NO. 43172-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

REX POPE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00729-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 19, 2013, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Rex Pope was charged by information filed in Kitsap County Superior Court with second-degree assault (based on commission during a felony) and attempted theft of a motor vehicle. CP 1.

On September 12, 2011, Pope was arraigned and counsel was appointed on that date. State's Supp. CP (Clerk's Minutes 9/12/11). Trial was set for November 11. *Id.* Counsel filed an appearance (dated September 12) on September 19. State's Supp. CP (Notice of Appearance).

On November 8, Pope moved to continue the trial date. State's Supp. CP (Clerk's Minutes 11/8/11). Trial was reset to December 6, 2011. *Id.*

On December 6, Pope again moved to continue the trial. RP (12/6 - J. Hartman) 2. Counsel asserted that part of the defense case had to with Pope's Parkinson's disease. RP (12/6 - J. Hartman) 3. He stated that they had had responses from of three physicians or counselors. RP (12/6 - J. Hartman) 3. The court stated that it failed to understand the connection between Pope's medical condition and the assault charge. RP (12/6 - J. Hartman) 4. Counsel responded that based on Pope's condition he would be unable to act as alleged. RP (12/6 - J. Hartman) 4. The State responded that the victim was not severely beaten, and that it would be willing to stipulate that Pope suffered from Parkinson's. RP (12/6 - J. Hartman) 5. The State expressly noted that it did not "know that there's any more to come from that testimony." RP (12/6 - J. Hartman) 5. No further argument was offered by Pope. RP (12/6 - J. Hartman) 5. The court declined to grant a second continuance:

> I'm going to deny the motion for continuance and send the case out. It's been continued o rice before for basically the same reason, and I think it needs to go to bat.

RP (12/6 - J. Hartman) 5. The case was then referred to another judge for trial. RP (12/6 - J. Hartman) 5.

The case came before Judge Mills the same day for trial. Pope renewed his motion for continuance:

> The State -- or the Defense had made requests for medical

> records for Mr. Pope. There are three physicians or medical professionals that are involved in his treatment. Medical waivers were executed, released. We've got – we've had receipt back from one out of three. That issue was brought up before Judge Hartman this morning. Judge Hartman denied the request to continue based on that. Defense feels that those medical records are pertinent to Mr. Pope's defense, because they do address his Parkinson's disease.

RP (12/6 - J. Mills) 4. Counsel conceded to the court that he had nothing to add to what he had presented to Judge Hartman, and, indeed, noted that he was not "able to predict what the medical people will be reporting on, one of the issues was regarding the debilitating effects of Mr. Pope's Parkinson's disease and the effects it has on him." RP (12/6 - J. Mills) 4-5.

Pope also raised, apparently also in support of a continuance, the issue of whether the State would agree to the admission of the fingerprint report without testimony from the Crime Lab personnel. RP (12/6 - J. Mills) 5-6. Counsel conceded that he had had the report since September 14. RP (12/6 - J. Mills) 7. The State and Pope reached a stipulation to resolve the issue. RP (12/6 - J. Mills) 9, 43.

Beyond that, Pope conceded he had nothing to add to what he presented to Judge Hartman, but reiterated his earlier argument. RP (12/6 - J. Mills) 10. The State countered that Pope had not raised a mental defense, and pointed out that he was not an invalid and was able to get around. RP (12/6 - J. Mills) 10. It further pointed out that the testimony was not going to

describe a particularly athletic encounter. RP (12/6 - J. Mills) 10.

The State also questioned whether an expert could testify as to whether Pope could or could not have performed the acts alleged, and noted that there was no offer of proof. Finally, it noted that the State would have no objection to Pope testifying that he had Parkinson's, or to any limitations it put on his abilities. RP (12/6 - J. Mills) 11.

The court declined to change the original ruling:

> I'm not going to overrule what's already been decided this morning. There's no new information provided so far as the medical records. And I've not heard anything specific as to how it's going to relate to or be relevant to the defense, in this case, especially in light of the fact that there appears to be an acknowledgement this afternoon that there is no mental defense being sought.

