

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0049

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSE FRANK PATINA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Rod Souza, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	3
I. The offenses.....	3
II. Patina’s request for new counsel	6
SUMMARY OF THE ARGUMENT	18
ARGUMENT	19
I. Standard of review	19
II. The district court properly exercised its discretion in denying Patina’s request for new counsel without an evidentiary hearing because Johnson did not make a substantial showing of a complete breakdown in communication	19
CONCLUSION	23
CERTIFICATE OF COMPLIANCE.....	24

TABLE OF AUTHORITIES

Cases

<i>State v. Cheetham</i> , 2016 MT 151, 384 Mont. 1, 373 P.3d 45	20, 21
<i>State v. Dethman</i> , 2010 MT 268, 358 Mont. 384, 245 P.3d 30	19
<i>State v. DeWise</i> , 2022 MT 145, 409 Mont. 284, 513 P.3d 1249	20
<i>State v. Gallagher</i> , 1998 MT 70, 288 Mont. 180, 955 P.2d 1371	21
<i>State v. Johnson</i> , 2019 MT 34, 394 Mont. 245, 435 P.3d 64	16, 19, 20, 21

STATEMENT OF THE ISSUE

Whether the district court properly exercised its discretion when it denied Patina's request for substitution of counsel without a hearing when Patina said his attorneys were good at their job, his attorneys addressed his discovery concerns, and both his attorneys were unaware of any communication breakdown before he requested new counsel.

STATEMENT OF THE CASE

The State charged Appellant Jose Frank Patina with five counts of assault with a weapon after Patina fired a gun multiple times at a vehicle with three adults and two children inside. (Docs. 1, 3.)

The case proceeded to trial by jury on May 31, 2022. (Doc. 45.) At the beginning of the first day of trial, Patina raised concerns regarding his two appointed attorneys for the first time in the pendency of the case. (5/31/22 Tr. at 30.) Patina said he had viewed some of the evidence for the first time two to three days prior and that he did not have his own copies of everything. (*Id.* at 31.) Patina's counsel explained that he was not provided WatchGuard videos in the jail because he had no way to play them and because they require special software. (*Id.*) Upon questioning from the court, Patina confirmed that he had reviewed all the discovery, had met with counsel, and he understood the State's anticipated

theory of the case and the nature of its evidence, as well as how his attorneys would counter the State's evidence. (*Id.* at 32-33.) The court proceeded on with trial.

On the third day of trial, Patina raised the issue regarding his counsel for the second time. (6/2/22 Tr. at 518.) Patina asserted he lacked confidence in his counsel because of a motion in *limine* denied by the court due to untimeliness, a motion to compel unredacted discovery his counsel never filed, Facebook and WatchGuard photos he had not seen prior to trial, and because one of his attorneys said she liked one of the victim witnesses so he did not believe she was able to cross-examine her fully. (*Id.* at 519-32.) Patina said he still did not have his discovery "regardless of whether it was shown to [him], you know, in full[.]" (*Id.* at 532.)

The court explained that while the referenced motion in *limine* was untimely, the evidence sought for admission in the motion was inadmissible hearsay anyway. (*Id.* at 524.) Counsel explained that the motion to compel was not filed because the State turned over the unredacted discovery. (*Id.* at 521.) Counsel confirmed that she reviewed all video and photo evidence with Patina and explained that the State did not turn over a copy of the photo pulled from Patina's Facebook profile until right before trial. (*Id.* at 522-23, 533.) Counsel also explained that while Patina was shown all the evidence, he was not given hard

copies of video because he had no means to watch it in the jail, and he was not given certain documents over concerns with his potential federal charges. (*Id.* at 533-34.) Both of Patina's attorneys stated they had been unaware of a breakdown in the attorney-client relationship. (*Id.* at 538-40.)

The court denied Patina's request for new counsel, stating that his complaints were vague, all discovery issues had been fully explained by his counsel, and that the information presented by both Patina and his counsel indicated there was not a breakdown in communication that would frustrate Patina's effective representation. (*Id.* at 541-43.)

On appeal, Patina concedes the district court made an adequate initial inquiry into his request for substitution of counsel but asserts the court abused its discretion by denying his request for new counsel without holding a hearing on the matter.

