Supreme Court No. _____
COA No. 84996-4-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

SCOTT DAVIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

MOSES OKEYO
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Scott Davis asks this Court to review the opinion of the Court of Appeals filed in his case on December 30, 2024 (Appendix 1-22).

B. ISSUES PRESENTED FOR REVIEW

1. Mr. Davis was confined in solitary confinement as he prepared for his trial. He had little to no access to the law library and his legal files. When the court saw he was not prepared it did not even consider appointing standby counsel to give him technical assistance. An accused, who chooses to represent himself, has a constitutional right to be allowed meaningful access to adequately prepare a defense. The Court of Appeals acknowledges Mr. Davis had less than eight hours to prepare for four complex cases. Yet, it simply apportions blame on Mr. Davis and concludes he received was "reasonable access." Is review

necessary to decide whether less than eight hours of law library access without access to legal files, and no standby counsel is constitutionally adequate access under RAP 13.4(b)(1), (2) and (3)?

C. STATEMENT OF THE CASE

Mr. Davis directs the Court to his rendition of the Statement of the case in the opening brief. Br. of Appellant 7-35.

The State charged Mr. Davis with two counts of second degree assault with a firearm; one count of second degree assault; and one count of unlawful possession of a firearm. CP 130-31; 4RP 152; 3RP 20.

1. Mr. Davis decides to represent himself. The jail throws him in solitary confinement.

Before trial, Mr. Davis asked to fire his attorney and represent himself. 1/9/23 RP 9-12. Mr. Davis had replaced two other attorneys who sought continuances over his objections and would not get certain evidence

he believed was critical for his defense. 8/17/22 RP 3-5; 9/14/22 RP 3-5. After the court granted his attorney's request to withdraw, it allowed Mr. Davis to represent himself. 3RP 22-23, 25; 4RP 80. Mr. Davis did not want the withdrawn counsel to act as standby counsel. 8/17/22 RP 3-5; 9/14/22 RP 3-5.

On the hearing where he asked to represent himself, Mr. Davis was wearing a mask below his nose. 1/9/23 RP 4. His attorney did not have a mask. *Id.* When an officer asked Mr. Davis to pull up his mask to cover his nose, he declined, and the correction officer punished him by throwing him in solitary confinement (locked up 24 hours a day), stripping him of his commissary, and restricting his diet to baloney sandwiches (without food he could eat).

After the hearing, Mr. Davis was now representing himself, moments later a correction

officers immediately cuffed him and put him in "max security" for the week: 24 hours a day in a cell, no access to the law library or his legal files. 3RP 22-23, 25; 4RP 80. Mr. Davis explained the physical and mental torture he felt in solitary confinement without food he could eat and without being able to conduct legal research and prepare his case. *Id*; 1/9/23 RP 4. The prosecution claimed it did not know why Mr. Davis was in solitary confinement and discussed jury instructions. *Id.* Mr. Davis insisted he was promised access to the law library or at a minimum tablet use—which never happened. *Id.* at 24.

The Court was more concerned with procedure: "[t]hat type of motion is supposed to go on extended criminal motions calendar, and you are supposed to give notice to the other side." *Id.* at 24. Mr. Davis reminded the court he had been objecting to all the

irregularities in his case, including his inability to get adequate information to prepare for trial, no discovery from the prosecutor, inability to review any of the research material after accessing them at the workstation, and the fact that he had no way to submit written motions—and relied on the opposing party and the jail to work on any aspect of his case. *Id.*

The State provided the court with a trial brief and its motions in limine. *Id.* Mr. Davis had not prepared any written motions. *Id.* The court ordered the jail to grant Mr. Davis access to the law library as appropriate based on their policies. *Id.* at 29-30. Despite Mr. Davis's indication that he could not meaningfully prepare for the motion in limine hearing, the court conducted the hearing to admit evidence. *Id.* at 31-32.

The State moved in limine to admit as evidence the "circumstances" surrounding Mr. Davis's arrest on August 2021. 4RP 121. Specifically, the State moved to admit evidence of Mr. Davis's previous arrest from his leased property which led to police towing away his vehicle. *Id.* His property, his dog, and his vehicle were never returned to him. *Id.* The State argued the details of this arrest were necessary to "contextualize" his statements: "You're going to do what you did last time and take my stuff", to show he didn't want police to take away his property like they did when they previously arrested him. *Id.* at 121. The State contended this evidence established Mr. Davis's motive for assaulting the officers and established that he was "aware" they were police officers. *Id.* The court admitted the evidence over Mr. Davis's objections. *Id.* at 124.

Despite knowing that Mr. Davis had no time to prepare, the court asked Mr. Davis to present and argue his motions in limine. *Id.* at 38.

Because Mr. Davis had no standby counsel to assist him in obtaining evidence, he asked the court to compel the State to provide certified copies of the Snohomish County Assessor's Report showing the owner of the garage, the writ of restitution showing the person listed is not the owner, and death certificates of the listed owners. *Id.* at 41, 47. The State objected that the information Mr. Davis requested was not relevant and had no bearing on the immediate proceeding. *Id.* at 42. The State countered that Mr. Davis only wished to pull these records to attack the validity of the eviction order contrary to the court's ruling in limine. *Id.* at 42. The court denied Mr. Davis's request for the county assessor records. 3 RP 48.

Mr. Davis also requested certified copies of property owners of the leased property listed with the county assessor. The State argued these certificates were not relevant and it had no obligation to gather evidence for Mr. Davis. *Id.* at 48. The court agreed with the prosecution, although Mr. Davis did not have standby counsel to assist him and he could not obtain the evidence from his cell. *Id.* at 48.

Mr. Davis explained he should be allowed to tell the jury the basis for his belief that the underlying eviction was invalid or unlawful. *Id.* at 43. For one, he knew the County Assessor's property report listed two owners who were now deceased, and none of those owners were listed in the writ of restitution. *Id.* at 43. This evidence was critical to his theory of defense. *Id.* at 43-44. The Court allowed those three documents Mr. Davis requested to be used for impeaching the

prosecution's witnesses's credibility. *Id.* at 47. The prosecutor agreed to provide those records for Mr. Davis. *Id.* at 49-50. The prosecution warned Mr. Davis that just before closing he should again move to admit all his evidence before the jury retired to deliberate to flag them for the jury. 5RP 316. Mr. Davis did not do so.

