NO. 311686-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

ELVIS CAMILLO RENTERIA LOPEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00407-0

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

On April 16, 2010, after two high speed chases, resulting in damage to a police vehicle and the use of spike trips, the defendant was arrested and charged with a twelve-count Information. (CP 1-6). Due to a variety of issues detailed below, the case did not proceed to trial until March 19, 2012. (RP 3/19/12 at 2). Following a mistrial on March 20, 2012, the defendant was ultimately found guilty on April 26, 2012, of Assault in the Second Degree with Deadly Weapon Enhancement, Assault in the Third Degree, Robbery in the First Degree, and two counts of Attempting to Elude a Police Vehicle, with an endangerment enhancement on each. (CP 140-150; RP 3/20/12 at 83, RP 4/26/12 at 468-71). Based

upon an offender score of eight, the defendant was sentenced to 132 months imprisonment. (CP 164-173).

During the two years that it took for this matter to go to trial, the defendant was represented by four lawyers, and a fifth lawyer was appointed to see the defendant through to sentencing. (RP 8/15/12 at 32-33). The defendant's first attorney, Gary Metro, was appointed by the court shortly after the defendant's arrest. (RP 4/21/10 at 3). On June 9, 2010, at the behest of Mr. Metro, the court ordered Eastern State Hospital (ESH) to conduct a competency evaluation on the defendant pursuant to RCW 10.77.060. (CP 10-18; RP 6/9/10 at 3). On August 5, 2010, a report was filed by ESH concluding that the defendant was competent to stand trial. (CP 19-28). On August 25, 2010, Mr. Metro requested additional time to hire Dr. Mark Mays to perform an independent evaluation on the defendant. (RP 8/25/10 at 4).

On October 27, 2010, the defendant appeared in court with his second attorney, Matthew Rutt. (RP 10/27/10 at 7). Mr. Rutt informed the court that the defense was still seeking an evaluation from Dr. Mays, and the matter was continued. (RP 10/27/10 at 7). On January 12, 2011, Mr. Rutt appeared with the defendant and explained that Dr. Mays had not yet completed his evaluation because Dr. Mays had not received all necessary documentation from prior counsel. (RP 1/12/11 at 9). The

matter was continued to February 9, 2011. (RP 1/12/11 at 9). On that date, more time was requested by the defense, because Dr. Mays was on vacation and told defense counsel he would need an additional month to complete the assessment. (RP 2/9/22 at 5). The matter was continued to March 16, 2011. (RP 2/9/22 at 5).

On March 16, 2011, Mr. Rutt explained that still more time was needed to complete the defendant's assessment because Dr. Mays required additional records from Lourdes Counseling Center. (RP 3/16/11 at 12). Mr. Rutt requested another continuance to April 20. (RP 3/16/11 at 12). At this point, the defendant addressed the court directly to complain about how long it was taking to get the defense expert's assessment. (RP 3/16/11 at 14-15). The State suggested that the court review the matter again on March 30th, rather than April 20, 2011, to check on the status of the defense assessment. (RP 3/16/11 at 14-15). The court agreed, and told the defendant he was setting the matter over so that he could talk with his attorney and make a decision regarding whether he wants to go forward with the defense assessment. (RP 3/16/11 at 15).

On March 30th, Mr. Rutt asked to withdraw from the defendant's case, stating, "Mr. Lopez has expressed extreme hostility towards having me represent him at this point." (RP 3/30/11 at 4). Mr. Rutt noted that he was sought out and retained by the defendant's family, but due to the

"hostility that has arisen" he could no longer represent him. (RP 3/30/11 at 4). The State expressed concern over the court allowing defense counsel to withdraw, given the already significant delay in the case. (RP 3/30/11 at 4-5). The court then addressed the defendant directly, asking if he wanted the court to allow Mr. Rutt to withdraw. (RP 3/30/11 at 7). The defendant answered in the affirmative. (RP 3/30/11 at 7). The court allowed Mr. Rutt to withdraw. (RP 3/30/11 at 7).

