NO. 31465-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MICHAEL LEON SHEMESH, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00744-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. **No speedy trial violation occurred.**

2. **Judge Carrie Runge's oral record, despite repeated interruptions by the defendant, clearly sets forth the rationale of the substantial and compelling reasons justifying imposition of the defendant's exceptional sentence upward.**

II. STATEMENT OF FACTS

The defendant was charged by Information with two counts of Rape of a Child in the First Degree and Sexual Exploitation of a Minor on August 3, 2009. (CP 1-5). The defendant was granted a court-appointed attorney, Tonya Meehan-Corsi, and arraigned on said charges on August 12, 2009. (RP August 12, 2009 at 3-5). At arraignment, the following dates were scheduled:

1. Omnibus – September 9, 2009
2. Pretrial – September 16, 2009
3. Trial – September 29, 2009

(RP August 12, 2009, at 3-4). Bail was set at $75,000 and a bail hearing was set for August 19, 2009. (CP 7-8). The bail hearing was held on August 19, 2009, and the bail was reduced to $40,000. (CP 9). However, the matter was noted on the docket for the following day, August 20, 2009.

On August 20, 2009, the State filed a First Amended Information adding two additional counts of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct and Sexual Exploitation of a Minor. (CP 10-12). The matter was continued to the omnibus date of September 9, 2009. (CP 7). At the omnibus hearing on September 9, 2009, the State filed a Second Amended Information, adding an additional count of Child Molestation in the First Degree. (CP 15-17). Based upon said amendment, the State requested an increase in bail to $100,000. (RP September 9, 2009, at 2-4). The court granted the State's bail request and the matter was continued to the pre-trial date of September 12, 2012, at the defendant's request. (CP 18; RP September 9, 2009, at 2).

On September 16, 2009, an Order for Mental Health Evaluation at Eastern State Hospital and Order Staying Proceedings was requested and the matter was continued for one week for entry of said Order. On September 23, 2009, an Order for Mental Health Evaluation at Eastern State Hospital and Order Staying Proceedings was entered and a status date hearing was scheduled for November 4, 2009. (CP 19-27).

An Eastern State Hospital evaluation was prepared by Trevor Travers, PhD, on November 12, 2009, and filed with the court. (CP 26-37). Pursuant to said evaluation, an Order of Competency was filed with the court on November 25, 2009, and new dates were set as follows:

1. Omnibus – December 23, 2009

2. Pre-Trial – January 13, 2010

3. Trial – January 25, 2010

(CP 47; RP November 25, 2009, at 6-7).

No objection was made to the setting of these dates or any reference made to the dates being in non-compliance with the defendant's right to a speedy trial. (RP November 25, 2009, at 6-7). On December 23, 2009, the omnibus date was continued to January 6, 2010, at the defendant's request, and on January 6, 2010, the hearing was continued to January 13, 2010. (RP December 23, 2009, at 21; RP January 6, 2010, at 7).

On January 13, 2010, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court, setting new dates of:

1. Omnibus and Pre-Trial – January 20, 2010

2. Trial – February 1, 2010

The Order indicated that the new commencement date would be January 13, 2010. (CP 48; RP January 13, 2010, at 9). The court inquired of the defendant if he was waiving his right to a speedy trial and the defendant indicated in the affirmative. (RP January 13, 2010, at 9-10).

On January 20, 2010, the defendant's attorney was sick, so the

matter was continued until January 27, 2010. (RP January 20, 2010, at 6). On January 27, 2010, the matter was continued until February 3, 2010, and a new trial date of February 16, 2010, was set. (RP January 27, 2010, at 10). On February 3, 2010, the defendant made a request for a new attorney due to "differences in the way the case has been handled." (RP February 3, 2010, at 5). A review of Ms. Meehan-Corsi's progress on the case was done and it was found that she had reviewed the evidence at the Richland Police Department, conducted victim interviews and a number of critical acts. (RP February 3, 2010, at 5). The defendant's motion was denied. (RP February 3, 2010, at 5-6). Omnibus was satisfied and the following new dates were set:

1. Pre-Trial – February 17, 2010
2. Trial – March 1, 2010

(RP February 3, 2010, at 5-8). These dates were within speedy trial due to the commencement date of January 13, 2010. (CP 48, RP January 13, 2010, at 9).

On February 17, 2010, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Omnibus – March 3, 2010
2. Pre-Trial – March 17, 2010

3. Trial – March 29, 2010

(CP 49; RP February 17, 2010, at 12).

At the hearing on February 17, 2010, the court inquired of the defendant if he was agreeing to waive his right to a speedy trial and the defendant answered in the affirmative. (RP February 17, 2010, at 12). The new commencement date was March 29, 2010. (CP 49; RP February 17, 2010, at 12).

At the March 3, 2010, hearing date, a defense Order for Mental Health Evaluation by Doctor E. Clay Jorgensen was entered. (CP 50-55; RP March 3, 2010, at 14-15). The proceedings were stayed and a status hearing was scheduled for March 31, 2010. (RP March 3, 2010, at 14-15). On March 31, 2010, Dr. Jorgensen's report was not received and the matter was continued until April 7, 2010. (RP March 31, 2010, at 13). Dr. Jorgensen's report was filed with the court on April 5, 2010. (CP 56-64). On April 7, 2010, the matter was continued to April 14, 2010, for entry of an Order of Competency and Ms. Meehan-Corsi advised the court that Mr. Shawn Sant would likely be substituting in for her on the case. (RP April 7, 2010, at 17-18). The matter was still in stayed status and the defendant acknowledged such on the record. (RP April 7, 2010, at 17).

On April 13, 2010, a Notice of Substitution was filed, removing Ms. Meehan-Corsi from the defendant's case and appointing Mr. Shawn Sant as counsel of record. (*Notice of Substitution of Counsel*, filed April 13, 2010[1]). On April 14, 2010, the defendant was ill and did not want to appear for court. (RP April 14, 2010, at 9). The matter was continued until April 28, 2010. (RP April 14, 2010, at 9). On April 28, 2010, Mr. Sant reported to the court that he was requesting a week's continuance due to the fact that the case was going to be reassigned to another attorney by the Office of Public Defense. (RP April 28, 2010, at 2).

On May 5, 2010, Mr. Sant advised the court that the defendant's case had been reassigned to Sam Swanberg by the Office of Public Defense and requested a one week continuance. (RP May 5, 2010, at 7-8). The State requested a continuance of two weeks and the defendant did not object. (RP May 5, 2010, at 7). The court confirmed that the matter was still stayed awaiting entry of an Order of Competency after the defense expert evaluation. (RP May 5, 2010, at 7-8).

On May 14, 2010, a Substitution of Counsel was filed, noting Mr. Swanberg as the attorney of record for the defendant. (*Substitution of*

[1] The State filed a Second Supplemental Designation of Record on August 13, 2014, designating two Notices of Substitution from the Clerk's file, and the Clerk's Index with the numbering of the documents has not yet been received as of the date of filing this brief.

Counsel, filed May 14, 2010 (*See* footnote number 1)). At the May 19, 2010, hearing, the matter was continued one week due to Mr. Swanberg's inability to meet with the defendant due to the defendant's recent hospitalization. (RP May 19, 2010, at 10). On May 26, 2010, the matter was once again continued at defense counsel's request. (RP May 26, 2010, at 11).

On June 2, 2010, defense counsel once again requested a continuance of the hearing to June 9, 2010. (RP June 2, 2010, at 4). Mr. Swanberg indicated to the court that he did not wish to enter the Order of Competency until he further discussed a possible resolution/plea negotiation with the State and due to the fact that he was unsure whether or not the defendant was willing to stipulate to competency or wished to proceed to a hearing. (RP June 2, 2010, at 4). At the June 9, 2010, hearing, counsel for defendant once again requested a continuance to enter into plea negotiations with the State by making a counter offer. (RP June 9, 2010, at 12).

