NO. 44589-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOEL KISSLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-03177-2

BRIEF OF RESPONDENT

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2. Has defendant failed to prove the trial court abused its discretion when it honored his constitutional right to represent himself after engaging him in a 35 question colloquy that established defendant understood the risks associated with his decision to proceed without counsel?

3. Whether the court properly imposed a firearm enhancement when the jury returned a special verdict that found defendant was armed with a firearm?

4. Is remand for correction of defendant's community custody term required to ensure his sentence does not exceed the statutory maximum?

B. STATEMENT OF THE CASE.

1. Procedure

On August 22, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with assault in the second degree (Count I), felony harassment (Count II), unlawful possession of a controlled substance with intent to deliver (Count III), unlawful possession

of a firearm in the second degree (Count IV), and unlawful possession of a controlled substance (Count V). CP 1–3.

On September 11, 2012, defendant petitioned the Court to allow him to proceed *pro se*. 9/11/12 RP 2. The Court conducted a colloquy with defendant. 9/11/12 RP 2–10. The court found that defendant made a knowing and voluntary waiver of his right to counsel and appointed standby counsel. 9/11/12 RP 10; CP 9.[1]

On December 27, 2012, the State amended the Information as to counts II, III, and V, alleging that defendant or an accomplice was armed with a firearm in the commission thereof. CP 26–28.

Trial was continued five times, each over defendant's objection. CP 261; CP 262; CP 263; CP 264; CP 265; CP 269.

On February 5, 2013, the case proceeded to a jury trial before the Honorable Kathryn J. Nelson. 1 RP 1.[2]

On February 8, 2013, the jury convicted defendant of unlawful possession of a controlled substance with intent to deliver (Count III), unlawful possession of a firearm in the second degree (Count IV), and unlawful possession of a controlled substance (Count V). CP 145; CP

[1] On February 4, 2013, defendant asked to proceed without standby counsel, and his request was granted. 2/4/2013 RP 6, 11–12.

[2] The verbatim report of proceedings contains five consecutively paginated volumes of transcripts. The first three volumes are the trial transcripts, volume four is the verdict reading, and volume five is sentencing. The State will refer to these proceedings by listing the volume number followed by RP. All other transcripts will be referred to by date.

147; CP 148. The jury returned a special verdict on counts IV and V, answering "yes" to whether defendant was armed with a firearm during the commission of the crime. CP 151; CP 152. The jury found defendant not guilty of assault in the second degree (Count I) and felony harassment (Count II). CP 143; CP 144.

On March 1, 2013, the court sentenced defendant to 66 months on Count III, 6 months on Count IV, and 6 months on Count V, to be served concurrently. CP 210–224; 5 RP 311. Defendant's sentence also included a 36 month firearm enhancement on Count III and an 18 month enhancement on Count V, to be served consecutively. CP 210–224. Defendant's 120 month sentence reflected the statutory maximum. CP 210–224. Finally, the court imposed a variable term of 12 months community custody for Counts III and IV, with the notation that "total i/c [in custody] and community custody not to exceed stat. maximum." CP 210–224 at 217.

Defendant timely filed his notice of appeal on March 1, 2013. CP 253.

2. Facts

In the afternoon of August 21, 2012, Ms. Kimber Wheeler called 911 claiming that her boyfriend (defendant) held a gun to her head and threatened to kill her. 1 RP 47–48; CP 4–5. Tacoma Police Officer Eric Robison responded to the call and met with Ms. Wheeler near defendant's

apartment building. 2 RP 130. Based upon Ms. Wheeler's allegations, police established a crime scene perimeter around defendant's residence.

Tacoma Police Officer Sargent Kieszling was responsible for watching the rear of defendant's residence and observed defendant exit the apartment with a pistol in his hand. 2 RP 181. Officer Kieszling watched defendant put the pistol in a white bucket. 2 RP 182–83. Meanwhile, officers at the front of the house used a PA system to request defendant's surrender. 2 RP 183.

Defendant was apprehended. 2 RP 165. Officer Matthew Graham located a bag of the prescription medication Alprazolam (generically known as Xanax) in defendant's pocket during a search incident to his arrest." 2 RP 165–66.

A search warrant was executed at defendant's apartment. 2 RP 132. The interior was consistent with a "shooting gallery," where a drug dealer has users inject the narcotics they purchase. 2 RP 152–53. Police recovered hundreds of syringes, several small baggies, and a digital scale. 2 RP 146–47. Police also recovered a 9 millimeter handgun, a methamphetamine pipe, and a bag containing "dealer quantities" of heroin from the white bucket outside the apartment's rear door. 2 RP 135, 144–45. Defendant admitted that he put a gun, glass pipe, and bag of drugs in a bucket outside his door but claimed that each belonged to Ms. Wheeler. 3 RP 226–27.

C. ARGUMENT.

1. THE CHALLENGED CONTINUANCES WERE PROPERLY GRANTED BECAUSE THEY ADVANCED THE INTERESTS OF JUSTICE WITHOUT PREJUDICING DEFENDANT'S ABILITY TO PRESENT HIS CASE.

Under CrR 3.3(b) "[a] defendant who is detained in jail shall be brought to trial within ... 60 days after the ... date of arraignment." Delays ordered by the court pursuant to CrR 3.3(f) are excluded from time for trial. CrR 3.3(e)(3). "If any period of time is excluded pursuant to [CrR 3.3] (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). Under CrR 3.3(f)(2) "the court may continue the trial date ... when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense...." "[A] grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion." ***State v. Woods***, 143 Wn.2d 561, 579, 23 P.3d 1046 (2001), *cert. denied*, 122 S. Ct. 374, 534 U.S. 964, 151 L. Ed. 2d 285 (2001) (*citing* ***State v. Campbell***, 103 Wn.2d 1, 14, 691 P.2d 929 (1984)). "A continuance granted by the trial court is an abuse of discretion only if it ... was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

On appeal, defendant broadly challenges whether each continuance was properly brought "in the administration of justice." Br. App at 15.

Defendant's challenge fails because he failed to preserve the issue for appeal and because each continuance was a proper exercise of the court's discretion.

The relevant proceedings are listed as follows:

Date:	Proceeding:	Trial Date:	Time for Trial:
1. 8/22/12:	Arraignment	10/17/12	60 days
2. 9/11/12:	Waiver of Counsel	10/17/12	40 days
3. 10/4/12:	Continuance	12/4/12	30 days
4. 11/27/12:	Continuance	1/7/13	30 days
5. 12/27/12:	Continuance	1/31/13	30 days
6. 1/31/12:	Continuance	2/4/13	27 days
7. 2/4/13:	Continuance	2/5/13	26 days
8. 2/5/13:	Case Called for Trial[3]	2/5/13	26 days

a. Defendant did not preserve an objection to the challenged continuance under CrR 3.3.

