No. 93900-2



IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ARTURO SPENCER MARTIN,

Petitioner.



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# PETITION FOR REVIEW

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Court of Appeals No. 75230-8-I
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 12-1-00649-2
The Honorable Frank Cuthbertson, Brian Tollefson,
Jerry Costello and Stanley Rumbaugh, Judges

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## I. IDENTITY OF PETITIONER

The Petitioner is ARTURO SPENCER MARTIN, Defendant and Appellant in the case below.

## II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 1, case number 75230-8-I, which was filed on November 21, 2016. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

## III. ISSUES PRESENTED FOR REVIEW

1. Where California's second degree burglary statute was legally broader than Washington's second degree burglary statute; where Washington's burglary statute requires proof that the defendant entered a building; and where the California charging document merely lists an address but does not specify if that address is a building, did the trial court err when it ruled that the convictions are factually comparable and when it included the California conviction in Martin's offender score calculation?

2. *Pro Se* issue: Did the Superior Court violate the time limitations pursuant to the provisions in the Interstate Agreement on Detainers?

## IV. STATEMENT OF THE CASE

### A. SUBSTANTIVE FACTS

Arturo Martin and Lisa Jacobs were introduced by mutual

friends in December of 2011. (4RP 48-49; 6RP 43)[1] Jacobs, who had suffered a work-related injury, was taking a variety of prescription medications and medical marijuana, and was visited daily by an in-home caregiver. (4RP 46-47, 48-49, 71-75) Within a week of their introduction, Martin began staying overnight in the home Jacobs shared with her four-year old daughter. (4RP 47, 51) According to Jacobs, their relationship quickly became intimate. (4RP 52) But, according to Jacobs, Martin was controlling and did not like that she had dogs and smoked. (4RP 52-53) Nevertheless, Jacobs agreed to use her medical marijuana prescription to begin, with Martin's assistance, to grow marijuana in her garage for both her personal use and to sell to dispensaries. (4RP 80-82)

On the night of December 12, 2011, Jacobs and Martin went to bed around midnight. (4RP 56) Jacobs testified that Martin became upset when she tried to snuggle with him because she had recently touched the dogs but did not wash her hands afterwards. (4RP 56, 84) Tired of Martin's high standards, Jacobs told him to leave her home. (4RP 56-57) According to Jacobs, this upset

[1] The transcripts labeled volumes I through VIII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

Martin and he punched her in the face with his fist. (4RP 57)

Jacobs responded by saying, "Dude, what are you doing?" (4RP 57) This upset Martin more because he felt the term "dude" was disrespectful. (4RP 57) Jacobs testified that Martin proceeded to punch her in the face about 10 more times. (4RP 57-58)

Later, after Jacobs took a shower, Martin directed her to use bleach to clean up any blood that had splattered on the bed or carpet. (4RP 59, 61) Jacobs' daughter came out of her bedroom several times during this time, but Martins ordered her back to bed. (4RP 60-61)

According to Jacobs, Martin asked if she was going to "snitch" on him, and she told him no in order to keep him calm. (4RP 64) She testified that Martin told her that he would kill her and her daughter if she "snitched." (4RP 64)

The next morning, Jennifer Dickenson, a substitute caregiver, arrived to help Jacobs. (4RP 65; 5RP 31) Dickenson noticed that Jacobs' face was swollen and bruised. (4RP 65-66; 5RP 32) Jacobs showed Dickenson around the house, but did not mention what had happened with Martin. (4RP 65-66; 5RP 33-34) Dickenson testified that there was obvious tension in the house, and that Jacobs and Martin did not speak to each other. (5RP 33)

After Martin left and Jacobs returned from taking her daughter to the school bus, Dickenson asked if Martin had caused her injuries. (4RP 67; 5RP 34-35) Jacobs answered affirmatively, and asked Dickenson to help change the bandage she had placed over a cut on her face. (4RP 67; 5RP 34-35) Dickenson eventually convinced Jacobs to seek medical care. (4RP 67; 5RP 35)

The doctors who examined Jacobs noted swelling around her eyes and jaw and lacerations on her nose and eyelid. (5RP 62; 6RP 21) A CT scan showed a fracture on Jacobs' nasal bridge. (5RP 63; 6RP 22) Jacobs received seven stitches to close the lacerations, and was in pain for some time afterwards. (4RP 68; 5RP 65)

Pierce County Sheriff's Deputy Gerald Tiffany interviewed Jacobs at the hospital. (5RP 11-12) He also noted that her eyes were bruised and swollen and that she had lacerations on her nose and under her eye. (5RP 13) Jacobs did not want to tell Deputy Tiffany what happened, but eventually she explained that Martin had hit her and caused her injuries. (5RP 13)

Sheriff's Deputy Tanya Terrones contacted Jacobs several days later at a hotel room where Jacobs and her daughter were staying. (5RP 22) Jacobs' face and eyes were still bruised and

swollen, and Jacobs appeared to be in significant pain. (5RP 22) Jacobs told Deputy Terrones that Martin had caused her injuries. (5RP 23) Deputy Terrones tried unsuccessfully to locate Martin. (5RP 24) She issued a bulletin to other law enforcement agencies that included his photograph and a list of suspected charges and sent the file to the prosecutor's office for processing. (5RP 24-25)