At the June 16, 2010, hearing, counsel for defendant requested another continuance to June 30, 2010, based upon what he believed to be a tentative plea agreement with the State. (RP June 16, 2010, at 16). Defense counsel stated that he wished to go over the tentative agreement with the defendant with more specificity and acknowledged that the matter

was still stayed pending entry of an Order of Competency. (RP June 16, 2010, at 16). On July 30, 2010, counsel for the defendant requested another continuance to July 14, 2010, and indicated plea negotiations as the basis and acknowledged the case was still stayed. (RP June 30, 2010, at 19). There were no objections by the defendant to any of the aforementioned dates.

At the July 14, 2010, hearing, an Order of Competency was entered. (CP 65; RP July 14, 2010, at 9). New court dates were set as follows:

1. Omnibus – August 4, 2010
2. Pre-Trial – August 25, 2010
3. Trial – September 7, 2010

(CP 66; RP July 14, 2010, at 10). No objection was made to the setting of these dates or any reference made to the dates being in non-compliance with the defendant's right to a speedy trial. (RP July 14, 2010, at 9-11).

At the August 4, 2010, omnibus hearing, counsel for defendant requested a one-week continuance of the hearing, as he did at the August 11, 2010, and August 18, 2010, hearing dates. (RP August 4, 2010, at 12; RP August 11, 2010, at 22; RP August 18, 2010, at 6). At the August 18, 2010, date, the State expressed its displeasure with the ongoing continuances in the matter. (RP August 18, 2010, at 6). On August 25,

2010, counsel for defendant once again requested a continuance and new dates were set as follows:

1. Pre-Trial – September 1, 2010
2. Trial – September 13, 2010

(RP August 25, 2010, at 8-10). Counsel for defendant acknowledged that the September 13, 2010, trial date was within speedy trial and indicated the defendant specifically requested the continuance. (RP August 25, 2010, at 9).

At the September 1, 2010, pre-trial hearing date, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Omnibus – September 22, 2010
2. Pre-Trial – October 6, 2010
3. Trial – October 25, 2010

(CP 67; RP September 1, 2010, at 13). The new commencement date was now October 25, 2010. (CP 67; RP September 1, 2010, at 13).

On the September 22, 2010, omnibus date, the matter was continued one week, as were the hearings on September 29, 2010, and October 6, 2010. (RP September 22, 2010, at 15; RP September 29, 2010, at 13). The September 22, 2010, and September 29, 2010, dates were both continued at the defendant's request. (RP September 22, 2010, at 15; RP

September 29, 2010, at 13).

At the October 6, 2010, court date, the court heard the State's Motion to Compel production of Kids Haven DVDs which contained interviews of the minor victims in this matter by a child forensic interviewer. (CP 13-14, 71-73; RP October 6, 2010, at 14-18). The State had previously provided copies of the DVDs to defense counsel, Ms. Tonya Meehan-Corsi, under an agreed protective order. (CP 13-14, 71-73; RP October 6, 2010, at 14-18). At the hearing, neither Ms. Meehan-Corsi nor Mr. Shawn Sant were able to account for the whereabouts of said protected items despite each of them signing a protective order regarding their safekeeping. (RP October 6, 2010, at 14-18). The October 6, 2010, date was continued one week at the request of the court. (RP October 6, 2010, at 17-18). On October 13, 2010, the matter was once again continued at defendant's request for one week and the trial date was continued to November 1, 2010. (RP October 13, 2010, at 27). At said hearing, the court again addressed the matter of the protected DVDs and their whereabouts were still unknown and are still unaccounted for today. (RP October 13, 2010, at 23-26).

On October 20, 2010, the defendant filed a Motion for Re-Appointment of Counsel. (CP 77-80). In said motion, the defendant admitted to being provided with the discovery he had requested, i.e. the

defendant's self-made child pornographic videos that contained audio and visual images, but also admitted to willfully refusing to participate in viewing the video evidence, because the State had not provided a transcript to him of said videos. (CP 77-79). The State did not have a transcript, nor did it intend to have a transcript made for use at trial. (RP October 20, 2010 at 21). The State at that time indicated that Mr. Swanberg was free at any point to go the Richland Police Department where the videos were being held in evidence and watch them. (RP October 20, 2010 at 24). No mention was made of needing a prosecuting attorney present at the defense viewing of the videos.

The court held that the State was not required to provide a transcript of the videos, but defense counsel could petition the Office of Public Defense for funds to do so. (RP October 20, 2010, pages 22-23). However, the court granted the defendant's motion and disqualified Mr. Swanberg as counsel of record and Gary Metro was appointed as the new attorney of record. (RP October 20, 2010, at 20-30). The court had a colloquy with the defendant and advised him that if his request for a new attorney was granted, it would allow the trial date to be extended an additional 60 days due to Mr. Swanberg's disqualification. (RP October 20, 2010, at 29). The defendant acknowledged his understanding of that fact and indicated that he would be willing to sign a waiver of speedy trial

to be appointed a new attorney. (RP October 20, 2010, at 29). New dates were set as follows without requiring a waiver of speedy trial:

1. Omnibus – November 3, 2010
2. Pre-Trial – November 24, 2010
3. Trial – December 6, 2010

(RP October 20, 2010, page 31).

The November 3, 2010, court hearing was continued at defendant's request until November 17, 2010 and new pre-trial and trial dates of December 1, 2010, and December 13, 2010, were set. (RP November 3, 2010, at 19). The November 17, 2010, hearing was continued to December 1, 2010, also at the defendant's request. (RP November 17, 2010, at 33). On December 1, 2010, the matter was continued to December 8, 2010, and the trial date was continued to December 20, 2010, due to defense counsel's illness. (RP December 1, 2010, at 12).

On December 8, 2010, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Pre-Trial – December 15, 2010
2. Trial – December 27, 2010

(CP 81; RP December 8, 2010, at 16-17). The speedy trial commencement date was now December 27, 2010. (CP 81; RP December

8, 2010, at 16-17).

On December 15, 2010, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Omnibus – January 5, 2011
2. Pre-Trial – February 2, 2011
3. Trial – February 14, 2011

(CP 82). At the hearing, the court inquired of the defendant if he was agreeing to waive his right to a speedy trial and the defendant answered in the affirmative. (RP December 15, 2010, at 18). The new speedy trial commencement date was now February 14, 2011. (CP 82). The State voiced its concerns to the court that the matter had been set for trial 16 times at this point. The court noted the State's frustration, but entered the waiver and extended the trial date a 17th time. (RP December 15, 2010, at 18-19).

On January 5, 2011, the matter was continued to January 19, 2011, at the defendant's request and the State advised the court they would not agree to move the trial date. (RP January 5, 2011, at 14). On January 19, 2011, the defendant once again requested a continuance and new dates were set as follows:

1. Omnibus – February 9, 2011

2. Pre-Trial – February 23, 2011

3. Trial – March 7, 2011

(RP January 19, 2011, at 16).

On February 9, 2011, the matter was continued to February 23, 2011, at defendant's request. (RP February 9, 2011, at 35). On the February 23, 2011, date, Mr. Metro indicated he was having difficulties with discovery for the first time. (RP February 23, 2011, at 18-19). He was under the mistaken belief that the State needed to go with him to the police department to view the video evidence. (RP February 23, 2011, at 18-19). New dates were set at the defendant's request as follows:

1. Omnibus – March 2, 2011

2. Pre-Trial – March 9, 2011

3. Trial – March 21, 2011

(RP February 23, 2011, at 18-20).