A defendant held in custody does not have a constitutional right to a trial date within sixty days of his arraignment as CrR 3.3's time for trial rule is not of constitutional magnitude. *See* U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); ***State v. MacNeven***, 173 Wn. App. 265, 268, 293 P.3d 1241 (2013) ("Violations of CrR 3.3 are not constitutionally based and cannot be raised for the first time on appeal") (*citing* ***State v. Smith***, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); ***State v. Fladebo***, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); ***State v. White***, 94 Wn.2d 498, 501, 617 P.2d 998 (1980).

[3] 1 RP 1.

The trial court still has "the responsibility of ensuring to each defendant a trial within CrR 3.3's time guidelines ... In order for the trial court to carry out its responsibilities, objections pursuant to CrR 3.3 must be specific enough to alert the court to the type of error involved." ***State v. Greenwood***, 120 Wn.2d 585, 606, 845 P.2d 971 (1993) (*citing* ***State v. Bernhard***, 45 Wn. App. 590, 600, 726 P.2d 991 (1986), *review denied*, 107 Wn.2d 1023 (1987); *see also* ***State v. Frankenfield***, 112 Wn. App. 472, 475-476, 49 P.3d 921 (2002). "Specificity is required because [of] the many facets of this technical rule, its several amendments and the many appellate decisions interpreting its provisions...." ***Frankenfield***, 112 Wn. App. at 476 (*quoting* ***Bernhard***, 45 Wn. App. at 600) (internal quotation marks omitted). "[T]he trial court cannot reasonably be expected, nor does it have the obligation, to rule on every possible aspect of CrR 3.3 every time there is a general incantation of the rule's applicability or an issue raised concerning one of its provisions." *Id.*

A defendant who fails to object to a trial date because it is not within the time limits of CrR 3.3 must do so within 10 days after notice of the trial date is given. CrR 3.3(d)(3). Appellate courts will not direct a dismissal of charges where a defendant is not prejudiced by a minor delay and the defendant did not make his or her intent to rely on the time for trial rules known before time expired. *See generally* ***Fladebo***, 113 Wn.2d at 394.

Here, defendant did not preserve an objection based on CrR 3.3 below and failed to provide the trial court any information that would have reasonably guided it to an applicable provision in the time for trial rule. Defendant was representing himself at the hearing, so he must bear the consequences of his own representation. *See* ***State v. Silva***, 107 Wn. App. 605, 622, 27 P.3d 663 (2001); *see also* ***State v. McDonald***, 143 Wn.2d 506, 512, 22 P.3d 791 (2001). Defendant never timely called upon the trial court to determine if a particular provision of CrR 3.3 was violated and the court was not obliged to conduct its own investigation of defendant's case to identify the time for trial errors defendant alleges on appeal. *See generally* ***Greenwood***, 120 Wn.2d at 606.

Despite receiving notice of a new trial date in the October 4, 2012, continuance, defendant waited until sometime in November, 2012 to attempt to guide the trial court to a specific part of CrR 3.3. The exact date is unclear because the existence of defendant's letter (titled: "Motion to Dismiss") is established only by an email from a Court Administrator with the letter attached. CP 19–20. The contents of the letter were never formally addressed with the court until January 17, 2013–well after the 10

day period prescribed by CrR 3.3(d)(3).[4] 1/17/13 RP 4. Because defendant failed to timely object within the 10 day limit required by CrR 3.3(d)(3), he is barred from now arguing that his trial commenced on a date in violation of CrR 3.3.[5]

b. Even if preserved, defendant's time for trial claim fails on its merits because each continuance was a proper exercise of the court's discretion.

"[T]he court may continue the trial date ... when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense...." CrR 3.3(f)(2). The phrase "administration of justice" is not limited to the administration of justice in a single case seen in isolation. ***State v. Angulo***, 69 Wn. App. 337, 343, 848 P.2d 1276 (1993). "Allowing counsel time to prepare for trial is a valid basis for continuance." ***State v. Flinn***, 154 Wn.2d 193, 200, 110 P.3d 748 (2005); *see also* ***State v. Williams***, 104 Wn. App. 516, 523, 17 P.3d 648 (2001) (the trial court did not abuse its discretion in granting

[4] The record contains a letter written by defendant titled "Motion to Dismiss," but the motion was never presented to the court in a timely manner and the only record of its existence is in an email from the Pierce County Clerk dated November 7, 2012. CP 19–20. Presumably, this is the motion referred to in the proceeding on January 17, 2013. 1/17/13 RP 4. Notably, in his colloquy, defendant understood that he was responsible for following the Superior Court criminal rules. 9/11/12 RP 7; *see also* "Appendix A" Questions 23–25.

[5] After the court granted the first continuance on October 4, 2012, defendant stated that he was not "familiar to the exact procedure" and asked the court if he "had to object to that so [he] can proceed on appeal?" 10/4/12 RP 3–4. One of the risks of self-representation defendant earlier told the court he understood was that he would be on his own and that the court wouldn't be able to offer him advice. 9/11/RP 5.

five continuances over defendant's objection due to the deputy prosecutor's unavailability and the need for defense counsel to prepare) (*citing* ***Campbell***, 103 Wn.2d at 15).

"Scheduling conflicts may be considered in granting continuances." ***State v. Flinn***, 154 Wn.2d 193, 200, 110 P.3d 748 (2005); (*citing* ***State v. Heredia-Juarez***, 199 Wn. App. 150, 153-155, 79 P.3d 987 (2003) (continuance granted to accommodate prosecutor's reasonably scheduled vacation); *see also* ***State v. Carson***, 128 Wn.2d 805, 912 P.2d 1016 (1996) (unavailability of counsel due to trial schedules justifies an extension); ***State v. Jones***, 117 Wn. App. 721, 72 P.3d 1110 (2003); ***State v. Palmer***, 38 Wn. App. 160, 162, 684 P.2d 787 (1984) (scheduling difficulties arising in another trial in which the prosecutor was appearing); ***State v. Krause***, 82 Wn. App. 688, 689, 919 P.2d 123 (1996) (conflicts in the prosecutor's schedule may be considered an unavoidable circumstance justifying an extension of the time for trial date).

In ***State v. Kelly***, the trial court properly extended the trial date when the prosecutor's scheduling difficulties resulted from other trial assignments. In reaching its decision the court observed:

> "Deputy prosecutors, particularly those in ... heavily populated counties, are required to try cases back to back, day after day, and month after month, and year after year. It is not humanly possible to work under this kind of pressure and stress, for months and years at a time, without extended vacation ... [T]o deprive deputy prosecutors of the dignity they deserve ... would result eventually ... in

> less effective justice as well as in unfairness in the administration of justice."
>
> 64 Wn. App. 755-767, 828 P.2d 1106 (1992).

