

COURT OF APPEALS NO. 69552-5-I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,

Respondent,

v.

LIBAN ADEM,

Appellant.

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

The Honorable Hollis R. Hill, Judge

2013 AUG 20 AM 11:12

COURT OF APPEALS
STATE OF WASHINGTON

36

BRIEF OF APPELLANT

JAMES R. DIXON
Attorney for Petitioner

Dixon & Cannon, Ltd.
601 Union Street, Suite 3230
Seattle, WA 98101
(206) 957-2247

TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF FACTS.....	3
1. Procedural History	3
2. Facts Relating To The Speedy Trial Violations.....	4
3. Trial Testimony	8
III. ARGUMENT.....	16
1. The Court's Failure To Bring Mr. Adem To Trial Within The Required Time Period Requires Reversal Of His Convictions.	16
2. Mr. Adem Was Deprived Of Effective Assistance When His Appointed Counsel Requested A Continuance At The Same Time The State Was Seeking More Time To Obtain DNA Evidence Against The Defendant.....	24
3. The State Failed To Present Sufficient Proof The Gun Was Operational	27
4. The Court Failed To Enter Findings Of Fact As Required By CrR 6.1	34
IV. CONCLUSION	37

TABLE OF AUTHORITIES

Page

Cases

<i>State v. Adamski</i> , 111 Wn.2d 574, 761 P.2d 621 (1988)	23
<i>State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	27
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984)	16, 18, 19
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	35
<i>State v. Chapin</i> , 118 Wn.2d 681, 826 P.2d 194 (1992)	31
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 892 (2006).....	31, 32, 34
<i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288 (2006).....	25
<i>State v. Denison</i> , 78 Wn. App. 566, 897 P.2d 437, <i>rev. denied</i> , 128 Wn.2d 1006 (1995).....	34
<i>State v. Eaton</i> , 82 Wn. App. 723, 919 P.2d 116 (1996).....	36
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980)	25
<i>State v. Faust</i> , 93 Wn. App. 373, 967 P.2d 1284 (1998)	28
<i>State v. Greco</i> , 57 Wn. App. 196, 787 P.2d 940, <i>review denied</i> , 114 Wn.2d 1027 (1990).....	34

<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	34, 35, 36
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009).....	17, 21, 22, 23
<i>State v. Nguyen</i> , 131 Wn. App. 815, 129 P.2d 821 (2006).....	23
<i>State v. Pam</i> , 98 Wn.2d 748, 659 P.2d 454 (1983).....	27, 28
<i>State v. Pierce</i> , 155 Wn. App. 701, 230 P.3d 237 (2010)	28
<i>State v. Portomene</i> , 79 Wn. App. 863, 905 P.2d 1234 (1995), <i>review denied</i> , 129 Wn.2d 1016 (1996).....	36
<i>State v. Raleigh</i> , 157 Wn. App. 728, 238 P.3d 1211 (2010).....	28
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	passim
<i>State v. Saunders</i> , 153 Wn. App. 209, 220 P.3d 1238 (2009)	passim
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005)	31
<i>State v. Vailencour</i> , 81 Wn. App. 372, 914 P.2d 767 (1996).....	34
<i>State v. Wake</i> , 56 Wn. App. 472, 783 P.2d 1131 (1989).....	22
Statutes	
RCW 9.41.010.....	27, 28, 30
RCW 9.41.010(7).....	27
RCW 9.41.040(1).....	3
RCW 9.94A.533	27

RCW 9.94A.533(3) 3

RCW 9A.56.200..... 3

Other Authorities

U.S. Amend 14; Wash const, Art. 1, section 22 24

Rules

Civil Rule 6.1(d)..... 34

CrR 3.3 passim

CrR 3.3(a)(1)-(2)..... 17

CrR 3.3(b)(1) 17

CrR 3.3(c)(1) 17

CrR 3.3(e)(3) 17

CrR 3.3(e)(8)..... 21

CrR 3.3(f)(2) 16, 21

CrR 3.3(h)..... 17

CrR 6.1 passim

CrR 6.1(d)..... 34

U.S. Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed. 2d 368 (1970)..... 31

Strickland v. Washington, 466 U.S. 668,
04 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 24, 26

I. ASSIGNMENTS OF ERROR

1. The court violated Mr. Adem's right to a speedy trial by failing to bring him to trial within the time period prescribed by CrR 3.3, and failing to inquire as to good cause for the continuances.

2. Mr. Adem received ineffective assistance of counsel when his attorney requested a continuance of the trial date at the same time that the State was asking for additional time to obtain DNA evidence against the defendant.

3. There was insufficient evidence to support the trial court's finding as to the firearm enhancement as well as the charge of possession of an unlawful weapon.

