# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRIAN DAVID MATTHEWS,<br><br>Appellant. | No. 41189-0-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Quinn-Brintnall, P.J. — A jury found Brian David Matthews guilty of first degree assault of a child with aggravating factors. Matthews appeals, arguing that (1) the trial court lacked subject matter and personal jurisdiction; (2) the trial court violated the timely trial rule, CrR 3.3; (3) the trial court failed to properly arraign him on the State's third amended information; (4) the trial court erred by denying his motion to dismiss count 1; and (5) the trial court erred in allowing him to proceed pro se. Matthews also argues that the trial court erred in imposing an exceptional sentence because there was insufficient evidence to support the aggravating factors. We affirm Matthews's conviction but remand for resentencing because the State improperly charged Matthews with abuse of trust as an aggravating factor.

## FACTS

### Background

On August 4, 1998, Tracey Sears left her home in Tacoma, Washington at approximately 9:30 pm to work as a nurse's aide. Before leaving, she put her 13-month-old daughter, A.E., to bed in a crib in the living room. Matthews, Sears's then live-in boyfriend, babysat A.E. while Sears worked overnight.

At some point during the evening, Matthews "noticed" A.E. had what looked like "dead skin" on her back, lips, face, nose, and knee. 2 Report of Proceedings (RP) at 84. Matthews called Sears at 1 am to tell her that A.E. had been sunburned while they were out swimming earlier that day. Sears told Matthews to give A.E. a cool bath. When Sears returned home the following morning, she immediately took A.E. to the Madigan Army Medical Center Emergency Room for treatment.

On August 5, at 9:30 am, Detective John Jimenez of the Pierce County Sheriff's Department was dispatched to Madigan. At Madigan, Jimenez learned that A.E. had been "severely injured." 2 RP at 59. A.E. had burns on her face, head, mouth, nose, right thigh, right knee, back, abdomen, and chest. A.E. also had bruises on her forehead, left ear, back of her head, legs, and feet. In addition, A.E. had old burn scars resembling cigarette burns on the soles of her feet. A.E.'s doctors determined the burns were nonaccidental and had occurred 12 to 72 hours before her hospitalization. The resulting burn scars are permanent and disfiguring.

Matthews told the police that he thought it was possible A.E. got to an iced tea maker. The iced tea maker was on the floor and was accessible to A.E. After executing a search warrant in Sears's residence, police collected an iced tea maker, steam iron, hair dryer, and curling iron.

Procedural History

On December 21, 1998, the State charged Matthews with first degree assault of a child (domestic violence). RCW 9A.36.011(1)(c), .120(1)(a). On April 19, 1999, the State filed an amended information, adding one count of second degree assault of a child. On June 7, as part of a plea agreement, the State filed another amended information charging Matthews with one count of first degree assault of a child and one count of third degree assault of a child. Matthews then pleaded guilty to the charges under an agreement that the State could ask for a 250-month exceptional sentence and Matthews could ask for the low end of the standard range (162 months).[1]

On June 23, Matthews requested to withdraw his guilty plea and the trial court denied the motion. The sentencing court followed the State's recommendation and sentenced Matthews to 250 months confinement. Matthews appealed, and we affirmed in an unpublished March 8, 2002 opinion. Matthews filed several subsequent personal restraint petitions (PRP).[2] On February 7, 2008, we granted one of Matthews's PRPs and entered an order allowing him to withdraw his guilty plea.

On March 21, prior to his first court appearance following our order, Matthews filed several motions in superior court: a motion challenging the trial court's jurisdiction, a motion to proceed pro se, and a motion to reduce bail. On April 4, Matthews appeared for a scheduling hearing. On April 8, Matthews filed a speedy trial demand. On April 25, the trial court granted

[1] The plea agreement stipulated that the State could seek an exceptional sentence but Matthews did not stipulate to the existence of aggravating factors.

[2] RAP 16.3.

Matthews's motion to proceed pro se, but appointed Matt Renda as standby counsel. On May 2, the trial court denied Matthews's motion to reduce bail.

On May 13, the State filed an amended information charging Matthews with three counts of first degree assault of a child with aggravating factors. RCW 9A.36.011(1)(a), 120(1)(a); RCW 9.94A.535(3)(a), (b), (n) (q);[3] former RCW 10.99.020 (1997). The trial court arraigned Matthews the same day.

