NO. 45823-3-II-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONALD ORMAND LEE,

Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The State charged the defendant with five counts of Rape of a child in the third degree alleging sexual intercourse with Jane Doe between June 1, 2008 and October 1, 2008. CP 6-8. Jane Doe testified when she was 15 and at home she received a random phone call from a man calling himself Rick. RP 54-57.[1] The conversation soon took on a provocative nature and Rick was asking her sexual questions and to meet him. RP 56-57, 59. Jane thought he used the last name of Johnson, but couldn't be sure as her memory was foggy. RP 57. She did positively identify "Rick" as the defendant in open court, indicating he hadn't changed much since. RP 61-62.

Jane met the Defendant several times that summer and engaged in vaginal and oral intercourse with him. RP 60, 65-69. She described having sex at his ex-girlfriend's house in Castle Rock, Tam O'Shanter and Riverside Parks. RP 66-67. While she could not remember any particular decorations in the home, Jane spoke about petting the two cats at his ex's

[1] The Verbatim report of proceedings consists of two consecutively numbered volumes, 1A and 1B and shall herein after be referred to as RP ____ (page number).

house and later identified the house to the police and in a photograph,. RP 71, 103, 111, 128, 130-131, 167. She did remember riding in his black Camaro/Thunderbird type car. RP 61-62, 79.

During Jane's time with Defendant, she learned he lived with his mother at the Cowlitz Villa, about a block away from Jane's house. RP 59-60, 81, 119. She even recalled meeting his mother and asking her if "Rick" was home. RP 82. Jane testified she went inside the home for less than five minutes after the defendant invited her in and couldn't remember any particular color or decor in the home, other than beige. RP 82, 117, 145-147, 151. She also didn't remember much about Lee's mother, other than she was much older with grey hair and was of a height as Jane when she answered the door. RP 141-143.

Jane testified the defendant he had a problem with his hip from an accident that limited him and had a tattoo on either his chest or shoulder and one on his arm. RP 72, 127. Jane told the jury the Defendant gave her a note, which she later gave to the police. RP 84-86. In the letter, the Defendant described the sex acts he did with her and wanted to do. Supp. Desig. CP – Exhibit #1.

Jane told her mother about the relationship with Lee in March 2009. RP 89, 157-158. It was then reported to the police and Officer McFall with the Kelso Police took the report. RP 89-90, 184. Jane gave McFall the letter. RP 90, 189. She then also worked with a Cowlitz County Sheriff's

Detective Broyles to do a photo lineup and immediately picked out the defendant. RP 90-92, 159; Supp. Desig. CP – Exhibit 2 – Photo lineup.

Beth Bongiovanne testified that during 2008 her ex-boyfriend Lee borrowed her black Camaro and had permission to use her home. RP 166-167. In June 2008 she left the home for three or four days and Lee had access to the home and car. RP 177. Additionally, in June 2008 she had two cats and obtained a third in July. RP 168. She described her home as having lots of pictures of wolves and a wolf comforter in the bedroom. RP 169, 175.

Officer McFall testified she received the report March 9, 2009. RP 184. In talking with Jane, she determined it did not happen in her jurisdiction and would need to forward it to the Cowlitz County Sheriff's department. RP 185-186.

The Sheriff's office received it and patrol deputy Robinson did a little bit of work in trying to identify the suspect. RP 200-201. The matter was sent to the detective unit where another patrol deputy on temporary light duty did some small work and then to Detective Broyles. RP 201. Detective Broyles's work on the case was inconsistent and sporadic because of some medical issues and an issue involving his parents on the other side of the state. RP 201. He eventually retired in April 2010. RP 201. Upon his retirement the case was not reassigned to another deputy and the case feel through the cracks. RP 201.

When Detective Sergeant Brad Thurman came into the unit in May 2012 he discovered the case and began working on it. RP 199-201. He did about six months of investigation, including talking to the victim and taking her to the various locations of the sex acts to obtain pictures of the areas, tracking down the Defendant and the vehicle he drove when he was with the victim, talking to Lee's ex-girlfriend, and obtaining a handwriting sample from the defendant for comparison purposes to the letter provided from the victim. RP 200-211, 213, 218. The results from the comparison came back from the lab in April 2013. RP 211. The defendant stipulated at trial that he wrote the letter. CP 18.

The Defendant called Tina Dunlap, his ex-wife as a witness. RP 227. She testified Lee stored items at her place, including papers, but didn't know what kind of papers as she never looked. RP 230, 234. The papers were kept in an open and accessible storage locker. RP 230. She testified she hadn't seen Lee's body since 2002, but didn't know of any tattoos on Lee. RP 231, 234. She knew he drove a black Thunderbird/Firebird at the time of trial. RP 231-232. She said Lee did live with his mother at the Cowlitz Villa for a while and she did visit there about five times. RP 232. She could not remember unique décor in the mother's residence. RP 232.

