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NO. 70464-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
DEC 06 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS BLALOCK,

Appellant.

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

The Honorable Douglass A. North, Judge  
The Honorable Jim Rogers, Judge  
The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously denied the appellant's request for a continuance.

2. The trial court violated CrR 3.4 by starting trial without the appellant being present.

3. The trial court erred in excluding as hearsay a relevant non-hearsay statement, and the exclusion was prejudicial.

4. The judgment and sentence contains a scrivener's error that should be corrected.

Issues Pertaining to Assignments of Error

1. The appellant, who represented himself at trial, was denied access to legal materials and discovery following his waiver of counsel a month before trial. The denial of access was based in part on misinformation provided to the jail by the prosecutor's office regarding the appellant's pro se status. On the day of trial, the appellant moved to continue to give himself adequate time to prepare his defense. Did the superior court err in denying his request for a continuance?

2. Where the appellant was not present at the start of trial for purposes of CrR 3.4, did the court err in finding he waived his right to be present for all stages of trial?

3. The court excluded as hearsay testimony regarding statements made by the appellant's community corrections officer (CCO). For similar reasons, the court sustained a prosecutor's objection during closing argument. Where the testimony was not hearsay, and where such testimony was crucial to the appellant's defense of lack of knowledge of sex offender registration requirements, was the exclusion of such evidence prejudicial error?

4. Should the judgment and sentence be corrected to reflect the charging period for the offense based on the amended information?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural facts

The State charged Travis Blalock with failing to register as a sex offender between December 1 and December 27, 2010. CP 1-6. The State later amended the information to expand the charging period to December 1, 2010 through January 31, 2011. CP 9.

A jury found Blalock guilty as charged. CP 32. The court sentenced him within the standard range. CP 54-64.

Blalock timely appeals. CP 66-67.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 3/12/13; 2RP – 3/13/13; 3RP – 4/8/13 (two hearings before J. North); 4RP – 4/18/13 (hearing before J. Rogers); 5RP – 4/9/13; 6RP – 4/10/13; 7RP – 4/11/13; 8RP – 4/12/13; 9RP – 5/2/13; 10RP – 5/3/13; and 11RP – 5/8/13.

2. The road to trial and motion for a continuance

Blalock was charged in early 2011. He hired private counsel Johnnie R. Hynson. Despite attempting to continue on the case, Hynson withdrew nearly two years later because his health had deteriorated to the point where he could no longer work. 1RP 4; Supp. CP \_\_\_ (sub no. 17, Motion to Authorize Funds); Supp. CP \_\_\_ (sub no. 42, Response to Motion for Special Setting of Trial); Supp. CP \_\_\_ (sub no. 74, Substitution of Counsel).

In late October 2012, the court appointed Rebecca Lederer as replacement counsel. Id. Blalock wished to retain other counsel but could not afford to hire a new attorney because he had expended his resources to hire Hynson. 3RP 9; Supp. CP \_\_\_ (sub no. 72, Stipulated Order to Continue Omnibus Hearing).

Blalock came to believe Lederer could not adequately represent him. 1RP 4-5; 4RP 9. On March 12, 2013, four weeks before the trial date, Judge Jim Rogers granted Blalock's request to proceed pro se. 1RP 4-15; CP 10-11 (written "waiver of counsel"). Blalock told Judge Rogers he might need a continuance. 1RP 17. Judge Rogers warned Blalock he might not grant a continuance, and suggested Blalock review his discovery and move for a more specific continuance once he had assessed what additional preparation was needed. 1RP 18, 21.

Blalock also asked to be returned to the Snohomish County jail, where he was serving a sentence on an unrelated charge, and where he would be closer to his family. 1RP 20. The court informed Blalock that returning to Snohomish County might hinder his ability to represent himself in the King County proceedings. 1RP 19. Nonetheless, the court told Blalock to contact the Snohomish County jail for a pro se “packet” of materials to help him represent himself. The court told Blalock that if he needed something else, he should note a motion for hearing and notify the prosecutor. The court ordered the prosecutor to provide Blalock his contact information. 1RP 22-23.

