No. 93347-2
COA No. 46758-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLIXZANDER HARRIS,

Petitioner.

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

The Honorable Sally F. Olson

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Allixzander Harris asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Allixzander Devell Harris*, No. 46758-5-II (June 1, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. Here, Mr. Harris accepted the prosecutor's and the trial court's invitation to represent himself but the trial court ignored his request. Is a significant question under the United States and Washington Constitutions involved where the trial court impermissibly denied Mr. Harris his right to represent himself requiring reversal of his convictions?

2. A defendant possesses a constitutionally protected right to be present at all hearings where his rights are affected. That right may be

limited by the trial court only if the court makes specific findings regarding the defendant's conduct and considered less restrictive alternatives to banishment. Is a significant question under the United States and Washington Constitutions involved where Mr. Harris's right to be present was violated when the trial court banished him from the courtroom?

3. Is a significant question under the United States and Washington Constitutions involved where the recent recidivism aggravator is unconstitutionally vague?

4. A defendant has the right under the Sixth Amendment and article I, section 22 to the effective assistance of counsel. Is a significant question under the United States and Washington Constitutions involved Mr. Harris's attorney stipulated to a waiver of his right to a speedy trial over his objection, and failed to move to dismiss for a violation of speedy trial where the trial court allowed Mr. Harris's attorney to withdraw solely on health reasons?

5. Sufficient evidence supports an aggravating circumstance where the evidence is competent evidence. Hearsay is not competent evidence. Is a significant question under the United States and Washington Constitutions involved where the only evidence supporting

the rapid recidivism aggravating circumstance was the Community Corrections Officer's (CCO) hearsay statements?

D. STATEMENT OF THE CASE

Allixzander Harris was alleged to have profited off the prostitution of two minor women, S.D. and K.H. during the month of December 2012. Mr. Harris was also alleged to have promoted the prostitution of L.P., an adult. Finally, while awaiting trial, Mr. Harris was alleged to have tampered with potential witnesses in the case. As a result, Mr. Harris was charged with six counts of promoting commercial sexual abuse of a minor, one count of promoting prostitution, and one count of witness tampering. CP 196-202.[1] The first two counts of promoting commercial sexual abuse of a minor also charged sentence aggravators for recent recidivism, free crimes, and an ongoing pattern of sexual abuse and victimization of homeless youth. CP 196-97. The remaining promoting commercial sexual abuse of a minor counts charged only the ongoing pattern of sexual abuse and victimization of homeless youth. CP 197-201. The ongoing pattern of

[1] Mr. Harris was also charged with a count of second degree possession of depictions of a minor engaged in sexually explicit conduct, which was severed before trial and dismissed once the jury returned its verdicts on the other counts. CP 202-03, 327; 8/11/2014RP 44-45.

sexual abuse aggravator was dismissed at the close of the State's case. 8/27/2014RP 1526-28.

Regretfully frustrated by the performance of his court-appointed attorneys, and after being told by the court on suggestion of the prosecutor that he could represent himself, on August 13, 2014, Mr. Harris unequivocally took the court up on its invitation and requested he be allowed to represent himself:

> THE DEFENDANT: For the record, my attorney did not want to excuse that juror until we put it on record about this whole issue. I'm asking to revisit the non-objections from the motions in limine that he refused to do.
>
> MR. TALEBI: Your Honor, if this is going to be persistent -- I mean, the defendant, once again, which we've been over, he has two decisions, whether to plead or to testify. *If he wants to make legal arguments, then he can go pro se*. I mean, this continued behavior normally isn't allowed for any defendant and it's just -- I think it's going to interrupt the proceedings.
>
> THE COURT: I will admonish him again. Mr. Harris, you need to speak through your attorney. Thank you.
>
> MR. VALLEY: May it please the court –
>
> THE DEFENDANT: How you just –
>
> THE COURT: Mr. Harris, you are speaking out of turn over and over again. Look at me, I'm warning you again. If you don't stop talking outside your attorney, I'm going to have you removed from the courtroom.
>
> THE DEFENDANT: He doesn't do it.

> THE COURT: You speak through your attorney. *You have choices of going pro se or letting your attorney do your job*. I will not allow this to continue. Mr. Talebi is correct, it's gone on too long. If you have motions, you make your attorney –
>
> THE DEFENDANT: He won't do it.
>
> THE COURT: He exercises his judgment as to what motions need to be made, period. We have a note from Juror No. 65.
>
> THE DEFENDANT: *I want to go pro se.*
>
> THE COURT: I believe I -- wait a minute. Mr. Harris, you are interrupting the proceedings. I'm trying to talk to counsel about another juror questionnaire. Are you ready to listen?
>
> MR. VALLEY: I'm ready, Your Honor. Absolutely. Yes.

8/13/2014RP 344-45 (emphasis added). The court never responded to Mr. Harris's request to represent himself.

Following a jury trial, Mr. Harris was convicted as charged including the sentence aggravators. CP 304-18. The court then conducted a subsequent jury trial on the recent recidivist aggravator. The sole witness to testify was CCO Rex Garland. 8/29/2014RP 8-9. Mr. Garland testified that based upon his review of the State's computer system, the Offender Management Network Information (OMNI), Mr. Harris was released from prison on October 1, 2012.