The Defendant's step-brother, Craig Riggle also testified. At the time of trial, he was living with Lee. RP 252, 260. Riggle told the jury he lived with his mother from March 2008-November 2008. RP 250. His mother's place was small and uncomfortable, neither he nor Lee had a

bedroom and Riggle slept on the couch. RP 251. He admitted there was no privacy and it certainly wasn't a place to bring a date. RP 251. Riggle described the residence having a purplish-mauve colored recliner, a wooden rocking chair with foot stool, and grandfather clock that ticked loudly. RP 241. He never mentioned any specific décor. He said his mother passed away a little over a year before trial. RP 256.

Riggle testified Lee obtained a 1981 Pontiac Firebird in September 2008. RP 243. Prior to that he had a Monte Carlo and also drove Bongiovanne's Camaro. RP 248, 253. Riggle testified he and Lee worked together every day during the week in August and September 2008 to pay off the car. RP 245. However, the car just sat at his mother's house because of mechanical problems. RP 243-244, 246, 263-264. Riggle testified Lee did not have any tattoos. RP 248.

Lee testified he lived with his mother during 2008. RP 265. She had a purple rocking chair, a grandfather clock in the living room, and a large collection of Betty Boop. RP 266-267. He said sometime in 2008 he spoke to the victim for about five minutes because she came up to him outside his mother's house and asked him if he was married to Tina Dunlap. RP 261. Other than one other time seeing her on the sidewalk while he was driving, they had no other interaction. RP 261-262.

Lee did admit he wrote the letter, Exhibit #1, and said it was in the belongings he stored at Tina's house. RP 269. He said he wrote the letter

as a fantasy, signing it with a "R" and never gave it to the victim. RP 269, 274. He denied ever being called "Rick." RP 269. He also denied driving Bongiovanne's car during 2008. RP 270.

In the letter, the Defendant directed his comments to a person, telling this person he's glad she's in his life, she turns him on like no other woman, he masturbates when he thinks of her or hears her voice, he wants to be there for her and is starting to have strong feelings for her. RP 305-307, Supp. Desig. CP – Exhibit #1. He also wrote about what looking at her does to his body and saying he wants to have sex with her and loves when she gives him oral sex. RP 308, Supp. Desig. CP – Exhibit #1.

B. STATEMENT OF PROCEDURE

The Defendant was arrested on October 9, 2009 and made a first appearance in court. RP 287, Supp. Desg. CP – Bail Study, page 2. Charges were not filed in 2009 and the defendant was released from any restrictions. RP 287, CP 3, 4-5. The State did file charges on March 6, 2013 and the Defendant appeared later that month out of custody. RP 287, CP 6-8. The trial date was continued twice over the next 7 months. On June 10, 2013, the Defendant's attorney requested a continuance and the defendant signed a waiver of his time for trial. Supp. Desig. CP – waiver of speedy trial 6/10/2103, Clerk's note 6/10/2013. On September 23, 2013, defense counsel requested another continuance and the defendant signed a waiver with a commencement date of September 23, 2013. Supp. Desig. CP –

waiver of speedy trial 9/23/2103, Clerk's note 9/23/2013. Trial began December 18, 2013. RP 13.

Prior to trial, the Defendant moved to allow evidence the victim had previously made a false allegation of nonconsensual rape in June 2008, pursuant to RCW 9A.44.020. RP 20, CP 15-17. The parties argued the matter and after it was apparent the Rape Shield law did not apply to allow the evidence, defense counsel alleged a prior false statement may be allowed, but left it up to the court. RP 26. Defense counsel did not cite to any evidence rule for the admission of the evidence. RP 20-21, 25-26. The state moved to exclude the evidence citing to the Rape Shield law and Evidence Rule 608. RP 22-25. The trial court found the false statement relevant to the victim's credibility, but not to whether the sex act was consensual. RP 28-29. The State proposed a middle ground to prohibit the admission of prior sexual acts, but to allow the prior false statement to be admissible. RP 30-31.

The trial court ruled it would allow cross-examination of the victim that she made a false accusation about another person to the police, that her motivations in making the complaint were admissible, and that she promptly rectified the very next day. RP 33. However, the court barred any mention of sexual conduct as a fair balance of competing interests. RP 33.

Upon cross-examination, counsel asked the victim, "You ever made any false accusations about another person to the police." RP 120. The

victim responded yes, it was in June 2008 before things with Lee, and she immediately corrected it. RP 121. She explained on re-direct that her mother made the report and Jane didn't want someone to think she made a false report and so she called the police to make it right. RP 151.

The jury found the defendant guilty of counts one and two – Rape of a Child in the third degree, a class C felony. CP 52-53, 64. The defendant's standard range sentence for both counts was 26-34 months. CP 64. At sentencing, the court indicated it reviewed the Presentence investigation report. RP 417. The report indicated the Defendant completed 10th grade, was currently unemployed, but also receiving disability benefits. Supp. Desig. CP – Presentence Investigation Report, pg 4. The court sentence as to count one was 34 months prison and 26 months community custody and count two was 26 months prison and 36 months community custody. CP 67. The counts were to run concurrently. CP 67. The court also sentenced the defendant to pay legal financial obligations. CP 65.