RP (12/6 - J. Mills) 13.

During pretrial motions, the State objected to the admission of two computer printout, one titled "Parkinson's Disease at a Glance," and the second, "Symptoms by Mayo Clinic Staff." RP (12/6 - J. Mills) 32. Pope explained that he did not want to admit it as evidence on its own, but as something to educate the jurors if they had any questions about why Pope visibly shook in the courtroom. RP (12/6 - J. Mills) 33. The court expressed concern as to whether Pope wished to testify, and counsel responded that he did not. RP (12/6 - J. Mills) 34-36. The State indicated that while it would

not oppose an instruction if the defense concern was the jury drawing adverse inferences from Pope's disease, it would object to introduction of documents with various descriptions of the disease and its effects on some patients without some foundation. RP (12/6 - J. Mills) 38-39. Pope conceded that the State had a point regarding the foundational issues. He did agree to having the court instruct the jury on the issue, however:

> MR. McMURDO: It was being introduced, Your Honor, on Mr. Pope's request so that the jury would have some knowledge that he does have this disease. In hindsight, just going through my mind, I can see the difficulty in bringing in Number 8 during the course of the trial. I would be agreeable, if the State is willing, to agree to some kind of instructions from the Court to let the jurors know that Mr. Pope does have this disease, just so that there's no question in their minds.

RP (12/6 - J. Mills) 40. The court sought clarification of the purpose of such an instruction:

> THE COURT: ... You just want the jurors to know that the reason that he's shaking in court is because of the Parkinson's disease.
>
> MR. McMURDO: Correct.
>
> THE COURT: Okay.
>
> MR. McMURDO: That is his –
>
> THE COURT: All right. So with that, then, what I could do, if it's agreeable to both sides, when ordinarily in the trial I would say, Mr. Anderson, introduce yourself, and he would introduce himself, and then, Mr. McMurdo, I would say, Mr. McMurdo is representing Mr. Pope. And I would say, Mr. McMurdo, would you like to introduce your client, which you would do. You would say, Jurors, this is my client, Mr. Pope. I could, at that point, if it's agreeable, say, you

know, Jurors, at this time, I'd like to inform you that on behalf of – well, actually, I'm wondering. I'm thinking this through. I don't know that it necessarily has to be an instruction. It could even be from Mr. McMurdo to explain to the jurors, I'd just like to let you know the reason why he's shaking is that, as a preliminary matter, my client suffers from Parkinson's disease. And that would answer some questions as to why he's shaking.

RP (12/6 - J. Mills) 41-42. The State responded that it would feel more comfortable with an instruction rather than counsel essentially testifying. RP (12/6 - J. Mills) 42. Pope agreed to that procedure:

> MR. McMURDO: I would have no objection to the Court addressing that or making that introduction, if the Court feels it's more appropriate coming from the Bench than from myself. You know, I certainly defer to the Court on that idea.
>
> Again, I – Mr. Pope and I just wanted it to be known to people, rather than having this overhanging question in their minds, why is Mr. Pope sitting in a courtroom for potentially two, maybe three days, and just visibly shaking without any kind of explanation, one way or another about the reason why he's shaking.

RP (12/6 - J. Mills) 42. The court proposed an instruction, to which both parties agreed:

> THE COURT: ... I've written this, and I'm not sure if it's a little redundant. But I've written, "At Mr. Pope's request, I would like to inform you that he suffers from Parkinson's disease. This is not a fact in the case. But he has requested that this be conveyed to you so as to explain his symptoms."
>
> MR. ANDERSON: That's fine, Your Honor.
>
> MR. McMURDO: That would be agreeable, Your Honor.
>
> THE COURT: Okay. And so I will do that at the

introduction.