On March 2, 2011, the case was continued to March 16, 2011, at defendant's request and a new trial date of March 28, 2011, was set. (RP March 2, 2011, at 22). On March 16, 2011, a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Omnibus – April 13, 2011

2. Pre-Trial – May 5, 2011

3. Trial – May 16, 2011

(CP 83). The commencement date was now May 16, 2011. (CP 83).

The April 13, 2011, hearing was continued until April 27, 2011, at the defendant's request. (RP April 13, 2011, at 20). On April 27, 2011, Mr. Metro revealed to the court the primary reason that he had not gone and watched the video evidence was that he had been unable to block out four hours to do so. (RP April 27, 2011, at 21). He requested a one-week continuance to allow him to do so, which was granted by the court. (RP April 27, 2011, at 21-22).

At the May 4, 2011, hearing, the trial was continued until June 6, 2011, and a new pre-trial date was scheduled for May 18, 2011, once again at the defendant's request. (RP May 4, 2011, at 37). At the May 18, 2011, hearing date, counsel for defendant requested a continuance into July. (RP May 18, 2011, at 39). He stated he planned on "hiring a variety of people to do a variety of different things" as a basis. (RP May 18, 2011, at 39). A Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

1. Omnibus – June 15, 2011
2. Pre-Trial – July 6, 2011
3. Trial – July 18, 2011

(CP 84; RP May 18, 2011, at 39-40). The court inquired of the defendant if he was freely and voluntarily waiving his right to a speedy trial and the defendant indicated in the affirmative that he was. (RP May 19, 2011, at 40). The commencement date was now July 18, 2011. (CP 84).

The June 15, 2011, hearing date was continued to June 22, 2011, at the defendant's request. (RP June 15, 2011, at 20). The June 22, 2011, hearing date was continued to July 6, 2011, at defendant's request. (RP June 22, 2011, at 42). On this date, Mr. Metro indicated to the court that he had found an expert witness. (RP June 22, 2011, at 42). On July 6, 2011, the matter was continued at defendant's request to July 20, 2011, because counsel for the defendant needed to hire another expert. (RP July 6, 2011, at 25). New pre-trial and trial dates were set as follows:

1. Pre-Trial – August 31, 2011
2. Trial – September 12, 2011

(RP July 6, 2011, at 24-27).

On July 6, 2011, the defendant expressly asked to continue matters, addressing the court of his own will. (RP July 6, 2011, at 29). The defendant accused the State of withholding discovery, and the State revealed that the only reason Mr. Metro had been unable to view the tapes was his unwillingness to sit down and do so. (RP July 6, 2011, at 30). On a later date, Mr. Metro admitted that discovery was complete in January of

2011. (RP November 9, 2012, at 221). The "requirement" of having a prosecutor there never existed. (RP July 6, 2011 at 26). Mr. Metro signed a protective order and never went to pick up the tapes. (RP July 6, 2011, at 26-27).

On July 20, 2011, the matter was continued to August 3, 2011, at defendant's request. (RP July 20, 2011, at 23). On August 3, 2011, the matter was continued to August 10, 2011, at the defendant's request. (RP August 3, 2011, at 45). The State advised the court of its frustration on the amount of continuances allowed. (RP August 2, 2011, at 45). On August 10, 2011, the matter was continued to August 17, 2011, again at the defendant's request, and again the State expressed its frustration on the amount of continuances the defendant had been granted. (RP August 10, 2011, at 21).

On August 17, 2011, the matter was continued to August 24, 2011, at the defendant's request. (RP August 17, 2011, at 47). The defendant admitted that the trial date of September 12, 2011, was no longer realistic, and that the holdup was his insistence on expensive experts. (RP August 17, 2011, at 47). On August 24, 2011, the matter was again continued to get an expert. (RP August 24, 2011, at 49). This expert was in the field of "childhood memory" and Mr. Metro later admitted that though he asked for a continuance, he had no idea if this person would be necessary. (RP

November 9, 2012, at 243).

On August 31, 2011, the defendant executed a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance and it was entered with the court setting new dates of:

1. Omnibus - September 7, 2011
2. Pre-Trial – September 21, 2011
3. Trial – October 3, 2011

The new commencement date was now October 3, 2011. (CP 91; RP August 31, 2011, at 30).

On September 7, 2011, the matter was continued to September 14, 2011, at the defendant's request. (RP September 7, 2011, at 31). On September 14, 2011, the matter was continued to September 21, 2011, at the defendant's request. (RP September 14, 2011, at 32). On September 21, 2011, Mr. Metro advised the court that he had successfully procured an expert and requested a continuance of the trial date. (RP September 21, 2011, at 23). The State advised the court of the restriction contained in RCW 10.46.085 wherein a defendant charged with a sex crime with an alleged victim under the age of 18 cannot extend the trial date unless the court finds that there are substantial and compelling reasons for the continuance and the benefits of the postponement outweighs the detriment to the victim. (RP September 21, 2011, at 23-24). The trial date was

continued over the State's objection. (RP September 21, 2011, at 24). The matter was continued two weeks and new pre-trial and trial dates were set as follows:

1. Pre-Trial – October 12, 2011
2. Trial – November 7, 2011

(RP September 21, 2011, at 23-25).

On October 5, 2011, the matter was continued one week at defendant's request to October 12, 2011. (RP October 5, 2011, at 26). On October 12, 2011, Mr. Metro was removed as attorney of record due to a reassignment by the Office of Public Defense and Kevin Holt was assigned to represent the defendant. (RP October 12, 2011, at 27). The defendant indicated he had no objection to the new appointment of counsel. (RP October 12, 2011, at 27). No party indicated any problem with this transfer. (RP October 12, 2011, at 27-28). The hearing was held while the State's representative most familiar with the case was out of the room. (RP October 12, 2011, at 27- 28). At the time of Mr. Holt's appointment, speedy trial was set to run on the case on December 2, 2011, giving Mr. Holt 51 days to have the matter brought to trial. (CP 91). The alleged victims in the matter had been interviewed on two occasions by prior counsel for defendant, and at least one set of said interviews had been tape-recorded. Additionally, at the hearing on October 26, 2011, Mr.

Holt indicated to the court that Mr. Metro would be staying on the case to ease the transition of attorneys and they would work the case together. (RP October 26, 2011, at 25). Furthermore, Mr. Holt represented to the court that the defendant did not object to any continuances of the trial date as he wanted his day in court and referenced another defendant who had appeared earlier in court and objected to Mr. Holt replacing Mr. Metro and moving the trial dates. (RP October 26, 2011, at 25). Mr. Holt also advised the court that even if Mr. Metro had not been removed as counsel of record, the trial would not have proceeded on the scheduled trial date due to Mr. Metro being unprepared to proceed. (RP October 26, 2011, at 27).

The matter was continued to November 9, 2011, and a Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was entered with the court setting new dates of:

4. Omni – November 9, 2011
5. Pre-Trial – January 11, 2012
6. Trial – January 23, 2012

(CP 92). The State was not in agreement and expressed concerns as to the length of time the matter had been pending. (RP October 26, 2011, at 28). The trial date was continued numerous additional times after the November 9, 2011, date, all at the defendant's request, and the defendant

entered at least three additional Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance waivers. (CP 96, 98, 185). None of the continuances of the trial dates were at the request of the State and the State continued to voice its displeasure at the length of delay in bringing the matter to trial.

On August 26, 2012, the defendant filed a motion to dismiss based upon violations of CrR 3.3 (Speedy Trial Rule), CrR 4.7 (Discovery), and CrR 8.3 (Governmental Misconduct). (CP 105-30). This is the first time in three straight years of being incarcerated that the defendant ever attempted to assert his speedy trial rights. This assertion was limited solely to the time period surrounding Ms. Meehan-Corsi's removal from the case. (CP 118). However, the defendant once again requested a continuance of the trial date, moving the trial out to November 26, 2012, in order for him to get transcripts of all the previous hearings. (RP August 30, 2012, at 40, 45). A Stipulation for Continuance Waiver of Time for Trial (CrR 3.3) Order of Continuance was signed by the defendant and new pre-trial and trial dates were set as follows:

1. Pre-Trial – November 14, 2012
2. Trial – November 26, 2012

(CP 185; RP August 30, 2012, at 45).