IV. ARGUMENT

A. THE DEFENDANT FAILS TO SHOW A MANIFEST ERROR AND THE COURT SHOULD NOT ACCEPT REVIEW OF THE SPEEDY TRIAL ALLEGATION.

Under Rule of Appellate Procedure 2.5, the appellate court may refuse to review any claim of error which was not raised in the trial court. WA RAP 2.5(a) (2014). However, a defendant may raise a manifest error affecting a constitutional right for the first time on appeal. Id. In order to

prove a manifest error, a defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). If the defendant does make the showing, the State may then show the error was harmless. Id.

Because the Defendant did not raise the issue of speedy trial to the trial court, he must plausibly show any alleged violation of his 6th Amendment right to speedy trial had practical and identifiable consequences in the trial. This means before the Appellate court looks at whether there was speedy trial violation, the court must first decide if there were consequences of any delay. The Defendant does not cite to any case to avoid the burden under Rule 2.5(a) and none of the cases cited by the Defendant under the argument for Sixth Amendment violation relieve the burden.

The Defendant alleges because his mother died in the intervening time between his arrest and the filing of a charge there was a practical and identifiable consequence in the trial as her testimony could have rebutted the victim's testimony that she visited the home. Def. Brf. at 15. The State acknowledges the potential hazard of proving what a deceased witness might testify, however, since the issue was not raised by the Defendant to the trial court, the question becomes does the Defendant's mere speculation his mother's testimony would show the victim was not present in the home rise to the level of practical and identifiable consequence in light of the evidence at trial.

The Defendant testified he never met the victim other than once outside the home. RP 260-261. He also testified to the unique furniture inside the home, to which the victim did not recall. RP 266-267. Additionally, he called his brother as a witness to testify to the contents of the home. RP 241. In light of the evidence already provided by the Defendant to contradict the victim's testimony, the Defendant cannot plausibly show that any testimony from another person would rise to the level of practical and identifiable consequences. Moreover, there was evidence directly linking the Defendant to the victim in a hand-written letter from the Defendant describing the sex acts he performed on the victim and wanted to perform on her. CP 18, Supp. Desig. CP - Ex. 1. In light of this evidence at trial the level of any consequence is slim and the Defendant fails to show there was manifest error.

B. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE DEFENDANT'S CLAIM OF A SPEEDY TRIAL VIOLATION.

The Defendant argues the State violated his Sixth Amendment right to a speedy trial, alleging it was the State's negligence that caused the delay of over four years. The Defendant claims there is sufficient evidence in the record to deduce the reason for the delay and the court to determine the delay was due to State negligence and prejudiced the Defendant. Because the Defendant never raised his allegation to the trial court, the evidence was never fully presented nor explained. Thus there is an insufficient record for the Appellate court to decide this issue.

When a defendant raises a challenge alleging a constitutional speedy trial right violation, appellate review is *de novo*. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). "The analysis is **fact-specific** and 'necessarily dependent upon the peculiar circumstances of the case.'" State v. Ollivier, 178 Wn.2d 813, 827, 312 P.3d 1 (2013) citing Iniguez, 167 Wn.2d at 288.

> [T]he conduct of both the prosecution and the defendant are weighed." 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." None of these factors is sufficient or necessary to a violation. But they assist in determining whether a particular defendant has been denied the right to a speedy trial.

Id. citations omitted.

The Defendant cites to a portion of the testimony presented to the jury to explain the age of the case and the Clerk's Papers establishing probable cause and arraignment. Def. Brf at 10. However, the evidence cited by the Defendant was a brief explanation provided to the jury by the State to allow them to understand the passage of time in the investigation. RP 199-201. The State did not present the testimony with an eye towards fully explaining the delay to a court looking at a speedy trial issue. There is no information in the record to explain why charges were not initially brought upon the Defendant's arrest. There is very little explanation of the change in personnel or why that happened. RP 199-201. There is no explanation of how long the investigation took initially or in the follow-up

prior to 2012. Moreover, the State did not have an opportunity to present testimony to a reviewing court to establish the reasons for delay and the trial court did not have an opportunity to find any facts to assist the appellate court to determine this highly factual issue. Lastly, the defendant has not been candid with the appellate court by failing to acknowledge his own request and agreements to continue the trial date. Supp. Desig. CP, Waiver of speedy trial, 6/10/2013, 9/23/2013.

The defendant requests an extraordinary remedy to dismiss the charges of which he was found guilty by a jury. CP 52-53. Because he has not provided a sufficient record for the Court to determine the facts in issue, the court should not accept review. However, should the court wish additional information, the State asks for the opportunity to present the entire factual history to the appellate court before consideration and asks the appellate court to remand the matter for a reference hearing pursuant to Rule 9.11. The State believes the additional evidence would probably change the decision being reviewed.

C. THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED

Should the court accept review of the issue of Sixth Amendment violation of speedy trial without a reference hearing, the Defendant cannot show a violation under the totality of the circumstances.

i. There is no presumptively prejudicial delay

When a defendant raises a Constitutional speedy trial issue he must make a threshold showing of presumptively prejudicial delay. State v. Ollivier, 178 Wn.2d 813, 827-28, 312 P.3d 1 (2013). "[I]f this showing is made, a court has to consider as one factor among several the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." Id. at 828. There is no clear cut magic number that tips the threshold question. Courts have found anywhere from 8 months to 8 years to trigger the question.

The defendant, citing to State v. Corrado, 94 Wn.App. 228, 232, 972 P.2d 5151 (1999), argues the Sixth Amendment right to a speedy trial attaches when a charge is filed or an arrest made, whichever occurs first. Def. Brf. at 11. However, this statement is an oversimplification of the issue. In Corrado, the Court of Appeals reversed a conviction of attempted second degree murder, finding the State never formally filed charges. Id. at 231. Upon remand and filing of charges, the Defendant filed a motion to dismiss for double jeopardy. Id. The trial court dismissed the charge and the State appealed. Id. The court continued to hold Corrado on bail while the appeal was pending. Id. The Court of Appeals reversed the trial court, allowing the retrial. Id. Corrado contented his 11 months incarceration while pending appeal violated his constitutional speedy trial right. Id. at 231-32.

Division Two, citing to State v. Higley, 78 Wn.App. 172, 184, 902 P.2d 659 (1995) and United States v. Loud Hawk, 474 U.S. 302, 310-11, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986), did make the statement that arrest and actual restraint can trigger the speedy trial protections. Corrado at 232. However, the cases of Higley and Loud Hawk did not involve an arrest where no charges were filed.

In Higley, the defendant was timely cited with DUI and reckless driving in District court arising out of a collision. State v. Higley, 78 Wn.App. 172, 175, 184, 902 P.2d 659 (1995). Higley entered into a deferred prosecution in District Court in November 1989. Id. Four months later law enforcement then found out the other driver developed medical problems from the collision. Id. The State moved to dismiss the District court case seven months later to file the felony charge of vehicular assault. Id. There were some legal challenges in District court and Superior court following this motion, but the charges were dismissed in District court in July 1991 and the felony charge filed. Id. Higley moved to dismiss the felony charge in part on double jeopardy grounds. Id. at 177. On appeal Higley also argued a violation of his Constitutional speedy trial rights.

The court cited to Loud Hawk for the position that "the right to speedy trial attaches when a charge is filed or an arrest is made, whichever occurs first." Id at 184. However, Higley's case never centered on whether there was a delay in charging the original citation, nor delay in filing the felony charges. The court found any delay started from the **filing** of the

citation and the reason for the lengthy delay was due to the granted deferred disposition and appellate proceedings, not in the charging decision or date. Id. at 185.

In U.S. v. Loud Hawk, 474 U.S. 302, 304, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986), the Supreme Court considered whether the Constitutional right to speedy trial applied "to time during which respondents were neither under indictment nor subjected to any official restraint," and whether delays by interlocutory appeals were properly weighed in assessing the speedy trial. In Loud Hawk's case he was arrested and indicted by grand jury within two weeks. Id. at 305-06. The court granted a motion to suppress and dismissed the case when the Government was not ready to proceed to trial. Id. at 307. The Government appealed both the ruling on the suppression motion and the dismissal. Id. The matter proceeded through the appeals process for nearly four years, with the trial court's ruling overturned and the defendant reindicted. Id. at 308. After reindictment Loud Hawk filed for and was granted a dismissal for vindictive prosecution. Id. at 308-09. The matter again proceeded through the appeals process and 29 months later the trial court was again overturned. Id. at 309. During this time the defendants were free on their own recognizance. Id. The third reindictment lasted almost four months before the trial court again dismissed the case for Sixth Amendment speedy trial violations. Id. at 310.

The Supreme Court found during much of the litigation the defendant was not under indictment nor subject to bail, and that additional

judicial proceedings would be necessary to subject him to any actual restraint. Id. at 311. The court stated the time during which a defendant is not under indictment nor subject to any restraint on their liberty should be excluded and not considered when looking at speedy trial. Id. at 310, citing to U.S. v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

> "[W]ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, 'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer.' " 456 U.S., at 9, 102 S.Ct., at 1502.
>
> Respondents argue that the speedy trial guarantee should apply to this period because the Government's desire to prosecute them was a matter of public record. Public suspicion, however, is not sufficient to justify the delay in favor of a defendant's speedy trial claim. We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were "in the same position as any other subject of a criminal investigation." MacDonald, *supra,* at 8-9, 102 S.Ct., at 1502. See Marion, *supra,* 404 U.S., at 309, 92 S.Ct., at 457. The Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial. The Clause does not, for example, limit the length of a preindictment criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." 456 U.S., at 9, 102 S.Ct., at 1502.

Id. at 311-12. The Court further found the lengthy appeal process was not a violation of speedy trial. Id. at 317.