4. The court erred in failing to enter CrR 6.1 findings following a bench trial.

Issues Pertaining to the Assignments of Error

1. From the beginning, Mr. Adem expressed his desire for a quick trial. On the record he expressed his willingness to forgo a better plea deal in order to have a quicker trial date. Over his objection, his attorney continued requesting continuances of the trial date. The court did not inquire into the good faith basis for any of these continuances, or why the identified interviews could not be conducted within the time allotted under the speedy trial rule. Nor

did the court inquire as to why, six months after charges were filed, the State needed additional time to obtain DNA evidence. Did the court violate Mr. Adem's right to a speedy trial when it granted the continuances over his steadfast objections?

2. Over her client's express objection, defense counsel requested a short continuance of the trial date at the same time that the State was seeking a longer continuance in order to obtain DNA evidence against Mr. Adem. If this Court were to conclude that defense counsel's request for a short continuance relieved the State of its obligation to demonstrate good cause for the longer continuance, did defense counsel's unreasonable request deprive Mr. Adem of his right to effective assistance of counsel?

3. Mr. Adem was charged with unlawful possession of a firearm, as well as a firearm enhancement on his robbery charge. The State failed to produce the alleged firearm, and the purported weapon was never discharged. Did the State fail to prove beyond a reasonable doubt that the gun was operable?

4. The State failed to enter written findings of fact and conclusions of law following a bench trial, as required by CrR 6.1. Is remand required for entry of these findings?

II. STATEMENT OF FACTS

1. **Procedural History**

The State charged Liban Adem with one count of robbery in the first degree and one count of unlawful possession of a firearm, both alleged to have occurred on February 9, 2012. CP 1-8; RCW 9A.56.200; RCW 9.41.040(1). On September 28, 2012, the State amended the information to add a firearm enhancement as to the robbery charge. CP 31-32; RCW 9.94A.533(3).

On October 4, 2012, Mr. Adem waived his right to a jury trial and proceeded by means of a bench trial before the Honorable Hollis Hill. CP 36. Three weeks later, on October 25, 2012, the court found Mr. Adem guilty of robbery in the first degree while armed with a firearm. RP 574-75. The court issued a lengthy oral ruling and asked the prosecutor to prepare written findings. RP 575. There are no written findings in the court file.

The court never specifically found Mr. Adem guilty of the unlawful possession of a firearm charge. *See Oral Ruling* RP 569-577. In fact, the court never mentioned that charge in its oral ruling. Apparently this fact went unnoticed, as the court later sentenced Mr. Adem on that charge without comment from either party.

The court sentenced Mr. Adem on November 9, 2012 to a standard range sentence on both offenses, plus an additional five years for the firearm enhancement. CP 107-115. The court did not enter findings of fact as required by CrR 6.1.

2. Facts Relating To The Speedy Trial Violations

On March 13, 2012, Liban Adem appeared at a case setting hearing. It was the first case setting hearing, and he had no desire to continue the case for negotiation. The prosecutor put on the record that by setting the case for trial at this point--before the State had made an offer--that Mr. Adem was potentially giving up his ability to broker a favorable deal. RP 3/13/12 at 1-2. Mr. Adem did not change his mind. He wanted to set the case for trial and put the State to its burden.

At the first omnibus hearing on April 13, 2012, defense counsel stated that she needed more time to have a "pretty in-depth conversation" about the case and the evidence to be presented. RP 4/13/12 at 1. Because his attorney believed it important, Mr. Adem agreed to the continuance. The court granted the continuance, with a new expiration date of June 23, 2012. Supp CP __ (sub no. 16A, 4/13/12).

At the second omnibus hearing on May 4, 2012, defense counsel stated that new charges had recently been filed against her client. Mr. Adem had a different attorney representing him on those charges. RP 5/4/12 at 2. The parties wanted to continue the omnibus hearing with a goal of a global resolution. Defense counsel indicated that Mr. Adem was “kind of on the fence” when she had last spoke to him about the continuing the trial date. *Id.* at 3. There was a brief pause in the proceedings and then his attorney asked, “Are you in agreement? Is that a yes or no?” to which Mr. Adem responded, “yeah.” *Id.* The court scheduled a new trial date for June 13, 2012, with an expiration date of June 13, 2012. Supp CP ___ (sub no. 19, 5/4/12). This was the last continuance to which Mr. Adem did not object.

At the third omnibus hearing, on June 1, 2012, defense counsel reported to the court that Mr. Adem was not interested in a plea and wanted a trial in this case. Defense counsel stated that she still needed to interview a number of witnesses, but that Mr. Adem did not want a continuance. RP 6/1/12 at 1-2. He wished to go to trial now, without waiving speedy trial. The court did not make any inquiry as to why the interviews could not be accomplished within the time period for trial, nor did the court inquire as to

why none of the interviews had occurred yet, close to two months after the case had been set for trial. Instead, the court granted a continuance over Mr. Adem's specific objection. Supp CP __ (sub no. 22, 6/1/12). The new omnibus and trial date were set beyond the existing expiration date, with a trial date of July 16, 2012, and new expiration date of August 15, 2012. *Id.*

At the fourth omnibus hearing, on July 13, 2012, defense counsel again sought another continuance over her client's specific objection. At this point, Mr. Adem was back in custody. RP 7/13/12 at 3. Defense counsel stated that she needed a one-week continuance to prepare the case for trial. Specifically, the robbery victim still needed to be interviewed. *Id.* at 3.

