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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WEST,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 18-1-01122-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant, Michael West, a sex offender convicted multiple times for sex offenses, has an ongoing duty to register any new address with the Sheriff's Office. West had previously been convicted twice before for failing to register as a sex offender.

Although West knew he was under an obligation to register any new address, and had registered previous changes of addresses with the Sheriff's Office, West failed to register his new address after moving out of the Madigan Motel on December 8, 2017. West had no contact with law enforcement until he was arrested on April 14, 2018.

The prosecution originally charged West with failing to register for the period of December 8, 2017, through December 16, 2018. However, after more complete registration documents were obtained from the Madigan Motel, the prosecution amended the charging period to December 14, 2017, through April 14, 2018, to accurately reflect the time period West failed to register.

West argues that the prosecution mismanaged his case and that that mismanagement prejudiced his right to a speedy and fair trial with the assistance of prepared counsel. He also argues that the trial court erred in granting his motion to represent himself at trial and then interfered with his right to self-representation. West finally argues that the trial court violated

his right to a fair trial by allowing the prosecution to rely on “propensity evidence throughout its case.”

None of West’s claims have merit. The trial court properly exercised its discretion in denying West’s motion to dismiss his case due to governmental mismanagement. The trial court properly advised West as to the disadvantages and consequences of representing himself and properly found that West knowingly, voluntarily, and intelligently waived his right to counsel. The trial court also properly proscribed the relationship between West and standby counsel, which did not interfere with West’s ability to represent himself. Finally, the trial court did not abuse its discretion in admitting limited evidence that a community corrections officer had previously issued a warrant for his arrest. In any event, any error in admitting this evidence or in allowing the prosecution to rely on this evidence in its closing and rebuttal arguments was harmless.

II. RESTATEMENT OF THE ISSUES

- A. Whether the trial court abused its discretion in finding that the prosecution did not mismanage West’s case when the prosecution provided all discovery prior to trial and within West’s speedy trial period and when it amended the charging period to conform with evidence discovered during the investigation.
- B. Whether the trial court abused its discretion in allowing West to waive counsel and represent himself after informing West of the dangers and disadvantages of self-representation and allowing standby counsel to provide legal advice to West, but not in front of the jury.

- C. Whether the trial court abused its discretion in allowing a community corrections officer to testify to issuing a warrant for Wests' arrest for not complying with his conditions when the prosecutor had an obligation to prove beyond a reasonable doubt that West willfully failed to register and when a previous witness had already testified that this warrant had been issued?
- D. Whether any potential error in admitting testimony from the community corrections officer regarding issuing a warrant or from the prosecution relying on this testimony during its closing and rebuttal argument created a reasonable probability of a different verdict when the evidence overwhelming demonstrated that West failed to register his address between December 14, 2017 and April 14, 2018.

III. STATEMENT OF THE CASE

Appellant, Michael West, is a convicted sex offender who is required by law to register any new address with the Sheriff's Office within three days of moving. 2 RP 232-235; 3 RP 411. West was informed of this obligation by his community custody officer and expressed no confusion as to his obligations. 2 RP 310-311.

The process for registering a new address requires the offender to go to the Pierce County Sheriff's Office counter at the county courthouse. There, a staff member has the offender fill out a registration packet with his or her updated address. 3 RP 391-394. West complied with this requirement on at least seven previous occasions between July 2011 and November 2017. 3 RP 423-451. However, the Sheriff's Office had no record of West registering after November 29, 2017, including the period between December 14, 2017, and April 14, 2018. 3 RP 450-454, 469-470.

Andrea Conger, the staff member with the Pierce County Sheriff's Office who testified at trial, admitted that there was one clerical error in the seven registration packets submitted by West – on one document, West's race had incorrectly been noted as "White." 3 RP 475-476, 480-481.

On December 16, 2017, Lakewood Police Officer Jeremy Vahle conducted a sex offender registration verification check on West. 2 RP 234-236; 3 RP 490-491. Officer Vahle went to West's last known residence, which was the Madigan Motel, to determine whether West was still checked in as a guest. 2 RP 237-239. Officer Vahle did not make contact with West and determined from the motel records provided by the owner that West checked out of the motel on December 4, 2017. 2 RP 240-242, 242-244; 3 RP 491-493, 496-498. Based on this information, the prosecution filed an Information charging West with failure to register as a sex offender from December 4, 2017, through December 16, 2017. CP 1.

In September 2018, Officer Vahle noticed that the registration material he had received from the motel's owner did not scan properly into the computer and were perhaps incomplete. Officer Vahle then returned to the Madigan Motel to get another copy of the records and determine if there were any other registration records. 2 RP 242-244; 3 RP 496-498. This time, Officer Vahle spoke to the owner's son, who spoke better English than

his father, and who assisted Officer Vahle in getting all of the relevant registration records. 2 RP 242-245, 341-342, 358, 498-502.

Based on these more detailed registration documents, Officer Vahle determined that West actually checked out of the motel on December 8, 2017, not December 4, 2017. RP 242-245, 344-363, 358; 3 RP 498-502. Officer Vahle ran a check of West's name and determined that a felony warrant had been issued by the Department of Corrections for failure to comply with his conditions. 2 RP 237-239, 308-310, 316-317; 3 RP 508-509.

West was arrested on April 17, 2018. CP 51. Based on the new and more complete registration information belatedly turned over by the motel staff, the prosecution amended the charging period to December 14, 2017, through April 14, 2018. CP 52, 70-71.

