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STATE OF WASHINGTON
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NO. ___
(COA NO. 84127-1-I)

Case #: 1031904

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON HOLMES,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Brandon Holmes asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Holmes seeks review of the Court of Appeals's decision in *State v. Holmes*, No. 84127-1-I (May 20, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. When a person accused of a crime moves to discharge counsel due to an irreconcilable conflict, the Sixth Amendment requires the court to conduct a meaningful inquiry into the nature and extent of the conflict. Here, trial counsel's near-complete failure to prepare for the trial for over two years and the resulting breakdown in communication created an irreconcilable conflict prompting Mr. Holmes to move for new counsel. However, the trial court summarily denied the motion without inquiry. The Court of

Appeals's conclusions that no conflict existed and the trial court's inquiry was adequate are contrary to precedent, calling for review. RAP 13.4(b)(1), (2).

2. A serious trial irregularity deprives the accused of the due process right to a fair trial. Here, during the trial, the jury learned Mr. Holmes's partner was too ill to come to court, and Mr. Holmes lived with her at the time. As the Omicron wave of the COVID-19 pandemic was in full swing, the jury could not help but conclude the witness had the illness and exposed Mr. Holmes to it, who in turn exposed the entire courtroom. The Court of Appeals's holding Mr. Holmes invited the error gives short shrift to his right to due process, calling for review. RAP 13.4(b)(3).

3. The prosecutor violated Mr. Holmes's right to attend his trial under article I, section 22 by commenting that his presence allowed him to tailor his

testimony to other witnesses'. Though counsel did not object, this Court has held a comment on the exercise of a constitutional right requires reversal unless proven harmless beyond a reasonable doubt even absent an objection. The Court of Appeals's holding Mr. Holmes waived the error is contrary to this Court's precedent, calling for review. RAP 13.4(b)(1), (3).

4. An unconstitutional community custody condition is ripe for review if the error is primarily legal, the condition is final, the issues do not require factual development, and hardship results. The trial court imposed a condition satisfying all four factors—it requires Mr. Holmes to allow the Department of Corrections to search his home without reasonable cause in violation of article I, section 7. The Court of Appeals nonetheless held the condition unripe based on this Court's precedent. That precedent is incorrect, as

well as harmful because it burdens judicial economy. This Court should grant review. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Mr. Holmes had two children with his partner, Peggy Toves. RP 1099–1101. Ms. Toves also has two older children predating their relationship, J.R. and H.P. RP 1099, 1101. J.R. was in middle school and, like many teenagers, she was rebellious. RP 1112–13. One day, while complaining to one of Mr. Holmes's sisters that her parents took away her phone, J.R. said Mr. Holmes touched her inappropriately. RP 803, 808, 819. Mr. Holmes's sisters called Child Protective Services, who notified law enforcement. RP 826–27.

Mr. Holmes's first three appointed attorneys withdrew on the attorney's or Mr. Holmes's motion, or both. RP 16–19, 25–29; CP 19. The Court appointed Jerry Stimmel as counsel in October 2019. RP 48.

Mr. Stimmel asked for numerous continuances of the trial date independent of delays introduced by the COVID-19 pandemic. RP 48–52, 62–63, 67, 72–73, 85, 91; Br. of App. at 12–18. During the years between his appointment in 2019 and the trial in March 2022, Mr. Stimmel did nothing to prepare except interview J.R. shortly before the trial was to begin. RP 78. Even on the first day of the trial, Mr. Stimmel complained he was not adequately prepared. RP 126–27.

Mr. Holmes moved to discharge Mr. Stimmel. RP 115–16. He complained about Mr. Stimmel's lack of preparation and communication, and felt forced into an intolerable choice between pleading guilty without understanding the consequences or going to trial with an unprepared lawyer. RP 115–16. The trial court asked Mr. Holmes no questions and denied the motion based solely on the age of the case, the number of

lawyers previously appointed, and unfounded suspicion the motion was "strategic." RP 116–18.

The prosecution planned to call Ms. Toves as a witness. RP 870. On the evening before her scheduled testimony, Ms. Toves told the prosecutor she had COVID-19. RP 869. The court told the jury Ms. Toves would testify remotely because she "is ill and cannot safely come to court." RP 1096. During her testimony, Ms. Toves said she lived with Mr. Holmes. RP 1098. After the court recessed, three jurors approached the bailiff with concerns that Mr. Holmes may also have COVID-19. RP 1222. Mr. Holmes tested negative the next day, but the court found the results only "somewhat" reassuring. RP 1225.

Mr. Holmes testified. RP 1406. On cross, the prosecutor asked Mr. Holmes whether he had the opportunity to be present throughout "the entire trial"

and "got to hear every single witness testify." RP 1481–82. The prosecutor also highlighted that Mr. Holmes was "the only person that got to do that and testify." RP 1482. When Mr. Holmes moved to preclude the prosecution from relying on this questioning in closing, the prosecutor argued Mr. Holmes "put his presence in the courtroom at issue." RP 1551–52.

The jury found Mr. Holmes guilty. CP 53. The trial court imposed a community custody condition allowing the Department of Corrections to search his home at any time without reasonable cause. CP 68.

E. WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals's holding the trial court did not violate Mr. Holmes's right to conflict-free counsel is contrary to precedent.**

A person accused of a crime is entitled to the assistance of competent, conflict-free counsel at all stages of a criminal proceeding. U.S. Const. amend. VI;

Const. art. I, § 22; *State v. Reeder*, 181 Wn. App. 897, 908, 330 P.3d 786 (2014). A trial court may not permit an attorney to represent a criminal defendant where there is an irreconcilable conflict of interest. *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). The deprivation of the right to conflict-free counsel is presumptively prejudicial and requires reversal. *See United States v. Nguyen*, 262 F.3d 998, 1005 (2001) (reversing without analyzing prejudice).

a. The Court of Appeals's conclusion the trial court made an adequate inquiry is contrary to this Court's precedent and its own.

The trial court had an "obligation to inquire thoroughly into the factual basis" of Mr. Holmes's desire for substitute counsel. *State v. Thompson*, 169 Wn. App. 436, 462 & n.68, 290 P.3d 996 (2012) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir.

1991)). Instead, the court asked only one question of Mr. Holmes: "What's your motion?" RP 115.

In no other published case of which the undersigned is aware has the appellate court upheld the denial of substitute counsel after such a paltry inquiry. In *Stenson*, the trial court conducted a "searching" inquiry in camera. 142 Wn.2d at 731. In *Thompson*, the court held ex parte hearings so that Mr. Thompson and his attorney could "fully articulate the extent of their conflict." 169 Wn. App. at 462. In *State v. Schaller*, 143 Wn. App. 258, 177 P.3d 1139 (2007), Mr. Schaller was "questioned" by the trial court "and queried about whether his conflicts really affected his case." *Id.* at 271.

Here, by contrast, the trial court made no effort to exclude the prosecution and asked no questions

about the specific nature of Mr. Holmes's concerns. RP 116–18.

The Court of Appeals's reasoning that the trial court "provided ample opportunity" for Mr. Holmes to describe his conflict with Mr. Stimmel is contrary to *Stenson*, *Thompson*, and *Schaller*. This Court should grant review. RAP 13.4(b)(1), (2).

b. In holding trial counsel's near-complete failure to do any work did not create a conflict, the Court of Appeals misapplied precedent.

Trial counsel's admitted failure to prepare for Mr. Holmes's trial for over two years and resulting breakdown in communication with Holmes created an irreconcilable conflict. Br. of App. at 26–32. It appears the only action counsel took was to interview a single witness, and even that did not take place until February 2022, two months before the trial began. RP 78. Counsel's failure to do any work on the case

rendered him unable to communicate with Mr. Holmes about potential strategies, including whether to accept a plea deal or proceed to trial. RP 115–16.

As a concrete example, trial counsel admitted he misrepresented the consequences of rejecting the prosecution's offer to plead guilty to third-degree rape of a child and proceeding to trial on the same offense in the second degree. RP 120. Had counsel properly prepared, he would have been able to provide accurate advice. Br. of App. at 29–30 & n.3.

The Court of Appeals rejected the notion a lack of preparation or breakdown in communication could ever be severe enough to amount to an irreconcilable conflict, insisting a communication breakdown and a conflict of interest are separate, never-overlapping concepts. Slip op. at 6–7. This rigid reasoning fails to account for cases like Mr. Holmes's, where Mr.

Stimmel did so little work in advance of the trial that Mr. Holmes effectively had no attorney to defend him. *See Daniels v. Woodford*, 428 F.3d 1181, 1199–1200 (9th Cir. 2005) ("lack of communication" created a "serious" conflict and "a presumption of prejudice"); *See Nguyen*, 262 F.3d at 1005 (noting the "severity of the conflict" caused by a "complete communications breakdown").

Indeed, this Court has endorsed the Ninth Circuit's precedent that a communication breakdown can constructively deprive an accused of the right to counsel. *Stenson*, 142 Wn.2d at 724–25.

The Court of Appeals's reasoning is troubling in another respect. The Court noted Mr. Holmes's briefs did not contend that Mr. Stimmel rendered inadequate performance during the trial. Slip op. at 12–13. As Mr. Holmes explained to the Court of Appeals, he did not

raise a claim of ineffective assistance during trial because such a claim would need to rely on evidence outside the existing trial record, not because no such claim existed. Reply Br. at 8–9; *e.g.*, *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011). The Court could not conclude Mr. Holmes's silence was a concession he received adequate representation without disregarding this fundamental limitation.

The Court of Appeals's conclusion Mr. Stimmel's near-complete failure to prepare for trial and the resulting breakdown in communication categorically did not result in the constructive denial of counsel reads the Sixth Amendment case law unreasonably narrowly. RAP 13.4(b)(1), (3). This Court should grant review.

2. The jury learned Mr. Holmes was exposed to COVID-19 before counsel elicited this fact, depriving Mr. Holmes of his right to a fair trial.

The state and federal due process clauses guarantee Mr. Holmes's right to a fair trial. Const. art. 1, § 3; U.S. Const. amend. XVI § 1. A "trial irregularity" implicates this fundamental right. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The jurors' knowledge they may have been exposed to COVID-19 in the courtroom is a serious irregularity that requires a new trial. *United States v. Dennison*, 626 F. Supp. 3d 189, 195–96, 205 (D. Me. 2022); *Ex. Parte Raines*, No. 06-21-00002-CR, 2021 WL 1555047, at *1 (Tex. Ct. App. 2021) (not des. for pub.).[1]

Here, the trial court explained to the jury that Peggy Toves, Mr. Holmes's partner, would testify

[1] *See* GR 14.1(b); TX Rules App. P. 47.7(a); Br. of App. at 42 n.6.

remotely by Zoom because she "is ill and cannot safely come to court." RP 1096. During the prosecution's direct examination, the jury learned Ms. Toves lived with Mr. Holmes. RP 1098. Because the Omicron wave was in full swing by this time, the jury could not help but connect the dots—Ms. Toves exposed Mr. Holmes to COVID-19, who may in turn have exposed everyone in the courtroom. Br. of App. at 44–48.