2. Despite a court order, the jail denies Mr. Davis access to the law library to prepare for trial.

The law library is a little room that is 8-by-10 feet with a locked down tablet with the workstation version of the legal research software. 1/9/23 RP at 94. A pro se inmate cannot bookmark cases, catalogue them, or print them for later use. *Id.* at 94.

On the next day of trial, Mr. Davis again complained the jail was violating his constitutional rights by denying him access to the law library or allowing him only about 30 minutes. *Id.* at 71. The

court said it could not deal with the issue without a jail representative present. *Id.* at 71. The court ordered the jail to grant Mr. Davis access to the law library over the long holiday weekend. 3RP 70-71.

When court resumed, Mr. Davis again informed the court the jail would not allow him access to the law library over the long weekend. *Id.* at 78. And so he was not "totally sure" if he was sufficiently prepared and ready to proceed with trial. *Id.* at 78. The prosecution still insisted trial should proceed. *Id.* at 77-78.

The jail representative, a corrections officer, apprised the court he woke up Mr. Davis early Saturday morning to take him to the library. *Id.* at 85. According to the officer, Mr. Davis yelled: "I'm not ready yet. I just woke up." *Id.* at 85, 96. The officer took that as "refusal" and so Mr. Davis missed the law library that morning and the rest of Saturday. *Id.* at

85, 95. On Sunday, Mr. Davis was up early and ready to go to the law library. *Id.* at 96. He waited and waited and waited. *Id.* By noon, he reminded a deputy officer he was supposed to go to the law library. *Id.* at 95. The officer granted him access to the library for what was supposed to be a two-hour slot. *Id.* at 85, 96. But at dinner time, Mr. Davis's time was cut short so he could eat. *Id.* at 96.

Mr. Davis was also scheduled to use the law library on Monday afternoon. *Id.* at 96. On Monday morning, Mr. Davis asked for a razor to make his face presentable for court. *Id.* at 96-97. The corrections officer he asked pretended not to hear his request and Mr. Davis repeated it louder. *Id.* The officer took issue with Mr. Davis's tone and denied him the razor. *Id.* at 97. When Mr. Davis expressed frustration by throwing baloney, he was placed on "sack restriction"— he was

confined to his cell, and was to receive only sacked baloney sandwiches for breakfast, lunch, and dinner. *Id.* at 85, 97-98; 1/9/23 RP 4. He was not allowed to leave his cell even to go to the law library. *Id.* at 85, 97-98.

Mr. Davis said he was able to do a little bit of legal research over the long weekend. But he still needed more time to prepare. The workstation edition in the law library did not allow him to print so he had to copy caselaw by hand— "I gotta handwrite everything." *Id.* at 98. The court said: "None of this really makes a difference to me because you've been given the opportunity [to access the law library] twice." *Id.* at 98. Mr. Davis said he wanted the court to know how the jail cut right into his preparation time. *Id.* at 99.

Though he was not prepared, he still insisted on his right to a speedy trial. *Id.* at 99. Because Mr. Davis had not had an opportunity to complete his legal research, the prosecution asked the court to rule on the motions in limine "without prejudice." *Id.* at 103. Mr. Davis would later be afforded a chance to present additional information to try and convince the court to change its ruling. *Id.*

The State moved in limine to introduce a certified copy of a prior guilty plea to prove that Mr. Davis had previously been convicted of a felony assault in the third degree and was prohibited from possessing a gun. *Id.* at 104, 106. The court admitted the plea agreement over Mr. Davis's objections. *Id.* at 116. Mr. Davis would not stipulate that he was "previously convicted of an offense which prohibited him from having a firearm." *Id.* at 117. The court recognized the prejudice from the

evidence and asked the State to prepare a limiting instruction that the jury could not consider this evidence to determine whether or not the alleged assaults in this case took place. *Id.* at 118.

The jail informed the court that its policy allowed pro se inmates only three sessions per week in the law library. *Id.* at 109. Mr. Davis could be provided two sessions that afternoon and evening and he would not be able to use the law library again until after Sunday. *Id.* The court acknowledged that the rigid policy was "problematic" given that a pro se inmate had a constitutional right to prepare for his own defense, especially mid-trial. *Id.* But the court said it could not change the jail's policy to make it easier for inmates to spend more time in the law library as the trial progressed. *Id.*

The next day, Mr. Davis said that though he was able to use the law library as the court ordered, he still was not able to print anything. The workstation edition allowed him to pull up the case summary but did not allow him to access the complete case. 5RP 245. Moreover, Mr. Davis could not print caselaw for later review in his cell. *Id.*

The State claimed not to know how the jail procedures worked. *Id.* The court told Mr. Davis it had no control over jail policy. 5RP 246. Mr. Davis complained that so far he was unable to prepare for his defense. *Id.* The court acknowledged the three-times access policy was arbitrary and if Mr. Davis needed more time to prepare for trial and no one else was using the law library, he should be allowed to do so. *Id.* The court said it could not interfere with jail policies: "It may be unfortunate that you can't print. The reality

is this too." 5RP 247. The State offered to print cases for Mr. Davis if he provided it with relevant citations. 5RP 249.

3. The State exploited Mr. Davis's lack of preparation to throw him off the game during motions in limine and at trial.

Because he had not yet been allowed access to the law library, Mr. Davis had not prepared his opening statement when the court asked the parties to present their opening remarks. 5RP 312. The court warned Mr. Davis that if he did not present his opening statements after the State's opening, and if he had no witnesses to call, then the court would deem his opening waived and require Mr. Davis to present only closing remarks. *Id.* at 312-14. Mr. Davis said he wanted to present an opening statement but was not given an opportunity to prepare it. *Id.* at 315.

By the time the State presented its opening statement, Mr. Davis took a few minutes to jot his opening statement. *Id.* at 343.