The trial court denied defense counsel's objection to the amending of the information to reflect the new charging period and denied counsel's motion to dismiss the case due to government mismanagement. 10/9/18 RP 4-52. West subsequently moved to waive counsel and proceed pro se. The trial court granted that motion and appointed his former counsel as standby counsel. 11/2/18 RP 2-15.

After jury selection, opening statements, and the direct examination of the prosecution's first witness, West decided that he wanted counsel

reappointed. 2 RP 272-273. The trial reappointed former defense counsel and continued the matter until that afternoon. The court advised counsel that it would allow him to recall Officer Vahle, the prosecution's first witness. 2 RP 274-276.

Prior to the defense's case-in-chief, the parties stipulated that West had suffered a conviction for a sex offense on February 28, 1990, requiring him to register, and that he had more than one such conviction. The parties also stipulated that West had a duty to register during the period of December 14, 2017, through April 14, 2018, and that he had previously been convicted two or more times for failing to register. 3 RP 485-486.

In addition to recalling Officer Vahle, who's testimony comported with his testimony earlier in trial, the defense called West's girlfriend Sarwat Oeun. She testified that she and West lived at the Madigan Motel from November 27, 2017, until December 8, 2017, and thereafter moved into an apartment with her uncle, where they stayed until March 2018. 4 RP 547-549, 553-555. She testified that she went with West to the courthouse sometime after moving in with her uncle, but she stayed in the car while West went inside and did not know what happened inside. She remembers West returning with paperwork. 4 RP 549-550, 558.

Oeun and West moved out of her uncle's apartment in March 2018 and she did not recall going to the courthouse with West after that time. 4

RP 550-551, 560. She testified that she and West moved into the Tacoma Center Inn in March 2018 and lived there until West was arrested on April 18, 2018. 4 RP 551, 554-555, 559-560.

The jury found West guilty of failing to register as a sex offender and the trial court sentenced him to a midrange term of 40 months in prison. 4 RP 610-613; 1/11/19 RP 20.

IV. ARGUMENT

A. THE PROSECUTION DID NOT MISMANAGE THE CASE AND ITS ACTIONS DID NOT PREJUDICIALLY INTERFERE WITH WEST'S RIGHT TO A SPEEDY AND FAIR TRIAL WITH THE ASSISTANCE OF PREPARED COUNSEL

West argues that the prosecution mismanaged this case and that that mismanagement prejudiced his right to a speedy and fair trial with the assistance of prepared counsel. Specifically, West claims that his conviction should be reversed, and his case dismissed because the prosecution disregarded discovery deadlines, mismanaged the basic investigation, and fundamentally altered its charges just before trial. Appellant's Opening Brief at 11-18. West's claim should be rejected because the trial court properly exercised its discretion in denying West's motion to dismiss his case due to governmental mismanagement.

On March 22, 2018, the prosecution charged West with the crime of failing to register as a sex offender from December 4, 2017, through

December 16, 2017. CP 3. West was arrested on April 17, 2018, and trial was set for October 2, 2018. CP 51.

The prosecution continued to investigate the case and provided discovery to West's defense counsel. CP 51-52. However, due to the failure of the staff at the Madigan Motel to provide all of the relevant registration information regarding West during the initial phase of the investigation, discovery was not complete until October 1, 2018. 2RP 240-245, 358; 3RP4 491-509; CP 52. Based on the new and more complete registration information belatedly turned over by the motel staff, the prosecution amended the charging period to December 14, 2017, through April 14, 2018. CP 52, 70-71.

On September 27, 2018, defense counsel filed a motion to dismiss for government mismanagement under CrR 8.3(b). CP 50-69. The prosecution then docketed the matter for October 1, 2018, to request a continuance of the trial date to respond to the defense motion. RP 40.

On October 1, 2018, the trial court held a hearing on the prosecution's request to continue the trial one week so it could respond to the defense's motion to dismiss. 10/1/18 RP 40. Defense counsel objected to continuance of the trial date, and also objected to the amended information arguing that the change in the charging period prejudiced West as he did not have time to investigate the "new" charging period. 10/1/18

RP 41-42, 44-45. The prosecutor responded that she should be able to have time to respond to the defense motion to dismiss and that the amended charging dates did not prejudice West as the new charging period still encompassed part of the original charging period and West's speedy trial time period did not end until November 1, 2018. 10/1/18 RP 42-44.

The trial court noted that it had already assigned the prosecutor to an older trial set to begin October 2, 2018. 10/1/18 RP 46-47. The court therefore found that a continuance was required in the administration of justice and continued the trial for a week and also continued the defense motion for dismissal so the prosecution could respond. 10/1/18 RP 47-48.

At the hearing on October 9, 2018, the defense again objected to the amended information charging the time period of December 14, 2017, through April 14, 2018, arguing West would be prejudice because counsel had prepared its case for the original charging period of December 4, 2017, through December 16, 2017. 10/9/18 RP 3-8. The prosecutor countered that the defense could not show prejudice from the prosecution amending the information. The prosecutor pointed out that defense counsel did not interview any of the State's witnesses until the previous day and the new charging period encompassed part of the original charging period. 10/9/18 RP 8-10. The prosecutor stated that perhaps due to a language barrier during the earlier investigation, the staff at the Madigan Motel had

additional registration records relating to West indicating that West actually checked out of the motel on December 8, 2017. 10/9/18 RP 10. As an offender has three business days to register a new residence, the prosecution amended its charging period to appropriately encompass December 14, 2017, through April 14, 2018. 10/9/18 RP 10-14.