Determining that the defendant lacked resources to hire another attorney, the court appointed counsel. (RP 3/30/11 at 8). The State suggested that Mr. Metro be re-appointed since he had already spent considerable time on the case. (RP 3/30/11 at 8). However, the defendant did not want Mr. Metro re-appointed, and instead, wanted the court to appoint new counsel. (RP 3/30/11 at 8). The court appointed Samuel Swanberg. (RP 3/30/11 at 8-9).

On June 1, 2011, the defendant appeared in court with Mr. Swanberg. (RP 6/1/11 at 23). Mr. Swanberg stated that he had received a report in the form of a letter from Dr. May, dated May 23, 2011. (CP 44-49; RP 6/1/11 at 23). Mr. Swanberg also let the court know that the defendant took issue with the adequacy of Dr. Mays's assessment. (RP 6/15/11 at 8-9). Ultimately, and at the defendant's request, a competency

hearing was held on July 22, 2011, and the defendant was found to be competent. (CP 43; RP 7/22/11 at 10-30).

A trial date was scheduled for September 12, 2011, with an omnibus hearing set for August 10, 2011. (CP 43; RP 7/22/11 at 30). At the omnibus hearing held on August 10, 2011, Mr. Swanberg informed the court that although he had not received a substitution of counsel, the defendant had contacted the office of another attorney. (RP 8/10/11 at 4). He asked to set the matter over one week so that it could be determined whether his client was hiring new counsel. (RP 8/10/11 at 4).

On August 17, 2011, Scott Etherton appeared in court on behalf of the defendant with a substitution of counsel form in hand. (RP 8/17/11 at 2-5). The court allowed the substitution over the prosecutor's objection. (RP 8/17/11 at 3). Due to the substitution of counsel, the September 12, 2011, trial date was stricken in favor of October 3, 2011. (RP 8/17/11 at 3).

On September 21, 2011, Mr. Etherton informed the court that he wanted a 45-60 day continuance in order to go through discovery with his client and prepare for trial. (RP 9/21/11 at 5). Despite the fact that Mr. Etherton had been retained on this case for little more than a month, the defendant objected to this continuance on the basis that he was "ready to have assistance of effective counsel and speedy trial and it says in the rule

that 60 days is enough." (RP 9/21/11 at 5-6). The defendant did not wish to sign a speedy trial waiver, but Mr. Etherton expressed serious concern that he could not give effective assistance of counsel absent a 45-60 day continuance because of the voluminous discovery and numerous counts charged against the defendant. (RP 9/21/11 at 5-6). The court granted the continuance, reasoning that counsel's concern that he would not be prepared by the time of trial was good cause for a continuance. (RP 9/21/11 at 5-6). The court made note of the defendant's objection and set the trial date for December 12, 2011. (RP 9/21/11 at 5-6).

On November 30, 2011, defense counsel informed the court that he had a major surgery scheduled for the time of trial, and he would need between four to eight weeks to recover. (RP 11/30/11 at 9). The court denied the motion, noting that Mr. Etherton had not submitted a Notice of Appearance or Substitution of Counsel. (RP 11/30/11 at 9). A week later, on December 7, 2011, Mr. Etherton filed a Substitution of Counsel, and the court granted Mr. Etherton's motion for a continuance of the trial date. (CP 50; RP 12/07/11 at 6-19). At that hearing, Mr. Etherton expressed concerns to the court regarding the defendant's ability to assist in his own defense, and indicated that another competency evaluation may be needed. (RP 12/07/11 at 6-8).

In addition, counsel stated that video evidence of the alleged incident had been discovered the day prior, and he needed time to review it. (RP 12/07/11 at 6-8). Based upon defense counsel's surgery, newly discovered evidence, and defense counsel's continuing concerns regarding the defendant's mental health status and possible mental defenses, the court found good cause to grant the Mr. Etherton's request for a continuance. (RP 12/07/11 at 18-19). The trial date was continued to March 5, 2012. (RP 12/07/11 at 15).

On March 2, 2012, the trial date was continued to March 19, 2012, because the prosecutor was ill. (RP 3/02/2012 at 8-9). On March 19, the trial commenced but resulted in a mistrial on the second day. (RP 3/20/2012 at 83). On April 23, 2012, the case again proceeded to trial, and on April 26, 2012, the jury found the defendant guilty. (CP 140-50; RP 4/26/12 at 468-71).