"The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). "[Reviewing courts] will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (*quoting* ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A list of the relevant proceedings in the present case is repeated below for convenience:

Date:	Proceeding:	Trial Date:	Time for Trial:
1. 8/22/12:	Arraignment	10/17/12	60 days
2. 9/11/12:	Waiver of Counsel	10/17/12	40 days
3. 10/4/12:	Continuance	12/4/12	30 days
4. 11/27/12:	Continuance	1/7/13	30 days
5. 12/27/12:	Continuance	1/31/13	30 days
6. 1/31/12:	Continuance	2/4/13	27 days
7. 2/4/13:	Continuance	2/5/13	26 days
8. 2/5/13:	Case Called for Trial	2/5/13	26 days

i. The October 4, 2012, continuance was a proper exercise of the court's discretion.

The State asked for the first continuance on October 4, 2012. CP 261. When defendant was arraigned he received a trial date of October

17, 2012. The case was then assigned to a prosecutor who had a pre-planned vacation and was scheduled to be out of state for the original trial date. 10/4/12 RP 1; CP 261. The DPA was also responsible for a pre-assigned rape/robbery case scheduled to begin on October 18, 2012. 10/4/12 RP 1.[6]

The court granted the continuance because it was "required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his defense[.]" CP 261. The court also found that, "[b]ased on the statements made on the record [...] and under the court rules and case law, there's both a justification and a requirement for the continuance." 10/4/12 RP 3.

The trial court did not manifestly abuse its discretion in granting the October 4, 2012, continuance for it is well established that a trial court can consider scheduling conflicts in granting a continuance. *See* ***Flinn***, 154 Wn.2d 193 at 200; ***Jones***, 117 Wn. App. 721; ***Palmer***, 38 Wn. App. 160 at 162; ***Krause***, 82 Wn. App. 688 at 689; ***Kelly***, 64 Wn. App. 755-767.

On appeal, defendant fails to make a clear showing that the trial court manifestly abused its discretion in granting the continuance. Notably, defendant does not challenge the validity of the reasons behind the October 4, 2012, continuance. Rather, defendant takes issue with the

[6] The physical copy of the order reflects the same information: "Assigned DPA is out of State on current trial date. DPA starts pre-assigned Rape/Robbery case on 10/18 anticipated to last 4 weeks or more. New DPA on case after trial date set." CP 261.

trial court's failure to "explai[n] why it did not set the case for an earlier date in the event that the prosecution's potential trial set for October 18, 2012, did not begin as scheduled." Br. App. at 12. Defendant fails to provide this court with any precedent requiring the trial court to offer such an explanation. Because defendant fails to offer argument or authority contesting the October 4, 2012, continuance, this court should reject any challenge to its validity. *See* ***State v. Hathaway***, 161 Wn. App. 634, 650 n.10, 251 P.3d 253, *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

ii. The November 27, 2012, continuance was a proper exercise of the court's discretion.

The State asked for a second continuance on November 27, 2012. CP 262. The DPA in charge of the case was still in trial. 11/27/12 RP 1. Defendant's standby counsel was scheduled to be on vacation from December 17 through 24. 11/27/12 RP 1.[7]

The court granted the continuance because it was "required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his defense[.]" CP 262. The court also found that "based on the statements made on the record by both sides, I haven't heard

[7] The physical copy of the order for the continuance reflects the same information: "Current trial DPA in trial, standby counsel on vacation 12/17–12/24." CP 262.

anything that's going to prejudice [defendant's] presentation of his defense[.] It's both justified and required by the court rules and the case law." 11/27/12 RP 3.

The trial court did not abuse its discretion in granting the November 27, 2012, continuance where the Prosecutor was in a different trial. *See* cases cited *supra* at 9–10.

Again, defendant fails to make a clear showing that the trial court manifestly abused its discretion in granting the continuance. Rather than challenging the validity of the reason supporting the continuance (that the DPA was in a different trial), defendant complains that "[t]he court did not explain what case law it was referring to and did not address how stand-by counsel's vacation could be used to justify a continuance over Mr. Kissler's objection." Br.App. at 13. Defendant fails to identify case law that requires a trial court's to expound upon case law when ruling on a continuance. And, even assuming *arguendo* that standby counsel's vacation is not a valid reason to grant the continuance, the court still considered the DPA's scheduling conflict as a compelling reason to grant the continuance–the validity of which is not challenged on appeal.

iii. The December 27, 2012, continuance was a proper exercise of the court's discretion.

The State asked for a third continuance on December 27, 2012. CP 263. The State filed an amended information adding firearm sentencing

enhancement to counts two, three, and five, and defendant was rearraigned at the same hearing. 12/27/12 RP 1; CP 26–28.

The physical copy of the order continuing trial lists the following reasons for the continuance: "Operability testing on firearm needs to be completed. Assigned DPA has preassigned murder (second degree) case starting 1/14/13. Defendant rearraigned today adding additional FASES." CP 263.

As with the first and second continuances, the court granted the continuance because it was "required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his defense[.]" CP 262. The court also found that,

> For the reasons stated on the order continuing trial and because Mr. Kissler hasn't shown any prejudice to him in the presentation of his defense and because the State has shown a justification requiring that in the administration of justice a continuance be granted, I'm granting the continuance.

12/27/12 RP 9.

The trial court did not manifestly abuse its discretion in granting the December 29, 2012, continuance where the record indicates that firearm testing needed to be completed, the DPA had a preassigned murder case starting on 1/14/13, and defendant was rearraigned with additional firearm enhancements. *See* cases cited *supra* at 9–10.

On appeal, defendant does not challenge the reasons behind the continuance. Instead, defendant takes issue that "[t]he prosecution offered

no explanation about why the testing of evidence has not yet occurred" and that "[t]he court did not ask the prosecution to explain why it was unprepared for trial, why necessary testing had not occurred, and why it would take more than one month for the testing to occur." Br.App. at 13-14. To the extent that the cited authority would require such a colloquy, it is distinguished from the current case.

Defendant relies upon ***State v. Kenyon***, 167 Wn.2d 130, 138-39, 216 P.3d 1024 (2009) for the proposition that "a court's authority to continue a trial based on an unavoidable circumstance requires it to first try to ameliorate the problem." Br.App. at 10. But, ***Kenyon*** requires only additional documentation of availability of judges and courtrooms in specific instances addressing what amounts to courtroom congestion. *See* ***State v. Oliver***, 178 Wn.2d 813, 825, 312 P.3d 1 (2013). In fact, the ***Kenyon*** court agreed that trial preparation and scheduling conflicts may be valid reasons for continuances beyond the time for trial period. *Id.* at 137.

iv. The January 31, 2013, continuance was not subject to the excluded period of CrR 3.3(e) and defendant's time for trial ticked down to 27 days.

