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NO. 67373-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY JACOBS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

---

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether Jacobs had sufficient notice that the State would allege an aggravating circumstance and whether his jury waiver was valid where the record establishes that trial counsel and Jacobs knew prior to trial the aggravating circumstance would be alleged and were prepared to defend against it at trial.

2. Whether the trial court exercised sound discretion in denying the defendant's motion for a new trial on grounds of ineffective assistance of counsel where the record establishes that trial counsel and Jacobs were communicating effectively during the trial and that trial counsel provided effective representation that resulted in an acquittal on the most serious charge and a "no" finding on a deadly weapon enhancement.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Jeremy Jacobs, with felony harassment - domestic violence for threatening to kill his girlfriend, Terri Crow, on May 15, 2010. CP 1-4. John Ostermann, a public defender, was assigned to represent Jacobs.

Jacobs vociferously opposed "any continuances of any kind since he was arraigned" on June 2, 2010. RP (8/10/10) 13. As a result, a minimal number of pretrial continuances were granted only for good cause over Jacobs's objections. RP (7/30/10) 9-10; RP (8/10/10) 13, 14. Jacobs also objected when the trial prosecutor informed his attorney that more serious charges would be filed if Jacobs did not accept a plea bargain. RP (7/30/10) 10; Post-Trial Ex. 3. Jacobs was also very upset with his attorney for requesting a continuance over his objection in order to conduct an investigation, so he filed a motion to discharge him. CP 7-10.

Jacobs's motion to substitute counsel was heard on August 10, 2010 before the Honorable Richard McDermott. During the hearing, the prosecutor stated that he did not think there would be any further delays in the case because defense counsel was ready for trial. Accordingly, the court explained to Jacobs that if the court granted his request for a new attorney, there would undoubtedly be further continuances. RP (8/10/10) 17. Nonetheless, Jacobs said he was "not gonna work with this gentleman any longer," and counsel agreed that Jacobs did not have "confidence in [him] at all." RP (8/10/10) 18. At that point, the court agreed to grant Jacobs's motion, but warned him that it would be the only time that the court

would grant such a request, and that if the new attorney was "not as good as Ostermann, too bad." RP (8/10/10) 19-20. Jacobs then reconsidered his request, and stated that he would rather be represented by current counsel rather than tolerate any further delays in his case. RP (8/10/10) 20. The court then denied Jacobs's motion to substitute counsel without prejudice, and told Jacobs to renew it if his dissatisfaction continued. RP (8/10/10) 21. The court also set Jacobs's pro se motion to dismiss on speedy trial grounds for argument at a later date. RP (8/10/10) 22.

Jacobs's pro se motion to dismiss was heard on August 20, 2010 before the Honorable Brian Gain. The court correctly ruled that the motion was without merit because the right to effective assistance of counsel is more important than the right to have a trial within the strict limitations of the time for trial rule. RP (8/20/10) 28. Jacobs then stated that his attorney was not effective, and voiced his perception that counsel was not doing anything except trying to "coerce" or "threaten" him into taking a plea bargain. RP (8/20/10) 29. The court explained that it was counsel's job to explain what Jacobs's options were, but stated that Jacobs could renew his motion to substitute counsel if he wanted to do so. RP (8/20/10) 29-30.

Another hearing was held on September 9, 2010 before the Honorable Mary Roberts. The prosecutor stated that the hearing had been set so that Jacobs could renew his motion to substitute counsel. At that point, defense counsel explained that Jacobs did *not* want a new lawyer because it would cause further delay, but that counsel was moving to withdraw from the case because he "believe[d] quite firmly that [their] communication has broken down." RP (9/9/10) 31. Counsel stated that Jacobs had accused him of being "dishonest" and not having Jacobs's best interests in mind, and that Jacobs had complained about him to the bar association. In sum, counsel stated that it would not be "fruitful" for him to continue to represent Jacobs. RP (9/9/10) 32.

Jacobs opposed counsel's motion to withdraw, stating:

But Your Honor, there's no reason for -- for him to be discharged off my case. I only put the letter in for my purposes and my records than -- for the -- for the Bar -- for the -- what I have -- complaint I made with the Bar. I'm not asking him to -- to be discharged. I just want his conduct corrected and so we can go on into trial. I don't need him off my case at this time.

RP (9/9/10) 32. The court asked him, "So, Mr. Jacobs, do you want me to discharge Mr. Ostermann . . . from your case?" Jacobs replied, "No. No, I don't," and reiterated, "I just want to go to trial."

RP (9/9/10) 36. The court acknowledged that defense counsel was

facing "an extreme challenge" in representing Jacobs, but denied counsel's motion to withdraw. RP (9/9/10) 37.

Trial began on September 28, 2010 before the Honorable Andrea Darvas. Defense counsel stated that Jacobs had decided to waive his right to a jury trial after discussing the issue extensively, and invited the court to perform a colloquy. RP (9/28/10) 8. After the court conducted a colloquy, Jacobs stated that he wanted a few more minutes to discuss the issue with defense counsel. RP (9/28/10) 8-10. After a recess, the defendant decided he still wanted a jury trial. RP (9/28/10) 11. The State then amended the information to allege the following crimes: assault in the first degree (count I), assault in the second degree (count II), felony harassment (count III), and witness tampering (count IV), all with domestic violence designations and with deadly weapon enhancements on counts II and III. RP (9/28/10) 11; RP (9/29/10) 84-85; CP 29-31.