The trial court allowed the amendment of the charging period:

The question before the Court based upon these facts is whether there is prejudice to the defense insofar as it relates to the amended charge and the answer is I don't find that there is. I simply don't accept the defense argument in that regard. The operative time period that could or could not impose criminal liability is the first three days for which the defense is presumably prepared to proceed. The defense has not adequately explained to the Court the significance of the remaining months, if in fact they have witnesses who are prepared to testify on behalf of the defense that as soon as he was obligated to, upon departure of the hotel, that he did in fact register. Which in many respects renders academic the other remaining portion of the defense argument. I just don't find a basis. I'm going to allow the amendment.

10/9/18 RP 18-19.

The trial court next turned to the defense motion under CrR 8.3(b) to dismiss for governmental mismanagement. The prosecutor explained to the court that the original information received from the Madigan Motel was from a person for whom English was a second language. 10/9/18 RP 19-20. After speaking to this person's son, who did speak fluent English and whom the prosecution did not know of previously, the prosecution was able

to obtain additional registration information previously undisclosed and unknown to the prosecution. 10/9/18 RP 20-21.

Defense counsel argued that, due to late discovery and new witnesses, West should not have to choose between continuing his trial or proceeding with unprepared counsel. 10/9/18 RP 23-26. Defense counsel asked the court to either dismiss the case or exclude all the documents that were provided “late” and all the testimony about them. 10/9/18 RP 26.

The trial court then went through with defense counsel the documents provided by the prosecution. 10/9/18 RP 26-34. The prosecutor argued that the court should deny the defense motion to dismiss because all of the material ostensibly provided late to the defense were not material to West’s defense. 10/9/18 RP 34-35. Furthermore, the prosecutor argued that the motel registration material given to defense in late September 2018 was outside the State’s possession and control until that time. These records were not handed over to law enforcement upon the initial investigation and it was only later learned that there were additional records. Upon learning of the existence of these registration records, the prosecutor immediately contacted law enforcement to retrieve these records so they could be given to the defense. 10/9/18 RP 37-38. The prosecutor again noted that West’s speedy trial time did not expire until November 1, 2018. 10/9/18 RP 45-46.

The trial court denied West's motion to dismiss for governmental mismanagement:

... [T]he question before the Court is, and I pulled it up here on the screen, the criteria for 8.3(b), which tells us that the Court in the furtherance of justice after notice and hearing may dismiss any criminal prosecution due to arbitrary action or governmental misconduct where there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

The bottom line here is that, first of all, speedy trial continues to be more or less five weeks off, maybe six. Second, the defense has not really made an argument that shows this materially affects the accused's rights to a fair trial. It certainly is that to which the defense is entitled in terms of doing their job, and I don't in any way discount that part of the argument. I don't see arbitrary action, I don't see governmental misconduct. I don't see the mismanagement that the case law speaks to or that I have seen recently in granting a partial 8.3(b) motion in another case.

I think at the heart of this is also a point that we talked about in the context of the Motion to Amend. At the end of the day, we're talking about a fairly finite period of time. We're actually talking about three days after the departure from the hotel. The document that the defense makes reference to are the sex offender registration packet which the State has represented, as an officer of the court, the State didn't have in its position until September 17th. Granted, the defense takes some issue with that. We have motel records consisting of five pages, the last of which establishes a checkout apparently on December 8th. In other words, nothing past December 8th to the 14th of December and December 8th was part of the originally charged period of time.

I think the chronology record probably is 13 pages and I think the defense makes a good point. Of course, the question then becomes was that in the possession of the prosecutor or not. And it is puzzling to me, but I'm not going

to second guess how the defense intends to defend its case. But the evidence is that several months ago the defense actually talked to this Mr. Montague, the CCO, and that was after the defense counsel had been assigned this case to defend, who talked to Mr. Montague, presumably at some length, about a number of variables regarding a bail hearing. But even though the defense was representing Mr. West on a failure to register as a sex offender, apparently, hey, your records reflect he registered, didn't come into the conversation, which is sort of a head scratcher for the Court.

I think the totality of the circumstances, without their being one sort of variable here, just does not rise to the level of the cases that have been correctly cited by both sides in their memorandum of authorities. So I'm going to deny the motion to dismiss here under 8.3(b).

10/9/18 (Nevin) RP 50-52.

The trial court subsequently denied West's pro se motion for reconsideration of this ruling:

The Court is familiar with the case law cited by Mr. West, however, in this case the Court finds that there is not sufficient basis to reconsider its prior decision. Accordingly, the Court will respectfully deny the motion for reconsideration.

11/9/18 RP 19.

CrR 8.3(b) states:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. . .

