

No. 41591-7-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SYLVESTER MAHONE
Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Sylvester Mahone, appeals both his conviction for felony harassment and his sentence. On appeal, Mr. Mahone argues the trial court violated his right to counsel by allowing him to proceed pro se without a valid waiver of his right to counsel, the court violated the speedy trial rules by granting the State a continuance without convincing and valid reasons for the continuance and to Mr. Mahone's prejudice, and the court imposed an unlawful sentence.

Mr. Mahone's waiver of counsel was not validly made. A knowing and intelligent waiver of counsel is made with an awareness of "the dangers and disadvantages of self-representation." City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). Here, the waiver was invalid when the trial court did not discuss the nature or seriousness of the charge against Mr. Mahone or the risks associated with the technical rules he would be required to follow at trial. Because Mr. Mahone's constitutional right to

counsel was violated, this Court should reverse his conviction.

The rules governing the timing of trial were also violated in this case when the trial court granted the State's motion for a continuance on the grounds that Mr. Mahone needed more time to prepare for trial and the prosecutor was newly assigned. While a continuance may be granted in the administration of justice, CrR 3.3(f)(2), in this case, no valid reason supports the continuance. Mr. Mahone had assured the court he could be ready by the trial date, sixteen days away, and the State provided no reason why it could not be ready for a trial involving one charge, three State witnesses, and ten pages of discovery. State v. Saunders, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009) (holding trial court's grant of continuance manifestly unreasonable when record lacked "convincing and valid reasons for the continuance"). Accordingly, Mr. Mahone's conviction should be dismissed.

Moreover, Mr. Mahone was illegally sentenced when the trial court added a point to his offender score

without either proof he was on community service at the time of the offense or his affirmative acknowledgment of the fact. State v. Weaver, 171 Wn.2d 256, 259-60, 251 P.3d 876 (2011) (reversing when defendant had not affirmatively acknowledged his offender score).

Finally, remand is required when the court imposed an exceptional sentencing without entering written findings and conclusions supporting the sentence. See State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (trial court's failure to enter correct findings and conclusions cured by remand).

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in allowing Mr. Mahone to be tried in violation of his constitutional rights to counsel.

2. The superior court violated Mr. Mahone's speedy trial rights under CrR 3.3 when it granted a continuance without a valid and convincing reason.

3. The superior court imposed an illegal sentence when it did not require the State to prove or

Mr. Mahone to affirm the calculation of his offender score.

4. The superior court erroneously imposed an exceptional sentence without entering written findings of fact and conclusions of law._____

B. Issues Pertaining to Assignment of Error

1. Was Mr. Mahone's waiver of counsel invalid when the trial court did not inform him of the nature or seriousness of the charge against him or the risks associated with the technical rules he would be required to follow at trial if he proceeded pro se?

2. Should this Court dismiss Mr. Mahone's conviction under CrR 3.3(h) when the trial court granted the State's motion for a continuance over Mr. Mahone's objection without convincing and valid reasons and with prejudice to Mr. Mahone?

3. Was Mr. Mahone illegally sentenced when the trial court added a point to his offender score for having committed the current offense while on community custody without either proof he was on community

custody at the time of the offense or his affirmative acknowledgment of that fact?

4. Is remand required when the trial court imposed an exceptional sentence without entering written findings of fact and conclusions of law as required by RCW 9.94A.535?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed May 19, 2010, the State charged Mr. Mahone with felony harassment in violation of RCW 9A.46.020(2)(b) and 9A.46.020(1)(a)(i)(b). Clerk's Papers (CP) 1. An amended information was filed prior to trial, adding the allegations that the defendant was under community custody at the time of the commission of the crime and that the offense was aggravated pursuant to RCW 9.94A.535(4)(v) by the fact that it was committed against a law enforcement officer performing his or her official duties at the time of the offense and that Mr. Mahone knew the victim was a law enforcement officer. CP 3-4.

Following a hearing on July 29, 2010, the trial court, the Honorable Linda CJ Lee presiding, granted Mr. Mahone's request to represent himself. Verbatim Report of Proceedings for July 29, 2010 (7/29/10 VRP).¹ The court appointed stand-by counsel prior to trial. 8/27/10 VRP 2-10.

Proceeding pro se, Mr. Mahone went to trial on October 11, 2010, the Honorable Ronald E. Culpepper presiding. Trial lasted five days (including voir dire); the State called three witnesses. Verbatim Reports of Proceedings for October 11, 12, 13, 14, & 15, 2010 (Trial VRP). Mr. Mahone was convicted. CP 27. The jury returned a special verdict finding the crime was committed against a law enforcement officer performing his or her official duties at the time of the offense and that Mr. Mahone knew the victim was a law enforcement officer. CP 28.

1. The Reports of Proceeding in this case, unless otherwise noted, are referred to by hearing date. Thus, 8/27/10 VRP designates the Verbatim Report of Proceedings for August 27, 2010.

The court imposed an exceptional sentence of 24 months in confinement, plus costs, fees and assessments. CP 43-44.

