

**NO. 41591-7**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SYLVESTER JAMES MAHONE, JR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper

No. 10-1-02159-2

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**BRIEF OF RESPONDENT**  
CORRECTED ONLY AS TO THE CLERK'S NUMBERING OF THE  
STATE'S SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly grant a trial continuance that advanced the administration of justice when it had no reason to believe defendant's case would be prejudiced by the brief delay?
2. Did the court properly accept defendant's waiver of counsel when defendant unequivocally asserted his right to represent himself after being thoroughly apprised of the associated risks?
3. Did the sentencing court properly add a community custody point to defendant's offender score after defendant acknowledged that he was on community custody at the time of his offense?
4. Should defendant's case be remanded for entry of findings and conclusions when the court already found the jury's verdict on the aggravating circumstance was a substantial and compelling reason to impose an exceptional sentence?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with one count of felony harassment for an incident that occurred in the Pierce County Jail while defendant was serving a sixteen month sentence for a community custody violation imposed on cause number 93-1-004436-6 (third degree assault) and 95-1-

01236-3 (second degree murder). RP 16-17, 55, 61, 226; (Sep. 23) 7,<sup>1</sup> (Oct. 15) 302-303, (Nov. 5) 30, 40-41; CP 1-2, 79-85, 92-93.<sup>2</sup> The court subsequently accepted defendant's waiver of counsel and appointed standby counsel over defendant's objection. RP (Jul. 29) 2, 25; (Aug 27) 10-11. An amended information alleging two aggravating circumstances was filed on September 23, 2010. CP 3-4. During preliminary motions the trial court ruled defendant's prior murder conviction was relevant to proving the victim's reasonable fear in the felony harassment charge, but directed the witnesses to describe defendant's murder conviction as "a serious violent offense" while testifying. RP 16-17. The jury found defendant guilty as charged. CP 27-28. Defendant had an offender score of two, resulting in a standard range sentence of 9-12 months. CP 40-51. The court imposed an exceptional twenty four month sentence on November 5, 2010, to run consecutive to the defendant's violation sentence. CP 40-51; RP (Nov. 5) 23-30. The sentencing court filed a letter on January 31, 2011, stating defendant's notice of appeal was misplaced by the court after being timely filed. CP 55-56.

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<sup>1</sup> This case has a multi-volume transcript. Citations to preliminary and post-trial hearings will include the date of the relevant hearing, e.g. RP (date ) page number. Volumes one and two of the trial transcript dated October 11-15, 2010 will appear as "RP" without reference to date.

<sup>2</sup> The trial court excluded any reference to defendant's community custody status at trial. RP 16-17.

## 2. Facts

On May 5, 2010, defendant was an inmate in the Pierce County Jail. RP 16-17, 55, 61. Defendant was playing a board game with several other inmates when Corrections Officer Cruz instructed them to clean their cell for a scheduled inspection. RP 60-61, 207. Defendant aggressively challenged Officer Cruz's authority to direct the maintenance. RP 61-62. Defendant's disruptive behavior became increasingly confrontational. RP 62-63. Defendant was relocated to a more secure unit. RP 63. Officer Cruz documented the incident. RP 63.

Defendant saw Officer Cruz conducting a security check on May 8, 2010, and yelled:

“That’s the fucking officer that placed me here ... You’re the fucking officer, the wetback that put me here. I’m going to fucking kill you and your family as Clemmons killed those officers ... I’m going to fucking kill you.”

RP 65. Defendant pointed his finger at Officer Cruz as if he was holding a gun and simulated pulling the trigger. RP 66. Officer Cruz reported the incident to his sergeant. RP 65-66. A fellow officer informed Officer Cruz defendant had committed a serious crime. RP 66. Officer Cruz testified that a record search revealed defendant had been convicted of a violent crime. RP 66.

Officer Cruz came into contact with defendant during a subsequent security check after becoming aware of his criminal history. RP 69. Defendant repeated his threat kill Officer Cruz and added that he was

going to “fuck” Officer Cruz’s “mother.” RP 69. Defendant pulled his pants down and exposed his genital. RP 70. Defendant said: “I am going to kill you and your family as Clemmons killed those officers,” and referred to Clemmons as a “true hero.” RP 73. Officer Cruz was fearful defendant would carry out his threats. RP 73. An inmate informed jail staff defendant was trying to get other inmates to lie for him when discussing the incident. RP 167, 170-172.

Defendant was the only witness to testify for the defense. RP 209-244. Defendant denied threatening Officer Cruz, but admitted to referencing Maurice Clemmons’ decision to kill police officers during their interaction. RP 210, 216-217, 240-241.

C. ARGUMENT.

1. THE COURT PROPERLY GRANTED A TRIAL CONTINUANCE THAT ADVANCED THE ADMINISTRATION OF JUSTICE BECAUSE IT HAD NO REASON TO BELIEVE DEFENDANT’S CASE WOULD BE PREJUDICED BY THE BRIEF DELAY.