Martin testified that he and Jacobs were never romantic, and that he had rejected her advances because he was married. (6RP 45, 46, 49) He saw Jacobs as a friend and business partner, because they agreed to grow and sell marijuana in her garage. (6RP 49-50, 56-58)

On the night of the assault, Martin was in Port Orchard with his friends, Molly and Maggie, and he spent the night at Maggie's house. (6RP 64, 69, 71-72) The next morning, he went to Jacobs' house and saw that she had a bandage over her eye. (6RP 72, 74) He asked Jacobs what was going on, and Jacobs told him he should not be there. (6RP 74) Jacobs told him that her family members visited and expressed their displeasure, in racially derogatory terms, that Martin had been staying with Jacobs and helping her grow marijuana. (6RP 63) Jacobs told Martin that they had threatened to kill Martin, and that he should leave for a few

weeks. (6RP 75) After confirming that Jacobs was okay, Martin left. (6RP 77) Martin also noted that, at the time, the marijuana plants in Jacobs' garage were worth at least $5,000.00 and could produce up to $87,000.00 worth of harvested marijuana. (6RP 62-63)

Martin adamantly denied assaulting Jacobs. (6RP 77)

B. PROCEDURAL FACTS

The prosecutor filed an Information on February 23, 2012, charging Martin with one count of second degree assault with a domestic violence aggravator (RCW 9A.36.021(1)(a); RCW 9.94A.535(3)(h)), one count of felony harassment (RCW 9A.46.020) and one count of interfering with the reporting of domestic violence (RCW 9A.36.150). (CP 1-3) A bench warrant was issued on February 24, 2012. (CP 471, 472)

On December 21, 2012, the State of Wyoming filed charges alleging that Martin committed several crimes in that State on October 7, 2011. (CP 300-03) Martin entered a guilty plea on March 26, 2013 and was sentenced on October 18, 2013, to a term of 3-5 years confinement in a Wyoming Department of Corrections facility. (CP 306-13)

On January 9, 2014, Martin sent a notice to the Pierce

County Prosecutor, pursuant to the Interstate Agreement on Detainers statute, requesting disposition of the outstanding charges filed against him. (CP 64, 113) Martin was eventually returned to Washington state, and on May 7, 2014 was arraigned in Pierce County Superior Court. (CP 65, 473) The trial date was set for June 30, 2014. (CP 473) Counsel was appointed and filed a notice of appearance on May 8, 2014. (CP 474)

At a hearing on June 12, 2014, defense counsel indicated that he needed more time to investigate and prepare the case and for the parties to obtain certified copies of Martin's out-of-sate convictions. (06/12/14 RP 2-4) Over Martin's objection, the trial court granted the request and set a new trial date for September 18, 2014. (06/12/14 RP 3-4; CP 475)

On August 5, 2014, the State filed a persistent offender notice. (CP 13) On August 12, 2014, Martin told the court that he was unhappy with his appointed counsel, and felt he had not been doing enough to prepare for trial. (08/12/14 RP 5-6) Martin was also upset because he felt his speedy trial rights were being violated due to the delay in transporting him from Wyoming to Washington coupled with the earlier continuance. (08/12/14 RP 6-7)

On September 3, 2014, defense counsel again requested more time to prepare to defend Martin against the substantive charges and the persistent offender allegation. (09/03/14 RP 2-4) Over Martin's objection, the trial court granted the request and set a new trial date for January 29, 2015. (09/03/14 RP 3, 4-5; CP 476)

On January 29, 2015, defense counsel and the prosecutor both requested another continuance, this time because the State had recently located Jacobs, and interviews were scheduled for the coming Monday. (01/29/15 RP 3) Because of his frustration with what he saw as a lack of effort and cooperation by defense counsel, Martin requested that he be allowed to represent himself. (01/29/15 RP 4-16; CP 26) After a lengthy colloquy, the court granted Martin's request, and set a new trial date for February 19, 2015. (01/29/15 RP 17; CP 477)

On February 12, 2015, Martin filed a motion to dismiss, alleging the trial delays violated both the time-for-trial provision of the Interstate Agreement on Detainers statute and his constitutional right to a speedy trial. (CP 53-57; 02/12/15 RP 7) At the same time, the State requested another continuance so that the court could "supplement the record" of its order allowing Martin to act pro se. (CP 27-52; 02/12/15 RP 2-3) Martin objected to the

continuance, but the trial court found good cause for the continuance and set a new trial date for February 26, 2015. (CP 478; 02/12/15 RP 8)