Significantly, the State also wanted more time in which to develop its evidence against Mr. Adem. *Id.* at 2. Despite the fact that the robbery had occurred back on February 9, 2012, the State indicated that it needed around 30 days to receive results from DNA testing. The tape from the hearing contains inaudible portions, but it appears that the State did not provide specific dates as to when the request had been put in for the DNA, other than a vague "it was a number of months ago." *Id.* at 4. The State did not

offer any explanation as to why it still had not taken a sample from Mr. Adem at the time of the hearing.

The prosecutor then informed the judge that Mr. Adem was in custody on other charges with later trial dates, "so he's not going anywhere in the near future." *Id.* The court appeared to consider this an important factor in determining whether the continuance of the trial date should be granted: "So, he's held on the other cases? They have trial dates later than this?" *Id.* The court granted the state's motion to continue the trial date to August 13, 2012, with a new expiration date now extended to September 12, 1012. Supp CP __ (sub no. 30, 6/1/12).

At the fifth omnibus hearing on August 3, 2012, defense counsel again requested a later omnibus date of August 16th, and a trial date of September 5, 2013. According to the prosecutor, the lab had just notified him that a piece of clothing sent off for DNA testing had come back as a match for the defendant. RP 8/3/12 at 1. Mr. Adem again objected to the continuance. *Id.* at 2. The court nevertheless granted the continuance over Mr. Adem's objection. CP 29.

At the sixth omnibus hearing on August 16, 2012, defense counsel again sought a continuance over her client's objection. RP

8/16/12 at 1. Despite the fact that the prosecutor had notified the court two weeks earlier of the lab results, defense counsel stated that she had not received the results of the examination until August 15th. *Id.* at 2. It was not explained why she waited so long to obtain the results. Defense counsel went on to explain that she was in trial until the end of August. She was not sure if she would need an expert, so she requested an additional six weeks before the next omnibus hearing, with a trial date on October 1, 2013. Mr. Adem objected to the continuance. *Id.* at 3. The court found, based on defense counsel's representations (and over Mr. Adem's continuing objections), that a continuance was necessary in the interests of justice. CP 30.

It was not until October 4, 2012 that the trial in this matter began. Of note, defense counsel did not request funding for a DNA expert to review the case, and did not present any DNA expert testimony.

3. Trial Testimony

On February 9, 2012, three suspects with bandanas across their face entered a small grocery and jewelry repair shop. This shop was located in the international district, and Ms. Lang Huynh owned and operated the repair shop portion of the store. RP 149.

There was a security camera that captured the incident on tape. RP 156.

The suspects pushed Ms. Huynh and told her to keep her head down. RP 154. She did as she was told. RP 155. Someone pushed what Ms. Huynh believed to be a gun against her head. RP 169. Ms. Huynh then added, "But, I did not look at the gun, you know?" RP 170. Ms. Huynh added that she had never actually seen a real gun except in a movie. She did not touch the gun. *Id.*

According to the security camera, the person with the gun was wearing a green hoodie. Because the suspects were all wearing hoods and bandanas, Ms. Huynh could not identify any of the men who came into her shop. RP 168. Other than bumping into a display case, Ms. Huynh did not suffer any injuries. RP 170-71.

After scooping up trays of jewelry from the display counter and the safe, the robbers ran out to a van in the back alley. As chance would have it, Nicholas Crimp, an employee from a nearby business, was at that same time parking his car in the alley. As he parked the car, he noticed a gray van parked in the alley with a driver hiding part of his face. RP 97. A moment later, masked men came running out of the jewelry store. As the fleeing suspects sprinted towards the awaiting van, jewelry spilled onto the ground.

RP 98. It was not until Crimp saw what appeared to be a gun skid across the ground towards his car, that prudence won out over curiosity. Crimp ran away and hid. RP 98. When the van drove away, Crimp called the police. RP 107. Crimp admitted that he is not very familiar with handguns, but he did think he heard a metallic sound when it hit the pavement. RP 105-06. The gun was never recovered. RP 251.

While the gun was never located, the van was discovered a short while later. After a description of the van was broadcasted to other police units, an officer saw the van in a parking lot of a housing project where one of the co-defendants lived. RP 138. Crimp identified it as the same van. RP 110-111. Nobody was in the van but the police did find various items of jewelry inside. RP 140, 213. Neither the inside of the van, nor the contents of the van, were ever tested for fingerprints. RP 250

Police spoke to Ms. Rivera, a resident at the housing project who lived near where the van was parked. She testified that she been looking out her window when she saw three people run by. RP 174. A moment later, a fourth person, who was not running, tossed something into the dumpster. *Id.* Ms. Rivera told police that this fourth person had long hair (which Liban Adem did not have at

that time). RP 181. The police retrieved the item and determined that it was a green multi-patterned hooded sweatshirt worn by the suspect with the gun in the robbery video. RP 207-08, 238.