On May 30, the State filed a second amended information, charging Matthews with one count of first degree assault of a child with a deadly weapon or, alternatively, by reckless act, and one count of second degree assault of child. RCW 9A.36.011(c), .120(1)(a), (b), .130(1)(a); RCW 9.94A.535(a), (b), (n), (q); former RCW 10.99.020. The trial court rearraigned Matthews the same day; he pleaded not guilty to both charges.

The State moved to add deliberate cruelty, particular vulnerability, and abuse of trust aggravating factors as charged in the original 1999 information. Matthews stated he had no questions regarding the factors, saying, "I'm familiar with what they are." RP (May 30, 2008) at 11. Matthews conceded that the State could charge the aggravating factors, but argued that he would not have moved to withdraw his guilty plea if he had known they would be charged again. The State clarified that if Matthews had not withdrawn his guilty plea and demanded only resentencing in 2005, the State would not have sought aggravating factors. But because Matthews had withdrawn his plea, and the State put him on notice in 1999 of the aggravating factors, it was seeking an exceptional sentence. The trial court granted the State's motion to add aggravating factors.

[3] Formerly RCW 9.94A.390 (1997) at the time of Matthews's charges.

On June 16, Matthews filed a motion for specific performance to enforce the original 1999 plea agreement, arguing that he had not yet formally withdrawn his plea. On July 17, the trial court entered a written order finding that Matthews had withdrawn his guilty plea on April 4, his first court appearance following our grant of his PRP. The trial court heard Matthews's motion for reconsideration on August 7. The trial court denied Matthews's motion for specific performance of the plea agreement, stating, "Mr. Matthews has never, until July of [2008], indicated anything other than a desire to withdraw his guilty plea." RP (Aug. 7, 2008) at 58. Based on its finding that Matthews had withdrawn his guilty plea, the trial court vacated Matthews's prior judgment and sentence.

On August 15, Matthews appealed the trial court's order denying his motion for reconsideration. We stayed Matthews's trial on November 19, pending his interlocutory appeal. On January 4, 2010, we dismissed Matthews's appeal based on his own motion to dismiss. On January 20, the trial court set Matthews's bail and trial setting hearings for January 29.

On February 12, the trial court granted the State's motion to continue the trial until May; Matthews noted an objection because "this case is extremely old" but he agreed to the continuance. RP (Feb. 12, 2010) at 24. As to bail, Matthews argued that $1 million was excessive. Although not in the record, it appears the trial court denied Matthews's request to reduce bail.[4]

[4] On February 12, 2010, the trial court heard both parties' arguments regarding reduction of bail. At the end of the hearing, the trial court told the parties it would take the issue under advisement. Although there is no ruling on the motion in our record on review, Matthews remained incarcerated throughout the remainder of the proceedings. Furthermore, it does not appear that Matthews raised the issue of reducing bail again.

A jury trial was held from June 28 to July 8.[5] On June 29, after the jury was empaneled, the State filed a third amended information. The third amended information removed domestic violence allegations and an egregious lack of remorse aggravating factor. The third amended information also corrected RCW citations to reflect those controlling in 1998. Former RCW 9.94A.390(2)(c)(iv) (1997), .390(2)(b) (1997), .390(2)(a) (1997); RCW 9A.36.011(1)(c), .021(1)(a), .120(1)(a), .130(1)(a).

Matthews objected, arguing he was unprepared to address "language from 1998" and requested "[f]our or five days" to prepare. 2 RP at 47-48. The trial court recessed for a few minutes to permit Matthews to confer with standby counsel Renda. When the trial court reconvened, Matthews restated his original objection but said he had read and understood the contents of the third amended information. The trial court then gave Matthews a formal reading of the charges.

During trial, at Matthews's insistence, Detective Sergeant Berg opined that she believed A.E. had been burned with a steam iron. Berg explained that the shape of the iron matched the burn marks on A.E. Dr. Heimbach testified that A.E.'s burns were caused by something "hot" and "flat," "with kind of a point." 6 RP at 590, 593. Heimbach opined a steam iron caused A.E.'s burns because her scars had "little holes" consistent with steam holes from an iron. 6 RP at 593.