The Court of Appeals's nonetheless held the jury's likely impression that Mr. Holmes may have exposed them to a deadly illness did not require a new trial. Slip op. at 17–18. The Court reasoned Mr. Holmes's counsel invited the error by eliciting from Ms. Toves on cross-examination that the illness that kept her out of the courtroom was COVID-19. *Id.*; RP 1161.

On the contrary, Mr. Holmes did not invite the error. Ms. Toves's testimony on cross that she had

COVID-19 merely confirmed what the jury would already have suspected based on the trial court's announcement she was too ill to come to court. That Ms. Toves's doctor called her for a "tele-visit" in the middle of her remote testimony would further cement this suspicion, regardless of what questions trial counsel may have asked. RP 1172.

The Court of Appeals's conclusion that the trial irregularity did not require reversal burdens Mr. Holmes's fundamental right to a fair trial. RAP 13.4(b)(3). This Court should grant review.

3. The Court of Appeals's holding Mr. Holmes waived the improper comment on his right to be present is contrary to this Court's precedent.

Under article I, section 22, the defendant has the right to appear, confront witnesses in person, and testify on his own behalf. Const. art. I, § 22; *State v. Martin*, 171 Wn.2d 521, 529, 252 P.3d 872 (2011).

Cross-examination suggesting a defendant's right to be present permits them to tailor their testimony to that of other witnesses, without citing a specific reason to believe such tailoring occurred, violates the defendant's right to be present and to testify at trial. *State v. Wallin*, 166 Wn. App. 364, 377, 269 P.3d 1072 (2012).

During cross examination, the prosecution questioned Mr. Holmes about his unique ability to hear all of the prosecution's witnesses before his testimony. RP 1481–82. This improper comment highlighted for the jury that Mr. Holmes's constitutional right to be present throughout his trial enabled him to tailor his testimony to the other witnesses'. Br. of App. at 51–56. Nor did the prosecution identify any remark in Mr. Holmes's testimony that would give rise to a reason to believe he was tailoring his statements to those of other witnesses. RP 1481–82. The prosecution's generic

tailoring comment violated Mr. Holmes's right to be present.

Rather than address this violation of Mr. Holmes's constitutional rights, the Court of Appeals held Mr. Holmes waived this argument because Mr. Stimmel did not object. Slip op. at 19–20. Instead, relying on its decision in *State v. Carte*, 27 Wn. App. 2d 861, 534 P.3d 378 (2023), the Court held Mr. Holmes was required to show the prosecution's comment on his right to be present was flagrant and ill intentioned. *Id.*

The Court of Appeals overlooked controlling precedent to the contrary. Reply at 15–16. This Court has "long held that the constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments." *State v. Emery*, 174 Wn.2d 741, 757, 278 P.3d 653 (2012). The flagrant and ill intentioned standard does *not* apply to

direct prosecutorial comments on the exercise of a constitutional right, but only to claims of prosecutorial misconduct that merely "touch upon a defendant's constitutional rights." *Id.* at 763–64. Where trial counsel did not object, it follows that appellate courts should apply the manifest constitutional error standard of RAP 2.5(a)(3), not the flagrant and ill intentioned standard. *State v. Gauthier*, 174 Wn.App. 257, 263, 298 P.3d 126 (2013).

Notwithstanding *Emery*, the Court of Appeals has held in some opinions that a comment on the exercise of a constitutional right is waived unless flagrant and ill intentioned. *State v. Teas*, 10 Wn. App. 2d 111, 122, 447 P.3d 606 (2019); *State v. Pinson*, 183 Wn. App. 411, 419, 333 P.3d 528 (2014). In others, the Court has held a successful showing the comment was flagrant and ill intentioned shifts the burden to the

prosecution to show it was harmless beyond a reasonable doubt. *State v. Espey*, 184 Wn. App. 360, 366, 369–70, 336 P.3d 1178 (2014).

This Court should grant review and resolve the conflict between *Emery* and other opinions as to whether the flagrant and ill intentioned standard applies to prosecutorial comments on the exercise of a constitutional right. RAP 13.4(b)(1), (3).

4. This Court's precedent that a community custody condition allowing suspicionless searches is not ripe for review is incorrect and harmful.

The condition that Mr. Holmes must permit the Department of Corrections to inspect his home with or without reasonable cause to believe he violated any other condition violates article I, section 7 of our state constitution. Br. of App. at 66–67; *State v. Cornwell*, 190 Wn.2d 296, 304, 306, 412 P.3d 1265 (2018).

The search condition requires Mr. Holmes to

> [c]onsent to [Department of Corrections] home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive/joint control/access.

CP 68.

The Court of Appeals held the condition is not ripe for review, citing *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015). Slip op. at 24. *Cates* is incorrect and harmful, and this Court should grant review and overrule it.

A challenge to a community custody condition is ripe "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)). An additional consideration is "the hardship" of precluding review. *Id.* (quoting same source).

The Court of Appeals correctly held—as did this Court in *Cates*—that whether Mr. Holmes's search condition violates article I, section 7 is primarily legal and the condition is final. Slip op. at 24; 183 Wn.2d at 534.

However, the Court of Appeals followed *Cates*'s reasoning that the condition requires further factual development. Slip op. at 24. This Court reasoned the condition "does not authorize any searches" on its own and an attempt to enforce it is therefore necessary. *Cates*, 183 Wn.2d at 535.

This reasoning is erroneous. In requiring Mr. Holmes to consent to home searches, the condition plainly authorizes searches. And whether the condition allows searches beyond what article I, section 7 permits—which it plainly does—is a purely legal

question that requires no factual development. *Cates*, 183 Wn.2d at 541 (Fairhurst, J., dissenting).

The Court of Appeals also followed *Cates*'s reasoning that the condition does not impose a present hardship. Slip op. at 24. *Cates* reasoned the condition "does not require [Mr.] Cates to do, or refrain from doing, anything upon his release" until the Department of Corrections attempts a search. 183 Wn.2d at 536.

This reasoning also misconstrues the applicable standard. The condition imposes a hardship on Mr. Holmes in the present because it will "immediately restrict [him] upon his release" and "nothing could change before [his] release" that would change the fact the condition allows searches without reasonable cause. *Cates*, 183 Wn.2d at 541 (Fairhurst, J., dissenting) (citing *Bahl*, 164 Wn.2d at 751–52).

The incorrect decision that unconstitutional search conditions like Mr. Holmes's are not ripe for review is harmful enough to warrant revisiting. First, the holding thwarts judicial economy. If a court can correct an unconstitutional condition at sentencing and obviate the need for a future hearing, it should do so. Second, the condition forces Mr. Holmes into a posture of vigilance for potentially unconstitutional searches he would not have to adopt if the condition's scope remained within the bounds of article I, section 7.

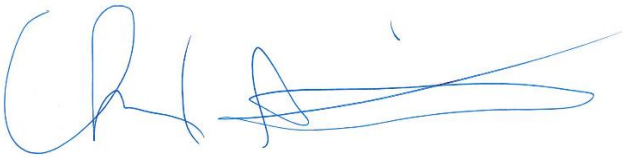
This Court should grant review and overrule *Cates*'s holding that Mr. Holmes cannot challenge his unconstitutional search condition at the time the condition is imposed. RAP 13.4(b)(3).

F. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 3,347 words.

DATED this 20th day of June, 2024.



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Petitioner's Appendix

A. Opinion of the Court of Appeals

B. *Ex Parte Raines*, No. 06-21-00002-CR, 2021 WL 1555047 (Tex. Ct. App. 2021) (not designated for publication) (*see* GR 14.1(d))

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Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON LEE HOLMES, Appellant.	No. 84127-1-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — Brandon Holmes appeals from a conviction for one count of rape of a child in the second degree. He raises numerous constitutional claims on appeal, arguing that he was deprived of the right to counsel, the right to a fair trial, and the right to be present and testify. While Holmes' various arguments are largely without merit and we affirm his conviction, the sentencing court did miscalculate his offender score based on an out-of-state conviction, and thus, remand is required for recalculation and resentencing.

FACTS

On September 28, 2018, the State charged Brandon Holmes with one count of rape of a child in the third degree. Before trial, the State amended the information to one count of rape of a child in the second degree and alleged that, between June 1 and August 29, 2018, Holmes had sexual intercourse with J who was 13 years old at the time.

Holmes' first appointed attorney, Karim Merchant, withdrew due to conflict. Thereafter, Holmes moved to discharge his second appointed attorney, Harry Steinmetz. While the trial court noted that it heard nothing from Holmes that would require a new attorney, it nonetheless exercised its discretion to grant the motion and stated, "[W]e'll give you a chance with someone else, and hopefully that'll be a better fit for you." On April 23, 2019, the King County Department of Public Defense assigned Abigail Cromwell to Holmes' case. Approximately five months later, Holmes moved to discharge Cromwell. The trial court noted that there was "room for additional or improved communication" between Holmes and Cromwell, but found there was not such a breakdown in communication to necessitate appointment of new counsel and denied the motion to discharge.

The next day, Cromwell moved to withdraw as counsel "due to professional considerations preventing [her] continued representation." At the hearing on the motion, Cromwell asserted there was "a total breakdown in communication" and explained that many of her conversations with Holmes ended either in Holmes hanging up or walking away. Holmes responded by asserting that Cromwell was lying: "I have never hung up the phone, never walked away, ever. That is a flat-out lie." The court denied counsel's motion to withdraw but said that it would consider further information submitted on the issue. Cromwell filed a supplemental motion and the trial court authorized her withdrawal on October 15, 2019.

Jerry Stimmel then became Holmes' fourth court-appointed attorney. Due to the COVID-19[1] pandemic, the trial was delayed several times and ultimately set

[1] 2019 novel coronavirus infectious disease.

for March 22, 2022. On the morning that trial was scheduled to begin, Holmes moved to discharge Stimmel and sought the appointment of yet another attorney. Holmes addressed the court and alleged that Stimmel was not prepared and expressed concern about "the way [they] communicate" with each other. The court denied the motion. In doing so, the court emphasized that they were "here on the day of the trial; today's the trial date." Further, the court reasoned that Stimmel had been representing Holmes since November of 2019, noted the case was already four years old, referenced the significant delay that would result from assigning new counsel, and stated that "given the record I've just outlined, it appears to the [c]ourt that there [are] strategic reasons to not move this case forward."