On October 30, 2012, the defendant indicated he was re-interviewing witnesses which previous counsel had interviewed, and for the first time disclosed that he needed the services of a new investigator. (RP October 30, 2012, at 60). The reason a new investigator was necessary was that the defendant refused to work with Mr. Mario Torres, the investigator who had been working the case since Ms. Meehan-Corsi was defense counsel. (RP October 30, 2012, at 58). On November 9, 2012, the defendant's motion to dismiss was heard. (RP November 9, 2012, at 151-311). Five witnesses testified and the matter could not be completed, as several more were necessary. (RP November 9, 2012, at 308). The defendant argued for yet another continuance of the trial date, which was denied by the court. (RP November 9, 2012, at 308-11).

On November 21, 2012, the defendant wrote a letter to the State indicating he wished to plead guilty to the crimes as charged. (RP November 21, 2012, at 2). However, when the State noted the matter before the court to address the defendant's letter, the defendant indicated he had changed his mind and did not wish to plead guilty. (RP November 21, 2011, at 4). However, he also advised the court he was not ready to proceed to trial on the scheduled trial date of November 26, 2011. (RP November 21, 2011, at 10) The court advised the defendant the matter trial would commence on the following Monday. (RP November 21,

2011, at 10). The matter did finally proceed to trial on November 26, 2012.

At trial, the jury heard testimony that in 2001, Ms. Alice Robb contacted the defendant after her husband and died. (RP November 29, 2012, at 825). The defendant had been a close personal friend of her deceased husband. Prior to his death, Ms. Robb's husband had asked the defendant to take care of Ms. Robb and their children in the event of his death. (RP November 29, 2012, at 825). A.D.[2], Ms. Robb's son, was around 10 years old at the time. (RP November 29, 2012, at 857). A.D. began to stay overnight at the defendant's residence, alone with the defendant. (RP November 29, 2012, at 857). Ms. Robb observed the defendant appear to be controlling and insistent of physical contact with her son, which caused her concern. (RP November 29, 2012 at 829). In August 2001, A.D. returned to live with Ms. Robb at her residence. (RP November 29, 2012, at 830). After his return home, an incident occurred wherein Ms. Robb's minor daughter and A.D. were engaged in physical play, and the girl accidentally brushed her hand against A.D.'s penis over his clothing. (RP November 29, 2012, at 830). A.D. immediately became distraught and began to scream. (RP November 29, 2012, at 830).

[2] Initials used in lieu of full names of all victims of sexual assault listed in Brief of Respondent.

A.D. finally disclosed to his mother what had been occurring to him while under the defendant's care. (RP November 29, 2012, at 831, 864). He disclosed that the defendant began sleeping in A.D.'s bed. (RP November 29, 2012, at 858). He instructed A.D. not to wear any form of clothing in bed. (RP November 29, 2012, at 859). While the two were lying in bed, the defendant touched A.D.'s penis almost every night he spent with him. (RP November 29, 2012, at 860). He would also perform oral sex on AD. (RP November 29, 2012, at 861). When A.D. attempted to stop the touching, he was either yelled at or punished by the defendant. (RP November 29, 2012, at 863). The defendant also had A.D. watch videos of nude children at a camp on his computer. (RP November 29, 2012, at 864).

After this disclosure by A.D., Ms. Robb immediately contacted the police. (RP November 29, 2012, at 831). A file on the matter was opened. (CP 536). A.D. was interviewed by a forensic child interviewer at Kids Haven on June 12, 2002. (CP 536). A.D. repeated the allegations of abuse by the defendant. (CP 536). After that, Ms. Robb elected to move out of the state. (RP November 29, 2012, at 831). Police lost contact with her upon that move. (CP 536). Contact was reestablished on March 20, 2006. (CP 536).

Also in 2006, the defendant began a romantic relationship with Rikki Kavarie. (RP December 3, 2012, at 1235). Ms. Kavarie had two minor children, J.K. and M.K. (RP December 3, 2012, at 1234). The defendant moved in with her that year. (RP December 3, 2012, at 1235). Ms. Kavarie was on a mixture of Prozac and hydrocodone while the defendant lived at her home. (RP December 3, 2012, at 1237). The defendant provided the hydrocodone to her. (RP December 3, 2012, at 1237). The mixture of the drugs had serious effects upon Ms. Kavarie, causing her to sleep for long periods and become unable to focus or care for her children. (RP December 3, 2012, at 1237). Child Protective Services intervened in 2007, removing J.K. and M.K. from the home. (RP December 3, 2012, at 1237). While at the Kavarie's residence, the defendant systematically molested and raped J.K. and M.K. (RP November 30, 2012, at 1105-12; 1164-78). He punished the children, and threatened them with a firearm if they did not comply or seemed likely to reveal what had happened to them. (RP November 30, 2012, at 1105-12; 1164-78).

After the children were returned to their mother by Child Protective Serves, J.K. and M.K. revealed the abuse that had occurred to their mother. (RP November 30, 2012, at 1111, 1178). The defendant had broken off the relationship with Ms. Kavarie shortly after the children

were removed from the home. (RP December 3, 2012, at 1238). Both children were interviewed by a child forensic interviewer at Kids Haven on July 17, 2009, and gave statements indicating the defendant sexually abused them. (CP 537). The defendant was booked into the Benton County Jail on July 30, 2009. (CP 537).

On August 4th and 5th of 2009, a search warrant was executed on the defendant's storage unit. (RP December 6, 2012, at 1629-30). Recovered during that search was an 8-millimeter videotape. (RP December 6, 2012, at 1629). In addition, another videotape belonging to the defendant was turned over to law enforcement by Ms. Kavarie after being discovered among some of the defendant's property that had been left with her when she and the defendant divided up the contents of a storage unit. (RP December 3, 2012, at 1240). The tape recovered from the storage unit showed the defendant molesting A.D. when he was about 10 years old. (CP 537; RP November 29, 2012, at 835-36). The second tape showed the defendant molesting another boy, whom the State was only able to identify as 'Kyle.' (RP December 10, 2012, at 1798).

After trial by jury, the defendant was found guilty on all counts as well as all eight aggravating factors which were as follows:

1. Rape of a Child in the First Degree With Aggravating Circumstance Allegations of Pattern of Sexual Abuse and Position of Trust;
2. Rape of a Child in the First Degree With Aggravating Circumstance Allegations of Pattern of Sexual Abuse and Position of Trust;
3. Rape of a Child in the First Degree With Aggravating Circumstance Allegations of Pattern of Sexual Abuse and Position of Trust;
4. Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree;
5. Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree; and
6. Child Molestation in the First Degree With Aggravating Circumstance Allegations of Pattern of Sexual Abuse and Position of Trust.

(CP 487-97; RP December 10, 2012, at 1829-34).

The matter proceeded to sentencing on February 26, 2013. At said hearing, the defendant began to disrupt proceedings, speaking over the judge, ignoring directions from her and corrections facility staff, and demanding to immediately be taken back to his cell. (RP February 26,

2013, at 36). The judge, confronted with this, cut short her provision of reasons for the exceptional sentence upward, and sentenced the defendant to 600 months in prison. (RP February 26, 2013, at 38). The defendant now appeals, arguing violation of his constitutional speedy trial rights, and that the failure to enter written findings requires remand.