At trial, as Mr. Davis cross-examined Mr. Greeno, he sought to introduce the 14-day quit or pay notice. 3RP 394. The State objected on the basis that Mr. Davis had not laid a proper foundation and that the evidence was hearsay. *Id.* After Mr. Greeno recognized the notice, the State conceded Mr. Davis laid the proper foundation but insisted the document was inadmissible as hearsay. 3RP 395. When the court asked the State to explain why this was hearsay, the State withdrew its objection: "If the defendant knew how to lay the foundation for a business records exception, it would apply under the business records exception." *Id.* The court admitted this notice as evidence. *Id.*

After the State's case in chief, Mr. Davis moved to dismiss the whole case for government misconduct in denying him access to the law library in violation of his right to a fair trial. 6RP 691. The court declined to entertain his motion: "That's not an issue I'm going to take up at this time." 6RP 691.

4. The court refuses to let Mr. Davis re-call State's witnesses to present his case.

Mr. Davis's theory of defense was that he believed the eviction was illegal because Mr. Greeno was not the property owner and had no legal authority to evict him from the premises. 4RP 129-30. Thus, he had the lawful right to defend the property against any malicious tresspassers, which included police. *Id.* He sought to question the State's witnesses to show the jury the basis for his belief the eviction was not valid. *Id.* Specifically, Mr. Davis sought to show the underlying writ of restitution named someone who was

not the actual owners of the property and the actual owners were now deceased. 3RP 48-49.

The State acknowledged defense of property and self-defense were viable defenses even though Mr. Davis mistakenly believed police were trespassing on his leased property. 3RP 127.

In his case in chief, Mr. Davis sought to recall some of the witnesses for the State—Officer Fournier, Officer Ross, Officer Grieve, and James Greeno. 7RP 709. The prosecution said it learned Mr. Davis wanted to recall its witnesses the previous week and it objected because he did not send subpoenas to them from jail. 7RP 688. The prosecution argued Mr. Davis should have developed all the testimony and presented all his evidence when he had them for cross-examination on the stand. 7RP 709. Mr. Davis said he informed corrections officers he needed to submit subpoenas and

asked them for the correct procedure to submit a witness list. *Id.* The corrections officers did not respond. *Id.*

The court told Mr. Davis that if he had not secured the presence of the witness by subpoena, he could not call them for his case. 7RP 690. Mr. Davis offered proof that he intended to impeach these witnesses generally, and especially to question Mr. Greeno with ownership documentation to show he was not the legal owner of the leased property. 7RP 709-711. The court ruled that the ownership documents were not relevant to any issue in the case. 7RP 711. It refused to allow Mr. Davis to recall these witnesses because he failed to question them when he had them on the stand. 7RP 710, 712.

Mr. Davis did not wish to testify, so he had no witnesses to present. *Id.* The court took a short recess

to allow Mr. Davis to work on his closing argument while the court made copies of the jury instructions for the parties. 7RP 712.

Mr. Davis was not ready to present closing argument, but the prosecution opposed any more continuances to allow Mr. Davis to prepare. 7RP 711.

The court said because Mr. Davis would not be able to provide instructions, it was the court's "obligation to provide the law," and Mr. Davis was only required to present evidence relevant to his defense. 5RP 247. The court ordered the law clerk to prepare jury instructions on Mr. Davis's behalf. *Id.*

The court took a brief recess to copy jury instructions and Mr. Davis prepared his closing argument. 7RP 712.

The court declined to give the defense of property instruction on the basis that the evidence presented

was that the officers were effecting a lawful court ordered writ of restitution. Therefore, no reasonable juror could conclude that police were trespassing. 7RP 714-15.

D. ARGUMENT

The Court of Appeals abbreviates prison inmates' constitutional right to meaningful access to the law library. Less than eight hours of access to prepare for four complex charges is not constitutionally adequate access.

"In criminal prosecutions the accused shall have the right to appear and defend in person." Const. art. I, § 22. This right to self-representation is also guaranteed by the federal constitution, but it is given greater protection by the Washington constitution. U.S. Const. amends. VI, XIV; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L.E d. 2d 562 (1975).

Article I, section 22 affords "a pretrial detainee who has exercised his constitutional right to represent

himself, a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense." *State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). To decide whether a detainee was given measures necessary for reasonable access, reviewing courts consider circumstances such as the nature of the charge, complexity of the issues, the need for investigation, and the administration of justice. *Id.* at 622-23; *See State v. Gwin*, 31 Wn. App. 2d 295, 301, 548 P.3d 970, 974 (2024) (unpublished).

The denial of the right of self-representation is a structural defect in the framework of the trial proceedings not subject to harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Silva*, 107 Wn. App. at 620.

The common law history of this right to self-representation in Washington also includes the right to

"reasonable access to legal materials, paper, writing materials, and the like." *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). "[T]he [substantive] right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense." *Silva*, 107 Wn. at 620-21.

In deciding whether a detainee was denied meaningful access, the Court of Appeals in *Silva* considered access to legal materials, pencil and paper, copying services, coordination of services such as arranging interviews, blank subpoena forms, postage, and opportunity to interview witnesses to be among the reasonable tools necessary to prepare a pro se defense. *Silva*, 107 Wn. App. at 625-26.

a. Mr. Davis was denied meaningful access to the law library.

Mr. Davis spent most of his pre-trial and trial in solitary confinement where he had little or no access to the law library. While in solitary confinement, the lack of access compromised his ability to complete legal research, to be meaningfully prepared for motions in limine, to complete the opening, prepare questions for cross-examination, prepare jury instructions, and prepare closing arguments. Mr. Davis was unable to seek evidence for his defense or subpoena witnesses for his defense.

b. Additionally, when Mr. Davis appeared to be unprepared and having difficulty, the court did not appoint standby counsel to provide him technical assistance.

The court did not provide Mr. Davis standby counsel for technical assistance when he seemed unprepared for motion hearings and struggled to tender evidence at trial. The lack of access inhibited his

ability to effectively access the courts and present his defense as an incarcerated pro se litigant.

A law library is but one of various constitutionally permissible means of providing "meaningful access" to the courts. *State v. Nicholas*, 55 Wn. App. 261, 269, 776 P.2d 1385 (1989). The right of a pro se party to access the courts can also be effectuated by the assistance of standby counsel. *See State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982) (if a defendant has "knowingly and intelligently exercised his right of self-representation, the appointment of standby counsel meets the meaningful access requirement"). This common law history indicates that, at a minimum, the Washington constitution guarantees the right to standby counsel when necessary to meaningfully effectuate the pro se

litigant's right of access to the courts and the right to meaningfully prepare his defense.