On April 14, 2022, the jury trial began and the parties provided opening statements. Testimony established that Peggy Toves and Holmes began dating in 2014. In 2016, they moved from California to Washington with Toves' two daughters, J (born in August 2004) and H. They lived with Holmes' parents until 2018 when they moved into a small motel room in Federal Way. While the family was staying in Federal Way, Holmes and Toves had a child together, A.

J recalled that in 2018 she was comfortable talking with Holmes about various things and felt that he listened to her. J testified that Holmes would tell her and H to call him "dad" and he would give them advice; J confirmed that she trusted Holmes. By May of 2018, however, J stated that Holmes told her that he and Toves were fighting "because he wanted to have a threesome and [her] mother didn't." She also explained that Holmes talked about her vagina and told her "the

reason [her] mom was so angry was because she didn't masturbate." J stated that this made her feel "uncomfortable," "weirded out, [and] confused." When J was 13, the summer before she started high school, she took a bath after volleyball tryouts and Holmes walked into the bathroom, "peeked his head" around the curtain, and looked at her. According to J, she "was naked and [Holmes] was looking at [her] . . . while [she] was in the bathtub." When Holmes walked out of the bathroom, J recalled hearing Toves and Holmes "laughing about it."

J also testified that, when she was 13, Holmes took her to a smoke shop in Tacoma to get marijuana. During the drive, Holmes began talking "about sex." J stated that she started to cry when Holmes told her "that he wanted [her] to have an orgasm and that he wanted to be the one to give [her] that." Holmes then tried to show J a pornographic video and "he got upset" because J did not want to watch it. When the two returned to the motel, J testified, Holmes gave her marijuana and she "threw up" after she smoked it. J stated that Holmes then pulled up the pornographic video on his phone, handed the phone to her, and told her to "go into the bathroom and not to argue and just watch it." J felt scared and went into the bathroom with the phone and just sat on the floor and closed her eyes. According to J, Holmes then walked into the bathroom, turned off the lights, and "grabbed [her] hand and guided [her] hand to [her] vagina and started moving [her] hand in circular motions." Holmes also put his "finger inside of [J's] vagina." J told Holmes to "stop" and he turned the light on and "asked if [J] was okay." After Holmes left the bathroom, J went to the bed and Holmes then asked her to come outside with him so they could talk. Holmes asked J whether she was going to tell her mom

and she answered, "Yes." In response, J testified, "[Holmes] asked me to let him know when I was gonna tell my mom so that way he can pack his bags and say goodbye to my brother so that we—because he said that we weren't gonna see him ever again."

J did not immediately disclose the incident to anyone, but shortly afterward, she visited Holmes' sister, Catrina Holmes,[2] and reluctantly told Catrina what had occurred in the bathroom. Catrina and Holmes' other sister, Valerie, told Toves what J had disclosed and took the children along with Toves to Holmes' parent's house, and later to Catrina's house. When Toves took the children to return to Holmes, Valerie called Child Protective Services and Holmes was ultimately arrested. Holmes testified in his own defense and denied ever touching J as she had described and further stated that he had never taken her to get marijuana.

At the conclusion of trial, the jury found Holmes guilty as charged. The trial court imposed an indeterminate sentence with a minimum of 108 months' confinement up to a maximum term of life in prison. The court also imposed the $500 victim penalty assessment (VPA) and $100 DNA collection fee, but noted that all "non-mandatory fines or fees waived."

Holmes timely appealed.

[2] Because they share the same last name as Holmes, we refer to both of his sisters by their first names for clarity. No disrespect is intended.

ANALYSIS

I. Claim of Complete Denial of Counsel

Holmes assigns error to the trial court's denial of his motion to discharge Stimmel as his attorney, which, he avers, violated his constitutional right to "conflict-free counsel."

As a preliminary matter, Holmes' briefing reflects fundamental misunderstandings of the law and fails to separate clearly distinct legal concepts for proper consideration. First, it is well established that "conflict-free counsel" refers to "counsel free from conflicts of interest." *State v. Reeder*, 181 Wn. App. 897, 908, 330 P.3d 786 (2014), *aff'd*, 184 Wn.2d 805, 365 P.3d 1243 (2015); *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). While Holmes frames this issue in both the assignment of error and his argument in briefing as a deprivation of his "right to conflict-free counsel," he makes no attempt to show that his attorney had an actual conflict of interest.[3] Second, "conflicts of interest" and "irreconcilable conflicts" are separate concepts that require different analyses. *United States v. Moore*, 159 F.3d 1154, 1157-58 (9th Cir. 1998); *see also In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 721-22, 16 P.3d 1 (2001) (*Stenson* II). Confoundingly, Holmes cites to *Stenson* II in his opening brief for a rule statement in which he conjoins those distinct categories into one that he then refers to as an "irreconcilable conflict of interest."[4] Third, a "complete breakdown in

[3] "To establish that an actual conflict of interest deprived him of effective assistance of counsel, [the defendant] must show both that [their] attorney had a conflict of interest and that the conflict adversely affected counsel's performance." *Reeder*, 181 Wn. App. at 909.

[4] At oral argument before this court, Holmes' counsel was asked where the phrase "irreconcilable conflict of interest" came from and what type of conflict he was alleging, to which defense counsel responded, "the key basis of the request to discharge counsel was the breakdown in communications." Wash. Ct. of Appeals oral argument, *State v. Holmes*, No. 84127-1-I (Mar. 7,

communication" and an "irreconcilable conflict" are also separate grounds to move for substitution of counsel. *See State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (*Stenson* I). Again, Holmes blends these together and asserts that the "breakdown in communications" with his counsel "constituted an irreconcilable conflict." Then, he avers reversal is required due to the "complete breakdown in communication." Regardless of the specific basis, Holmes ultimately asserts that he was completely denied his right to the assistance of counsel under the Sixth Amendment to the United States Constitution.

Whether to grant a defendant's motion for new court-appointed counsel is a decision within the discretion of the trial court. *Stenson* I, 132 Wn.2d at 733. On a motion to substitute counsel, courts are to consider "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." *Id.* at 734. This court reviews the denial of a defendant's motion for new appointed counsel under an abuse of discretion standard. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). "Discretion is abused if the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

While the Sixth Amendment guarantees all accused persons the right to assistance of counsel, it provides neither an absolute right to choose a particular

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2024), at 2 min., 7 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024031201/?eventID=2024031201.

On rebuttal, in an apparent attempt to provide an answer to the question posed, defense counsel stated that *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001), "equat[ed] a communications breakdown with an irreconcilable conflict." Wash. Ct. of Appeals oral argument, *supra*, at 19 min., 2 sec. The question regarding "irreconcilable conflict of interest" remained unanswered; *Nguyen* does not mention "irreconcilable conflicts" nor "conflicts of interest."

court-appointed counsel nor any right to have a "meaningful relationship" with appointed counsel. *Wheat v. United States*, 486 U.S. 153, 158, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Stenson* I, 132 Wn.2d at 733; *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). "[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Thus, "the Sixth Amendment is not implicated absent an effect of the challenged conduct on the reliability of the trial process." *State v. McCabe*, 25 Wn. App. 2d 456, 461, 523 P.3d 271, *review denied*, 1 Wn.3d 1014 (2023). "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. One example is "the complete denial of counsel." *Id.* at 659.

In order to obtain a different appointed attorney, a defendant "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. Schaller*, 143 Wn. App. 258, 267-68, 177 P.3d 1139 (2007). Holmes contends that he and Stimmel had an "irreconcilable conflict," which "occurs when the breakdown of the relationship results in the complete denial of counsel." *Id.* at 268. "A defendant need not show prejudice when the breakdown of a relationship between attorney and defendant from irreconcilable differences results in the complete denial of counsel." *Stenson* II, 142 Wn.2d at 722. To determine whether an irreconcilable conflict exists, this court

considers "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *Id.* at 724.

Looking at the conflict, "this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented." *Schaller*, 143 Wn. App. at 270. Prejudice is presumed when representation is inadequate. *Stenson* II, 142 Wn.2d at 724.

On the day trial was scheduled to begin, Stimmel told the judge that Holmes "desire[d] to discharge [him]." Stimmel noted that it "ha[d] been a very difficult month" and their "communication ha[d] really broken down." He concluded, "[Holmes] would like to fire me, and I would like to be fired or—or withdraw under the circumstances." The trial court then turned to Holmes and the following exchange occurred:

> [HOLMES]: Uhm, my motion is I guess an agreement to discharge—or in agreements with my lawyer, to discharge my lawyer. Uhm, we have tried to look for different ways to work with one another. And do—I don't know the exact penal codes or the-the exact statutes, but I do not believe I have good counsel in the form of, for one, the way we communicate, the actual work or things that have been done or addressed. There have been a number of things, even when it comes to the—to the choice I can make between a trial or taking a deal. On one side, the deal, we have not properly sat down and went through every single thing that is involved in the deal. I've had questions from the time he's been my lawyer, questions that have not been addressed, questions that have—have left me, uh, between a rock and a hard place between going to trial with an individual who hasn't—doesn't even know certain facts of my case. He—we've talked about certain facts of my case. He doesn't know certain defense strategies, certain communications. Uh, I don't believe I have somebody who's unbiased. I believe I have somebody who, if I go to trial, it's been said in so many words that it's not going to be too much assistance or help for even proper protocol and procedures, strategies, or anything of the sort. When it comes up to—since 2020, he's been [] my lawyer, and I feel like I'm placed between the—the urgency to go to trial or make a decision. But, my

> counsel has expressed just now for the [c]ourt, previously for the courts, and in the past documentations and records from me and him before that he is not the one that's ready. He is not prepared. He is not—we are at a—at a strong standstill, sir, and I feel like I will be—I will set myself up to fail if I go to trial or take a deal with the counsel that I have.
>
> THE COURT: Thank you, Mr. Holmes. The record before the [c]ourt is that you were arraigned in October of 2018. You had counsel. That counsel and you had difficulties, and there w[ere] discussions about changing counsel. Initially that was denied and—and then eventually granted. You've had Mr. Stimmel here since November of 2019. And we are here on the day of the trial; today's the trial date.
>
> The [c]ourt is not inclined to discharge [c]ounsel. You have the right to have competent counsel. Mr. Stimmel is competent. He will act ethically and try the case appropriately. I have complete confidence in that. If there's something that happens during trial, we'll address it at that time.
>
> In terms of what the [c]ourt has been saying for the last few months, this case has to go to trial given the age of the case. And so, I expect it to go to trial. If you are firing Mr. Stimmel to represent yourself, that's one thing. We'll have a discussion about that. If you're asking for a new counsel at this late date for an attorney to get up to speed for a case that is four years old, that is unreasonable. It would mean [] a delay of the case for a lengthy period of time. Again, the [c]ourt has to make decisions based on the need of [c]ounsel to be able to communicate with their client, the need of [c]ounsel to be prepared to go forward on the case, and any other concerns the [c]ourt is worried about.
>
> In this case, given the record I've just outlined, it appears to the [c]ourt that there is strategic reasons to not move this case forward. And so, the [c]ourt is going to deny the motion to discharge [c]ounsel.