III. ARGUMENT

1. No speedy trial violation occurred.

The State, from the outset, will concede that this case is exceptional, and not attempt to argue the delay in trying the case was in any way normal. As the Court says, "[t]his does not mean that the right to a speedy trial has been violated, but rather that the 23–month delay is sufficient to trigger the Barker analysis." *State v. Ollivier*, 178 Wn.2d 813, 828, 312 P.3d 1 (2013). In this case, over three years passed before this case was tried. The State acknowledges that a delay such as this receives greater scrutiny, in the form of the *Barker* test. When analyzing an alleged violation of the speedy trial right, the State of Washington has indicated the State speedy trial right is coextensive with the federal speedy trial right, and expressly adopted the federal standards and tests. *Id.* at 826.

The Court has recognized that the constitutional speedy trial right, separate and distinct from one created by CrR 3.3, or 18 U.S.C. § 3161

(2008), is a more indefinite concept. "[T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). There is no single test, no exhaustive list of factors. "The analysis is fact-specific and " 'necessarily dependent upon the peculiar circumstances of the case.' " . . . "[T]he conduct of both the prosecution and the defendant are weighed." " *Ollivier*, 178 Wn.2d at 827.

However, the court has seen fit to provide a list of things which may prove relevant. "Among the nonexclusive factors to be considered are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." " *Id.* None of these factors is determinative, but they are provided as guides. *Id.* The defendant bears the burden of proof in this matter:

> The major distinction between a claimed violation under Rule 3.3 and an alleged denial of a constitutional speedy trial right is the degree of proof. A defendant who has not been brought to trial within the time limits of the rule is not required to show actual prejudice or prosecutorial misconduct; a Sixth Amendment speedy trial challenge, however, requires not only prosecutorial delay, but also substantial damage to the defendant's ability to prepare for trial."

State v. Anderson, 65 Wn. App. 493, 498, 828 P.2d 1161 (1992), *aff'd,* 121 Wn.2d 852, 855 P.2d 671 (1993).

a. Length of the Delay

The first analysis is the length of the delay. The State will note this case was incredibly complex. The conduct at issue in this case covered five years. There were three named victims, each with hours-long taped interviews, as well as a fourth unnamed victim, and multiple other allegations of abuse on the part of the defendant. There was a total of seven hours of child pornography. The children had extensive psychiatric needs, which had to be disclosed. There were 9A.44 hearings to perform, experts to prepare for, and massive amounts of other work. Even in ideal circumstances, it is quite likely this case would have taken a great deal of time to try. Furthermore, the defendant complicated matters at every turn. From refusing to come to court on pivotal dates, to willfully sabotaging his relationship with members of the defense team, to outright refusing to review evidence. No action the defendant took at any time made this easier for defense counsel. (RP April 14, 2010 at 9; RP October 20, 2010, at 20-31; RP October 30, 2012).

The State does not believe the delays in this case were excessive, given the difficult place the defense counsel occupied. Defense counsel required the aid of multiple experts and sought every possible angle to

obtain a favorable result for the defendant. (RP May 18, 2011). In the end, the primary reason the case was so difficult is that the defendant was so clearly guilty. Defense counsel was forced to stretch its resources to the limits, looking for experts on video evidence, child memory, and other subjects. Such expert testimony was the defendant's only option in a case where the State had videotapes which the court characterized as "damning evidence." (RP February 26, 2013, at 33).

The State does not believe that 39 months, under these facts, is excessive. As the Court notes in *Ollivier*, longer periods have been found acceptable by the court. *Ollivier,* 178 Wn.2d at 828. In fact, the court in *United States v. Lane*, found that a 58-month delay was not excessive, given that the defendant requested the continuances. *United States v. Lane,* 561 F.2d 1075 (2d Cir. 1977). In *United States v. Porchay*, a 39-month delay was again found to not be excessive, given the numerous motions, demands, and general effort by the defendant to delay matters. *United States v. Porchay,* 651 F.3d 930, 940 (8th Cir. 2011).

The defendant makes no argument that the length of time in this matter was excessive, or indeed anything but sufficient to trigger the *Barker* test. Given the defendant's actions throughout the case, it seems his concession on this factor is appropriate. Clearly, while 39 months is

an exceptional amount of time, the delay was not excessive in the particular context of the case.

b. Reasons for the delay

The Court is directed next to consider the reasons for the delay. Frankly, the reason for the delay can largely be summed up as "the defendant, or his counsel." The Prosecuting Attorney's Office never requested a single continuance of the trial date and continued to object to the ongoing continuances. All of the trial date continuances were at the defendant's or defense counsel's request as were both of the stays to determine competency. "Delay caused by defense counsel is chargeable to the defendant." *Ollivier*, 178 Wn.2d at 832.

The defendant makes three arguments to support his claim that the overwhelming delay caused solely by him or his counsel should be charged against the State. The first the State will address is the stay surrounding the entry of the second Order of Competency. The defendant argues that the delay should not be charged to him. He indicates that it was the change of counsel that was responsible for the 108 days of delay. A simple reading of the transcripts reveals that is a misstatement of the facts. The Order for Evaluation was entered on March 3, 2010. (CP 50-55; RP March 3, 2010, at 14-15). The report was received and filed with the court on April 5, 2010. (CP 56; RP April 7, 2010, at 17). It was set

over a week so the Order of Competency could be entered. (RP April 7, 2010, at 17-18). However, on that date, the defendant chose not to come to court. (RP April 14, 2010, at 9). The matter had to be set forward two weeks at that point. (RP April 14, 2010, at 9). In the time intervening, Mr. Sant replaced Ms. Meehan-Corsi as defense counsel on the case. (*Notice of Substitution of Counsel*, filed April 13, 2010). On April 28, 2010, Mr. Sant revealed that the case would likely be reassigned. (RP April 28, 2010, at 2). On the May 5, 2010, Mr. Sant confirmed that the case was being reassigned. (RP May 5, 2010, at 7). On May 19, 2010, Mr. Swanberg was assigned to the case. (RP May 19, 2010, at 10). From then on, defense counsel's decision to not accede to the defendant being found competent was a tactical one. (RP November 9, 2012, at 196). All in all, of the 108 days the defendant argues should be charged to the State, 21 of them can be attributed to the substitution of counsel. Beyond that, the entirety of the period is the responsibility of the defendant's direct action, or the actions of counsel, tactically moving to the defendant's benefit.

Furthermore, just because the report finding the defendant competent was in the court file did not mean the court was in a position to find the defendant competent.

> When the issue of the defendant's competency to stand trial is raised, the issue is determined by the court, and if neither the prosecutor nor defense counsel contests the findings contained in the report, the judge may make his determination on the basis of the report. *However, if the report of the court-appointed experts is contested, the court must hold a hearing.*

State v. P.E.T., 174 Wn. App. 590, 597, 300 P.3d 456 (2013) (emphasis added).

> The expert's examination and report may be of relatively little importance to the trial court in making its competency determination in a given case, regardless of whether the examination and report are accepted as adequate for the purpose of satisfying RCW 10.77.060. *See Dodd*, 70 Wash.2d at 514, 424 P.2d 302 ("The trial judge may make his determination from many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.").

State v. Sisouvanh, 175 Wn.2d 607, 622-23, 290 P.3d 942 (2012).

As Mr. Swanberg stated, one of the reasons that he had not filed an Order of Competency was that he needed to know if the defendant wished to do that. (RP June 2, 2010, at 4). The defendant still had every right to contest the finding of competency. It would have been an error for the court to enter the order without the defendant stipulating to competence or conducting a hearing. It is clear that all of the 108-day period should be construed against the defendant, or at the very least, regarded as a necessary delay, given the posture of the case.