On July 7, the State rested its case in chief and Matthews moved to dismiss based on the

[5] At trial, the State presented testimony from Detective Jimenez, Pierce County Sheriff's Department Detective Sergeant Teresa Berg, Sears, Jenny Lewis, Jordan Sears, Pierce County Sheriff's Department investigator Loree Barnett, Henry Eldridge, and Dr. David Heimbach. Matthews rested without presenting witnesses.

State's failure to present a prima facie case. The trial court granted his motion to dismiss the second degree assault of a child charge but denied the motion to dismiss the first degree assault of a child charge. Matthews then objected to the trial court's failure to arraign him on the third amended information. Matthews initially pleaded not guilty to the first degree assault of a child charge. But after consulting with Renda, Matthews withdrew his objection and declined to enter any plea. Matthews objected to the trial court entering a plea of not guilty on his behalf.

On July 9, the jury found Matthews guilty of first degree assault of a child. The jury was also given an interrogatory form for count I which read,

> **Question 1:** Did you unanimously agree the defendant committed the crime of Assault in the First Degree against A.E.?
> . . . .
> **Question 2:** Did you unanimously agree that the defendant intentionally assaulted A.E. and recklessly inflicted great bodily harm?

Clerk's Papers (CP) at 141. The jury answered yes to each question on the interrogatory form. The jury also found that (1) Matthews's conduct during the crime manifested deliberate cruelty, (2) Matthews knew or should have known A.E. was a particularly vulnerable victim, and (3) Matthews used his position of trust to facilitate the crime. On August 13, the trial court sentenced Matthews to an exceptional sentence of 540 months. The trial court entered a permanent no-contact order with A.E. Matthews fraudulently modified the judgment and sentence, and then moved to vacate the judgment and sentence and dismiss the charge, alleging that the judgment and sentence reflected that the trial court had dismissed the first degree assault of a child charge.[6] On October 8, the trial court denied the motion and entered a corrected

[6] Having reviewed the document, it appears that after writing extensively on the judgment and sentence, Matthews also checked the box in section 3.2 indicating that "[t]he court dismisses Counts [sic] 1." CP at 147.

judgment and sentence. Matthews timely appeals.

## DISCUSSION

Matthews's arguments that the trial court lacked subject matter jurisdiction, lacked personal jurisdiction, violated the timely trial rule, and failed to arraign him on the third amended information lack merit. The trial court did not err by denying Matthews's motion to dismiss for failure to make a prima facie case or by allowing Matthews to proceed pro se. There was also sufficient evidence to support the jury's verdict. Therefore, we affirm Matthews's convictions. But because the State improperly charged abuse of trust as an aggravating factor, we remand to the trial court to resentence Matthews based on the remaining valid, aggravating factors.

### Subject Matter and Personal Jurisdiction

Matthews asserts that the trial court lacked subject matter and personal jurisdiction after his original judgment and sentence was vacated. Matthews's assertion is based on his misunderstanding of the effect of this court's order allowing him to withdraw his guilty plea, and the trial court's subsequent order vacating his judgment and sentence. Because the underlying charges against Matthews were never dismissed, Matthews's arguments lack merit.

We review jurisdictional challenges de novo. *State v. Waters*, 93 Wn. App. 969, 976, 971 P.2d 538 (1999) (citing *State v. L.J.M.*, 129 Wn.2d 386, 396, 918 P.2d 898 (1996)). "'Jurisdiction is the power of the court to hear and determine the class of action to which a case belongs.'" *State v. Franks*, 105 Wn. App. 950, 954, 22 P.3d 269 (2001) (quoting *State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (2000)). "'Subject matter jurisdiction' refers to the authority of a court or tribunal to adjudicate a particular type of controversy, not a particular case." *Franks*, 105 Wn. App. at 954 (quoting

*Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994)).

The Washington constitution grants superior courts subject matter jurisdiction over felonies. *Franks*, 105 Wn. App. at 954. CrR 2.1 provides that a criminal proceeding is commenced when the State files an initial pleading either by indictment or information. *State v. Barnes*, 146 Wn.2d 74, 81, 43 P.3d 490 (2002). "'From the time an action is commenced, the superior court acquires jurisdiction.'" *Barnes*, 146 Wn.2d at 81 (quoting *State v. Sponburgh*, 84 Wn.2d 203, 206, 525 P.2d 238 (1974)).