Mr. Mahone filed a timely notice of appeal. CP 55-56.

B. Substantive Facts

1. The Conviction

A deputy corrections officer at the Pierce County Jail, Ricardo Cruz, testified that on May 8, 2010, while he was doing a security check in the disciplinary unit in which Mr. Mahone was then housed, Mr. Mahone threatened to kill him and his family. 10/12/10 VRP 55, 65. Cruz also stated Mr. Mahone pointed his finger like a gun and mimed pulling the trigger. *Id.* at 66. Another threat was made later the same day, when Mr. Mahone also exposed himself to the officer. *Id.* at 69-70.

Cruz took the threats seriously because he later found out Mr. Mahone had previously been incarcerated for committing a serious violent crime. 10/12/10 VRP 66. In his fourteen years of working as a corrections

officer, these were the only threats he decided to pursue charges for because he believed Mr. Mahone would carry out the threats. *Id.* at 72-73.

2. The Hearing Regarding Mr. Mahone's Ability to Proceed Pro Se

At the start of the hearing to determine whether Mr. Mahone could proceed pro se, and over Mr. Mahone's frequent interruptions, the court asked him why he wished to proceed pro se. Mr. Mahone stated he believed he could do a better job than the Department of Assigned Counsel because his first attorney and his current attorney had both refused to secure certain witnesses, among other failings. He noted he had an "associates degree in paralegal studies, 15 years of law experience" and had represented himself in two civil trials. 7/29/10 VRP 4. When asked to slow down, he then repeated these facts, adding he had a conflict of interest with his attorneys. *Id.* at 5.

The court determined Mr. Mahone's 15 years of legal experience was obtained through his having filed several lawsuits and from being in prison for 15 years, filing paperwork for other inmates. 7/29/10 VRP 6-7,

9. The conflict of interest with his attorney was counsel's failure to identify and produce Mr. Mahone's witnesses who were jail inmates. *Id.* at 8.

When asked if he knew what potential sentence he faced on the charge of felony harassment, Mr. Mahone answered, "three, four, six months, with the extension that they seek it." 7/29/10 VRP 10. The prosecutor clarified that the sentencing range would be four to twelve months, with the addition of a possible aggravating factor if the case proceeded to trial, and a maximum sentence of five years. *Id.* at 10-11.

When the court asked Mr. Mahone if he knew how an aggravating factor would affect his sentence, Mr. Mahone's answer was less than clear:

Well, I don't know what it should mean to me, but all I know is that there's allegations that are being made, and when it comes to the aggravating factors, if the jury finds aggravating factors, then they should do their job. And it's my job to defend against that and put up my defense and if the jury decides that my version of the facts is correct, then I win. And if the jury decides that the prosecution's facts are correct, if the defendant -- the prosecution has some type of aggravating circumstance they can provide to the jury to make a decision on that, then I'll lose.

7/29/10 VRP 11-12. Later, he clarified, "Aggravating circumstances are issues that can cause me to get more time than the four to 12 months." *Id.* at 12.

After the court and Mr. Mahone had a discussion about his agitation and habit of interrupting, the court asked him if he had had the chance to discuss the aggravating circumstances with his attorney. 7/29/10 VRP 12-14. Mr. Mahone answered no, but responded in a manner indicating he understood the consequences of such circumstances. *Id.* at 14.

The court warned Mr. Mahone that if he represented himself, it would not assist him with the case.

7/29/10 VRP 14 & 22. Mr. Mahone responded he would like the court to inform him about matters such as "how much time I get for the opening arguments, closing arguments, how much time I get for the redirect and direct examinations." *Id.* at 14-15.

The court asked him if he were familiar with the rules of evidence. Mr. Mahone's response was rambling and unclear:

Well, I'm very familiar with it, but I don't have them memorized, and the law library here

is very helpful, but they've been on vacation for a while, so they come back on the 2nd and I can put in a request to see that and that was going to be part of one of my motions, to direct them -- I'm pro se and do need the law books for this particular trial coming up on the 19th, so I can have that in front of me so I can be prepared by the time the trial comes. If I can get the law book in my cell, it will be no problem.

Id. at 15. Mr. Mahone said he was familiar with the rules of criminal procedure. *Id.*

The court warned Mr. Mahone that if he represented himself and did "not present a proper defense or properly subpoena witnesses or otherwise represent yourself in a competent manner," he would not be able to argue ineffective assistance of counsel on appeal.

7/29/10 VRP 16. Mr. Mahone answered he was prepared to "declare war up in the courtroom." *Id.* at 17.

The court cautioned him that his experience with civil trials would not necessarily be of use in a criminal trial. *Id.* at 18. Mr. Mahone assured the court he was fully prepared to go forward, although his words somewhat belied his message:

I've represented myself in civil court, yes, and because I don't have a license to practice law in the State of Washington or

period, I can't represent anybody, period, but as far as the trial advocacy goes, between the prosecution and the defense, that's really somewhat synonymous. I know the burden of proof that the prosecution has to make and I know my responsibilities as far as the defense to thwart that.