The police spoke to Hassan Warfa. Hassan is the older brother of Liban Warfa, one of the men the police suspected of committing the robbery. RP 317. Hassan testified at trial about what he recalled of the incident.

Hassan works at the Port of Seattle, a job he has held for close to three years. RP 373-374. In the early morning hours of February 9, 2012, Hassan arrived home from work and saw his brother Liban Warfa with their cousin, Liban Adem. RP 322-23, 326, 337. Hassan went to bed while they were still up. The next morning, Hassan's brother woke him up and asked for the keys to the van. Hassan did not see Liban Adem with his brother at that time. Hassan gave him the keys and went back to sleep. RP 325-326, 359-361.

It was shortly after noon when Hassan next saw the van. RP 327. He had been outside the apartment working on his car, when the van pulled up. Hassan watched as the van door slid open, and four people began running away. Id. Concerned that something untoward had occurred, he ran after the occupants, yelling at them

to stop. RP 330. They did not. He could identify some of the occupants. He saw his brother (Liban Warfa), as well as a long time friend, Nate. He also saw a short Mexican guy he did not recognize. RP 328. There was a guy in a green sweatshirt that was running. Initially Hassan had assumed this was Liban Adem, but he later learned that this was not correct. RP 328, 345.

The State questioned Hassan extensively about his earlier statements implicating Liban Adem, but Hassan steadfastly maintained that he had made incorrect assumptions and that the police had pressured him to name Liban Adem as a participant. The police told him that because he drives the van he could be charged and deported. RP 371-73. They also threatened to contact his employer and cause him to lose his job. RP 371. He felt intimidated. The police had seized Hassan's wallet, demanding to know how come he had \$1,663 in his wallet. He tried explaining it was from his paycheck. RP 369-70. The police kept his money for the 4 to 5 hours he was detained. RP 363, 369. The police made Hassan very anxious to cooperate. RP 373.¹

¹ The court admitted Hassan's prior statements for purposes of impeachment only. RP 574. The court did indicate that his statement that he chased after Liban could be considered as a recollection recorded, but that this fact was not central to the court's decision. RP 574.

The only person at trial who actually identified Liban Adem as a participant in the robbery was a juvenile co-defendant, Antonio Ortiz. Mr. Ortiz explained that he really had little choice in the matter. RP 67. He was 16 years old, and told that he would be tried as an adult on felony charges unless he pled guilty and specifically named the co-defendants in his plea. RP 70, 73, 83, 90. There were three charged co-defendants in superior court, and Mr. Ortiz obediently complied by listing all three. RP 73. As an adult, he would have received more than eight years in prison as an accomplice to an armed robbery. By accepting the State's offer, he received a three-month sentence. RP 75.

Ortiz testified that when he got into the van, the person in the green hood was in the front passenger seat, facing forward. RP 87. He never saw anyone with a gun. RP 80. He hardly knows Liban Adem. RP 81. In fact, when shown a photomontage by the police, he told police he was unable to recognize Liban Adem. RP 65. Nevertheless, following his plea deal, Mr. Ortiz stated that he did in fact recognize Liban Adem as the person in the green hoodie, and

that he had lied to the police when he said he could not identify him.² RP 65, 69.

Inside a dumpster, police located jewelry trays taken from the heist. RP 226. One the trays contained a live round of ammo. RP 229; EX 40. One of the police officers speculated that the live round might have been ejected from the gun used in the robbery if the suspect had attempted to chamber a bullet when one was already in the chamber. RP 247. No testing was conducted on the bullet.

At trial, the State also introduced DNA evidence intended to connect Liban Adem to the green hooded sweatshirt recovered from the trash dumpster. The lab technician testified that the likelihood of two people chosen at random in the United States sharing the same DNA profile was 1 in 7.9 quadrillion. RP 281, 293. But in this case, at least one of the other suspects was not a random person. Rather, one of the known participants was Liban Warfa, who was Liban Adem's cousin. RP 348. The lab technician failed to test the DNA from the hoodie against Liban Warfa's DNA, nor did

² While Ortiz was on the stand, Liban Adem purportedly mouthed to him that he was going to pay dearly for his testimony. While the prosecutor viewed this as evidence of guilt, defense counsel appropriately pointed out that it was just as equally an angry expression directed at someone who was giving false testimony in court.

she offer any statistics regarding the likelihood of two cousins sharing similar characteristics.

Further questioning of the DNA technician revealed that there was additional DNA found on the sweatshirt not attributed to Liban Adem. RP 278-279. The crime lab made no effort to determine to whom that DNA belonged. Nor could the DNA technician offer any opinion as to how long the DNA would have remained on the clothes, if for example, Liban Adem had worn his cousin's sweatshirt at some point in the past. RP 299. The technician further acknowledged that items can be extremely sensitive to contamination at the crime scene, and that while she can protect against contamination in the lab, she has no control over the crime scene and the taking of the subject's DNA. RP 283-84, 286, 298.

