of printer paper. 3RP 4. Marston states, "The jail, when you go to the Westlaw library, you know, the computer, you have to put your own paper in the printer and that kind of stuff." 3RP 4.

At this hearing, standby counsel handed Marston a rule book and a copy of an evidence book by Karl Tegland and asked counsel for the jail whether Marston would be allowed to keep them in his cell. 3RP 21. Jail counsel did not know the answer to that question. 3RP 22. However, she did note that the jail Westlaw workstation had both of those resources, and "quite an expansive database." 3RP 22.

At a motion hearing on January 21, 2009, Marston stated that he was not ready for trial and that he wanted the same resources that the deputy prosecutor had. 4RP 2. Marston stated that he anticipated being ready the last week of February. 4RP 8. He noted that he had access to the jail law library twice a week for two hours each time. 4RP 14. Marston said that standby counsel had sent Marston sample trial memoranda and sample jury instructions, among other things. 4RP 29.

Marston filed another set of motions and proposed orders on the same date. E.g., CP 216-40. In a motion for release, he discussed the capacity of the jail Westlaw computer, objecting that it did not contain blank motion forms or sample jury instructions. CP 226. He stated, "Other than

Westlaw to look up case law, RCW's and court rules, the library is worthless." CP 226.

In an affidavit dated February 6th, filed February 19th, Marston declared that his motion for a rule book should be granted because he was not being given sufficient time to use the jail law library. CP 249-51.

In a hearing on February 6th, Marston requested a rule book, on the basis that he was denied access to the library many times. 4RP 56-58. Counsel for the jail noted that the jail Westlaw workstation contains the court rules, the Washington Practice series, and state and federal case law, among other databases. 4RP 58. Marston responded:

I agree, your Honor. Everything's on that workstation. All you got to do is to be able to have access to that workstation.

4RP 59. When the court observed that it sounded as if Marston had been in the law library a lot, Marston responded, "I have." 4RP 59. Later Marston commented that he had four hours every week in the law library. 4RP 87-88.

On February 19th, the trial date was continued again to allow more time for Marston to prepare. CP 247.

At a hearing on March 2, 2009, Marston requested another continuance of the trial date, and the trial date was continued to May 11, 2009. 5RP 1-15.

On March 20, 2009, the trial court entered a written order responding to defense motions dated March 8, 2009. CP 253-56. Regarding access to legal research, the court ruled:

Mr. Marston does have access to Washington Court Rules and law on Westlaw during limited times. While each individual session may be short, he has had many such sessions at this point. Mr. Marston now alleges (for the first time) that he does not know how to use the computer. The packet handed to every pro se inmate at the KCJ is very clear, but to the extent necessary, the need for instruction can be addressed at the next hearing.

CP 253-54. The court noted that at the last hearing, Marston had said that he was largely ready for trial once his investigator completed certain tasks. CP 254. The court observed that Marston "is intelligent, demonstrates a sophisticated view of his case theory, and has a clear understanding of his legal defenses." CP 254.

On April 1, 2009, Marston made statements that suggested to the court that he was having trouble finding cases by entering citations on Westlaw. 4RP 119. He said that he also was having trouble looking up rules. 4RP 119. Standby counsel responded that he did not understand that request because he had explained how to enter citations numerous times. 4RP 119-20.

At a status hearing on April 10th, Marston claimed he was having trouble using Westlaw. 4RP 126-31. Marston first said he could not get case law, then said he could find things one week and then not the next. 4RP 130-31. Shortly after that, Marston himself explained that if a citation is entered a case comes up. 4RP 131. Marston asserted that "there's more information in there that I need to know what to do about." 4RP 131. He said that when he "click[ed] court rules," he got ten thousand hits. 4RP 131.

In his April 24th written response to the State's trial brief, Marston concluded with a declaration that he had repeatedly been denied access to the jail law library and that he had repeatedly stated that he was "not literate on the law library computer." CP 46.

At a status hearing on April 24th, Marston claimed that he needed help getting access to state cases by entering citations in Westlaw. 6RP 5. Marston said that he was not having trouble getting access to federal cases. 6RP 5. Marston said he had been given directions in the jail's "pro se packet." 6RP 6. Jail counsel explained that the jail provides "simple step-by-step instructions" but will not provide a legal assistant. 6RP 19. The court stated that it would like to see the jail provide assistance for 5 to 10 minutes, showing Marston how to type in the citation. 6RP 21, 23.

