NO. 42999-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM CHARLES WOMACK,

Appellant.

AMENDED BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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Assignment of Error

1. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it granted a state's motion to continue the trial past the time for speedy trial based upon the state's belief that the defendant might not be ready for trial after the court granted his motion to represent himself.

2. The trial court erred when it admitted evidence of the defendant's custodial statements taken in violation of the defendant's right to silence and counsel under Washington Constitution, Article 1, § 9 & § 22, and United States Constitution, Fifth and Sixth Amendments.

3. The trial court denied the defendant his right to counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when it accepted a waiver of counsel that the defendant did not knowingly, voluntarily, and intelligently enter.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to speedy trial under CrR 3.3 if it grants a state's motion to continue the trial past the time for speedy trial based upon the state's belief that the defendant might not be ready for trial after the court granted his motion to represent himself?

2. During custodial interrogation, do the defendant's statements "Talk to my attorney - I'm done," and "You guys need to talk to my lawyer at this point," constitute invocations of a defendant's right to counsel and the right to consult with an attorney to the point that a trial court's admission of that defendant's subsequent statements constitutes a violation of that defendant's right to silence and counsel under Washington Constitution, Article 1, § 9 & § 22, and United States Constitution, Fifth and Sixth Amendments?

3. Does a trial court deny a defendant the right to counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment if it accepts a waiver of counsel that the defendant did not knowingly, voluntarily, and intelligently enter?

STATEMENT OF THE CASE

Factual History

Between November of 2002 and September of 2006, the Defendant William Charles Womack lived in an area called Vison Acres in rural Cowlitz County outside the City of Kelso with his daughter A.W., his girlfriend Tamilynn Ashley (Tami), and Tami's two sons Matt and Nathan. A.W. was born on October 1, 1994. RP 432-436, 646-650[1]. Prior to 2002, the defendant and A.W.'s mother divorced and the defendant obtained custody of A.W. because her mother was not a fit parent. RP 433-434. Indeed, one of A.W.'s consistent fears in life was that she would be forced to live with her mother. *Id.* During the time between 2002 and 2006, the defendant drove truck locally and Tami worked for a title company. RP 646-650, 1079-1080. In 2007, Tami went to work for the Cowlitz County Sheriff in the sex offender registration unit. RP 646-650.

According to A.W., in late 2002 the defendant started sexually abusing her on a routine basis. RP 437-440. The first incident occurred in his bedroom when nobody else was at home. *Id.* In some of the incidents he would have her lay on her back on his bed and he would have penile-vaginal

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[1]The record on appeal includes 2,198 continuously numbered pages of verbatim reports in 16 separate volumes of pretrial, trial, and post-trial proceedings. They are referred to herein as "RP [page #]."

intercourse with her until he ejaculated. RP 446-455. At other times he would lie down on the bed behind her and have penile-vaginal sex, a position he called "spooning." RP 470-474. Sometimes he would rub her pubic region and insert his fingers in her vagina and sometimes he would penetrate her vaginally with sex toys. RP 436-456. On other instances he would lick her vagina and force her to perform oral sex on him. RP 446-453. A.W. also reported that when she was 10 or 11-years-old and started developing sexually he would touch her breasts as well as digitally penetrate her vagina and force her to have intercourse with him. RP 453-456.

A.W. remembered that at some point early in the cycle of abuse she had developed some type of rash on her buttocks and her father would have her undress so he could put the cream on her. RP 437-440. He would then force her to have intercourse with him. *Id.* She stated that she later found out that he was rubbing lubricant on her instead of any type of medicated cream. RP 632. According to A.W., when the abuse started she would sometimes try to physically resist. RP 437-453. However, the defendant would hold her down by her arms to the point that he would leave bruises. RP 453-454. Eventually she stopped physically resisting. *Id.*

A.W. also reported a number of instances in which she was in the same bed with her father and Tami while they were having sex with each other and that on a few of these instances the defendant would reach over and

either rub her pubic region or penetrate her vagina with his fingers. RP 490-492. According to Tami, she was aware of what the defendant was doing to A.W. while she was in the bed when Tami and the defendant were having sex. RP 664.