8/29/2014RP 11. Based solely on this testimony, the jury found Mr. Harris guilty of the aggravating factor. CP 324-26.

At sentencing, the court imposed LFOs in the amount of $7,535 of which only $600 were mandatory fees. CP 445. The Judgment and Sentence contains a boilerplate finding stating: "The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations." CP 445. In sentencing Mr. Harris, the trial court made no oral finding regarding his ability to pay the LFOs, stating simply: "All the financials that the State imposed will be ordered." 9/26/2014RP 22.

The trial court imposed an exceptional sentence of 486 months. CP 438-49.

The Court of Appeals rejected Mr. Harris's arguments and affirmed his conviction and sentence.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The trial court violated Mr. Harris's right to represent himself.

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution.

including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). In addition, the Sixth and Fourteenth Amendments to the United States Constitution as well as art. I, § 22 of the Washington Constitution allow criminal defendants to waive their right to the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). This waiver of the right to counsel must be knowing, voluntary, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1(1991).

When a defendant asks to represent himself, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson,* 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), *cert. denied,* 523 U.S. 1008 (1998). Absent a finding that the request was equivocal or untimely, the trial court must then determine if the defendant's request is voluntary, knowing, and intelligent. *Faretta,* 422 U.S. at 835; *State v. Stegall,* 124 Wn.2d 719, 881 P.2d 979 (1994). The unjustified denial of this right requires reversal. *Madsen,* 168 Wn.2d at 503; *Stenson,* 132 Wn.2d at 737.

Here, Mr. Harris continually sought a speedy trial and objected each time his attorney's moved to continue the trial. His request to represent himself here was not accompanied by a request to continue the trial. Mr. Harris demanded to exercise his right to represent himself unequivocally, and in answer to the suggestion of both the prosecutor and the court. 8/13/2014RP 344-45. This was a sufficient invocation of the right to represent oneself and the trial court was compelled to rule on it. *See Madsen*, 168 Wn.2d at 506 ("Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution - the provision protecting Madsen's right to represent himself." (emphasis in original)).

The Court of Appeals found the request was equivocal based on the entire record. Decision at 16. This Court should accept review to determine whether it was appropriate to consider Mr. Harris's unequivocal request to represent himself in light of the entire record or at the time of his request.

2. The trial court violated Mr. Harris right to be present during the October 4, 2013, hearing.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. U.S. Const. amends VI, XIV; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d

267 (1983). Under this standard, a defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

The Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." art. I, § 22. In addition, Washington's criminal rules state that "[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown." CrR 3.4(a); *State v. Chapple*, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). Thus, in Washington, "[i]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel ... *at every stage of the trial when his substantial rights may be affected.*" *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011), *quoting State v. Shutzler*, 82 Wn. 365, 367, 144 P. 284 (1914) (emphasis in original).

Mr. Harris had a constitutional right to be present at the omnibus hearing. The hearing was one where the parties were to speak about anticipated pretrial matters as well as matters and concerns

expected to occur at trial. The State was also seeking protective orders regarding discovery items linked to K.H., which Mr. Harris felt needed to be addressed. These matters went to core of the trial strategy in which Mr. Harris was actively involved and in which his distrust of his attorneys was fostered. Mr. Harris's rights were affected and he had the right to be present.

This Court should accept review to determine whether Mr. Harris had the right to be present at the hearing.

3. The recent recidivist aggravator is unconstitutionally vague.

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *Id.* at 297. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973). The Court reviews a

vagueness challenge *de novo*. *State v. Williams*, 159 Wn.App. 298, 319, 244 P.3d 1018 (2011).

The constitutional requirement must be applied to sentencing aggravators in light of recent federal cases. In *State v. Baldwin*, this Court held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct' and that it was 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.'" 150 Wn.2d 448, 458, 78 P.3d 1005 (2003), *quoting State v. Jacobson*, 92 Wn.App. 958, 966, 967, 965 P.2d 1140 (1998). But this holding is incorrect in light of *Blakely*, 542 U.S. 296 and *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). *Baldwin*'s holding that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" cannot withstand these United States Supreme Court decisions finding statutory factors *do* alter the statutory maximum for the offense and must be first found by a jury beyond a reasonable doubt. *E.g.*, *Blakely v. Washington*, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The United States Supreme Court has also made clear that "due process and associated jury protections

extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi v. New Jersey*, 530 U.S. 466, 484, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* and *Alleyne* clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause; this Court should overrule *Baldwin* in light of the decisions of the United States Supreme Court.