RCW 9A.04.030(1) establishes the superior court's personal jurisdiction over all individuals who commit crimes in Washington. *State v. Golden*, 112 Wn. App. 68, 74, 47 P.3d 587 (2002), *review denied*, 148 Wn.2d 1005 (2003). If a defendant pleads not guilty and is in court on the day of trial, the court has jurisdiction over his person. *Waters*, 93 Wn. App. at 976 (citing *State v. Ryan*, 48 Wn.2d 304, 305, 293 P.2d 399 (1956)).

Matthews was charged with several felonies including first degree assault of a child, therefore the superior court had subject matter jurisdiction over his case. *Franks*, 105 Wn. App. at 954; RCW 9A.36.011(2). The superior court obtained personal jurisdiction over Matthews when he was originally arraigned on the charges in 1999. *Waters*, 93 Wn. App. at 976. Our order allowing Matthews to withdraw his guilty plea, and the trial court's subsequent order vacating Matthews's judgment and sentence, did not dismiss the underlying criminal charges. Therefore, the trial court never lost subject matter or personal jurisdiction and Matthews's claim fails.

Timely Trial

Matthews also argues that the trial court violated the timely trial requirement under CrR 3.3(b), but Matthews's timely trial claim fails.[7]

CrR 3.3(b) provides that a defendant in custody must be brought to trial within 60 days. The initial commencement date is the date of arraignment. CrR 3.3(c)(1); CrR 4.1. An order allowing a defendant to withdraw a plea of guilty resets the commencement date to the date of the order. CrR 3.3(c)(2)(iii). An order terminating a stay of proceedings resets the commencement date to a defendant's first trial court appearance following the order. CrR 3.3(c)(2)(iv). In addition, a defendant loses the right to object on timely trial grounds if he fails to make an objection within 10 days of receiving notice of the court date. CrR 3.3(d)(3).

Here, on February 7, 2008, we ordered that Matthews was entitled to withdraw his guilty plea. Matthews subsequently appeared in the superior court on April 4. We stayed his trial on November 19, pending his subsequent interlocutory appeal. On January 4, 2010, we terminated the stay and dismissed the interlocutory appeal at Matthews's request. Trial was scheduled to begin on February 23, but Matthews agreed to continue trial first to May 6, then to June 14, and last to June 29. Matthews did not object to the June 29 trial date on timely trial grounds. Accordingly, Matthews has not only lost "the right to object that a trial commenced on such a date . . . [was] not within the time limits prescribed by" CrR 3.3, but the trial court did not violate CrR 3.3(b). CrR 3.3(d)(3).

[7] In his brief, Matthews argues that the trial court's violation of timely trial deprived it of subject matter jurisdiction. As discussed above, the trial court had subject matter jurisdiction over the case; accordingly, we address Matthews's time for trial claim separately.

Motion to Dismiss

Matthews argues that the trial court erred when it denied Matthews's "motion to dismiss." Br. of Appellant at 1. But Matthews cannot appeal the denial of his motion to dismiss for failure to make a prima facie case because the case proceeded to verdict. "In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, and (e) on appeal." *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996) (footnotes omitted), *review denied*, 131 Wn.2d 1006 (1997). At each point, the evidence "is more complete, and hence better, than . . . before." *Jackson*, 82 Wn. App. at 608. The court will always use the best factual basis available when the defendant challenges the sufficiency of the evidence. *See, e.g.*, *Jackson*, 82 Wn. App. at 608 ("[A] defendant who presents a defense case in chief 'waives' (i.e., may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief."). A defendant is not barred from challenging the sufficiency of the evidence at a later stage of the proceeding but the court will analyze the claim using the "most complete factual basis available." *Jackson*, 82 Wn. App. at 608-09. Accordingly, we review Matthews's claim using the same evidence and the same standard of review we use when reviewing any other challenge to the sufficiency of the evidence on appeal.

Matthews asserts that the State failed to prove the first degree assault of a child charge beyond a reasonable doubt. Matthews argues that

> there was absolutely no testimony or evidence presented that MATTHEWS committed an assault upon A.E. No one testified that they witnessed MATTHEWS assault A.E., or that they heard him assault A.E., or that he ever confessed to assaulting A.E.