The second source of delay the State will address is the alleged discovery issues. (Appellant's Brief at 19). From the onset, the State will note that the "understanding" the defendant claims existed isn't clear at all from the record. The defendant's first counsel had watched the tapes, in their entirety, before February 3, 2010. (RP February 3, 2010, at 5). The defendant's third counsel said the issue with the tapes was never that he could not view them, but rather that he was having difficulties getting the defendant to view them. (RP October 20, 2010, at 20-21; RP November 9, 2012, at 184). These difficulties were not the result of the State's actions. (RP November 9, 2012, at 184). In fact, the reason the defendant was unable to view the tapes was that he utterly refused to view them without his exact conditions being met. (RP October 20, 2010, at 20-30). These conditions were unacceptable. (RP October 20, 2010, at 20-30). They involved having a transcript of seven hours of video produced solely for the defendant's benefit. (RP October 20, 2010, at 20-30). In addition, he demanded to be left alone with the videos. (RP October 20, 2010, at 26). The issues with leaving a child rapist alone with his self-made child pornography wherein he can be seen molesting small children should be obvious to anyone.

The fourth attorney is the only one who appeared to have this "understanding" regarding the need for the prosecutor's presence at the

viewing of the video evidence which the defendant references. Mr. Metro admits that he has no idea if this "understanding" actually existed, and admits he may have totally misconstrued the requirements. (RP November 9, 2012, at 254). The defendant's only evidence cited to show that this understanding actually ever existed is that, at a hearing on the alleged discovery violations, an email was mentioned that said Detective Benson was now managing the material, and asking for coordination to view the tapes. (RP November 9, 2012, at 255). It is undoubtable that someone needed to coordinate with Mr. Metro to view the tapes. (RP November 9, 2012, at 255). After all, they had to provide a secure viewing area, the devices to view them, and someone had to be present to take them back to the evidence room. As a note, the actions taken by the State in coordinating access are the exact kind of things required by RCW 9.68A.170. While that law was not in effect during the trial, the standards for constitutional speedy trial have not changed. Unless the legislature has made it impossible for speedy trial rights to be kept, it seems those steps are unlikely to imperil the rule.

Even when Mr. Metro was made aware that he did not need the deputy prosecutor present, he still could not arrange the time to go down and watch the videos. (RP April 27, 2011, at 21). On July 6, 2011, it was revealed that though Ms. Long had told him months ago in clear terms to

go watch them without her, Mr. Metro had still not done so. (RP July 6, 2011, at 24). In fact, Mr. Metro waited two weeks after signing a protective order that would grant him access to the tapes to go pick up his copies. (RP July 6, 2011, at 27). In the six months after he had full access to the tapes, Mr. Metro had made no progress whatsoever toward getting the case ready for trial. No other attorney found accessing the DVDs difficult. Mr. Swanberg and Ms. Meehan-Corsi both reviewed them in a timely fashion. Mr. Metro's lack of desire to move the case forward cannot be charged to the State.

At no point did Mr. Metro ever make a formal discovery request, or complaint. He never asked the court to order the State to allow him to watch the videos. He never alleged the State was out of compliance with the court rules. Nothing Mr. Metro did in that time speaks to the fact that the State was, in any way, blocking him from accessing the tapes. If that had been the case, the court had the power to direct otherwise. His failure to do so speaks volumes.

The final reason for the delay the defendant suggests is that a "systematic breakdown" in Office of Public Defense that should be charged to the State. (Appellant's Brief at 12). The State will note from the outset that the defendant only suggests four events that demonstrate this "systemic breakdown": the termination of Ms. Meehan-Corsi's

contract; the unwillingness to pay Mr. Sant hourly; the unwillingness to pay the exorbitant fees of the experts; and the removal of Mr. Metro from the case.

No testimony was ever given and there is no record as to why Ms. Meehan-Corsi was removed from the case or why her defense contract was terminated by the Office of Public Defense. The defendant's failure to raise that issue in a timely fashion has left the Court with absolutely no ability to evaluate the reasons underlying Ms. Meehan-Corsi's dismissal. "The party presenting an issue for review has the burden of providing an adequate record to establish such error, *id.*; see RAP 9.2(b), and should seek to supplement the record when necessary, see RAP 9.9, 9.10." *Sisouvanh*, 175 Wn.2d at 619. There is no means for this Court to consider the underlying reasons for Ms. Meehan-Corsi's dismissal. The defendant's only answer to this is to hinge his reliance on the fact that Ms. Meehan-Corsi was not instructed to provide a written summary, or detail the case for the next counsel. The State is unsure that represents a "systematic breakdown," especially given that Ms. Meehan-Corsi did discuss the case with the next attorney assigned to it: Mr. Sant. (RP April 7, 2010, at 17). Additionally, the defendant himself had petitioned the court for Ms. Meehan-Corsi's removal from the court due to his inability to work with her.

The Office of Public Defense was also unwilling to pay Mr. Sant a fee it was contractually unable to pay. The defendant had no right to demand the State pay Mr. Sant hourly. "In particular, a defendant may not insist upon representation by an attorney he cannot afford." *State v. Price*, 126 Wn. App. 617, 632, 109 P.3d 27 (2005). If the defendant wished to retain Mr. Sant, he was certainly free to do so. He did not. He was not entitled to have counsel who would not stick to the payment plan the county was authorized to provide in these kinds of cases. Furthermore, the removal of Mr. Sant caused two weeks of delay out of 39 months. None of that delay actually altered his speedy trial time, because the matter was stayed.

The third sticking point was the defendant's insistence on expensive experts. First of all, the defendant never actually filed a request for an expert. Despite Mr. Metro's insistence to the contrary, he never filed a request for funds to obtain an expert. (RP November 9, 2012, at 275). Instead, he sent Mr. Hsu, the Office of Public Defense administrator, two emails discussing expert witnesses. (RP November 9, 2012, at 275-76). The first was dated August 2nd, 2011. (RP November 9, 2012, at 275). It discussed a Dr. Phillip Esquin, out of Wenatchee. (RP November 9, 2012, at 275). This was clearly not the expert from "British Columbia" that Mr. Metro mentioned. (RP August 24, 2011, at 49). The

second email, on August 15, 2011, discusses the Vancouver PhD, but indicates that Mr. Metro had yet to even speak to the individual. (RP November 9, 2012, at 276). This was two months before Mr. Metro was removed. Despite Mr. Metro's representations to the contrary, there was no "systematic breakdown." He simply didn't request an expert. Furthermore, just because an expert is not approved does not suggest a breakdown. A defendant is not entitled to every expert that he might wish to retain on a whim. "Under CrR 3.1(f), an indigent defendant is entitled to the assistance of an expert witness only if such services are necessary to an adequate defense." *State v. Hermanson*, 65 Wn. App. 450, 452, 829 P.2d 193 (1992). Furthermore, the determination of whether the cost of an expert is reasonable under the circumstances is one that the court is expressly allowed to engage in. *United States v. Davis*, 77 F. App'x 902, 906 (7th Cir. 2003). Finally, the defendant never asked the court to direct the Office of Public Defense to release the funds as he was expressly allowed to do if he could not obtain experts another way. CrR 3.1. The failure to do so shows that a "systematic breakdown" of the Office of Public Defense was not the reason for the delay the defendant cites. There were clear methods to go around any such delay. The defendant's choice not to use them strongly indicates that the procedures and policies of the Office of Public Defense did not create this delay. Indeed, the defendant

actually availed himself of that option later in the case and the court appointed an investigator at defense counsel's request. (RP October 30, 2012, at 63). There was no difficulty with this, the court approving and setting a level of compensation appropriate with no objection from any party. (CP 203-05). The fact that Mr. Metro did not avail himself of this again speaks to the actual source of the day.