The recent recidivism aggravator is impermissibly vague because it is impossible to know what the term "shortly after being released from incarceration" means. The statute provides no standards against which the jury, the accused, or the trial judge can measure what is "shortly." *See* RCW 9.94A.535(3)(t). A jury has no reference point from which to determine the conduct that constitutes "shortly after being released," just as the public has no way of knowing which conduct is proscribed. In Mr. Harris's case in particular, the jury had no reference point with regard to measure how much is "shortly" after being released; one day, one week, one month, etc. This statutory provision is vague because it is ripe for arbitrary enforcement. *Goguen*, 415 U.S. at 578. This Court should accept review, overrule the decision

in *Baldwin*, strike the aggravator for vagueness, and remand for resentencing.

4. Mr. Harris's attorney rendered ineffective assistance for a failure to enforce his right to a speedy trial under CrR 3.3.

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;[2] Const. art. I, § 22;[3] *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate

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[2] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[3] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

This Court should accept review to determine whether counsel was ineffective for stipulating to a waiver on April 7, 2014, of his right to a speedy trial and failed to move for dismissal based on a violation of CrR 3.3 where the withdrawal of his prior attorney was solely for health issues.

5. The State failed to prove the aggravating circumstance regarding rapid recidivism with competent admissible evidence.

Under RCW 9.94A.585(4), the facts supporting an exceptional sentence must support the reasons for the exceptional sentence. *State v. Griffin*, 173 Wn.2d 467, 474, 268 P.3d 924 (2012). This is reviewed under a sufficiency of the evidence standard. *Id.*

Under the sufficiency of the evidence standard, the State is required to prove each element of the aggravating factor charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Griffin*, 173 Wn.2d at 474. The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The evidence supporting the aggravating factor must be competent, admissible evidence. *Griffin*, 173 Wn.2d at 475-76. Where the only evidence supporting the aggravating factor is inadmissible, "there is no evidence in the record supporting the trial court's aggravated circumstance finding." *Id.*

The court may impose an exceptional sentence where the defendant committed the offense "shortly after being released from incarceration." RCW 9.94A.535(3)(t). This aggravating factor is also known colloquially as "rapid recidivism." *State v. Williams*, 159 Wn.App. 298, 309, 244 P.3d 1018 (2011).

Here, as in *Griffin*, the only evidence supporting the jury's finding regarding the rapid recidivism factor was the testimony of the CCO regarding the date Mr. Harris was allegedly released from incarceration. Thus, as the Court ruled in *Griffin*:

> Because the only evidence supporting the trial court's finding of an aggravating circumstance was inadmissible, there is no evidence in the record supporting the trial court's aggravating circumstance finding.

Griffin, 173 Wn.2d at 475-76.[4]

Thus, as in *Griffin*, the jury's finding regarding the rapid recidivism aggravator was not supported by admissible evidence, thus the exceptional sentence must be reversed and the matter remanded for resentencing. *Griffin*, 173 Wn.2d at 476.

F. CONCLUSION

For the reasons stated, Mr. Harris asks this Court to grant his petition and reverse his convictions and/or sentence.

DATED this 30th day of June 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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[4] *Griffin* involved a bench trial, thus the use of the terms "court's finding."

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALLIXZANDER DEVELL HARRIS, Appellant.	No. 46758-5-II UNPUBLISHED OPINION

MELNICK, J. — Allixzander Devell Harris appeals his sentence and convictions for six counts of promoting commercial sexual abuse of a minor with multiple aggravating factors on those counts, one count of tampering with a witness, and one count of promoting prostitution in the second degree. He makes numerous arguments that his exceptional sentence should be reversed because it was based on the rapid recidivism aggravating factor. Because the jury found other aggravating factors existed and the trial court said it would have imposed the same exceptional sentence based on the presence of only one, we do not consider his sentencing arguments. In addition, we reject Harris's argument that the trial court violated his right to be present and his right to self-representation. Harris also challenges the imposition of his legal financial obligations (LFOs). In a statement of additional grounds (SAG), Harris asserts that he received ineffective assistance of counsel. We affirm, but remand the case to the trial court to conduct an individualized inquiry on Harris's ability to pay discretionary LFOs.

FACTS

In late 2012, S.D. and K.H., both minors, became homeless. They asked Harris about becoming prostitutes because they needed money for a place to stay. He took S.D. and K.H. to meet a woman, Trista, who taught them about prostitution. Trista helped them find their first client. S.D. and K.H. were instructed to go into a nearby room where they performed oral intercourse on the client. K.H. also had penile-vaginal intercourse with the client. As payment, they received money, marijuana, and a marijuana pipe from the client. K.H. was arrested shortly thereafter, but after her release, she continued prostituting.

Harris took pictures of S.D. and created Backpage.com[1] advertisements for K.H. and S.D. He received phone calls from the advertisements on his cell phone. Harris, S.D., and K.H. responded to inquiries by text message. Harris made the arrangements for S.D. and K.H. to meet clients. Harris drove S.D. and K.H. to different locations to meet new clients. He took all of the money S.D. and K.H. made.

The State charged Harris with six counts of promoting commercial sexual abuse of a minor with aggravating factors (counts I through VI), one count of tampering with a witness (count VII), one count of promoting prostitution in the second degree (count VIII), and possession of depictions of a minor engaged in sexually explicit conduct in the second degree (count IX).[2] Counts I through VI included the aggravating factors of ongoing pattern of sexual abuse[3] and victimization of

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[1] Backpage.com is a classified advertising website where escorts advertise their services. Advertisers include phone numbers in their advertisements that interested clients can call or text message.