Id. at 19.

Mr. Mahone's counsel told the court Mahone had seen the plea offer, which contained the charge, the four to twelve month sentencing range, the maximum sentence of five years and the aggravating factors. 7/29/10 VRP 19-20.

The court ensured no one had made any promises to Mr. Mahone in exchange for his decision to represent himself and ascertained that the decision was voluntary. *Id.* at 20. It urged him not to represent himself, given his lack of experience, and asked him to reconsider his request.

Well, I'm advising you, despite what you think, that you are far better off with [defense counsel] as your attorney. I know you say it's confidence that you have coming across as cockiness, but based on some of your answers I will tell you that I have some suspicions as to whether you really are as familiar with the law as you think you are. And you say you're not familiar with the court procedures and that you're not -- you

will need to have access to the rules of evidence and the rules of criminal procedure in order to be prepared. I am going to strongly urge you to not try to represent yourself, especially in light of the penalty you may be suffering and the consequences you may be facing. So I'm going to ask if there's any possible way that you reconsider your request.

Id. at 20-21. Mr. Mahone held fast to his decision to represent himself. *Id.* at 21. In the end, the court determined Mr. Mahone knowingly and voluntarily waived his right to counsel and granted his request to represent himself. *Id.* at 25.

The court recessed while the parties met to discuss the omnibus order. Back on the record, the State described some issues that had arisen during the meeting, indicating Mr. Mahone might not be equipped to handle the case. 7/29/10 VRP 25-27. The prosecutor indicated Mr. Mahone seemed not to understand how the pretrial and trial processes worked and had sought her advice about certain matters. Mr. Mahone did not disagree with the prosecutor's description of what had happened. *Id.* at 29-30.

The court warned Mr. Mahone that neither the court nor the prosecutor could advise him. However, Mr.

Mahone declined to reconsider his decision to proceed pro se. 7/29/10 VRP 31-33. The court directed the prosecutor to provide the discovery to Mr. Mahone by the end of the following day. *Id.* at 28-29. It continued the omnibus hearing until August 3, 2010, but retained the trial date of August 19. *Id.* at 34.

On August 3, the trial was continued until September 13. CP 63. On August 27, when Mr. Mahone continued to exhibit confusion regarding the pretrial process, 8/27/10 VRP 2-10, the court appointed stand-by counsel. *Id.* at 10.

3. The August 3rd Continuance

Mr. Mahone was arraigned on May 19, 2010. CP 1-2. Following a forensic psychological examination (filed under seal in the trial court on July 16, 2010), on July 22, the case was set for trial for August 19, 2010. CP 60, 61. Mr. Mahone was incarcerated at all relevant times during the pretrial proceedings.

On August 3, 2010, the court, the Honorable Katherine M. Stolz presiding, heard the State's motion for a continuance of trial until September 13, 2010.

The prosecutor requested the continuance because she had been on trial most of July, finishing a case just that morning, and had not yet been able to look at the discovery:

I've pretty much been in trial the entire month of July. I just closed this morning in Judge Felnagle's court. I was assigned last week this case and haven't even had a chance to read the discovery.

8/3/10 VRP 2. The prosecutor provided no information about her August schedule. See *id.* She raised additional issues having to do with Mr. Mahone's readiness, noting he had not received the discovery and was seeking appointment of an investigator. *Id.* The State averred it should not take long to get the discovery to Mr. Mahone as it was only ten pages long. *Id.*

Mr. Mahone objected to the motion. 8/3/10 VRP 4-5. The court granted the motion, stating: "Apparently you still haven't been given all the discovery. You still haven't had a chance to interview witnesses now that you're representing yourself." *Id.* at 5. Mr. Mahone assured the court he could be ready on time: "I can have that done by the 19th." *Id.* When the court

did not reconsider its decision, Mr. Mahone indicated he wanted to file an affidavit of prejudice against the judge and the proceeding was concluded. *Id.* at 6-7.

The continuance order states, "DPA newly assigned discovery needs to be provided to [def]. [Def] is requesting an investigator." CP 63. The prosecutor had been handling the case since July 27, 2010, five days after trial was set for August 19. See CP 62. The discovery had been fully provided to Mr. Mahone's counsel on July 27. CP 59, 62. The State did not provide it to Mr. Mahone until August 17. CP 64.

On September 13, the prosecutor asked for a continuance until September 21, stating she was currently on trial in another department and noting a court recess until September 20. 9/13/10 VRP 2. Mr. Mahone argued he would be prejudiced by the delay because his witnesses who were inmates would be released from confinement and become unavailable. He stated that one witness he had planned to call on August 19, the original trial date, had been transferred to a jail in Eastern Washington on August 23 and thus made unavailable. *Id.* at 2-3. He further

stated that he had tried to show prejudice at the hearing held on August 3, but that the court refused to hear him. *Id.* at 2-3. When the State tried to use Mr. Mahone's failure to locate his witnesses as an additional reason for the continuance, Mr. Mahone maintained he could go to trial without them. *Id.* at 4-5.