RP (12/6 - J. Mills) 43. The next day, the court offered a slightly refined version of the instruction, to which both parties again agreed:

> THE COURT: Okay. And just so that we go over this one more time, what I would say then, to the jurors, concerning what we discussed yesterday, "At Mr. Pope's request, I would like to inform you that he suffers from Parkinson's disease. This is not a fact in the case, but he has requested that this be conveyed so as to explain his visible symptoms of shaking."
>
> MR. ANDERSON: That's fine, Your Honor.
>
> MR. McMURDO: That's fine. Thank you very much, Your Honor.

RP (12/7) 49. The instruction was read to the jury in the latter form. RP (12/7) 52.

After a trial at which only the victim, Laverne Hallsted, and the responding officer, Donna Main, testified, the jury found Pope guilty as charged. RP (12/8) 227-28.

Sentencing was set for January 13, 2012. However, at that hearing, defense counsel moved to withdraw based on an alleged breakdown of communications. RP (1/13) 3-4. The trial court granted the motion and appointed Thomas Weaver as new counsel. RP (1/13) 10.

A status hearing was held on February 24, at which Weaver informed the court that he had reviewed the trial transcripts and had not found any basis to file a meritorious CrR 7.5 motion. RP (2/24) 14. He therefore

announced that he was prepared to go forward with sentencing. RP (2/24) 14.

Pope then asked the court to proceed pro se. RP (2/24) 16. After conducting a *Faretta* inquiry,[1] the Court found a knowing waiver of counsel, and appointed Weaver as standby counsel. RP (2/24) 29. Pope then filed a written CrR 7.5 motion. RP (2/24) 29-30, CP 20. The court set the matter over until date of sentencing. RP (2/24) 30.

In his motion, Pope alleged that he was entitled to a new trial because:

1. His medical records and expert testimony would have shown that he was physically incapable of punching Hallsted;

2. He was not able to testify in his own behalf;

3. His counsel was ineffective for failing to interview witnesses;

4. He was prejudiced by juror comments during voir dire;

5. The State failed to preserve the stick that Pope was using to break the ignition in Hallsted's truck;

6. He did not have any witnesses testify on his behalf;

7. The trial court erred in not granting Pope's second request for continuance and/or counsel was ineffective for not timely seeking a continuance.

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[1] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975).

The State filed a written response before the sentencing hearing. CP 67. At the hearing, the trial court considered the parties' submissions, and denied the motion:

> First of all, so far as the medical records which have been described and which have been provided, as well – first of all, does this constitute newly discovered evidence? I tend to agree with the State that the issue of whether or not Parkinson's existed at the time was not a surprise or no new evidence. It was apparent that that was a concern for the Defendant in bringing his case. In fact, there was discussion, prior to the trial, before the jury, that – and, in fact, on the request of Defense to explain to the jurors why the Defendant was shaking, which the Court acknowledged and agreed to present to the jury, the fact that the shaking was a result of Parkinson's, as opposed to anything else. I believe – my recollection is that there was a concern that the shaking may be perceived as some kind of nervousness or some indication of guilt. And so the agreement and what was presented to the Court and accepted by the Court as a resolution to that issue was to advise the jurors that Parkinson's was an issue for the Defendant, and that was the reason for the shaking. It was not a fact in the case, however.
>
> Certainly, Mr. McMurdo seems to have made some attempts to get those records. But I have to go a step further and ask, What would those records have shown? And there's not been a demonstration that had those records been available, they would have presented the fact that is being sought to be presented, which is whether or not, due to the Parkinson's, Mr. Pope would have been unable to perform the actions – the assaultive actions that were described by the State.
>
> So certainly, sometime before the trial there is a description in the medical records of being diagnosed and having symptoms and indications of Parkinson's. But I've not seen how that would tie in to the defense, as it were. Certainly, Mr. Pope could have testified, should he have chosen to testify, about his abilities or inabilities. He chose not to take the stand. Also, he has not described today how he

is actually prejudiced in his case by not having those records.

RP (3/2) 41-42.