[2] RCW 9.68A.101; RCW 9A.72.120; RCW 9A.88.080; RCW 9.68A.070(2); and RCW 9.68A.011(4)(f), (g).

[3] RCW 9.94A.535(3)(g).

homeless youth.[4] Counts I and II also included aggravating factors of multiple unpunished current offenses[5] and rapid recidivism.[6] The trial court dismissed count IX, possession of depictions of minors engaged in sexually explicit conduct, during trial. Harris plead not guilty to all charges.

I. PROCEDURAL HISTORY

On April 17, 2013, Harris filed a motion for his appointed lawyer to withdraw because he would not file motions as Harris instructed.[7] The trial court denied the motion. On May 15, Harris again moved for his lawyer's withdrawal, telling the court that his lawyer was harassing him and threatening him. The trial court again denied the motion. On May 23, Harris's lawyer told the trial court that Harris filed a bar complaint against him and that Harris refused to talk to him. The trial court again refused to appoint new counsel. On June 6, the trial court granted the lawyer's motion to withdraw based on a breakdown of communication with Harris.

The trial court appointed a new lawyer and granted a continuance to allow him to prepare for trial. Harris objected to the continuance "to preserve any speedy trial issues." Report of Proceedings RP (June 21, 2013) at 8. On August 1, the trial court granted the second lawyer's motion to withdraw because of a conflict with Harris. The trial court appointed Harris a third lawyer.

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[4] RCW 9.94A.535(3)(j). This statute has been amended, however, the amendments do not affect the provisions we utilize for our analysis.

[5] RCW 9.94A.535(2)(c).

[6] RCW 9.94A.535(3)(t).

[7] Harris said, "My motion is to withdraw defense counsel." Report of Proceedings (RP) (Apr. 17, 2013) at 7. For consistency, we refer to this motion and other similar motions as motions to withdraw.

On October 4, Harris indicated to the trial court that he wanted to file a motion to withdraw counsel and he was not speaking to his lawyer. The trial court explained to Harris that he must bring motions through his lawyer. Harris told the trial court that the third lawyer was not his lawyer. Harris continued to interrupt the trial court at the hearing:

> THE COURT: No. No. Sir, one more word and you are coming out of this jail [sic] right now. Look at me. He is your attorney until he has been withdrawn. I haven't done that yet, and I am not entertaining a motion to his withdrawal. That is not what we are here for.
>
> [HARRIS]: I am here against the law.
>
> THE COURT: One more word and you are out of here. We are here for omnibus only. If you have a separate motion to make, you note it up through your attorney. You have been here long enough you know how.
>
> [HARRIS]: I am—
>
> THE COURT: Not another word.
>
> . . . .
>
> [HARRIS]: You can take me back, but I am—
>
> THE COURT: Take him back now. Take him out.
>
> [HARRIS]: Take me back, but I never signed that order, and you cannot proceed with that because I never gave him prior consent, so all that should be on record.

RP (Oct. 4, 2013) at 5. After Harris was removed from the courtroom, the lawyer explained this exchange was the first he heard of Harris's displeasure, and that Harris consistently contacted his office several times a day. The trial court continued to conduct the hearing and signed a stipulation and protection order based on an agreement between the State and Harris's lawyer. The order related to "the use and distribution of image and audio evidence from the DVD recording . . . provided to the defense in the course of discovery." Clerk's Papers (CP) at 462. It pertained to interviews with children and "suspected child pornography." CP at 462.

On November 4, Harris's lawyer moved to continue the trial date because he had health issues. The trial court granted the continuance. Eight days later, Harris personally filed a handwritten objection to the continuance.

On January 14, 2014, Harris's lawyer again moved to continue the trial date. When Harris complained, the trial court explained to Harris:

> your choices are today is if you want to go to trial today this afternoon, then you will have to do it by yourself without [your lawyer] if you wish to proceed and represent yourself because it's—as long as he remains your attorney, he has cited some compelling reasons why the matter should be continued.

RP (Jan. 14, 2014) at 19-20. Harris responded: "I don't need to discuss it. No disrespect. It's I don't need to discuss it because I am not stupid. I am not going to go pro se. I am not going to do that, so I am going to have to do this with him." RP (Jan. 14, 2014) at 20-21. The trial court warned Harris that "it's unlikely that if you make another motion that you are unhappy with him and you want the Court to relieve him, assuming I grant it, I can assure you that I am not going to appoint a fourth public defender for you." RP (Jan. 14, 2014) at 22.

On March 24, Harris's third lawyer filed a motion to withdraw. He explained that Harris had "orally fired [him] on the record several times "declaring that [he is] not his attorney and that he will not work with [him]." CP at 42. He also represented that Harris filed bar complaints against him and continued to appeal the dismissal of those complaints. He pointed to a breakdown in communication with Harris, and added that his health issues precluded him from taking the case to trial in the foreseeable future. On March 28, the trial court granted the motion.