The trial court, the Honorable Linda CJ Lee presiding, put the case over for one day, noting no courtrooms were available. However, the court also started the speedy trial clock counting down. 9/13/10 VRP 6. The case was put over four more times before trial began on October 11, 2010, within 30 days of the September 13 trial date. See 9/14/10 VRP; 9/23/10 VRP; 9/29/10 VRP; 10/6/10 VRP & 10/11/10 VRP.²

2. Given that the trial court started the speedy trial clock on September 3, it appears it granted only the one continuance pursuant to CrR 3.3(f)(2), the August 3rd continuance. Nevertheless, the trial court signed three additional orders continuing trial. CP 65, 69 & 70. In any event, the August 3 continuance is the one that injured Mr. Mahone because it put his trial outside the CrR time limits. If the August 3 continuance were improperly granted, trial commenced outside the CrR limits and Mr. Mahone's speedy trial rights were violated. If the continuance were properly granted, trial commenced within 30 days of the excluded time period and, regardless of the validity of any subsequent continuances, his rights would not have been violated. See CrR 3.3(b)(5).

4. Offender Score/Exceptional Sentence

Mr. Mahone declined to sign the State's draft Stipulation on Prior Record and Offender Score. CP 38-39. At the sentencing hearing, he acknowledged his prior convictions, but did not acknowledge that he was on community custody at the time of the current offense. 11/5/2010 VRP 34-36. The State offered no proof of this allegation at the hearing. *See id.* at 29-52.

Counting two prior convictions and an additional point for being on community custody at the time of the offense, the trial court found Mr. Mahone had an offender score of three and a standard sentencing range of nine to twelve months. 11/5/2010 VRP 44. The court imposed an exceptional sentence of 24 months in prison. *Id.* at 45. It apparently did not enter written findings and conclusions regarding this sentence.

IV. ARGUMENT

**Point I: Mr. Mahone Did Not Knowingly and
Intelligently Waive his Right to Counsel When
He Was Not Informed of the Dangers and
Disadvantages of Self-Representation**

Mr. Mahone's constitutional right to counsel was violated when the trial court allowed him to proceed pro se without fully informing him of the dangers and disadvantages of self-representation. The state and federal constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. United States Const. amends. VI and XIV; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed.2d 562 (1975); State v. Luvane, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). Before proceeding pro se, a defendant must make a knowing and intelligent waiver of his right to counsel. State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

A knowing and intelligent waiver requires a defendant to understand "the dangers and disadvantages of self-representation":

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware of the dangers and disadvantages of self-representation*, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. [269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942)].

City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984), *quoting*, Faretta, 422 U.S. at 835 (italics added by Washington Supreme Court). The rule of Acrey has been distilled to three essential requirements: "At a minimum, a defendant must understand the severity of the charges; the maximum possible penalties for the crime charged; and the existence of technical, procedural rules governing the presentation of a defense. State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007), *citing*, Acrey, 103 Wn.2d at 211; *accord*, State v. Hahn, 106 Wn.2d 885, 895, 726 P.2d 25 (1986) (a knowing and intelligent waiver of counsel is made "with 'eyes open', which includes an awareness of the dangers and disadvantages of the decision"); Silva, 108 Wn. App. 536 (reversing where defendant not informed of maximum penalty before purported waiver).

For a waiver to be valid, a trial court must have examined the defendant and ensured he understood the risks of proceeding pro se. In other words, because “the question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation provided,” the trial court is required to conduct “a penetrating and comprehensive examination” of the defendant’s understanding. State v. Chavis, 31 Wn. App. 784, 790, 644 P.2d 1202 (1982). In Chavis, the Court adopted U.S. Supreme Court precedent requiring a trial court to ensure the defendant waives his right “with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” Chavis, 31 Wn. App. at 789, quoting, Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1948) (plurality opinion). The Von Moltke factors were later codified in RCW 10.77.020. Hahn, 106 Wn.2d 885, 893.

Thus, in evaluating a defendant's waiver of the right to counsel, the key information an appellate court must ensure is present in the record is the "defendant's actual awareness of the risks of self-representation." Acrey, 103 Wn.2d at 211. While appellate courts sometimes state that the standard of review in these cases is abuse of discretion, see, e.g., James, 138 Wn. App. 628, courts more typically have conducted a comprehensive review of the record. See, e.g., Acrey, 103 Wn.2d at 211-12, Hahn, 106 Wn.2d 885, 895-901; Silva, 108 Wn. App. at 539-41; State v. Buelna, 83 Wn. App. 658, 660-62, 922 P.2d 1371 (1996); Chavis, 31 Wn. App. at 785-93.