At Martins' request, his defense counsel was re-appointed to act as standby counsel. (02/20/15 RP 11, 19-20; 02/25/15 RP 3) On February 25, 2015, the court denied Martin's motion to dismiss for violation of his speedy trial rights, finding that all of the prior continuances had been for good cause. (02/25/15 RP 3-5) On February 26, 2015, the trial court granted another continuance, this time at the request of both the prosecutor (deputy in trial in another case) and the defense (more time to prepare). (CP 479) The court set a new trial date for April 9, 2015. (CP 479)

On April 9, 2015, Martin asked the court to allow him to be represented by counsel, but by someone other than his current standby counsel, who he still felt was not adequately assisting him in preparing a defense. (1RP 6-9) The court told Martin that he could either be fully represented by current standby counsel or continue pro se, so Martin decided to accept full representation. (1RP 9, 15) The court heard motions in limine beginning on April 14, 2015 and the first witness was called to testify on April 16, 2015. (2RP 17; 4RP 46)

The jury found Martin guilty of second degree assault but not guilty of harassment and interfering with the reporting of domestic violence. (7RP 55-56; CP 179, 182, 184) The jury found that the assault was an aggravated domestic violence offense and that Martin and Jacobs were members of the same family or household. (CP 180-81; 7RP 56)

At sentencing, the court undertook an analysis of the comparability of Martin's out of state convictions to Washington offenses. (8RP 5-26) The court found that some convictions were comparable to Washington felonies, and others were not. (8RP 5-26) As a result, Martin is not a persistent offender. (8RP 36) But the court imposed an exceptional sentence based on the jury's finding of the domestic violence aggravator and based on the court's finding that Martin's unscored misdemeanor or foreign criminal history results in a presumptive sentence that is clearly too lenient. (CP 449, 480-83; 8RP 37)

Martin timely appealed. (CP 464) In an unpublished opinion, this Court rejected Martin's arguments and affirmed his conviction and sentence.

## V. ARGUMENT & AUTHORITIES

The issues raised by Arturo Spencer Martin's petition should

be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

### A. MARTIN'S 1983 SECOND DEGREE BURGLARY CONVICTION IN CALIFORNIA IS NOT FACTUALLY COMPARABLE TO A SECOND DEGREE BURGLARY CONVICTION IN WASHINGTON.

Out-of-state convictions are included in a Washington defendant's offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). But an out-of-state conviction may not be used to increase a defendant's offender score unless the State proves it is equivalent to a felony in Washington. State v. Weiand, 66 Wn. App. 29, 31-32, 831 P.2d 749 (1992).

The State bears the burden of establishing the comparability of offenses, typically by proving that the out-of-state conviction exists and by providing the foreign statute to the court. State v. Ford, 137 Wn.2d 472, 479-482, 973 P.2d 452 (1999). If the State provides sufficient evidence, the sentencing court must conduct the comparison on the record. State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state conviction should be

included in the offender score. Ford, 137 Wn.2d at 480-81.

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). A foreign offense is legally comparable if "the elements of the foreign offense are substantially similar to the elements of the Washington offense." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). It may then be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense. Ford, 137 Wn.2d at 479 (citing Morley, 134 Wn.2d at 606).

In this case, the State presented copies of seven out-of-state convictions that it asserted were comparable to Washington felonies and should be counted in Martin's offender score. (CP 353-438) Martin objected to the inclusion of several of these prior

convictions, including a 1983 second degree burglary conviction from California. (CP 429-437; 8RP 5-8) The court reviewed the statutes and court documents, and found that five of the seven convictions were comparable and should be included in Martin's offender score. (RP 5-25; CP 449) But the 1983 California burglary conviction is not comparable and should not have been included in Martin's offender score.

In 1983, the crime of burglary was defined in California Penal Code section 459 as follows:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, ... house car, ... inhabited camper, ... vehicle ... when the doors of such vehicle are locked, aircraft ... mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

Cal. Penal Code § 459 (1983 Ed.) (CP 372). Any burglary "of an inhabited dwelling house or trailer coach ... or the inhabited portion of any other building" was first degree burglary. Cal. Penal Code § 460 (1983 Ed.). All other burglaries were considered second degree. Cal. Penal Code § 460 (1983 Ed.) (CP 372).

In 1983, a person was guilty of second degree burglary in

Washington if, "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle." RCW 9A.52.030 (1983 Ed.) (CP 373).

The State conceded that the 1983 California burglary statute was broader than the 1983 Washington burglary statute, and therefore not legally comparable. (CP 355) But the State asserted that Martin's conduct, as alleged in the criminal complaint, would have violated Washington's second degree burglary statute and was therefore factually comparable. (CP 355; 8RP 6)

The criminal complaint filed in California, to which Martin pleaded guilty, simply stated that Martin "did willfully and unlawfully enter 800 Admiral Callaghan Lane, Vallejo, California, with the intent to commit theft." (CP 212, 213, 217) The complaint does not specify that 800 Admiral Callaghan Lane is a building, as required to support a Washington burglary conviction. (CP 212) And the State did not present any other documents, such as a declaration of probable cause or plea statement, that describes 800 Admiral Callaghan Lane as a building, as opposed to a "tent, vessel, railroad car, trailer coach, ... inhabited camper, ... [locked] vehicle ... aircraft ... [or] mine." Cal. Penal Code § 459 (1983 Ed.).