The following day, the prosecutor moved to prevent Blalock from returning to Snohomish County. The prosecutor feared Blalock would not have access to his discovery once he moved. 2RP 3-4. Blalock told Judge Ronald Kessler he had checked with Snohomish County jail staff and learned he would be permitted to have access to his paperwork and the electronic files in discovery. 2RP 5. The court denied the prosecutor’s motion but again warned Blalock the transfer might make self-representation more difficult. 2RP 7.

Lederer filed a notice of withdrawal on April 5, three days before Blalock’s trial. Supp. CP \_\_\_ (sub no. 92, Notice of Withdrawal of Attorney). Blalock next appeared before the court on the scheduled trial

date, April 8. 3RP 3. He moved to continue because he had been unable to access the law library or his discovery materials. 3RP 4. Blalock explained that on March 18, 2013, five days after the last hearing, he had sent a written request, or “kite,” to Snohomish County jail personnel to access the law library and his legal materials. Blalock provided jail personnel the name of the prosecutor assigned to his case, Jason Rittereiser, as well as Rittereiser’s contact information 3RP 4, 18-19. Supp. CP \_\_\_ (sub no. 124, Letter). But the prosecutor’s office informed the Snohomish County jail that Blalock was not representing himself. Rather, the jail was told Lederer represented him. 3RP 18-19; Supp. CP \_\_\_ (sub no. 124, supra). Blalock “kited” again but had not received a response by the time he was transported to King County. 3RP 19-20.<sup>2</sup>

The prosecutor objected to the continuance. 3RP 6-7. The prosecutor claimed Blalock was told he would not be granted a continuance at the time he was allowed to go pro se. 3RP 7. The prosecutor also asserted Blalock promised the court he would be ready for

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<sup>2</sup> The “kite” also contains a request for “Alexis Dare” to be permitted to retrieve Blalock’s “legal materials.” Dare is Blalock’s wife’s friend. 3RP 22. Blalock told the court he made the request hoping his wife would be able to search the discovery for items he needed, because jail staff were unwilling to do so. 3RP 23. The jail eventually advised Blalock to “kite” so he could access the materials himself. 3RP 23. It was later revealed that Blalock’s wife had the discovery materials at the time of trial. 7RP 16.

trial on April 8. 3RP 8. Both claims were false. Blalock became frustrated by the prosecutor's misrepresentations and told the court he wished to obtain transcripts of the prior hearing. 3RP 8.

Judge Douglass North ordered the prosecutor to provide Blalock discovery but denied Blalock's motion, observing the case had been delayed many times already. 3RP 8-9.

Blalock, however, pointed out that he had not caused the previous continuances. 3RP 9. He argued that even though he had waived counsel, as a pro se litigant he was still permitted adequate time to prepare a defense. 3RP 15-16, 25-27, 29. The court again denied Blalock's motion, having previously stated that Blalock's only remedy was to appeal. 3RP 12, 26, 30-31. The court then recessed. 3RP 33.

Proceedings reconvened in the afternoon before Judge Rogers. 4RP 3. Blalock reiterated he was unprepared for trial because the jail had refused to provide him access to legal materials typically granted to pro se defendants. But the court observed that Blalock had been provided a "waiver of counsel," which should have been adequate to prove to the jail that he was pro se. 4RP 5. Blalock repeated that the prosecutor had given the jail incorrect information regarding his pro se status. 4RP 5-6. In response, the prosecutor asserted Blalock's claims could not be trusted.

4RP 6. According to the prosecutor, Blalock was attempting to delay trial and was moving to continue because he had failed to prepare. 4RP 9.