Mr. Adem did not testify. Following the trial, the court found Mr. Adem guilty of robbery and the firearm enhancement. RP 574-75. The court made no mention of the unlawful possession of a firearm charge. Although the prosecutor stated that he would prepare written findings of fact, it appears that he never did so. RP 575. There are no CrR 6.1 findings on record.

III. ARGUMENT

1. **The Court's Failure To Bring Mr. Adem To Trial Within The Required Time Period Requires Reversal Of His Convictions.**

A trial court may grant a continuance over a defendant's objection. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). Before doing so, however, the court is required to make a meaningful inquiry and determination that the continuance is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

In the present case, Mr. Adem made it clear from the start that he was not interested in negotiation; he wanted a speedy trial. In fact, the prosecutor even put that on the record at the time of the first case setting hearing. Given Mr. Adem's steadfast objections to the repeated continuances, the court was required to inquire in greater detail before granting the repeated continuances requested by Mr. Adem's appointed counsel and by the prosecutor. The last expiration date that Mr. Adem agreed to was July 13, 2012. Because the court failed to comply with the requirements of CrR 3.3 in extending the trial date beyond that time, reversal is required.

A defendant who is held in jail must be brought to trial within 60 days of arraignment, unless a period of time is excluded

from the time for trial. CrR 3.3(b)(1), (c)(1). When a defendant is out of custody, the State has 90 days in which to bring the defendant to trial. A delay pursuant to a properly granted continuance is excluded from the time for trial period. CrR 3.3(e)(3). While the court's decision to grant a continuance required in the administration of justice is generally reviewed for an abuse of discretion, a violation of the time for trial rule is reviewed de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Once the 60-day time for trial period expires without a lawful basis for further continuances, CrR 3.3 requires dismissal and the trial court loses authority to try the case. *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009); CrR 3.3(h). "The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials." *Saunders*, 153 Wn. App. at 220 (citing CrR 3.3(a)(1)-(2)).

In the present case, while desiring a quick trial, Mr. Adem agreed to his attorney's request for a continuance at the first omnibus hearing. More grudgingly, he agreed to the second. Thereaf-

ter, for the next four continuances, Mr. Adem repeatedly objected to requests to extend the trial date.

When a defendant objects to a continuance requested by his attorney, the trial court is still required to make the requisite findings. See *Saunders*, 153 Wn. App. at 212-15. It is helpful to compare cases in which the trial court made sufficient findings against those in which the trial court's findings and the explanations offered by counsel were inadequate.

For instance, in *State v. Campbell*, the Supreme Court rejected a CrR 3.3 speedy trial challenge where defense counsel stated she needed additional time to prepare the defense in this death penalty case. *State v. Campbell*, 103 Wn.2d at 14-15. Of particular note, the defense made the request while still within the initial 60 days since the filing of charges.

In response to the defense request for more time the trial court in *Campbell* made specific findings that the delay was "through no fault of [defense counsel's] own but because of the complexity and length of this case." *State v. Campbell*, 103 Wn.2d at 14-15. Further, the State conceded that discovery would not be complete by the trial date. Finally, the trial court found that if it required defense counsel to go to trial within that initial 60 days of

charges being filed, that a claim of ineffective assistance of counsel could be raised on appeal. *Id.* Even with the granted continuances in *Campbell*, trial in this triple homicide death penalty case occurred within six months of charges being filed.

The facts in *Campbell* stand in sharp contrast to the facts in our case. Here, the continuance requested in July of 2012 occurred six months after the case was filed. At that point, the State had not yet even obtained a DNA sample from the defendant, and yet was seeking a continuance to gather additional evidence. The court did not make a finding of due diligence on the part of the State, nor could the court have done so under these facts. As to defense counsel's request for a continuance, there was no finding by the court that the defense interview of a witness could not occur within the time set for trial. Neither the State nor defense counsel exhibited anything resembling due diligence.

The Court of Appeals' decision in *State v. Saunders* is more analogous to our case. In that case, the Supreme Court held that a trial court must still find good cause for an "agreed" continuance, when the defendant is himself objecting to the continuance. In *Saunders*, the trial court granted six continuances over the defendant's objections. For the last three, neither party demonstrated

that continuances were required in the administration of justice. One was granted to allow for further negotiations, despite the defendant's statement that he was done negotiating and ready to go to trial. The other two were granted because the case had not yet been assigned to the deputy prosecutor who would try the case. There was some discussion about a particular trial prosecutor just coming off a seven week long trial, but as of the last continuance date, the case was still in the negotiating unit and had not been assigned to anyone for trial. *Saunders*, 153 Wn. App. at 212-15.

On appeal the Court noted that, while a specific prosecutor's unavailability due to another case may be justify a continuance, the record showed that the reason for the continuance was that the State had failed to assign the case to a prosecutor for trial. *Saunders*, 153 Wn. App. at 219. Because the State provided no meaningful explanation for the requested continuances, the court abused its discretion in granting them. Thus, despite the agreement of defense counsel (over the client's objection), the Court reversed *Saunders*'s convictions and remanded for dismissal of the charge with prejudice. *Id.* at 221.