As trial counsel pointed out, "we don't have any information

about what was entered other than this address. In fact, it could have been a vacant lot with a tent on it. It could have been a warehouse, a vessel, a motor home. That information is missing from the record." (8RP 7) But the court disagreed, and decided that 800 Admiral Callaghan Lane must be a building because "willfully and unlawfully enters [is] not the language that's used for vacant lots. Enter implies that there is a building or other structure that you are entering into." (8RP 7)

But the court ignored the fact that the California burglary statute specifically criminalized entry into a number of things in addition to a building, such as a tent, a vessel, a locked vehicle, or a mine.[2] And the Washington criminal code also makes it a crime to "enter" any number of other things besides a building, such as "premises" (which includes real property),[3] a motor home or a "vessel ... which has a cabin equipped with permanently installed sleeping quarters or cooking facilities,"[4] or a "dwelling" (which means any "structure, though movable or temporary ... which isused ... by a person for lodging" and could, by its plain terms,

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[2] See Cal. Penal Code § 459 (1983 Ed.).
[3] See RCW 9A.52.080 (second degree criminal trespass); RCW 9A.52.010 (defining premises).
[4] See RCW 9A.52.095 and RCW 9A.52.100 (vehicle prowling).

include a tent).[5] Clearly, the term "enter" is not exclusively applied to buildings in Washington's criminal code.

Furthermore, sentencing courts are prohibited from making assumptions regarding the facts underlying a foreign conviction, or from engaging in any factual comparability analysis when the underlying facts were not admitted, stipulated to, or proven beyond a reasonable doubt. Lavery, 154 Wn.2d at 258; State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004). This is "because the judicial determination of the facts related to a prior out-of-state conviction implicates the concerns underlying Apprendi and Blakely, [so] judicial fact finding must be limited." State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006) (referencing Apprendi v. New Jersey, 530 U.S. 466, 491-92, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). And courts should be wary of "allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea[.]'" Descamps v. United States, __ U.S. __, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d

[5] See RCW 9A.52.025 (residential burglary); RCW 9A.04.110(7) (defining dwelling).

438 (2013) (quoting Shepard v. United States, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)).

Because the California complaint does not specify that Martin entered a building, and the remaining record is deficient as to this critical point, the State did not carry its burden of proving that this conviction is comparable to a Washington second degree burglary. The trial court therefore erred when it included this conviction when it calculated Martin's offender score, and the Court of Appeals erred when it affirmed the trial court's decision (Opinion at 14-16).

Martin's offender score should have been five, not six, which lowers his standard range sentence. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Accordingly, because it is not clear from the record that the court in this case would have imposed the same sentence using Martin's lower standard range, the remedy is to remand Martin's case for resentencing.

B. *PRO SE* ISSUE: THE 15 MONTH DELAY IN THE START OF ARTURO MARTIN'S TRIAL VIOLATED HIS SPEEDY TRIAL RIGHTS UNDER THE INTERSTATE AGREEMENT ON DETAINERS.

The Interstate Agreement on Detainers (IAD) is an interstate compact designed to address issues that arise when an individual is incarcerated in one jurisdiction while also facing charges in another jurisdiction. RCW 9.100.010 (Art. I); State v. Welker, 157 Wn.2d 557, 563, 141 P.3d 8 (2006). Under the IAD, when Washington has charges pending against a prisoner held in another jurisdiction, it may file a detainer with that authority requesting that the prisoner not be released before resolution of the Washington charges. State v. Simon, 84 Wn. App. 460, 464, 928 P.2d 449 (1996) (citing State v. Anderson, 121 Wn.2d 852, 861, 855 P.2d 671 (1993); RCW 9.100). After the detainer is filed, the prisoner may demand that Washington bring him/her to trial commencing within 180 days of the demand. Simon, 84 Wn. App. at 464; RCW 9.100.010, Art. 3; Anderson, 121 Wn.2d at 861.

In his *pro se* Statement of Additional Grounds for Review, Martin argued that the 15 month delay in the start of trial violated his speedy trial rights under the IAD. The arguments and authorities pertaining to this issue is contained in Martin's Statement of Additional Grounds, which is hereby incorporated by

reference. The Court of Appeals rejected these arguments. (Opinion at 11-12) This Court should review this *pro se* issue as well.

## VI. CONCLUSION

Martin respectfully requests that this Court grant review of the Court of Appeals' decision in this case. Martin's convictions should be reversed based on the violation of his IAD speedy trial rights or, alternatively, Martin's case must be remanded for resentencing without the inclusion of his 1983 California burglary conviction.