In MacDonald, the Supreme Court made clear that delay prior to arrest or indictment may give rise to a Fifth Amendment due process claim,

but it is not applicable to Sixth Amendment speedy trial concerns as that does not arise until charges are pending. U.S. v. MacDonald, 456 U.S. 1, 7, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

In the present case, on October 12, 2009 the Defendant was arrested, and the court found probable case and set bail. RP 1-2. However, the State never filed charges at that point and the Defendant was released of all restrictions. CP 3, 4-5. The State did file charges on March 6, 2013 and the Defendant first appeared on a summons on March 25, 2013. RP 4, CP 6-8. He was arraigned on April 8, 2013 and a trial date set for June 24, 2013. RP 10. There were two waivers of speedy trial filed by the Defendant, one with a commencement date of June 31, 2013 and the other September 23, 2013. Lee came to trial on December 18, 2013, within the time allotted by the last speedy trial waiver. RP 13.

In State v. Corrado, 94 Wn.App. 228, 233-34, 972 P.2d 515 (Div 2, 1999), the Appellate court determined on the basis of the length of time only that an eleven month delay was sufficient to trigger the presumption. However, the Washington Supreme Court in Iniguez determined the approach under Corrado was out of step with the fact-specific nature required under the *Barker* analysis. State v. Iniguez, 167 Wn.2d 273, 292, 217 P.3d 768 (2009). While the passage of time is important in the analysis, it is only a factor. Id.

In Iniguez, the court found the length of delay (8 months, 14 days), the fact Iniguez was in custody during the time, the simplicity of the charge

of Robbery in the first degree, and that the case rested mostly on eye witness testimony triggered the presumption. Id. at 292.

In Mr. Lee's case, calculating the time from the date of charging, Lee's case lasted seven months and 12 days. He was not under indictment prior to this date and his incarceration lasted at most five days. CP 3, Supp. Desig. CP – bail study, pg 2. Even adding the five days to the calculation, there is no reason to believe that a case charging five counts of Rape of a Child in the third degree pending for less than eight months and with two defendant sanctioned continuances, would trigger the presumption of prejudicial delay.

ii. Even under the *Baker* factors, the defendant's speedy trial rights were not violated

Should the Court decide the presumptively prejudicial threshold is met, the Defendant cannot show under the totality of the circumstances a violation of speedy trial.

When the threshold of presumption is met, the court does a fact-specific analysis of nonexclusive factors, including the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant." State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013) citing to Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

In State v. Ollivier, the defendant was arrested and charged with possession of depictions of minors engaged in sexually explicit activity. Id.

at 821. After 22 continuances, mostly sought by defense counsel, Ollivier was brought to trial twenty-two months later. Id. Ollivier objected to all but the first two continuances of his trial. Id.

In looking at the *Baker* factors, the Washington Supreme Court noted that numerous cases did not find a 22 month delay, nor even longer, as exceptionally long, particularly when the delay was attributable to the defendant. Id. at 828.[2] In the present case the delay between arraignment and trial was attributable to the defendant, at his request and after a waiver of his rights to speedy trial. Supp. Desg. CP, Waivers of speedy trial, Clerk's notes for 6/10/2013, 9/23/2013. While the reasons for the continuances are not readily apparent from the documents, the delay was sanctioned by the defendant and he never once asserted his right to a speedy trial.

The Defendant's briefing never addresses the delay from arraignment to trial, but rather focus completely on what happened prior to charging. As argued above, under MacDonald and Loud Hawk the court should not consider this time. However, should the court consider this time and not refer it back for a reference hearing, the time from arrest to charging was October 9, 2009 – March 6, 2013 – approximately three years and five months. As stated by the Ollivier court, the length of time is not necessarily exceptional in comparison to other cases. Id. at 828-29.

[2] The Ollivier court cited to a number of federal cases where delays between 21 and 58 months were not considered overly long. Id. at 829.

As briefly explained to the jury by Detective Sergeant Brad Thurman the case was originally reported to the Kelso Police department. RP 186, 200. Once it was determined to have occurred in the county it was referred to the Cowlitz County Sheriff's office in March 2009. RP 186, 200, 201. A patrol deputy did some basic work on the case and then it was transferred to the detective unit. RP 200-201. Another patrolman on temporary light duty assigned to the detective unit did some brief work on the investigation and then Detective Broyles also worked on the investigation. RP 201. Detective Broyles' work was sporadic due to medical issues and then he retired in April 2010. RP 201.

Detective Sergeant Thurman came into the detective unit in May 2012 and discovered the case was not assigned to anyone since Detective Broyles. RP 199. This was unusual and it appeared the case "fell through the cracks." RP 200.[3] At this point Detective Sergeant Thurman picked up the case and finished the investigation. RP 201. He spoke to the victim again, tried to determine the Defendant's whereabouts, and investigated the type of car the Defendant drove, even tracking the car to a Portland wrecking yard. RP 201-208. He also obtained a handwriting exemplar from the Defendant and submitted it for analysis. RP 209-210. His

[3] There is nothing in the record to explain why the case was not reassigned or what happened in the Sheriff's Office between April 2010 and May 2012.

investigation took him six months to complete and the handwriting analysis report was not complete until April 2013.[4]

In looking at the reasons for delay, if the delay is due to the government's negligence the delay is weighted against the government but to a lesser extent than deliberate delays. Ollivier, at 832. If there are valid reasons for the delay, then the valid reason may justify a reasonable delay. Id. In the present case, there is little information about why the case was not actively investigated from April 2010 to May 2012 – 25 months. It is apparent that when the issue was known there was active investigation that took an additional 6 months.