Indeed, given that this issue involves the waiver of a constitutional right, the more appropriate standard of review is de novo. See Brewer v. Williams, 430 U.S. 387, 403, 97 S. Ct. 1232, 51 L. Ed.2d 424 (1977) (stating that question of waiver requires "application of constitutional principles to the facts as found"); State v. Vasquez, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648

(2002), (standard of review for waiver of constitutional right to jury trial is de novo). Moreover, the de novo standard is generally applied in federal courts. See State v. Nordstrom, 89 Wn. App. 737, 741, 950 P.2d 946 (1997) (discussing application of de novo standard in the Ninth Circuit); United States v. McBride, 362 F.3d 360, 365-66 (6th Cir. 2004) (noting sister Circuits uniformly apply de novo standard of review).

In this case, the waiver was invalid because the trial court failed to ensure Mr. Mahone understood the "the dangers and disadvantages of self-representation." The court primarily focused on Mr. Mahone's background, experience and knowledge of the procedural rules, spending little to no time on the risks of self-representation. Because the court failed to ensure Mr. Mahone understood the nature, classification and seriousness of the charges against him and failed to explain the risks associated with the technical rules he would be required to follow at trial, no valid waiver can be found here.

First, although the court mentioned the charged crime by name and ascertained that Mr. Mahone had read the charge in the proposed plea agreement, 7/29/10 VRP 10 & 19-20, it did not discuss the nature or the severity of the charge. In Nordstrom, the court found the defendant understood the seriousness of the charges when the court had informed him of the charges against him, answered a question about the legal meaning of "assault," and explained he faced "fairly serious offense[s]." Nordstrom, 89 Wn. App. at 742-43.

Here, by contrast, the court not only failed to discuss the nature or severity of the charge, it did not review the elements of the crime or its classification. See Acrey, 103 Wn.2d at 211 (colloquy with defendant "at a minimum, should consist of informing the defendant of the nature and classification of the charge"); James, 138 Wn. App. 628, 636 (court must discuss charge's severity). Indeed, the court spent more time discussing the consequences of the aggravating factor than it did the nature of the charge itself. See 7/29/10 VRP. Under these circumstances, the court failed to ensure Mr.

Mahone understood "the dangers and disadvantages of self-representation" when it did not ensure he understood the nature, classification, or severity of the charge.

Next, although the court indicated to Mr. Mahone he would need to follow technical rules, it failed to ensure he understood the risks posed by this requirement. See Acrey, 103 Wn.2d at 211. Merely telling the defendant that certain technical rules must be followed is insufficient. To satisfy this prong of the Acrey test, the court must "explain the connection between the technical rules and the dangers of proceeding pro se." Nordstrom, 89 Wn. App. at 744.

In Nordstrom, the Court found waiver had not been validly made despite admonitions made by the trial court regarding the difficulty in trying a case pro se. The trial court had told the defendant, "[i]t's a difficult thing to try a jury trial case." Nordstrom, 89 Wn. App. at 743. The Court found this statement, coupled with an explanation that the trial court could not help the defendant, "did not adequately inform him of the risks he faced in foregoing the assistance of

counsel.” *Id.* In the instant case, of course, no similar discussion of the difficulty of trying a case was held, although the court did tell Mr. Mahone it would not help him and urged him to employ a lawyer. 7/29/10 VRP 20-21, 22. But the court provided no specifics about the dangers of self-representation, merely advising against it.

If telling the defendant a pro se trial will be difficult is insufficient to apprise a defendant of “the dangers and disadvantages of self-representation,” the admonition the trial court provided in this case was clearly insufficient. In Nordstrom, the trial court had given the defendant information about the rules to follow in trying a case, including information about proof beyond a reasonable doubt, the examination and cross examination of witnesses, and the defendant’s right to testify or remain silent. 89 Wn. App. at 743. Nevertheless, the Court of Appeals held these instructions were insufficient to create a valid waiver as they did not explain the connection between the rules and the pitfalls of proceeding pro se:

These instructions apprised Nordstrom of certain "technical rules" governing the presentation of his case and the fact that he could not simply "tell his story" at trial. But the court did not explain the connection between the technical rules and the dangers of proceeding pro se. Absent such a warning, it is unlikely that an explanation that technical rules will apply will mean anything to a defendant.

Nordstrom, 89 Wn. App. at 743-44. For the same reasons the court's colloquy was insufficient in Nordstrom, the colloquy with Mr. Mahone was insufficient here, making his waiver invalid.

By contrast, when a court provides a detailed explanation geared to ensuring the defendant understands the inherent risks of proceeding pro se, a valid waiver should be found. In James, the Court found a valid waiver when the trial judge had reviewed the offenses and maximum penalties with the defendant and informed him of "the basic trial requirements and complexities," including such matters as "jury selection, evidence rules, examining witnesses, closing arguments . . . jury instructions" and affirmative defenses. James, 138 Wn. App. 633. In addition, the

defendant in James had repeatedly informed the court he understood his decision to act pro se.