Before a trial court may dismiss charges under CrR 8.3(b), the defendant must show by a preponderance of the evidence (1) arbitrary

action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The governmental misconduct need not be evil or dishonest; simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Violations of obligations under the discovery rules can support a finding of governmental misconduct. *See Brooks*, 149 Wn. App. at 375–76. However, the defendant must also show “that such action prejudiced his right to a fair trial.” *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009) (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). And, the defendant must show *actual* prejudice, not merely speculative prejudice affecting his right to a fair trial. *Rorich*, 149 Wn.2d at 657. “Such prejudice includes the right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *Brooks*, 149 Wn. App. at 384 (internal quotation marks omitted) (quoting *Michielli*, 132 Wn.2d at 240). Dismissing charges under CrR 8.3(b) is an ““extraordinary remedy.”” *State v. Rohrich*, 149 Wn.2d at 658 (quoting *State v. Baker*, 78 Wn.2d 327, 332, 474 P.2d 254 (1970)). It is limited to those ““truly egregious cases of mismanagement or misconduct.”” *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d

441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). The trial court should resort to dismissal under CrR 8.3(b) “only as a last resort.” *Wilson*, 149 Wn.2d at 12.

A trial court's CrR 8.3(b) ruling is reviewed on appeal for abuse of discretion. *Michielli*, 132 Wn.2d at 240; *State v. Brooks*, 149 Wn. App. at 384. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240; *Brooks*, 149 Wn. App. at 384.

West claims that the prosecution's delay in providing discovery and its late amendment to the charging period constitutes prejudicial government mismanagement and requires this Court to reverse his conviction and dismiss his case because he was forced to make a choice between his right to a speedy trial and his right to effective assistance of counsel. Not so.

First, the record reflects that there was no “gamesmanship” involved in the prosecution's delayed production of documents. Instead, the prosecutor worked diligently to locate further discovery, even after having reason to believe, based on the initial investigation, that none existed. In *State v. Wilson*, 149 Wn.2d 1, 10-11, 65 P.3d 657 (2003), the Washington Supreme Court found no governmental misconduct when the prosecutor

acted diligently to set up last-minute witness interviews and there was no evidence of unfair gamesmanship.

The facts here simply do not in any way resemble the egregious facts in the cases West relies on in his opening brief, cases in which substantial prejudice was apparent. *See Michielli*, 132 Wn.2d at 233, 243–45 (new charges added without explanation or justification, and perhaps due to prosecutorial vindictiveness, only three days before trial that would require continuance beyond expiration, and which were based on facts long known to the State); *Brooks*, 149 Wn. App. at 386-388 (upholding dismissal where, after a previous continuance, the trial court found a “total failure to provide discovery in a timely fashion,” which included the report of the lead case detective, the 60–page victim’s statement and disclosure of two new witnesses, all of which had been available for weeks). Here, in contrast, the prosecution diligently pursued records outside of its possession and control in order to accurately reflect the appropriate time period in which West failed to register, despite the language barrier and the motel’s record keeping practices, and provided this information to the defense as soon as it obtained this material. Finding that these new records changed the period for which West could be charged, the prosecution then appropriately amended the charging period to conform to the evidence it discovered.

The trial court carefully went through all of the discovery provided by the prosecution to the defense and listened to the arguments on both sides regarding the defense motion to dismiss for government misconduct. Given the reasons for the prosecution's late discovery, the lack of any actual prejudice to West due to this late discovery as set forth by the trial court in its ruling, and that West's speedy trial time period had not expired, the trial court's decision to deny West's motion was not manifestly unreasonable. West claim should be denied.

B. THE TRIAL COURT PROPERLY GRANTED WEST'S MOTION TO REPRESENT HIMSELF AND DID NOT INTERFERE WITH HIS RIGHT TO SELF-REPRESENTATION

West claims that the trial court erred in granting his motion to represent himself at trial and then interfered with his right to self-representation. Specifically, West argues that the trial court erred in finding that he waived his right to counsel because the court did not adequately discuss the charges with him or warn him of the disadvantages of self-representation, and misled him regarding the consequences of self-representation. Appellant's Opening Brief at 18-25, 29-31. West also contends that once he was representing himself, the trial court put unreasonable restrictions on his ability to communicate with standby counsel. Appellant's Opening Brief at 25-32. West's claim should be denied. The trial court properly advised West as to the disadvantages and

consequences of representing himself and properly found that West knowing, voluntarily, and intelligently waived his right to counsel. The trial court also properly proscribed the relationship between West and standby counsel, which did not interfere with West's ability to represent himself.

A criminal defendant has the constitutional right to waive the assistance of counsel and represent himself at trial. *Faretta v. California*, 422 U.S. 806, 819-21, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 500, 229 P.3d 714 (2010). This right, protected by Sixth Amendment of the United States Constitution and article I, section 22, of the Washington State Constitution, is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Madsen*, 168 Wn.2d at 503.

The right to self-representation, however, is neither absolute nor self-executing. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). The trial court must first determine whether the request for self-representation is timely and unequivocal. *State v. Curry*, 191 Wn.2d 475, 486, 423 P.3d 179 (2018). The court must then determine whether the request is voluntary, knowing, and intelligent. *Id.* at 486.