According to A.W., when she was 13-years-old she told Tami that the defendant had been sexually molesting her. RP 475-480. Tami cried upon hearing this, and said that she should get a gun and kill the defendant. *Id.* Tami reported that she confronted the defendant the next day about what he was doing to A.W., and the defendant promised her that the abuse would stop. RP 475-480, 657-660. A.W. stated that the abuse did stop for a short while. RP 479-480. However, a few weeks later when A.W. and her father had been drinking heavily, her father took her into his bed with Tami and ordered that she and Tami perform oral sex on him and on each other, which they did. RP 480-487. He then used a two-headed dildo and penetrated both of them with it at the same time. *Id.* According to A.W., the defendant then had penile-vaginal intercourse with each one of them. *Id.* A.W. claimed that the next day Tami texted A.W. that she was sorry for what she had done to A.W.. RP 490-492.

The Cowlitz County Sheriff's Office later began an investigation of Tami upon a claim that she had known about the defendant abusing A.W. and that she had failed to report the abuse. RP 681-687. After a number of

interviews Tami admitted that she had failed to report the claims of abuse. *Id.* Eventually Tami confessed that she had indeed participated in a "threesome" with the defendant and A.W., and that she had apologized to A.W. about what she had done. RP 734. The Cowlitz County Prosecutor's Office later brought a charge of Second Degree Rape of a Child against Tami and allowed her to plead to a reduced charge of Second Degree Child Molestation. RP 674-675.

In late 2006 the defendant's relationship with Tami fell apart and Tami moved out with her two sons. RP 676. A.W. then stayed with her for a few weeks, and eventually went to live with the defendant's parents. RP 679. After A.W. went to live with her grandparents the defendant remarried and took a job long haul trucking. RP 1080. At some point the police became aware of A.W.'s allegations of abuse. RP 808-811. After interviewing A.W. on a number of occasions, the police obtained a warrant for the defendant's arrest. RP 816. The defendant was later arrested on the warrant while in Illinois and eventually returned to the Cowlitz County Jail, where he remained until trial. RP 816-821, 847. The defendant denied ever sexually or physically abusing A.W., but did claim that he once walked into the bedroom to find A.W. and Tami engaged in sexual contact with each other. RP 1066-1068. Finally, while lodged in the Cowlitz County Jail the defendant wrote three letters to Tami threatening that he would expose

criminal activity on her part if she did not change her testimony at his trial. RP 1116-1121.

Procedural History

By information filed October 13, 2010, the Cowlitz County Prosecutor charged the defendant with one count of first degree rape of a child, one count of first degree child molestation, and two counts of second degree rape of a child. RP 1-3. The prosecutor later amended this information and added two more counts of second degree rape of a child and one count of intimidating a witness. CP 59-63. This last charge arose after the state obtained possession of the three letters the defendant wrote to Tami threatening to reveal incriminating evidence against her if she did not change her testimony about what had happened. RP 1116-1121.

The defendant appeared for arraignment on January 25, 2011, at which time the court set a pretrial for February 22, 2011 and a trial date for March 14, 2011. CP 353. At the pretrial, the court set a readiness hearing for March 3, 2011, which the court later continued to March 10, 2011. CP 354, 355. On that date the court accepted a speedy trial waiver from the defendant good until May 15, 2011. CP 10-11, 357. The court then reset the trial to May 9, 2011, with a review on May 6, 2011. *Id.* On May 6, 2011, the parties again appeared before the court. RP 11-17; CP 358. At that time, the defendant's attorney moved to continue the trial date on the basis that he

needed more time to prepare. *Id.* The defendant objected to any continuance and insisted upon his right to go to trial on the date set. *Id.* In spite of the defendant's protest, the court found good cause and reset the trial to June 20, 2011. RP 11-13, 14-17.

On June 7, 2011, the parties appeared before the court upon the state's motion to continue the trial on the basis that two of the state's witnesses had a scheduled vacation in Louisiana. RP 18-23; CP 360. In spite of the defendant's vigorous objection, the court again found good cause and reset the trial to August 1, 2011. *Id.* On July 26, 2011, the defendant's attorney filed a new motion for continuance on the basis that the state was threatening to add charges of possession of depictions of minors engaged in sexually explicit conduct and that he needed time to consult with an expert about the evidence the state claimed supported these potential additional charges. CP 22-24. Defense council's affirmation given in support of the motion to continue noted that the defendant refused to sign a speedy trial waiver in support of counsel's motion. CP 24.