The instructions provided in this case clearly did not rise to the level of admonition provided in James. Here, the trial court did not provide any real instructions, merely asking Mr. Mahone if he were familiar with the rules of evidence and criminal procedure. 7/29/10 VRP 15. Unlike the situation in James, Mr. Mahone's answers, moreover, did not reveal he even understood the reason for the questions. See 7/29/10 VRP. Although the court mentioned two other procedural topics, making a competent defense and subpoenaing witnesses, it did not mention them to provide information but to make sure Mr. Mahone knew he could not raise an ineffective assistance claim on appeal. 7/29/10 VRP 16. Accordingly, the trial court failed to satisfy the third Acrey requirement as clarified in Nordstrom and James, making the waiver invalid.

For all these reasons, Mr. Mahone did not knowingly and intelligently waive his right to counsel because the court failed to ensure he understood the

"the dangers and disadvantages of self-representation" when it failed to inform him of the nature, classification and seriousness of the charges against him and failed to explain the risks associated with the technical rules he would be required to follow at trial. Accordingly, this Court should reverse his conviction.

Point II: The Trial Court Violated Mr. Mahone's Speedy Trial Right Under CrR 3.3 When it Granted the August 3rd Continuance

Mr. Mahone was denied his speedy trial right when the trial court granted a twenty-five day continuance in this case without a valid basis for the extension and with prejudice to him. Under the speedy trial rules, an incarcerated defendant must generally be brought to trial within 60 days. CrR 3.3(b)(1)(i). The trial court must ensure compliance with the speedy trial rules. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); CrR 3.3(a)(1). When a defendant is not brought to trial within the limits of CrR 3.3, the court must dismiss the charges with prejudice if the defendant objects within 10 days after notice of trial

date setting is mailed. Kenyon, 167 Wn.2d at 136; CrR 3.3(d)(3), (h).

Upon motion by a party, the trial court may continue a trial date if a continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2). The court "must state on the record or in writing the reasons for the continuance." *Id.* In making the decision, the court must consider all relevant factors. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005), *citing*, State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003).

Courts of appeal review an alleged violation of the speedy trial rule de novo. Kenyon, 167 Wn.2d 130, 135 (citation omitted); State v. Lackey, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009). However, "the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court," and a court of appeals should only reverse the trial court's decision when "there is a clear showing it is manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons." Kenyon, 167

Wn.2d 130, 135, *citing*, Flinn, 154 Wn.2d 193, 199 (internal quotation marks omitted). If the record lacks "convincing and valid reasons for the continuance," the trial court's grant of the continuance is "manifestly unreasonable [and] exercised on untenable grounds [and] for untenable reasons." State v. Saunders, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009) (internal quotation marks omitted).

In this case, the trial court granted a continuance to a time outside the CrR 3.3 limit over Mr. Mahone's objection, without a valid reason for the continuance and with prejudice to him, requiring reversal. Kenyon, 167 Wn.2d 130 (reversing where trial court failed to document the availability of pro tempore judges and unoccupied courtrooms before granting continuance); Saunders, 153 Wn. App. 209 (reversing when trial court failed to articulate convincing and valid reasons for the continuances).

Mr. Mahone was arraigned on May 19, 2010. Since he was in custody, the last day to begin a timely trial would normally have been 60 days later. CrR 3.3(b) (1) (i). However, on June 17, the trial court

ordered a competency evaluation. On July 22, the court found Mr. Mahone competent and set trial for August 19. CP 61, 62. The August 19th trial date was within the time for trial. CrR 3.3(b)(5); CrR 3.3(e)(1). On August 3, the court granted the State's request for a continuance to September 13, over Mr. Mahone's objection. Because this continuance was granted without convincing and valid reasons and with prejudice to Mr. Mahone, the trial court erred and Mr. Mahone's speedy trial rights were violated.

The lack of convincing and valid reasons compels reversal under the Supreme Court's decision in Kenyon. In Kenyon, the Court reversed this Court's decision and dismissed numerous unlawful firearm possession charges based on the trial court's failure to articulate an adequate basis for continuances beyond the speedy trial limits. Kenyon, 167 Wn.2d 130, 131-32. Relying on Kenyon, in Saunders, this Court reversed and dismissed a defendant's conviction when the trial court had also granted continuances without sufficient reasons. Saunders, 153 Wn. App. 209, 219-20. Similarly, in this case, no convincing and valid reasons support the

continuance. The continuance order alleges three grounds for the continuance: 1) "DPA newly assigned," 2) "discovery needs to be provided to" Mr. Mahone, and 3) Mr. Mahone "is requesting an investigator." CP 63. None of these reasons is sufficient to support the continuance.

First, having a newly assigned prosecutor does not provide a legitimate reason for a continuance in this case. The prosecutor had been assigned only a few days after the case was first set for trial. CP 60-62. Thus, she was only as new to the case as the trial was to the docket. Even if other obligations prevented her from beginning trial preparation until the date of the hearing, August 3, she still had sixteen days until trial. Significantly, moreover, this was a simple case: one charge, ten pages of discovery, three State witnesses. 8/3/10 VRP 2; Trial VRP. It did not require extensive preparation. Indeed, prosecutors are routinely expected to prepare for trial in far less time. See, e.g., Saunders, 153 Wn. App. at 214-15 (after numerous delays, trial court required newly-

assigned prosecutor to proceed to trial within one week).