What appears to be an e-mail from jail counsel in response to the April 24th hearing was filed as an attachment to a later filing of Marston. CP 146. Jail counsel asserted that Marston had been scheduled for 144 hours of Westlaw access since he was authorized to act pro se, making it inconceivable that he still did not know how to use the computer. CP 146. Jail counsel explained that no staff person provides instruction to inmates using the computer and that the jail does not have the resources to provide personal instruction to all inmates eligible for access to the

computer. CP 146. She noted that the written instructions provided to inmates are "clear, simple and illustrated." CP 146. She concluded with a request that the court not order that Marston be provided an assistant. CP 146.

On April 27, the Office of the Public Defender denied Marston's request for funds for a paralegal, on the grounds that he had adequate access to legal materials through the jail Westlaw computer. CP 149-50.⁵

C. ARGUMENT

1. MARSTON WAS PROVIDED LEGAL MATERIALS NECESSARY TO PREPARE HIS DEFENSE

Marston contends that Westlaw, a computer legal research program, is not a constitutionally sufficient means of providing access to legal materials for a pro se defendant because Westlaw is difficult to use. That argument is without merit. Providing legal materials via a computer legal database that is relied upon by lawyers is constitutionally

⁵ Appellant's brief attributes this order to the trial judge but the (illegible) signature appears above a line titled "for the Office of the Public Defender" and is not the signature of the trial judge. Compare CP 150 with CP 154. The trial judge referred the issue of paralegal services to the Office of the Public Defender in an order dated April 15, 2009. CP 154.

sufficient access to legal materials. Marston's inefficiency in using the computer database is a function of his lack of training as a lawyer, an inherent risk of acting as his own lawyer.

This Court has held that the Washington Constitution affords a pro se pretrial detainee a right of "reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense." State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). What measures are necessary to provide those resources lies within the discretion of the trial court based upon the totality of the circumstances, including the charge, the complexity of the issues in the case, the need for investigative services, and the fair allocation of judicial resources. Id. at 622-23. In that case, the court concluded that the defendant was not deprived of appropriate legal materials although he did not have access to a law library, because he was provided relevant legal materials that he requested through a law librarian. Id. at 623-24.

The State must allow the pro se defendant reasonable access to legal materials but a law library is not required. State v. Bebb, 108 Wn.2d 515, 524-25, 740 P.2d 829 (1987). A defendant does not have a due process right of access to a library if he is afforded another means of access to legal materials. State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008). A defendant may not reject a constitutionally adequate method provided "and insist on an avenue of his or her choosing." Id. (citing State v. Nicholas, 55 Wn. App. 261, 269, 776 P.2d 1385, rev. denied, 113 Wn.2d 1030 (1989), quoting United States v. Wilson, 690 F.2d 1267, 1271 (9th Cir. 1982)).

Several of the Washington cases addressing access to legal materials rely on the United States Supreme Court case of Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), directly and through reliance on Bebb, supra, which in turn relied upon Bounds. E.g., Bebb, 108 Wn.2d at 524; Silva, 107 Wn. App. at 615, 619; Nicholas, 55 Wn. App. at 267-269. But the United States Supreme Court has retreated from statements in Bounds that appear to

suggest that the State must enable the defendant to litigate effectively once in court.⁶ Lewis v. Casey, 518 U.S. 343, 354, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Bounds and Lewis were decided in the context of access to courts for prisoners, and the court in Lewis stated that "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires." Lewis, 518 U.S. at 354.

A defendant has a right to represent himself even if he has no technical skills. State v. Vermillion, 112 Wn. App. 844, 851, 857, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003). The defendant may exercise the right "despite the fact that exercising the right will almost surely result in detriment to both the defendant and the administration of

⁶ In light of this retreat from Bounds and the significance of Bounds in the Washington cases, the scope of the right of access to legal materials under the Washington Constitution should be re-examined. While unnecessary here because the access provided satisfies the standard articulated in Silva, supra, the State reserves the right to address whether the Washington Constitution, art. I, §22, confers a greater right of access to legal materials than the United States Constitution, Sixth Amendment, and the scope of that right, if this case reaches the Washington Supreme Court, which has not addressed the issue.

justice." Id. at 850-51, 858. A defendant is asked about familiarity with the law during the colloquy concerning his request to proceed pro se, but the purpose of that questioning is not to assure that he has the skill to do so, but to determine whether he understands the risks of proceeding without counsel. Id. at 847.

Computer legal databases provide access to an extensive range of the most current legal materials available and are superior to books for that reason. Computer databases also permit wide-ranging searches for relevant authority. These programs have replaced books in the practice of many lawyers.

The jail Westlaw computer in this case provided access to federal and state cases, statutes, court rules, the Washington Practice series (which includes standard instructions)⁷, and Karl Tegland's multi-volume text setting out the rules of evidence and relevant case law.⁸ CP 226; 3RP 22; 4RP 58-59. The available databases included additional materials, but the sufficiency of the database is

⁷ 11-11A Washington Practice, Pattern Jury Instructions Criminal (3rd ed. 2008)

⁸ 5-5C K. Tegland, Washington Practice, Evidence (5th ed. 2007).

not challenged on this appeal and no record was made of it below.