Under the third *Barker* factor, the Defendant argues he did not have the opportunity to assert his right to speedy trial because the case lay dormant and he suffered prejudice prior to the charging. Def. Brf at 13. However, Lee never raised the concern after charging.

The assertion of the speedy trial right is an important factor in the balancing test. Ollivier at 837. In Ollivier, the Washington Supreme Court notes that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id. citing to Barker, 407 U.S. at 532. Generally, the failure to raise the issue weighs against a defendant in the balance. Id. at 838. Moreover, if a defendant, like Mr. Lee, actually

[4] The Court ordered defendant to provide a handwriting sample on April 8th, 2013. Supp. Desig. CP – Order compelling handwriting exemplar.

requests a continuance courts are reluctant to find speedy trial violations. Id. at 838-39, Supp. Desig. CP – clerk's notes 6/10/2013, 9/23/2013.

The last factor is whether a defendant is prejudiced. In Ollivier, the court clarified prejudice is not presumed. Id. at 840. If there is negligence on the government's behalf, but no bad faith, a presumption of prejudice may arise depending upon the length of the delay. Id. at 841. A defendant must show particularized prejudice when shorter delays and not government bad faith are involved. Id. at 842. "[C]ourts 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. quoting WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.2(e) (3d ed.2007).

In weighing prejudice the court will compare the benefits the defendant gained by the delay as well as compare the potential evidence lost to the evidence presented at trial. Id. In the present case, the Defendant benefited from the delay by the impairment of the State's witnesses' memories and his own testimony and that of his brother was sufficient to combat the testimony of the victim.

In weighing all of the factors under the Barker test, the Defendant has not shown a speedy trial violation.

D. THE TRIAL COURT PROPERTY EXCLUDED CROSS-EXAMINATION OF THE VICTIM CONCERNING A PRIOR RAPE ALLEGATION AS IT WAS IRRELVANT AND INADMISSIBLE.

i. The court did not abuse its discretion when it prohibited cross-examination that a prior false complaint involved "rape" as the details were irrelevant and prejudicial.

The Defendant argues the court violated his constitutional right to cross-examine the victim about a prior false allegation of rape. However, the trial court properly balanced the evidence and allowed the Defendant to cross-examine the victim about the prior false allegation, without reference to the rape.

The Sixth Amendment right to cross-examine an adverse witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative." Id. citing State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). A defendant does not have a right to present irrelevant or inadmissible evidence to a jury. See e.g., WA ER 401 (2014) State v. Phillips, 160 Wn. App 36, 47-48, 246 P.3d 589 (Div 2, 2011); State v. Strizheus, 163 Wn. App 820, 262 P.3d 100 (Div 1, 2011). Even if the evidence is relevant, the defendant's right must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of trial. State v. Darden, 145 Wn.2d at 621. If the State can show

a compelling interest to exclude prejudicial or inflammatory evidence, exclusion does not violate a defendant's right to cross-examination. Id. A court applies basic rules of evidence to determine relevance and admissibility. Id. at 624. A trial court's ruling on admissibility is generally reviewed for manifest abuse of discretion. Id. at 619.

Generally, a victim's past sexual history is not relevant nor admissible to prove credibility as it has little or no relationship to the ability of the witness to tell the truth. State v. Hudlow, 99 Wn.2d 1, 9, 659 P.2d 514 (1983). Moreover, such evidence is not admissible under RCW 9A.44.020 for the issue of credibility.

The State is not aware of any Washington case that allows prior accusations of rape to be admissible. See State v. Demos, 94 Wn.2d 733, 736, 619 P.2d 968 (1980). There are two cases of note that talk about prior false accusations of rape. In State v. Demos, 94 Wn.2d 733, 619 P.2d 968 (1980), Demos was charged with Rape in the first degree and burglary in the first degree. He wanted to offer two prior incidents where the victim said she was raped to discredit her current accusation. Id. at 735-736. The court specifically did not reach the question whether rape shield laws prohibit evidence of prior false rape accusations since there was no admissible evidence the prior allegations were false. Id. at 736. Moreover, the court found no abuse of discretion as the prior accusations had no tendency to prove anything in dispute and would have been highly prejudicial. Id. at 737.

In State v. Harris, 97 Wn.App. 865, 989 P.2d 553 (1999), Harris faced charges of Rape in the third degree. He wanted to offer evidence the victim told a friend she was previously raped by another man on a different occasion. Id. at 868. The victim denied making the statement. Id. The defendant argued to the trial court it would be relevant because it would go to the victim's truthfulness and would be impeachment as she testified the defendant told her not to tell her father Harris raped her. Id.