The case proceeded to trial with Stimmel representing Holmes and no further issues or complaints were raised by either of them.

In *Stenson* II, the court rejected a denial of counsel claim based on an alleged irreconcilable conflict between Stenson and his attorney that continued throughout trial. 142 Wn.2d at 732. Stenson moved to substitute his counsel after nearly three weeks of jury selection and argued that one of his attorneys "spent

virtually no time preparing for the jury trial." *Id.* 726-27. He insisted that his "attorneys refused to investigate things he and his family thought were important to the case." *Id.* at 727. According to Stenson, his counsel "visited him in prison fewer than 10 times in 10 months," he "could never get through to [counsel] on the phone" and his "[attorney's] office stopped receiving his calls." *Id.* After the court denied Stenson's motion for new counsel, his attorney moved to withdraw 10 days into trial. *Id.* at 728-29. Defense counsel explained that he "felt he did not have an attorney-client relationship with Stenson," he was "extremely frustrated with [Stenson] to the point of really not wanting to go on with this case," and stated, "Quite frankly, I can't stand the sight of him." *Id.* at 729. Stenson "continued to complain about a lack of communication and was upset that counsel had visited him only twice during the three-week duration of trial." *Id.* On review, our Supreme Court explained that "it does not appear that the extent of the conflict was very great or the breakdown in communication very severe." *Id.* at 731. Not only did the court determine there was "no reason to believe that an irreconcilable conflict between Stenson and his counsel existed," it also plainly held that the circumstances "*d*[*id*] *not come close* to constituting denial of counsel." *Id.* at 732 (emphasis added).

Here, unlike in *Stenson* II, the conflict between Holmes and Stimmel did not continue into trial; the record shows no further requests from Holmes or Stimmel to discharge or withdraw, respectively. Moreover, the extent of the conflict in *Stenson* II resulted in counsel stating that he did not believe he had an attorney-client relationship with Stenson and also that he could not stand the sight of him.

Here, however, Holmes merely noted, "I do not believe I have good counsel in the form of, for one the way we communicate." The difference as to the level of these respective disputes is plain on its face. While Holmes insists that Stimmel was "not prepared," this contention is belied by the record and the fact that Holmes never raised another concern based on his counsel's performance. Nothing in the record before us reaches the level of the dispute in *Stenson* II.

It is noteworthy that Holmes does *not* contend Stimmel was ineffective as counsel. Further, while he alleges that Stimmel "had not answered his questions, was not prepared, did not know the facts of the case, and did not know about defense strategies" before trial began, Holmes does not point to *anything* that Stimmel did or failed to do during the course of trial that could have constituted inadequate representation. This omission makes sense as the record shows that Stimmel provided Holmes' with adequate representation during trial. Stimmel engaged in voir dire and questioned potential jurors, filed motions in limine to exclude certain testimony of various witnesses and other evidence, cross-examined officers in the CrR 3.5 hearing and argued for suppression of Holmes' statements, presented the defense theory of the case during opening statement and closing argument, conducted cross-examinations of numerous State witnesses, and made objections throughout trial. While it is clear that Holmes was concerned about the way he and Stimmel communicated, as well as Stimmel's general preparation for trial and knowledge of "defense strategies," the record does not show a serious conflict between the two nor any impact on the representation Holmes actually received at trial. *See State v. Svikel*, No. 83649-8-I, slip op. at 7

(Wash. Ct. App. Mar. 27, 2023) (unpublished) ("It necessarily follows that when counsel's representation results in an adequate defense having been presented, the defendant has not been completely deprived of his right to counsel."), https://www.courts.wa.gov/opinions/pdf/836498.pdf.[5]

As to the adequacy of the trial court's inquiry in response to Holmes' motion to discharge counsel, we have held that the "trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *Schaller*, 143 Wn. App. at 271. Here, the trial court allowed Holmes and Stimmel to express their concerns completely. While Holmes cites to *Stenson* II, in which the court held an in-camera hearing, the record before us does not reflect the same level of conflict and/or necessity for such a hearing. We have made clear that when the defendant asserts his reasons for dissatisfaction on the record, formal inquiry is not always necessary. *Schaller*, 143 Wn. App. at 272. Here, Holmes was provided ample opportunity to share his concerns and did so. The trial court also assured Holmes that if "there's something that happens during trial, we'll address it at that time." As the record shows, Holmes did not feel the need to address this matter again.

Turning next to the timeliness of Holmes' motion, he moved to discharge Stimmel on the day trial was set to begin. According to Holmes, the "motion was timely under the circumstances," and "[a]lthough the motion was made close to trial, it was based on [] Stimmel's failure to work on [his] case." Even at oral

[5] This opinion is unpublished and cited pursuant to GR 14.1(c) as necessary for a well-reasoned opinion. Because of the factual similarities with the instant case, we expressly adopt the sound reasoning articulated in *Svikel*.

argument before this court, defense counsel claimed that the timing of the motion "doesn't weigh against [Holmes] because the delay was entirely attributable to [] Stimmel."[6] Such a characterization paints Holmes as a client without autonomy to express concerns regarding his attorney-client relationship, which is blatantly contradicted by the record, especially the fact that he raised similar issues with numerous other attorneys who had represented him in this case before trial. As our Supreme Court held in *Stenson* II, "'where the request for change of counsel comes during the trial, or on the eve of trial, the [c]ourt may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request.'" 142 Wn.2d at 732 (quoting *United States v. Williams*, 594 F.2d 1258, 1260-61 (9th Cir. 1979)).

As none of the factors set out in *Stenson* II support a conclusion that there was an irreconcilable conflict between Holmes and Stimmel, we reject this claim. Just like those in *Stenson* II, these facts do not come close to constituting a complete denial of counsel under the Sixth Amendment. Because the denial of Holmes' last-minute motion for new counsel was based on tenable grounds, the trial court did not abuse its discretion.

II. Trial Irregularity Concerning Potential COVID-19 Exposure

Holmes contends he was deprived of his right to a fair trial because the jury discovered that Toves, who lived with him, tested positive for COVID-19 leading jurors to inquire about whether Holmes had exposed them to the disease during trial.

[6] Wash. Ct. of Appeals oral argument, *supra*, at 21 min., 30 sec.

Trial irregularities are those that occur during a criminal trial and "implicate the defendant's due process rights to a fair trial." *State v. Davenport*, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In ascertaining whether the defendant received a fair trial, we "look to the trial irregularity and determine whether it may have influenced the jury." *Id*. An irregularity necessitates a new trial when it is so prejudicial that "'nothing short of a new trial can insure that the defendant will be tried fairly.'" *State v. Lupastean*, 200 Wn.2d 26, 36, 513 P.3d 781 (2022) (quoting *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010)).

The Sunday night before Toves was scheduled to testify, she informed the prosecutor that she had tested positive for COVID-19. Defense counsel was made aware of this on the same day as the prosecutor. On Monday, the State moved to allow Toves to testify remotely on the following day and, with no objection from Holmes, the court granted the motion based on a finding of extraordinary circumstances.

Prior to her testimony, the trial court told the jury: "Toves is ill and cannot safely come to court. And so, I've made a ruling allowing her to testify via Zoom[7] audio and video link. So, please consider her testimony the same way you would consider the testimony of any other witness." During direct examination, the prosecutor had the following exchange with Toves regarding her health and housing status:

> [STATE:] And Ms. Toves, you were initially supposed to come in in person yesterday; is that right?
>
> [TOVES:] That is right.

[7] "Zoom" is an internet-based videoconferencing platform.

> [STATE:] But, you're not feeling so good, and under the circumstances we're—we're having you call in; is that right?
>
> [TOVES:] That is correct.
>
> [STATE:] Okay. Thank you very much for doing that. And Ms. Toves how—how old are you?
>
> [TOVES:] I'm 37.
>
> [STATE:] And where do you currently live?
>
> [TOVES:] In Auburn.
>
> [STATE:] And who do you live with?
>
> [TOVES:] With Brandon.
>
> [STATE:] And who—
>
> [TOVES:] Holmes.
>
> [STATE:] Brandon Holmes? And do you live with anyone else?
>
> [TOVES:] No.
>
> [STATE:] How long have you lived there?
>
> [TOVES:] Say a couple months.

The prosecutor did not elicit any testimony from Toves concerning her contraction of COVID-19. At the beginning of cross-examination, however, Holmes immediately directed his questions to Toves' illness:

> [DEFENSE:] Ms. Toves, do you have any objection to our reviewing to the—the jury what the nature of your illness is?
>
> [TOVES:] No, I don't have any objection.
>
> [DEFENSE:] You positive about that?
>
> [TOVES:] Yes.
>
> [DEFENSE:] You sure that's okay?

[TOVES:] About what—okay.

[DEFENSE:] Just—just to tell the jury what your sickness is?

[TOVES:] My—oh, COVID?

[DEFENSE:] Yes.

[TOVES:] Tested positive for COVID.

Outside the presence of the jury, when the court expressed concern about not being notified that Holmes lived with Toves and was exposed to COVID-19, defense counsel apologized and informed the court that Holmes had taken a COVID-19 test the night before Toves was originally scheduled to testify and "it was negative for him." Though defense counsel knew Toves and Holmes lived together, the prosecutor "wasn't sure of that until [they] began the testimony." After Toves' testimony concluded and the jury had heard that she had COVID-19 and lived with Holmes, three jurors asked the bailiff whether Holmes had been tested for the virus. Before trial the following day, Holmes took a COVID-19 test, which was negative. To promptly address the jurors' concerns, the court informed the jury that Holmes had taken two COVID-19 tests, both with negative results.

Invited Error Doctrine

The invited error doctrine provides that "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The doctrine "'precludes a criminal defendant from seeking appellate review of an error they helped create, even when the alleged error involves constitutional rights.'" *State v. Tatum*, 23

Wn. App. 2d 123, 128, 514 P.3d 763, *review denied*, 200 Wn.2d 1021 (2022) (quoting *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014)). "To be invited, the error must be the result of an affirmative, knowing, and voluntary act." *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). The doctrine applies to testimony that is directly elicited by the defense. *See State v. McPherson*, 111 Wn. App. 747, 764, 46 P.3d 284 (2002); *State v. Vandiver*, 21 Wn. App. 269, 273, 584 P.2d 978 (1978).