Blalock explained the trial had been previously delayed for a variety of reasons having nothing to do with his need to prepare as a pro se litigant, including the State's inquiry about a plea deal, attorney Hynson's deteriorating health, and Lederer's appointment. 4RP 9. Blalock said he needed a continuance to prepare for trial. 4RP 10-11.

Judge Rogers, noting Blalock was warned of possible problems if he transferred to Snohomish County, again denied the request for a continuance. 4RP 11-12.

The parties returned to Judge North's courtroom. 3RP 34. The prosecutor suggested the court recess so Blalock could review a new copy of discovery. The prosecutor explained pretrial motions would take up the morning, after which a jury could be chosen. 3RP 34. A frustrated Blalock told the court he would not appear for trial because he was unprepared. 3RP 35-36.

The following day, April 9, the prosecutor informed the court Blalock refused transport from the jail to the courtroom. 5RP 3. The prosecutor told the court he believed trial could proceed with or without Blalock, because he had been present for the start of trial. 5RP 4. The

court agreed with the prosecutor's assessment but ordered Blalock to be transported to the courtroom. 5RP 5, 8.

Once Blalock arrived, the court told him trial had already begun and the plan was for the parties to complete pretrial motions and pick a jury that day. 5RP 9. It also said Blalock could come to trial each day if he changed his mind. 5RP 9. Blalock handed the court a written motion to dismiss the charge based on his inability to interview witnesses, which he had a constitutional right to do before trial. 5RP 10-11. The court noted the witnesses that Blalock wanted to interview had already been interviewed by investigators working with Blalock's former attorneys. The other witness Blalock named was his wife, whom Blalock could presumably contact whenever he wanted. 5RP 13.

Blalock responded that he had been unable to call his wife because her phone number was blocked. He reiterated he had not been able to prepare a defense due to the jail's mistaken belief that he was represented, which was the fault of the prosecutor and former defense counsel.<sup>3</sup> 5RP 13-14. Blalock observed that because, as the court had told him, his only recourse was appeal, it was pointless for him to attend trial. 5RP 16.

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<sup>3</sup> Blalock also advised the court that Lederer had failed to file her withdrawal until the Friday before the Monday trial date. 5RP 13; see Supp. CP \_\_\_ (sub no. 92, supra).

The court told Blalock that because he had been present for the beginning of trial the day before, trial could proceed whether he was present or not. 5RP 17. Frustrated, Blalock asked to be removed from the courtroom and was taken away. 5RP 20.

On the prosecutor's motion, the court found Blalock had "voluntarily absented himself" from proceedings. The prosecutor and court went through the State's motions in limine, picked a jury, and presented testimony from two witnesses including the lead detective. 5RP 20-170.

Blalock returned to court the next day and was present through the end of trial. 7RP 125-32 (defense closing argument).

Mid-trial, however, Blalock moved to dismiss the charge due to prosecutorial misconduct. He pointed out that he had been denied access to legal materials by not only Snohomish County but by King County as well and offered for the court's inspection a copy of a more recent "kite" from the King County jail. Blalock had asked for access to legal materials on April 5, the Friday before trial. The jail responded on April 9 that Blalock was not considered pro se. 6RP 100-02, 105-06; Supp. CP \_\_\_\_ (sub no. 124, supra). Thus, Blalock argued, the prosecutor had again failed him. 6RP 102-03. Alternatively, he asked to withdraw his pro se status or for standby counsel to be appointed based on the denial of access

to legal materials. 6RP 107. The court again denied the motions. 6RP 108.

3. Trial testimony and closing argument

The State presented testimony that Blalock was required to register because of two 2004 convictions for third degree child rape.<sup>4</sup> 5RP 148-49, 160-61, 166-67; 6RP 16-18. He fled through his neighbor's attic when police knocked on his door before ultimately arresting him for failure to register. 6RP 82-85

Blalock had registered on a number of occasions, but had also been convicted of attempted failure to register in 2007 and failure to register in 2009. 6RP 30-34. Witnesses, including representatives from King and Snohomish county registration programs, testified Blalock moved from his last known address in late 2010 but had not registered the move during the charging period. 6RP 16, 48, 92-94.