Under CrR 3.3(b) “[a] defendant who is detained in jail shall be brought to trial within ... 60 days after the ... date of arraignment.” Delays ordered by the court pursuant to CrR 3.3(f) are excluded from time for trial. CrR 3.3(e)(3). “If any period of time is excluded pursuant to [CrR 3.3] (e), the allowable time for trial shall not expire earlier than 30

days after the end of that excluded period.” CrR 3.3(b)(5).<sup>3</sup> Under CrR 3.3(f)(2) “the court may continue the trial date ... when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense....” “[A] grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion.” *State v. Woods*, 143 Wn.2d 561, 579, 23 P.3d 1046 (2001), *cert. denied*, 122 S. Ct. 374, 534 U.S. 964, 151 L. Ed. 2d 285 (2001) (*citing State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984)). “A continuance granted by the trial court is an abuse of discretion only if it ... was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.*

On appeal defendant concedes his time for trial claim turns on the validity of the first discretionary continuance ordered on August 3, 2010. App.Br. at 3, n.2;<sup>4</sup> CP 61. The relevant proceedings are listed below:

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<sup>3</sup> All proceedings related to the competency of a defendant to stand trial on the pending charge are also excluded in computing the time for trial. CrR 3.3(e)(1). The period excluded under CrR 3.3(e)(1) begins on the date when the competency examination is ordered and terminates when the court enters a written order finding the defendant competent.

<sup>4</sup> Appellant’s Brief (“App.Br.”)

<b>Date:</b> <sup>5</sup>	<b>Proceeding:</b>	<b>Trial Date:</b>	<b>Time for Trial:</b>
1. 5/19/10:	Arraignment <sup>6</sup>	7/12/10	60 days
2. 6/17/10:	Competency Eval Order <sup>7</sup>	Struck	31 days <sup>8</sup>
3. 7/22/10:	Competency Order <sup>9</sup>	8/19/10 <sup>10</sup>	31 days
4. 7/29/10:	Waiver of Counsel <sup>11</sup>	8/19/10	24 days
5. 8/03/10:	Pro Se Discovery demand <sup>12</sup>	8/19/10	18 days
6. 8/03/10:	Continuance <sup>13</sup>	9/13/10	Excluded
7. 9/13/10:	Continuance <sup>14</sup>	9/14/10	29 days
8. 9/14/10:	Continuance <sup>15</sup>	9/21/10	Excluded
9. 9/21/10:	Continuance <sup>16</sup>	9/23/10	Excluded
10. 9/23/10:	Case Called for Trial <sup>17</sup>	9/23/10	30 days

Defendant filed a pro se motion to compel several witness interviews at the August 3, 2010, hearing. CP 132-138. The prosecutor requested the continuance to prepare defendant's case for trial as it was assigned to her one week before while she was preoccupied in a month long trial which concluded that morning. RP (Aug. 3) 2; CP 61. Defendant objected, claiming the continuance violated his constitutional speedy trial right. *Id.* 2-7. Defendant did not assert his time for trial right under CrR 3.3 at the August 3, 2010, hearing but relies on it to appeal his

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<sup>5</sup> A 2010 calendar has been added as an appendix for the reader's convenience. Appendix A. See ER 201.

<sup>6</sup> CP 1-2.

<sup>7</sup> CP 75-78.

<sup>8</sup> Defendant's trial date had only been rescheduled prior to the challenged continuance to accommodate defendant's competency evaluation. CP 75-78, 128-129.

<sup>9</sup> CP 130-131. Incorrectly filed as "Order to Compel Production."

<sup>10</sup> "Order For Hearing" CP 128-129.

<sup>11</sup> RP (Jul. 29) 25.

<sup>12</sup> CP 132-138.

<sup>13</sup> CP 61

<sup>14</sup> CP 65

<sup>15</sup> CP 69

<sup>16</sup> CP 70

<sup>17</sup> RP (Sep. 23) 17

conviction. *Id.* at 1-7; App.Br. at 3. *Id.* at 2-7. The court found “good cause” to set the trial date to September 13, 2010. *Id.* The challenged order provided the following reasons for the delay:

“DPA newly assigned[,] discovery needs to be provided to [defendant], defendant is requesting an investigator.”

CP 61.

On August 27, 2010, defendant moved to continue the omnibus hearing so he could “gather ... discovery ... need[ed] ... for trial.” RP (Aug. 27) 3-4. Defendant did not make a time for trial objection pursuant CrR 3.3 until the September 13, 2010. *Id.* at 1-13CP 66-68. Defendant’s case was called for trial ten days later. RP (Sep. 23) 3. The prosecutor was scheduled to begin three trials that day and tried defendant’s case back to back with another case. RP (Sep. 23) 3.

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

A defendant held in custody does not have a constitutional right to a trial date within sixty days of his arraignment as CrR 3.3’s time for trial rule is not of constitutional magnitude. *See* U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980); *see also State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978); *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986); *State v.*