DATED: December 13, 2016

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Arturo Spencer Martin

**CERTIFICATE OF MAILING**

I certify that on 12/13/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Arturo S. Martin #388945, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001-1899.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ARTURO SPENCER MARTIN,<br><br>Appellant. | ) | No. 75230-8-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: November 21, 2016 |



LEACH, J. — Arturo Martin appeals his conviction and sentence for second degree assault. He claims that a 15-month delay in bringing him to trial violated his constitutional speedy trial rights and the interstate agreement on detainers (IAD).[1] Also, he claims that he did not receive effective assistance of counsel due to an alleged conflict between him and his trial counsel. Because most of the trial delay resulted from continuances requested by defense counsel to prepare for trial and sentencing, the delay did not violate Martin's speedy trial rights. The delay did not violate the IAD because it was the result of reasonable and necessary continuances granted for good cause shown in open court. And, because Martin does not show that his attorney had a conflict of interest, his ineffective assistance of counsel claim fails. We therefore affirm Martin's conviction.

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[1]RCW 9.100.010.

Martin also claims that a 1983 California second degree burglary conviction should not have been included in his offender score calculation. Because the California conviction is factually comparable to Washington's second degree burglary statute, the trial court properly included it. We affirm Martin's sentence.

FACTS

In February 2012, the State charged Arturo Martin with second degree assault with a domestic violence aggravator, felony harassment, and interference with the reporting of domestic violence. These charges arose out of events occurring in Washington in December 2011. The court issued a bench warrant in connection with these Washington offenses, but law enforcement could not find Martin.

In December 2012, the State of Wyoming charged Martin with several crimes. In March 2013, Martin pleaded guilty to those Wyoming crimes and was sentenced to three to five years' confinement in a Wyoming Department of Corrections facility.

On January 9, 2014, Martin requested disposition of his Washington charges. In May 2014, while still serving his Wyoming sentence, Martin was extradited to Washington state. The trial court arraigned him on May 7 and set trial for June 30, 2014.

At a June 12 hearing, Martin's assigned defense counsel, Mark Quigley, requested a trial continuance to provide more time to prepare and to investigate Martin's numerous out-of-state convictions. Over Martin's objection, the trial court granted the request and set a new trial date for September 18, 2014.

In August 2014, the State filed a persistent offender notice. Defense counsel requested another continuance to address the persistent offender allegation, do a comparability analysis, and prepare for trial. The trial court found good cause for the continuance and rescheduled trial for January 29, 2015.

On January 29, the parties requested a third continuance so the defense could interview the victim, who had just been located. The court also granted Martin's request to proceed pro se. Although Martin refused to sign the continuance order, he admitted he was not ready for trial and needed time to review discovery. The court set a new trial date for February 19, 2015.

Before granting pro se status, the trial court conducted a lengthy colloquy but did not make an express finding that Martin had knowingly, intelligently, and voluntarily waived his right to counsel. On February 12, the State requested a continuance so the trial court could supplement the record supporting its order allowing Martin to act pro se. Finding good cause, a different judge continued the trial until February 26. On February 20, the trial court reaffirmed that Martin could proceed pro se and permitted him to have Quigley as standby counsel.

On February 12, Martin moved to dismiss the case for violation of the time requirements of the IAD. The court denied the motion, finding that the continuances were "necessary and reasonable and for good cause shown in open court."

On February 26, the court entered an agreed order continuing the trial because the prosecutor was in a different trial and Martin needed additional time to prepare. The court set a new trial date for April 9, 2015.

On April 9, Martin requested new counsel, claiming he had "no other choice" but to go pro se because Quigley was not adequately representing him. The court denied his request for new counsel but permitted Martin to have Quigley represent him. The court gave Quigley a few days to prepare for trial. On April 14, Martin requested additional time for his attorney to prepare. The court denied this request, and trial began on April 16, 2015.

The jury convicted Martin of second degree assault. By special verdict, the jury also found that the crime was an aggravated domestic violence offense.

At sentencing, the trial court analyzed the comparability of Martin's out-of-state convictions to Washington offenses and determined that some were comparable and others were not. The court did not sentence Martin as a persistent offender. The court calculated his offender score to be 6 and imposed

an exceptional sentence based on the domestic violence aggravator. The court sentenced him to a total of 79 months.

ANALYSIS

*Constitutional Speedy Trial Rights*

Martin claims a 15-month delay in bringing him to trial violated his constitutional right to a speedy trial. Typically, we review a decision to grant or deny a continuance for an abuse of discretion. But when a defendant claims a delay violated his constitutional speedy trial rights, we review the decision de novo.[2]

To determine whether a delay has violated a defendant's right to a speedy trial, courts apply the test set out in Barker v. Wingo.[3] To trigger the Barker analysis the defendant must show a presumptively prejudicial delay.[4] If a defendant meets this threshold test, the court then considers a number of factors to determine if the delay constitutes a constitutional violation: the length of the delay, the reason for the delay, whether and to what extent the defendant asserted his speedy trial rights, and whether the delay caused prejudice to the defendant.[5]

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[2] State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).
[3] 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
[4] Barker, 407 U.S. at 530.
[5] Barker, 407 U.S. at 530-32.