STATEMENT OF THE FACTS

I. The offenses

On July 10, 2021, Jessie Villarreal (Jessie) went to the Shrine Auditorium in Billings to celebrate her father's 75th birthday. (5/31/22 Tr. at 210.) Patina was also present at the party. (*Id.* at 209.)

Jessie left the party around 1:30 in the morning on July 11, 2021, with her two minor children J.V. and D.N., her adult daughter Mary Nava (Mary), and her cousin Shawnee Rodriguez (Shawnee). (*Id.* at 211, 255.) They dropped Mary's car off, and Jessie, Mary, Shawnee, J.V., and D.N. headed to drop Shawnee off at her own residence. (*Id.* at 211-15, 255.)

After making a turn, Jessie suddenly saw Patina, and she thought he was shooting at a vehicle in front of her. (*Id.* at 215.) Jessie tried to reverse so she would not "get caught up in what was going on[.]" (*Id.* at 215-16.) Patina turned around and began shooting at Jessie's vehicle. (*Id.* at 216, 258-59.) Jessie saw several flashes of light as he fired the gun, and she thought he fired six or seven bullets. (*Id.* at 217.) Mary threw Jessie's young kids J.V. and D.N. onto the floor in the back of the car. (*Id.*) The bullets "struck the front grill and [the] driver's side" of the vehicle, and it began leaking fluid. (*Id.* at 260, 262.) Officers who later arrived on scene found 16 spent 9-millimeter shell casings. (6/1/22 Tr. at 357-62, 369.) Jessie said the flashes from the gunfire would light up the shooter's face and that she recognized it was Patina, whom she had known for about 25 years. (5/31/22 Tr. at 208, 217.)

Jessie held Shawnee's hand as Patina shot at them, and Jessie kept saying, "Shawnee, I love you, I love you, Shawnee, I love you, I love you." (*Id.* at 218.) The kids were "scared" and "screaming." (*Id.* at 261.) Jessie testified that it "felt

like [she] was going to die.” (*Id.* at 219.) Shawnee testified that “all that [she] could think of is that [her] daughters might have had to bury [her] that day.” (*Id.* at 260.)

Jessie said the incident “impacted [her] kids real bad, [her] 14[-]year[-]old and [her] six[-]year[-]old.” (*Id.* at 222.) At trial, Jessie testified that D.N. “wakes up with nightmares almost every night screaming and running. When [she] asked what’s the matter[,], he t[o]l[d] [her] [Patina] is coming for him.” (*Id.*) Jessie put both kids in counseling, but they would not talk to anyone. (*Id.*)

Jessie told the officers she believed Patina had gone back to the apartment where he lived with his girlfriend, Raelicia Montanez (Raelicia). (5/31/22 Tr. at 191, 220-21, 232.) Jessie tried to contact Raelicia, who she thought was in the apartment, first by Facebook Messenger, but Jessie was unable to reach her. (6/1/22 Tr. at 424.) Officers also tried to call Raelicia’s phone number, but it went straight to voicemail, and Patina did not answer his phone when they called him. (*Id.*)

The night of the shooting, officers also looked at Patina’s Facebook profile, and the State admitted two photos from his profile at trial: a photo of Patina and Raelicia and a photo of Patina holding a gun pointed at the camera. (*Id.* at 425-26.) Sergeant Samantha Puckett testified that the photo of Patina with the firearm struck her as significant because Patina was alleged to have been involved in a shooting, and his Facebook photo showed him in possession of what appeared to be a

firearm. (*Id.* at 427.) Law enforcement also heard from other 911 callers that Patina may have left in a vehicle with two other males. (*Id.* at 422.) Given that they were not positive that Patina was in the building and due to safety concerns, the SWAT commander said they would not be activating the SWAT team. (*Id.* at 424.)

On July 11, around 3:40 p.m., officers were dispatched back to the apartment complex near the shooting. (*Id.* at 456-57.) A witness had reported that Patina had returned to the apartment complex in a white Mustang. (*Id.* at 457.) Officers arrested Patina and noticed a revolver and a box of ammo in the front passenger seat of the Mustang. (*Id.* at 499-500.) The Mustang was seized and eventually searched pursuant to a search warrant. (6/2/22 Tr. at 550-51.) On the third day of trial, law enforcement testified about the search of the Mustang, and photos were admitted into evidence that showed items found in the vehicle, including two different loaded guns, ammunition that could be fired from the two weapons in the vehicle, and 9-millimeter ammunition in a sock. (*Id.* at 556-66.)