Here, Holmes knowingly and deliberately elicited Toves' testimony concerning her COVID-19 diagnosis shortly after she had testified on direct examination that she resided with Holmes. Because the alleged error was set up by Holmes and that information was revealed to the jury only by the defense through its cross-examination, the invited error doctrine applies and precludes appellate review of this issue. *Mercado*, 181 Wn. App. at 630; *Vandiver*, 21 Wn. App. at 273.

III. Tailoring Argument During Cross-Examination

Holmes asserts that, during cross-examination, the prosecutor suggested he tailored his testimony which deprived him of his constitutional rights to both appear and testify. Because Holmes did not object to the prosecutor's tailoring argument during cross-examination and he fails to address the heightened standard of prejudice applicable on appeal, his claim is waived.

Under the Sixth Amendment and article I, section 22 of our state constitution, criminal defendants have "the right to 'appear and defend in person,'

to testify on [their] own behalf, and to confront witnesses against [them]." *State v. Berube*, 171 Wn. App. 103, 114, 286 P.3d 402 (2012).

"A claim of 'tailoring' alleges that the defendant conformed their testimony to the evidence they observed while attending trial." *State v. Carte*, 27 Wn. App. 2d 861, 871, 534 P.3d 378 (2023), *review denied*, 2 Wn.3d 1017 (2024). Tailoring arguments are either "specific" or "generic." *Id.* They are "specific" when "derived from the defendant's actual testimony" and "generic" when "based solely on the defendant's presence at the proceeding." *Id.*

Tailoring arguments do not violate a defendant's Sixth Amendment right to be present. *See Portuondo v. Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). However, article I, section 22 is analyzed independently of the Sixth Amendment and while specific tailoring arguments do not violate our state constitution, generic tailoring arguments do. *State v. Martin*, 171 Wn.2d 521, 533, 535-36, 252 P.3d 872 (2011); *State v. Wallin*, 166 Wn. App. 364, 376, 269 P.3d 1072 (2012). While we have extensive case law detailing the constitutionality of, and test for both specific and generic tailoring, Holmes encounters a procedural bar to review of this issue.

When the defendant fails to object at trial, the alleged tailoring violation is waived unless the defendant "demonstrate[s] that the error was flagrant, ill intentioned, and uncurable." *Carte*, 27 Wn. App. 2d at 870. "After error has been established, the defendant must show prejudice." *Id.* at 874. Here, Holmes did not object during cross-examination and thus he must establish the heightened standard of prejudice. To do so, he is required to show that "(1) no curative

instruction could have eliminated the prejudicial effect and (2) there was a substantial likelihood the misconduct led to prejudice that affected the jury verdict." *Id.* at 874.

Holmes makes no attempt to meet this standard. Instead of following the applicable standard this court set out in *Carte*, he requests that we apply the constitutional harmless error standard and place the burden on the State to show the absence of prejudice beyond a reasonable doubt. He also asks this court to "stay this case until *Carte* is resolved on the merits," asserting that our Supreme Court will likely grant review. But the court has since denied review of *Carte* and that case is controlling. Thus, even assuming arguendo that the prosecutor's tailoring argument here was an improper generic tailoring accusation, Holmes' claim fails. *Carte*, 27 Wn. App. 2d at 870. Because Holmes provides no argument as to the heightened standard of prejudice and he has the burden to make the showing, this claim is waived. *See id.; In re Det. of Rushton*, 190 Wn. App. 358, 373, 359 P.3d 935 (2015) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

IV. Miscalculation of Offender Score

Holmes next avers that remand for resentencing is required as the trial court erred by including his prior California burglary conviction in his offender score. The State agrees.

This court reviews the calculation of a defendant's offender score de novo. *State v. Olsen,* 180 Wn.2d 468, 472, 325 P.3d 187 (2014). "The offender score is the sum of points accrued as a result of prior convictions." *Id.*; RCW 9.94A.525.

"Out-of-state convictions count toward that score if the trial court determines them to be comparable." *State v. Davis*, 3 Wn. App. 2d 763, 771, 418 P.3d 199 (2018). "The comparability analysis has two steps, one legal and the other factual." *Id.* at 772. Under the legal comparability step, "the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Pursuant to the factual comparability inquiry, the court must determine "whether the defendant's conduct would have violated the comparable Washington statute." *Olsen*, 180 Wn.2d at 473.

Here, the trial court included Holmes' California burglary conviction in calculating his offender score based on the State's argument that it was comparable to a Washington conviction of burglary in the second degree, a class B felony. This was erroneous. First, the crime of burglary as defined in California is not legally comparable to burglary in Washington. *Davis*, 3 Wn. App. 2d at 772. Second, as the State concedes in briefing, Holmes' California burglary conviction was not factually comparable to a Washington burglary conviction. Because the trial court miscalculated Holmes' offender score based on its erroneous inclusion of the California burglary conviction, we remand for recalculation of his offender score and resentencing based on a proper score.[8] *See State v. Shelley*, 3. Wn. App. 2d 196, 203, 414 P.3d 1153 (2018).

[8] Holmes' last assignment of error is to the imposition of the $500 VPA. As resentencing is required, we need not reach this issue.

V. Facial Challenge To Condition of Community Custody

Next, Holmes assigns error to the trial court's imposition of a condition of community custody that requires him to consent to random searches by the Department of Corrections (DOC). The State asserts that this issue is not ripe for review. We agree with the State.

The judgment and sentence included a special condition requiring Holmes to "[c]onsent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive/joint control/access."

A preenforcement challenge to a community custody condition is ripe for review on the merits "'if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (internal quotation marks omitted) (quoting *State v. Sanchez Valencia,* 169 Wn.2d 782, 786, 239 P.3d 1059 (2010)). Further, "we must consider the hardship to the [defendant] if we refused to review their challenge on direct appeal." *Sanchez Valencia*, 169 Wn.2d at 789.

In *Cates,* our Supreme Court considered whether a facial challenge to a nearly identical community custody condition was ripe for review:

> "You must consent to [DOC] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to."

183 Wn.2d at 533. The court noted that "the community custody condition is a final action and Cates' challenge raises primarily legal issues." *Id.* at 534.

However, the court rejected Cates' argument that no further factual development was necessary. *Id.* at 535. In doing so, the court explained that the condition did not allow any and all searches; rather, it limited the State's authority to conduct searches to those with the purpose of "'monitor[ing] Cates' compliance with supervision.'" *Id.* at 535. Because any potential constitutional violation depended on how the State attempted to enforce the condition and search Cates' residence after he was released from confinement, the court determined that further factual development was necessary. *Id.*

Additionally, the court decided that the risk of hardship to Cates was insufficient to justify review prior to such factual development. *Id.* This was so, the court explained, because "[c]ompliance here does not require Cates to do, or refrain from doing, anything upon his release until the State requests and conducts a home visit." *Id.* at 536. Thus, the court held Cates' preenforcement challenge was not ripe and declined to review the merits. *Id.*

Holmes does not reference *Cates* in his opening brief. Rather, he relies on an unpublished opinion from Division Two of this court that "distinguished" *Cates* and reached the merits of a constitutional challenge to the same community custody condition, *State v. Franck*, No. 51994-1-II (Wash. Ct. App. Feb. 4, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2051994-1-II%20Unpublished%20Opinion.pdf.[9] *Franck* misconstrues the reasoning of *Cates* in one paragraph, contrasts the holding of *Cates* with *Sanchez Valencia* and *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), and concludes that "the issue is ripe

[9] Cited pursuant to GR 14.1 only as it is the primary authority provided by Holmes in support of this challenge.

for review." *Franck*, slip op. at 19-20. *Franck* is not controlling, or persuasive on the issue of ripeness.

While the community custody condition at issue here is final, as it was imposed on the judgment and sentence, and the claim presented is primarily legal, as it is a constitutional challenge, we follow *Cates* and conclude that the issue is not ripe for review. Because the condition, like the one in *Cates*, is limited to "visits to monitor compliance and supervision" and compliance does not require Holmes "to do, or refrain from doing, anything upon his release until the State requests and conducts a home visit," the risk of hardship here does not justify review prior to the factual development that is as necessary here as it was in *Cates*.

Affirmed in part, reversed in part, and remanded.

WE CONCUR:

Díaz, J.

2021 WL 1555047
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EX PARTE Charles RAINES

No. 06-21-00002-CR
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Date Submitted: March 24, 2021
|
Date Decided: April 21, 2021
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Discretionary Review Refused July 28, 2021

On Appeal from the 85th District Court, Brazos County, Texas, Trial Court No. 19-03987-CRF-85

Attorneys and Law Firms

Jarvis J. Parsons, Amy Eades, Jessica Escue, Douglas Howell III, for State of Texas.

E. R. (Ned) Turnbull, Lane D. Thibodeaux, for Appellant.

Before Morriss, C.J., Burgess and Stevens, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Morriss

***1** After one day of testimony in August 2020, the State had rested its Brazos County [1] case against Charles Raines for continuous violence against the family. [2] The next morning, the trial court had learned that Raines had been in close contact with a person who had been diagnosed with COVID-19, and after a short hearing and over Raines's objection, the trial court *sua sponte* declared a mistrial.

Before his second trial, Raines filed an application for a writ of habeas corpus (the Application) asserting that a re-trial was barred by his right against double jeopardy. After an evidentiary hearing, the trial court denied the Application.

On appeal, Raines complains that there was no manifest necessity that justified a mistrial because the COVID-19 exposure resulted from judicial and law enforcement disregard of their own COVID-19 risk avoidance protocols and because the trial court did not reasonably rule out the less drastic alternative of a fourteen-day continuance. Because (1) the mistrial declaration is entitled to great deference and (2) the trial court's manifest-necessity determination was not an abuse of discretion, we affirm the denial of Raines's application for a writ of habeas corpus.

After the Office of Court Administration approved a COVID-19 safety plan for holding jury trials developed by the Brazos County district courts (the Brazos COVID-19 Plan), [3] the trial court and the 361st Judicial District Court of Brazos County both held criminal jury trials that began on August 17, 2020. The courts held jury selection in separate locations away from the courthouse on August 17 and began testimony in their separate courtrooms on August 18. The defendant in the 361st Judicial District Court was Teron Pratt, and Raines was the defendant in the 85th Judicial District Court. Both Pratt and Raines were incarcerated in the Brazos County Jail, which is located about one mile from the courthouse.

***2** In the Pratt trial, testimony was concluded on the morning of August 18, arguments were concluded that afternoon, and the jury members deliberated until they were sent home for the evening at 5:00 p.m. In this case, the State called ten witnesses against Raines and then rested its case.

That night, Judge Smith was informed by Sergeant Doug Chambers, the jail transportation sergeant, that Pratt had tested positive for COVID-19. The next morning, Judge Smith informed Judge Hawthorne, the judge in this case, that Pratt had tested positive for COVID-19 and that, on August 18, Pratt and Raines had been transported in the same vehicle between the jail and the courthouse. The trial court also learned that Pratt had tested positive for COVID-19 on August 10.