The failure to adequately document the factual basis for a trial continuance was the basis for the Supreme Court's reversal of

a conviction in *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). In that case, the court continued a trial date beyond speedy trial based upon the “unforeseen or unavoidable circumstances” exception contained in CrR 3.3(e)(8). The court of appeals affirmed the conviction, but the Washington Supreme Court reversed. In doing so, the Court explained, “But the record here contains no information regarding the number or availability of unoccupied courtrooms, nor the availability of visiting judges or pro tempores to hear criminal cases in the unoccupied courtrooms.” *State v. Kenyon*, 167 Wn.2d at 138. Citing to the requirement of CrR 3.3(f)(2) that the court state the reasons for the continuance, the Supreme Court found that the trial court’s failure to comply with this provision required reversal. *Id.* at 139.

In the present case, the State wanted a continuance in order to obtain DNA results. In seeking the continuance, the prosecutor speculated that the delay in obtaining the results might be a result of possible backlog at the crime lab. First, the prosecutor presented no facts that would support a claim of a backlog. Moreover, this request was made more than 180 days after charges were filed, and the State had not yet even obtained a sample DNA from the defendant. See Supp CP __ (sub no. 34, 7/24/12 , order com-

elling DNA sample). Nor were there findings by the trial court that a delay of this magnitude in gathering and processing evidence could justify a continuance. To the contrary, “if congestion at the state crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.” *State v. Wake*, 56 Wn. App. 472, 475, 783 P.2d 1131 (1989).

Compounding the problem, the judge seemed to grant the continuance on the basis that there would be no prejudice to the defendant because he was in jail on other charges. In asking for the continuance, the prosecutor assured the judge that Mr. Adem was in custody on other charges and therefore “would not be going anywhere soon.” RP 7/13/12 at 4. The judge, rather than asking questions about the delay in requesting and obtaining the DNA results, simply asked for confirmation that Mr. Adem was in custody on other charges with later trial dates. Upon receiving that confirmation, the court granted the continuance. RP 7/13/12 at 4-5.

This was an untenable basis for granting the continuance. The purpose of the speedy trial rule is to ensure a timely trial, regardless of whether the defendant is in custody. Criminal rule 3.3 has the purpose of protecting that right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Neither CrR

3.3 nor the cases interpreting that rule require a showing of prejudice. See *Kenyon*, 167 Wn.2d at 136; *Saunders*, 153 Wn. App. at 220. It is the denial of the speedy trial itself, not whether the defendant was in custody, that is controlling.

The State may argue in our case that the deferential “abuse of discretion” standard protects the trial court’s ruling from meaningful review. Such an argument, if made, should be rejected. As this Court has explained:

The State retreats to the argument that the decision to grant a continuance is discretionary with the trial court. But as our Supreme Court has observed in another context, if “administration of justice” can be invoked at any time to grant a continuance, then “there is little point in having the speedy trial rule at all.” *State v. Adamski*, 111 Wn.2d 574, 580, 761 P.2d 621 (1988).

State v. Nguyen, 131 Wn. App. 815, 821, 129 P.2d 821 (2006).

In sum, because the defendant specifically objected to the continuances, the court was required to make the requisite findings that the continuances were necessary in the administration of justice. *Saunders*, 153 Wn. App. at 221. The fact that defense counsel joined in those motions does not relieve the trial court of that obligation. See *Id.* The court did not make the necessary findings; nor were facts presented that could have supported such a finding.

Because the improper continuances deprived Mr. Adem of his right to a speedy trial, the charges must be dismissed.

2. Mr. Adem Was Deprived Of Effective Assistance When His Appointed Counsel Requested A Continuance At The Same Time The State Was Seeking More Time To Obtain DNA Evidence Against The Defendant.

It should not be necessary for this Court to address this ineffective assistance of counsel argument. As noted above, the fact that defense counsel sought a short continuance of the trial date, did not excuse the court from making findings as to the State's request for a longer continuance so as to belatedly obtain and process DNA evidence. But, if this Court were to conclude that defense counsel's motion did relieve the trial court of that obligation, then Mr. Adem most certainly received ineffective assistance of counsel.

The state and federal constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Amend 14; Wash const, Art. 1, section 22. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 04 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Both requirements are satisfied in this case.

As an initial matter, it can hardly be contested that defense counsel's action were unreasonable. The robbery victim in this case had already indicated to the police that she was unable to identify the suspects in this case. Up to this point, in the five months since the charges were filed, defense counsel had not brought any motion to compel her interview or deposition. This sudden need to continue the trial date over her client's objection in order to talk to the witness, who by her own account saw nothing, is unreasonable. More importantly, any reasonable attorney would recognize that the threat of DNA evidence was a greater threat than the need to interview a witness whom had already given statements to the police.

While there is a presumption of competency, this presumption is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). Because there was no legitimate trial strategy in allowing the State additional time to obtain DNA re-

sults against her client, this Court must necessarily find deficient performance in failing to object to the continuance.