> There's a claim by Mr. Pope today that his counsel was ineffective. He claims that witnesses were not interviewed. There's not been a demonstration how this has prejudiced Mr. Pope. Certainly, Mr. McMurdo could have interviewed the victim in the case. Whether or not he did, I don't know. But I've not seen how Mr. Pope was prejudiced or how that was ineffective assistance of counsel by definition. And so with what's been presented, I'm not able to make a determination of ineffective assistance of counsel. That, of course, is a valid area of inquiry and a valid area of appeal, should this case be appealed.

RP (3/2) 43.

> So far as calling witnesses, there were no witnesses identified in any witness list from the Defense. And so I'm not finding that there was any preclusion or prevention of the Defendant calling witnesses.
>
> Going back for a moment to the records, the fact that records have now been obtained does not mean that those records, in the form that they have been found, would have been admissible in evidence. They are photocopies of medical records. I do not see that there was an attempt to identify, bring in witnesses to in any way bring forth those records. I don't see any affidavits that would have substantiated those records. And so I'm not finding that there was a failure of the Court or this process to allow witnesses from testifying.
>
> So far as the trial date, this case was pending since August of last year. There had been several continuances, as I recall. But certainly, there was no surprise in the trial date itself. Certainly, there was – when this matter – on the day of trial, in the morning, I believe it was Judge Hartman who was on the calendar. There was a request for a continuance. Judge Hartman heard the argument as to whether or not the matter should be continued. He declined to grant the continuance. It was then sent out for trial and came to me. I

> understood and the record reflects that the same request was made of me as the trial judge. The specific question was asked whether there was new information that was not presented to Judge Hartman. And it was relayed by Mr. McMurdo that there was no new information to bolster a request for a continuance. And therefore, the Defendant was bound by the decision of Judge Hartman when he heard that argument. There was no motion for reconsideration brought to Judge Hartman to reconsider his decision to not grant the continuance. I don't see that there are any irregularities in that proceeding. So for all of those reasons, with all due respect, Mr. Pope, I have considered your motion. But I don't believe that they rise to the level of a new trial.

RP (3/2) 44-45.

The matter then proceeded to sentencing. Although the jury had found the alleged aggravating circumstances, RP (12/8) 251, the trial court imposed a standard-range sentence. RP (3/2) 55, CP 7.

B. FACTS

Laverne Hallsted was a computer security specialist at Puget Sound Naval Shipyard in Bremerton. RP (12/8) 91. He commuted via worker-driver bus from Port Orchard to Bremerton. RP (12/8) 91-92. He took the bus from the park-and-ride lot at the National Guard Armory in Port Orchard. RP (12/8) 93.

On August 8, 2011, Hallsted drove his Toyota pickup to the lot and took the bus to work. He parked in his usual spot, the first space on the right. RP (12/8) 95.

When he returned from work that evening the door to the truck was

open. RP (12/8) 97. As he approached he saw feet hanging out of the passenger door. RP (12/8) 97. He would have locked the door when he left in the morning. RP (12/8) 97. The person, later identified as Pope, was wearing white-soled shoes. RP (12/8) 98.

Hallsted approached and saw that Pope had a stick that Halsted kept in the truck to put on the tire chains. RP (12/8) 99. Pope was attempting to smash the ignition lock with the stick. RP (12/8) 99. Halsted had never seen Pope before. RP (12/8) 106.

Hallsted asked him if he could help him. RP (12/8) 99. Pope responded that he could and swung at Hallsted, hitting him in the cheek with his right hand. RP (12/8) 99-100.

Hallsted, who was 57, was surprised and began to fear for his life. RP (12/8) 100. At no point had he threatened Pope. RP (12/8) 100.

After he was hit, Hallsted grabbed Pope's shirt and jabbed him in the cheek, as hard as he could, with his keys. RP (12/8) 101. Pope tried to go through the adjacent hedge, but Hallsted was still holding on. RP (12/8) 102. Pope punched Hallsted in the chin and Hallsted jabbed at him with his key again. RP (12/8) 104. Pope ran. RP (12/8) 104. Hallsted ran after him, but did not want to follow him into the woods behind the armory. RP (12/8) 104.