Here, the 15-month delay is sufficient to trigger the Barker analysis, but each Barker factor weighs in favor of the State. The delay was not extraordinarily long and primarily benefited the defendant. And because Martin does not show how the delay prejudiced his defense, the "extreme remedy" of dismissal with prejudice is not warranted here.[6]

As a threshold matter, Martin must establish the delay was presumptively prejudicial.[7] In applying this threshold test, courts consider the length of delay, the complexity of the case, and if the defense relies on eyewitness testimony where eyewitnesses might become unavailable or their memories fade.[8] Washington courts have not adopted a bright line rule for when the delay is presumptively prejudicial.[9] But our Supreme Court has found that eight months was "just beyond the bare minimum needed to trigger the Barker inquiry."[10]

Martin calculates the delay as 15 months, the time between his request for disposition and the trial. The State suggests the proper calculation is the time between Martin's arraignment and the trial, which is approximately 11 months. Neither party cites authority supporting its calculation. Because each yields a

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[6] Iniguez, 167 Wn.2d at 295.
[7] Iniguez, 167 Wn.2d at 283.
[8] Iniguez, 167 Wn.2d at 292 (citing Barker, 407 U.S. at 531 & n.31).
[9] Iniguez, 167 Wn.2d at 292.
[10] Iniguez, 167 Wn.2d at 293.

result longer than 8 months, the length of delay exceeds the bare minimum necessary to pass the threshold test.

Martin contends the delay was excessive because his charges were not complex.[11] The State responds that even if the charges were not complex, other aspects of the case were complex. Specifically, the State insists that the persistent offender allegation and Martin's multiple out-of-state convictions complicated the case. Despite the complications arising from Martin's criminal history, because the delay exceeds the eight-month bare minimum, Martin has met the threshold test. We therefore consider the Barker factors.

"'[T]he length of the delay is both the trigger for analysis and one of the factors to be considered.'"[12] In State v. Ollivier,[13] the Supreme Court listed a number of speedy trial challenges involving delays ranging from 21 months to 6 years where the delays were not "exceptionally long." The 15-month delay in this case is comparatively short. Although the length of delay is sufficient to trigger the Barker analysis, because the delay does not substantially exceed the "bare minimum" and Martin's prior convictions complicated the case, this factor weighs in favor of the State.

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[11] See Iniguez, 167 Wn.2d at 292.

[12] State v. Ollivier, 178 Wn.2d 813, 828, 312 P.3d 1 (2013) (quoting United States v. Colombo, 852 F.2d 19, 24 (1st Cir. 1988)).

[13] 178 Wn.2d 813, 828-29, 312 P.3d 1 (2013).

The second factor is the reason for the delay and which party is more responsible for it.[14] "'[D]elay caused by the defense weighs against the defendant.'"[15] "Many courts hold that even where continuances are sought over the defendant's objection, delay caused by the defendant's counsel is charged against the defendant under the Barker balancing test if the continuances were sought in order to provide professional assistance in the defendant's interests."[16]

Here, preparation of the defense was the primary reason for the delay. As in Ollivier, where the defendant objected to most of the continuances, "[n]early all of the continuances . . . were sought to accommodate defense counsel's need to prepare for trial."[17] The only continuance requested solely by the prosecutor caused a delay of only one week. Martin attributes the February 26 continuance to the State because the prosecuting attorney was going to be in trial on another matter in a few weeks. But Martin's trial would have begun on February 26 had he not requested additional time to prepare. Thus, this delay is attributable to Martin. The second factor also weighs in favor of the State.

The third factor—whether and to what extent the defendant asserted his constitutional right to a speedy trial—involves examining the frequency and force

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[14] Ollivier, 178 Wn.2d at 831; Iniguez, 167 Wn.2d at 294.

[15] Ollivier, 178 Wn.2d at 833 (alteration in original) (quoting Vermont v. Brillon, 556 U.S. 81, 90, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009)).

[16] Ollivier, 178 Wn.2d at 834.

[17] Ollivier, 178 Wn.2d at 834.

of the defendant's objections.[18] In State v. Iniguez,[19] this factor weighed against the State when the defendant "asserted his right at every continuance request. He objected, requested reduced bail, moved for a severance twice, and moved for a dismissal at least four times." Here, Martin objected to the continuances at first, refused to sign the continuance orders, and moved for dismissal under the IAD for failure to timely bring him to trial. But, as the trial date grew near, Martin repeatedly requested additional time. Because Martin was not consistent in asserting his speedy trial rights, this factor weighs in favor of the State.

The final Barker factor is particularized prejudice.[20] In Ollivier, the Supreme Court clarified that despite meeting the threshold showing of presumptively prejudicial delay, the court will not necessarily presume the defendant has been prejudiced.[21] "Presumed prejudice is recognized only in the case of extraordinary delay, except when the government's conduct is more egregious than mere negligence."[22] Here, the delay is not exceptionally long and there is no evidence of bad faith by the government, so Martin must present evidence of particularized prejudice.