To demonstrate a valid waiver of the right to counsel, the record must show the defendant understood "the dangers and disadvantages of self-representation" and establish "his choice is made with eyes open." *Faretta*,

422 U.S. at 835. The method for determining whether a defendant understands the risks of self-representation is a colloquy on the record. *State v. Burns*, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019). The colloquy, at a minimum, must inform the defendant of the nature of the charges, the maximum penalty faced, and the fact that the defendant must adhere to the rules of evidence and criminal procedure. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

A trial court's decision to grant or deny a defendant's request to represent himself is reviewed on appeal for abuse of discretion. *Curry*, 191 Wn.2d at 483. A court abuses its discretion only if its decision is manifestly unreasonable, rests on facts unsupported in the record, or was reached by applying the wrong legal standard. *Id.* at 483-84. Great deference is given to the trial court's determination because it is in a better position than an appellate court as it had "the benefit of observing the behavior and characteristics of the defendant, the inflections and language used to make the request, and the circumstances and context in which it was made." *Id.* 484-85 (citing *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

Several weeks prior to the scheduled start of trial, West made a motion to represent himself which was heard by the trial court on November 2, 2018. CP 162-164. At that hearing, West told the trial court that he had lost confidence in his defense counsel. 11/2/18 RP 2-3. After complaining

about late discovery from the prosecution (11/2/18 RP 3-7), West unequivocally requested that he be allowed to represent himself at trial. 11/2/18 RP 7.

During a colloquy with the court, West confirmed that he would be ready to proceed to trial as scheduled on November 28, 2018. 11/2/18 RP 7. West indicated that he had not studied the rules of evidence but he “could get reacquainted with it.” 11/2/18 RP 7-8.

The trial court and West continued with their colloquy:

THE COURT: Okay. And you understand that, if you go to trial representing yourself, any evidence that you choose to offer has to be pursuant to the rules of evidence. And, similarly, any objections you want to make to the State's offer of evidence - whether it's questioning of a witness or a physical document -- would have to be according to the rules of evidence.

You understand all that?

THE DEFENDANT: Yeah. Yeah. Yeah. I understand.

THE COURT: Okay. And you understand that neither the State nor the Court can assist you with regard to the rules of evidence. You're expected to know them. You're nodding yes.

THE DEFENDANT: Yes, ma'am.

...

THE COURT: And I assume you are also unfamiliar with the criminal rules of procedure.

THE DEFENDANT: I'm not familiar with that.

THE COURT: Okay. And the criminal rules of procedure would govern how this case progressed; right? And you would be required to follow the criminal rules of procedure if you represent yourself.

And, again, the State and the Court will not assist you in that regard. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And if you choose to represent yourself and decide at trial to take the stand and testify, you would have to do so in a question and answer format. Do you understand that?

THE DEFENDANT: She would ask me a question, and I would answer it.

THE COURT: No. You would ask -- if you're going to take the stand and testify, she'd get a right to cross-examine you.

THE DEFENDANT: Okay.

THE COURT: But in your direct testimony, it would be a question/answer format because you are playing the role of the attorney -

THE DEFENDANT: Oh, I understand.

THE COURT: -- as well as the witness.

THE DEFENDANT: Okay.

THE COURT: And both the State and the Court need to hear the question so that, if it's an improper question, she can interpose an objection before you make the answer, and the Court can rule on that objection.

THE DEFENDANT: Okay.

THE COURT: Does that make sense?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. And I'd ask Ms. Gunder at this time to please inform the Court and Mr. West what the sentence is that Mr. West is looking at if he is convicted as currently charged, please.

MS. GUNDER: Your Honor, Mr. West comes in at nine plus points with a standard range of 43 to 57 months. This is a class B felony with a maximum term of ten years and a 20,000-dollar fine.

THE COURT: Okay. Did you understand all that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. So you're looking at 43 to 57 months, if convicted as charged in this case. And recognizing that that's the sentence you're looking at, it's still your desire to represent yourself.

THE DEFENDANT: I was -- I read somewhere that if I do go pro se and lose, that I won't be able to appeal this; is that true?

THE COURT: Won't be able to appeal what?

THE DEFENDANT: My conviction if I'm found guilty.

THE COURT: Oh, no. If you go to trial with Mr. Trujillo, any other attorney, or yourself as an attorney, you can appeal it. You don't give up the right to appeal.

You give up the right to appeal a conviction if you plead guilty, but not if you go to trial and are convicted. But you would be sentenced. Again, if convicted as charged, you would be sentenced in the 43 to 57 months.

THE DEFENDANT: Okay. So this -- if I answer your question -

THE COURT: Uh-huh.

THE DEFENDANT: -- the State's not going to set my motion to reconsider for dismissal? To reconsider dismissal for the -

THE COURT: The State would not set a motion for you, no.

THE DEFENDANT: I mean you. I mean the Courts. I filed a motion to reconsider -- to argue to dismiss for government -- governmental mismanagement.

THE COURT: Uh-huh.

THE DEFENDANT: And if I don't go pro se -

THE COURT: Uh-huh.

THE DEFENDANT: -- will the Courts reset that hearing?

THE COURT: When you're represented by counsel, counsel decides what motions to file. And so you would need to talk to Mr. Trujillo about whether or not to file a motion to reconsider. That's not up to you. It's your decision whether or not to accept an offer made by the State or to take the case to trial, but he decides which motions to file. And the Court doesn't set motions for you.

MR. TRUJILLO: I think Mr. West is simply inquiring, if he's pro se, will he have the opportunity to note up a motion to reconsider.

THE COURT: Oh, certainly.

THE DEFENDANT: Because I already filed that with your courts.

THE COURT: Uh-huh.

THE DEFENDANT: If I don't go pro se, that motion still won't -- won't -- won't get pushed through? I mean, he has to -- he has to set it?

MR. TRUJILLO: If I'm representing you, then I decide what gets filed and what doesn't. If you're representing you, then you decide what gets filed and what doesn't.