Br. of Appellant at 21. The State's evidence presented at trial was sufficient to support the jury's

verdict and Matthews's insufficient evidence claim fails.

Evidence is sufficient if, when viewed in a light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Our role is not to reweigh the evidence and substitute our judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because the jurors observed the witnesses testify first hand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence. *See State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Here, A.E. was 13 months old at the time of the assault. The State presented evidence that Matthews was alone with A.E. on the night of the assault and that she was not burned when Sears left for work at approximately 9:30 pm, but was severely burned when Sears returned the following morning. A.E.'s burns were so severe that she received treatment at the burn center in Harborview Medical Center for more than two weeks. Dr. Heimbach testified that the steam iron could have "[a]bsolutely" caused A.E.'s burns because her scars matched the steam holes and shape of the iron. 6 RP at 594. Heimbach also testified that A.E.'s burns "[a]bsolutely [could] not" have been caused by hot water such as from the iced tea maker because she had no burns consistent with hot water dripping across her body. 6 RP at 594. A.E.'s burn scars are

permanent and disfiguring. Former RCW 9A.04.110(4)(c) (1988).

Matthews alleges that Sears's and Jordan Sears's testimony proved he did not commit the crime. But we defer to the credibility determinations of the jury, which clearly determined that Dr. Heimbach's testimony was more credible than the testimony supporting Matthew's theory that A.E. burned herself by spilling water from the iced tea maker. Furthermore, because circumstantial evidence is equally as reliable as direct evidence, the lack of direct evidence establishing Matthews's assault on A.E. is not fatal to the State's case. The State presented sufficient evidence from which any reasonable jury could infer that while Matthews was alone with A.E., he repeatedly burned her with a steam iron. Accordingly, Matthews's claim that insufficient evidence supports the jury's verdict fails.

Motion for a Continuance

Matthews asserts that the trial court erred by denying his request for a continuance "after the State initiated the action by filing the Amended information on the second day of jury trial." Br. of Appellant at 2. We disagree.

We review a trial court's denial of a motion to continue for abuse of discretion. *State v. Baker*, 4 Wn. App. 614, 615, 483 P.2d 642 (1971) (quoting *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584, *review denied*, 78 Wn.2d 996 (1970)). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Baker*, 4 Wn. App. at 615-16 (citing *Rehak v. Rehak*, 1 Wn. App. 963, 465 P.2d 687 (1970)). "'An amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.'" *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986) (quoting *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404, *review denied*, 94 Wn.2d 1013 (1980)).

On the second day of trial, the State filed a third amended information correcting the citations to properly cite the law controlling in 1998. Matthews requested "[f]our or five days" to "process" the information because he was "totally" unprepared to address "language from 1998." 2 RP at 47-48. But Matthews had known the charges against him for 12 years and nothing in the amended information included additional charges or increased the degree of the charge. Nothing in the record supports Matthews's contention that he was surprised or prejudiced by the amended information. Accordingly, the trial court did not abuse its discretion by refusing to grant Matthews's motion for a continuance.

Pro Se Representation

Matthews also argues that the trial court erred by permitting him to represent himself. Matthews asserts that "the record is chock full of instances in which MATTHEWS equivocates his request to proceed pro se, and the record clearly delineates numerous instances in which MATTHEWS' competency could be reasonably doubted." Br. of Appellant at 35-36. The trial court did not abuse its discretion in permitting Matthews to represent himself or failing to, sua sponte, reappoint counsel.

We review a trial court's decision on a request to proceed pro se for abuse of discretion. *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Under the Washington and federal constitutions, criminal defendants may waive their right to be represented by counsel and choose instead to represent themselves. *State v. Fritz*, 21 Wn. App. 354, 357, 585 P.2d 173 (1978), *review denied*, 92 Wn.2d 1002 (1979). A defendant's decision to waive his right to counsel and proceed pro se must be timely made and stated unequivocally. *State v. Stenson*, 132 Wn.2d 668, 737, 740, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). It must also be

knowingly and intelligently made. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). A criminal defendant's ability to represent himself has no bearing on whether he should be allowed to assert his constitutional right to self-representation. *See State v. Canedo-Astorga*, 79 Wn. App. 518, 524-25, 903 P.2d 500 (1995) (citing *Godinez v. Moran*, 509 U.S. 389, 399-400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)), *review denied*, 128 Wn.2d 1025 (1996); *State v. Imus*, 37 Wn. App. 170, 178, 679 P.2d 376, *review denied*, 101 Wn.2d 1016 (1984).