The fourth continuance was brought by the court for administrative necessity. CP 264. 1/31/13 RP 3. The physical copy of the order continuing trial lists the following reasons for the continuance: "No courtrooms available today. Assigned DPA is awaiting trial assignment

on an older case, which may necessitate a continuance on this matter on 2/4." CP 264. In granting the continuance, the court stated that "[T]his isn't a function of [the Prosecution] being unprepared. This is a function of them not having a courtroom. So I will set it over until Monday. Tick down speedy trial." 1/31/13 RP 3–4. The court failed to document the number of unoccupied courtrooms or develop a sufficient record to support a continuance that would reset defendant's time for trial. *See* ***Kenyon***, 167 Wn.2d at 138-39.

Although the court failed to document the number of unavailable courtrooms, the issue is moot because it also ticked down defendant's time for trial. 1/31/13 RP 3–4. Because time for trial was ticked down, and not reset to 30 pursuant to CrR 3.3(b)(5), it is clear that the continuance was *not* subject to the "Excluded Period" provision of CrR 3.3(e).[8] *See also* 2/4/13 RP 12 (trial court, at later hearing, informing defendant that trial time was ticked down because of unavailability of courtrooms).

The first three continuances extended the time for trial expiration date to March 2, 2013. Defendant's case was timely called for trial nearly

[8] Defendant's time for trial expiration date of 3/2/13 remained unchanged from the December 27, 2012, continuance and the January 31, 2013, continuance. CP 263, 264.

one month earlier on February 5, 2013. His time for trial claim is therefore meritless and should be rejected.[9]

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT HONORED DEFENDANT'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF AFTER ENGAGING HIM IN A DETAILED COLLOQUY THAT ESTABLISHED DEFENDANT UNDERSTOOD THE RISKS ASSOCIATED WITH SELF-REPRESENTATION.

"Criminal defendants have a federal and state constitutional right to waive assistance of counsel and represent themselves." ***State v. Woods***, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001); *see also* ***State v. Floyd***, 316 P.3d 1091, 1095 (2013). "Waiver of a constitutional right must be 'knowing, intelligent, and voluntary.'" ***State v. Stone***, 165 Wn. App. 796, 815, 268 P.3d 226 (2012) *quoting* ***State v. Stegall***, 124 Wn.2d 719, 724, 881 P.2d 979 (1994); ***City of Bellevue v. Acrey***, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984). The defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will

[9] The fifth and final continuance was brought by the court on February 4, 2013, because "Judge Nelson is sick and needs [the] matter set over 1 day." CP 269. The order also contains a scriveners error, listing the time for trial days remaining as 29 when the only possible options were 30 (if reset pursuant to CrR 3.3(e)) or 26 days. CP 269. Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See Black's Law Dictionary*, 582, 1375 (8th ed. 1999). The State presumes that, as with the January 31, 2013, continuance, the court intended to tick down defendant's time for trial as there is no record that it was ever intended to fall under the "Excluded Time" provision of CrR 3.3(e). Regardless, the issue is moot where defendant was brought to trial within his time for trial dating back to the December 27, 2012, continuance.

establish that 'he knows what he is doing and his choice is made with eyes open.'" ***Faretta v. California***, 422 U.S. 806, 835, 95 S. Ct. 2525 (1975) *quoting* ***Adams v. United States ex rel. McCann***, 317 U.S. 269, 279, 63 S. Ct. 236 (1942).

A trial court's decision to allow a defendant to proceed *pro se* is reviewed for an abuse of discretion. ***State v. Mehrabian***, 175 Wn. App. 678, 691, 308 P.3d 660 (2013); ***State v. James*** 138 Wn. App. 628, 636, 158 P.3d 102 (2007); ***In re Personal Restraint of Rhome***, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (*quoting* ***State v. Powell***. 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A discretionary decision "is based on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached in applying the wrong legal standard." ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting* ***State v. Rundquist***, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); *see also* ***State v. Dye***, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

a. Defendant was aware of the dangers and disadvantages of self representation and made the decision to proceed *pro se* with his eyes wide open.

When a defendant requests to proceed *pro se*, "the trial court should assume responsibility for assuring that the defendant's decision is made with at least minimal knowledge of what the task entails[.]" ***State v. Vermillion***, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). "There is no formula for determining a waiver's validity[.]" ***State v. Silva***, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). "[T]here is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." ***State v. DeWeese***, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). "[A] colloquy on the record is the preferred means of assuring the risks of self-representation." ***City of Bellevue v. Acrey***, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); *see also* ***State v. Buelna***, 83 Wn. App. 658, 662, 922 P.2d 1371 (1996) (Division Two recommending that trial courts follow the colloquy outlined in ***State v. Christensen***, 40 Wn. App. 290, 295–96 n.2, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985)). "That colloquy, at a minimum, should consist of informing the defendant of the nature and classification of the charge, the maximum

penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case." ***Acrey***, 103 Wn.2d at 211.

Here, defendant requested to proceed *pro se* during a pre-trial hearing three weeks after arraignment. 9/11/12 RP 1.[10] The trial court conducted a 35 question colloquy with defendant. This colloquy revealed that defendant at least knew the (1) nature and classification of the charges; (2) maximum penalty upon conviction; and (3) technical rules governing the presentation of his case. 9/11/12 RP 2–10.[11] For clarity, each will be addressed separately.

The trial court read defendant each charge. 9/11/12 RP 3–5; *see* "Appendix A" questions 8–13. Defendant understood the charges. *Id.* The trial court informed defendant that he would be responsible for following the rules of evidence and the Superior Court rules. 9/11/12 RP 6–7; *see* "Appendix A" questions 20–25. Defendant understood these requirements. *Id.* The court told defendant that Count 1 was a Class B felony that carried a maximum of 10 years in prison and a $20,000 fine.

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[10] It is uncontested that defendant made a timely, unequivocal, request to proceed pro se. *See* ***State v. Modica***, 136 Wn. App. 434, 441, 149 P.3d 446 (2006).

[11] A list containing each question is provided in Appendix A.

9/11/12 RP 4–5. Defendant understood the penalty.[12] *Id.* The court then told defendant that Class C felonies have a maximum penalty of five years and a $10,000 fine. 9/11/12 RP 5. While the court's assessment of Class C felonies was correct, Count 3 was in fact a Class B felony with a maximum penalty of ten years confinement. RCW 69.50.401.