Over the objection of his client, Mr. Etherton asked for several continuances of the sentencing hearing due in part to some personal issues, as well as wanting more time to prepare, and possibly file motions. (CP 154-55; RP 6/07/12 at 476-77; 7/09/12 at 14; 8/07/12 at 483-89; 8/15/12 at 33). On August 15, 2012, Mr. Etherton was allowed to withdraw due to a conflict of interest arising from claims made by the defendant in a motion he filed pro se. (CP 153-58; 8/15/12 at 32-33). The court then appointed

Scott Johnson who represented the defendant at sentencing. (RP 8/15/12 at 32).

III. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL UNDER CrR 3.3.

A trial court's decision to grant continuances under CrR 3.3 is reviewed for abuse of discretion. *State v. Ollivier,* No. 86633-3, ___Wn.2d ___, 312 P.3d 1, 8 (Oct. 31, 2013). A trial court does not abuse its discretion when, to ensure effective representation, it grants a defense counsel's request for a continuance of the trial date over the defendant's objection. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). Furthermore, a continuance brought "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2).

The recently decided case of *State v. Ollivier,* is similar to the case at bar, and hence, very instructive. In *Ollivier,* the Court considered whether 22 continuances, resulting in a 23-month delay before trial, violated the defendant's speedy trial rights under CrR 3.3 or the State and Federal Constitutions. *State v. Ollivier,* 312 P.3d at 8. Despite the length of delay and the number of continuances in that case, the Court held that no violation of speedy trial rights occurred. *Id.* at 14. The Court held that defense counsel acts as an agent of the defendant, thus a defendant's

objections to counsel's request for continuances does not weigh in favor of a violation. *Id.* at 23.

In *Ollivier*, the majority of continuances were granted at defense counsel's request in order to prepare for trial. *Id.* The Court reasoned that despite the defendant's personal objections to all but two of the continuances, his right to a speedy trial was not violated. *Id.* The Court stated that any personal objections by the defendant were waived pursuant to CrR 3.3(f)(2), because the continuances were sought by the defendant's own counsel. *Id.*; CrR 3.3(f)(2).

Similar to *Ollivier,* the continuances complained of by the defendant were those granted at his counsel's request in furtherance of exploring a mental health evaluation or preparing for trial. All of the continuances were proper under CrR 3.3(f)(2), and thus qualify as excluded periods under CrR 3.3(e). As a result, the defendant's speedy trial rights were not violated by the continuances granted on his behalf.

In support of his claim of a speedy trial violation, the defendant relies heavily on *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009) where the Court held that the continuances at issue were without adequate basis or reason, and thus violated the defendant's speedy trial rights. However, the facts of *Saunders* are easily distinguishable from those here.

In *Saunders,* despite the defendant's repeated objections to any continuances of the trial date and stated desire to go to trial and not negotiate with the State, his trial date was continued at defense counsel's request for "further negotiations." *Saunders* at 217-19. Following that delay, it was again continued twice more, still over the defendant's objection, without any adequate basis being stated on the record. *Id.* The facts in *Saunders* display a complete absence of due diligence on the part of defense counsel, the prosecutor, or the trial court to safeguard the defendant's right to a speedy trial. The same cannot be said about the parties or trial court in this case.

By contrast, the record in this case clearly articulates an adequate basis for the court's finding of good cause to grant continuances of the trial dates. Defense counsel informed the court on November 30, 2011, of a major surgery that he had scheduled that would require four to eight weeks of recovery time. (RP 11/30/11 at 9). Additionally, defense counsel expressed renewed concerns about the defendant's competency, and needed additional time to review newly discovered video evidence. (RP 12/07/12 at 6-8). These facts strongly support the trial court's finding of good cause for a continuance. *See Ollivier,* 312 P.3d at 9-10.