The final instance of an alleged "systemic breakdown" was the removal of Mr. Metro from the case. However, the defendant has failed to show anything on the level of a "systemic breakdown." When it comes to speedy trial concerns, the Court has firmly indicated that absent extraordinary circumstances, the actions of State actors not involved in the prosecution (e.g. the Sheriff's office in *Ollivier*; the Office of Public Defense here) are not given the same significance. *Ollivier*, 178 Wn.2d at 836. In the defendant's attempts to the contrary, he cannot show a "systemic breakdown" with a single event. A systemic breakdown, by its very nature, must be endemic to the system as a whole. A single mistake, even one far more egregious than the one in this case, cannot be a systemic breakdown.

Furthermore, looking at what occurred, it is impossible to say how much delay the transfer from Mr. Metro to Mr. Holt required. When Mr. Holt came on, the next trial date was October 31, 2011. Mr. Holt had 51

days with the speedy trial clock to bring the matter to trial. Nevertheless, Mr. Holt admitted that even if Mr. Metro had kept the case, there was no way Mr. Metro would go to trial within that period. (RP October 26, 2011, at 27). Mr. Holt pushed out the trial to January 23, 2012, immediately. (CP 92). It would take more than a year for trial to actually go forward from there. Less than a week before trial began, the defendant was still attempting to continue the trial date. (RP November 9, 2012, at 308, November 21, 2011, at 10). CrR 3.3 gives 60 days prep time for defendants who are in custody. It seems reasonable that a trial attorney could be expected to become familiar with the case in that time. "[B]oth adult and juvenile speedy trial rules are designed to protect the constitutional right to a speedy trial." *State v. Hoffman*, 150 Wn.2d 536, 539, 78 P.3d 1289 (2003). While the constitutional speedy trial rule and the statutory one are not coextensive, it does represent a judgment of how long a case can reasonably be expected to sit while a new attorney gets up to speed on the case. Here, the case sat for four times that period and the defendant was still attempting to continue the trial. (RP November 9, 2012, at 308).

All in all, the delays were caused by the defendant's conduct. He was the one who asked for them. Indeed, as the matter dragged further and further on, the State actively began opposing them. There has been

absolutely no showing that any of the delays in this case are actually attributable to the State. The reason for the delay clearly entirely lies with the defendant. "Nearly all of the continuances in this case were sought to accommodate defense counsel's need to prepare for trial." *Ollivier*, 178 Wn.2d at 834. "In summary, most of the continuances were sought by defense counsel to provide time for investigation and preparation of the defense. Time requested by the defense to prepare a defense is chargeable to the defendant, and this factor weighs heavily against the defendant." *Id.* at 837.

Even if the defendant is correct, the Court has firmly indicated that systemic inadequacies, while attributable to the State, are the least concerning kind of error. "Finally, even if one assumes that any delay was due to institutional dysfunctions attributable to the State, this would weigh against the State but "less heavily than 'deliberate delays or delays related to inexcusable inefficiency.' " " *Id.*

c. The defendant's assertion of his speedy trial rights.

The third factor is the defendant's assertion of his speedy trial rights. This factor is indicated to be enormously important. "The Court added in *Barker* that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." " *Id.*

> [t]he more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Id. at 837-38 (quoting *Barker v. Wingo*, 407 U.S. at 531-32).

The defendant repeatedly requested the continuances, not only through the acts of counsel, but even when the court directly inquired of him. The defendant asked for continuances even of his own initiative. (*E.g.* RP August 25, 2010, at 8; RP May 18, 2011, at 39-40; RP October 12, 2011, at 27; RP January 11, 2012, at 51). The final continuance of this case was requested directly by the defendant, without counsel's aid. (RP Novemer 9, 2012, at 308). The defendant never invoked his speedy trial rights in any other capacity with regards to setting dates. He did file a motion based upon them, but that sought dismissal, and was based on events that had happened years ago. (CP 105-130). However, at the same time as the defendant was seeking dismissal based on alleged speedy trial violations, he continued to seek continuances of the trial date. (RP November 12, 2012, at 308). As the court specifically noted, the defendant was in the process of simultaneously saying that he had not been brought to trial fast enough, while asking to continue the trial date. (RP February 26, 2013 at 29). To assert a defendant's speedy trial rights,

it is not enough to just seek dismissal based upon something that happened years ago. Never, not once, did the defendant attempt to bring this matter to a conclusion more quickly. He continuously requested delay after delay. The defendant admits he did this. (Appellant's Brief at 20).

d. Prejudice to the defendant.

The fourth factor is prejudice. "Under the fourth factor, prejudice to the defendant as a result of delay may consist of (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." " *State v. Ollivier*, 178 Wn.2d at 840. "Contrary to Mr. Ollivier's contention, prejudice is not always presumed. To the extent that our decision in *Iniguez* may have been less than clear on this point, we clarify it now. A defendant ordinarily must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." *Id.* "This treatise explains that in applying the analysis from *Doggett* courts " 'generally have found presumed prejudice only in cases in which the post-indictment delay lasted *at least five years* except where the government was responsible for the delay by virtue of something beyond simple negligence.' " *Id.* at 842 (emphasis added). The defendant does not argue that prejudice should be presumed.

In arguing oppressive pretrial incarceration, the defendant offers nothing more than his self-serving statements, contained in a declaration he produced for a motion to dismiss. (CP 149-158). No other evidence supports his allegations. The defendant did not testify and refused to be subjected to cross-examination over his claims, and they were expressly refuted by the testimony of the Benton County Jail Lt. Robert Guerrero. (RP November 9, 2012, at 290-304). The defendant was treated the same way as any other prisoner. He was fed a diet he agreed to in a written contract. (Ex. I – *Dietary and Allergic Concerns to Meal Plan*[3]). In said document, the defendant admitted that even when not in custody, he did not adhere to a strict Kosher diet. (Ex. I – *Dietary and Allergic Concerns to Meal Plan*). Even if these events occurred, everything the defendant claimed was nothing more than what every inmate in jail care suffers. "Moreover, his complaints about jail conditions do not suggest that conditions were oppressive; rather, the conditions are common to incarceration." *Ollivier*, 178 Wn.2d at 844.

The defendant also suggests that he was under stress because defense counsel informed him at various times that they were not prepared

[3] The State filed a Designation of Exhibits on August 14, 2014, designating Exhibit I – *Dietary and Allergic Concerns to Meal Plan*, admitted at the November 9, 2012, hearing, and the Clerk's Exhibit Index with the numbering of the document has not yet been received as of the date of filing this brief.

to go to trial. First of all, the defendant elected to only present his self-serving allegations again. In fact, he specifically blocked any questioning about those statements by asserting attorney-client privilege. And again, nothing about this suggests the defendant suffered anything out of the ordinary restraints prisoners encounter. " "[T]he second type of prejudice ... is always present to some extent, and thus absent some unusual showing is not likely to be determinative in defendant's favor." ... Mr. Ollivier has not established this type of unusual anxiety and concern." *Ollivier*, 178 Wn.2d at 845. That the defendant's counsel was honest with him, and told him that they needed additional time, does not create unusual anxiety or concern, nor does the fact that the defendant was not given free access to the child pornography he created.

The defendant claims absolutely no prejudice to his ability to present a defense. "The most important of the three interests is protection against impairment of the defense because if the defendant cannot adequately prepare his case, "the fairness of the entire system is skewed."" *Id.* The defendant was given access time and time again to everything he requested. He did not show any form of prejudice. He suggests no witnesses whose memories dimmed. For some of the charges, 39 months was far less time than had already passed between the rape and the trial. In two of the charges, the only relevant information was the existence of

the tapes themselves, which the defendant offers nothing to controvert. The defendant offered no witnesses, did not testify, and introduced no evidence. There is no justification for concluding his ability to present a defense was compromised.