Moreover, the prosecutor gave the court no information regarding her August schedule, only informing it of her past caseload:

I've pretty much been in trial the entire month of July. I just closed this morning in Judge Felnagle's court. I was assigned last week this case and haven't even had a chance to read the discovery.

8/3/10 VRP 2. This statement, made August 3rd, offers no basis for a continuance past the August 19th trial date. Indeed, all the prosecutor told the court about her prospective schedule was that she was currently free, having just finished a trial that morning.

In addition, while courts routinely approve continuances granted to defense counsel to prepare for trial, see, e.g., State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (upholding continuance for defense counsel to prepare for trial); State v. Ollivier, 161 Wn. App. 307, 316, 254 P.3d 883 (2011) (upholding continuances in face of constitutional challenge when defense counsel reasonably sought all of them); State v. Williams, 104 Wn. App. 516, 524, 17 P.3d 648 (2001)

(upholding continuance when prosecutor had scheduling conflict and newly-appointed defense counsel unprepared for trial), the State is generally not granted a continuance except when scheduling conflicts or circumstances out of its control arise. See, e.g., Flinn, 154 Wn.2d 193, 196-97 (upholding continuance to give State time to prepare for defendant's newly claimed diminished capacity defense); Lackey, 153 Wn. App. 791, 799 (upholding continuance sought by State because witness was ill); State v. Cannon, 130 Wn.2d 313, 326-27, 922 P.2d 1293 (1996) (upholding continuance due to prosecutor's scheduling conflict); Heredia-Juarez, 119 Wn. App. at 153-55, (upholding continuance for prosecutor's prescheduled vacation when vacation had not interfered with original trial date); State v. Perez, 16 Wn. App. 154, 155-56, 553 P.2d 1107 (1976) (upholding continuance to allow State's witness to recover from auto accident). In this case, no scheduling conflicts were discussed and no new circumstances arose requiring the prosecutor to take additional time to prepare. See 8/3/10 VRP. Accordingly, no legitimate need for a continuance

existed. For all these reasons, that the prosecutor was newly assigned to this cases did not support the grant of a continuance.

Second, that the Stated needed to provide discovery to Mr. Mahone also did not support a continuance. The discovery was ten pages long. It had been fully provided to defense counsel a week before the continuance was granted, on July 27. CP 59, 62. Indeed, the trial court had actually ordered the State provide it to Mr. Mahone by July 30. 7/29/10 VRP 28-29. In reality, the State could have given the discovery to Mr. Mahone the same day as the hearing. Under these circumstances, the State's delay in getting the discovery to Mr. Mahone also did not support the continuance.

Finally, that Mr. Mahone sought an investigator similarly did not provide a valid reason for the continuance. This reason turns the State's motion for a continuance on its head, pinning the reason for the continuance on Mr. Mahone, who sought nothing so much as a speedy trial. Indeed, when the trial court stated its reasons for the continuance at the hearing, noting

Mr. Mahone had not received all the discovery or finished interviewing witnesses, Mr. Mahone assured the court he could be ready on time: "I can have that done by the 19th." 8/3/10 VRP 5. Given the lack of complexity of the case, Mr. Mahone's confidence was not obviously misplaced. In any event, if a party assures the court it will be ready on the trial date, the court cannot support the continuance with the party's need to prepare. For all these reasons, no convincing and valid reasons support the continuance and this Court should reverse and dismiss Mr. Mahone's conviction.

Further, the trial court also failed to consider the prejudice Mr. Mahone would suffer by the delay. Although Mr. Mahone was not given the chance to discuss his prejudice at the August 3rd hearing, he did explain the prejudice at the September 19th hearing. See 9/13/10 VRP 2. Then Mr. Mahone argued he would be prejudiced by the delay because his witnesses who were inmates would be released from confinement and become unavailable. He stated that one witness he had planned to call on August 19, the original trial date, had been transferred to a jail in Eastern Washington and made

unavailable on August 23. *Id.* at 2-3. He further stated that he had tried to show prejudice at the hearing held on August 3, but that the court refused to hear him. *Id.* at 2-3.

For all these reasons, Mr. Mahone's trial was held outside the CrR speedy trial limits, over his objection, without valid and convincing reason and with prejudice to him. Under these circumstances, Kenyon and Saunders require this Court to reverse his case and dismiss his convictions.