On appeal, defendant claims the court's misidentification of Count 3 as a class C felony undermined the validity of his waiver. Br.App. at 22. He is mistaken as that technical inaccuracy did not cause defendant to misunderstand the maximum possible penalty he faced. Regardless of Count 3's classification, defendant was correctly informed that he faced a maximum penalty of ten years confinement. 9/11/12 RP 4–5; *see also* ***Acrey***, 103 Wn.2d at 211 ("[The] colloquy, at a minimum, should consist of informing the defendant of [...] the maximum penalty upon conviction

[12] The State refers to the custodial component of defendant's penalty as this is his primary contention on appeal. The State's research has revealed no cases in which an otherwise valid waiver was overturned because the court misinformed defendant only of the financial penalty involved. *See*, e.g., ***State v. Silva***, 108 Wn. App. 536, 541, 31 P.3d 729 (2001); ***State v. Buelna***, 83 Wn. App. 568, 922 P.2d 1371 (1996). This is unsurprising given that physical confinement carries greater constitutional implications than mere monetary penalties. *See*, e.g., ***State v. Devlin***, 164 Wn. App. 516, 528, 267 P.3d 369 (2011); ***In re Grove***, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995); ***Blanton v. City of N. Las Vegas***, 489 U.S. 538, 542, 109 S.Ct. 1289 (1989). Here, defendant was indigent when he waived counsel and could not have reasonably based his decision to proceed *pro se* upon the difference of facing a $20,000 penalty compared to a $25,000 penalty because his indigence insulated him from any realistic exposure to financial obligations greater than the statutory minimums. CP 236–252 (Judgment & Sentence); 254–256 (Order of Indigency); CP 268 (Notice of Appearance). ER 201. While court's are not required to consider a defendant's present or future ability to pay when imposing mandatory legal financial obligations, the same considerations must be taken into account when imposing discretionary fees. ***State v. Lundy***, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

[...]." Defendant indirectly concedes as much as he fails to argue that he actually misunderstood his possible maximum penalty.

Defendant erroneously compares his case to ***State v. Silva***, 108 Wn. App. 536, 31 P.3d 729 (2001). Br.App. at 18–19, 22. The court in ***Silva*** never performed a colloquy with the defendant in the case it was hearing. *Id.* at 539-40. It contained "no warnings regarding the risks associated with preparing for trial by jury." *Id.* at 540. Because the trial court in ***Silva*** did not conduct a colloquy, Division One was forced to determine whether it was faced with one of the "rare circumstances [where] a record devoid of a colloquy [would] contain sufficient information show a valid waiver of counsel." *Id.* at 540.

Here, unlike ***Silva***, the court performed a detailed colloquy and repeatedly warned defendant of the risks of self-representation. *See* "Appendix A". Indeed, the trial court followed this Court's advice in ***Buelna***, 83 Wn. App. at 662, and asked the recommended questions set forth in ***State v. Christensen***, 40 Wn. App. 290 at 295–96 n.2. 9/11/12 RP 11; CP 9 (Order allowing defendant to proceed *pro se*). As a result, this Court is not confronted with a "rare circumstance" in which it must decide the validity of defendant's waiver in the absence of a proper colloquy. It can readily verify the trial court's careful acceptance of defendant's waiver from the comprehensive record it created for review.

b. The Court was not required to engage in a second colloquy with defendant when there is no binding precedent requiring the trial court to engage in such a colloquy and when defendant's maximum penalty remained unchanged throughout all proceedings.

There is no law in Washington that requires a trial court to *sua sponte* reassess the validity of a ***Faretta*** waiver after it is executed. A court cannot therefore manifestly abuse its discretion when it refrains from periodically engaging a *pro se* defendant in post-waiver ***Faretta*** colloquies to verify he is still comfortable with his ***Faretta*** waiver. In fact, a Court's continual probing into a defendant's decision to exercise his constitutional right to proceed *pro se* could be perceived as the court unconstitutionally attempting to coerce the defendant to forego an earlier waiver and accept counsel. *See* ***State v. Stenson***, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (A court violates a defendant's constitutional rights when it refuses to honor a timely and unequivocal request to proceed without counsel); ***State v. Breedlove***, 79 Wn. App. 101, 900 P.2d 586 (1995) (murder conviction reversed where trial court denied defendant's request to proceed *pro se*); ***State v. Paumier***, 155 Wn. App. 673, 678–79, 230 P.3d 212 (2010) (burglary and theft convictions reversed where trial court denied defendant's request to proceed *pro se*).

Defendant erroneously claims the trial court abused its discretion by failing to abide by the problematic "substantial change in

circumstances rule" that has been unprofitably applied in a few other jurisdictions. Br.App. at 23. The rule provides that "only a substantial change in circumstances will require the [trial] court to inquire whether the defendant wishes to revoke his earlier waiver." ***State v. Modica***, 136 Wn. App. 434, 445, 149 P.3d 446 (2006) *citing* ***United States v. Fazzini***, 871 F.2d 635, 643 (7th Cir.1989). "The essential inquiry is whether circumstances have sufficiently changed since the date of the ***Faretta*** inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." ***U.S. v. Hantzis***, 632 F.3d 575, 581 (9th Cir.2010). Put differently, "A properly conducted ***Faretta*** colloquy need not be renewed in subsequent proceedings *unless intervening events substantially change the circumstances* existing at the time of the initial colloquy." *Id.* at 580–81 (emphasis added).

The rule has not been formally adopted in Washington and has been only identified as a rule used in federal courts. ***Modica***, 136 Wn. App. 434 at 446. After discussing (and failing to expressly apply) the federal rule, Division One cautioned in dicta that:

> [I]f every added charge against a *pro se* defendant resulted in the automatic invalidation of all prior valid waivers of counsel and created the need for a second full colloquy, the State might be hindered in its ability to bring additional charges against *pro se* defendants, and defendants might be encouraged to proceed *pro se* in order to avoid exposure to additional charges.

Modica 136 Wn. App. 434 at 453 n.7. In its own analysis of the legal landscape surrounding the rule, the Minnesota Supreme Court in ***State v. Rhoads***, 813 N.W.2d 880, 887–88 (Minn.2012)[13], observed that: "When squarely faced with the issue of whether a subsequent charge constitutes a substantial change in circumstances, courts have reached seemingly different conclusions" and that "[t]here is [...] some disagreement as to what constitutes a 'substantial change' in circumstances." *Id.* at 887.