Blalock acknowledged trying to elude the police before his arrest, but said he fled not because he knew he was guilty of failing to register, but because he had been mistreated by police since his youth and feared them. 7RP 53, 79-80, 84-85.

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<sup>4</sup> In the midst of the argument regarding his continuance request, Blalock refused to stipulate to the underlying convictions that required him to register. 3RP 16-17.

Blalock admitted receiving written notification of his registration requirements on multiple occasions. 7RP 47, 60-61. Since his conviction for the underlying offenses, however, he was often homeless and had had little time to read the fine print of court documents. 7RP 47-48, 51-52, 64-65, 86-88. As Blalock understood it, his registration requirement was connected to his Department of Corrections (DOC) community custody requirements. 7RP 69-70, 75. Blalock recalled a DOC representative told him he had to register for either five or seven years. 7RP 66, 68.

Blalock attended a meeting marking the completion of his DOC supervision in December 2010. At the meeting, he asked his CCO Shawna Dickerson whether he had an ongoing obligation to register. 7RP 50. He said Dickerson told him, "As far as DOC is concerned, you're off DOC." 7RP 86. Dickerson testified her practice was to tell clients whose supervision was ending that while DOC was no longer monitoring them the requirements of the judgment and sentence still applied. 6RP 59.

Blalock's wife, Jennifer, was present at the meeting with Dickerson. The State moved to exclude as hearsay her testimony regarding what Dickerson told Blalock. 7RP 16. The court agreed and

explained that Jennifer could not tell the jury what Dickerson said because such testimony would be hearsay.<sup>5</sup> 7RP 19-20.

Blalock nevertheless attempted to ask Jennifer about what had occurred at the meeting. The court told Jennifer, “You can’t say what Ms. Dickerson said. You can talk about, you know, what you saw because we can cross examine you about that.” 7RP 40.

In closing, Blalock argued the CCO told him that as far as the DOC was concerned, Blalock was “done.” 7RP 129. The prosecutor objected, contending such testimony was not in evidence. 7RP 129. The court sustained the objection. 7RP 129.

4. Post-trial motions and court’s findings

Blalock filed a motion for a new trial based on various theories including prosecutorial misconduct and a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). CP 33-47. The court found the prosecutor had not committed misconduct and therefore denied the motion. CP 48-49.

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<sup>5</sup> As set forth above, the prosecutor did not object to similar testimony by Blalock, who testified after Jennifer and after the court’s ruling, but then objected during Blalock’s closing argument that such statements were not in evidence. 7RP 129.

C. ARGUMENT

1. THE COURT'S DENIAL OF BLALOCK'S REQUEST FOR A CONTINUANCE TO PREPARE FOR TRIAL WAS REVERSIBLE ERROR.

- a. The denial implicated Blalock's right to represent himself and his related right to meaningful access to the courts.

Article I, section 22 of the Washington Constitution guarantees that “in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel,” which includes “the constitutional right to represent himself.” State v. Silva, 107 Wn. App. 605, 618, 27 P.3d 663 (2001). The right is absolute and “its deprivation cannot be harmless.” State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002) (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). An accused also has a federal constitutional right to self-representation. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975).

The right to represent oneself must be timely invoked. But a reasonable time requirement cannot be used to limit the defendant's constitutional right to self representation. State v. Breedlove, 79 Wn. App. 101, 900 P.2d 586 (1995). ““When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted.”” State v. Fritz, 21 Wn. App. 354, 362, 585 P.2d 173 (1978),

review denied, 92 Wn.2d 1002 (1979) (quoting People v. Windham, 19 Cal.3d 121, 137 Cal.Rptr. 8, 560 P.2d 1187, 1191 n.5 (1977)). The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. State v. Estabrook, 68 Wn. App. 309, 317, 842 P.2d 1001, (citing Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir.1990), cert. denied, 501 U.S. 1255 (1991)), review denied, 121 Wn.2d 1024 (1993).