The case proceeded with pretrial motions, during which King County Sheriff's Deputies Lohse-Miranda, Abbott, and Nelson testified regarding the circumstances surrounding Jacobs's arrest

and the statements that Terri Crow had made at the scene.<sup>1</sup> RP (9/28/10) 14-68, 77-112. In addition, the prosecutor presented testimony from Detective Melissa Rogers in an effort to provide sufficient foundation for the admission of a cell phone video of Crow that Jacobs had made during the incident. RP (9/28/10) 113-37; RP (9/29/10) 3-6, 14-17. After extensive argument, the trial court ruled that the cell phone video was admissible; however, the trial court also ruled that almost all of Terri Crow's statements were inadmissible if Crow did not appear and testify at trial because admitting the statements would violate Jacobs's right to confrontation. RP (9/29/10) 18-70.

After the trial court made these rulings, Jacobs again stated that he wanted to waive his right to a jury trial. Jacobs affirmed on the record that he was "really sure" that he wanted the trial court to hear his case instead of a jury, and defense counsel affirmed that Jacobs's waiver was knowing and voluntary. RP (9/29/10) 91-92. Jacobs executed a written waiver as well. CP 28.

Shortly after Jacobs waived jury, the State asked the trial court to compel defense counsel to provide a copy of the audio-

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<sup>1</sup> The State offered this testimony regarding Crow's hearsay statements because Crow was not a cooperative witness and had not yet been located for trial.

recorded defense interview with Terri Crow. Counsel agreed he was required to provide the interview to the State, and promised to do so. RP (9/29/10) 98. The parties also agreed that the trial court could consider the pretrial testimony for purposes of the trial.

RP (9/30/10) 3.

The trial recessed for the weekend on Thursday, September 30, 2010. When the trial resumed on Monday, October 4, 2010, the prosecutor informed the court and the defense that Terri Crow had been apprehended and would be testifying at trial. RP (10/4/10) 3. The prosecutor also moved to amend the information because Crow's defense interview, a copy of which defense counsel had very recently provided, contained substantial evidence supporting a domestic violence "pattern of abuse" aggravating circumstance.<sup>2</sup> RP (10/4/10) 4-5. Defense counsel objected to the aggravating circumstance on grounds of vagueness; he did not object on grounds of notice or timeliness. RP (10/4/10) 5-6. The trial court overruled counsel's vagueness objection and allowed the State to

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<sup>2</sup> This aggravating circumstance applies if "the current offense involved domestic violence," and "was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim . . . manifested by multiple incidents over a prolonged period of time[.]" RCW 9.94A.535(3)(h)(i).

amend the information to allege the aggravating circumstance.

RP (10/4/10) 6-8; CP 225-28.

At the conclusion of the trial, the trial court convicted Jacobs of assault in the second degree (count II), felony harassment (count III), and witness tampering (count IV). The court found that each offense was a crime of domestic violence, and the court found that the State had proved the "pattern of abuse" aggravating factor for counts II and III. Although the court found that the State had proved the deadly weapon allegation for count III, the court rejected the deadly weapon allegation for count II. The court acquitted Jacobs of assault in the first degree (count I). CP 32-45.

Although Jacobs had expressed no dissatisfaction or disagreement with defense counsel during trial, Jacobs's allegations that counsel was ineffective resurfaced at the sentencing hearing on October 27, 2010. RP (10/27/10) 3-4. Rather than proceed with sentencing, the trial court allowed defense counsel to withdraw, ordered the appointment of new counsel for Jacobs's motion for a new trial, and continued the matter for an evidentiary hearing. RP (10/27/10) 5-10; RP (12/21/10) 2.

Jacobs's new counsel identified five bases for the motion for a new trial: 1) whether Jacobs received ineffective assistance of counsel due to a complete breakdown in communication; 2) whether Jacobs's right to a fair trial was violated because the State amended the information to allege an aggravating circumstance after the trial had begun; 3) whether Jacobs's waiver of the right to a jury trial was knowing and voluntary; 4) whether Jacobs's waiver of the right to testify was knowing and voluntary; and 5) whether Jacobs's cell phone and a butcher knife should have been suppressed.<sup>3</sup> CP 134-45. The issues were extensively briefed, and the motion was litigated over several lengthy hearings, during which both Jacobs and trial counsel testified. CP 73-172; RP (2/17/11) 47-118; RP (4/20/11) 164-228, 244-306. In addition, trial counsel submitted to a lengthy interview, a transcript of which was admitted as testimonial evidence by agreement of the parties. RP (2/17/10) 44; Post-Trial Ex. 8.

As will be discussed at length and in detail in the argument sections below, the trial court rejected all of Jacobs's claims and denied the motion for a new trial. CP 191-204. The trial court

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<sup>3</sup> Jacobs has not raised any issues on appeal with respect to his right to testify or the suppression of evidence.

found that Jacobs and defense counsel knew before trial that an aggravating circumstance would be alleged based on Terri Crow's defense interview, that Jacobs had waived jury knowingly and voluntarily, and that although Jacobs and trial counsel had a very difficult relationship prior to trial, they had a productive and effective relationship during the trial. CP 191-98, 200-02. In so doing, the trial court specifically found that Jacobs's testimony "that his conflicts with Ostermann continued throughout the course of the representation are not credible and are not consistent with all of the other evidence." CP 201.