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[18] Ollivier, 178 Wn.2d at 837-38.
[19] 167 Wn.2d 273, 295, 217 P.3d 768 (2009).
[20] Doggett v. United States, 505 U.S. 647, 654, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).
[21] See Ollivier, 178 Wn.2d at 840.
[22] Ollivier, 178 Wn.2d at 842.

Three types of particularized prejudice may arise from delay: oppressive pretrial incarceration, anxiety and concern of the accused, and impairment to the defense.[23] Martin contends that he was likely prejudiced by the delay because of impairment to his defense. Prejudice by impairment to the defense, the most important of the three interests, relates to the possibility that evidence will be lost.[24] Delay can cause difficulty in finding witnesses and decay in the witnesses' memories.[25] But we must weigh any impairment to the defense against the benefit to the defendant as a result of the continuances.[26]

Martin claims that the delay impaired his defense because he was unable to locate certain witnesses that could confirm an alibi. But these witnesses were unavailable on the original trial date, so they would not have been available to support his defense. In fact, even though his search was ultimately unsuccessful, the continuances provided Martin with more time to look for them. In addition, Martin's defense benefited from the delay because defense counsel had time to tackle Martin's complex criminal history. Thus, Martin does not show particularized prejudice, and this final factor weighs in favor of the State.

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[23] Ollivier, 178 Wn.2d at 840 (quoting Doggett, 505 U.S. at 654).
[24] Barker, 407 U.S. at 532.
[25] Barker, 407 U.S. at 532.
[26] Ollivier, 178 Wn.2d at 845.

Because all four Barker factors weigh in favor of the State, the delay did not constitute a speedy trial violation.[27]

*Interstate Agreement on Detainers*

Martin also claims that the delay violated the IAD, requiring dismissal. Under the IAD, when Washington has charges pending against a prisoner incarcerated in another jurisdiction, it may place a "hold" on him.[28] The prisoner may then demand disposition of his Washington charges.[29] Once the State receives a disposition request, it has 180 days to bring the defendant to trial.[30] However, the IAD permits the court to grant "any necessary or reasonable continuance" for "good cause shown in open court."[31] An appellate court will not disturb a trial court's decision to grant or deny a continuance absent a showing of manifest abuse of discretion.[32]

Here, the State agrees that the time between Martin's disposition request and trial exceeded 180 days. But the State contends that the continuances were reasonable and necessary and for good cause shown in open court. We agree.

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[27] Iniguez, 167 Wn.2d at 295.
[28] RCW 9.100.010 art. III(a); State v. Welker, 157 Wn.2d 557, 563, 141 P.3d 8 (2006).
[29] RCW 9.100.010 art. III(a).
[30] RCW 9.100.010 art. III(a).
[31] RCW 9.100.010 art. III(a).
[32] State v. Woods, 143 Wn.2d 561, 579, 23 P.3d 1046 (2001).

The trial court granted most of the continuances at the request of Martin or his counsel. Martin cannot now assert that they were not for good cause or that they were not necessary or reasonable.[33] The only continuance requested solely by the prosecutor was to supplement the record supporting the pro se order. That continuance delayed proceedings for only a week, and the court found the State had shown good cause. Because fewer than 180 days passed between Martin's request for disposition and the first request for continuance and each continuance was requested by the defense or granted for good cause, no violation of the IAD occurred.[34]

*Ineffective Assistance of Counsel*

Claims of ineffective assistance present mixed questions of law and fact, which this court reviews de novo.[35] Martin claims the trial court should have considered whether a conflict existed between Martin and his trial counsel, Quigley. A defendant's constitutional right to effective assistance of counsel includes representation free from conflicts of interest.[36] A conflict deprives a defendant of effective assistance of counsel when an actual conflict exists and that conflict adversely affects the performance of defendant's attorney.[37] "An

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[33] See State v. Johnson, 79 Wn.2d 173, 177, 483 P.2d 1261 (1971).
[34] See State v. Carpenter, 24 Wn. App. 41, 47, 599 P.2d 1 (1979).
[35] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).
[36] State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).
[37] White, 80 Wn. App. at 411.

actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant."[38]

Martin provides no factual support for his contention that a conflict existed. And nothing in the record shows that Martin's counsel owed a duty to anyone with interests adverse to Martin. Thus, a conflict of interest does not provide the basis for Martin's ineffective assistance of counsel claim. Rather, Martin appears to base his ineffective assistance claim on Quigley acting against his wishes when requesting continuances.[39] As the court observed in Ollivier, "[i]f because of the objections the trial court had denied counsel's requests for continuances that were needed to prepare for trial, then Ollivier might have had a strong claim that the right to effective assistance of counsel had been denied."[40] That concern is relevant here too. If the trial court had not granted the continuances, Martin could have claimed he had been denied effective assistance of counsel because Quigley had not adequately prepared for trial. The record shows that Quigley requested the continuances to best advance Martin's defense and did so by defeating the persistent offender allegation. Martin fails to show ineffective assistance of counsel.

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[38] White, 80 Wn. App. at 411-12 (citing State v. Byrd, 30 Wn. App. 794, 798, 638 P.2d 601 (1981)).