The Court of Appeals upheld the trial court's exclusion of the evidence as there was no proof the prior accusation was false and it was not relevant. Id. at 872-873. The court went further to add a court "can keep out prior accusation evidence, even if the defendant offers it for a purpose other than attacking credibility, if it has slight probative value that is outweighed by suggesting to the jury some impropriety." Id. at 872. The court also found it was inadmissible under Evidence Rule 608 as it could only be proven by extrinsic evidence. Id. at 873.

In the present case the Defendant at first moved to introduce the evidence of a prior false rape complaint under RCW 9A.44.020. CP 15-17. The parties argued the matter and after it was apparent the Rape Shield law did not apply to allow the evidence, defense counsel alleged a prior false statement may be allowed, but left it up to the court. RP 26. Defense counsel did not cite to any evidence rule for the admission of the evidence. RP 20-21, 25-26. Generally, a defendant must preserve the error for the Appellate Court by making a timely and specific motion or objection. See

State v. Carlson, 61 Wn.App. 865, 869, 812 P.2d 536 (Div 1, 1991). A non-specific objection or general objection is insufficient to preserve the matter for a motion for a new trial. Id. at 869-70. In the present case the defendant did not cite to any specific rule or basis to allow the testimony other than a prior false complaint. He did not argue that a specific false **rape** complaint was more relevant than a prior false complaint.

The trial court found the false statement relevant to the victim's credibility, but not to whether the sex act was consensual. RP 28-29. The State proposed a middle ground to prohibit the admission of prior sexual acts, but to allow the prior false statement to be admissible. RP 30-31.

The trial court ruled it would allow cross-examination of the victim that she made a false accusation about another person to the police, that her motivations in making the complaint were admissible, and that she promptly rectified the very next day. RP 33. However, the court barred any mention of sexual conduct as a fair balance of competing interests. RP 33.

Upon cross-examination, counsel asked the victim, "You ever made any false accusations about another person to the police." RP 120. The victim responded yes, it was in June 2008 before things with Lee, and she immediately corrected it. RP 121. She explained on re-direct that her mother made the report and Jane didn't want someone to think she made a false report and so she called the police to make it right. RP 151.

In the present case it was the victim's mother that made the initial complaint to the police. There is no evidence the defendant could prove the victim made the initial false complaint, only that she didn't want someone to believe the victim made a false complaint. Under Harris and Demos, without proof she made the initial false complaint the evidence is inadmissible as irrelevant.

If there was some small evidence on cross-examination of the initial false complaint, the question becomes whether a prior rape complaint contains more importance than merely a false police complaint. The Washington Supreme Court found in State v. Hudlow that the State has a compelling state interest in applying the rape shield statute to bar evidence that may distract and inflame jurors and "exclusion of prior sexual history evidence aids in achieving just trials and preventing acquittals based on prejudice against the victims' past sex lives, [and] it tends to further the truth-determining function of criminal trials." State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Given Lee faced charges of Rape of a Child in the third degree, consent was not an issue and irrelevant. Because her prior sexual history involving consent to sex was irrelevant to prove any issue in the case, any prior false **rape** complaint would inflame and prejudice the jury, and distract from the truth. What was potentially important was a false complaint, not whether she was raped. The court used its discretion and

balanced the defendant's need and allowed merely the false complaint. This was not a manifest abuse of discretion.

Should the court find error, the error was harmless beyond a reasonable doubt in light of the letter written by the Defendant to the victim and given to the police by the victim. The Defendant obviously addressed the letter to a person of who he had intimate knowledge. The defendant's explanation that the letter was stolen from his items and was written as fantasy is simply too incredible to believe. Given the victim's identification of Defendant, her knowledge of Bongiovanne's home location and cats, and car details, there was overwhelming evidence of guilt.

ii. The trial court did not abuse its discretion under Evidence Rule 608 when it prohibited cross-examination that a prior false complaint involved "rape."

The Defendant separately alleges an abuse of discretion for failure of the trial court to admit the evidence under Rule 608(b). However, as argued above, in order for the defendant to prove the victim made a false complaint, he would have to call either her mother or the officer as a witness to testify it was the victim who made the false complaint.[5] This would be extrinsic evidence barred under Rule 608(b). Moreover, the rules of relevance under rule 403 still apply and the test used for the determination

[5] The victim testified it was her mother that made the report to the police and she called the police to make things right as she didn't want anyone to think she was making the false report. RP 151.

under the Sixth Amendment challenge above is the same. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

Evidence Rule 608(b) talks about cross-examination as to the truthfulness or untruthfulness of the person. The Defendant was allowed to cross-examine the victim as to her truthfulness when it got her to admit to making a false report. Rule 608 does not state that it has to be truthfulness as to a particular topic. The defendant cites to two cases alleging when the witness is important and this is only avenue for impeachment, such should be allowed.

However, the Defendant impeached the victim with a number of details, including information about the car he drove, the meeting of his mother and interior of both his mother's and Bongiovanne's home. The details that the prior accusation involved rape were not the only means of impeachment and the trial court did not abuse its discretion.