Later the morning of August 19, the trial court addressed the situation in open court with Raines, Raines's attorney, and the district attorney. The trial court expressed its concern that, because Raines had been transported with Pratt, there was a potential exposure to Raines, his attorneys, the court bailiff, the court coordinator, and, because the bailiff escorted the jurors between the jury room and the courtroom, the jury. The trial court also acknowledged that, contrary to guidelines of the Centers for Disease Control and Prevention, the state

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health department, and the Brazos COVID-19 Plan, Pratt had not been quarantined. Finally, the trial court recounted its contact with David Slayton, the administrative director of the OCA, who informed the trial court that anybody who had a potential exposure to COVID-19 would have to be quarantined and tested. The following exchange ensued:

> THE COURT: So, that puts us at the very least of continuing this trial for at least 14 days and that's if nobody comes back and tests positive. So we're assuming that we may be able to continue in 14 days assuming nobody -- everybody clears.
>
> This Court's got concerns about informing the jury that they have a potential event related to COVID. One of the first questions I asked them on voir dire was whether -- what their comfort level -- if they were concerned just by the mere fact that they were being called as potential jurors during this time period that we're going through with all the Governor's mandates and -- related to COVID-19 under his emergency orders; all the OCA's orders related to the situation the courts have been in; and the general public about dealing with COVID-19 that could materially affect their decision-making process one way or the other, good or bad for both sides; and whether their decision would be based on the facts that are presented in the case versus the surrounding circumstances that they're having to make this decision under. Obviously, that's speculation on my part; but having been a trial attorney for 28 years and a judge for 6 and given the nature of their responses during jury selection, I don't think there's any guarantee that either side receives a fair trial because of the information that they would get related to what we're exposed to at this particular point in time.
>
> Comments from the State?
>
> [The State]: Judge, I'd like to ask in addition to that for the record to reflect that during my voir dire the first -- one of the first questions I asked was, "How many people here are uncomfortable just being in a group of other individuals"; that around -- between one third and one half of the panel raised their hands indicating that they were uncomfortable being in a room, that we repeatedly assured them of their safety and the protocols that we would take in regards to their safety -- the preparations we were making and the assurances that we would make.
>
> ***3** I would ask the record to reflect that when you asked whether or not they were comfortable with us removing masks or us talking to them without masks, a good percentage of the -- the venire panel indicated they were uncomfortable with us removing masks even 6 feet social distancing or -- because of the nature of the Corona virus, and that they continued to approach Mr. Tyler throughout the trial and the venire process concerned about safety with the ongoing global pandemic.
>
> We would ask you to find based on their responses and their answers to questions in voir dire that granting a mistrial in this case over the defendant's objection is manifestly necessary, that there is no other lesser measures including a continuance that could assure both the State and the Defense a fair trial and thus it is necessary to grant one and that it's at no fault of the prosecution of the State of Texas that this mistrial is granted.
>
> THE COURT: If I grant a mistrial, it's nobody's fault. I'll find that for the record. I don't think it's either side's fault -- not related to this courtroom. I'll put it to you that way. And I don't specifically recall your questions on voir dire without going back to look at the record. I do recall that there was -- there was concern -- deep -- I don't know if I would qualify it as deep concern; but there was specific concern about just the mere fact they were there and the effect of the environment COVID-19 that we were working under, by the jurors. I think I expressed that.
>
> Mr. Turnbull?
>
> [Defense Attorney]: Judge, just simply the State has known -- they can try and separate themselves from the Sheriff's Department if they want to, but they're all one entity. They have known for seven days I think at least that -- that Mr. Pratt, the other defendant, was positive; and the Court -- there are less restrictive means that the Court could take to take care of this.
>
> THE COURT: What are those?
>
> [Defense Attorney]: We object.
>
> THE COURT: What are those?
>
> [Defense Attorney]: The Court -- that's up to the Court for what those are.
>
> THE COURT: Well, give me some suggestions. I'm looking for some suggestions.
>
> [Defense Attorney]: Well, it's not my place to do so, Judge. It's the Court's place to make those decisions. It's the Court's

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decision and the Court's making the decision, but we object to it obviously.

THE COURT: Well, I will put on the record -- and I've held off talking to the judge -- I mean, talking to the Sheriff's Department because I don't think I'm in a proper place to be talking to them about it right now. But I'll note for the record that we were not told about this until this morning, the other court was not told about it until last night; that's at least eight days from the testing of -- positive test out at our jail and a person is being transported while they're supposed to be in quarantine. That's the facts that I know as of right now....

[The State]: And, Judge, just as an officer of the Court -- and you recognize that you were the ones that informed the prosecution -- of the State of Texas about this testing result, that we did not have any prior knowledge or prior information about any inmate that had tested positive or were supposed to be quarantined.

THE COURT: If I didn't make that clear – I immediately told y'all about 8:15 this morning, and that was -- y'all didn't know anything about it -- neither side knew anything about it at that time.

Anything else, Mr. Turnbull? ...

[Defense Attorney]: Yes, sir.... Just to reurge to the Court that there are less restrictive means that the Court could take under the circumstances. Those are, of course, the decision of the Court but there are and we object to the mistrial. State has known that this was going on for over a week and told none of us, as you've said on the record.

***4** THE COURT: I've run through every scenario you can think of of a manner that I could take less drastic actions than considering a mistrial, and I can't think of what it is. Take a smarter person than me, I guess, at this particular point in time.

Anything else from anybody?

[The State]: Just that you find that the mistrial is of manifest necessity.

THE COURT: All right. Based on everything that I've said, Court's going to find that --

[Defense Attorney]: Well, Judge, obviously we disagree with the Court. There are less restrictive means that could be taken by the Court. There are a bunch of them, and they should be taken.

THE COURT: Okay.

[Defense Attorney]: And we object to the mistrial.

[The State]: And that that manifest necessity is due to the Corona virus and the global pandemic.

THE COURT: Based on all the reasons that I've stated on the record here, I believe the circumstances render it impossible to provide a fair verdict.

[The State]: And we're not a party to that, Judge -- the prosecution.

THE COURT: Based on what I know today I'm going to say that's the situation, neither party knew anything about it.

Now, how it may fall out from the fact that the jail seems to be the issue here, I don't know what -- what's going on in the background associated with that so ... But I'm going to find it's impossible to continue with the trial and declare a mistrial.

The jury was then brought in and after informing the jury that a material participant in the trial had a potential exposure to COVID-19 and that he had declared a mistrial, the court explained his reasons:

[T]he very least that I could have done was delay this trial for two weeks and ask y'all to come back at a later date. That's if everything came out negative. If anything -- if anybody tested positive or anything like that, I don't know when we would continue the trial.

Also at the very least -- even if didn't have to quarantine -- and y'all don't need to quarantine from what I've been told. Even if they didn't quarantine, we would have to test the individual -- the person has not been tested and would be two to five days before we got any results back. So be at least two to five days from being able to come back and continue the trial.

Just the mere fact -- I would have had to tell you -- even if I said, “okay. I'm going to tell the jurors and we're going to go forward,” based on y'all's responses at voir dire I got the impression that most of the panel was uncomfortable being called as jurors just by the mere fact that we're in this environment. I mean, most people shook their head affirmatively when I asked the question -- if I remember

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> correctly. [The State] asked the question and same response was, "yeah, I'm uncomfortable being here" blah, blah, blah.
>
> So, based on that I declared a mistrial because I think even after I tell y'all whether you would have been making your decision, consciously or unconsciously, based on the facts or "I want to get out of here. I'm going to find him guilty, not guilty --"whatever it may have been would not have been a decision strictly on the facts of the case which is what you're required to do. And I was unwilling to put y'all in that position. I don't think it would have been fair to the State, I don't think it would have been fair to the defendant. So for that reason I declared a mistrial.

***5** At the hearing on the Application, Judge Smith testified that he did not know that Pratt had been in the COVID isolation unit at the jail before the Pratt trial began. He also believed that none of his staff knew before the trial began. Patrick Massey, the bailiff for the 361st Judicial District Court, testified that he believed he learned that Pratt was in the isolation unit the Friday before trial, on August 14. Massey also believed he mentioned to Judge Smith as he was walking through the office that Pratt was in a unit with positive people and that he needed to be tested.

Steve Tyler, the bailiff in this case, testified regarding the arrangement of the courtroom during Raines's trial and the social distancing and other precautions that were taken. He testified that Raines was seated twenty feet from the nearest juror and that he had worn a mask. Tyler also testified that he wore a mask at all times, including when he was in contact with jurors. He was in close proximity to Raines five or six times that day and wore a mask each time. Tyler agreed that a few of the jurors were skittish about COVID-19, that at least one juror expressed concerns about the court reporter not wearing a mask, and that one or more jurors expressed concerns about him not wearing his mask over his nose. He also agreed that the attorneys, jurors, and witnesses in the Pratt case and this case would all have to share the same bathrooms, elevator, and stairwells.

Kit Wright, the medical sergeant at the jail, testified that inmates exposed to someone who had tested positive for COVID-19 were quarantined for fourteen days and that they were not released from quarantine until they had been symptom-free for seventy-two hours. She also testified that Pratt was symptomatic on August 9, tested positive on Aug 10, and under the jail protocols, should have been quarantined for at least fourteen days. Wright testified that Pratt tested positive again on August 19. She also testified that Raines tested positive for COVID-19 on August 19 and opined that he was probably exposed to COVID-19 four or five days before the 19th. She stated that Raines would have to be isolated for at least fourteen days. After taking the case under advisement, the trial court denied the Application.

"Generally a criminal defendant may not be put in jeopardy by the State twice for the same offense."[4] *Pierson v. State*, 426 S.W.3d 763, 769 (Tex. Crim. App. 2014) (citing U.S. CONST. amend. V; *Hill v. State*, 90 S.W.3d 308, 313 (Tex. Crim. App. 2002)). "In cases tried before a jury, a defendant is placed in jeopardy when the jury is empaneled and sworn, and 'because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." ' " *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 504 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949))). However, "there are two exceptions when a criminal defendant may be tried a second time without violating double-jeopardy principles if the prosecution ends prematurely as the result of a mistrial: (1) if the criminal defendant consents to retrial or (2) there was a manifest necessity to grant a mistrial." *Id.* at 769–70 (citing *Ex parte Garza*, 337 S.W.3d 903, 909 (Tex. Crim. App. 2011)). "These exceptions are recognized because valid reasons exist for a jury to be discharged before the conclusion of a trial and not all of those reasons 'invariably create unfairness to the accused[.]' " *Id.* at 770 (quoting *Washington*, 434 U.S. at 505). Consequently, "a defendant's right to have his trial conducted by a particular tribunal 'is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.' " *Id.* (quoting *Washington*, 434 U.S. at 505).