Pope did not seem to Hallsted to be suffering from any physical

disability at the time of the assault. RP (12/8) 114. He hit Hallsted pretty hard and ran faster than he did, despite Hallsted being "in pretty good shape" himself. RP (12/8) 114.

After giving up the chase, Hallsted returned to his truck and called 911. RP (12/8) 104. Port Orchard Police Officer Donna Main responded to the dispatch. RP (12/8) 133. When she arrived, Hallsted appeared shaken and upset. RP (12/8) 137. He had blood coming from his nose and mouth, and a cut on his forearm that was also bleeding. RP (12/8) 137. Hallsted initially declined medical assistance, but the officer pointed out several places where he was bleeding, and called the medics. RP (12/8) 120. They came and treated his cuts or abrasions at the scene. RP (12/8) 120.

Apparently, none of the other bus riders noticed the altercation. RP (12/8) 105. However, only two other people got off at the stop. RP (12/8) 117. They were parked on the other side of the bus stop. RP (12/8) 119.

Hallsted examined the truck afterwards. RP (12/8) 106. The vent window on the passenger side had been broken open. RP (12/8) 106. The plastic panels around the ignition switch were all broken. RP (12/8) 106. Main, who had done numerous vehicle theft investigations, also surveyed the scene. RP (12/8) 141. She thought the damage Pope did to the area around the ignition lock was consistent with an attempt to steal the vehicle. RP

(12/8) 141.

Hallsted and Main also observed a number of objects that had fallen from the Pope's bag during the altercation. RP (12/8) 109. There were several 8½ by 11 blister packs of pills marked with Pope's name. RP (12/8) 109, 143.

At the scene, Hallsted described Pope as being somewhat darker than the officer, having short hair and wearing a mustard colored T-shirt, dark jeans, and white-soled shoes. RP (12/8) 122. Hallsted would have guessed his age as mid-40's to 50 years old. RP (12/8) 122. Pope was 45. CP 1.

The next day, Hallsted picked Pope out of a photographic montage. RP (12/8) 113, 150, 153. He had never seen Pope before the assault. RP (12/8) 113. Hallsted also identified Pope in court. RP (12/8) 114.

The day after Hallsted made the identification, Main received a report as to Pope's whereabouts. RP (12/8) 156. She and a detective followed Pope to a dirt road where Pope got out of his vehicle and walked down the road out of sight. RP (12/8) 156. They followed him on foot, and when they caught up with him, ordered him to kneel down, and placed him under arrest. RP (12/8) 157. They then walked the 100 yards or so back to the police car. RP (12/8) 157.

Pope had scratch marks on the left side of his face. RP (12/8) 157.

Photos of the injury were shown to the jury. RP (12/8) 159.

Pope did not have any apparent physical disability at the time of his arrest. RP (12/8) 159. He had no difficulty complying with her commands or putting his hands behind his back when she cuffed him. RP (12/8) 178. He did not have any difficulty walking. RP (12/8) 159. He did not have any difficulty kneeling. RP (12/8) 159. He had no trouble getting out of the patrol car. RP (12/8) 159.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED POPE'S SECOND REQUEST FOR A CONTINUANCE ON THE DAY OF TRIAL.

Pope argues that the trial court abused its discretion in denying his second motion to continue trial. This claim is without merit because Pope failed to justify not being ready for trial, and failed to show that allowing him further time would have produced any material evidence.

A criminal defendant is not entitled to a continuance as a matter of right. *State v. Early*, 70 Wn. App. 452, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994);. The trial court in exercising its discretion considers various factors including diligence, due process, the need for an orderly procedure, and the possible impact on the trial. *Id.* (*citing* 12 R. Ferguson, *Wash. Prac., Criminal Practice and Procedure* § 1901 (1984), at 361-62. It

may also consider whether prior continuances have been granted. *Id.* Denial of the motion will not be disturbed absent a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted.[2] *Id.*

Pope fails to show that he acted diligently. Counsel was appointed in mid-September. At the time of the *second* continuance motion in December, he failed to explain why he had been unable to obtain the records he sought. His only comment was that he had requested them, but that he had received them yet. There was no representation as to when they were requested, or what steps Pope had taken to follow up on his requests. RP (12/6 – J. Hartman) 3. Further, the original continuance was apparently granted for the same reason. RP (12/6 – J. Hartman) 2. Finally, Pope *did* obtain records from one of his medical providers. RP (12/6 – J. Hartman) 3. There is no record indication as to why that information was inadequate for Pope to present his purported defense, or why that provider was not called as a witness.