To show prejudice, Mr. Adem need not show his attorney's deficient performance more likely than not altered the outcome of the proceeding. *Thomas*, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, *i.e.*, "a probability sufficient to undermine confidence in the reliability of the outcome." *Fleming*, 142 Wn.2d at 866 (quoting *Strickland*, 466 U.S. 668). In the present case, the court specifically adopted the DNA results into the court's oral findings. RP 572. Moreover, as a simple matter of human nature, the fact that the DNA results appeared to support the trial court's credibility determination, it cannot be said with confidence that the verdict would have been the same in the absence of this evidence. Mr. Adem more than satisfies the prejudice prong of the *Strickland* test.

As a general rule, a finding of ineffective assistance results in a new trial. In the present case, however, this is an inadequate remedy. The State did not have a reasonable justification for a continuance. Thus, even assuming that defense counsel's request for a continuance somehow waived the speedy trial issue ad-

dressed above (which it did not), Mr. Adem is not made whole by simply granting him a new trial with the State allowed to use the same evidence against him. But for defense counsel's deficient performance, the charges would have been dismissed against Mr. Adem. The appropriate remedy under these circumstances is dismissal of the charges.

3. The State Failed To Present Sufficient Proof The Gun Was Operational.

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533 (3). This section incorporates the definition of a firearm found in RCW 9.41.010. That provision provides the following definition: "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." See RCW 9.41.010 (7).

The Supreme Court has held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*,

111 Wn.2d 124, 761 P.2d 588 (1988)). Published cases decided by the Court of Appeals after *Pam* but prior to *Recuenco* took the position that *Pam* allowed the enhancement even in the case of an inoperable gun, as long as it was a "real" gun. See, e.g., *State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998). But *Recuenco* clarified that *Pam* prohibited the enhancement unless the State established that the gun was operable. *Recuenco*, at 437.

Relying upon *Recuenco*, the Court in *State v. Pierce*, held that the defendant's firearm enhancements must be vacated where the State presented inadequate evidence of the operability of the firearms. *State v. Pierce*, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010). The *Pierce* Court further held that it was error for the trial court to fail to instruct the jury that it must find that a gun is operable in order for it to meet the definition of a firearm under RCW 9.41.010. *Pierce*, 155 Wn. App. at 714.

Some courts have characterized the language in *Recuenco* as dicta, unnecessary to the decision. See *State v. Raleigh*, 157 Wn. App. 728, 238 P.3d 1211 (2010). For instance, in *Raleigh*, the Court of Appeals held that in order to qualify as a firearm under RCW 9.41.010 a gun need only be a "gun in fact" as op-

posed to a toy gun. *Id. at 734*. This argument is unpersuasive.

As an initial matter, the Supreme Court is well aware that dicta is disfavored and therefore it should be presumed that the Court means exactly what it says. Moreover, it is clear from the context that this language regarding operability of the weapon went straight to the heart of the controversy. In *Recuenco*, the defendant was found guilty of assault in the second degree for threatening his wife with a deadly weapon. The weapon at issue was a handgun. There was no testimony that the handgun was operational.

The jury made a specific finding that the defendant used a deadly weapon for purposes of a sentencing enhancement. Because the only evidence of a deadly weapon was the handgun, the court imposed a firearm enhancement, rather than just a deadly weapon enhancement, to the sentence. The issue before the Supreme Court was whether this was a harmless error. The dissent argued it was, as there was no other weapon used.

The majority rejected this argument:

The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." [Internal citations omitted] We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. [Citations omitted]

Recuenco at 437.

Thus, critical to the Court's holding that the error could not be harmless (the precise issue before the Court) was the fact that although the only weapon mentioned at the trial was a handgun, there had been no evidence presented that the gun met the definition of a firearm under RCW 9.41.010 because there had been no evidence presented that the gun was operable. See *Recuenco* at 437. The language about the State bearing the burden of proving a firearm operable was central to the *Recuenco* Court's holding because the State's failure to

meet that burden was one of the two facts which, taken together, rendered the error not harmless.³

This definition of a firearm applies to both the charge of unlawful possession of a firearm as well as the firearm enhancement added to the robbery conviction. In each instance, due process requires the State to prove the existence of an operable firearm with proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). In determining the sufficiency of the evidence, “the existence of a fact cannot rest upon guess, speculation, or conjecture.” *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is insufficient to support a conviction unless; viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691-92, 826 P.2d 194 (1992).

In the present case, the court appeared to focus on the wrong issue. Following the prosecutor’s lead, the court’s oral find-

³ The other fact that rendered the error not harmless was that because the State failed to provide notice that it was seeking a firearm enhancement, the trial court’s imposition of such an enhancement violated Mr. Recuenco’s right to notice and due process. See *Recuenco* at 440-41. In subsequent cases, the Supreme Court held that the lack of a jury finding, standing alone, would be enough to invalidate the conviction or enhancement.

ings were directed at whether this was a toy, or whether it was a “real gun.” As discussed above, the State was required to prove beyond a reasonable doubt that the firearm was operational. The court made no findings as to that dispositive issue, nor was there sufficient evidence from which the court could have made that finding.