*Farnsworth*, 133 Wn. App. 1, 11, 130 P.3d 389 (2006) (citing); *State v. Nguyen*, 131 Wn. App. 815, 820, 129 P.3d 821 (2006). The trial court still has “the responsibility of ensuring to each defendant a trial within CrR 3.3’s time guidelines ... In order for the trial court to carry out its responsibilities, objections pursuant to CrR 3.3 must be specific enough to alert the court to the type of error involved.” *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993) (citing *State v. Bernhard*, 45 Wn. App. 590, 600, 726 P.2d 991 (1986), review denied, 107 Wn.2d 1023 (1987); see also *State v. Frankenfield*, 112 Wn. App. 472, 475-476, 49 P.3d 921 (2002). “Specificity is required because [of] the many facets of this technical rule, its several amendments and the many appellate decisions interpreting its provisions....” *Frankenfield*, 112 Wn. App. at 476 (quoting *Bernhard*, 45 Wn. App. at 600) (internal quotation marks omitted). “[T]he trial court cannot reasonably be expected, nor does it have the obligation, to rule on every possible aspect of CrR 3.3 every time there is a general incantation of the rule’s applicability or an issue raised concerning one of its provisions.” *Id.* A defendant who fails to object, “for any reason,” to a trial “date set upon the ground that it is not within the time limits prescribed by [CrR 3.3] ... within 10 days after ... notice is ... given ... shall lose the right to object that [his or her] trial commenced on ... a date [that] is not within the limits prescribed by [CrR 3.3]. CrR 3.3. Appellate courts will not direct a dismissal of charges where a defendant is not prejudiced by a minor delay and the defendant did not

make his or her intent to rely on the time for trial rules known before time expired. *See generally Fladebo*, 113 Wn.2d at 394.

Defendant does not claim a violation of his constitutional speedy trial right on appeal and he did not preserve an objection based on CrR 3.3 below. App.Br. at 3; RP (Aug.3) 1-7; CP 66-68. Defendant failed to provide the trial court any information that would have reasonably guided it to an applicable provision in the time for trial rule. Defendant was representing himself at the hearing, so he must bear the consequences of his own representation. *See State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001); *see also State v. McDonald*, 143 Wn.2d 506, 512, 22 P.3d 791 (2001). Defendant never called upon the trial court to determine if the challenged continuance violated a particular provision of CrR 3.3 and the court was not obliged to conduct its own investigation of defendant's case to identify the time for trial error defendant alleges on appeal. *See generally Greenwood*, 120 Wn.2d at. 606.

Defendant eventually asserted his time for trial right on September 13, 2010. CP 66-68. That objection did not preserve defendant's time for trial claim because CrR 3.3(d)(3) expressly provides an objection to a trial date based on the time for trial rule is waived if it is not made "for any reason" within ten days of receiving notice of the continuance. Defendant received the required notice when the challenged continuance was ordered on August 3, 2010, but he waited twenty nine days to articulate an

objection pursuant to CrR 3.3. Defendant consequently waived his time for trial objection to the challenged continuance.

It is not unjust to hold a criminal defendant strictly accountable to the provisions of the time for trial rule. Strict application of CrR 3.3's waiver provision promotes the administration of justice by requiring objections to be raised when potential errors remain curable. The injustice in allowing defendants to prevail on untimely assertions of their time for trial right is observable in this case. The challenged continuance was ordered when eighteen days remained before time expired on August 21, 2010. CP 61. Time for trial could also have then been extended fourteen days to September 4, 2010, pursuant to CrR 3.3(g)'s cure period provision if invoked by August 26, 2010. Defendant eliminated the court's ability to call his case before time expired by waiting until September 13, 2010, to raise his time for trial objection. Since defendant failed to abide by the strict requirements of CrR 3.3 this assignment of error should be rejected.

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

“[T]he court may continue the trial date ... when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense....” CrR 3.3(f)(2). The phrase “administration of justice” is not limited to the administration

of justice in a single case seen in isolation. *State v. Angulo*, 69 Wn. App. 337, 343, 848 P.2d 1276 (1993). “Allowing counsel time to prepare for trial is a valid basis for continuance.” *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005); *see also State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001) (the trial court did not abuse its discretion in granting five continuances over defendant’s objection due to the deputy prosecutor’s unavailability and the need for defense counsel to prepare) (*citing Campbell*, 103 Wn.2d at 15). “Scheduling conflicts may [also] be considered in granting continuances.” *Flinn*, 154 Wn.2d at 200 (*citing State v. Heredia-Juarez*, 199 Wn. App. 150, 153-155, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor’s reasonably scheduled vacation); *see also State v. Carson*, 128 Wn.2d 805, 912 P.2d 805, 912 P.2d 1016 (1996) (unavailability of counsel due to trial schedules justifies an extension); *State v. Jones*, 117 Wn. App. 721, 72 P.3d 1110 (2003); *State v. Palmer*, 38 Wn. App. 160, 162, 684 P.2d 787 (1984) (scheduling difficulties arising in another trial in which the prosecutor was appearing); *State v. Krause*, 82 Wn. App. 688, 689, 919 P.2d 123 (1996) (conflicts in the prosecutor’s schedule may be considered an unavoidable circumstance justifying an extension of the time for trial date).

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

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

64 Wn. App. 755-767, 828 P.2d 1106 (1992).

The challenged continuance advanced the administration of justice.

The prosecutor reasonably required the continuance to prepare for trial.