On July 8, 2011, after more than a year of litigation, the trial court imposed a sentence totaling 22 months in prison. CP 230-37. Four months of that prison term was imposed as an exceptional sentence for the domestic violence "pattern of abuse" aggravating circumstance. CP 231, 233; RP (7/8/11) 488-89.

Jacobs now appeals. CP 229.

## **2. SUBSTANTIVE FACTS**

Jacobs and Terri Crow were in a long-term relationship and they have a son together. RP (10/4/10) 31-32. Crow also has two daughters from a previous relationship. RP (10/4/10) 32. Jacobs

and Crow's relationship was marred by frequent arguments and Jacobs's controlling, violent behavior. Jacobs's physical and psychological abuse of Crow included punching Crow on numerous occasions, preventing her from leaving the house or having friends over, and keeping Crow's bank card in order to control her access to money. RP (10/4/10) 65-66, 78-79, 81-82. During one incident, Jacobs pushed one of Crow's daughters down and kicked her in front of Crow. RP (10/4/10) 77. Crow had previously petitioned for a protection order, but she discontinued those efforts when Jacobs took their son and refused to return him; Crow had to drop her petition in order to get her son back. RP (10/4/10) 79-80.

In January 2009, an incident occurred that resulted with Crow being taken to the hospital with injuries to her jaw and forehead and an eye that was swollen shut. RP (10/4/10) 66-75. After this incident, Jacobs and Crow moved from Oklahoma to Seattle.<sup>4</sup> RP (10/4/10) 66.

On May 14-15, 2010, Crow finished her shift at the Cheesecake Factory restaurant at around midnight and drove

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<sup>4</sup> The trial court disregarded the evidence concerning this incident because Terri Crow invoked her Fifth Amendment privilege not to answer certain questions about it, and thus, Jacobs did not have a full opportunity for cross-examination. RP (10/4/10) 107-12, 130-53; CP 34 (footnote 2).

home to the apartment in SeaTac that she shared with Jacobs and the children. RP (10/4/10) 33. As soon as Crow arrived, Jacobs told her that he had been in an argument with their next-door neighbor, a large man named "Fred." Jacobs said that Fred and his girlfriend had "punked" him; Jacobs was agitated and upset. RP (10/4/10) 34-36. Jacobs picked up a large knife from the kitchen and poked a hole in the couch. RP (10/4/10) 37. Although Crow was concerned by Jacobs's behavior because he often took it out on her when he was upset with someone else, Crow mostly thought that Jacobs was being "loud and drunk." RP (10/4/10) 38-39.

Crow yelled at Jacobs for poking a hole in the couch. RP (10/4/10) 37. Jacobs then grabbed the necktie that was part of Crow's work uniform and yanked it so that her face was close to his. Jacobs told Crow not to "start with him" because he had "had a bad day." RP (10/4/10) 40-41. Crow pulled away and went into the bedroom to change out of her uniform. RP (10/4/10) 41. Jacobs followed her into the bedroom and insisted that she come out and eat the dinner he had cooked for her. Crow told Jacobs she wanted to go to bed because Jacobs was drunk and she did not want to argue with him, but Jacobs insisted. RP (10/4/10) 42.

While Crow ate, Jacobs continued to talk about the dispute with the neighbors. When Crow was done eating, she told him she was going to bed. RP (10/4/10) 43. Crow went into the bedroom, cracked the window open, and lit a cigarette. Jacobs followed her into the bedroom and got "in [her] face." Crow yelled at Jacobs to leave her alone; Jacobs said, "If you don't be quiet, you know, I'm going to put you out the window." RP (10/4/10) 45-46.

Jacobs grabbed Crow by the chest and face, pushed her up against the window, and reiterated that he was going to throw her out of the window. Jacobs did not immediately succeed because the windowsill was too high, so he grabbed Crow's legs and tried to flip her out of the window. Crow threw her weight down to the floor to prevent Jacobs from doing this. Crow scraped her back on the windowsill, and she had bruises on her legs from where Jacobs grabbed her. RP (10/4/10) 46-49, 56. Crow and Jacobs's apartment was on the second floor, and below their bedroom window was asphalt. RP (9/30/10) 21.

As Crow sat on the floor and cried, Jacobs started videotaping her with his cell phone. He taunted her while videotaping, asking her "What do you have to say? What do you have to say to the world?" Crow was "hysterical at that point."

RP (10/4/10) 50. Jacobs also threatened to kill Crow, the children and himself while videotaping. CP 36 (Finding of Fact #10).

Michelle Roberts, the manager of Jacobs and Crow's apartment building, was awakened that night by the sound of Jacobs and Crow arguing. Roberts heard Crow shout "get back" or "step back" several times, and she heard Jacobs call Crow a "bitch." RP (9/30/10) 41-46. Roberts went to her window, which was directly across from Jacobs and Crow's bedroom, and saw Jacobs slap Crow across the face. RP (9/30/10) 47-48. Crow cried out, and the yelling continued. Roberts got her phone and called 911. RP (9/30/11) 49.