The court did not provide Mr. Davis standby counsel to provide technical information. *See State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). Standby counsel can explain the court's rulings and requirements to a pro se litigant. *Id. citing McKaskle*, 465 U.S. at 177-78.

The lack of standby counsel inhibited Mr. Davis's ability to present his defense in several ways. Mr. Davis needed technical assistance with legal research to get up to speed on evidentiary rules. He needed assistance to track down evidence in his defense and properly introduce that evidence in court. He needed to subpoena witnesses.

For most of pre-trial and trial, the jail housed Mr. Davis in solitary confinement. His ability to prepare

was hampered by this "maximum security" confinement. Such extreme confinement conditions further necessitated assistance of standby counsel.

Mr. Davis could not even print caselaw so he could go over it in-depth in his cell. The workstation edition version of legal research software restricted his ability to compile and print materials. He was relegated to copying caselaw on paper with a pencil. The confinement also meant Mr. Davis could not schedule interviews of witnesses or prepare subpoenas. Standby counsel would have assisted him in overcoming some of these limitations.

In short, Mr. Davis was not provided with the ability to meaningfully represent himself, which could have been solved by appointing him standby counsel.

The failure to provide access to reasonable tools necessary to prepare a meaningful pro se defense

violates a defendant's right to self-representation under article I, section 22. *Silva*, 107 Wn. App. at 626.

A violation of the right to self-representation is structural error requiring automatic reversal. *State v. Sabon*, 24 Wn. App. 2d 246, 249, 519 P.3d 600 (2022).

c. Review should be granted because, less than eight hours in the law library to prepare for a complex multi-charge case, without standby counsel, is not constitutionally adequate access.

Although, the trial court has broad discretion to determine what measures are necessary or appropriate to constitute reasonable access to legal resources, caselaw requires a meaningful consideration of all circumstances. *Silva*, 107 Wn.at 622–23. The trial court must consider the circumstances, including the nature of the charge, the complexity of the issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of

judicial resources, legitimate safety, and security concerns, and the accused's conduct. *Silva*, 107 Wn.App. at 623, 27 P.3d 663; *See State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50, 53 (2007). Contrary to its own precedent in *Silva*, the Court of Appeals dodges the legal issue presented for review: Whether Mr. Davis was allowed meaningful access to resources necessary to prepare an adequate defense. The Court of Appeals exclusively blames Mr. Davis as the reason he was unable to fully utilize the sessions the jail provide. It reasons that Mr. Davis's own behavioral issues was the only reason he did not have access. Slip. Op. at 10. The Court of Appeals concludes: "Because any lack of access to the law library was Davis' own fault, …, his constitutional right to self-representation was not violated." Slip. Op. at 10.

Tellingly, the Court of Appeals concludes Mr. Davis's constitutional right to represent himself was not violated because he was given "reasonable access" to the jail's law library. Slip. Op. at 8. It acknowledges Mr. Davis was allowed only about eight hours to prepare and dodges answering the question whether it believes that was constitutionally sufficient to prepare a meaningful defense.

The Court of Appeals decided the access was reasonable without any analysis of the *Silva* factors as explained in *Gwin*. The Court of Appeals did not analyze any of the circumstances necessary for reasonable access such as the "nature of the charge, complexity of the issues, the need for investigation, and the administration of justice. *Silva*, 107 Wn. App. at 622-23; *Gwin*, 31 Wn. App. 2d at 301.

A fair analysis of these factors shows that Mr. Davis was denied meaningful access to the law library. Mr. Davis was in Solitary confinement throughout trial. This was the biggest limiting factor as he could not review audio transcripts, and he was physically separate from his legal materials. 7RP 689. For the first two weeks he did not even have pencil and paper. 1/19/23 RP 6 ("I haven't even so much as got a pencil.") No one provided him the blank subpoena forms or postage to mail subpoenas. No one assisted him to interview or subpoena witnesses. Mr. Davis had to rely on the jail staff or the prosecutor to work on any aspect of his case. From solitary confinement, Mr. Davis had no way of communicating with the prosecutor or the court.

Mr. Davis faced four complicated charges. This was not a run of the mill case. It was a complex

multiple assault case, an illegal firearm charge, aggravators, special verdicts, affirmative defense, enhancements, exceptional sentences, so complex the prosecutor even miscalculated the standard range and had to correct himself on the record. 4RP 101.

Additionally, an incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense. *Fleming*, 140 Wn.App. at 138. The Court of Appeals ignored that solitary confinement was the biggest factor impeding access. The jail allowed Mr. Davis only about 7.5 hours of access to the law library, he did not have his legal files, no access to a printer to print cases for later review. 4RP 85, 96; 5RP 244. Mr. Davis did not have access the full cases as he could only read case summaries. In solitary confinement, he had no assistance to interview or subpoena witnesses.

Review is warranted. The Court of Appeals concluded allowing a person unschooled in law only seven and a half hours[1] to prepare a defense without his legal files, without standby counsel, was constitutionally adequate access. Slip Op. 6, 10. This conflicts with precedent on the both the state and federal right to self-representation, particularly *Silva*. RAP 13.4(b)(1), (2).

Review is justified as matter of substantial public interest because many accused persons represent themselves and this issue will recur. RAP 13.4(b)(4).

Since 1997 in *Bebb,* 108 Wn.2d at 524, this Court has not provided guidance to our lower courts how to provide detainees constitutionally adequate access to the courts. This issue is also a significant question of

[1] The prosecutor's 64-page powerpoint for closing must have taken longer than the total time Mr. Davis was allowed to prepare his entire case.

constitutional law, further meriting review. RAP 13.4(b)(3).

E. CONCLUSION

Mr. Davis respectfully requests this Court accept review.

This brief complies with RAP 18.7 and contains 4,945 words.

DATED this 21st day of January 2025.

Respectfully submitted,

MOSES OKEYO (WSBA 57597)
Washington Appellate Project
Attorneys for Petitioner

APPENDICES

FILED
12/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SCOTT GREGORY DAVIS, Appellant.	No. 84996-4-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Scott Gregory Davis was arrested after pointing a gun at officers during an eviction. A jury convicted Davis on two counts of second degree assault with a firearm, one count of second degree assault, and one count of unlawful possession of a firearm in the second degree. Davis appeals, arguing his constitutional right to self-representation was violated, insufficient evidence exists to support his second degree assault conviction of Deputy Brown, the State committed prosecutorial misconduct, the court erroneously excluded evidence and imposed exceptional sentencing, and the victim penalty assessment (VPA) should be stricken.