Further, the records request he filed with his post-trial motion indicates that he did not even request the records until after trial, on December 16, 2011. CP 34.

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[2] Pope cites *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009), in support of his claim that review is *de novo*. That case was addressing a constitutional speedy-trial issue, however, and does not appear to overrule long-established precedent that denial of a continuance is reviewed for abuse of discretion. *Id.*, at ¶ 10 ("Because Iniguez argues his

Pope's due process contention is without merit for the simple reason that he failed at trial or now to show how the procurement of additional records would have resulted in admissible exculpatory evidence. Washington courts have held that " failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case." *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975). Nevertheless, such a claim must establish prejudice:

> [E]ven where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

Here, Pope offered nothing to establish that the records he sought would demonstrate that his disability would have prevented him from engaging in the conduct of which he was accused. Nothing in the records he filed after trial establish that fact.

Indeed, the records reveal no indication that Pope had any symptoms other than shaking ("tremulus"), and that he was in "no acute distress." CP 36. Six months before the assault, his toes were tender due to gout, not his

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constitutional speedy trial rights were violated, our review is de novo.").

Parkinson's. CP 38. There is no mention of gout in his exam in June, two months later. CP 35-36.

An August 2009 examination, while noting tremors, also observed that his "power is full." CP 96. It also noted that he walked with "good-sized steps," and that he only was in danger of falling when walking backwards. CP 96. In October of that year, he was again observed to walk fairly well. CP 97.

The remaining documentation is general, and not specific to Pope's particular condition. There is no expert evidence as to the degree of Pope's symptoms, or more importantly, as to whether he would be able, especially in an adrenalin/stress type of situation to punch someone and run away. These materials do indicate, however, that medication can reduce the symptoms. CP 53, 57-58, 61. Pope's June exam indicated that he had been off his medications for two years. CP 35. The chart indicates he is to take a number of medications. CP 36. At the time of the assault, the police recovered several bubble packets of his medications that he dropped. The obvious implication is that he had resumed taking his medications. During the pretrial hearing it was indicated that if he was timely taking his medications, his symptoms were alleviated to a large extent. RP (12/6 – J. Mills) 33-35.

Further, State's evidence was contrary to his claim. Hallsted testified that Pope struck him several times and then ran. Likewise, at the time of his arrest, Main observed Pope walk 200 yards without difficulty, and Pope had no difficulty complying with her command for him to kneel or putting his arms behind his back so she could cuff him. In short, Pope fails to establish by competent evidence that a continuance would have resulted in a different outcome at trial.

Pope argues that "the need for orderly procedure" was not a factor here, because the court could have continued the trial. However, the trial court's need to adhere to its trial schedule is a legitimate factor to be considered when deciding whether to grant or deny a continuance. S*ee State v. Chichester*, 141 Wn. App. 446, 454, 170 P.3d 583 (2007) (denial of continuance was not abuse of discretion as court could consider "orderly procedure in the setting of trials" and prefer maintaining a confirmed trial setting over prosecutor's scheduling conflicts); *see also State v. Edwards*, 68 Wn.2d 246, 257, 412 P.2d 747 (1966). Undoubtedly, the court *could* have continued the trial, but that is not the test. Absent compelling reasons to do so, the trial court was well within its discretion to determine that preventing a backlog of criminal cases, and further inconveniencing the prosecutor, the victim and the law-enforcement personnel, all of whom were ready for trial, was a valid consideration. This is so particularly where Pope had already

received one continuance, and had offered no explanation as to why he was unable to obtain his locally-available medical records in the nearly three months since he was arraigned.