After Jacobs finished videotaping Crow with his cell phone, Crow crawled into bed and pulled the covers over her head. Jacobs told her "to be quiet or he would kill [her]." RP (10/4/10) 52. Jacobs continued taunting and threatening Crow; he took the large butcher knife he had used to poke a hole in the couch and he tapped it on the dresser and the television in the bedroom so that Crow could hear it. Jacobs told Crow he would cut her and kill her, and he said he would throw Crow, the children, and himself out the window. RP (10/4/10) 54. Crow stayed under the covers and kept quiet. RP (10/4/10) 55.

King County Sheriff's Deputies Lohse-Miranda, Abbott, and Nelson had arrived at that point, and Deputy Abbott knocked on the door. RP (9/28/10) 51. Jacobs told Crow to stay quiet, but the police kept knocking. Crow told Jacobs that the police were not going to just go away, and Jacobs said, "Fine, go open the door. Just don't say anything." RP (10/4/10) 55.

Crow answered the door. Deputy Abbott saw that she was very upset and crying. Abbott asked her where Jacobs was, and Crow pointed behind her and said that Jacobs was in the bathroom. Abbott asked if he had any weapons, and Crow said that he had a knife. RP (9/28/10) 51-52. Abbott and Nelson entered the apartment, went into the bathroom, and took Jacobs into custody. RP (9/28/10) 52. As the deputies were taking Jacobs out of the apartment, he pushed back against their efforts to escort him out, looked at Crow, and said, in the presence of the deputies, "Terr[i], you better not say anything." RP (9/28/10 19, 54.

**C. ARGUMENT**

**1. JACOBS HAD NOTICE OF THE AGGRAVATING CIRCUMSTANCE AND HIS JURY WAIVER WAS KNOWING AND VOLUNTARY; THUS, THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE.**

Jacobs first claims that the trial court erred in imposing an exceptional sentence because the trial court should not have allowed the State to file the third amended information alleging the domestic violence "pattern of abuse" aggravating factor after the bench trial had begun. Jacobs makes this claim on grounds that he did not have sufficient notice of the aggravating factor, and that this renders his jury waiver invalid. Appellant's Opening Brief, at 16-27. These claims should be rejected. The defense received constitutionally adequate notice of the aggravating circumstance in this case, which was based primarily on new information that Jacobs's counsel had withheld from the State for as long as he was able to do so, and Jacobs both waived any objection as to timeliness and failed to demonstrate prejudice. Furthermore, an aggravating circumstance to which the defendant did not object and of which he had notice does not invalidate a knowing, intelligent, and voluntary jury waiver. Jacobs's arguments should be rejected.

As a preliminary matter, this claim is moot. Jacobs was sentenced to a total of 22 months in the Department of Corrections on July 8, 2011 after having been continuously in custody since his arrest on May 15, 2010; therefore, Jacobs has completed his prison term. CP 230-37. Thus, Jacobs's claim that the trial court erred in imposing an exceptional sentence is moot because Jacobs has already served that sentence and this Court can no longer provide relief. See State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (a claim regarding the length of a sentence is moot if that sentence has already been served); see also In re Personal Restraint of Mines, 146 Wn.2d 279, 283-84, 45 P.3d 535 (2002) (an appeal is moot if the appellate court can no longer grant relief); In re Detention of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (same). However, if this Court chooses to review Jacobs's claim in spite of its mootness, it should be rejected in any event.

By statute, the State is directed to give notice "[a]t any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced" that it intends to seek an exceptional sentence based on aggravating circumstances. RCW 9.94A.537(1). Although a defendant is entitled to notice of aggravating circumstances, they need not be charged in the

information because they are not essential elements of the underlying crime. State v. Siers, \_\_\_ Wn.2d \_\_\_, 2012 WL 1355763. Moreover, as Division Two of this Court has observed, "while the essential elements of the underlying crime may be readily discernable at the time the information is filed, facts supporting an exceptional sentence may only be revealed as the case develops." State v. Berrier, 143 Wn. App. 547, 555, 178 P.3d 1064 (2008). Furthermore, although the statute specifies that notice of an aggravating factor should be given prior to trial or guilty plea, "[o]ur state and federal constitutions require only that a criminal defendant be provided notice of the charges sufficient to allow the defendant to prepare a defense." Id. at 555-56 (citing State v. Yates, 161 Wn.2d 714, 757-60, 168 P.3d 359 (2007)). Therefore, even if notice does not strictly comply with the statute, notice is constitutionally sufficient if there is no prejudice to the defendant's ability to prepare a defense.

In this case, after the trial had begun with pretrial motions, the State asked the trial court to compel the defense to provide a copy of the audio-recorded defense interview of Terri Crow, whom the State had been unable to contact at that point. RP (9/29/10) 98. After reviewing this recording, the State discovered that it

contained previously undisclosed evidence of Jacobs's pattern of prior abuse against Crow. RP (10/4/10) 4-5. Although the State is not required to allege an aggravating circumstance in the information, the State did so in this case after discovering this additional evidence. RP (10/4/10) 4-5. Moreover, when the State moved to amend the information to allege the aggravating circumstance based on this previously undisclosed evidence, defense counsel did *not* object on grounds of timeliness. Rather, counsel objected on grounds that the "pattern of abuse" aggravating circumstance was vague. RP (10/4/10) 5-6.