An accused also has a right of access to the courts under the due process clause. State v. Dougherty, 33 Wn. App. 466, 655 P.2d 1187 (1982) (citing Ex parte Hull, 312 U.S. 546, 549, 61 S. Ct. 640, 641, 85 L. Ed. 1034 (1941); Storseth v. Spellman, 654 F.2d 1349, 1352 (9th Cir.1981)), review denied, 99 Wn.2d 1023 (1983). Even though a pro se defendant may have waived counsel, he is entitled to reasonable access to legal and other materials necessary to defend himself. State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (citing Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)). “If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner.” Smith, 430 U.S. at 825-26; see also People v. Sherrod, 59 Cal.App.4th 1168, 1175, 69 Cal.Rptr.2d 361 (1997) (a pro se defendant “is not entitled to any greater privileges or time than what is accorded attorneys; but neither is he entitled to any less”).

The denial of a defendant's motion for a continuance is generally reviewed under an abuse of discretion standard. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The denial of such a motion may, under certain circumstances, operate to deny a defendant a fair trial and due process of law. State v. Williams, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975) (citing State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)).<sup>6</sup> Accordingly, this Court must carefully evaluate a trial court's denial of a motion for a continuance. As the Cadena court explained, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Cadena, 74 Wn.2d at 189 (citing Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964)); see also People v. Cruz, 83 Cal.App.3d 308, 326, 147 Cal.Rptr. 740 (1978) ("The concern for orderly judicial administration must not be the means used to deny a defendant a full and fair trial.").

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<sup>6</sup> Westlaw erroneously indicates that Williams was overruled by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). However, Gosby overruled not Williams but rather a portion of State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968). The error appears to have originated in a scrivener's error in State v. Brett, 126 Wn.2d 136, 220, 892 P.2d 29 (1995), which cites both Cadena and Williams.

Here, the court abused its discretion in denying Blalock's motion. The error violated Blalock's right to self-representation as well as his due process right of meaningful access to the legal system. While an incarcerated, pro se defendant faces a difficult undertaking in defending himself, he must be given a reasonable opportunity to prepare a defense and he must be given no less opportunity than a defendant represented by counsel. Id. at 325.

Blalock offered a good reason for the continuance: He needed more time to prepare for trial, which included not only time to review discovery but also to access legal research materials. The prosecutor offered no countervailing interest other than to generally express frustration and annoyance at Blalock, as well as a bald statement that the delays were "prejudicing the State." E.g. 4RP 8-9. Although two years had passed since the original charges were filed, any prejudice is difficult to glean. Each State's witness but one was a law enforcement employee who relied on files, reports, or online databases to support his or her testimony. E.g. 5RP 148. The sole civilian, a Seattle resident, relied on business records. 6RP 44-49. Had the prosecutor attempted to articulate the prejudice resulting from a small additional delay, he would have been unable to do so.

Undeniably, the situation was frustrating for all involved, not least Blalock. Blalock was told that he could ask for a continuance once he had a

better idea how much time he would need. But Blalock had difficulty accessing legal materials and legal research, primarily due to the State's provision of misinformation and Lederer's failure to timely enter her written withdrawal. This was not the type of danger Blalock was warned about when he requested a transfer to Snohomish County. Nor was it one he could be held accountable for failing to plan for.

Rather than acknowledging his office's role in Mr. Blalock's difficulties, the prosecutor overstated the discussion regarding continuances at the time of the pro se colloquy, asserting that Blalock was told, and even promised the court, that there would be no continuances. 3RP 7-8. Yet the prosecutor was present when Judge Rogers suggested Blalock could be granted a continuance if a review of discovery revealed he would need more time to prepare. 1RP 17-18, 21. Judge Rogers was one of the judges to deny Blalock's repeated April 8 requests for a continuance despite his earlier suggestion Blalock might obtain one. Moreover, despite a duty to act in the interests of justice, the prosecutor failed to provide Judge North judge an accurate description of what occurred during the original pro se colloquy. See, e.g., State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (defendants are among those that the prosecutor represents, and thus the prosecutor owes a duty to see that their rights to a fair trial are not violated) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497

(1899)). Had the prosecutor done so, he would have corroborated Blalock's claims.