Finally, the defendant claims that defense counsel's failure to file a substitution of counsel weighed in the court's decision to grant the

continuance; however, the record reflects the substitution of counsel was filed on that same day and did not impact the continuance in any way. (RP 12/07/11 at 6-19). The record does not support the contention that there was a gap in effective representation during this time period, nor does the defendant show how he may have been prejudiced by the late filing of the substitution. To the contrary, the record shows that Mr. Etherton consistently appeared on the defendant's behalf beginning August 17, 2011, until the substantiation was filed on December 7, 2012. *See,* RP 8/17/11; RP 9/21/11; RP 10/19/11; RP 11/2/11; RP 11/30/11; RP 12/7/11. The court further noted that Mr. Etherton had made an oral substitution of counsel on August 17, 2011, when Mr. Swanberg asked for permission to withdraw. (RP 12/07/11 at 10, 08/17/11 at 2).

In sum, a plain reading of CrR 3.3(f)(2) shows that the defendant waived any objection to speedy trial when his defense counsel, acting as his agent, moved the court for the continuance in order to adequately prepare for trial. The record is clear that when seeking these continuances, Mr. Etherton was furthering his client's interest in proceeding to trial with competent counsel. Since the record reflects that the court had good cause to grant Mr. Etherton's request for continuances, the trial court did not abuse its discretion.

2. THE COURT DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WHEN IT GRANTED CONTINUANCES AT DEFENSE COUNSEL'S REQUEST.

A denial of speedy trial rights under the Sixth Amendment and article I, section 22 is reviewed de novo. *Ollivier,* , 312 P.3d at 10. When evaluating whether a speedy trial violation has occurred, the Court engages in a fact specific inquiry where, "the conduct of both the prosecution and the defendant are weighed." *Id.* (quoting *Barker v. Wingo,* 407 U.S. at 530-31, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). The four part *Barker* test is triggered when the length of delay is presumptively prejudicial. *Ollivier,* , 312 P.3d at 10*; State v. Iniguez*, 167 Wn.2d 273, 291, 217 P.3d 768 (2009) (holding that an eight-month delay in that case was presumptively prejudicial thus triggering a *Barker* analysis)). The delay in this case from the defendant's arrest on April 16, 2010, to his conviction on April 26, 2012, most likely satisfies the threshold requirement of presumptive prejudice, thus an individualized analysis pursuant to *Barker* is appropriate.

A. Length of Delay.

The first *Barker* factor looks at the "extent to which the delay stretches past the bare minimum needed to trigger" the *Barker* inquiry.

Iniguez, 167 Wn.2d at 283-84 (citing *Doggett v. U.S.,* 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). This is not the same as the presumptive prejudice analysis, because it is looking at the time beyond the triggering of the test. *See, Ollivier,* 312 P.3d at 11. It is important to evaluate this factor in light of the complexity of the case and the actions of the defendant. *Id.* at 12. This factor weighs against the defendant when the length delay is attributable to the defendant, or the complexity of the issues in proportion to the delay required more time. *Id.* at 12.

As with the CrR 3.3 analysis, *Ollivier* is instructive in this analysis as well. The *Ollivier* Court cited numerous State and Federal cases where Courts held that the length of delay (many of which exceeded the delay here) did not violate the defendant's right to a speedy trial. *Id.* at 11-15. The Court there reasoned that the first *Barker* factor weighed against the defendant, when nearly all of the continuances were sought by defense counsel to prepare for trial, and the complexity of the issues necessitated more time to prep. *Id.* at 12-13.

Likewise, the facts here lend themselves to a similar conclusion. Here, the defendant was originally charged with multiple counts, and there were potential mental health issues effecting potential defenses, as well as the defendant's competency to stand trial. The delay was further exacerbated by the defendant's changing of defense counsel, sometime

only weeks before trial. (RP 10/27/10 at 7; 03/30/11 at 4; 08/10/11 at 4; 08/15/12 at 32).

Given the number of charges, the time the defendant was facing in prison, and the number of counsel on this case, it is clear that the length of delay was not excessive. Given the fact that delay here is mostly attributable to the defendant, this factor weighs in the State's favor, not the defendant's.

B. Reason for Delay.

The second *Barker* factor focuses on the reason for the pretrial delay. *Ollivier,* 312 P.3d at 12-13. In *Ollivier,* the Court found that the second factor weighed against the defendant when the delays were caused by defense counsel. *Id.* at 13-15. This was true despite the fact that the defendant objected to nearly every continuance requested by his counsel. *Id.* The *Ollivier* Court was adamant that delays for the defendant's benefit, such as seeking more time to prepare for trial, did not violate the defendant's speedy trial rights. *Id.* at 14.