The trial court appointed a fourth lawyer. Harris tried to make a record about one of the trial court's orders. The trial court told Harris that he needed to speak to his new lawyer and make motions through him. Harris responded that "when I asked [my lawyer] to do these things for me that you're telling me to do properly, he didn't do it. So what am I supposed to do if these attorneys aren't going to do it for me? I'm not going to go pro se." RP (Mar. 28, 2014) at 19.

On April 7, the trial court held a status conference hearing. There was discussion about when time for trial would expire based on the appointment of new counsel. The trial court had a colloquy with Harris:

> [DEFENSE ATTORNEY]: Do you think that the 60 days period started over again when I got appointed?
>
> [HARRIS]: Yes.
>
> THE COURT: All right. That means your speedy trial expires in May, end of May. Do you agree with that sir, Mr. Harris?
>
> [DEFENSE ATTORNEY]: Whatever 60 days—
>
> [HARRIS]: I agree, man. So basically what I am saying is I believe that my expiration date—if I am saying it right—would actually be the 30th, but—man, I don't know how to explain it. I believe that my expiration date is the 30th. . . .
>
> [DEFENSE ATTORNEY]: And I am your new lawyer starting March 28th.
>
> [HARRIS]: Right. So 60 days from—okay, yes. I understand what you are saying.
>
> THE COURT: So why don't we count up 60 days; March 28th. So the next order is going to reflect when the new speedy trial expiration date is.
>
> . . . .
>
> [THE COURT:] May 27th is the new speedy trial expiration date.

RP (Apr. 7, 2014) at 8-10.

The next week, the trial court held another status conference. Harris claimed a violation of his time for trial right because his third lawyer was not actually disqualified, and instead moved for leave to withdraw because of health issues. Harris acknowledged that he waived his time for trial right at the previous hearing, but claimed he was "either tricked or confused." RP (Apr. 14, 2014) at 7. Harris's current lawyer cited to *State v. Campbell*, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), which permitted "counsel [to ask] for a continuance even over the client's objections on effective assistance grounds" because he "couldn't be ready in time." RP (Apr. 14, 2014) at 8. The trial court said that Harris's third lawyer was replaced for reasons other than just his health, and Harris's current lawyer agreed. Harris told the trial court that "I'm ready myself today, but I

know that my attorney is definitely not, and that's who is representing me because I'm not going pro se." RP (Apr. 14, 2014) at 14.

On May 5, the trial court held another status conference. Harris's lawyer was still not ready to go to trial, stating "I'm asking for as much of a continuance—and I think, under *State v. Campbell*, and I could be wrong, . . . I think that enables me to ask for only 30 days, but I could be wrong." RP (May 5, 2014) at 23. He also told the trial court that Harris wanted him to object on his behalf because Harris felt his time for trial right was violated. When Harris again complained to the trial court about the continuances, the trial court advised Harris that he had,

> two choices. Your attorney has good cause to ask for a continuance. If you wish the trial to go forward on May 14—
>
> [HARRIS]: I will not go pro se.
>
> THE COURT: . . . Your choices are, we have this matter continued to sufficient time for your attorney to be ready, or to go by yourself.

RP (May 5, 2014) at 26.

On July 25, Harris filed another motion to withdraw his counsel. Harris explained to the trial court that there had been a breakdown in communication with his fourth lawyer. He claimed that he did not "feel safe going to trial with [his lawyer]" because he was not allowed to see some evidence. RP (July 25, 2014) at 12. Harris's lawyer denied this. Harris's lawyer explained to the trial court that he "anticipate[s] that [Harris] will file a bar complaint against me and file an appeal for ineffective assistance of counsel." RP (July 25, 2014) at 16. Harris later told the trial court that he already wrote a bar complaint against his lawyer because of their disagreement. The trial court responded:

> Mr. Harris, I have several concerns. I told you last time that if you want to represent yourself you may do that. I am not going to keep continuing to appoint public defender after public defender for you. You have made similar complaints about each and every attorney I have appointed for you. I am quite concerned it wouldn't matter how many attorneys I gave you. You will have the same problems with them. None of the attorneys that I appoint for you would be good enough, that would do what you want them to do. I am not going down that road.
>
> What I am hearing from this counsel is that he is working hard. Maybe you disagree with him in strategies. . . . He has not told me that he can't work with you. I am concerned about your ability to work with any attorney.

RP (July 25, 2014) at 22-23. When Harris protested, the trial court again explained that Harris would not receive another public defender:

> I am just saying the time for you to speak every time you are in court is now over. I have been very, very patient with you and very accommodating.
>
> I am denying your request for new counsel. You need to work with your current counsel. Your only other alternative is to go by yourself or hire private, and obviously you can't do that. So you have two choices. You can represent yourself, you stay with counsel—or actually there is a third choice—you hire private counsel.
>
> You can't do that the day before trial either because that would require a whole new continuance. I am just kind of warning you: Do not come in here the day of trial before and try to say, "Now I have money. I am going to hire a private lawyer." That won't fly.
>
> [HARRIS]: If I chose to represent myself, would counsel be able to like still be there for me to refer to?
>
> THE COURT: No.
>
> . . . .
>
> [THE COURT:] Standby counsel, they end up, you know, being your attorney. So just have him represent you. I am stopping the conversation.