Once a defendant has asserted his right to represent himself and made a knowing, voluntary, and intelligent waiver of counsel, a criminal defendant is not entitled to reappointment of counsel. *DeWeese*, 117 Wn.2d at 379. After a defendant's valid waiver of counsel, the reappointment of counsel is within the trial court's discretion. *DeWeese*, 117 Wn.2d at 379. When deciding whether to reappoint counsel, the trial court may take into account all existing circumstances. *State v. Modica*, 136 Wn. App. 434, 443, 149 P.3d 446 (2006) (citing *Canedo-Astorga*, 79 Wn. App. at 525-27), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008).

The trial court granted Matthews's motion to proceed pro se on April 25, 2008. In its order, the trial court found that Matthews "knowingly, intelligently, and [without] coercion" waived his right to counsel.[8] CP at 520. After Matthews knowingly and voluntarily waived his right to counsel, reappointment of counsel lay solely within the trial court's discretion. *DeWeese*, 117 Wn.2d at 379. After a thorough review of the record, we cannot agree with Matthews's assertion that "the record is chock full of instances in which MATTHEWS equivocates his request

[8] The record does not contain the transcripts of the hearing but the order and the clerk's minutes indicate that the trial court conducted a colloquy with Matthews prior to granting his motion to proceed pro se. *See In re Det. of Morgan*, 161 Wn. App. 66, 83, 253 P.3d 394 (2011) ("As the party seeking review, [the Appellant] has the burden to perfect the record." (citing RAP 9.2(b); *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994))).

to proceed pro se, and the record clearly delineates numerous instances in which MATTHEWS' competency could be reasonably doubted." Br. of Appellant at 35-36.

Instead, there are only three such instances in the over 1,700 pages of the record provided for our review. On January 29, 2010, Matthews was unresponsive to all of the trial court's questions. On April 16, Matthews made several "legalistic" and "fictitious" arguments unrelated to the issues in his case. RP (Apr. 16, 2010) at 14. On May 11, Matthews told the court, "I don't know what I'm doing. I'm a businessman; I'm not a lawyer." RP (May 11, 2010) at 7.

Matthews's behavior in each instance only raises questions as to Matthews's ability to represent himself at trial, not his general mental competency to stand trial. *Canedo-Astorga*, 79 Wn. App. at 524-25. Furthermore, these isolated instances occurred within what the trial court noted was surprisingly competent pro se representation. Finally, the record reveals that Matthews did not actually request reappointment of an attorney; in fact, he often reaffirmed his desire to continue representing himself. Given these facts, the trial court did not abuse its discretion by allowing Matthews to proceed pro se, or by failing to, sua sponte, reappoint counsel.[9]

Exceptional Sentence

Matthews assigns multiple errors to the trial court's imposition of his exceptional sentence. We hold that sufficient evidence supports the aggravating factors based on particular victim vulnerability and deliberate cruelty. But because there was no statutory abuse of trust aggravating factor in 1998, we remand for resentencing. Accordingly, we do not address Matthews's claim that his exceptional sentence was clearly excessive.

[9] We also note that the trial court may not deny a defendant's request to proceed pro se if it is made unequivocally, timely, and knowingly and intelligently. *See Fritz*, 21 Wn. App. at 360-63.

In 2004, the Supreme Court of the United States ruled that for an exceptional sentence to be constitutional the State must prove the facts supporting aggravating factors to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.537(3). Here, Matthews contends insufficient evidence supports the jury's verdict on the aggravating factors.

> We use the same standard of review for the sufficiency of the evidence of an aggravating factor as we do for the sufficiency of the evidence of the elements of a crime. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007)[, *cert. denied*, 554 U.S. 922 (2008)].