On August 18, 2011, the parties appeared before the court upon defense counsel's motion for a continuance. RP 24-58; CP 366. At the beginning of the hearing the defendant insisted upon representing himself if that was the only way he could get to trial on the date set and avoid any new continuances. RP 24-25. The defendant's initial statement was as follows:

DEFENDANT: Your Honor, can I say something first?

JUDGE EVANS: Sure, you want to run it through your Counsel first and then –

DEFENDANT: No, that's alright. At this time, I would like to fire my Counsel and represent myself.

RP 24.

At this point the court began a colloquy with the defendant. RP 24-28. During that colloquy the defendant made the following response as to why he wanted to represent himself.

JUDGE EVANS: Tell me why you think you would be in a better position than he to represent yourself, recognizing that he has got a lot more experience and familiarity with the law than, I'm assuming you would admit, than yourself.

DEFENDANT: Oh, of course. One thing I – supposed to have a speedy trial. I signed a 60 – day waiver, due to the fact that I had some DNA evidence that I wanted processed that I gave to him numerous months ago, before March tenth, which I signed that waiver. It is 102 days later, now, to this date, since I've signed. The end of that waiver's been up. And he had not had the time to either do anything with the evidence, and – nor he just does a continuance after continuance after continuance. I have denied every continuance that's been set. On August 2nd I was in front of Stonier, and he said there would be no more continuances, so they just forced another court date for two days later, and a continuance was onto the 22nd. I just want my chance to go to trial. I would be more than happy to represent myself at this time. The State's had over a year to come up with a case. Obviously, you know, I don't really think they need any more time. I'm ready to just go to trial.

RP 26-27.

Based upon the fact that defendant's real objection was to the failure

to get his case to trial in a timely manner, the court initially denied the defendant's request to represent himself. RP 27-28.

> DEFENDANT: I have had eight months in jail and have not had the privilege to use the law library. So.
>
> JUDGE EVANS: Okay. Alright. So it looks like there's been prior speedy trial waivers filed, and with each speedy trial waiver that's filed, generally, the Court engages the person who's charged with the crime –
>
> DEFENDANT: I've only signed one.
>
> JUDGE EVANS: – in a colloquy. And I see that there's been one back in March. And so, I think at this point in time, it sounds like there's still communication between the parties. There may be some disagreement on things – how things are proceeding. And I think it's also important to recognize that I think that you yourself, Mr. Womack, will recognize that by representing yourself you are at a distinct disadvantage against somebody who's a trained lawyer, and who knows the rules and is familiar with the rules of evidence and courtroom procedure. So based on that fact and on the fact that there's still a working communication – there may be some disagreement about some things, I think in any representation there's probably disagreement about things. So at this point in time I am going to deny your motion to discharge Mr. Scudder and represent yourself.

RP 27-28.

At this point the prosecutor objected to the court's decision, stating as follows:

> MS. HUNTER: Your Honor, I have some concerns. I don't have my usual colloquy with me that typically I have when somebody wants to represent themselves.

RP 28.

Based upon this objection and further argument by the state, the court adjourned for about 10 minutes, returned and then initiated a new colloquy with the defendant in which the court reviewed the charges and the maximum penalties for the charged offenses, as well as the fact that if the defendant represented himself he would be subject to the rules of evidence. RP 29-36. The court then asked the defendant whether he still wanted to represent himself after considering all of the difficulties in self-representation. RP 36-37. The defendant did not respond in the affirmative to this question. RP 37. Rather, he asked if he could have a new attorney. RP 37. This exchange went as follows:

> JUDGE EVANS: So, considering the dangers that we've talked about, the disadvantages that we have talked about of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer? Or do you want to step back from that position?
>
> DEFENDANT: Am I allowed to get a different attorney?

RP 37.

At this point the court told the defendant that they could address that issue after the court finished its colloquy on self-representation. RP 37. Specifically, the court stated: "Let's finish up with this, and then we can talk about that." *Id.* The court then asked a number of follow up questions with the defendant consistently answering that he wanted to represent himself. RP 37-42. At this point the court returned to the defendant's request for a new

attorney. RP 42. This exchange went as follows:

> JUDGE EVANS: Okay. So, if you were given a new attorney, you might have an opportunity to talk to that attorney about the case, and do you think that might change your mind?
>
> DEFENDANT: Possibly.
>
> JUDGE EVANS: Okay. So, if that's the case, do you think you might want to be represented by an attorney?
>
> DEFENDANT: At this point, I would just rather, you know, the attorney, as far as you were saying the, you know, there's a lot to, you know, with all the witnesses and all that. Most of the work's been done. I just need to go to trial. You know, I realize that there's some definite legal procedures that I need to get hip on, and I would ask that from now until the trial date that I could use the law library as much as possible, and I think I'll be alright.