II. Patina's request for new counsel

On the first day of trial, after addressing the remaining pretrial motions, the district court asked the prosecution to leave the room and addressed Patina on the record with his counsel present. (5/31/22 Tr. at 30.) The court confirmed with Patina that he understood that the State charged him with five counts of assault

with a weapon, that the maximum penalty on each count was 20 years in prison and a \$50,000 fine, and that his counsel had the opportunity to discuss the plea offer with him. (*Id.*) The court asked Patina if he had been given the opportunity to discuss the nature of the State's evidence, its anticipated prosecution, and his defense with counsel. (*Id.* at 30-31.) Patina responded:

The only thing that I was concerned about, Your Honor, is, we did go over Watch—you know, a WatchGuard—Watchguard evidence and audio—audio evidence, but I have not—I—I just recently received my transcripts and everything just two days ago of my discovery.

I have not received pictures of my discov—from my discovery, the evidence held against me, I've seen it all in the—the WatchGuard about three days ago. So I have not received, you know, the full discovery in hand.

(*Id.* at 31.)

One of Patina's attorneys, Natasha Hammack, explained:

Our office, per policy, provided Mr. Patina with the written discovery, which is the police reports. We do not send out digital discovery to a defendant if they are in custody, as they are not able to look at it. There is also special software that is used to play WatchGuard videos.

I met with Mr. Patina extensively. Prior to trial, I reviewed all of the State's evidence. It is not a practice for us to provide transcripts, but he did have an opportunity to listen to the statements. And I did as a courtesy, give him the transcripts after they were received.

I have reviewed everything in the file and have advised him according to my review of the file. So—which is my standard practice with all the cases I have.

(Id.)

Upon follow-up questioning from the court, Hammack confirmed that one of the officers who conducted all of the victim interviews had also summarized each interview in her police report. (*Id.* at 32.)

The court confirmed with Patina that he could read and write in English.

(Id.) Then, the following exchange occurred between the court and Patina:

THE COURT: So you were to review the reports?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you were able to listen to those audio statements well in advance, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So you've had the benefit of all the discovery?

THE DEFENDANT: Yes, sir.

THE COURT: Have you been able to visit with [M]s. Hammack and Ms. Fiscus—

THE DEFENDANT: Yes.

THE COURT: —about the anticipated trial testimony from State's witnesses?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand the State's theory of the case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand how your attorneys will confront or attack that evidence?

THE DEFENDANT: Yes, Your Honor.

(*Id.* at 32-33.) The court continued, confirming that Patina understood the charges against him, the maximum penalties, the State's plea offer, and that he believed he was making the best choice he could with the options he had available to him. (*Id.*) Patina answered affirmatively to all questions. (*Id.*)

On the third day of trial, before any witness testimony, Hammack alerted the court that Patina would like to address the court regarding Hammack's and Fiscus's representation of him. (6/2/22 Tr. at 518.)

Patina referenced "alleged pictures in evidence with guns, that has to do with guns, ammo, [and] videos" that he believed fell under a motion in *limine* that he said he believed was filed during a status hearing on May 19. (*Id.* at 519.) Patina continued:

It was only brought to my attention by Ms. Hammack that she was going to file for these motions the day of trial during our meeting with your—with you, Your Honor. And those motions were denied by the Court due to rules or laws placed for these procedures for untimely

manner, which was to my knowledge—which—which only I feel hurts my case.

(*Id.* at 519-20.) Patina also brought up a motion to compel unredacted discovery that he said he believed was never filed in his case. (*Id.* at 520.) Patina concluded his statement by explaining:

I feel that I'm not being given the proper direction to have a fair trial, Your Honor, and don't feel comfortable going forward with this trial. With respect, Your Honor, if you feel that this is—it's okay to move forward in this trial after expressing my concerns, then let's move on.

(*Id.* at 520-21.)