*State v. Zigan*, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

As an initial matter, the statutory abuse of trust factor did not exist in 1998 when Matthews assaulted A.E. In the 2010 information, filed after Matthews withdrew his guilty plea, the State alleged that

> the defendant used his position of trust or confidence to facilitate the commission of the current offense, as defined in RCW 9.94A.390(2)(c)(iv) (1998) (now RCW 9.94A.535(3)(n)).

CP at 64. However, former RCW 9.94A.390(2)(c)(iv) is not equivalent to RCW 9.94A.535(3)(n). Former RCW 9.94A.390(2)(c) is an aggravating factor requiring proof that the defendant knew the victim was pregnant and it is clearly not applicable to this case. In 1998, there were only two statutory aggravating factors based on abuse of trust. These applied specifically to either major economic offenses or violation of the uniform controlled substances act offenses. Former RCW 9.94A.390(2)(d)(iv) (1997) and former RCW 9.94A.390(2)(e)(iv) (1997). Pre-*Blakely* cases held that the statutory list of aggravating factors was not exclusive and

that the trial court had authority to impose an exceptional sentence in other circumstances which clearly demonstrated an abuse of trust. *State v. Armstrong*, 106 Wn.2d 547, 556, 723 P.2d 1111 (1986); *State v. Quigg*, 72 Wn. App. 828, 842, 866 P.2d 655 (1994). But the statutory abuse of trust aggravating factor, charged by the State and codified at RCW 9.94A.535(3)(n), was not enacted until 2005 in response to *Blakely*. *See* former RCW 9.94A.390 (1997); Laws of 2005, ch. 68, § 3. Accordingly, here, the State could not charge Matthews with the abuse of trust aggravating factor for Matthews's 1998 assault on A.E.

But substantial evidence supports the remaining aggravating factors. The second aggravating factor alleged that Matthews "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth." Former RCW 9.94A.390(2)(b). A.E. was 13 months old when Matthews assaulted her. A.E. was also completely dependent on adults and helpless to defend herself against Matthews's assault. Thus, sufficient evidence supports the jury's finding that A.E. was a particularly vulnerable victim. *See, e.g.*, *State v. Fisher*, 108 Wn.2d 419, 424-25, 739 P.2d 683 (1987) (particular vulnerability aggravator proper against five-and-one-half-year-old victim).

The third aggravating factor alleged that Matthews's "conduct during the commission of the current offense manifested deliberate cruelty to the victim." Former RCW 9.94A.390(2)(a). Deliberate cruelty is gratuitous violence or other conduct which is significantly more serious than typical of the crime and which inflicts physical, psychological, or emotional pain as an end in itself. *State v. Russell*, 69 Wn. App. 237, 253, 848 P.2d 743, *review denied*, 122 Wn.2d 1003 (1993); *State v. Delarosa-Flores*, 59 Wn. App. 514, 518, 799 P.2d 736 (1990), *review denied*, 116 Wn.2d 1010 (1991). Assault "is an intentional touching or striking of another person that is

harmful or offensive." CP at 123. Here, the evidence supports the inference that Matthews intentionally assaulted A.E. with a hot steam iron, severely burning her face and body resulting in permanent scarring. This evidence is sufficient to support the jury's verdict finding that Matthews's conduct manifested deliberate cruelty to A.E. beyond conduct typical of a first degree assault.

Accordingly, sufficient evidence supports the jury's findings that A.E. was a particularly vulnerable victim, and that Matthews's conduct manifested deliberate cruelty. But because the statutory abuse of trust factor did not exist in 1998, when Matthews assaulted A.E., we remand to the trial court to resentence based on the remaining aggravating factors: particularly vulnerable victim and deliberate cruelty.[10]

We affirm Matthews's convictions, but remand for resentencing because the abuse of trust aggravating factor was improperly submitted to the jury.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, P.J.

We concur:

[10] We also note that imposition of an exceptional sentence must be based on substantial and compelling reasons supported by the facts and circumstances of the underlying crime and aggravating factors properly found by a jury. RCW 9.94A.530(3); *see also State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42 (1992) ("Allowing an exceptional sentence based on a belief that the defendant lied at trial would allow the defendant to be punished for a wholly unrelated crime with which he has never been charged, much less convicted.").

No. 41189-0-II

VAN DEREN, J.

PENOYAR, J.