RP (Aug. 3) 2. The prosecutor had just received defendant’s pro se demand for witness interviews with numerous jail inmates, eight Sheriff’s Department employees, and the Pierce County Sheriff. RP (Aug. 3) 2-3; CP 132-138. Defendant’s case was assigned to the prosecutor one week before the conclusion of her month long trial in another case. *Id.* The prosecutor’s unavoidable preoccupation with the other trial until the morning the challenged continuance was granted prevented her from immediately preparing defendant’s case. RP (Aug. 3) 2. The prosecutor had not requested a previous continuance and the brief delay was reasonable in light of defendant’s extensive discovery demand and the seriousness of the allegations. Defendant was a convicted murderer serving a community custody violation sentence. CP 73-74. He was alleged to have exposed his genitalia to a corrections officer after threatening to sexually assault his mother and kill his entire family while

lauding the officer murders perpetrated by Maurice Clemmons. CP 73-74. The Court of Appeals has recognized that depriving prosecutors working under the stress of back to back trials time needed for vacation would eventually result in “less effective justice as well as unfairness in the administration of justice.” See *Kelly*, 64 Wn. App at 755-767. The same principle must hold true when a prosecutor’s preoccupation with a month long trial compels her to request one brief continuance to prepare a newly assigned felony case with an outstanding defense discovery request. It would be strange if the time for trial rule contemplated time for a prosecutor’s vacation but did not allow time for a prosecutor actively working on multiple cases to prepare between trials.

The challenged continuance also advanced the administration of justice by providing time for previously provided discovery<sup>18</sup> to be redirected to a pro se defendant who began representing himself five days before. RP (Jul.29) 25; CP 59, 61, 62, 64. It was also reasonable for the court to perceive the justice in granting the challenged continuance over defendant’s unsubstantiated objection when the continuance afforded him an adequate opportunity to conduct multiple witness interviews he averred “must be granted ... in order for [him] to receive a ‘FAIR’ [sic] trial.” CP 132-138.

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<sup>18</sup> CP 59, 62, 64.

The justice advanced by the challenged continuance was not off set by evidence of resulting prejudice. Defendant did not alert the court to any reason why the brief delay would negatively impact the presentation of his case. RP (Aug. 3) 1-7. A continuance that allows a defendant the opportunity to present evidence that would otherwise be unavailable is typically not deemed prejudicial. *See generally Woods*, 143 Wn.2d at 581. Defendant's specific discovery demand included interviews with "[a]ll ... inmates ... housed in [cell ward] 3 South, F Tier, Cells 3, 4, and 10[;]" five inmates housed in other wards, and eight employees of the Pierce County Sheriff's Department, and the Sheriff. CP 132-138. Defendant requested compliance "one week or so" prior to trial, or within nine days. *Id.* It was reasonable for the court to conclude defendant would need more time to complete the requested discovery and defendant never suggested a willingness to forego it to be tried by August 19, 2010. The fact that defendant was asking for additional time to complete discovery on August 27, 2010, demonstrates that the court's conclusion was accurate. RP (Aug. 27) 3-4. Since defendant was serving a sentence that was not anticipated to expire until 2011, the court was not confronted with the potential for defendant to be prejudiced by prolonged pretrial incarceration. CP 73-74. There was simply no identified prejudice for the court to balance against the continuance's clear contribution to the administration of justice. The challenged continuance should be affirmed because defendant has failed to prove it was a manifest abuse of the trial court's discretion.

2. THE COURT PROPERLY ACCEPTED  
DEFENDANT’S WAIVER OF COUNSEL  
BECAUSE HE UNEQUIVOCALLY ASSERTED  
HIS RIGHT TO REPRESENT HIMSELF  
AFTER BEING THOROUGHLY APPRISED  
OF THE ASSOCIATED RISKS.

Criminal defendants have a constitutional right to represent themselves. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “[A]lthough [a defendant] may conduct his [or her] defense ... to his [or her] own detriment, his [or her] choice must be honored ....” *DeWeese*, 117 Wn.2d at 834. “To protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation ... a defendant’s request to proceed ... pro se ... [must] be unequivocal.” *DeWeese*, 117 Wn.2d at 376. This requirement “derives from the fact that ... a defendant’s request for self-representation can be a ‘heads I win, tails you lose’ proposition for the trial court.” *Id.* at 377 (citations omitted). “If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant his [or her] right to self-representation.” *Id.* (citation omitted).

A criminal defendant’s unequivocal waiver of counsel must be knowing and intelligent with at least minimal knowledge of the task involved. *Id.* at 378 (citing *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d

829 (1987); *Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). “A colloquy on the record is the preferred method; but in the absence of a colloquy, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense.” *Id.* at 378 (citing *Acrey*, 103 Wn.2d at 211). “The court is under no duty to inform a pro se defendant of the relevant rules of law.” *Bebb*, 108 Wn.2d at 524. “[V]alid [waiver] depends on the facts and circumstances of each case, and there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant.” *DeWeese*, 117 Wn.2d at 378 (citing *State v. Imus*, 37 Wn. App. 170, 173-174, 679 P.2d 376 (1984)). Appellate courts review a trial court’s decision to accept a defendant’s waiver of counsel to determine if the trial court abused its discretion. *Bebb*, 108 Wn.2d at 524; *State v. Dennison*, 115 Wn.2d 609, 620, 801 P.2d 193 (1990). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

Defendant filed a document entitled “Defendant’s Affidavit To Proceed As Pro-Se” which asserted he was competent and enumerated several credentials, to include:

an A.S. degree in Paralegal Studies, 15 years of experience in criminal and civil litigation, trial court experience, “informed knowledge” in criminal procedures, trial

preparations, juror selection, objections, witness examinations, argument, evidentiary rules and jury polling.