Not only are there practical difficulties with applying the rule, the cases in which courts have found a "substantial change in circumstances" reflect more that the initial ***Faretta*** waiver was invalid than they reflect that a second colloquy was *required.* For instance, the court in ***Schell v. U.S.***, 423 F.2d 101 (7th Cir.1970), accepted defendant's ***Faretta*** waiver, but erroneously informed defendant that he faced a maximum possible penalty of five years confinement. The court corrected the mistake six months later–informing defendant that he actually faced up to six years confinement–but failed to conduct a second colloquy to see if he still wanted to proceed *pro se*. The Seventh Circuit considered the defendant's mistaken belief that he faced five years instead of six a substantial change in his circumstances. ***Schell***, 423 F.2d at 103; ***Modica*** 136 Wn. App at 446. Although the court considered this a substantial change in

[13] One of two cases cited by defendant as support for applying the rule in the present case. Br. App. at 23.

circumstances, the second colloquy was only "required" because the court failed to correctly inform defendant of the penalty he faced during the initial ***Faretta*** colloquy.

Similarly, in ***U.S. v. Erskine***, 355 F.3d 1161 (9th Cir.2004), the court accepted defendant's ***Faretta*** waiver after confirming that defendant understood his maximum possible penalty to be one year. It was later discovered that the correct maximum possible penalty was five years, and the court failed to inquire whether the defendant still wanted to proceed without counsel. The Ninth Circuit considered the defendant's mistaken belief that he faced one year instead of five a substantial change in his circumstances. *Id.* at 1170.

Finally, in ***Jensen v. Hernandez***, 864 F.Supp.2d 869, 900 (Cal.2012), the court accepted defendant's ***Faretta*** waiver before an amended information was filed that included four additional allegations. These four allegations subjected defendant to an additional four years confinement. The Eastern District Court of California considered the addition of four years possible confinement to be a significant change in circumstances that left the petitioner without a clear understanding of the maximum penalty he faced. *Id.* at 900.

Here, unlike ***Schell***, ***Erskine***, and ***Jensen***, defendant correctly understood the maximum possible penalty he faced upon conviction. This maximum penalty did not change with the addition of firearm enhancements on counts two, three, and five. Defendant was acting as his

own attorney and is not entitled to special consideration on appeal. ***State v. Deweese***, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). Even under the "substantial change in circumstances" rule, defendant's claim fails as he was informed of the correct maximum penalty when he waived his counsel and the maximum penalty did not change.

3. THE COURT WAS AUTHORIZED TO IMPOSE A FIREARM ENHANCEMENT WHERE THE JURY RETURNED A SPECIAL VERDICT THAT FOUND DEFENDANT WAS ARMED WITH A FIREARM.

a. Defendant failed to object to the trial court's instruction below pursuant to CrR 6.15(c) and has not preserved the issue for appeal.

"It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court. That rule is not a mere technicality." ***State v. Bailey***, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990); *see also* ***State v. Smith***, 174 Wn. App. 359, 363, 298 P.3d 785 (2013) ("Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal."); ***State v. Schaler***, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). "Any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review." ***State v. Sublett***, 176 Wn.2d 58, 75–76, 292 P.3d 715 (2012). "Counsel has duty to lodge formal objections even if

instructions [were] discussed during informal hearing." *Id.* at 76 *citing* ***Goehle v. Fred Hutchinson Cancer Research Ctr.***, 100 Wn. App. 609, 615–17, 1 P.3d 579 (2000).

CrR 6.15(c) explains the manner for objecting to the trial court's refusal to give a requested instruction as follows:

> Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to *object to* the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. *The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.* The court shall provide counsel for each party with a copy of the instructions in their final form.

Id. (emphasis added).

"An exception to the rule that a jury instruction must be excepted to exists in the case of 'manifest error affecting a constitutional right.'" ***Bailey***, 114 Wn.2d at 347. "[T]he constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Id.* at 348. "[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts." ***State v. Lynn***, 67 Wn. App. 339, 343–44, 835 P.2d 251 (1992).

Here, defendant failed to object to Instruction #33, the same instruction he now takes issue with on appeal. Defendant fails to allege that the trial court's Instruction #33 constitutes an error of constitutional magnitude that can be raised for the first time pursuant to RAP 2.5(a)(3). Because defendant fails to carry his burden of establishing an error of constitutional magnitude, "the burden does not shift to the State to prove that the alleged error was harmless beyond a reasonable doubt." ***State v. Bertrand***, 165 Wn. App. 393, 403 n.11, 267 P.3d 511 (2011). Even if the alleged error was preserved, it is harmless beyond a reasonable doubt (argued *infra* at 30–31).

b. Defendant's firearm sentencing enhancement is supported by the jury's special verdict finding that defendant was armed with a firearm.

"A sentence enhancement must be authorized by the jury in the form of a special verdict." ***State v. Williams-Walker***, 167 Wn.2d 889, 900, 225 P.3d 913 (2010). Here, defendant's unlawful possession of a controlled substance (heroin) with intent to deliver conviction (count III) and his unlawful possession of a controlled substance conviction (count V) were subject to firearm enhancements of three years, and eighteen months, respectively. RCW 9.94A.533(3)(b)-(c). The jury returned special verdicts indicating that defendant was armed with a firearm during the commission of each crime. CP 151, 152. Because defendant's firearm enhancements are supported by the jury's findings, there is no basis for an

appeal that such enhancements were outside of the court's sentencing authority.

On appeal, defendant claims that "[t]he jury's special verdict finding did not authorize the court to impose the firearm enhancement." Br.App. at 28. Defendant relies upon jury instruction #33 which states that "for purposes of the special verdict the State must prove [...] that the defendant was armed with a deadly weapon at the time of the commission of the crime." CP 157–206. Defendant cites case law which explains, however, that it is the content of the jury's *special verdict* finding that authorizes a court to impose a sentencing enhancement, not a separate jury instruction. Br.App. at 26–27 *citing* ***State v. Williams-Walker***, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010). Where the trial courts in the consolidated cases of ***Williams-Walker*** improperly imposed firearm enhancements based upon a deadly weapon special verdict; here, the court imposed firearm enhancements based upon a firearm special verdict. *Id.* at 892. The jury expressly found that defendant was armed with a firearm when he committed the crimes as charged in counts three and five.

c. Any error in Instruction #33 is harmless beyond a reasonable doubt where the alleged error did not contribute to the jury's special verdict that defendant was armed with a firearm.

"An erroneous jury instruction [...] is generally subject to a constitutional harmless error analysis." ***State v. Lundy***, 162 Wn. App.

865, 871, 256 P.3d 466 (2011). "The harmless-error doctrine ... recognizes the principal that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 35 (1999) (*citing* ***Delaware v. Van Arsdall***, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). "To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained." ***State v. Grimes***, 165 Wn. App. 172, 187-88, 267 P.3d 454 (2011).