Because Davis's constitutional and statutory rights were not violated and the trial court did not err in its rulings or abuse its discretion, we affirm the judgment and sentence, but remand to the trial court to strike the VPA.

FACTS

Background

In 2019, Scott Davis began renting a garage from Tian Jun Tang for storage purposes. James Greeno, Tang's boyfriend, acted as property manager. Greeno continued in this role after Tang's death in 2020. Greeno subsequently discovered that Davis was living in the garage in violation of the lease and had not been paying rent. Greeno spoke with Davis about vacating the premises and, after Davis failed to leave, pursued formal eviction proceedings, serving Davis and posting a notice of eviction on the door to the garage. Davis remained on the property and the court granted a writ of restitution.

In July 2022, pursuant to the writ of restitution, Snohomish County Sheriff's Department Sergeant Eric Fournier and Deputies Alexander Ross and Tyler Brown went to the property to evict Davis. The officers knocked on the access door to the garage and announced themselves multiple times but did not receive a response. The officers began pounding on both the outside access door to the garage and the rollup garage doors for several minutes, identifying themselves and yelling, "police" and "Scott, it's eviction day. You need to come out." After receiving no response, Greeno took the officers inside the home to use an alternative access door to the garage.

Fournier and Ross made their way into the garage while Brown stayed by the doorway. While Ross went to open the rollup door to the single-car bay of the garage, Fournier made his way through the clutter in the garage toward a tarp-covered car to see if anyone was sleeping in the car. After Ross opened the

garage door, Brown made his way back through the house entrance and outside toward the open garage door.[1]

When Fournier got close to the car, he looked up to see Davis leaning over the rear side of the car and pointing a gun directly at his face. Fournier, scared for his life, yelled "sheriff's office" and "police" to make sure Davis knew he was law enforcement. At this point, Brown had positioned himself outside behind a pillar between the two rollup garage doors. Ross, still inside the garage, engaged Davis in negotiations. Ross mentioned multiple times that the officers were there to execute an eviction. Davis had the gun pointed directly at Ross, and Ross "thought [he] was getting shot that day." Davis stated, "[i]f I lower my gun, you're just going to take my resources away, my ID, my property . . . you're going to rush me and take me to jail."

Brown, still outside the garage door, looked around the pillar and saw Davis pointing the gun in his direction; he was also afraid of getting shot. Brown called for backup and Ross suggested Brown get a ballistic shield from their vehicle. Brown and Ross positioned themselves behind the shield. Eventually, in response to negotiations with Ross and the arrival of the Lynnwood Police Department, Davis put down his weapon and was arrested.

Pre-trial

The State charged Davis with three counts of second degree assault—two of which included firearms enhancements—and one count of unlawful

[1] A shelf obstructed the inner door to the garage, so Brown went back outside for a clearer path to the garage.

possession of a firearm in the second degree. Davis pleaded not guilty.

Over the course of the next couple of months, Davis moved for new counsel multiple times. When requesting new counsel for the second time, Davis noted that "[b]oth attorneys out of the Public Defender office have proven to be inadequate in defending me . . . which is why I'm seeking conflict counsel." The court granted Davis's request for conflict counsel and Natalya Forbes was appointed. Less than a month later, Davis again requested new counsel. The court denied his motion and encouraged Davis to work with Forbes, to which he replied, "No."

Two weeks later, Forbes requested new counsel be appointed, citing "a complete breakdown in communication." The court denied this motion, noting that Davis's primary concern was the continued delay of trial and granting new counsel would only hold up proceedings further. Two months later, Forbes moved to withdraw. The court asked Davis, if granted new counsel, would he be able to communicate with them. Davis replied, "[a]s far as I'm concerned, you're all paid by the same beast. You're all against me, regardless of what you say." The court denied Forbes' motion, noting, essentially, that the problem was not the attorney, but Davis's unwillingness to work with representation.

A few weeks later, Davis requested to proceed pro se, noting that Forbes had not provided adequate or timely representation and he would be able to do a better job himself. The court questioned Davis on his experience and provided Davis with an explanation of what proceeding pro se would entail. The court warned Davis there are "significant disadvantages" to proceeding pro se, but at a

subsequent hearing, Davis unequivocally and voluntarily waived his right to counsel and declined the assistance of standby counsel.

Davis first raised the issue of his inability to access the law library at the same hearing he requested to proceed pro se. Despite asserting that he was having trouble accessing the law library at the prison and admitting that "every aspect of my ability to work on this case relies on me to go through the opposing party," Davis maintained that he did not want standby counsel.

During another hearing concerning motions in limine,[2] Davis again noted that he had not been granted access to the jail's law library. The court requested an order be prepared alerting the jail of Davis's decision to proceed pro se and his need for access to the law library. The court also requested that a representative from the jail appear at the next hearing to discuss Davis's access to the law library. Despite Davis asserting a lack of access to the law library, he was able to present motions at this hearing and confirmed he was not requesting a continuance.

At a hearing the following week, Davis again claimed he was not given adequate time at the law library, but continued to indicate he was not requesting a continuance. A representative from the jail noted that Davis had been scheduled for three, three-hour sessions[3] over the weekend but, because of his

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[2] A motion in limine is "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial." BLACK'S LAW DICTIONARY, 1215 (12th ed. 2024).

[3] The jail representative noted that three, three-hour sessions a week is standard policy for the jail. The amount and timing of sessions in the law library is based on where the inmate is located, staffing, and the needs of other inmates.

own behavioral issues, Davis had only been allowed to utilize the library for one of the sessions. On Saturday, when a corrections officer woke Davis for his library time, Davis swore at the officer and said that he did not know he was scheduled for library time. The officer twice asked if he wanted his library time and Davis said he was not ready, kicked the door of his cell, and continued to yell at the officer. The officer took this as a refusal. On Monday, Davis's library time was denied after Davis yelled at a corrections officer and threw a bologna sandwich at the officer. The representative from the jail noted that "the jail has done everything that it needs to [do], to provide Mr. Davis with access to the law library, but it's really only his own actions that have prevented his ability to use the facility."