Addressing the motion to compel discovery that Patina said was not filed, Hammack explained that she requested unredacted police reports from the prosecution so she could obtain contact information for the victims and witnesses but was not getting a response, so she notified the State she would be filing to compel the unredacted reports. (*Id.* at 521.) The State provided the unredacted reports the same day Hammack notified the State she intended to file a motion to compel, so she no longer needed to file the motion. (*Id.*) Hammack “note[d] that the only difference[s] between the reports that were produced initially and those unredacted reports were the victim witness contact information, phone number and addresses.” (*Id.*)

Patina acknowledged that Hammack came “to the jail three days prior” to show him evidence which he felt “was last minute.” (*Id.* at 522.) Patina also

claimed that some pictures that were admitted at trial were not shown to him due to a computer failure. (*Id.*)

The court stated that its “recollection [wa]s we previously discussed videos and that Mr. Patina was shown all of the videos.” (*Id.*) Hammack confirmed that was correct and stated that she believed Patina was referring to the Facebook photos that the State provided at 10 p.m. on the Friday before trial. (*Id.*) Hammack noted that she objected to the admission of the photos. (*Id.* at 522-23.) Patina confirmed he was referencing the Facebook photos and “the photo of the gun.” (*Id.* at 523.)

The court addressed some of Patina’s concerns and explained:

Okay. So first on the status hearing, there was no status hearing on May 19th because I was not here. . . . And so rather than have in-person status hearings, all counsel, both defense and prosecution, were directed to file status reports, which your counsel did.

Now with regard to the motions in *limine*, you suggested that because these motions were untimely that I did not rule for you. Respectfully, sir, that is not true.

The one witness that I did exclude as being untimely, I did find that that was not properly disclosed, consisted with 46-15-223 of the Montana Code. And when I had asked counsel for essentially an offer of proof as to what that individual would testify, this would be someone that was going to apparently testify that they “heard” who the other shooter was, who the actual shooter was.

Okay. And so I pointed out on the record at that time, that first, it’s untimely; but second, it would not be admissible evidence regardless because it’s unquestionably hearsay.

(*Id.* at 523-24.)

The court pointed out that Patina’s counsel successfully argued and excluded “evidence of the copious quantities of alleged narcotics” found in the vehicle. (*Id.*) The court also addressed other issues raised in motions and reminded Patina of the court’s rulings on various issues and the basis for its rulings. (*Id.* at 525-26.) Regarding the Facebook photos, the court explained that it denied counsel’s request to exclude the photos because the State noticed the photos in one of the officer’s reports and because Patina generated the photos and was aware of the photos’ content because he was the one who posted them to Facebook. (*Id.* at 527-28.)

Hammack and the court asked Patina for clarification regarding whether he was seeking to remove counsel or just to lodge his concerns in the record for purposes of appeal. (*Id.* at 528.) Patina said he was seeking to remove counsel. (*Id.*) He said it was “due to—due to lack of communication and, you know, communication and I feel that lack of interest in my case.” (*Id.* at 528-29.)

The court explained that this Court’s precedent instructs that substitution of counsel requests based on ineffective assistance of counsel claims are not an appropriate venture for district courts to address at the trial level. (*Id.* at 529.) The court explained that its inquiry would be limited to an actual conflict of interest, an irreconcilable conflict between counsel and defendant, or a breakdown in communication. (*Id.*) The court asked why Patina believed there had been a breakdown in communication. (*Id.*) Patina said that his counsel told him that she

liked one of the victims and, because of that, he felt like his attorney did not fully cross-examine that victim. (*Id.*)

Patina reiterated his concerns that things were not presented to him by his attorneys as early as he would have liked. (*Id.* at 532.) Patina said he “still d[id no]t have [his] discovery regardless of whether it was shown to [him], you know, in full[.]” (*Id.*) Patina said he did not get to see all the evidence, “all the WatchGuards, regardless of whether it’s the same or not.” (*Id.*) Patina also brought up the pictures. (*Id.*) The court asked Patina to clarify which pictures he had not seen before the trial. (*Id.*) Patina said, “the WatchGuard pictures” of the Mustang, pictures of the guns. (*Id.* at 532-33.)