CP 86-91. On July 29, 2010, defendant told the court:

“I wish to represent myself ... under the Washington Constitution, Article 1, Section 22. I want to invoke that right to represent myself as pro se under the 6<sup>th</sup> Amendment of the United States Constitution.”

RP (Jul. 29) 3-5. Defendant stated he was making a voluntary decision.

*Id.* at 5, 19-21. The court told defendant his attorneys were “very professional people and very good lawyers.” *Id.* at 23. Defendant said he could “look out for [his] best interests....” *Id.* at 4-5, 7-9, 18-19, 23.

Defendant repeated the credentials he enumerated in his motion while adding that he had represented himself in two civil trials. *Id.* at 4.

Defendant assured the court he understood different rules and laws applied in criminal cases. *Id.* at 18. Defendant claimed he had previously prepared “PRP’s, briefs, [and] various motions.” *Id.* at 9. Defendant represented he was “very familiar with the Constitution, the Washington State statutes, Revised Code of Washington ... court system ... process, and procedures.” *Id.* at 7-8. Defendant knew he was charged with felony harassment. *Id.* at 10. Defendant distinguished the prosecution’s burden of proving his charge beyond a reasonable doubt from the preponderance of the evidence standard applied in civil trials. *Id.* at 19. Defendant was correctly advised his offender score was two, resulting in a potential twelve month base sentence and that he could be sentenced to the

maximum of five years. *Id.* at 10-12,14.<sup>19</sup> Defendant's attorney confirmed that defendant did not have any confusion about his potential sentence. *Id.* at 20.

The court twice informed defendant it would not assist him present his defense. *Id.* at 14, 22. Defendant acknowledged he was "required to abide by both the rules of evidence ... the rules of criminal procedure," and the court's rules of decorum. *Id.* at 15-17. Defendant understood he would bear the consequences if he failed to competently represent himself. *Id.* at 15-17; (Aug. 27) 7-8. The court urged defendant not to attempt representing himself, asking him to if ther[e] [wa]s any possible way that [he] [would] reconsider [his] request." RP (Jul. 29) 21. Defendant insisted on proceeding pro se. *Id.* at 21. The court accepted defendant's waiver as knowing and voluntary. *Id.* at 25. On August 3, 2010, the court again warned defendant that it was unwise to represent himself. RP (Aug. 3) 4. On August 27, 2010, the court gave defendant a second opportunity to reconsider his decision. RP (Aug. 27, 2010) 7. Defendant rejected the court's offer, so the court ultimately appointed standby counsel over defendant's emphatic objection. *Id.* at 7, 10.

Defendant's persistent and unequivocal assertion of his right to proceed pro se forced the trial court choose between granting his request

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<sup>19</sup> Defendant was accurately informed of the maximum base sentence and jurisdictional maximum; the low end of the standard range was misstated as four months instead of nine months.

or depriving him of a constitutional right. The steadfastness of defendant's decision was made clear over the course of two hearings. Defendant twice invoked his constitution right to represent himself and twice rejected the court's invitation for him to reconsider that decision. RP (Jul. 29) 21; (Aug. 27, 2010) 7. Defendant's waiver was unequivocal.

The record makes it equally clear defendant understood the seriousness of his offense, to include the potential consequences. Defendant was informed of his felony harassment charge could result in a five year sentence. RP (Jul. 29) 10-14. Defendant was uniquely capable of appreciating the reality of spending five years in prison as he had recently spent fifteen years in prison where he assisted other inmates seek collateral relief of their own convictions. RP (Jul. 29) 9. Defendant was reminded of his potential consequences when he still had time to seek the reappointment of counsel. RP (Sep. 23) 6; CP 3-4. It is not reasonable to maintain that the gravity of defendant's circumstances remained unknown to him.

Defendant also understood the risks associated with incompetently navigating the technical rules of a criminal trial. RP (Jul. 29) 15-18. Defendant told the court: “[He was] fully aware of all the repercussions of [his] representation[,]” and “very familiar with the Constitution, the Washington State statutes, Revised Code of Washington ... court system

... process, and procedures.” RP (Jul. 29) 7-8, 12; CP 86-91. Defendant averred he was capable of applying his knowledge of the law as well as the experience he obtained trying two civil trials to his criminal trial. RP (Jul. 29)18-19; CP 86-91. The court nonetheless cautioned defendant that he may be over estimating his ability to adequately represent himself. RP (Jul. 29)16, 21.

The court’s comprehensive effort to ensure defendant appreciated the disadvantages of proceeding pro se are highly distinguishable from the colloquy deemed insufficient in *State v. Nordstrom*, 89 Wn. App. 737, 744, 950 P.2d 946 (1997) (advisement of the technical rules governing trial not sufficient where the court failed to show defendant how his demonstrated ignorance of the rules put him at a substantial disadvantage at trial). The trial court at bar did not merely alert defendant to the abstract or potential pitfalls of representing himself; it cited concrete examples of defendant’s proven limitations as evidence of his potential inability to ensure a fair trial while strenuously urging him to permit reappointment of counsel. The court confronted defendant with the difficulties he had already encountered one month after accepting his waiver:

Mr. Mahone, when you asked me to allow you to represent yourself ... I cautioned you strongly against your decision, because I did not feel that it would be in your best interest ... but you insisted on doing it. But what has transpired since you have been representing yourself—I hope you have the presence of mind to recognize this as well—is that you are not accomplishing what you need—you’re accomplishing even less in your defense than those

attorneys you were complaining about ... And I'm going to again ask you to reconsider your decision to represent yourself in this case, because I would like you to have a fair trial. And I'm not seeing that that will happen if you continue representing yourself.