And I think part of this is simply a dispute about strategy and what motions should get filed so -

THE COURT: Yeah.

THE DEFENDANT: I'll take my chances.

THE COURT: You'll take your chances -

THE DEFENDANT: I'll go by myself. I'll represent myself.

THE COURT: Okay.

THE DEFENDANT: I'll go -- I mean, I still want to stick with the go pro se.

THE COURT: Okay. And you've never represented yourself before. No. He's shaking his head no.

THE DEFENDANT: No, ma'am.

(Indiscernible crosstalk.)

THE COURT: Again for the record -

THE DEFENDANT: I'm sorry. I'm sorry.

THE COURT: That's okay. It's hard -- we're used to doing non-verbal so I completely understand it. It's -

THE DEFENDANT: No, ma'am. I -- I -

THE COURT: Okay. And you've never represented yourself. You're never studied the law. Right?

THE DEFENDANT: Absolutely correct.

THE COURT: Okay. And yet this is your decision. What you want to do is represent yourself, go to trial on November 28th, and perhaps in the meantime note up a motion for reconsideration in front of Judge Nevin.

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Well, I think Mr. West has been properly advised of the consequences of representing himself pro se, the sentence that he's looking at if convicted

as charged. He certainly has a right to represent himself, and I think his request is unequivocal and so I'm going to grant his request to go pro se.

11/2/18 RP 9-15.

West now complains on appeal that the court “did not warn him of the dangers and disadvantages of waiving his right to counsel that would impress upon him the importance of counsel.” Appellant’s Opening Brief at 21-22, 24. Not so. The trial court clearly advised West that although he did not know the rules of evidence or criminal procedure, anything he did would have to comply with those rules and he would not be able to obtain the help of the prosecution or the court. The court also advised him of the lengthy sentence he was facing upon conviction. Contrary to West’s contention, the trial court, in warning him that he would be held to the standard of an attorney and would not be able to get help from the prosecution or the court, adequately informed him of the dangers and disadvantages of waiving counsel.

West also complains that he was not informed of the nature of his charges. Appellant’s Opening Brief at 22, 25. However, West overlooks the lengthy discussion he had with the court at the beginning of this colloquy. There, West demonstrated that he had knowledge of the charges, including the specific dates as to when he was alleged to have failed to register:

That was -- another thing that [defense counsel] argued -- he had asked the prosecutor was the charging document. Her - her own notes -- he also informed me over the phone that the checkout date was 12-8-17, not 12-4-17 as listed in the police report.

He -- she is faxing me those documents, which is why it -- which I will immediately discover to you upon receipt. Given this new information, I will be amending my charging period.

Okay. Now --

11/2/18 RP 5. West therefore was well aware of the nature of the charges he was facing.

Furthermore, while the trial court did not specifically mention that West would face a “skilled adversary” or that there were “difficulties [] accessing information while in jail” (Appellant’s Opening Brief at 24), neither of these admonitions is required before a court finds that a defendant’s waiver of counsel is knowing, intelligent, and voluntary. *See U.S. v. Haynes*, 231 F.3d 1132, 1138 (9th Cir. 2000) (“We do not intend to set forth what would be a minimum explanation to meet the ‘dangers and disadvantages’ demands of *Faretta*.”). In addition, West takes issue with how the trial court answered his question, “I was -- I read somewhere that if I do go pro se and lose, that I won't be able to appeal this; is that true?” 11/2/18 RP 12; Appellant’s Opening Brief at 23-24. The court directly answered this question by stating that West would not give up his right to appeal by going pro se. 11/2/18 RP 12. Although the court did not get into

the specifics of what West could or could not appeal, the court is not required to do so before finding a valid waiver of counsel.

The court conducted a lengthy and detailed colloquy with West on the requirements and dangers of self-representation. West was well aware of the charges he faced and the court explained the sentence he might receive if the jury convicted him. The court emphasized that West would be required to follow the rules of evidence and criminal procedure. Despite these admonitions, West never wavered from his desire to represent himself. Given this record, the trial court did not abuse its discretion in finding that West knowingly, intelligently, and voluntarily waived his right to counsel and allowing him to represent himself.

West next argues that once he was representing himself, the trial court put unreasonable restrictions on his communication with standby counsel. Again, not so.

The role of standby counsel is not to represent the defendant, but to provide technical assistance to the defendant and to be prepared to step in and represent the defendant if it becomes necessary for the court to terminate the defendant's self-representation. *State v. Pugh*, 153 Wn. App. 569, 222 P.3d 821 (2009); *State v. Buena*, 83 Wn. App. 658, 660, 922 P.2d 1371 (1996). Thus, even defendants with standby counsel represent themselves at trial.

A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

State v. McDonald, 143 Wn.2d 506, 512–13, 22 P.3d 791 (2001).

Here, the trial court appointed West's former DAC attorney, Trujillo, as standby counsel. 11/2/18 RP 15-16. During a hearing on December 11, 2018, the prosecution, citing *State v. Silva*, 107 Wn. App. 605, 27 P.3d 663 (2001), objected to West asking standby counsel for legal advice. 1 RP 8-9. The trial court ruled that West would be allowed to consult with standby counsel outside the presence of the jury, but otherwise West would handle matters during trial proceedings and standby counsel could not "coach" him on what to say or how to argue. 1 RP 10-11. The court made clear, however, that it was not "prohibiting [West] from seeking legal advice at a designated breaktime, over the lunch hour or when the jury is not present." 1 RP 12.