In Cruz, in denying a pro se defendant's request for a continuance, the court relied on the fact that Cruz, when he waived his right to counsel, was provided a "clear, unequivocal statement [that he] had to be ready for trial on the date set." 83 Cal.App.3d at 324. The appellate court rejected this rationale as a ground to deny the continuance and reversed Cruz's conviction. Id. at 326.

Here, there was no such unequivocal statement to Blalock that continuances were off the table once he went pro se. Yet "we told you so," was the primary basis for the denials of the continuance request. 3RP 8-9 (Judge North); 4RP 11 (Judge Rogers). As in Cruz, the court abused its discretion in denying Blalock's reasonable request for a continuance. For the reasons set forth below, the error was structural and/or prejudicial and thus warrants reversal.

b. The remedy is reversal and remand for a new trial.

The erroneous denial of the continuance entitles Blalock to a new trial. The trial court's refusal to grant a continuance to prepare for trial was tantamount to denying Blalock the right to represent himself. Where a defendant is denied the right to represent himself, reversal is required regardless of prejudice. Estabrook, 68 Wn. App. at 317; see Johnson v.

United States, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (structural errors include total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of defendant's race, and the denial of the right to self-representation at trial, denial of the right to a public trial, and erroneous reasonable doubt instruction to jury).

Reversal is also required because the denial of the continuance effectively denied Blalock meaningful access to the courts. Although undersigned counsel is unaware of a Washington case with identical facts, our Courts have held that a pro se litigant must be provided access to legal materials to prepare for trial, whether such access is in the form of a law library or standby counsel. Bebb, 108 Wn.2d at 525 (citing Faretta, 422 U.S. at 834 n. 46; Dougherty, 33 Wn. App. 466). Blalock asked for, but was refused, standby counsel. 1RP 6, 23. Through no fault of his own, Blalock had no access to legal research materials. Such a denial of due process requires reversal regardless of a showing of prejudice. See State v. Mundon, 121 Hawai'i 339, 219 P.3d 1126, 1145-46 (2009) (reversing conviction based on deprivation of due process where pro se defendant was denied access to legal materials during the four days before trial and court refused to grant continuance on the ground that it had repeatedly warned defendant of the difficulties of self-representation); see also Cruz, 83 Cal.App.3d at 325

(“[t]he denial of a proper request for a continuance to prepare a defense constitutes . . . a denial of due process.”).

In any event, Blalock can show prejudice. The denial of the continuance left Blalock with inadequate time to prepare his case. He did not have the opportunity to review his discovery or research the law before trial. The inability to review the relevant law could have affected his case in number of ways. Blalock declined to stipulate to his prior conviction. 3RP 16-17. As a result, the prosecutor was able to repeatedly refer to his convictions for child rape. 5RP 128, 129, 132; 6RP 14, 25, 125; 7RP 58, 66, 107, 108, 111, 113, 114. In addition, Blalock presented his wife’s testimony regarding his arrest and the circumstances of his move out of county. But her testimony regarding the CCO’s statements at Blalock’s the final DOC meeting was, as discussed below, improperly excluded as hearsay. Given appropriate access to legal materials, Blalock may have been able to successfully argue Jennifer’s testimony was admissible. As discussed below, such testimony had the potential to undermine the knowledge element of the charge and could have swayed the jury toward acquittal.