Similarly, the record in this case shows that the reason for delay is primarily attributable to the defendant himself or to his counsel. The fact that the defendant objected to the continuances is not dispositive since his counsel was acting diligently on the defendant's behalf. *Id.* at 16.

As the record reflects, the continuances being contested by the defendant where either caused by the defendant's acquisition of new counsel, or requested by his attorney to prepare for trial or recover from surgery. Given these reasons for the delay, this factor weighs in favor of the State, not the defendant.

C. Assertion of Speedy Trial Rights.

The third *Barker* factor is "the defendant's assertion of or failure to assert his right to a speedy trial." *Ollivier,* 312 P.3d. at 15. This analysis requires that the defendant's assertions be "objectively examined in light of the defendant's other conduct." *Iniguez,* 167 Wn.2d at 284. Like the defendant in *Ollivier,* the defendant here is arguing that because he objected to the continuances, he satisfactorily asserted his speedy trial rights. (App. Brief at 17). The defendant argues that, based on his objections, this factor weighs in his favor. (App. Brief at 18). The case law, however, does not support that contention. *Ollivier,* 312 P.3d at16; *See also, Vermont v. Brillon,* 556 U.S. 81, 90-2, 129 S. Ct. 1283, 173 L.Ed.2d 231 (2009).

The *Ollivier* defendant engaged in a similar argument after objecting to twenty continuances, but the Court there held that "his objections cannot be given effect when his own counsel sought the continuances to prepare for trial." *Id.* at 16. The same is true in this case

since the continuances at issue were all requested by the defense in order to be prepared for trial. Consequently, this factor does not weigh in the defendant's favor.

D. Actual Prejudice to Defendant.

The fourth *Barker* factor looks at the prejudice to the defendant as a result of the pretrial delay. *Ollivier*, 312 P.3d at 17. Despite the threshold inquiry of presumptive prejudice, a defendant "ordinarily must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." *Id.* The Court looks to the defendant's interest in avoiding (1) "'oppressive pretrial incarceration,'" (2) "'anxiety and concern of the accused,'" and (3) "'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Id.* (quoting *Doggett,* 505 U.S. at 654, 112 S.Ct. 2686, 120 L.Ed.2d 520). When the delay is not the result of bad faith on the part of the State, and the delay is "not sufficiently long for a presumption of prejudice to arise," the defendant must demonstrate the above particularized prejudice. *Ollivier,* 312 P.3d at 17. Given the *Ollivier* Court's decision, and the particular circumstances of this case, a delay of 23 months is not sufficiently long to trigger a presumption of prejudice. *See, Id.* at 18-19. Consequently, the defendant must demonstrate particularized showings of actual prejudice. *Id.*

With regard to pretrial incarceration, the *Ollivier* Court held that 22 months in jail awaiting trial was not presumptively prejudicial nor was it oppressive. *Id.* at 19 (noting that "Periods of incarceration as long or longer have been found not oppressive."). Here, there was delay of 23 months until the defendant's first trial. Nearly a year of that delay was caused by the defendant's pursuit of an independent competency evaluation. Given the number of charges, and the numerous attorneys that handled this case, the defendant's 23-month incarceration was not oppressive. Likewise, the defendant has not shown anything beyond ordinary concern and anxiety that might result from a defendant facing similar charges.

Finally, the *Ollivier* Court noted that the most important factor in the prejudice analysis is the impairment of the defendant's ability to adequately prepare his case. *Ollivier,* 312 P.3d at 19. A Court must balance the benefits reaped by the defendant against any impairment caused by the delay. *Id.* The only impairment that the defendant offers is that the State was able to discover and present video evidence against the defendant. (App. Brief at 18). That, however, is not the type of impairment encompassed by this factor. *Doggett*, 505 U.S. at 655. On December 7, 2011, when the continuance was requested, in part due to the newly discovered evidence, neither side had viewed the evidence. (RP

12/07/11 at 9). Given that the defense was being presented with evidence that could have been helpful to the defendant's case, it was not unreasonable for him to ask for additional time. The defendant cannot make a compelling argument that the delay caused an erosion of exculpatory evidence.