***6** "To prevail in a double-jeopardy claim, a criminal defendant must first show that he or she is being tried for the same offense for which the mistrial was declared over the defendant's objection." *Id.* "The burden then shifts to the State to demonstrate a 'manifest necessity' (also referred to as a 'high degree' of necessity) for the mistrial. A trial court's decision to declare a mistrial is limited to the inquiry of if there was a 'manifest necessity' to grant a mistrial." *Id.* (citing *Garza*, 337 S.W.3d at 909). Manifest necessity exists when the circumstances giving rise to the mistrial "(1) render it impossible to arrive at a fair verdict before the initial tribunal, (2) render it impossible to continue the trial, or (3) involve

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trial error that would trigger an automatic reversal on appeal if a verdict was returned." *Ex parte Falk*, 449 S.W.3d 500, 505 (Tex. App.—Waco 2014, pet. ref'd) (citing *Garza*, 337 S.W.3d at 909). A trial court abuses its discretion "whenever the trial court declares a mistrial without first considering the availability of less drastic alternatives and reasonably ruling them out." *Garza*, 337 S.W.3d at 909. However, "[t]he trial court need not expressly articulate the basis for the mistrial on the record in order to justify it to a reviewing court, so long as manifest necessity is apparent from the record. *Id.* at 909–10 (citing *Washington*, 434 U.S. at 516–17).

A trial court's denial of an application for a writ of habeas corpus is reviewed for an abuse of discretion. *Falk*, 449 S.W.3d at 503 (citing *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006)). "We review 'the record evidence in the light most favorable to the trial court's ruling and [we] must uphold that ruling absent an abuse of discretion.' " *Id.* (quoting *Kniatt, 2*06 S.W.3d at 664). To be an abuse of discretion, the trial court's decision must be outside the zone of reasonable disagreement. *George v. State*, 41 S.W.3d 241, 243 (Tex. App.—Waco 2001, pet. ref'd).

Nevertheless, our review of a decision to grant or deny double jeopardy relief is not static, and it varies depending on the cause of the mistrial. *Id.* at 503–04 (citing *Ex parte Rodriguez*, 366 S.W.3d 291, 296 (Tex. App.—Amarillo 2012, pet. ref'd) (citing *Washington*, 434 U.S. 497, 507–08)). On one end of the spectrum, great deference is afforded the trial court when a mistrial results from a deadlocked jury. *Arizona v. Washington*, 434 U.S. 497, 510 (1978). On the other end of the spectrum, "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Id.* at 508–09. Consequently, "part of our task is to determine the correct standard of review by identifying the cause of the mistrial." *Falk*, 449 S.W.3d at 504 (quoting *Rodriguez*, 366 S.W.3d at 296 (citing *United States v. Fisher*, 624 F.3d 713, 719 (5th Cir. 2010))).

(1) The Mistrial Declaration Is Entitled to Great Deference

In this case, the precipitating event that led to the trial court declaring a mistrial was Raines's close-contact exposure to Pratt, who had previously tested positive for COVID-19. Raines asserts that the cause of his exposure was the Brazos County judiciary's and the Sheriff's Office's disregard of known risks and risk avoidance protocols for COVID-19. Relying on cases in which the State chose a jury and went to trial knowing that a key witness may not be available for trial, Raines argues that, because the judicial and jail officials ignored the known risks and did not follow proper risk avoidance protocols, strict scrutiny is the proper standard of review in this case.

All of the cases applying the strict-scrutiny standard of review cited by Raines involve prosecutors who (1) assumed known risks of something within their control, i.e., ensuring that an essential witness would be available and present at trial when the case went to trial, and (2) subjected the defendant to jeopardy.[5] In those cases, the defendant's "valued right to have his trial completed by a particular tribunal"[6] is frustrated by a mistrial, and a mistrial gives "the prosecutor a more favorable opportunity to convict." *Downum*, 372 U.S. at 736 (citing *Gori v. United States*, 367 U.S. 364, 369 (1961)). In addition, " 'where "bad-faith conduct by judge or prosecutor" ... threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant,' " strict scrutiny would be appropriate. *Washington*, 434 U.S. at 508 (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality op.); *Downum*, 372 U.S. at 736)). However, neither the United States Supreme Court nor the Texas Court of Criminal Appeals has held that a mistrial caused by anything less than bad-faith conduct by a judge would be subject to strict scrutiny.[7]

***7** Raines contends that the judiciary and jail personnel ignored their own protocols when Raines was transported with Pratt between the jail and the courthouse, but he does not contend, and the record does not show, that any judiciary or jail personnel acted in bad faith. The record does show that at least one jail worker failed to follow the jail protocols when Pratt was removed from isolation and transported to the courthouse, even though he had tested positive for COVID-19 seven or eight days earlier. Nevertheless, while this may show

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that the jail personnel acted negligently, it does not show the jail employee acted in bad faith.

Raines also faults both Judge Smith and Judge Hawthorne for not following the OCA Guidelines by allowing Pratt to be removed from the isolation tank and by not testing Pratt and Raines for COVID-19 immediately before trial. However, the OCA Guidelines in effect at the time of trial did not require the judiciary to oversee jail practices and did not require detainees to be tested for COVID-19 prior to trial. Rather, the OCA Guidelines required only that individuals be screened so that persons, including detainees, feeling feverish or with measured temperatures equal to or greater than 100.0°F, with the then-known signs or symptoms of COVID-19, or having known close contact with a person who was confirmed to have COVID-19, not be allowed in the courtroom. There is no evidence in the record that Raines or Pratt exhibited any symptoms of COVID-19 on August 17 or 18 or that they were not appropriately screened.

Although Raines asserts that Judge Smith, the local administrative judge, and his personnel knew that Pratt was housed in the COVID-19 isolation pod before the trials began, the record establishes only that Judge Smith's bailiff knew that information. Although the bailiff testified that he mentioned this fact as Judge Smith walked through the office, Judge Smith testified that he did not learn that Pratt was in the isolation tank or that he was positive for COVID-19 until the night of August 18. In a bench trial, "the trial court is the 'exclusive judge of the credibility of the witnesses and the weight to be given to their testimony.' " *Deckard v. State*, 953 S.W.2d 541, 543 (Tex. App.—Waco 1997, pet. ref'd) (quoting *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995)). Consequently, the trial court was free to believe Judge Smith's testimony and discount the bailiff's recollection.

The record in this case does not support Raines's contention that the conduct of judiciary personnel caused the mistrial. The record also does not establish that the mistrial was caused by the bad-faith conduct of jail personnel. Rather, the record shows that, although the Brazos County courts had approved COVID-19 protocols in place, an event unanticipated by those protocols, i.e., the transportation of a COVID-19-positive detainee with the defendant, precipitated the mistrial. Under this record, we find that the trial court's decision to grant a mistrial is entitled to great deference by this Court. *See* *Washington*, 434 U.S. at 510. We overrule this issue.

(2) The Trial Court's Manifest-Necessity Determination Was Not an Abuse of Discretion

Raines also contends that no manifest necessity existed, since a continuance of fourteen days was possible. Raines argues that the trial court did not adequately consider and rule out a continuance and faults the trial court for assuming that a number of the jurors would be too upset with the knowledge of their possible exposure to COVID-19 to be able to render a fair verdict. He argues that the trial court should have inquired of the jurors to accurately gauge their reactions before it declared a mistrial.

***8** Both parties agree that the trial court should be accorded great deference in our review of the trial court's manifest-necessity ruling. *Pierson*, 426 S.W.3d at 774. As the Texas Court of Criminal Appeals has pointed out, this same deference applies to a trial judge's determination that a less drastic alternative would be insufficient to ensure a fair trial. *See id.* The United States Supreme Court has explained that "[t]here are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance" of the mistrial-precipitating circumstances on the jury:

> He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. *See* *Wade v. Hunter*, 336 U.S. 684, 687....

Washington, 434 U.S. at 513–14. "In evaluating manifest necessity, a reviewing court must consider the nature of the case, its procedural posture, the cause of the mistrial, the interests of the parties, the availability of less drastic alternatives, and the ends of public justice." *Falk*, 449 S.W.3d at 505.

There are several unique factors in this case that affected the trial court's determination that manifest necessity required a mistrial. First, the trial took place only about six months into the COVID-19 global pandemic that was causing widespread death across the United States and the world and that was not equalled by any such event in over a century. Also, this was one of the first jury trials held

in Brazos County and the first held by that trial court since the Texas Supreme Court began allowing jury trials conditioned on the trial court developing a COVID-19 plan in accordance with OCA Guidelines. Those guidelines provided for extraordinary measures to be taken in social distancing, screening of all persons entering the courthouse, hygiene, face coverings, and frequent cleaning of surfaces in and around the courtroom. Nevertheless, the record suggests that the dangers and uncertainties surrounding COVID-19 and what and how courtroom activities could be conducted safely weighed on the minds of all concerned from the outset of the trial.

At the beginning of jury selection, the trial court spent considerable time addressing those concerns by explaining how the COVID-19 protocols instituted by the court came about and describing the protocols. The court also urged the members of the venire panel to notify court personnel if they saw something that concerned them. One of the first questions asked by the State in voir dire was if the venire members were uncomfortable sitting in the room even though they were socially distanced. Out of sixty-one venire members, the record shows that twenty raised their hands and acknowledged their discomfort. Three of the venire members who raised their hands served on Raines's jury. What the record does not reflect, but the trial judge could observe, was any facial expressions or body language of the remaining jurors that could have also indicated unacknowledged discomfort.[8] The record also reflects that at least a few of the jurors selected to serve on Raines's jury remained skittish about COVID-19 and expressed concern when they observed some of the court personnel not following the COVID-19 protocols.

***9** On the first day of trial, the State put on ten witnesses before resting its case. When the trial court learned the next morning that Raines had had close contact with Pratt, it contacted OCA and learned that Raines, Raines's attorneys, and the court coordinator would have to quarantine for fourteen days and be tested for COVID-19. It also learned that, if any of those people tested positive, the jury would have to be informed and might have to quarantine. The trial court expressed its concern that any continuance would be at least fourteen days and perhaps more if anyone involved tested positive. It also expressed the concern that, because some of the jurors expressed discomfort at being there before being exposed to COVID-19, once they were informed of their exposure, it could materially affect their decision-making process. It explained that it was concerned that the jury would be unable to render a fair verdict because jurors would be anxious to reach any verdict quickly to get out of the situation as soon as possible, rather than reach a verdict based on the facts of the case. It did not believe that would be fair to either the defendant or the State.