In view of the foregoing, the trial court did not abuse its discretion in determining that further continuing the trial was not appropriate. Under these circumstances, Pope's reliance on *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985), is misplaced. There, in a case involving use of summary contempt procedures, the defendant was allowed only three days to obtain psychiatric evaluations by witnesses that had actually been identified, and it was apparent from the defendant's in-court behavior that there was some question regarding his mental state. Here the defense had nearly three months to obtain his medical records, all of which were apparently locally available, and to find an expert (which to date has not been indentified) who would support his claim. The cases are not comparable. This claim should be rejected.

B. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE, AND EVEN IF IT DID, ANY ERROR WOULD BE INVITED.

Pope next claims that the trial court erred in instructing the jury that Pope suffered from Parkinson's and that this was not a fact in the case. This claim is without merit because Pope requested that the jury be so instructed,

agreed to the instruction given, and the instruction correctly stated the law that the only evidence to be considered was that presented through testimony or exhibits.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Carter*, 127 Wn. App. 713, 716, 112 P.3d 561 (2005) (*citing State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)). Specifically, a party cannot propose a jury instruction and then assign error to it on appeal. *State v. Elmore*, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). This includes challenging the instruction as a comment on the evidence. *Id.*

While merely failing to object does not invite the error, Pope did more than fail to object. Pope specifically requested that the jury be informed of his condition, and twice specifically endorsed the instruction now complained of. *See State v. Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004), *rev. granted on other grounds*, 153 Wn.2d 1017 (2005).

Moreover, even were the alleged error not invited, it is not a comment on the evidence. Trial courts may not comment on the evidence. Const. art. IV, § 16. "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally

believed the testimony in question.' *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

First, the comment is not *on* the evidence. As noted in one of the cases cited by Pope, "[b]y reciting his personal observations of [the witness] as she entered and left the witness stand, the deputy prosecutor improperly introduced evidence not presented at trial and not properly before the jury for consideration." *State v. Rafay*, 168 Wn. App. 734, ¶ 237, 285 P.3d 83 (2012). Pope asserts that this principal does not apply to the defense. He cites absolutely no authority for this startling proposition that a criminal defense attorney could properly argue facts not in evidence.

Secondly, the court properly noted that facts not presented to the jury via testimony or exhibit are not for the jurors consideration. WPIC 1.02 specifically provides:

> The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

The jury was given substantially that instruction in this case:

> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial.

State's Supp. CP (Instruction 1).[3]

Plainly the instruction that Pope sought, which was given in a form to which he agreed, was a correct statement of the law. This claim should be rejected.

C. THIS COURT HAS ALREADY REJECTED POPE'S UNPRESERVED CLAIMS THAT THE DEFINITIONAL INSTRUCTIONS FOR ATTEMPT WERE INADEQUATE.

Pope next claims that the trial court erred in the instruction defining "substantial step." This claim is without merit because Pope did not object at trial, and a challenge to a definitional instruction may not be raised for the first time on appeal. Moreover, the instruction correctly stated the law, and any error would be harmless.

In *State v. Gordon*, 172 Wn.2d 671, ¶ 13, 260 P.3d 884 (2011), the Supreme Court determined that definitional instructions could not be challenged on that basis for the first time on appeal: "Further elaboration in the instructions would have been in the vein of definitional terms, and the omission of such definitions is not an error of constitutional magnitude satisfying the RAP 2.5(a) standard." Further, a definitional instruction that is

[3] In his brief, Pope cites to the defendant's Supplemental Clerk's Papers, but he appears to have overlooked including the instructions his supplemental request.

incomplete may also not be raised for the first time on appeal. *State v. O'Hara,* 167 Wn.2d 91, ¶¶ 23-24, 217 P.3d 756 (2009).

Here, the court instructed the jury that to find Pope guilty of attempted theft of a motor vehicle, it had to find the following elements beyond a reasonable doubt:

> (1) That on or about August 8th, 2011, the defendant did an act which was a substantial step toward the commission of theft of a motor vehicle.
>
> (2) That the act was done with intent to commit theft of a motor vehicle; and
>
> (3) That the acts occurred in the State of Washington.