In sum, an application of the four *Barker* factors shows that the State did not violate the defendant's constitutional right to a speedy trial. The delay at issue here was predominantly caused by the defendant and defense counsel on his behalf. The State respectfully asks this Court to deny the defendant's claim that his constitutional right to a speedy trial was violated.

3. THE DEFENDANT'S RIGHT TO SPEEDY SENTENCING WAS NOT VIOLATED

A sentencing hearing shall be conducted within 40 days of conviction unless either party moves the court for good cause, or the court itself extends the time period. RCW 9.94A.500(1). A sentencing delay beyond 40 days does not require dismissal, nor does it violate speedy sentencing rights, unless the delay was purposeful or oppressive and the defendant shows prejudice. *State v. Anderson,* 92 Wn. App. 54, 59–60, 960 P.2d 975 (1998); *see also, State v. Modest,* 106 Wn. App. 660, 663, 24 P.3d 1116 (2001). In determining whether the delay was purposeful or

oppressive, the court "balances the length and reason for the delay, the defendant's assertion of his right to a speedy sentence, and the extent of prejudice to the defendant." *Modest*, 106 Wn. App at 663.

While the delay here did exceed the 40-day window provided under the statute, it was not purposeful or oppressive. The fault for delay does not rest with the State, as the time period was twice extended by defense counsel for the stated purpose of preparation. (RP 6/7/12 at 477-78). While defense counsel's absence at the July 9, 2012, hearing may appear dubious, his reason would still fall under the good cause exception for a delay. Furthermore, the defendant was aware he was facing significant time, between 132-168 months of confinement, thus it was incumbent that defense counsel be adequately prepared for sentencing.

The defendant claims that he was forced to choose between his speedy trial right and his right to effective representation, but the record shows that he was not forced to make such a Hobson's choice. As with the speedy trial analysis above, this is a situation where defense counsel wanted to be prepared, but his client objected to any continuances that would allow for preparation. The defendant relies on *State v. Ellis,* 76 Wn.App. 391, 884 P.2d 1360, 1361 (1994) to support his extraordinary demand of dismissal, however, *Ellis* is easily distinguishable.

In *Ellis* there was a 23-month delay in sentencing that was undeniably the fault of the prosecutor and the court. *Id.* at 392. In that case, the defendant was out in the community on his own recognizance for nearly two years before sentencing occurred. *Id.* The court made special note that the defendant had "reconciled with his divorced wife, was promoted to a supervisory position at work, and became an upstanding citizen." *Id.* at 393. The Court held that all of these factors combined with the fact that the prosecutor and the court were at fault, resulted in a definite prejudice to the defendant warranting dismissal. *Id.* at 395.

By contrast, the delay in this case was neither the fault of the prosecutor or the court, nor was the defendant here prejudiced, as was the defendant in *Ellis*. The defendant here was incarcerated during the four months pending sentencing, and was facing confinement up to 168 months. Some of the delay was unavoidable due to the defendant's pro-se motion, which necessitated the appointment of new counsel. (CP 153-58; RP 7/9/12, at 15-19; 08/15/12 at 32-34).

Even if this Court finds that the continuances were not for good cause, the harsh remedy of dismissal is not warranted in this case. *See, Anderson,* 92 Wn. App. 54, 60, 960 P.2d 975 (1998) (The potential loss of protection to the public is not an acceptable consequence of a comparably strict enforcement of the 40–day time limit for sentencing)). The delay at

issue here was caused by a combination of the defense counsel and the defendant himself through his motion.

The delay of four months was not excessive, and did not prejudice the defendant. The State respectfully asks the Court to deny defendant's request to dismiss this case for violation of speedy sentencing.