The trial court then asked for comments from the parties. The State argued that, based on the COVID-19 pandemic, the acknowledged discomfort by the jurors during voir dire, and their continued concern regarding courtroom safety, the trial court should find that there was manifest necessity for a mistrial and that no other lesser measures, including a continuance, could assure the State and Raines a fair trial. Raines objected to a mistrial and insisted that there were less restrictive alternatives but did not identify viable alternatives for the trial court. The trial court then found that the circumstances it had discussed made it impossible to obtain a fair verdict and declared a mistrial.

This case is not a case in which the trial court made an arbitrary decision to declare a mistrial without considering less drastic alternatives. *See, e.g.,* *Brown v. State*, 907 S.W.2d 835 (Tex. Crim. App. 1995); *Ex parte Little*, 887 S.W.2d 62, 64 (Tex. Crim. App. 1994); *Harrison v. State*, 788 S.W.2d 18, 21 (Tex. Crim. App. 1990). Rather, this record demonstrates that the trial court carefully considered the feasibility of the less drastic alternative of continuing the case for a minimum of fourteen days, the uncertainty of the length of any continuance,[9] the continued discomfort of at least some of the jurors with participating in a trial during the COVID-19 pandemic and with the trial court's safety protocols, and the impact that informing the jury that one of the participants in the trial had been exposed to COVID-19 would have on their ability to render a fair verdict for both Raines and the State.

Nevertheless, Raines argues that the trial court should have inquired of jurors to accurately gauge their reactions before it declared a mistrial, relying on *Garza.* In *Garza*, a jury was empaneled and sworn in on Monday, August 13, for Garza's trial for misdemeanor driving while intoxicated. The next morning, the trial court announced on the record that one of the jurors had experienced "a cardiac event" the night before and was hospitalized, then reset the case for two days later, August 16. On August 16, the trial court announced that the ailing juror was still in the hospital as of the afternoon of August 15 and that the earliest he would be available was after August 21. The defendant objected to the State's motion for mistrial and asked for a continuance of a week to allow the

ailing juror to recover. The trial court reset the trial for August 22 and instructed its bailiff to contact the other jurors to check on their availability. That same afternoon (August 16), the parties returned to the courtroom for an update, and the bailiff reported that the ailing juror would not be available until after August 21, that two of the other jurors would be available, that one of the jurors would not be available August 21 or 22 because of a business trip, and that he had been unable to reach the remaining two jurors. *Garza*, 337 S.W.3d at 906–07.

***10** The trial court then told the parties that it had told the jury that the trial would take no more than two days, that it was concerned about keeping the jury through the weekend and beyond Wednesday of the following week, and that, in its experience, when the trial takes longer than expected, there can be problems with the jury's willingness to process information. It also noted the uncertainty of when the ailing juror would be available. The trial court then declared a mistrial and ordered the parties to return on August 22 for jury selection. *Id.* at 907. Garza objected and requested a continuance for one or two weeks or, in the alternative, to proceed with the jurors who were available. The trial court denied the continuance but did not acknowledge Garza's request to proceed to trial with the remaining jurors. *Id.* Before jury selection in the second trial, Garza filed an application for a writ of habeas corpus based on double jeopardy, which the trial court denied. *Id.* at 907–08.

In sustaining Garza's double-jeopardy claim, the Texas Court of Criminal Appeals noted that it had not been shown that the trial court had not ruled out the possibility that a one-week continuance could have allowed Garza to obtain a verdict from the original jury or from five members of that jury. *Id.* at 916. The court also faulted the trial court for relying solely on its experience in assuming a delay could affect the jury's attitude and willingness to process information. Noting that "[t]his was not a situation, however, in which a trial had already commenced, and a jury would be expected to retain information over the course of a protracted continuance," the court, at the time the mistrial was declared, "had not ... determined ... that a continuance of more than a week was necessary." *Id.* The court went on to note that, rather than relying on its experience, the trial court should have made inquiries of the jury to determine whether such a short delay "would in fact negatively impact their 'attitude' and detract from their ability to 'process information' and otherwise focus on the proceedings." *Id.*

Garza is distinguishable on its facts. First, although the jury had been empaneled and sworn, no testimony had been taken. In this case, the State had called ten witnesses and rested its case. Also, in *Garza*, the trial court had not established that any continuance would last more than a week. In this case, the trial court had established that, because of the COVID-19 protocols, a continuance would last a minimum of fourteen days. Consequently, in this case, a continuance would have required the jury to retain information over the course of a protracted period. Further, although Garza agreed to proceed with the remaining five jurors, the trial court failed to even consider that option. In this case, the trial court considered and reasonably eliminated the only less drastic alternative to mistrial. Finally, the *Garza* trial court relied solely on its past experience and assumed what the jury's reaction to a continuance would be. In this case, the trial court did not rely solely on its experience. Rather, it considered the jurors' acknowledged concerns about being in a court proceeding during the COVID-19 pandemic, the jurors' expressed concerns about the court's safety protocols, and the impact that the knowledge that a material participant in the trial had been exposed to COVID-19 would have on the jury.

Raines also argues that the course of Pratt's trial showed that there was no manifest necessity for the mistrial in this case. In Pratt's trial, the evidentiary stage was complete, and the jury had begun deliberations on the first day of trial. After Judge Smith told the attorneys of Pratts COVID-19 status the next morning, they agreed to let the jury continue deliberating. After the jury concluded deliberations and reached a guilty verdict, Judge Smith told them of their possible exposure to COVID-19 and recessed the trial until September 17, when the punishment phase was to be held.

***11** We do not conclude that the Pratt trial has any bearing on whether the trial court in this case abused its discretion in declaring a mistrial. The procedural posture of the Pratt trial at the time it was discovered that Pratt had tested positive for COVID-19 was significantly different, its guilt/innocence phase being almost complete. Since the jury finished its deliberation in the guilt/innocence phase before the recess, it was not required to retain information regarding Pratt's guilt or innocence during a protracted continuance. In addition, there is no evidence in the record that the jurors in the Pratt trial had expressed any concerns about being involved in a court proceeding during the pandemic or that they had expressed any concerns about the court's safety protocols,

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which were major considerations in this trial court's decision to declare a mistrial in this case.

Based on this record, we cannot say that the trial court's determination that there was manifest necessity to declare a mistrial was outside the zone of reasonable disagreement. *See* *George*, 41 S.W.3d at 243. Therefore, we find that the trial court did not abuse its discretion in its manifest necessity determination. We overrule this issue.

For the reasons stated, we affirm the trial court's denial of Raines's application for a writ of habeas corpus.

All Citations

Not Reported in S.W. Rptr., 2021 WL 1555047

Footnotes

1 Originally appealed to the Tenth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Tenth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

2 *See* TEX. PENAL CODE ANN. § 25.11(a).

3 The Honorable Steve Smith, judge of the 361st Judicial District Court and administrative judge for Brazos County, testified that the Office of Court Administration (OCA) permitted the Brazos County courts to hold in-person jury trials as long as they followed the Brazos COVID-19 Plan and did the "other things [OCA] outlined." Although it is unclear what the "other things OCA outlined" were, Raines introduced an OCA document entitled "Guidance for All Court Proceeding During COVID-19 Pandemic (For Proceedings on or after June 1, 2020) (OCA Guidance). The OCA Guidance required that, before holding non-essential in-person proceedings, the administrative district judge, in consultation with other judges and the local health authority, must develop and have approved an operating plan that contained the protocols for safely holding in-person proceedings during the COVID-19 pandemic. Among other components, the OCA Guidance required the operating plan to include the following screening requirement:

> **Screening - how the courts will ensure screening of all individuals entering the courthouse or courtroom areas**
>
> Individuals feeling feverish or with measured temperatures equal to or greater than 100.0°F, or with new or worsening signs or symptoms of COVID-19 such as cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, sore throat, loss of taste or smell, diarrhea, or having known close contact with a person who is confirmed to have COVID-19 must not be permitted entry.
>
> Special attention should be given to how inmates or detainees from jail and juvenile facilities who may be transported to a courtroom will be screened, including consideration of a lower threshold temperature of 99.6°F as an indicator of symptoms.

(Footnotes omitted). There was no evidence that the Brazos County courts did not screen the participants in the trials taking place on August 17 and 18 as required by the OCA Guidelines.

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4 The Fourteenth Amendment to the United States Constitution extends the prohibition on double jeopardy to the states. *Id.* (citing *Benton v. Maryland*, 395 U.S. 784 (1969)).

5 *See* *Downum v. United States*, 372 U.S. 734, 735–36 (1963) (jeopardy attached when prosecution let a jury be chosen and sworn even though prosecutor knew a key witness was not present and had not been subpoenaed); *Walck v. Edmondson*, 472 F.3d 1227, 1239 (10th Cir. 2007) (jeopardy attached when prosecutor let jury be chosen and sworn knowing that key witness would not be available for trial); *McClendon v. State*, 583 S.W.2d 777, 778–79 (Tex. Crim. App. 1979) (in bench trial, jeopardy attached when State allowed defendant to plead guilty and went to trial without making any attempt to secure the presence of a key witness).

6 *Washington*, 434 U.S. at 503 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

7 Raines does not cite, and we have not found, any reported cases in which a mistrial was caused by the conduct of law enforcement officers or jail personnel based on their actions transporting or implementing health and safety procedures for inmates outside the presence of the jury. Additionally, we do not believe courts of last resort would apply a strict scrutiny standard of review in such circumstances unless, at a minimum, the conduct was intentional or in bad faith.

8 The trial court's recollection two days later was that most of the venire members nodded their heads when asked if they were uncomfortable being there.

9 Although every case must be reviewed on its own circumstances, we note that, even in a non-pandemic setting, the Texas Court of Criminal Appeals and other courts have rejected double-jeopardy claims based on a trial court declaring a mistrial resulting from the illness of the defendant or another essential trial participant after the State had begun its case, rather than continuing the case for a week or more. *See* *Jones v. State*, 187 S.W.2d 400 (Tex. Crim. App. 1945); *see also* *Loux v. United States*, 389 F.2d 911 (9th Cir. 1968), *cert. denied*, 393 U.S. 867 (1968); *People v. Castro*, 657 P.2d 932 (Colo. 1983), *overruled on other grounds by West v. People*, 341 P.2d 520 (Colo. 2015); *Glover v. United States*, 301 A.2d 219, 222 (D.C. 1973); *State v. Saavedra*, 766 P.2d 298 (N.M. 1988); *Commonwealth v. Thomas*, 498 A.2d 1345 (Pa. Super. Ct. 1985), *app. denied*, 522 A.2d 1105 (Pa. 1987); *State v. Mendoza*, 305 N.W.2d 166 (Wis. Ct. App. 1981). *But see* *Dunkerley v. Hogan*, 579 F.2d 141 (2nd Cir. 1978).

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