**Point III: The Court Imposed an Illegal Sentence
When it Sentenced Mr. Mahone Without
Sufficient Proof of His Offender Score**

Mr. Mahone was illegally sentenced when the trial court added a point to his offender score without either proof he was on community service at the time of the offense or his affirmative acknowledgment of the fact. A court may add a point to an offender score for committing the current offense while on community custody if the fact is established by a preponderance of the evidence, State v. Jackson, 150 Wn. App. 877, 891, 209 P.3d 553 (2009) (State conceded lack of

proof); State v. Hunley, 161 Wn. App. 919, 927-29, 253 P.3d 448 (2011) (holding unconstitutional 2008 amendment to the SRA allowing an offender score to be established by less than preponderance of the evidence), or if the defendant affirmatively acknowledges the fact. State v. Weaver, 171 Wn.2d 256, 259-60, 251 P.3d 876 (2011) (reversing when defendant had not affirmatively acknowledged his offender score), citing, State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). In this case, neither occurred. The State alleged a point should be added to Mr. Mahone's offender score for being on community service, but Mr. Mahone neither signed the draft Stipulation on Prior Record and Offender Score, CP 38-39, nor acknowledged the fact at the sentencing hearing. 11/5/2010 VRP 34-36. Accordingly, he was illegally sentenced and this Court should remand for resentencing.

Mr. Mahone may raise this issue for the first time on appeal because the sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score and such a sentence "is a fundamental defect that inherently results in a

miscarriage of justice.” Jackson, 150 Wn. App. 877, 891; accord, Hunley, 161 Wn. App. 919, 930; RAP 2.5(a).

Moreover, the State will not be able to remedy this problem on remand. Indeed, the applicable law establishes Mr. Mahone was not on community custody at the time of the current offense because he committed it in the Pierce County Jail, not while on community custody. One additional point is added to a defendant’s offender score “[i]f the present conviction is for an offense committed while the offender was under community custody.” RCW 9.94A.525(19).

Community custody, by definition, means time served in the community subject to supervisory restrictions:

“Community custody” means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and **served in the community subject to controls placed on the offender’s movement and activities by the department.**

RCW 9.94A.030(5) (emphasis added).

Community custody “includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.” RCW 9.94A.525(19).

The referenced definitions used in chapter 9.94B
RCW are found in RCW 9.94B.020, which states:

In addition to the definitions set out in RCW 9.94A.030, the following definitions apply for purposes of this chapter:

(1) "Community placement" means that period during which the offender is **subject to the conditions of community custody and/or postrelease supervision**, which **begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody** in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

(2) "Community supervision" means a period of time during which a convicted offender is **subject to crime-related prohibitions and other sentence conditions imposed by a court** pursuant to this chapter or RCW 16.52.200(6) or 46.61.524. Where the court finds that any offender has a chemical dependency that has contributed to his or her offense, the conditions of supervision may, subject to available resources, include treatment. For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

(3) "Postrelease supervision" is that portion of an offender's community placement that is not community custody.

RCW 9.94B.020.

Thus, the bolded portions of the statutes printed above establish that the key elements of the applicable definitions triggering application of RCW 9.94A.525(19) are that the person be 1) released to the community and 2) subject to the supervisory restrictions imposed either by a court or by the Department of Corrections. When a person is in jail, neither of those elements is present. Once in custody, a person is both not in the community and not under the supervisory conditions of community custody. See State v. King, 162 Wn. App. 234, 253 P.3d 120 (2011) (construing these definitions strictly so as to exclude from the definition of community custody community supervision assigned by jurisdictions other than Washington).

Thus, by the plain meaning of these definitions, a person is on community custody when they are in the community under conditions of supervision, not when they are in custody. A court's primary objective in statutory interpretation is to give effect to the intent of the Legislature, beginning with the plain language of the statute. Plain meaning "is to be discerned from the ordinary meaning of the language at

issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (citations omitted).

While these definitions do not appear ambiguous, to the extent they might be read to reach incarcerated defendants in Mr. Mahone’s position, they are ambiguous. When a statute is subject to more than one reasonable interpretation, it is ambiguous. State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (citations omitted). The rule of lenity requires a court “to interpret an ambiguous statute in favor of a criminal defendant absent legislative intent to the contrary.” Id. at 87-88. Accordingly, to the extent the definitions are ambiguous, they should be read so as not to apply to defendants in Mr. Mahone’s situation.

For all these reasons, Mr. Mahone’s sentence is illegal and this Court should remand for resentencing.

**Point IV: Remand is Required When the Trial Court
Imposed an Exceptional Sentence Without
Entering Written Findings and Conclusions**

Finally, the trial court apparently imposed an exceptional sentence in this case without abiding by the requirements of RCW 9.94A.535. That statute requires written findings of fact and conclusions of law when an exceptional sentence is imposed: "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. When no written findings or conclusions were entered in this case, Mr. Mahone's sentence should be remanded. See State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (trial court's failure to enter correct findings and conclusions cured by remand).

V. CONCLUSION

For all of these reasons, Sylvester Mahone respectfully requests this Court to reverse his conviction and/or remand for resentencing.

Dated this 18th day of October, 2011.

Respectfully submitted,

/s/ Carol Elewski

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CERTIFICATE OF SERVICE

I certify that on this 18th day of October, 2011, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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and, by U.S. Mail, on:

Mr. Sylvester Mahone
DOC # 719359
Clallam Bay Corrections Center
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/s/ Carol Elewski

Carol Elewski

ELEWSKI, CAROL ESQ

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