This Court should hold that Jacobs's failure to object on grounds of timeliness at the time of the amendment constitutes a waiver of the statutory notice provision, particularly because the amendment was largely based on evidence that defense counsel admittedly withheld for tactical reasons until it was absolutely necessary for him to disclose it. Post-Trial Ex. 8, pgs. 30-31. Moreover, as this Court has observed, "[w]here the defendant fails to ask for a continuance [based on amendment of the charges during trial], there is presumed to be a lack of surprise and prejudice." State v. Schaffer, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993). Here, a lack of

surprise and prejudice need not be *presumed*. Rather, it is amply *established* by record of the motion for new trial, wherein defense counsel explained at length and in detail that he was aware that an aggravating factor would be alleged, that he discussed it with Jacobs, and that he was prepared to defend against it at trial. Post-Trial Ex. 8, pgs. 4,7, 30-31, 37-38; RP (4/10/20) 252-56, 270-71, 273, 282, 298, 300-01, 305-06. Based on this record, the trial court found that both defense counsel and Jacobs received adequate notice of the aggravating factor and that there was no prejudice to the defense. CP 192, 201-02.

Given the circumstances present in this case, this Court should hold that notice of the aggravating circumstance was constitutionally sufficient because the defense knew that it would be alleged based on Crow's defense interview, and there was no prejudice to the defendant's ability to mount a defense. This Court should also hold that even if the statutory notice provision was not strictly followed, any claim based on the statute was waived by the defendant's failure to object on grounds of timeliness.

For many of the same reasons, Jacobs's jury waiver is valid as well. Obviously, a waiver of the right to a jury trial must be knowing, intelligent, and voluntary. But in this case, as the trial

court found, both trial counsel and Jacobs knew about the aggravating circumstance and the evidence upon which it would be based. Moreover, Jacobs's reasons for deciding to execute a jury waiver were sound and the record demonstrates that he considered the decision carefully with the advice of counsel. Therefore, Jacobs's jury waiver was knowing, intelligent, and voluntary.

A criminal defendant has the constitutional right to be tried by a jury. State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994). Accordingly, the decision to waive the right to a jury trial must be made knowingly, intelligently, and voluntarily. Id. at 725; City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). However, "[t]he validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities." Stegall, 124 Wn.2d at 725 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938)).

Some constitutional rights may be waived more easily than others. In other words, "the inquiry by the court will differ depending on the nature of the constitutional right at issue." Stegall, 124 Wn.2d at 725. For instance, a waiver of the right to

counsel generally requires a full colloquy on the record to ensure that the defendant's request for self-representation is unequivocal and that the defendant understands the risks inherent in proceeding pro se. Id. (citing Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). In addition, a guilty plea, "which involves waiving numerous trial rights," requires a record sufficient to demonstrate not only a voluntary and intelligent waiver of such rights, but also the defendant's understanding of the consequences of the plea. Stegall, 124 Wn.2d at 725 (citing State v. Smissaert, 103 Wn.2d 636, 643, 694 P.2d 654 (1985)).

On the other hand, unlike the right to counsel or the right to plead not guilty, the right to a jury trial may be waived for tactical reasons "while still preserving to the accused the right to a fair trial." State v. Likakur, 26 Wn. App. 297, 303, 613 P.2d 156 (1980). Accordingly, "no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; all that is required is a personal expression of waiver from the defendant." Stegall, 124 Wn.2d at 725. In fact, "[t]he claim that an extended colloquy on the record is required for jury waiver has been rejected each time it has been presented." State v. Brand, 55 Wn. App. 780, 788, 780 P.2d 894 (1989), *rev. denied*, 114 Wn.2d

1002 (1990). Thus, a written waiver of the right to a jury trial constitutes "strong evidence" that the waiver is valid, particularly when coupled with trial counsel's representations to the court that the right is being waived intelligently and voluntarily. Id. In this case, there is not only a written waiver, but a record that demonstrates beyond question that the waiver was knowing, intelligent and voluntary.

On the first day of trial when the issue came up the first time, the trial court conducted a colloquy (even though none was required), after which Jacobs requested a recess to discuss it further with counsel, and then he decided he still wanted a jury trial. RP (9/28/10) 4-11. As pretrial motions proceeded, after the trial court had ruled that only limited out-of-court statements by Terri Crow would be admitted if Crow did not testify, but that the cell phone video was admissible, Jacobs decided he wanted to waive jury after all and stated unequivocally that he was "really sure" about that decision. RP (9/29/10) 18-32, 66-70, 91. Trial counsel affirmed that Jacobs's decision to waive jury was knowing and voluntary. RP (9/29/10) 92.

During litigation of Jacobs's motion for a new trial, trial counsel explained at length and in detail that he had discussed the

issue of waiving jury with Jacobs on numerous occasions. Post-Trial Ex. 8, pgs. 14-15, 21-25, 41. Trial counsel explained that he discussed with Jacobs the fact that having a bench trial would allow the State far less time to locate Terri Crow, and that a judge (unlike a jury) would not be prejudiced by the cell phone video and would be more objective in deciding the case and far less likely to convict Jacobs of first-degree assault. Post-Trial Ex. 8, pgs. 14-16, 24-25. Trial counsel also explained that he had discussed the aggravating circumstance with Jacobs prior to trial, and that he anticipated that the State would allege it based on Terri Crow's interview, which he had played for Jacobs in its entirety. Post-Trial Ex. 8, pgs. 37-38. Although trial counsel did not separately discuss Jacobs's right to a jury trial on the aggravating circumstance, trial counsel explained that he did not think it mattered because the reasons for having a bench trial "were even more persuasive in [his] mind when it came to the aggravating factors[.]" Post-Trial Ex. 8, pg. 57.