West complains that the trial court's rulings interfered with his right to make decisions on how to proceed by limiting the substantive content of any questions he could ask standby counsel. Appellant's Opening Brief at 27-29. Not so. West was representing himself. The trial court allowed West to consult with, and seek legal advice from, standby counsel anytime

he was not in front of the jury. This admonition did not limit in any way the substantive content of any questions West could ask standby counsel. The only limitation is that standby counsel could not coach West on what to say or how to argue. That limitation was appropriate, given that West was proceeding pro se,¹ and still allowed standby counsel to fulfill his duties to

be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

McDonald, 143 Wn.2d at 512–13. West's claim to the contrary should be denied.²

¹ Even that limitation was occasionally waived by the trial court. *See* RP 75 (trial court allows West to consult with standby counsel during court prior to voir dire); RP 269-270 (trial court allows standby counsel to assist West in court).

² In his opening brief, West sets forth several pages arguing how he was disadvantaged by his decision to waive counsel and proceed pro se. Appellant's Opening Brief at 29-32. However, as set forth above, the trial court both properly granted West's motion to waive counsel and proceed pro se and, by setting certain ground rules for standby counsel, did not interfere with West's right of self-representation.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING COMMUNITY CORRECTIONS OFFICER MONTAGUE TO BRIEFLY TESTIFY ABOUT ISSUING A WARRANT FOR WEST; IN ANY EVENT, IT IS NOT REASONABLY PROBABLE THAT ANY ERROR IS ADMITTING THIS EVIDENCE OR IN THE PROSECUTOR'S CLOSING OR REBUTTAL ARGUMENTS HAD ANY IMPACT ON THE JURY'S VERDICT

West claims that the trial court violated his right to a fair trial by allowing the prosecution to rely on “propensity evidence throughout its case.” Specifically, West argues that the trial court violated ER 404(b) by admitting evidence of his unrelated warrant for failing to follow other court-imposed rules and erred in allowing the prosecution to refer to this evidence in its closing and rebuttal arguments to portray him as a risk to the public with a propensity to disregard his legal obligations. Appellant’s Opening Brief at 32-50. West’s claim should be denied. The trial court did not abuse its discretion in admitting limited evidence that a community corrections office had previously issued a warrant for his arrest. In any event, any error in admitting this evidence or in allowing the prosecution to rely on this evidence in its closing and rebuttal arguments was harmless.

Trial court rulings admitting or excluding evidence are reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Trial courts have wide discretion in determining the

admissibility of evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Under ER 404(b),

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011).

To admit evidence of prior bad acts, the trial court must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Gunderson*, 181 Wn. 2d 916, 923, 337 P.3d 1090, 1093 (2014). The State has the burden to establish that the evidence of prior bad acts falls under one of the exceptions to this general prohibition. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

After West was reappointed counsel, defense counsel moved to exclude Community Corrections Officer Montague’s testimony that he fell out of contact with West near the beginning of the charged period. As West

only had a duty to register with the Sheriff's Office, not the Department of Corrections, counsel argued that Montague's testimony would constitute propensity evidence in violation of ER 404(b) - that West did not comply with court-ordered requirements. 2 RP 284-285. The prosecution countered that because the State must prove that West *knowingly* failed to register as a sex offender, testimony from Montague would demonstrate that he went over this specific requirement with West prior to the charging period and had to issue a warrant when West failed to comply with court-ordered requirements. 2 RP 285-286. The trial court allowed limited testimony from Montague on this issue:

. . . I do think there is relevance to his testimony as to his status of being on community custody, as to his knowledge of registration requirements, and as to his address at the time he last had contact with him. As to the final point, I will sustain the objection by the defense that he is not to talk about how he had fallen off the radar essentially, but at the last -- he can testify factually as to the last time he had contact with him and where he resided at that time.

. . .

. . . I am okay with [Montague testifying regarding West] having a warrant, but I don't want any further comment than that, other than facts, last time I had contact and where he was living at that time and issued a warrant for failing to keep in contact, and that's the extent of it on that issue.

2 RP 287-288.

Montague testified that West had been on his caseload a couple of different times. 2 RP 307. When he stated that there were

some periods where West would “abscond,” the trial court sustained defense counsel’s objection and told the jury to disregard that testimony. 2 RP 309. Montague also testified, pursuant to the court’s ruling, that he issued a warrant for West on December 11, 2017, for failing to report to him. 2 RP 309-310. Montague testified that he discussed with West his obligation to register with the Sheriff’s Office and that West did not appear to be confused about this obligation. 2 RP 310-311. When Montague again mentioned West “absconding,” the court sustained an objection to this testimony. 2 RP 311-312. The court also sustained an objection to the prosecutor’s question about why Montague issued the December 11, 2017 warrant. 2 RP 317-318. Montague had no contact with West after he issued the December 11, 2017 warrant. 2 RP 318.

During closing argument, the prosecutor argued, among other things, that Montague’s testimony that he issued a warrant for West on December 11, 2017, and had no contact with him after that date, demonstrated that West was “out in the wind” after that time period. 4 RP 580-581. During rebuttal argument, the prosecutor argued that West was “in the wind” because “[he] did not want to be under the rules and restrictions of either the Department of Corrections or the laws of the State.” However, defense counsel

objected to this statement as “appealing to the passion and prejudice.” The trial court sustained the objection and told the jury to disregard the statement. 4 RP 603.