[39] Martin claims that "counsel showed indifference to Martin's demand to protect his rights and abused their authority and discretion by delaying jury trial."

[40] Ollivier, 178 Wn.2d at 839.

*Offender Score Calculation*

Martin challenges the trial court's inclusion of a 1983 California burglary conviction in his offender score calculation. We review calculation of the offender score de novo. We review any factual determinations to decide comparability de novo to see if admitted facts, stipulated facts, or those found beyond a reasonable doubt in the foreign conviction support them.[41]

The sentencing court may include an out-of-state conviction in a defendant's offender score only if it has a comparable Washington crime.[42] "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."[43] If the Washington and foreign statutes are not legally comparable, the trial court can consider the defendant's conduct under the Washington statute to see if the offenses are factually comparable. "The key inquiry is whether, under the Washington statute, the defendant could have been convicted if the same acts were committed in Washington."[44] The court must rely on facts admitted to, stipulated to, or found by a trier of fact beyond a reasonable doubt.[45]

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[41] State v. Olsen, 180 Wn.2d 468, 473-74, 325 P.3d 187, cert. denied, 135 S. Ct. 287 (2014).

[42] State v. Weiand, 66 Wn. App. 29, 31, 831 P.2d 749 (1992).

[43] RCW 9.94A.525(3).

[44] State v. Thomas, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006).

[45] In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); Ortega, 120 Wn. App. at 174.

The State has the burden of proving the offenses are comparable.[46] The State concedes that because the California statute is broader than the Washington statute, the statutes are not legally comparable.[47] Thus, at issue is whether they are factually comparable. The dispute centers on whether the trial court could properly conclude that Martin had entered a "building" as defined by Washington law.

Martin contends that the trial court did not have adequate proof that the California conviction was based on entry into a "building" as required by the Washington burglary statute. The California statute permits conviction for burglary for entry into a number of structures.

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . railroad car, . . . trailer coach, . . . house car, . . . vehicle . . . when the doors are locked, aircraft . . . , or mine . . . , with intent to commit grand or petit larceny or any felony is guilty of burglary.[48]

By contrast, the Washington statute requires entry into "a building other than a vehicle."[49] Under Washington law, "'[b]uilding,' in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo

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[46] Thomas, 135 Wn. App. at 483.

[47] See also Thomas, 135 Wn. App. at 483 (acknowledging that the California and Washington burglary statutes were not legally comparable because "unlawful" entry was not an element of the California burglary statute).

[48] CAL. PENAL CODE § 459.

[49] RCW 9A.52.030.

container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods."[50]

The criminal complaint to which Martin pleaded guilty in California stated that he "did willfully and unlawfully enter 800 Admiral Callaghan Lane, Vallejo, California, with the intent to commit a theft." Martin asserts that this conviction could have been based on entry into something other than a building, like a tent, vessel, or railroad car. But these structures fall under the Washington burglary statute's definition of "building."

Although the record does not show exactly what Martin entered at 800 Admiral Callaghan Lane, Martin has not shown that he could have been convicted in California by entering something that would not satisfy Washington's definition of "building." Thus, the offenses are factually comparable. We affirm Martin's sentence.

*Appellate Costs*

Martin asks this court to waive his appellate costs. This court has broad discretion to grant or deny appellate costs.[51] RAP 14.2 permits the court to exercise that discretion in a decision terminating review. In exercising that discretion, ability to pay, although not the only relevant factor, is an important

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[50] RCW 9A.04.110(5).

[51] RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

consideration.[52] "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."[53]

In this case, the trial court imposed 79 months to be served consecutively to any remaining time on his 3- to 5-year Wyoming sentence. Because at the termination of his incarceration Martin will have spent substantial time in prison, he will likely have difficulty paying the costs of this appeal. The State offers no argument or evidence to the contrary. Therefore, we give Martin the continued benefit of the trial court's order of indigency and deny the State costs of appeal.

## CONCLUSION

Because the delay in Martin's trial was not exceptionally long, with much of it attributable to the defendant, Martin's speedy trial challenge fails. Because the continuances were attributable to Martin or granted for good cause shown in open court, his IAD challenge also fails. Finally, Martin's ineffective assistance challenge fails because he does not provide evidence of a conflict of interest.

Because the California burglary offense was factually comparable to the Washington burglary offense, the trial court properly considered Martin's out-of-state conviction in calculating his offender score.

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[52] Sinclair, 192 Wn. App. at 389.
[53] RAP 15.2(f).

We affirm Martin's conviction and sentence.

Leach, J.

WE CONCUR:

Mann, J.

Trickey, ACJ

RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
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CASE #: 75230-8-I
State of Washington, Respondent v Arturo Martin, Appellant

Counsel:

A petition for review has been filed in the above case. A copy of the petition for review is enclosed. RAP 13.4(g).

Counsel is advised to review RAP 13.4(d) in regard to the filing of an answer to the petition for review.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

c: The Honorable Susan L. Carlson
Clerk of the Supreme Court