Patina said, “I’m not discrediting Ms. Hammack or Ms. Fiscus, as you know, attorneys, like they do a great job, they’re good at what they do.” (*Id.* 533.) Patina said that he did not “feel comfortable going forward with—given that lack of evidence for [him]self to—to process.” (*Id.*)

Hammack explained that she went over all the discovery with Patina, had shown Patina “all of the pictures,” and went over all the reports. (*Id.*) Hammack was not certain whether Patina had received paper copies of the federal search warrant. (*Id.*) Hammack explained that they anticipated that “those documents are going to be used in a federal case.” (*Id.* at 533.) Hammack said that out of an “abundance of caution,” because of the pending potential federal matter, she showed Patina

everything, so he was aware of it but did not give him copies of the documents because of concerns regarding rules for federal discovery. (*Id.* at 533-34.)

The court explained to Patina that if it were to grant his request for new counsel and grant a mistrial based upon manifest necessity, Patina would be put in the disadvantageous position of having the State know the defense's strategy, and the State would likely fix any holes in its case that had been exposed at trial. (*Id.* at 535-37.) Patina asserted that he did not believe he had a sufficient relationship with counsel to go forward with the trial. (*Id.* at 537.) The court asked Patina to explain why, and the following exchange occurred:

THE DEFENDANT: I just feel that, you know, like I said, I just—I—I just don't feel comfortable going forward. I feel that, you know, like I said, the evidence, the evidence—I feel that evidence is left out and I feel that, you know, I mean it wasn't—

THE COURT: What evidence was left out?

THE DEFENDANT: Just things in the case—things in the case, Your Honor, a victims, alleged victims that, you know, are now, you know, out the, you know, out the woodwork, you know I mean, that—that have left town, that, you know, they—you know, they have—you know—

THE COURT: Sir, you need to give me more specificity.

THE DEFENDANT: I—I mean I guess I don't know what to say, you know, anymore, Your Honor. Like I said, I'm not—I'm not smart when it comes to these things.

I'm just—I just wanted to state for the record, I'm not saying that Ms. Hammock or Ms. Fiscus, you know, are horrible at their job.

I just feel that, you know, the timely manner of my discovery and everything presented to me was not in a timely manner.

MS. FISCUS: And for full disclosure, Your Honor, he is referring to Mary Nava, who was subpoenaed and ended up leaving town after she was released. Same with Officer Hill. We attempted to subpoena them, but she was gone, out of town.

THE COURT: Okay.

MS. FISCUS: That's just—that's the witness he is—that is alleged victim he is referring to, is Mary, just for the Court's knowledge.

(*Id.* at 537-38.)

The court asked both Fiscus and Hammock whether they believed that communication with Patina was at a point where they could no longer represent him. (*Id.* at 538.) Fiscus explained that because she joined the case later to assist with trial, she was not familiar with communication prior to trial preparation. (*Id.* at 538-39.) She said she had “been in every conversation with him since.” (*Id.* at 539.) Fiscus said she “ha[d] seen no issues with [their] communication.” (*Id.*) She said they had discussed the issues with Mary and Officer Hill and discussed that they could still proceed forward without them under the strategy they had maintained the entire time. (*Id.*) Fiscus said that “[u]p until this morning [she] didn’t think there was a breakdown.” (*Id.*) She said that she “d[id no]t feel there [wa]s a breakdown between the two of [them] personally” but that she would let Hammack address whether she felt she could proceed. (*Id.*)

Hammack said that “similar to Ms. Fiscus, [she] wasn’t aware of the severity of the breakdown that he’s claiming at this point until today. You know, as with any attorney-client relationship, there are ups and downs.” (*Id.*) Hammack said her impression was that they had worked through those ups and downs, but she said she did “now have concerns.” (*Id.* at 540) Hammack said she was prepared to go forward but that it was hard to give a yes or no answer at that point. (*Id.*)

Fiscus expressed concern regarding Patina’s need to decide whether to testify given Patina’s potential federal case. (*Id.* at 540.) Fiscus expressed concern that if Patina did not believe they were adequately representing him at trial, that it might impact his decision about whether to testify. (*Id.*) Hammack said she felt the same. (*Id.*)

After a recess, the court denied Patina’s request for substitute counsel. (*Id.* at 541-43.) The court explained its decision as follows:

So previously I referenced the standards from *State v. Johnson* and reasons for substitution of counsel. And I’d stated the bases are breakdown in communication, irreconcilable conflict or actual conflict.