Based on this record, the trial court found that trial counsel "had discussed with Jacobs the likelihood of such an aggravator being added by the State when [counsel] played the recorded interview with Crow for Jacobs, which was weeks before trial."

CP 201. Accordingly, as the trial court concluded, "[t]he aggravating factor arose from information that [counsel] had discussed with Jacobs well before Jacobs made the decision to waive jury," and thus, there is no basis to find that Jacobs's jury waiver was not valid. CP 202.

Nonetheless, Jacobs argues that the record is insufficient to establish that he knowingly waived jury on the aggravating circumstance. Appellant's Opening Brief, at 23-25. In support of this argument, he cites State v. Monroe, 126 Wn. App. 435, 109 P.3d 449 (2005), *overruled by* State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006), and State v. Borboa, 124 Wn. App. 779, 102 P.3d 183 (2004), *rev'd in part*, 157 Wn.2d 108, 135 P.3d 467 (2006). These cases are not on point because they were decided before the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), holding that aggravating circumstances must be found by a jury. Although Jacobs argues that "[i]t is not material that Mr. Jacobs entered his jury trial waiver after Blakely was decided,"<sup>5</sup> this argument is not well taken. As trial court found, trial counsel

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<sup>5</sup> See Appellant's Opening Brief, at 25.

discussed with Jacobs waiving jury *on the case*, which necessarily includes aggravating circumstances post-Blakely. CP 202.

Jacobs's argument fails.

In sum, there are no grounds to vacate the trial court's finding of the domestic violence "pattern of abuse" aggravating factor or reduce Jacobs's sentence. This Court should reject Jacobs's claim, and affirm.

**2. THE TRIAL COURT EXERCISED ITS DISCRETION PROPERLY IN DENYING JACOBS'S MOTION FOR A NEW TRIAL ON GROUNDS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Jacobs also claims, as he did in the trial court, that the breakdown in communication with his trial counsel was so severe that he was denied effective assistance of counsel. Appellant's Opening Brief, at 27-36. This claim should also be rejected. Although the record establishes that Jacobs and trial counsel had a very difficult relationship *before* trial, the record also establishes that Jacobs and trial counsel had a productive and effective relationship *during* trial. Therefore, as the trial court correctly concluded, Jacobs was not deprived of the right to effective assistance of counsel based on a complete breakdown of

communication because Jacobs and his counsel *were* communicating effectively during the trial. Accordingly, the trial court did not abuse its discretion in denying Jacobs's motion for a new trial on these grounds.

A trial court's ruling denying a defendant's motion for a new trial under CrR 7.5 is reviewed for abuse of discretion. State v. Thach, 126 Wn. App. 297, 318, 106 P.3d 782, *rev. denied*, 155 Wn.2d 1005 (2005). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

As a preliminary matter, Jacobs frames his claim within the three-prong test for reviewing the denial of a motion to substitute counsel rather than under the rubric of reviewing the denial of a motion for new trial. See Appellant's Opening Brief, at 29 (stating that "[t]o determine whether an attorney-client conflict required the substitution of counsel, the Washington Supreme Court has adopted the Ninth Circuit's three-part test"). But given the

procedural history of this case, the issue on appeal is not whether Jacobs should have been granted new counsel; rather, the issue is whether Jacobs should have been granted a new *trial*. Accordingly, this Court's inquiry must focus on whether the trial court abused its discretion in ruling that a new trial was not warranted because Jacobs received effective assistance of counsel at trial.

Ineffective assistance of counsel occurs only if "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prove ineffective assistance of counsel in the vast majority of cases, a defendant must show both prongs of a two-part standard: 1) that trial counsel's performance fell below a minimum objective standard of reasonableness (the performance prong); and 2) that but for this substandard performance, there is a reasonable probability that the outcome would have been different (the prejudice prong). State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland).

But there are narrow exceptions to the general rule that the defendant must specifically demonstrate prejudice in order to obtain

a new trial on grounds of ineffective assistance of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). As is relevant here, one such exception is "when the breakdown of a relationship between attorney and defendant from irreconcilable differences results in the complete denial of counsel." Id. In determining whether such a denial of counsel has occurred, a court examines "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives. If the representation is inadequate, prejudice is presumed." Id. at 724. In other words, if the defendant demonstrates both a complete breakdown in communication *and* resulting deficient representation at trial, the defendant has made a showing of ineffective assistance of counsel and no further showing of prejudice is necessary.

The United States Supreme Court has observed that the constitution does not guarantee a "meaningful relationship" between a criminal defendant and trial counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). Therefore, the fact that the defendant and counsel have a difficult relationship is not sufficient to satisfy the standard for a complete denial of counsel. Rather, "because the purpose of providing

assistance of counsel is to ensure that criminal defendants receive a fair trial, the appropriate inquiry focuses on the adversarial process, not the accused's relationship with his lawyer as such." In re Stenson, 142 Wn.2d at 725 (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). In other words, the focus must be on the competency of counsel's representation at trial, not on whether counsel and the defendant got along with one another at other times in the proceedings. Accordingly, the cases addressing this issue analyze whether and to what extent a breakdown in communication has actually affected counsel's representation during trial in determining whether a new trial is warranted.