RP (July 25, 2014) at 30-31.

II. TRIAL

On the third day of trial, during voir dire, Harris continued to object to the decisions his lawyer made regarding jury selection. The State expressed concern about Harris's conduct. The following exchange occurred.

> [THE STATE]: Your Honor, if this is going to be persistent—I mean, the defendant, once again, which we've been over, he has two decisions, whether to plead or to testify. If he wants to make legal arguments, then he can go pro se. I mean, this continued behavior normally isn't allowed for any defendant and it's just—I think it's going to interrupt the proceedings.
>
> THE COURT: I will admonish him again. Mr. Harris, you need to speak through your attorney. Thank you.
>
> [DEFENSE ATTORNEY]: May it please the court—
>
> [HARRIS]: How you just—
>
> THE COURT: Mr. Harris, you are speaking out of turn over and over again. Look at me. I'm warning you again. If you don't stop talking outside your attorney, I'm going to have you removed from the courtroom.
>
> [HARRIS]: He doesn't do it.
>
> THE COURT: You speak through your attorney. You have choices of going pro se or letting your attorney do your job. I will not allow this to continue. [The State] is correct, it's gone on too long. If you have motions, you make your attorney—
>
> [HARRIS]: He won't do it.
>
> THE COURT: He exercises his judgment as to what motions need to be made, period. . . .
>
> [HARRIS]: I want to go pro se.
>
> THE COURT: I believe I—wait a minute. Mr. Harris, you are interrupting the proceedings. I'm trying to talk to counsel about another juror questionnaire.

3 RP at 344-45. The trial court did not verbally answer Harris's request to go pro se and trial continued.

The jury found Harris guilty on all counts. The jury also found Harris guilty of the following aggravating factors: knowingly advancing the commercial sexual abuse of a minor and victimization of homeless youth on counts I through VI. The jury also found the aggravating factor that Harris knowingly profited from K.H.'s sexual conduct on count V.

After the jury announced its verdict, the trial court informed the jury that it would hear testimony and arguments on the recent recidivism aggravating factor as part of a bifurcated trial. The jury heard testimony. After closing arguments, Harris moved for the aggravating factor to be

dismissed because it was unconstitutionally vague. The trial court denied the motion. By special verdict, the jury found Harris guilty of the aggravating factor on counts I and II.

III. SENTENCING

On September 26, the trial court entered judgment and sentence. The trial court sentenced Harris to 486 months of confinement on each of the first six counts, and 60 months on counts VII and VIII. The trial court ran all of the confinement concurrently for a total of 486 months. The trial court noted that "an exceptional [sentence] is extremely warranted given all the aggravating circumstances." RP (Sept. 26, 2014) at 19. The trial court entered findings of fact and conclusions of law for the exceptional sentence. In its findings, the trial court found:

> I.
>
> That the Defendant has been convicted of 6 Counts of Promoting Commercial Sexual Abuse of a Minor (Counts I through VI), one count of Tampering With a Witness, and one Count of Promoting Prostitution in the Second Degree. The Defendant's standard range is 240-318 months. The statutory maximum is life incarceration.
>
> II.
>
> That the Jury was asked to return a special verdict to determine if the defendant committed this offense shortly after being released from incarceration for Count I and II. The Jury determined that this aggravating factor was present.
>
> III.
>
> That the Jury was asked to return a special verdict to determine if the defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization. The Jury determined that this aggravating factor was present.

CP at 435-36. In its conclusions, the trial court determined:

> II.
>
> That there are substantial and compelling reasons to impose an exceptional sentence of 486 [months] on Counts I through VI.
>
> . . . .

IV.

That the exceptional sentence is justified by the following aggravating circumstances—

a) . . . the defendant committed this offense shortly after his release from incarceration.

b) . . . the defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

c) . . . the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished[.]

V.

That the grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid.

CP at 436-37

The trial court imposed the mandatory and discretionary LFOs the State requested. The trial court did not conduct an individualized inquiry into Harris's ability to pay the discretionary LFOs. Harris appeals.

ANALYSIS

I. EXCEPTIONAL SENTENCE

Harris argues that his exceptional sentence should be reversed because the recent recidivism aggravator is unconstitutionally vague, insufficient evidence supported the aggravating factor, and, in the alternative, his attorney rendered constitutionally deficient assistance because he failed to object to inadmissible hearsay testimony at the hearing on the aggravating factor. But the trial court found three aggravating factors and concluded that any one aggravating factor would have been sufficient grounds to impose the exceptional sentence. Because of the trial court's ruling

and because Harris does not challenge any other aggravating factor, we affirm Harris's exceptional sentence without reaching his other arguments on the aggravated factor of rapid recidivism.[8]

In *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003), our Supreme Court stated, "Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing."