When asked how much additional time he would need to prepare, Davis told the court "[a] day or two at present." The court requested Davis be given additional time that week to prepare for trial, which the jail representative approved.[4] Davis was able to choose what days he wanted his sessions. Altogether, Davis claims he received less than eight hours in the law library to prepare.

At this same hearing, Davis sought to introduce evidence related to the ownership of the property he had been renting, including the Snohomish County Assessor's Report and certified proof of the deaths of Michael Dipofi and Tang, the alleged owners of the property. When questioned as to its relevance, Davis

[4] The court noted that the jail's procedure for granting time to pro se defendants was "problematic," but also recognized this was not an issue that could be resolved in the current matter.

stated it went to the credibility of the witnesses. The court then asked Davis if his overall defense was based on a claim of defense of property or self-defense, to which Davis responded that his "basis is denial." The court denied the motions because the documents were "impeachment on a collateral issue." The State nevertheless provided Davis with the Snohomish County Assessor's Report so Davis could have access.

Trial

At trial, Davis continued to assert that his inability to access the law library was the reason that he was not adequately prepared. When Davis sought to recall most of the State's witnesses for his case in chief, he argued that he had not been able to secure their appearance. The court noted that any matter Davis wished to address could have been brought up on cross-examination and Davis failed to do so. Additionally, when asked for an offer of proof about the testimony he sought to elicit from the witnesses, Davis indicated that he intended to impeach at least one of the witnesses. The court noted this was impeachment on a collateral issue and declined to allow it.

When it came time for closing arguments, Davis stated he did not have one prepared because he was unaware closing arguments would be happening that day. Opposing counsel noted that he had told Davis the prior day that closing arguments may happen. But after a short recess by the court, Davis did present a closing argument, and the court noted it was impressed by the argument.

Davis did not object to the jury instructions provided by the court. The court went out of its way to note that it did consider providing an instruction for defense of property, but ultimately declined to do so because "based upon the evidence presented, . . . I find that no reasonable juror can conclude that any trespass was malicious." Davis did not raise any issues with the judge's reasoning.

The jury convicted Davis on all counts. Davis appeals.

ANALYSIS

Self-Representation

Davis asserts that his lack of access to the jail's law library and standby counsel violated his constitutional right to self-representation. We conclude Davis's constitutional rights were not violated because he had reasonable access to the jail's law library and was offered and refused standby counsel.

We review questions of constitutional law de novo. *State v. Gregg*, 196 Wn.2d 473, 478, 474 P.3d 539 (2020).

Criminal defendants have a right to self-representation under both the Sixth Amendment to the United States Constitution and the Washington Constitution. U.S. CONST. amend VI; WASH. CONST. art 1, § 22; *see also State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). For a defendant's self-representation to be meaningful, the defendant must be given reasonable access to legal materials "necessary to prepare an adequate pro se defense." *State v. Silva*, 107 Wn. App. 605, 613, 621, 27 P.3d 663 (2001). What constitutes reasonable and necessary "lie[s] within the sound discretion of the trial court after

consideration of all the circumstances, including . . . the fair allocation of judicial resources (i.e., an accused is not entitled to greater resources than [they] would otherwise receive if [they] were represented by appointed counsel), legitimate safety and security concerns, and the conduct of the accused." *Silva*, 107 Wn. App. at 622-23. Appropriate legal materials may include access to a law library, pencil and paper, access to a telephone, subpoenas, and witness interviews. *Silva*, 107 Wn. App. at 613, 625.

Appointment of standby counsel may also provide a defendant with the resources needed to effectuate meaningful self-representation. *State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982). Appointment of standby counsel against a pro se defendant's objections may be judicially authorized, but "to force a lawyer on a defendant can only lead [them] to believe that the law contrives against [them]." *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A defendant's choice to represent themselves "must be honored." *Faretta,* 422 U.S. at 834. When a defendant chooses to proceed pro se, they are not entitled to "special consideration[,] and the inadequacy of the defense cannot provide a basis for a new trial or an appeal." *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

Here, Davis contends he was denied access to the jail's law library and, as a result, was unable to prepare a proper defense. But Davis was granted the standard amount of access to the law library per the jail's policies: three, three-hour sessions per week. The court asked Davis how much time he needed to prepare and worked with a jail representative to get him additional time in the

library. Davis was never denied additional time in the law library when requested. Davis's own behavior, including kicking his cell door and yelling at a corrections officer and throwing food at him, prevented him from fully utilizing his session time. Despite continued complaints about not having access to the materials he needed, Davis repeatedly denied wanting a continuance.

Davis also asserts the court should have appointed him standby counsel over his objections to provide technical information. But Davis vehemently denied standby counsel. In response to Forbes' offer to stay on as standby counsel, Davis asserted he did not "want anything to do with Ms. Forbes whatsoever." Additionally, when the court asked if Davis believed he could work with a new counsel, Davis responded, "The only person I could have more confidence in is a private attorney. . . . As far as I'm concerned, you're all paid by the same beast. You're all against me, regardless of what I say." Appointing standby counsel against Davis's wishes would have been fruitless, as Davis made it clear he believed he could provide a better defense working on his own.

Because any lack of access to the law library was Davis's own fault and he repeatedly, expressly declined standby counsel, his constitutional right to self-representation was not violated.

Second Degree Assault

Davis contends there was insufficient evidence to determine beyond a reasonable doubt that he committed second degree assault against Deputy Brown. We disagree. Sufficient evidence exists to support Davis's second

degree assault conviction against Brown because Davis put Brown in apprehension of bodily harm and Brown feared for his life.

We review the sufficiency of evidence under the substantial evidence standard. *Dolan v. King County*, 172 Wn.2d 299, 310-11, 258 P.3d 20 (2011). To determine whether substantial evidence was presented, we must view the evidence in the "light most favorable to the state" and determine whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This standard of review is highly deferential to the jury's decision. *In re Pers. Restraint of Arnsten*, 2 Wn.3d 716, 724, 543 P.3d 821 (2024).