For example, in Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970), the court found that the defendant "was forced into a trial" with an attorney with whom he completely refused to communicate. Id. at 1169. As the court further noted, this total lack of communication directly impacted the defendant's trial: "Brown did not testify in his own behalf, there was only a perfunctory defense, and the jury found him guilty of murder in the first degree," which the trial judge "promptly reduced" to murder in the second degree. Id. In fact, the court opined that with effective assistance of

counsel, it was likely that the defendant would have been convicted only of manslaughter. Id. The court held that there had been a complete denial of counsel, and that the defendant should be appointed a new attorney on remand "in whom he may, if he does not demonstrate obstinance, recalcitrance, or unreasonable contumacy, repose his confidence." Id. at 1170. Thus, although the court found a complete denial of counsel based on the record at trial, the court also recognized that a defendant's obstreperous behavior, standing alone, is insufficient to demonstrate a complete denial of counsel.

In United States v. Williams, 594 F.2d 1258 (1979), the record amply demonstrated that the defendant and trial counsel were not communicating, and that their interactions consisted of "quarrels, bad language, threats, and counter-threats." Id. at 1260. When the defendant moved for substitution of counsel, the trial court expressed its mistaken belief that it was "improper" to allow an indigent defendant to "fire" his public defender and obtain a new one. Id. Due to the trial court's improper refusal to consider the defendant's motion to substitute counsel, the defendant decided instead to proceed pro se. "As might be anticipated, the defense was a disaster." Id. Accordingly, the court held that the defendant

was "deprived of the constitutionally guaranteed right to have the effective assistance of counsel *at trial*." Id. (emphasis supplied). Nonetheless, the court also recognized that a motion to substitute counsel need not be granted if the difficulties between attorney and client do not rise to the level of an irreconcilable conflict, or if the motion is made "on the eve of trial." Id.

In Frazer v. United States, 18 F.3d 778 (9th Cir. 1994), the defendant alleged that his trial attorney had used a highly offensive racial slur, told him he hoped he would be sentenced to life in prison, and threatened to provide ineffective representation if he insisted on going to trial rather than pleading guilty.<sup>6</sup> Id. at 780. The defendant ultimately waived his right to a jury trial, submitted to a bench trial on stipulated facts, and was convicted of eight counts of bank robbery. Id. at 780. The circuit court concluded that the defendant's allegations, if true, would demonstrate a complete denial of counsel: "It would be astonishing to hold that the Sixth Amendment right to appointed counsel is satisfied by the provision of an attorney who explicitly assaults his client with racial slurs and

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<sup>6</sup> Due to the procedural posture of the case (*i.e.*, because the trial court had denied the defendant's motion for an evidentiary hearing), the circuit court was required to treat defendant Frazer's allegations as true for purposes of the appeal. Id. at 781. This case is in the opposite posture: the trial court held an evidentiary hearing and found Jacobs's claims to be unfounded. CP 191-204.

makes threatening and improper statements to the client capable of overriding the client's own judgment as to how he should exercise his various rights." Id. at 784. In other words, the court found that counsel's alleged conduct, if true, clearly had a negative effect on the manner in which the trial was conducted (or, more accurately, *not* conducted) and on the representation that the defendant had received at trial.

In sum, these cases have one crucial feature in common: a severe breakdown in communication between the defendant and trial counsel that continued throughout the trial and negatively impacted the trial. It is this impact on the trial that resulted in a complete denial of counsel in each case. But on the other hand, when the defendant is the primary source of strife in the attorney-client relationship and the attorney provides competent representation at trial in spite of the defendant's refusal to cooperate, reversal is not warranted.

In Morris v. Slappy, the defendant was highly displeased that a new attorney was appointed shortly before trial because his original attorney was in the hospital. The new attorney maintained that he was ready for trial and did not need a continuance. But the defendant, who insisted that a continuance was necessary, became

increasingly uncooperative as the case progressed; he told the trial court repeatedly that his lawyer did not represent him, and he refused to take the stand and testify at trial in spite of counsel's explicit advice to the contrary. Slappy, 461 U.S. at 5-9.

Nonetheless, the Supreme Court concluded that the defendant was not entitled to a new trial because counsel had provided effective representation in spite of the defendant's unreasonable behavior:

Nor is there any merit to the claim that the denial of a continuance prevented [trial counsel] from being fully prepared for trial. Despite respondent's adamant -- even contumacious -- refusal to cooperate with [trial counsel] or to take the stand as [he] advised, in spite of respondent's numerous outbursts and disruptions, and in the face of overwhelming evidence of guilt, [trial counsel] succeeded in getting a "hung jury" on the two most serious charges at the first trial. Given the undisputed and overwhelming evidence of guilt, the jury's failure at the first trial to convict the defendant on the more serious charges cannot reflect other than favorably on [counsel's] readiness for trial.

Slappy, 461 U.S. at 12; see also Stenson v. Lambert, 504 F.3d 873, 887 (9th Cir. 2007) (noting that the competence of counsel's representation at trial is an important consideration when the defendant claims an irreconcilable conflict resulting in a complete denial of counsel).