In *State v. Trebilcock*, 184 Wn. App. 619, 634, 341 P.3d 1004 (2014), *review denied*, 183 Wn.2d 1001 (2015), we upheld the trial court's exceptional sentence. The defendant challenged one of the two aggravating factors. *Trebilcock*, 184 Wn. App. at 634-36. Because the trial court concluded that either aggravating factor alone would have been sufficient grounds to impose the sentence, we did not review the challenged aggravating factor. *Trebilcock*, 184 Wn. App. at 635-36. The same situation exists in Harris's case. Because the trial court would have sentenced Harris to 486 months based on only one aggravating factor, we need not decide his issues.[9]

II. RIGHT TO BE PRESENT

Harris argues that the trial court violated his federal and state constitutional right to be present after he was removed from the October 4, 2013 hearing. We disagree.

A. Standard of Review

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The Washington Constitution provides

[8] We avoid ruling on constitutional issues when we can resolve the case on other grounds. *See State v. Haney*, 125 Wn. App. 118, 125-26, 104 P.3d 36 (2005).

[9] We do not address Harris's ineffective assistance of counsel argument regarding the aggravating factor because there is no prejudice. The trial court would have imposed the same sentence regardless of the number of aggravating factors.

in relevant part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." WASH. CONST. art. 1, § 22. The right to be present is supported by the confrontation clause of the Sixth Amendment to the United States Constitution. *Irby*, 170 Wn.2d at 880. The United States Supreme Court has "recognized that this right is also 'protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.'" *Irby*, 170 Wn.2d at 880-81 (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Whether a defendant's constitutional right to be present has been violated is a question of law we review de novo. *Irby*, 170 Wn.2d at 880.

B. Right to be Present Not Violated

"[A] defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). But that right is not absolute. *Irby*, 170 Wn.2d at 881. "'[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" *Irby*, 170 Wn.2d at 881 (quoting *Snyder*, 291 U.S. at 106-07. A defendant does not have a right to be present when his "'presence would be useless, or the benefit but a shadow.'" *Irby*, 170 Wn.2d at 881 (quoting *Snyder*, 291 U.S. at 106-07). It follows then that a "defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts." *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000).

A defendant does not generally have a right to be present where purely legal matters are at issue in a proceeding. *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007); *see In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (holding defendant had no right to be present during various sidebar conferences and in-chambers hearings on "matters of law," where no prejudice was shown). For example, the absence of a defendant during a jury instruction hearing was not a violation of his constitutional rights. *Bremer*, 98 Wn. App. at 835.

Harris argues he had a right to be present when the trial court entered a stipulation and protection order and scheduled a status conference. He had been removed earlier after the trial court determined he was disruptive. The order related to "the use and distribution of image and audio evidence from the DVD recording . . . provided to the defense in the course of discovery." Clerk's Papers (CP) at 462. It pertained to interviews with children and "suspected child pornography." CP at 462. Harris's lawyer remained in court. Nothing occurred that required the resolution of disputed facts. Only legal matters and scheduling issues took place. For these reasons, the trial court did not violate Harris's right to be present.[10]

III. RIGHT TO SELF-REPRESENTATION

Harris argues that his conviction should be reversed because the trial court violated his right to represent himself at trial when he requested to go pro se and the court did not respond to his request. We disagree.

A. Standard of Review

We review decisions on the right to self-representation for an abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011); *State v. Madsen*, 168 Wn.2d

[10] Harris also argues that the trial court violated his right to be present because it should not have removed him. Because no violation of his right to be present occurred, we need not address this argument.

496, 504, 229 P.3d 714 (2010). The "ad hoc," fact-specific analysis of waiver of counsel questions is best assigned to the trial court's discretion. *State v. Hahn*, 106 Wn.2d 885, 900, 726 P.2d 25 (1986). A trial court abuses its discretion if its "decision is manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *Madsen*, 168 Wn.2d at 504 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

B. The Trial Court Did Not Abuse Its Discretion

"Article 1, section 22 of the Washington Constitution explicitly guarantees criminal defendants the right to self-representation. The Sixth Amendment to the United States Constitution implicitly guarantees this right." *State v. Englund*, 186 Wn. App. 444, 455, 345 P.3d 859 (internal citations omitted) (footnote omitted), *review denied*, 183 Wn.2d 1011 (2015). Courts regard this right as "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503. Improper denial of the right to represent one's self requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

There is no automatic right to represent one's self, and "courts are required to indulge in 'every reasonable presumption against a defendant's waiver of his or her right to counsel.'" *State v. Coley*, 180 Wn.2d 543, 560, 326 P.3d 702 (2014) (quoting *Madsen*, 168 Wn.2d at 504), *cert. denied*, 135 S. Ct. 1444 (2015). "'The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences.'" *Englund*, 186 Wn. App. at 456 (quoting *Madsen*, 168 Wn.2d at 504-05). "Such a finding must be based on an 'identifiable fact.'" *Englund*, 186 Wn. App. at 456-57 (quoting *Madsen*, 168 Wn.2d at 505). If the defendant's request is not unequivocal or timely, the motion will not be considered. *Madsen*,

168 Wn.2d at 504. A defendant's request to proceed pro se must be unequivocal to protect "defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation." *State v. Stenson*, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997). The request to be pro se must be unequivocal in the context of the record as a whole. *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Timeliness of a request for self-representation is determined on a continuum:

> If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994).