2. BLALOCK COULD NOT WAIVE HIS RIGHT TO ATTEND TRIAL UNDER CrR 3.4(b) BECAUSE HE WAS NOT PRESENT FOR THE START OF TRIAL.

It is the court’s role to ensure a knowing, voluntary, and intelligent waiver of the constitutional rights of an accused. The duty to protect

fundamental constitutional rights “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Consistent with this duty, CrR 3.4(a) requires the defendant’s presence at every stage of trial unless “excused or excluded by the court for good cause shown.” (Emphasis added).<sup>7</sup>

This Court reviews construction of court rules de novo. State v. Bertrand, 165 Wn. App. 393, 414, 267 P.3d 511 (2011) (citing State v. Robinson, 153 Wn.2d 689, 693, 107 P.3d 90 (2005)), review denied, 175 Wn.2d 1014 (2012). This Court interprets a court rule as though it were enacted by the Legislature, giving effect to its plain meaning as an

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<sup>7</sup> CrR 3.4, Presence of the Defendant, provides in relevant part:

(a) When Necessary.

The defendant shall be present at the arraignment, at every stage of the trial including the empanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

(b) Effect of Voluntary Absence.

The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict.

expression of legislative intent. State v. Chhom, 162 Wn.2d 451, 458, 173 P.3d 234 (2007). Plain meaning, in turn, is discerned by “reading the rule as a whole, harmonizing its provisions, and using related rules” to help identify the intent behind it. Id.

Under the rule, trial in absentia, although disfavored, is proper if “trial commenced” in a criminal defendant's presence and the defendant's absence is voluntary. State v. Jackson, 124 Wn.2d 359, 361, 878 P.2d 453 (1994).

This Court interprets CrR 3.4 in a manner parallel to the federal courts' interpretation of Federal Rule of Criminal Procedure 43. State v. Hammond, 121 Wn.2d 787, 790-93, 854 P.2d 637 (1993). In State v. Crafton, 72 Wn. App. 98, 103, 863 P.2d 620 (1993), the Court held that under CrR 3.4, trial begins the moment the jury panel is sworn for voir dire. In reaching this conclusion, the Court stated that “when the . . . panel is sworn for voir dire, the defendant is given an unambiguous and readily discernible sign that trial is beginning and he or she will have the opportunity to participate in jury selection.” Crafton, 72 Wn. App. at 103 (quoting State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994)) (alteration omitted).

This “bright-line” rule, Crafton, 72 Wn. App. at 103, “serves to assure that any waiver [of the right to be present at trial] is indeed

knowing.” Thomson, 123 Wn.2d at 883 (quoting Hammond, 121 Wn.2d at 792 and Crosby v. United States, 506 U.S. 255, 262, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993)).

Here, the, before jury selection, court told Blalock trial had already started and could go on without him, whether Blalock liked it or not. 5RP 9, 17. Blalock, frustrated for the reasons discussed above, asked to be removed from the courtroom, and was taken away. The court later found that Blalock had voluntarily removed himself from the proceedings. 5RP 21-22. But as CrR 3.4 makes clear, Blalock could only voluntarily waive his right to be present after the jury panel was sworn for voir dire. That did not occur. Crafton, 72 Wn. App. at 103. Reversal is, therefore, required. Id. at 104.

3. THE COURT ERRED WHEN IT EXCLUDED AS HEARSAY BLALOCK’S WIFE’S TESTIMONY REGARDING THE CCO’S STATEMENTS AND INCORRECTLY SUSTAINED THE STATE’S OBJECTION DURING CLOSING ARGUMENT.

This Court reviews a court’s decision to exclude evidence for abuse of discretion, but only after this Court determines that the trial court properly interpreted the appropriate evidentiary rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Interpretation of an evidentiary rule is a question of law, which this Court reviews de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

A statement is not “hearsay” if it is not offered to prove the truth of the matters asserted. ER 801(c). Out-of-court statements offered to show their effect on the listener, regardless of their truth, are not hearsay. Patterson v. Kennewick Pub. Hosp. Dist. 1, 57 Wn. App. 739, 744, 790 P.2d 195 (1990) (citing 5B Karl B. Tegland, Washington Practice, Evidence § 336, at 34 (3d ed. 1989)). Such statements are admissible provided the listener's state of mind is relevant to some material fact. State v. Parr, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980).