The issue that Mr. Patiña has raised is breakdown in communication. Justice McKinnon in *Johnson* stated, at paragraph 18, when defining this term, “when communication between counsel and defendant becomes so compromised that mounting a defense is impossible, the defendant is neither being heard by counsel, nor receiving effective assistance. Accordingly, the defendant’s right to substitute counsel arises only when a breakdown of the attorney-client relationship becomes so great that the principal purpose of the

appointment to provide the defendant with effective assistance of counsel is frustrated.”

I do not find there has been a breakdown in communication in this case necessitating substitution of counsel which would require a mistrial.

I find your complaints to be vague. The primary issue that you have raised with me repeatedly has been issues regarding discovery that have been fully explained by Ms. Hammack.

And I have not found an issue regarding you not being provided with discovery or having the opportunity to go over that discovery with your counsel in advance of trial.

The other issue that was raised was your trust in counsel regarding advice on whether or not to testify. However, ultimately, as I stated previously, that is a decision reserved to you that you must make.

Regarding that testimonial issues, there are different levels of trust in every attorney-client relationship, nevertheless, I find that counsel will be able to effectively give you advice and you will be able to make an informed decision after we talk about that much more extensively later on in the trial.

I would also note, that while you have raised these complaints, both Ms. Fiscus and Ms. Hammack, who are officers of the court, have stated that they had not perceived an issue until you raised this issue with them this morning. This cuts against a claim of breakdown in communication.

But also very important is, as I stated, again quoting the Court, “the defendant’s right to substitute counsel arises only when the breakdown of the attorney-client relationship becomes so great that the purpose of the appointment, effective assistance is frustrated.”

As I stated, I found counsel’s performance thus far to be effective. Counsel has prevailed on multiple motions to exclude evidence in this case that I deemed was prejudicial; moreover, both Ms. Hammack and Ms. Fiscus, Ms. Hammack with regard to lay

witnesses, Ms. Fiscus with regard to law enforcement witnesses, have both cross-examined on multiple issues pointing out inconsistencies, pointing out issues regarding the underlying investigation in this case that will provide them with a basis to make effective arguments during closing argument.

(*Id.* at 541-43.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion when it denied Patina's request for substitution of counsel after an adequate initial inquiry because his complaints evinced a general dissatisfaction with counsel rather than seemingly substantial complaints based on specific material facts. Patina's counsel addressed all his discovery concerns, and Patina acknowledged he had seen all the discovery in some form, even if he did not have physical copies of some things that he could not view in the jail. Patina told the court that his attorneys were good at their job and prefaced his request for substitute counsel by stating that if the court thought everything was fine after hearing his complaints, they could move on with the trial. Both of Patina's attorneys told the court they were unaware of a breakdown in communication between themselves and Patina until he raised it at trial. The district court properly denied Patina's request for new counsel without a hearing because Patina's complaints were not seemingly substantial and did not demonstrate a breakdown in communication that would frustrate his effective representation at trial.

ARGUMENT

I. Standard of review

A request to substitute counsel rests within the sound discretion of the district court and is reviewed for an abuse of that discretion. *State v. Johnson*, 2019 MT 34, ¶ 13, 394 Mont. 245, 435 P.3d 64. A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceed the bounds of reason, resulting in substantial injustice. *Id.*

II. The district court properly exercised its discretion in denying Patina’s request for new counsel without an evidentiary hearing because Johnson did not make a substantial showing of a complete breakdown in communication.

Both the United States Constitution and the Montana Constitution guarantee criminal defendants the right to effective assistance of counsel. *Johnson*, ¶ 14. However, the right to effective assistance of counsel does not grant a defendant the right to counsel of his choice. *Id.* (citing *State v. Dethman*, 2010 MT 268, ¶ 15, 358 Mont. 384, 245 P.3d 30). A “defendant’s right to substitute counsel arises only when a breakdown of the attorney-client relationship becomes so great that the principal purpose of the appointment—to provide the defendant with the effective assistance of counsel—is frustrated.” *Johnson*, ¶ 18 (citation omitted). “[A] defendant may not demand dismissal or substitution of counsel simply because he

or she lacks confidence in, or does not approve of, appointed counsel.” *State v. DeWise*, 2022 MT 145, ¶ 25, 409 Mont. 284, 513 P.3d 1249 (citation omitted).

A defendant is entitled to substitute counsel only if he presents material facts showing good cause for substitution as demonstrated by: (1) an actual conflict of interest; (2) an irreconcilable conflict between defense counsel and the defendant; or (3) a complete breakdown in communication between defense counsel and the defendant. *Johnson*, ¶ 19.