4. INEFFECTIVE ASSISTANCE OF COUNSEL

When evaluating an ineffective assistance claim on appeal, a reviewing court will only look to the facts within the record. *State v. Grier,* 171 Wn.2d 17, 29, 246 P.3d 1260 (2011). To demonstrate ineffective assistance, the defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Id.* at 32–33; *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Grier,* 171 Wn.2d *at* 33. The defendant bears the burden of overcoming "a strong presumption that counsel's performance was reasonable." *Id.* When defense counsel's performance can be considered "legitimate trial strategy or tactics, performance is not deficient." *Id.* The second prong of the test requires that the defendant show, "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Id.*

In support of his claim, the defendant gives a general accusation that defense counsel delayed the proceedings and was otherwise unprepared. (App. Brief at 22-23). The record is clear that defense counsel made tactical decisions to continue the case in order to adequately prepare, review the newly discovered evidence, and possibly pursue an additional competency hearing or mental health defenses. (RP 12/7/11 at 6-8). The defendant argues that "nothing in the record indicates counsel actually followed through on these purported justifications." (App. Brief at 22). Just because defense counsel did not obtain an additional competency evaluation or file a motion, it does not mean his performance was unreasonable or deficient. *See*, *Grier*, 171 Wn.2d at 43. As the *Grier* Court noted, fruitlessness or failure of a strategy is "immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis" *Id.*

Even if the Court were to find that defense counsel's performance was deficient, the defendant fails to show that the performance prejudiced him. The defendant cannot simply say that "the errors had some conceivable effect on the outcome," but must instead "'affirmatively prove prejudice.'" *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland,* 466 U.S. at 691)).

The defendant's primary argument is that the delays resulted in a conflict of interest which caused a 6th Amendment violation of his speedy trial and sentencing rights. (App. Brief at 21). In furtherance of that, the defendant asks the Court to rely on *State v. Regan,* 143 Wn. App 419, 427, 177 P.3d 783 (2008) for the proposition that Mr. Etherton's conflict of interest was presumably prejudicial.

However, this is a clear misapplication of the *Regan* precedent. *Regan* involved a scenario where the State unnecessarily compelled defense counsel to appear as a witness against his own client during the State's case in chief. *Id.* at 425. The State was unable to show any need to compel the defense counsel's testimony, and the Court found that the subsequent continuance to accommodate that testimony was prejudicial to the defendant. *Id.* at 431. The error there occurred when the trial court did not properly balance the defendant's interest. *Id.*

The facts of *Regan* are distinguishable from those of the case at bar. The defendant objected to continuances in this case, but the conflict of interest that led to Mr. Etherton's withdrawal did not materialize until after the defendant was convicted. (RP 8/7/12 at 482-92). Unlike the *Regan* case, the State did not call Mr. Etherton during its case in chief to testify against the defendant. The earliest time that the court became aware of a possible conflict was at the July 9, 2012, hearing when defense

counsel was unable to appear due to car trouble. (RP 7/9/12). At the very next hearing, the court advised defense counsel of a possible conflict of interest given the defendant's pro-se motion, and advised counsel to reflect upon his ethical responsibilities. (RP 8/7/12 at 488-89). The following week, Mr. Etherton withdrew due to the conflict, and the court appointed Mr. Johnson. (RP 8/15/12 at 32-33). Any conflict was appropriately handled by the court and counsel through the timely withdrawal of Mr. Etherton following the defendant's motion. The defendant points to no discrepancies in Mr. Johnson's representation at sentencing.

As another basis for his claim, the defendant asserts that the late filing of the substitution of counsel caused "substantial confusion." As previously discussed in this brief, Mr. Etherton's late filing of the substitution of counsel form had no impact on the defendant's case and the record demonstrates no interruption in the defendant's representation.

Consequently, the defendant fails to show that but for his counsel's deficient performance the outcome of the proceedings would have been different. As a result, the defendant fails to establish the second prong of the *Strickland* test.

The State respectfully asks this Court do deny the defendant's ineffective assistance of counsel claim.

5. CALCULATION OF OFFENDER SCORE

In light of the defendant's argument, the State agrees that the matter should be remanded for a hearing to properly determine the defendant's offender score.

IV. CONCLUSION

The trial court did not err, and the defendant's rights to a speedy trial and speedy sentencing were not violated. Furthermore, the defendant was not denied effective assistance of counsel during the trial and sentencing period of his case. The defendant's conviction should be affirmed. However, remand for a hearing regarding the defendant's offender score is warranted.

RESPECTFULLY SUBMITTED this 20th day of December 2013.

ANDY MILLER
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of

Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 20, 2013.

Pamela Bradshaw
Legal Assistant