The alleged error in including a "deadly weapon" definitional jury instruction is harmless where the jury was provided with the essential components of the "firearm" definitional instruction despite its omission.[14] The omitted instruction, WPIC 2.10.01 "Firearm–Definition for Sentence Enhancement–Special Verdict," is composed of three primary components: (1) a requirement that the jury must find defendant was armed with a firearm; (2) a definition of what it means to be "armed"; and

[14] Because the alleged error occurred before the jury verdicts were reached (as defendant is not challenging the special verdict form itself, in which case the error would occur post-verdict), the harmless error doctrine is not barred. *See* ***Williams-Walker***, 167 Wn.2d 889 at 901. *See also* ***State v. Reyes-Brooks***, 165 Wn. App. 193, 202, 267 P.3d 465 (2011) ("[W]hen a trial court imposes an enhanced sentence not supported by facts found by the jury with its *special verdict*, the resulting error can never be harmless" (emphasis added).

(3) a definition of "firearm."[15] *Id.* The instruction that was provided in the present case also contains three primary components: (1) a requirement that the jury must find defendant was armed with a deadly weapon; (2) a definition of what it means to be "armed"; and (3) a definition that any firearm is a deadly weapon.[16] CP 157–206. Here, the jury was still required to find that defendant was armed with a firearm. This is most evident from the special verdict form itself which asks, "Was the defendant [...] armed with a *firearm* at the time of the commission of the crime?" CP 151 (emphasis added). Next, the jury received a definition for what it meant to be "armed." The definition of "armed" is identical in both the deadly weapon and the firearm special verdict definitional instructions (with each referring to "deadly weapon" or "firearm" throughout). Finally, the jury was provided with a definition of "firearm" in instruction #25. The "firearm" definition in Instruction #25 is identical to the definition in the omitted instruction.[17]

In sum, because each of the three components of the "firearm" definitional instruction were given to the jury, any harm from using the words "deadly weapon" instead of "firearm" in Instruction #33 is harmless. The jury was properly instructed on what it was required to find to return its special verdict.

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[15] WPIC 2.10.01 is included as "Appendix B."
[16] This instruction follows WPIC 2.07.02, included as "Appendix C."
[17] Defendant stipulated to the operability of the firearm and admitted at trial that he possessed a firearm. CP 83–84; 3 RP 226.

Furthermore, the alleged error in the present case is much less egregious than other cases in which entire elements were missing from jury instructions but courts nonetheless found the errors to be harmless. *See* ***State v. Berube***, 150 Wn.2d 498, 79 P.3d 1144 (2003) (harmless error to omit general knowledge element of accomplice liability); ***State v. Jones***, 117 Wn. App. 221, 228–29, 70 P.3d 141 (2003) (harmless error to omit knowledge element from to-convict instruction for unlawful possession of a firearm charge); ***State v. Ballew***, 167 Wn. App. 359, 367–68, 272 P.3d 925 (2012) (harmless error to omit component of "true threat" in jury instruction). Here, there are no missing elements to any of the charged crimes. Any error in mentioning "deadly weapon" is harmless for the reasons listed above.

4. A REMAND IS REQUIRED FOR THE TRIAL COURT TO EITHER AMEND THE COMMUNITY CUSTODY TERM OR RESENTENCE DEFENDANT CONSISTENT WITH RCW 9.94A.701(9).

Defendant's case should be remanded so that his term of community custody can be corrected to comply with the Supreme Court's decision in ***State v. Boyd***, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (*applying* RCW 9.94A.701(9)).

D. CONCLUSION.

Defendant received a timely trial after properly waiving his right to counsel. This Court should affirm defendant's convictions and remand to correct the community custody term.

DATED: March 10, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Chris Bateman
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

APPENDIX "A"

"Appendix A"

Number	Question	Cite[18]
1	Whether defendant wanted to proceed *pro se*	2
2	"Have you ever studied law?"	2
3-4	"Ever represented yourself in a trial?" When?	3
5-6	"Was it criminal or civil?" When?	3
7	"Have you ever represented any other person in a criminal trial?"	3
8	"Do you know what you're charged with?"	3
9-13	Whether defendant understands each individual charge	4
14	Whether defendant understood penalty for Count 1	4
15	Repeating whether defendant understood penalty for Count 1	5
16	Whether defendant understood maximum penalty for Class C felonies	5
17	Whether defendant understood his firearm enhancement	5
18	Whether defendant understood that he would be on his own and the judge wouldn't be able to offer him advice	5
19	Whether defendant understood that, if applicable, he would be responsible for the complex task of jury selection	6
20	"Are you familiar with the rules of evidence of the State of Washington?"	6
21	"Do you have a copy of the rules of evidence?"	6
22	Whether defendant understood that he had to follow all the rules of evidence	6
23	"Are you familiar with the Washington State Superior Court criminal rules?"	7
24	Whether defendant understood that the trial would be governed by the court rules	7
25	Whether defendant understood that he had to abide by the court rules	7
26	Whether defendant understood that he would be responsible for calling any witnesses	7
27	Whether defendant understood that, if he chose to	7–8

[18] Citations for "Appendix A" are to 9/11/12 RP.

	take the stand, he would have to proceed by asking himself questions	
28	"Why is it you don't want an attorney?"	8
29	"Were any threats or promises made to you to get you to waive your right to counsel?"	8
30	Whether defendant understood that standby counsel was appointed only at the court's discretion	8
31-32	Whether defendant still wanted to represent himself, and even without standby counsel	9
33	Whether defendant understood that, in the court's opinion: (1) he would be better represented by counsel; (2) it was unwise to represent himself; (3) this is a very complex case; and (4) defendant would have to learn court and evidence rules before trial	9
34	"[I]n light of the penalty you might suffer if found guilty, in light of all the difficulties in representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?"	10
35	Is the decision to proceed without a lawyer entirely voluntary?	10

APPENDIX "B"

11 WAPRAC WPIC 2.10.01

WPIC 2.10.01 Firearm—Definition for Sentence Enhancement—Special Verdict

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.10.01 (3d Ed)

Washington Practice Series TM
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal
Washington State Supreme Court Committee on Jury Instructions

Part I. General Instructions
WPIC CHAPTER 2. Definitions

WPIC 2.10.01 Firearm—Definition for Sentence Enhancement—Special Verdict

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime *[in Count_____].*

[A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant *[or an accomplice].* The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including *[the location of the weapon at the time of the crime][the type of weapon]* [_____].]

[If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.]

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

NOTE ON USE

This instruction should be used when there is a special allegation that the defendant was armed with a firearm at the time of the commission of a crime pursuant to RCW 9.94A.533(3) (formerly .510). This applies only to crimes committed after July 23, 1995.