State's Supp. CP (Instruction 14). This instruction sets forth each of the elements of attempted theft of a motor vehicle. *See State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (attempted crime involves two elements: the intent to commit a specific crime and the taking of a substantial step toward its commission); WPIC 100.02.

Pope nevertheless argues that the instructions were deficient, first, because the instruction defining substantial step, which tracks WPIC 100.05 states that a substantial step is "is conduct that strongly indicates a criminal purpose and that is more than mere preparation." State's Supp CP (Instruction 13), instead of quoting *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978) (to be a substantial step, an act "must be strongly corroborative of the actor's criminal purpose"). He also argues that because

(definitional) Instruction 13 requires only that the conduct indicate a criminal purpose, rather than *the* criminal purpose, the instruction is flawed, citing *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

This court rejected these contentions last year, however:

> Regardless of *Roberts* and *Cronin* and the language difference between WPIC 100.05 and *Workman*, Eplett's arguments are flawed because Eplett reads jury instruction 7 in isolation. It is well settled that we must read jury instructions together, as a whole. *State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003) (*citing State v. Haack*, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997), *review denied*, 134 Wash.2d 1016 (1998)), *aff'd*, 152 Wn.2d 333 (2004). And when read with jury instruction 5, which provides, "A person commits the crime of attempted rape of a child in the second degree when, with intent to commit that crime, he or she does any act that is a substantial step *toward the commission of that crime*," the two instructions clearly require the jury to find that there was evidence demonstrating that Eplett took a substantial step toward committing *the charged offense*. CP at 61 (emphasis added).

State v. Eplett, 167 Wn. App. 660, ¶ 14, 274 P.3d 401 (2012) (emphasis the Court's). In addition to Instruction 13, and in addition to the correct to-convict instruction quoted above, Instruction 12 provided:

> A person commits the crime of Attempted Theft of a Motor Vehicle when, with intent to commit *that* crime, he does any act which is a substantial toward the commission *that* crime.

(Emphasis supplied). This case is indistinguishable from *Eplett*.

Finally, any error would be harmless. When Hallsted came upon

Pope he had broken into Halsted's truck and was in the process of smashing the ignition lock with a chunk of wood. The jury was shown the pictures of the smashed ignition housing. Officer Main testified that in her experience, the damage was consistent an attempt to steal the truck. This claim should be rejected.

D. POPE FAILS TO MEET HIS BURDEN OF ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL.

Pope next claims that counsel was ineffective for failing to adequately investigate the case. This claim is without merit because the record on appeal demonstrates neither deficient performance nor prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*,

117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Pope asserts that counsel did not review his medical records before trial, did not consult with his treating physicians, did not consult with experts, and did not attempt to secure witnesses for trial. None of these contentions is actually support by any record evidence.[4]

Moreover, Pope also fails to demonstrate that the outcome of trial

[4] Pope faults counsel for not seeking reimbursement for records copying until after trial. An examination of the motion, however, shows that the invoice was dated November 30, 2011, which was before trial. Stater's Supp. CP (Motion for Funds).

would have been different had counsel done these things (assuming *arguendo* that he did not). As discussed above, the medical records alone do not establish that Pope could not have committed the crime. Pope has presented no statements from experts supporting his medical theory. He has failed to identify any of the "12" witnesses that counsel allegedly failed to call, and has failed to even allege who they were or what they would have testified to. He identified one witness, Clayton Longacre, but has offered no admissible evidence as to what his testimony would have been. Nor has he identified anything that might have been done differently based on an interview of Hallsted. This claim should also be rejected.

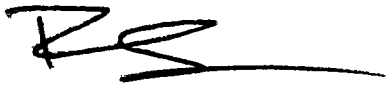
IV. CONCLUSION

For the foregoing reasons, Pope's conviction and sentence should be affirmed.

DATED February 19, 2013.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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KITSAP COUNTY PROSECUTOR

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