RP (Aug. 27) 7-8. The court also cited defendant's failure to adequately conduct his own discovery as further evidence of how he was disadvantaged by his own representation. *Id.* at 8. Defendant agreed with the court's assessment of his shortcomings, but rejected the court's offer to reassign counsel, claiming that "[e]verythin[g] [was] going to fall into place." *Id.* at 8-10. Defendant then objected to the court's appointment of standby counsel after being informed:

[The court] continue[d] to have grave concerns about [his] ability to represent himself ... given the various appearances and issues that th[e] [c]ourt ... had to deal with since [he] had been allowed to represent himself ....

RP (Aug. 27)10.

The trial court was confronted with a defendant who was undeterred by his admitted disadvantages. The court was not empowered to interfere with defendant's constitutional right to represent himself to protect him from himself. Assistance of counsel is to "be an aid to a willing defendant[,]"; it is not to be "thrust[ed] ... upon the accused, against his considered wish." *Faretta*, 422 U.S. at 820. "[A]though he may conduct his own defense ultimately to his own detriment, his choice must

be honored.” *Id.* at 834; *see also State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001) (citation omitted). Defendant’s decision to represent himself may have been unwise, but it was his decision to make. The trial court did not abuse its discretion when it accepted defendant’s intransigent waiver and should be affirmed.

3. THE COURT PROPERLY ADDED A COMMUNITY CUSTODY POINT TO DEFENDANT’S OFFENDER SCORE BECAUSE HE ACKNOWLEDGED THAT HE WAS ON COMMUNITY CUSTODY AT THE TIME OF HIS OFFENSE.

Under Washington’s determinant sentencing scheme a defendant’s offender score is determined by his or her other convictions, with the scoring of those convictions dependant upon the nature of the current offense. *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (*citing* RCW 9.94A.510, .525, .530(1)). Sentencing courts must also add one point to the offender score when the current offense was committed while the defendant was on community custody. *See* RCW 9.94A.525(19); *Jones*, 159 Wn.2d at 233. A sentencing court’s calculation of a defendant’s offender score is reviewed de novo. *State v. Mendoza*, 139 Wn. App. 693, 698, 162 P.3d 439 (2007). “[T]he remedy for a miscalculated offender score is resentencing using [the] correct offender score.” *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (*citing State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)).

- a. Defendant acknowledged he was on community custody at the time of his offense.

The court may rely on a defendant's acknowledgment of his or her community custody status. *State v. James*, 138 Wn. App. 628, 634, 158 P.3d 102 (2007) (citing RCW 9.94A.530(2); *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 873-874, 123 P.3d 456 (2005)); see also *Ford*, 137 Wn.2d at 479-480 (citing RCW 9.94A.110 recodified as RCW 9.94A.500); *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). Absent such an acknowledgment the State must prove it by a preponderance of the evidence. See *Ford*, 137 Wn.2d at 481.

Defendant's community custody status was intricately related to his case as it was the reason he was incarcerated when he committed the charged offense. RP (Sep. 23) 7, RP 16-17, 302-303; RP (Nov. 5) 30. That status was consequently acknowledged throughout the proceeding. CP 79-85, 92-93; RP (Sep. 23) 7, RP 16-17, 302-303, (Nov. 5) 30, 40-41, 43. On July 15, 2010, defendant averred "under the penalty of perjury" that he was:

incarcerated at the PCDCC... on a 16 month probation-community supervision violation sentence from a revo[c]tion hearing held in Judge Vicki Hog[a]n's courtroom on April 23, 2010, under cause numbers 93-1-04436-6, for an Assault in the Third Degree conviction & 95-1-01236-3, for a Murder in the Second Degree Conviction ... On May 19, 2010, [I] was arraigned ... on one count of Felony Harassment against PCDCC Corrections Deputy Ricardo Cruz.

CP 92-93. At sentencing defendant acknowledged his community custody status again when he personally asked the court to run his sentence “concurrent with [his] community custody.” RP (Nov. 5) 41. Defendant assured the court he had been engaging in positive behavior “following th[e] probation violation [he was] in jail for.” RP (Nov. 5) 43. Defendant’s community-custody point was proved by acknowledgment.

- b. Defendant’s community-custody point was authorized by statute.

Under RCW 9.94A.525(19) sentencing court is to add one point to a defendant’s offender score if the defendant is being sentenced for an offense committed while he or she was under community custody.

Pursuant to RCW 9.94A.030:

“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 ... and served in the community subject to controls placed on the offender’s movement and activities by the department.

For the purpose of RCW 9.94A.525, community custody includes community placement or postrelease supervision, as defined in RCW

9.94B. “Community placement” means:

that period of time 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.