The defendant in a criminal case has the constitutional right to present evidence in his or her defense. State v. Hawkins, 157 Wn.App. 739, 750, 238 P.3d 1226 (2010) (citing State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)). The evidence must be relevant; there is no constitutional right to have irrelevant evidence admitted. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). The threshold to admit relevant evidence is, however, very low. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). “Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.” State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978)).

Here, Blalock did not argue the CCO’s statements suggesting he was no longer required to register were correct. Blalock acknowledged he was

legally required to register for at least 10 years after his 2004 conviction. 7RP 47, 60-61. Thus, he did not seek to introduce the statements for the truth of the matter asserted. Rather, he wished to introduce the statement to demonstrate its effect on his knowledge of an ongoing registration requirement. Indeed, the court instructed the jury that one element of failure to register was that Blalock “knowingly failed to comply with the requirements off sex offender registration.” CP 23 (Instruction 8); RCW 9A.44.132(1).

Such statements were therefore admissible. Patterson, 57 Wn. App. at 744. Because the court misinterpreted the evidence rules, the court abused its discretion in excluding the statement. Foxhoven, 161 Wn.2d at 174

Similarly, the court abused its discretion when it sustained a related objection by the prosecutor during Blalock’s closing argument. Blalock reminded the jury of his own testimony that according to CCO Henderson, as far as DOC was concerned, Blalock was done registering. The prosecutor objected that such testimony was not in evidence, and the court sustained the objection. 7RP 128-29.

When a court errs by excluding evidence, this Court must consider whether the evidence, within reasonable probabilities, would have affected the outcome of the trial. City of Seattle v. Personeus, 63 Wn. App. 461, 465, 819 P.2d 821 (1991). The excluded evidence could have affected the jury’s

verdict in this case. See State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (trial court's ruling excluding testimony was not harmless because it hampered defendant's ability to present his theory of the case).

Here, Blalock's wife was not permitted to testify to evidence that had the potential to persuade the jury that Blalock had a reason to be confused about his registration requirements. Although Blalock did testify to such statements, apparently because the prosecutor forgot to object, the court's ruling sustaining an objection that such facts were not in evidence had the effect of nullifying Blalock's testimony. Cf. State v. Edvalds, 157 Wn. App. 517, 525, 237 P.3d 368 (2010) (juries are presumed to follow a court's instructions as to whether they may consider evidence that has been ruled inadmissible).

Because the trial court erred in excluding this relevant evidence, and the error was prejudicial, Blalock's conviction should be reversed.

4. THE JUDGMENT AND SENTENCE SHOULD BE  
CORRECTED TO AMEND A SCRIVENER'S ERROR

Finally, the court's judgment and sentence states that the dates of the crime were December 1 through December 27, 2010. CP 54. This is consistent with the original charging document. CP 1. The information, was, however, amended to broaden the charging range to January 31, 2011. CP 9.

This Court should therefore remand to correct the judgment and sentence to indicate the proper date range. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

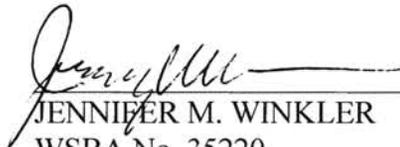
D. CONCLUSION

For the foregoing reasons, this Court should reverse Blalock's conviction. In any event, the judgment and sentence should be corrected to amend the scrivener's error.

DATED this 6<sup>TH</sup> day of December, 2013.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70464-8-1
	)	
TRAVIS BLALOCK,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6<sup>TH</sup> DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

[X] TRAVIS BLALOCK  
DOC NO. 869504  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF DECEMBER 2013.

X *Patrick Mayovsky*

70464-8-1  
12/6/13