To prove assault in the second degree, the State must show the defendant intentionally assaulted another with a deadly weapon. RCW 9A.36.021(1)(c). Washington courts have recognized three definitions of "assault": "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).[5]

Here, the State presented evidence to show that the defendant committed assault in the second degree against Brown under two theories: intended-victim theory and transferred-intent theory.

[5] Count 3 (Brown's assault) was predicated on the apprehension definition.

1. Intended-Victim Theory

Under the intended-victim theory, the State must prove that the defendant "inten[ded] to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury."

Specific intent can be inferred when a defendant points a gun at another, unless the victim knows the gun is unloaded. *State v. Miller*, 71 Wn.2d 143, 146, 426 P.2d 986 (1967). Even when a gun is not pointed directly at the victim but is being wielded in a way that causes apprehension and fear of injury, second degree assault can occur. *Arnsten*, 2 Wn.3d at 730 (affirming a second degree assault charge where, even though the defendant did not point his gun at the victim, he took the gun out "to create fear and apprehension that he would harm [the victim]"). No physical injury is needed for a finding of second degree assault. *Arnsten*, 2 Wn.3d at 725.

In his testimony, Brown stated that Davis's gun was pointed in his direction and he was afraid of getting shot. Brown stated when he was standing behind the pillar of the garage, he did not feel safe. He testified that "a bullet could easily go through it." Even after Brown brought the ballistic shield out, he noted that he didn't feel less afraid. The shield was not large enough to cover a

single person, let alone both Brown and Ross. A picture of the shield is included below.[6]

Brown was reasonably apprehensive and feared imminent bodily injury as a result of Davis's actions. Sufficient evidence exists to find assault in the second degree against Brown under an intended-victim theory.

2. Transferred-Intent Theory

The doctrine of transferred intent provides that "once the intent to inflict harm on one victim is established, the mens rea transfers to any other victim who is actually assaulted." *State v. Aguilar*, 176 Wn. App. 264, 275, 308 P.3d 778 (2013). When challenging the sufficiency of the evidence for a finding of

[6] This image was admitted as Exhibit 44 at trial.

transferred intent, the court must view the evidence in light of the instructions given to the jury. *State v. Jussila*, 197 Wn. App 908, 921, 392 P.3d 1108 (2017).

Here, the jury instruction provided: "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person." Under these instructions, if the jury found Davis intended to assault both Fournier and Ross, that intent would transfer to Brown given his apprehension and fear of immediate bodily harm. Davis did not challenge the findings that he intended to assault Fournier and Ross; therefore, the jury had sufficient evidence to find the necessary mens rea as to Brown under the instructions given.

We conclude sufficient evidence exists to support an intended-victim and transferred-intent theory of second-degree assault against Brown.

Presentation of Defense

Davis asserts the trial court violated his constitutional right to present a defense by excluding evidence critical to his defense and by not instructing the jury on the theory of defense of property. We disagree.

We review whether the Sixth Amendment right to present a defense has been violated de novo. *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019); *see also State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) ("The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo."). But we review a trial court's evidentiary rulings for an abuse of discretion. *Arndt*, 194 Wn.2d at 797.

A criminal defendant's right to present a defense is guaranteed by both the United States Constitution and the Washington State Constitution. U.S. CONST. amend VI; WASH. CONST. art 1, § 22. To determine whether a defendant's right to present a defense has been violated, Washington courts engage in a two-step review process. *Arndt*, 194 Wn.2d at 797-98. First, the court reviews the trial court's evidentiary rulings for abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). If the evidentiary ruling was not an abuse of discretion, the court then considers "whether the exclusion of evidence violated the defendant's constitutional right to present a defense." *Jennings*, 199 Wn.2d at 58.

In assessing a challenge to a trial court's evidentiary ruling, the court determines if the evidence is at least minimally relevant. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Defendants do not have a constitutional right to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If evidence is relevant, the court "must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Jennings*, 199 Wn.2d at 63.

The use of force in defense of property is not unlawful "[w]henever used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary." RCW 9A.16.020(3). Whether the

use of force in defense of property is greater than justified is ordinarily a question of fact for the jury. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 506, 125 P.2d 681 (1942). But the amount of force used has its limitations and can be so disproportionate to be unjustified as a matter of law. *See, e.g.*, *State v. Murphy*, 7 Wn. App. 505, 515, 500 P.2d 1276 (1972) (holding that the use of a deadly weapon in ejecting nonviolent trespassers was not justified as a matter of law).

Here, Davis maintains the court abused its discretion when it rejected a claim of defense of property and denied the admission of evidence to mount that defense. Davis claims his actions were lawful because he was "defending his property from what he believed to be an unlawful eviction," and he was entitled to present "some evidence" showing the basis for his belief that the police were maliciously interfering with his property. Upon Davis's request, the court admitted evidence of Davis's lease, the 14-day eviction notice, and the writ of restitution packet. Davis does not specify what evidence the court erroneously denied. Regardless, any evidence supporting a defense of property theory is not relevant because a defense of property theory was not viable.

Similar to *Murphy*, 7 Wn. App. at 515, where the defendant used a firearm in an attempt to eject officers who were not trespassing, Davis's use of force was unjustified. Here, the officers were performing a lawful eviction. Whether Davis believed the officers were trespassing or not (i.e., whether he was in lawful possession of the property), his use of force was greater than necessary and unjustified under the circumstances. Because defense of property is not a valid

justification, the court properly excluded that instruction from the jury instructions. Accordingly, any evidence supporting a theory of defense of property was also properly excluded, and Davis's constitutional right to present a defense was not violated.

Prosecutorial Misconduct

Davis asserts the State committed prosecutorial misconduct by using admitted exhibits on separate, consecutive slides in its closing argument. We disagree.

This court reviews prosecutorial misconduct allegations for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 563, 940 P.2d 546 (1997). Abuse of discretion arises when "the trial court 'acts on untenable grounds or its ruling is manifestly unreasonable.' " *State v. Hill*, 19 Wn. App. 2d 333, 345, 495 P.3d 282 (2021) (quoting *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016)).