Looking at the four factors, they all weigh against the defendant. The defendant fails to make arguments to even address two of them. Given the defendant's burden of proof, there is no way to take that but as a concession. The reasons for the delays overwhelmingly favor the State. The defendant claims that each attorney's reappointment should be judged against the State, with the exception of Mr. Swanberg. However, the Office of Public Defense administrator, Eric Hsu, specifically testified that the State did not have any role in the reassignment of the defendant's case to any of his public defenders. (RP November 29, 2012, at 970-71). Nor did the State have any input as to which public defenders were assigned to which criminal docket. (RP November 29, 2012, at 972). In fact, Mr. Hsu indicated that he would not have accepted any such input as it would have been improper. (RP November 29, 2012, at 972).

The defendant also cites the allegedly dilatory entry of the competency order. The defendant fails to recognize that covers the exact same period of time as his previous argument. Finally, the defendant asks that 24 weeks be held against the State. That is 168 days. So, of the total

of 1,215 days, the defendant admits that, via his continuous requests for continuances, he was responsible for 913 days of the delay. He provides no persuasive argument that his pretrial imprisonment prejudiced him more than the average inmate is prejudiced. All four factors strongly suggest that the defendant bears the responsibility for delays in this case, and as a result, that his Sixth Amendment rights were not violated.

2. Judge Carrie Runge's oral record, despite repeated interruptions by the defendant, clearly sets forth the rationale of the substantial and compelling reasons justifying imposition of the defendant's exceptional sentence upward.

The State concedes that no formal written Findings of Fact and Conclusions of Law were entered with regard to the imposition of the defendant's exceptional sentence upward as required by RCW 9.94A.535. However, the fact that formal written Findings of Fact and Conclusions of Law were not entered is not enough to warrant a remand. When the court's oral ruling, together with the records, are clear and comprehensive enough that remand would be a simple formality, the court will proceed without such, treating the oral ruling as written findings. *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011).

In the instant case, the court's oral findings were very clear. Judge Carrie Runge in her ruling stated that,

> And it might be argued that the videos did not show the horrific abuse that these children complained of, but I

> would venture to guess that from the jury's perspective, and certainly from my perspective, the videos that were presented to this jury were damning evidence against you of really where you were at, your frame of mind and how you dealt with children. Those videos were there in plain view for everyone to see. That evidence alone, even if the children were not able to come into this court and testify, would have been damning in and of itself. But I think even more is the testimony of the children.
>
> So we have the videos, we have the testimony of the children that took the stand . . . (the defendant then interrupted Judge Carrie Runge so she was unable to continue).

(RP February 23, 2013, at 33-34).

Judge Carrie Runge was finally able to continue after several interruptions by the defendant and stated:

> So what I was saying is that we have the videos that were shown to the jurors. We have the testimony of the victims that took the witness stand. And beyond that, we have statements that you made sir, that, from the court's perspective, were also damning statements from your own mouth regarding . . . (the defendant once again interrupts Judge Carrie Runge so she was unable to continue).

(RP February 23, 2013, at 34).

Judge Carrie Runge then continued and stated:

> I've listened, as I've said, to what you've had to say. And once again, I think Ms. Long is absolutely on point; you go on and on and on. At no point do you acknowledge that any of this occurred. At no point do you acknowledge the victims in this particular case. It is all about you. . . . But at this point this is about justice for everyone in the courtroom and closure for these victims.
>
> I think it's important as the jury found sir, and rightly so, that you did abuse position of trust.

> And you selected a vulnerable victims but also vulnerable mothers. Mothers that obviously were incapable; and maybe they selected you would be a better way to put it. But you preyed upon that and took full advantage of the opportunities that these vulnerable individuals provided you. . . . (the defendant once again interrupted Judge Carrie Runge so she was unable to continue).

(RP February 23, 2013, at 35-36).

At this point, the defendant demanded to be returned to the jail and indicated he was not interested in the law. (RP February 23, 2013, at 36). Judge Carrie Runge advised the defendant, "[t]he fact of the matter is you were never simply going to be satisfied with anyone's best and I get that. So rather than justify my sentence, I'll go ahead and sentence you so that you can be removed from the courtroom. (RP February 23, 2013, at 37). The defendant thanked Judge Carrie Runge and she proceeded with her imposition of sentence. (RP February 23, 2013, at page 37).

Judge Carrie Runge stated, "[t]he jury did find aggravating factors beyond a reasonable doubt. Based on that, the court finds it appropriate to follow the request of the prosecutor and sentence you to the term of 600 months on Counts 1, 2 and 3. . . 600 months on Count 6. . ." (RP February 26, 2013, at 38). Furthermore, Judge Carrie Runge indicated on the Judgment and Sentence that "substantial and compelling reasons exist which justify an exceptional sentence . . ." (CP 560).

In the instant matter, the eight aggravating circumstances alleged by the State were found by the jury. (CP 571-78). The defendant has not alleged insufficient evidence supported them. "It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal." *In re Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). As a result, the Court is bound by the finding that the defendant raped and molested the victims in this matter as part of an ongoing pattern of sexual abuse manifested by multiple incidents over a prolonged period of time and the defendant utilized a position of trust to facilitate the commission of said crimes. During sentencing, Judge Carrie Runge indicated that based upon the aggravating factors, she found it was appropriate to follow the request of the prosecutor, and marked that substantial and compelling reasons existed on the Judgment and Sentence. (CP 560; RP February 23, 2013, at 38). The aggravating factors the court relied upon in justifying the defendant's exceptional sentence are expressly listed in the statute as a basis to do so. RCW 9.94A.535(3)(g) and (n). Additionally, the eight aggravating factors provided a substantial and compelling reason to sentence the defendant above the standard range.

The facts of this case were atrocious. During the trial, the jury and Judge Carrie Runge heard testimony that the defendant systematically sought out single mothers in financial and emotional distress, and

ingratiated himself into their families. (RP February 26, 2013, at 35-36). He then utilized the fact that these children and their mothers trusted him to repeatedly rape and molest four children over an extended period of time. (CP 571-78). The defendant even admitted to the fundamentally manipulative conduct. "Mr. Shemesh told an interviewer 'he doesn't have friends, he acquires family.'" (CP 528). The molestation of two of the victims was captured on video the defendant had secretly placed to film himself while he molested the victims. (CP 537; RP November 29, 2012, at 835-36). The exceptional sentences mark one small step toward redressing the fundamental failure of almost every system meant to protect these children from sexual predators like the defendant.

While formal written Findings of Fact and Conclusions of Law regarding the imposition of the exceptional sentence upward would have been preferable, the record provided by the court, despite the defendant's disrespectful and offensive conduct during the hearing, is clear. (RP February 23, 2013, at 37). The court clearly exercised the discretion it knew it had, and found that the exceptional sentence was justified by substantial and compelling reasons, including the eight aggravating factors found by the jury. However, if this Court does not believe the record provided by Judge Carrie Runge is sufficient to support the exceptional sentence upward, the State would request the matter be remanded back so

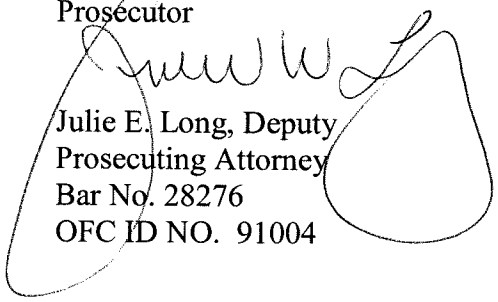
a complete record can be made. The defendant should not benefit when his inappropriate courtroom behavior is the result of the record by Judge Carrie Runge being cut short.

IV. CONCLUSION

The defendant's speedy trial rights were not violated and there were substantial and compelling reasons found by the court in its oral ruling justifying the imposition of an exceptional sentence upward. Thus, the defendant's appeal should be denied and his convictions affirmed.

RESPECTFULLY SUBMITTED this 15th day of August, 2014.

ANDY MILLER
Prosecutor



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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 August 15, 2014.

Courtney Sheafer
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