Marston was provided clear, simple, illustrated instructions on the use of Westlaw. CP 146, 253-54; 6RP 6, 19. The trial court found that the packet given to every pro se inmate at the jail is "very clear." CP 253-54.

A defendant who has been granted the right to proceed pro se does not have the right to the time and resources to learn how to be a lawyer before trial. State v. Honton, 85 Wn. App. 415, 422-24, 932 P.2d 1276, rev. denied, 133 Wn.2d 1011 (1997). The defendant assumes the risk of his own ineptitude when he makes a valid waiver of counsel. State v. Canedo-Astorga, 79 Wn. App. 518, 525-26, 903 P.2d 500 (1995), rev. denied, 128 Wn.2d 1025 (1996). Even if Marston was unable to use the Westlaw program efficiently, that was a risk he assumed by proceeding pro se. Marston was not entitled to the same training in legal research that a lawyer receives.

To the extent that Marston is challenging the adequacy of the instruction that he received, RAP 2.5(a) bars consideration of this issue. A claim of error may be

raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. There is no record of the instruction received by Marston, including the pro se packet provided by the jail, so there can be no manifest constitutional error in the nature of that instruction.

In any event, the record establishes that Marston was comfortable using the computer and quickly learned how to use the Westlaw program. At the first hearing in this case, Marston requested unlimited access to the computer. 1RP 13. On August 6, 2008, he told the court that he had used the computer and that "You can dig through there and find different rules and stuff." 1RP 22.

On October 6th, Marston filed a document asserting that he had not been provided enough paper to download the Washington Court Rules book from the Westlaw computer. CP 166.

On December 8th, Marston filed documents in which he complained that he had inadequate access to the Westlaw computer and that on three occasions the printer was inoperable, "making the session ineffective." CP 194. In requesting a rule book, he again justified the request on the basis that the jail did not provide enough paper to download the book from the computer. CP 213.

On January 5, 2009, Marston requested another ream of paper for the computer printer. 3RP 4. In a motion filed on January 21st, Marston stated that he had access to "case law, RCW's and court rules" on the Westlaw computer. CP 226. This was in the context of a claim that the capacity of the Westlaw computer was inadequate. CP 226. Marston asserted, "Other than Westlaw to look up case law, RCW's and court rules, the library is worthless." CP 226 (emphasis added).

On February 6th, in writing and in court, Marston said that he should be provided a rule book because he was not allowed sufficient time to use the computer. CP 249-51; 4RP 56-58.

At the February 6th hearing, Marston agreed that all necessary databases were on the computer, asserting only that he had insufficient access. 4RP 58-59. When the court observed that is sounded as if Marston had been in the law library a lot, Marston agreed. 4RP 59.

As the trial court noted in its order of March 20, 2009, it was in documents filed on March 8th that Marston for the first time said he did not know how to use the computer. CP 253-54. The court found that Marston had had many sessions on the computer. CP 253-54. Marston's previous requests for more access and more paper, without mention of difficulty using the computer, belie the claim that he could not use the computer.

In later hearings, Marston admitted that he knew how to retrieve cases, and said he had no trouble getting federal cases. 4RP 130-31; 6RP 5. Standby counsel explained to Marston how to enter citations, many times. 4RP 119-20. Marston's complaint that he got too many results when he entered a query is not surprising. His lack of sophistication in efficiently sorting those results is a function of his lack of legal training - a deficit inherent in pro se status.

Further, the Westlaw computer was not the only source of legal material provided to Marston. Standby counsel provided sample trial memoranda and sample jury instructions by January 2009, months before trial. 4RP 29. The scope of legal material provided by standby counsel is not a matter of record. The extent of Marston's access to legal materials beyond the Westlaw computer has not been established on this appeal.

Marston's argument on appeal that browsing through books is a necessary component of access to legal materials is unsupported by authority. A Westlaw user also may browse the legal materials on the computer, using the Table of Contents of a resource, if that is preferred.

Considering all of the circumstances of this case, providing this intelligent, literate defendant access to legal materials via Westlaw did not deprive him of constitutionally sufficient access to legal materials.

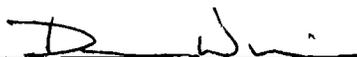
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Marston's convictions and the sentence imposed.

DATED this 6th day of December, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
DONNA WISE, WSBA 13224
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kari Dady and Christopher Gibson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. LARRY MARSTON, Cause No. 63713-4-I, 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.



Name
Done in Seattle, Washington

Date


12-06-10