In finding that the gun was “real”, the court relied upon Ms. Hunyh’s testimony that she was confident the suspect held a gun. But Ms. Hunyh testified that she had never seen a real gun and her only knowledge of guns came through seeing them in a movie. Ms. Hunyh’s subjective belief, without a factual basis to support that belief, is meaningless. See *State v. Colquitt*, 133 Wn. App. at 796 (officer’s belief that the little rocks “appeared to be rock cocaine”, combined with positive field test for cocaine, insufficient to prove substance was cocaine).

The State also cited to the presence of a live round on a jewelry tray discovered in a dumpster. RP 575. Again the focus appeared to be on whether a toy gun would use a bullet, not whether the gun was operational. While the presence of the bullet leads to interesting speculation as to how the bullet ended up in the

dumpster, this does not establish proof beyond a reasonable doubt that the gun was operational.

The court also cited to the testimony of Nick Crimp who heard the sound of metal hitting the pavement. RP 575. While this may establish that the firearm was not a plastic toy, his testimony accomplishes little else.

The court stated in its oral ruling, "Eyewitness testimony to a real gun that is discharged and not recovered is sufficient to support a firearms enhancement under the law." RP 575. The court is correct. If an eyewitness observed a gun being discharged, that would be sufficient evidence to support a finding that the gun was operational. In the present case, no such evidence exists. The gun was never discharged.

While the State may be able to point to some evidence suggesting an operational gun, there is a great chasm separating "some evidence" with proof beyond a reasonable doubt. Here the totality of the evidence fails to rise to the requisite high level. The gun was never fired nor recovered. At most, the State established it was not a *plastic* toy. But whether the handgun was a toy is not the dispositive issue. The question is whether the gun was operational. The State did not come close to meeting that burden. The

enhancement and the unlawful possession of a firearm must be dismissed.

4. The Court Failed To Enter Findings Of Fact As Required By CrR 6.1.

Civil Rule 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial." *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).⁴ The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). "Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts." *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940, review denied, 114 Wn.2d 1027 (1990). In a bench trial the right to appeal is not lost and the State continues to bear the burden of proving each element of each charge beyond a reasonable doubt. *Colquitt*, 133 Wn. App. at 793-96.

The written factual findings should therefore address the elements of the crimes separately and state the factual basis for the

⁴ CrR 6.1(d) states: "In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties."

legal conclusions as to each element. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437, *rev. denied*, 128 Wn.2d 1006 (1995). The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see *Head*, 136 Wn.2d at 622 ("A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.").

In the present case, the court did not enter any oral or written findings as to the unlawful display of a weapon charge. In fact, the court did not even issue an oral ruling finding Mr. Adem guilty of that charge. There is simply no mention of the charge until the time of sentencing, when the court sentenced Mr. Adem on both the robbery and the firearm charge.

As to the robbery and the firearm enhancement, the court did issue somewhat detailed, prepared oral findings. The court asked the State to prepare written findings, but it appears that did not happen. As of the date of this brief, no written findings have been filed. The current state of the record therefore prohibits effective appellate review.

The failure to enter findings does not, on its own, require reversal of the conviction. Rather, the remedy is to remand for the Court to enter findings of fact, which can then be challenged in subsequent briefing. *Head*, 136 Wn.2d at 624. Assuming the State ultimately presents the findings and conclusions and the court signs them, reversal will still be required if the delayed entry prejudices Mr. Adem or prevents effective appellate review in his case. *State v. Portomene*, 79 Wn. App. 863, 864, 905 P.2d 1234 (1995), *review denied*, 129 Wn.2d 1016 (1996). Similarly, if the findings are tailored to address the issues raised in this brief, reversal must follow. *State v. Eaton*, 82 Wn. App. 723, 727, 919 P.2d 116 (1996); *Portomene*, 79 Wn. App. at 865.

Given the detailed oral ruling from the bench, it is assumed that the written findings will mirror the court's oral ruling. Should the written findings depart from the oral ruling, it would certainly raise suspicion that the findings were tailored to address the issues raised in this opening brief. Thus, depending on the content of the findings and conclusions (if and when they are ultimately entered), Mr. Adem reserves the right to address the issues of prejudice and tailoring in a supplemental or reply brief. *See Head*, 136 Wn.2d at 624-25, n.3 (The question of tailoring is not ripe prior to remand.)

IV. CONCLUSION

Mr. Adem had a right to be brought to trial in a timely manner. Because of his repeated objections, the trial court had an obligation to ensure that there was good cause for a continuance. Because the trial court failed to do this, reversal of all charges is required. Independently, there was insufficient evidence of an operable gun to support the firearm enhancements and the conviction for unlawful possession of a firearm. Finally, because the trial court failed to enter written CrR 6.1 findings, remand is required.

Respectfully Submitted on this 20th Day of August



James R. Dixon, WSBA #18014
Attorney for Appellant