When a defendant requests a substitution of counsel, the district court must first perform an adequate initial inquiry to determine whether the defendant’s claims are seemingly substantial. *DeWise*, ¶ 26 (citation omitted). A district court’s inquiry is adequate when the “court considers the defendant’s factual complaints together with counsel’s specific explanations addressing the complaints.” *State v. Cheetham*, 2016 MT 151, ¶ 20, 384 Mont. 1, 373 P.3d 45 (citation omitted). “Conversely, a district court’s initial inquiry is inadequate if the court fails to conduct even a cursory inquiry into the defendant’s complaints.” *DeWise*, ¶ 26 (citation omitted).

The district court “should consider the circumstances of a defendant’s substitution motion, including the degree to which the conflict prevented the mounting of an adequate defense.” *Id.* (citing *Johnson*, ¶ 23). “A defendant must demonstrate more than the feeling that communication with counsel is

unsatisfactory.” *Id.* (citing *Johnson*, ¶ 23). To meet the seemingly substantial threshold, “a defendant must present material facts demonstrating a deterioration in the attorney-client relationship, to the point of irreconcilable conflict or breakdown in communication, that prevents the mounting of an adequate defense.” *Id.* (citing *Johnson*, ¶ 23). A defendant is not entitled to substitute counsel based on a general claim of ineffective assistance of counsel. *Id.* Thus, to avoid confusion, the court’s inquiry “should focus not on specific disagreements between counsel and defendant regarding trial strategy or on whether defense counsel’s chosen techniques are effective.” *Johnson*, ¶ 20.

If the district court performs an adequate initial inquiry and determines the defendant’s complaints are not seemingly substantial, the court does not need to conduct a hearing to address the defendant’s complaints. *State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371. A subsequent hearing is only required if the district court determines the defendant’s complaints are seemingly substantial. *Johnson*, ¶ 22.

Patina affirmatively acknowledges that the district court conducted an adequate initial inquiry, noting the court “spent a good deal of time inquiring into Patina’s concerns with his counsel, then heard from counsel regarding those concerns before ultimately denying Patina new counsel.” (Appellant’s Br. at 11.)

Instead, Patina claims that the district court abused its discretion when it denied his request for substitute counsel without a hearing. (Appellant's Br. at 11-13.)

Here, the district court properly exercised its discretion when it found that Patina's complaints were not seemingly substantial and thus did not warrant a hearing. As the district court noted, Patina's claims were vague. Counsel fully addressed his complaints regarding discovery. Patina himself agreed that he had had the full benefit of all the discovery. Patina's concerns regarding discovery centered around him not having a physical copy of certain discovery materials, "regardless of whether it was shown to [him], you know, in full[.]" (6/2/22 Tr. at 532.) While Patina asserted that he had not seen "all the WatchGuard[]" evidence, he also acknowledged that it was the same as the other WatchGuard evidence he had seen. (*Id.*) Notably, the photos of the Mustang and what was found in the Mustang had not even been admitted into evidence at the point when Patina requested new counsel. Patina claimed he had not seen the photos until they were admitted into evidence; however, the photos had not yet been admitted and Patina already knew what the photos depicted, indicating he had already seen them prior to admission.

Patina also prefaced his complaints regarding his attorneys by telling the court that "if [it] fe[lt] that this is—it's okay, to move forward in this trial after expressing [his] concerns, then let's move on." (6/2/22 Tr. at 520-21.) Patina told

the court that Ms. Hammack and Ms. Fiscus “do a great job, they’re good at what they do.” (*Id.* at 533.) Both of Patina’s attorneys also stated they were unaware of a breakdown in communication between them and Patina until he raised it at trial.

Patina merely expressed a general feeling that his counsel’s performance was unsatisfactory and that, therefore, he did not trust them, which is insufficient to warrant substitution of counsel. The district court properly exercised its discretion when it found that Patina’s complaints were not seemingly substantial and that his assertions did not indicate a breakdown in the attorney-client relationship that would frustrate his right to effective assistance of counsel.

CONCLUSION

This Court should affirm Patina’s conviction.

Respectfully submitted this 3rd day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,521 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison

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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-03-2024:

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