To prevail on a claim of prosecutorial misconduct, a defendant must establish "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 678, 286 P.3d 673 (2012). Prejudice is established "only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.' " *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 627, 904 P.2d 245 (1995)). Prosecuting attorneys are permitted wide latitude in their closing arguments to " 'draw[] and express[] reasonable inferences from the evidence.' " *Brown*, 132 Wn.2d at 565 (quoting *State v. Gentry*, 125 Wn.2d 570, 461, 888 P.2d 1105 (1995)). When a

defendant fails to object to improper conduct during trial, it constitutes a waiver unless the defendant can establish the "misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann,* 174 Wn.2d at 704.

A prosecutor commits flagrant misconduct when they deliberately alter evidence in a way that influences the jury's deliberations. *Glasmann*, 175 Wn.2d at 706-07. Presenting numerous, suggestive photos with superimposed captions in a PowerPoint slideshow constitutes flagrant misconduct. *Glasmann*, 175 Wn.2d at 706-07; *see also State v. Walker*, 182 Wn.2d 463, 477-78, 341 P.3d 976 (2015) (holding that the prosecutor's PowerPoint presentation was "serious misconduct" because it contained over 100 slides that included inflammatory captions, racial text, and expressed personal opinions of the defendant's guilt). Showing an unkempt and bloodied booking photo may also be misconduct. *Glasmann*, 175 Wn.2d at 705. But, while a booking photograph may not be "absolutely necessary," its relevance in establishing identity in a prior conviction is not prejudicial. *State v. Newton*, 42 Wn. App. 718, 726-27, 714 P.2d 684 (1986). In addition to altered and/or prejudicial images, prosecutorial misconduct may occur where photographs of the victim and defendant are shown together on a single slide and are meant to improperly compare the two parties. *State v. Salas*, 1 Wn. App. 2d 931, 944-45, 408 P.3d 383 (2018) ("[S]lide shows may not be used to inflame passion and prejudice.").

Because Davis failed to object to the State's slides at trial, Davis must show that the State's behavior was so flagrant or ill-intentioned it could not have

been cured by an instruction to the jury. Davis takes issue with three sets of slides: slides 33-35 (depicting photographs of the officers on the day of the eviction taken from a surveillance camera); slides 47-48[7] (slide 47 is Davis's mugshot and slide 48 includes two pictures of the weapon Davis used); and slides 59-60 (slide 59 is Davis's booking photo from a previous arrest and a photo of Davis's identification and slide 60 is the jury instructions for "armed with a firearm").

Davis's specific objection to slides 33-34 is unclear. Davis states that the slides "depict[] three officers carefree and unarmed," but provides no rationale for why these images would constitute misconduct. Even assuming Davis meant to argue these images were prejudicial in a manner similar to the *Salas* case, that argument is unconvincing. Unlike *Salas*, the pictures here were not put on the same slide as Davis's photo and were not used to "inflame passion and prejudice." *Salas*, 1 Wn. App. 2d at 944-45. Furthermore, unlike *Salas*, none of the slides contained inflammatory text or altered exhibits. The images on slides 47-48 also fail to contain elements of flagrant misconduct. The sequence of Davis's booking photo and a picture of the weapon tracked with the elements the State was required to prove.

Finally, Davis had the opportunity to stipulate to his prior conviction, which would have alleviated the need for the State to present the images in slides 59-60. These images were used by the State to establish the prior conviction element of Davis's fourth charge of unlawful possession of a firearm in the

[7] Davis misidentifies these slides as 44 and 45 in his brief.

second degree. Any possible prejudice that did exist could have been cured by an instruction to not consider the defendant's past incarceration status in deciding its verdict except for the purposes of determining whether Davis had been previously convicted of the predicate offense. The State's use of the closing PowerPoint slides was not improper and, therefore, no misconduct occurred that was flagrant or ill-intentioned.

Exceptional Sentencing

Davis contends the court erred when it stated it lacked the authority to not impose firearm enhancements consecutively under RCW 9.94A.533(3)(e). We disagree because the trial court did not have authority to impose an exceptional sentence under RCW 9.94A.533(3)(e).

We review the interpretation of a statute de novo. *State v. Abdi-Issa*, 199 Wn.2d 163, 168, 504 P.3d 223 (2022).

Under RCW 9.94A.535, "[t]he court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." But the enhancement statute RCW 9.94A.533(3)(e) provides in pertinent part: "[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. In *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d

608 (1999), the Supreme Court held "judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement."

Davis maintains that precedent has changed since *Brown*, and the language of RCW 9.94A.533(3)(e) allows for modification of firearm enhancements. Davis is correct that precedent has changed since *Brown*, but he mischaracterizes the extent to which firearm enhancements may be modified. Subsequent case law overruled *Brown*, but only as applied to juveniles; *Brown* is still good law with regards to all other individuals (such as Davis). Washington courts have repeatedly confirmed *Brown* was overruled only to juveniles. *State v. Kelly*, 25 Wn. App. 2d 879, 889, 526 P.3d 39, *granting review*, 2 Wn.3d 1032 (2023) (noting that *Brown* was overruled "with regard to juveniles only"); *State v. Wright*, 19 Wn. App. 2d 37, 47, 493 P.3d 1220 (2021) ("It is settled law that except in the case of juveniles, firearm enhancements cannot run concurrently as an exceptional sentence.").

We conclude that the trial court did not err when it stated it did not have authority to impose an exceptional sentence under RCW 9.94A.533(3)(e).

Victim Penalty Assessment

Davis and the State agree the court should strike the VPA from Davis's conviction.

Interpretation of a statute is reviewed de novo. *Abdi-Issa*, 199 Wn.2d at 168. Under former RCW 7.68.035 (2018), a trial court was required to impose a $500 VPA on any person convicted of a crime. In 2023, the legislature amended the statute, prohibiting imposition of the VPA on indigent defendants as

defined in RCW 10.01.160(3). This amendment took effect on July 1, 2023. LAWS OF 2023, ch. 449, § 1. A defendant, on direct appeal not yet final, is entitled to remand to receive the benefits of the recent legislative amendments. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). The trial court found Davis indigent under RCW 10.01.160(3), yet still imposed the $500 VPA. Given the updated statute, the VPA should be stricken from Davis's judgment and sentence.

We affirm the defendant's conviction and sentence but remand to strike the victim penalty assessment.

Smith, C.J.

WE CONCUR:

Birk, J.

Chung, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84996-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Nathaniel Sugg, DPA
[nathan.sugg@snoco.org]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: January 21, 2025

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