First, the trial court properly allowed Montague to testify that he issued a warrant for West for failing to comply with his community custody requirements. Here, the prosecution had the burden to prove beyond a reasonable doubt that West *willfully* failed to comply with his registration requirements during the charged period. The fact that a warrant was out for West as of December 11, 2017, and that his community corrections officer had no contact with him during the entirety of the charging period is probative because it helped demonstrate that West was willfully noncompliant, rather than just being forgetful, with his registration requirement. Any prejudice stemming from this testimony was allayed by the fact that at the time of Montague’s testimony, another witness had already testified that West had a “felony warrant” out for his arrest. RP 237-239.

West’s implication that the trial court’s failure to follow the strict confines of an ER 404(b) analysis and to do a balancing test on the record requires reversal (Appellant’s Opening Brief at 40-41) is inaccurate. While a balancing is required, the lack of such

balancing on the record can still be harmless. In *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002), citing *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984), the court held:

What the trial court failed to do was to balance on the record probative value versus prejudicial effect. Mr. Hepton contends this is a fatal error. While Washington courts generally observe that this balancing test should be done on the record, its absence is not fatal if the trial court has established a careful record of the reasons for admission. *Jackson*, 102 Wash.2d at 694, 689 P.2d 76. When the trial court identifies the purpose for which the evidence is believed to be relevant, the reviewing court can determine whether the probative value of the evidence outweighs its prejudicial effect.

Here, as set forth above, both the purpose of this testimony and its probative value versus its potential for prejudice is evident from the record. And in this case, the record is sufficient for this court to conclude that the probative value outweighs the prejudicial effect.

As to the prosecutor's closing and rebuttal arguments, the prosecutor properly argued that the admitted evidence supported her theory of the case. As the evidence that West had a warrant issued for his arrest on December 11, 2017, was properly admitted, the prosecutor was well within the bounds of proper argument to argue that this evidence helped demonstrate that West willfully failed to register as a sex offender from December 16, 2017, through April 14, 2018. Although the choice of phrases such as "off the grid" and "into the wind" may be colorful, they are valid comments on the

properly admitted evidence, which included that West's community corrections officer had not seen him during the entire charged period.

In any event, even if the trial court erred in allowing Montague to testify that he issued a warrant for West on December 11, 2017, any error in the admission of this testimony, or in the prosecutor's closing and rebuttal arguments, was harmless as there is no reasonable probability that the jury's verdict would have been different absent this evidence and argument. *See State v. Pogue*, 104 Wn. App. 981, 988, 17 P.3d 1272 (2001) ("The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome").

First, as mentioned above, the jury already knew that a "felony" warrant had been issued for West on December 11, 2017. Therefore, Montague's confirmation of that fact would not have impacted the jury. During Montague's testimony, the trial court sustained objections when Montague strayed from the court's ruling and told the jury to disregard any of the improper testimony. Jurors are presumed to follow the court's instructions in this regard. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 171-72, 410 P.3d 1142 (2018).

Similarly, even if the prosecutor should not have been allowed to mention Montague's testimony as to West's warrant in her closing or rebuttal arguments, any such argument was harmless. Again, evidence

independent of Montague's testimony showed that West had a warrant issued for him on December 11, 2017. Therefore, reference to this warrant during argument was proper. Furthermore, the trial court sustained defense counsel's objection when the prosecutor strayed too far from proper argument and told the jury to disregard which, again, the jury is presumed to follow.

Most importantly, however, is that overwhelming evidence supported the Jury's finding of guilt. Officer Jerry Vahle testified extensively regarding his investigation into West's whereabouts. He ultimately learned that West had checked out of his last registered address at the Madigan Motel on December 8, 2017. West had registered his addresses previously and had knowledge of his requirement to do so. Andrea Conger went through the registration requirement for a person updating his address and testified that when an offender registers with the Sheriff's Office, that person is given a receipt to keep as proof of registration. That office had no record of West being registered from December 14, 2017, through April 14, 2018.

West based his whole defense on his theory that the Sheriff's Office must have lost his registration packet. 4 RP 597-598. In support, he points to several errors by Lakewood Police and the Madigan Motel staff, which have nothing to do with West's registration, and to a single clerical mistake

by the Sheriff's Office in data entry – entering an incorrect race for West.
3 RP 475-481, 510-512.

However, West's argument about possible data entry errors *on* the registration packet does not support an argument that the Sheriff's Office must have lost his registration. In addition, the testimony of West's girlfriend, Sarat Oeun, was of no help to West. She only testified that, after she and West moved in with her uncle, she stayed in the car while West went in to the courthouse to supposedly register and saw him with some paperwork afterwards. She did not go to the courthouse with West after he moved out of her uncle's house in March 2018. 4 RP 549-551, 554-560.

Accordingly, based on the overwhelming evidence that West failed to register during the charged period, and the dearth of defense evidence to the contrary, any possible error in allowing Montague to testify about West's December 11, 2017, warrant, and in the prosecution's closing and rebuttal argument referring to this testimony, was harmless as there was no reasonable probability that the jury's verdict would have been different without this evidence.

V. CONCLUSION

For the foregoing reasons, this Court should deny West's claims and affirm West's conviction and sentence.

RESPECTFULLY SUBMITTED this 20th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


THEODORE M. CROPLEY WSB# 27453
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

11/20/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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