Do not use the second paragraph in a case in which the weapon was actually used and displayed during the commission of the crime.

For a discussion of the relationship of this instruction to other instructions defining "firearm" and "deadly weapon" see the Note on Use and Comment to WPIC 2.06, Deadly Weapon—Definition as Element.

If applicable, the third paragraph should be used together with WPIC 10.51, Accomplice—Definition.

Use this instruction with WPIC 160.00, Concluding Instruction—Special Verdict—Penalty Enhancements, and WPIC 190.02, Special Verdict Form—Firearm.

Comment

RCW 9.41.010(1).

Pre-SRA law. Prior to the effective date of the Sentencing Reform Act (July 1, 1984), a defendant's sentence could, under some circumstances, be enhanced under either the general deadly weapon statute (RCW 9.95.040) or under a more specific firearm statute (former RCW 9.41.025, the Uniform Firearms Act). The SRA repealed the firearm statute and consolidated the enhancement provisions into a single statute referring to the use of a deadly weapon. RCW 9.94A.602 (formerly .125). Accordingly, in its 1994 edition, the committee withdrew the firearm definition but reserved WPIC 2.10, where it had previously been located.

Legislation enacted in 1995 revived the sentencing enhancement for use of a firearm in the commission of a crime. RCW 9.94A.533(3) (formerly .510). A statutory definition of the term firearm, as stated in the instruction's final paragraph, was also adopted. See RCW 9.41.010(1).

An issue that remains unresolved is the extent, if any, to which case law concerning the old firearm statute (former RCW 9.41.025) would be applicable once again. See, e.g., State v. Adlington-Kelly, 95 Wn.2d 917, 631 P.2d 954 (1981) (whether enhancement permitted when underlying offense also requires proof of use of firearm); see also State v. Stephens, 22 Wn.App. 548, 554-56, 591 P.2d 827, 830-31 (1979) reversed by 93 Wn.2d 186, 607 P.2d 304 (1980) (discussing the "long and troubled history" of the Uniform Firearms Act).

See also the Comment to WPIC 2.10, Firearm—Definition as Element, regarding the firearms enhancement statute.

Operability of firearm. The Court of Appeals has held that a sentence may be enhanced under RCW 9.94A.602 (formerly .125) even if the prosecution does not prove that the firearm was operable. State v. Faust, 93 Wn.App. 373, 967 P.2d 1284 (1998) (malfunctioning firearm). Noting that unloaded guns meet the statutory definition of firearm, the court observed: "If an unloaded gun can be loaded, a malfunctioning gun can be fixed." State v. Faust, 93 Wn.App. at 381, 967 P.2d 1284. The *Faust* court distinguished between real guns that malfunction (which qualify as "firearms") and toy guns or other "gun-like objects" (which do not qualify as "firearms"). State v. Faust, 93 Wn.App. at 379-81, 967 P.2d 1284 (construing State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983)). Under *Faust*, then, the firearm sentence enhancement applies when the prosecution proves beyond a reasonable doubt the existence of a "true firearm" (as opposed to a "gun-like object")—the prosecution need not further prove the weapon's operability. For a discussion of related cases, see the Comment to WPIC 2.10, Firearm—Definition as Element (discussing, in the context of firearm offenses under RCW Chapter 9.41, whether temporarily inoperable firearms qualify as firearms under RCW 9.41.010(1)).

Armed with a firearm. For the 2005 update the committee has added a definition of "armed." For a related discussion, see the Comment to WPIC 2.07, Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—General.

[Current as of July 2008.]

11 WAPRAC WPIC 2.10.01

END OF DOCUMENT

APPENDIX "C"

11 WAPRAC WPIC 2.07.02
WPIC 2.07.02 Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Firearm

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.07.02 (3d Ed)

Washington Practice Series TM
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal
Washington State Supreme Court Committee on Jury Instructions

Part I. General Instructions
WPIC CHAPTER 2. Definitions

WPIC 2.07.02 Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Firearm

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime *[in Count _____]*.

[A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant *[or an accomplice]*. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including *[the location of the weapon at the time of the crime][the type of weapon]* [_____].]

[If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.]

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

NOTE ON USE

Use this instruction in those cases in which an enhanced sentence for use of a deadly weapon is sought under RCW 9.94A.602 (formerly .125) and RCW 9.94A.533 (formerly .510) and the only weapon allegedly used by the defendant is a firearm. If other weapons are allegedly used, use either WPIC 2.07 (Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—General) or WPIC 2.07.01 (Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Knife).

Do not use the second paragraph in a case in which the weapon was actually used and displayed during the commission of the crime.

Along with this instruction, use WPIC 160.00 (Concluding Instruction—Special Verdict—Penalty Enhancements) and WPIC 190.01 (Special Verdict Form—Deadly Weapon).

Use bracketed material as applicable. If the bracketed material on accomplices is used, use WPIC 10.51, Accomplice—Definition, with this instruction. For directions on using bracketed phrases, see the Introduction to WPIC 4.20.

Comment

RCW 9.94A.602 (formerly .125).

For a detailed discussion of the law applicable to sentencing under the deadly weapon provisions of RCW 9.94A.602 (formerly .125), see the Comment accompanying WPIC 2.07. For a discussion of why the term "firearm" is not further defined here, see the Comment to WPIC 2.06, Deadly Weapon—Definition as Element (section entitled "Firearm—Definitional Issue").

A firearm that is unloaded is a deadly weapon within the meaning of RCW 9.94A.602 (formerly .125). State v. Schelin, 147 Wn.2d 562, 567 n. 2, 55 P.3d 632 (2002); State v. Simonson, 91 Wn.App. 874, 883, 960 P.2d 955 (1998); State v. Sullivan, 47 Wn.App. 81, 733 P.2d 598 (1987).

It has been an open question whether a firearm must be operable to be a deadly weapon within the meaning of RCW 9.94A.602 (formerly .125). A similar issue as to interpreting "firearm" under RCW 9.94A.533(3) (formerly .510) was addressed in State v. Faust, 93 Wn.App. 373, 967 P.2d 1284 (1998). *Faust* is discussed in the Comment to WPIC 2.10.01, Firearm—Definition for Sentence Enhancement—Special Verdict.

Armed. Under RCW 9.94A.602 (formerly .125), the prosecution must prove that the defendant was "armed" with the firearm. State v. Simonson, 91 Wn.App. at 882–83, 960 P.2d 955. For the 2005 update, the committee has added a definition of "armed." For a related discussion, see the Comment to WPIC 2.07, Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—General.
[Current as of July 2008.]

11 WAPRAC WPIC 2.07.02

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PIERCE COUNTY PROSECUTOR

March 10, 2014 - 2:04 PM

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