This case is far more like Slappy than it is like Brown, Williams, or Frazer. Although it is undisputed that Jacobs and trial counsel had difficulty communicating prior to trial, the record amply demonstrates that these difficulties were primarily attributable to Jacobs's strenuous objections to any continuances for any reason, his refusal to listen to counsel's advice regarding plea bargaining and the charges the State would add for trial, and his abusive behavior toward counsel, which included insults directed at counsel and his family. See, e.g., RP (7/30/10) 9-10; RP (8/10/10) 13-14, 18; RP (8/20/10) 29-30; Post-Trial Ex. 8, pgs. 10, 45-46.

Nonetheless, the record also amply demonstrates that counsel provided competent representation during trial. Counsel succeeded in convincing the trial court to acquit Jacobs of first-degree assault, which would have carried a sentence of approximately ten years in prison, and he also convinced the trial court not to find a deadly weapon enhancement on second-degree assault, which would have resulted in an additional year in prison. CP 40-43. Indeed, this case is even less troubling than Slappy, because the record establishes that Jacobs and trial counsel were communicating productively during the trial, to the point where Jacobs candidly admitted to his mother that counsel was a good

lawyer who was doing a good job defending him. RP (4/20/11) 200-05. The trial judge also described her own observations of the interactions between Jacobs and counsel in the courtroom during trial in her ruling denying Jacobs's motion for a new trial, and she found those interactions to be "uniformly cordial, positive, and cooperative." CP 193. The trial court also found that Jacobs's testimony to the contrary was not credible -- a finding that cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In sum, this record does not demonstrate a complete breakdown in communication that continued during the trial and affected counsel's ability to render effective assistance of counsel at trial. In fact, the record demonstrates quite the opposite. Therefore, Jacobs has failed to show that the trial court abused its discretion in denying his motion for a new trial, and his arguments to the contrary should be rejected.

Nonetheless, Jacobs argues that he should be granted a new trial, citing several cases that he claims support his position. See Appellant's Opening Brief, at 30-33 (citing United States v. Nguyen, 262 F.3d 998 (9th Cir. 2002), Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), United States v. Adelzo-Gonzales, 268

F.3d 772 (9th Cir. 2001), and United States v. Moore, 159 F.3d 1154 (9th Cir. 1998)). These cases are not on point, because in each of these cases (as in Brown, Williams, and Frazer) the breakdown in communication continued through trial and affected the trial. See Nguyen, 262 F.3d at 1004 (the defendant refused to speak to his lawyer during trial); Daniels, 428 F.3d at 1197-99 (in a death penalty case, the breakdown in communication continued during both the guilt and penalty phases); Adelzo-Gonzalez, 268 F.3d at 776 (the defendant pled guilty to avoid going to trial with counsel with whom he would not cooperate; the defendant stated on the record during the plea colloquy that he and counsel were not communicating); Moore, 159 F.3d at 1160-61 (the trial court erred in refusing to allow substitution of counsel solely to avoid a continuance; lack of communication between defendant and counsel continued during the trial).

In addition, Jacobs emphasizes his attempts to obtain new counsel and counsel's motion to withdraw prior to trial as evidence of an irreconcilable conflict resulting in a complete denial of counsel. Appellant's Opening Brief, at 36. But this does not adequately describe the record, which reveals that Jacobs withdrew his motions to substitute counsel because he adamantly objected to

any further continuances, and that Jacobs strenuously opposed trial counsel's motion to withdraw. RP (8/10/10) 18-20; RP (9/9/10) 31-37. In fact, during the last hearing at which Jacobs's motion for new counsel and counsel's motion to withdraw were addressed, the court asked Jacobs specifically, "So, Mr. Jacobs, do you want me to discharge Mr. Ostermann . . . ?" Jacobs replied, "No. No, I don't," and reiterated, "I just want to go to trial." RP (9/9/10) 36. This record refutes Jacobs's claim that he persisted in expressing his desire for new counsel due to an irreconcilable conflict.

In sum, Jacobs cannot show that the trial court manifestly abused its discretion in denying Jacobs's motion for a new trial based on ineffective assistance of counsel. The record demonstrates that despite their difficulties prior to trial, Jacobs and trial counsel communicated effectively during the trial and counsel provided competent representation that resulted in an acquittal on the most serious charge and a "no" finding on a deadly weapon enhancement. Thus, the trial court's ruling denying Jacobs's motion for a new trial is reasonable and based on tenable grounds supported by the record. This Court should affirm.

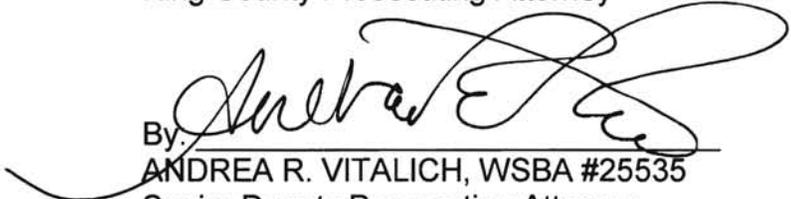
D. CONCLUSION

For the foregoing reasons, Jacobs's convictions and sentence should be affirmed.

DATED this 4<sup>th</sup> day of May, 2012.

Respectfully submitted,

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By, 

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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JEREMY JACOBS, Cause No. 67373-4-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.

U Brame  
Name  
Done in Seattle, Washington

5/4/12  
Date