RCW 9.94B.020(1). “Postrelease supervision” is that portion of an offender’s community placement that is not community custody.” RCW 9.94B.020(3). An offender remains subject to the terms of community custody while incarcerated even though the period of the offender’s community custody sentence is tolled. *In re. Personal Restraint of Dalluge*, 162 Wn.2d 814, 819, 177 P.3d 675 (2008).

The trial court appropriately added one point to defendant’s offender score because he was subject to the conditions of his community custody at the time of his offense. Community custody commences with an offender’s release from the initial period of incarceration and persists so long as the judgment makes the offender subject to controls placed on his or her activities by DOC. RCW 9.94A.030; RCW 9.94B.020(1); *In re Dalluge*, 162 Wn.2d at 818-819.<sup>20</sup> Defendant’s community custody

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<sup>20</sup> “Statutory interpretation begins with the statute’s plain meaning. 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.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal citations and quotations omitted). “If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end.” *Id.* “[B]ecause ... some measure of vagueness is inherent in the use of language, [appellate courts] do not require impossible standard of specificity or absolute agreement.” *State v. Caton*, 163 Wn. App. 659, 673, 260 P.3d 946 (2011) (citing *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007)) (internal quotation marks and citations omitted). “In addition ... citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute and [appellate courts] consider such materials presumptively available to all citizens.” *Id.* (citing *Watson*, 160 Wn.2d at 8).

conditions were triggered when he was released from his fifteen year period of incarceration and were in place when defendant committed the offense for which he was sentenced. See *In re Dalluge*, 162 Wn.2d at 818-819.

The facts presented in *Dalluge* are nearly identical to the facts at bar. Dalluge was serving a year of community custody when he was arrested and taken to jail where he became involved in an altercation. *In re Dalluge*, 162 Wn.2d at 815, 817. DOC found the altercation violated Dalluge's community custody and sanctioned him following a hearing. *Id.* Like defendant, Dalluge appealed his sanction, claiming he was not subject to the conditions of community custody at the time of the altercation because they tolled during his incarceration. *Id.* The Supreme Court rejected that argument and held Dalluge's community custody conditions remained in effect during his incarceration giving the department the statutory power to sanction him for his misconduct in jail. *Id.* at 816. The Court observed a contrary decision would lead to "absurd "result[s,]" such as "an offender ... subject to a no-contact order as a condition of his community custody, [who could] contact his victims while he was in jail." *Id.* at 817.

It is similarly unreasonable to maintain the legislature intended a convicted murderer to avoid having a point added to his offender score because he elected to commit a subsequent felony after being incarcerated. One purpose of the SRA's sentencing scheme is to punish recidivism. See

RCW 9.94A.010(7). Failure of incarceration to deter a defendant from immediately reoffending reflects disdain for the law and makes an offender particularly culpable in the commission of a current offense. *See generally State v. Butler*, 75 Wn. App. 47, 54-55, 876 P.2d 481 (1994). In keeping with the SRA's aim of deterring recidivism "[t]he legislature intend[ed] that all terms and conditions of an offender's supervision in the community ...not be curtailed by an offender's absence from supervision for any reason including confinement in any correctional institution." *Id.* at 819 (*citing* Laws of 2000, ch. 226, § 1). "The legislature has explicitly and broadly given the department the power and responsibility to supervise offenders while on various types of community custody." *Id.* at 818 (*citing* RCW 9.94A.720). In contrast the SRA "says nothing about the department's power and responsibility being tolled while offenders are confined ... It would be peculiar ... if an offender could evade the requirements [of community custody] by committing an offense that results in confinement." *Id.* at 818-819.

Under defendant's interpretation of the relevant statutes offenders who commit crimes after being incarcerated for community custody violations would receive more lenient sentences than similarly situated offenders who are otherwise in compliance. Defendant advocates this outcome with reference to statutes designed to prevent offenders from getting undeserved credit against a community custody sentence while they are incarcerated, not to shield recidivist offenders from

accountability. *See also* RCW 9.94A.030; RCW 9.94B.020(1). The relevant statutes were not intended to reward recidivist offenders by granting them a reprieve from their community custody conditions the moment they are incarcerated for violating them. *See* RCW 9.94A.030; 9.94B.020; 9.94A.720; *In re Dalluge*, 162 Wn.2d at 818-819. And “[Washington’s appellate courts] will not read statutes in an absurd or strained way.” *In re Dalluge*, 162 Wn.2d at 819 (*citing State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983)). Defendant’s claim that a community-custody point cannot be added to his offender score because he was incarcerated at the time of his offense is contrary to Supreme Court authority and fundamentally inconsistent with the clear legislative intent to deter recidivism. Defendant’s offender score is accurate.

4. THE COURT ALREADY FOUND THE JURY’S VERDICT ON THE AGGRAVATING CIRCUMSTANCE WAS A SUBSTANTIAL AND COMPELLING REASON TO IMPOSE AN EXCEPTIONAL SENTENCE.