In reviewing the record as a whole, there are numerous colloquies between the trial court and Harris focused on his requests for new lawyers. He continually and repeatedly told the trial court he did not want to represent himself because he was not stupid." Additionally, we note that Harris's trial had been pending for over a year and a half. Many of the delays resulted from Harris's requests for new lawyers. The trial court appointed four different lawyers to represent Harris. Harris finally mentioned going pro se during voir dire, on the third day of trial. He did so only after the trial court again admonished him to talk through his lawyer. In the context of the whole record, Harris's statement that he wanted to represent himself was equivocal.

Under the totality of the circumstances, the trial court did not abuse its discretion by considering Harris's statement that he wanted to go pro se as equivocal.[11] Harris's comment is more reasonably construed to be a continuation of his disruptive behavior.

IV. LFOs

Harris contends that the trial court erred by not conducting a particularized inquiry before imposing discretionary LFOs. At oral argument, the State conceded that the trial court failed to make an individualized inquiry into Harris's ability to pay discretionary LFOs. The record reflects that the State's concession is correct. We exercise our discretion and remand the case to the trial court to make an individual inquiry on Harris's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

V. STATEMENT OF ADDITIONAL GROUNDS

A. Ineffective Assistance of Counsel

Harris asserts that he received ineffective assistance of counsel because his lawyer improperly stipulated to a waiver of speedy trial on April 7, 2014. He asserts that this stipulation blocked any motion for dismissal that "would have been granted" on a violation of his right to a speedy trial.[12] He further claims that his attorney's failure to move for dismissal on this ground also constitutes ineffective assistance. We disagree.

1. Standards of Review

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel,

[11] Although we conclude Harris's request to go pro se was equivocal, we also note that the request was not timely. It occurred on the third day of trial.

[12] Although Harris uses the term "speedy trial" he only asserts a violation of the "time for trial" court rule. CrR 3.3.

the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). If either prong is not satisfied, Harris's claim must fail. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Representation is deficient if after considering all the circumstances, the performance falls "below an objective standard of reasonableness." *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. An appellant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33.

"'We interpret a court rule as though it were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent.'" *State v. Miller*, 188 Wn. App. 103, 106, 352 P.3d 236 (2015) (quoting *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)). "'Plain meaning is discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule.'" *Miller*, 188 Wn. App. at 106 (quoting *Chhom*, 162 Wn.2d at 458).

Under CrR 3.3(b)(1)(i), a defendant held in custody pending trial must be tried within 60 days of arraignment. The trial court may grant an extension of time for trial when unavoidable or unforeseen circumstances exist. CrR 3.3(e)(8). The trial court may also grant a continuance on the written agreement of the parties, or on the motion of the court or a party when required in the administration of justice and where the defendant will not be substantially prejudiced in the presentation of the defense. CrR 3.3(f)(1), (2). The trial court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). Violation of the time for trial rule results in dismissal with prejudice. CrR 3.3(h). Under CrR 3.3(c)(2)(vii), "[o]n occurrence of one of the

following events, a new commencement date shall be established, and the elapsed time shall be reset to zero: . . . The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification."

2. Stipulation of Time for Trial and Continuance

Harris challenges the "stipulation" on April 7, 2014, that resulted in a new time for trial expiration date and a continuance. SAG at 3. However, Harris's analysis relies on factual inaccuracies. At the April 7, hearing, there was some confusion as to when time for trial would expire. The trial court made it clear that the new commencement date occurred when the trial court appointed a new lawyer on March 28. The trial court made sure that Harris agreed to its calculations. The parties did not enter into a stipulation, and the trial court did not grant a continuance. The trial court made a determination, and Harris agreed with it. Because Harris's argument is based on erroneous facts, his claim fails.

3. Failure to Move for Dismissal on Time for Trial Violation

Harris asserts that he received ineffective assistance of counsel when his lawyer failed to move for dismissal of the case because of a time for trial violation. He asserts that the motion to dismiss would have likely been granted because his third lawyer withdrew solely because of health issues, and the trial court improperly considered this action to be a conflict under CrR 3.3. We disagree.

A new commencement date is established when a defense attorney is disqualified. CrR 3.3(c)(2)(vii). Here, the trial court stated that it disqualified Harris's third lawyer not only because of health issues, but because Harris filed bar complaints against the lawyer and there was a breakdown in communication. The record supports the trial court's finding. Therefore, the trial

court properly computed the time for trial and an objection would not have been sustained. Harris cannot show prejudice. His claim fails.

We affirm but remand the case to the trial court to conduct an individualized inquiry on Harris's ability to pay discretionary LFOs.

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

Melnick, J.

We concur:

Worswick, P.J.

Lee, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 46758-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Randall Sutton
[kcpa@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 1, 2016

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