E. THE TRIAL COURT PROPERLY SENTENCED DEFENDANT FOR EACH CHARGE OF RAPE OF A CHILD AS THE INDIVIDUAL CHARGES DID NOT EXCEED THEIR STATUTORY MAXIMUM SENTENCE.

The Defendant alleges his sentence exceeded the statutory maximum sentence allowed of five years of incarceration. Def. Brf at 26. He argues that the jail as to count one when combined with the community custody range in count two exceeds five years. The defendant's argument

completely misses the mark as no sentence for a particular **charge** may exceed the statutory maximum sentence.

In all the statues cited by the Defendant it indicates the statutory limits apply to the charge and not the case. See RCW 9.94A.505(5) (2014), RCW 9.94A.701 (2014). There is nothing in the law that says combined concurrent sentences over multiple charges must not exceed the statutory maximum sentence. If this were the case, the law would lead to absurd results. For instance, if the charge was rape of a child in the second degree, a class B felony, and rape of a child in the third degree, and the community custody ran concurrent, it would easily occur that the community custody would exceed the class C felony because of the sentence in the class B felony. Would this mean the court would have to calculate how the community custody in each charge will affect the remaining charges? The answer is no. There is nowhere under the law requiring the reduction of community custody for a charge when another charge's community custody range will affect the statutory maximum sentence. The court should deny this issue as unsubstantiated by law.

F. THE TRIAL COURT ERRED WHEN IT AUTHORIZED THE COMMUNITY CORRECTIONS OFFICER TO ORDER PLETHYSMOGRAPH TESTING.

The Defendant argues and the State concedes the trial court exceeded its authority to authorize the community corrections officer to order plethsymograph testing as such testing is only reasonable when it requested by a treatment provider. State v. Riles, 135 Wn. 2d 326, 344-45,

957 P.2d 655 (1998). The Court should remand the matter back to the trial court to strike the condition only as it reads the Community Custody officer can authorize the testing.

G. THE DEFENDANT FAILED TO PRESERVE HIS CLAIM AS TO LEGAL FINANCIAL OBLIGATIONS, THE ISSUE IS NOT YET RIPE, AND THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION.

i. The Defendant failed to preserve his right to appeal the imposition of legal financial obligations under RAP 2.3(a).

The Defendant argues under State v. Bertrand, 165 Wn. App. 393, 404, 267 P.2d 511 (Div 2, 2011), there was insufficient record to support the court's finding the Defendant had sufficient ability to pay future legal financial obligations (LFO's) and the finding should be vacated. However, the Defendant failed to raise this issue to the trial court at sentencing and did not object to the imposition of the LFO's. RP 417-435. Under Rule of Appellate procedure 2.5(a) the appellate court may refuse to review any claim of error which was not raised in the trial court. WA RAP 2.5(a) (2012), State v. Blazina, 174 Wn.App. 906, 911-12, 307 P.3d 492, rev. granted, 178 Wn.2d 1010 (2013). Moreover, this issue is not ripe for review until the State attempts to collect legal financial obligations. State v. Lundy, 176 Wn.App. 96, 108, 308 P.3d 755 (2013). The State requests this court refuse review on this issue as it was not raised below, the Defendant has not perfected their argument, and the issue is not ripe for review.

ii. There was sufficient evidence in the record to impose legal financial obligations.

Should the court accept review, a challenge to a trial court's findings of fact for ability to pay is reviewed under a clearly erroneous standard. State v. Bertrand, 165 Wn.App. 393, 403-04, 267 P.2d 511 (Div 2, 2011). State v. Bertrand requires a trial court to take into account the financial resources of the defendant and the nature of the burden imposed by legal financial obligations (LFO's). Id. at 404, citing State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116 (Div 1, 1991). After the entry of findings, the reviewing court determines if there is an abuse in discretion in imposition. State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116 (Div 1, 1991).

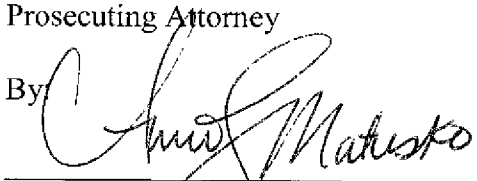
At sentencing, the court knew from testimony that the Defendant could work as his brother testified he and Lee worked every week day to help pay for the car Defendant purchased. RP 244-245. The court was also aware from the Presentence investigation report the Defendant completed the 10th grade and while currently unemployed, also received disability benefits. RP 417, Supp. Desig. CP – Presentence Investigation Report, pg 4. This information combined with the Defendant's relative working age of 48 years, would lead to a reasonable conclusion the Defendant was able to find work, had worked in the past enough to earn money enough to support him and buy a car. This information thus supports the trial court's finding present and future ability to pay and the finding was not clearly erroneous.

V. CONCLUSION

For the foregoing reasons and arguments the court should affirm the conviction. However, the court should remand the matter back to the trial court for amendment to the conditions of community custody as addressed above.

Respectfully submitted this 5th day of December, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By 

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 22nd, 2014.

Michelle Sasser
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