“Former RCW 9.94A.535 (2005) required that 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.” *State v. Bluehorse*, 159 Wn. App. 410, 422-423, 248 P.3d 537 (2011). The Legislature also established that if the trial court imposed a sentence outside the standard range, then “the sentence is subject to review only as provided for in RCW 9.94A.585(4). RCW 9.94A.585(4) provides:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Prior to *Blakely v. Washington*, 542 U.S. 296, 301–04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), our Supreme Court established a three-part analysis to review the trial court’s findings and conclusions justifying an exceptional sentence under RCW 9.94A.585. *State v. Hale*, 146 Wn. App. 299, 189 P.3d 829 (2008) (citing *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). After *Blakely*, the jury determines the factual basis for most aggravating circumstances and the trial court is left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence. *Id.* at 306. This requires the trial court to enter findings that merely reiterate the jury’s special verdict. *Id.* at 307. Consequently, this Court has decided that it will not remand for entry of findings and conclusions when the trial court’s ruling is sufficiently clear to facilitate effective appellate review. *Bluehorse*, 159 Wn. App. 410, compare with *In re Breedlove*, 138 Wn.2d 298, 310-311, 979 P.2d 417 (1990) (the remedy for a trial court’s failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings) (citing *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998)).

The trial court unmistakably relied on the jury's aggravating circumstance verdict when it imposed defendant's exceptional sentence.

Defendant's judgment and sentence states:

[S]ubstantial and compelling reasons exist which justify an exceptional sentence ... above the standard range for Count(s) I ... Aggravating factors were ... found by jury by special interrogatory.

CP 41. When the trial court imposed sentence it stated:

"[T]he jury found, obviously, that you threatened Officer Cruz ... the jury ... found the law enforcement enhancement. They did find that Officer Cruz is a law enforcement officer acting in the course of his employment. That's pretty obvious." The court concluded the facts of defendant's case warranted the imposition of an exceptional sentence.

RP (Nov. 5) 44-45.

The jury's finding was well supported by the evidence adduced at trial. Pursuant to RCW 94A.535(3)(v) the jury was asked to decide whether:

the crime [was] committed against a law enforcement officer who was performing his or her official duties at the time of the crime, and did the defendant know the victim was a law enforcement officer.

CP 155 Instruction No. 13.<sup>21</sup>

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<sup>21</sup> The jury was further instructed that a "law enforcement officer is: "any employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense ...." CP 150 Instruction No. 10. And that a person knows or acts with knowledge with respect to a fact when: "he or she is aware of that fact...[or] has information that would lead a reasonable person in the same situation to believe that a fact exists...." CP 149 Instruction No. 49.

The evidence was overwhelming evidence that defendant knew Officer Cruz was a correction's officer and that Officer Cruz was engaged in his official duties at the time since Officer Cruz was conducting a security check in the jail where defendant was housed when the offense occurred. RP 60-65, 77, 207. Defendant clearly articulated his awareness of Officer Cruz's professional status at the time of the offense when he stated: "That's the ... officer that placed me here...." RP 65.

If this Court is inclined to follow its *Bluehorse* decision, then remand for entry of findings and conclusions would be unnecessary as the evidence supports the jury verdict underlying defendant's exceptional sentence. 159 Wn. App. 410. Otherwise, the Court should remand defendant's case to the sentencing court so it can enter findings of fact and conclusions of law pertaining to defendant's exceptional sentence. RCW 9.94A.535; *In re Breedlove*, 138 Wn.2d at 310-311.

D. CONCLUSION.

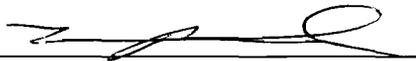
Defendant received a timely trial after properly waiving his right to counsel and the sentencing court imposed a lawful sentence based on an

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accurately calculated offender score. Defendant's conviction and sentence should be affirmed.<sup>22</sup>

DATED: December 20, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

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<sup>22</sup> This Court consolidated defendant's direct appeal with his personal restraint petition, but notified the State that a response to the petition was not required. The State has accepted the Court's invitation to refrain from filing a comprehensive response to defendant's petition as it does not appear to raise a meritorious issue for which relief could be granted. The petitioner claims the trial court committed reversible error when it failed to summon him for a jury question before the jury returned its verdict. The record establishes the jury sent its question to the court over the lunch hour at 12:52 p.m. and returned its verdict without an answer to its question eleven minutes later at 1:03 p.m. RP (Oct. 22) 10, 13. Under CrR 6.15(f)(1) the court shall notify the parties of the content of jury questions and provide them an opportunity to comment upon an appropriate response. However, CrR 615(f)(2) provides that once jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the length of time a jury will be required to deliberate. The jury returned its verdict before the court could have reasonably summoned the parties. The only way for the court to have given the parties an opportunity to respond would have been to force the jury to continue deliberations until it received the additional information it had already deemed unnecessary to its verdict. Such a response may have complied with CrR 615(f)(1) at the cost of violating CrR 615(f)(2). Since the jury reached its decision eleven minutes after asking its question without any additional information provided by the court in violation of CrR 615(f)(1), any conceivable error on the part of the trial court was harmless. *See State v. Jasper*, 158 Wn. App. 518, 543, 245 P.3d 228 (2010).

Certificate of Service:

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

2/12/12 \_\_\_\_\_  
Date Signature

# PIERCE COUNTY PROSECUTOR

## February 02, 2012 - 3:19 PM

### Transmittal Letter

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- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

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