RP 42-43.

The court then continued with its colloquy, after which the state interjected that it was worried that the defendant had stated that what he really wanted was a new attorney. RP 43-44. Although the defendant initially stated that he simply wanted to represent himself, the following exchange then took place. RP 44-45.

> JUDGE EVANS: Okay. So, with that understanding, again, talking about if you had a different attorney, do you think that would make a difference, that you would be willing to proceed to trial with a different attorney?
>
> DEFENDANT: I don't think we have any court appointed attorneys that are from out of town, do we?
>
> JUDGE EVANS: Court-appointed attorneys are appointed on a random basis. Sometimes if there's conflicts there's attorneys that

come from out of the county who represent clients, and it's just kind of based on a rotating schedule.

DEFENDANT: It's random. I'd rather take my chances with myself.

RP 44-45.

The court thereafter granted the defendant's motion to represent himself. RP 46. After the court granted the defendant's request, the state moved to continue the trial. RP 43-57. The state argued in part that a continuance was necessary because the state had "some concerns that the Defendant's ability to prepare for trial, or [the state's] ability to provide him discovery . . ." RP 48. In spite of the defendant's protestations that he wanted to go to trial on the date set, the court again found good cause, granted the state's motion, and put the case over one week to set a new trial date. RP 49-57. On August 25, 2011, the court set a new trial for October 10, 2011. RP 1376; CP 367-368.

On September 21, 2011, the defendant filed a written motion to dismiss for violation of his right to speedy trial under CrR 3.3. CP 52-56. On October 6, 2011, the parties appeared before the court on the defendant's motion and for readiness. RP 59-121. Following argument of counsel, the court denied the motion to dismiss. *Id.* The court also made a finding that there was insufficient time to hear all of the necessary pretrial motions prior to the current October 10th trial date. RP 134-141. As a result, the court reset

the trial date to November 15, 2012. RP 141. When the defendant objected and asked for clarification as to whether or not "good cause" justified the continuance, the court stated: "I'm moving it within the previously found good cause period." RP 140. On October 27th, the state informed the defense and the court that it could proceed to trial a day early on November 14, 2011. CP 375-578. The defense had no objection so the court changed the trial date to November 14, 2011. *Id.*

This case was finally called for trial on November 14, 2011. CP 381. Prior to starting *voir dire*, the court held a hearing under CrR 3.5 to determine the admissibility of the defendant's statement to the police following his arrest. RP 163-226. During the hearing the state called two police officers to testify concerning their trip to Illinois to interrogate and transport the defendant back to Washington. RP 166, 211. The first officer testified to meeting the defendant in the Grundy County, Illinois jail. RP 167-168. Initially, this officer began the interview by advising the defendant concerning his *Miranda* right, which the defendant indicated that he understood and would waive. RP 169-170. According to the officers, the defendant quickly became extremely defensive in answering questions. RP 175. He then made the statement at the beginning of the interview: "Talk to my attorney. I'm done." RP 174. The first officer's testimony concerning this statement went as follows:

Q. How would you describe his demeanor at that point, when he was like, "I'm going to take everything to court?"

A. It was defensive. It was defensive.

Q. Same as he was earlier, or a little more intense, or something different?

A. He may have been more intense as we went along.

Q. So after this diatribe against people lying and him being treated poorly, does he mention the word attorney again?

A. Yes, he does.

Q. And how did that arise?

A. He said that, "Everyone is lying about me", and "Talk to my attorney. I'm done."

Q. Were those his exact words, "Talk to my attorney. I'm done?"

A. Yes, they were.

Q. And how do you know they were his exact words?

A. I have it in quotations in my notes.

RP 174-175.

The second officer testified as follows concerning this exchange going as follows:

Q. Okay. Did the Defendant ever mention the word 'attorney' in that conversation?

A. He did. At some point early on in Detective Voelker's questioning, he said something to the effect of you need to talk to my attorney at this point.

RP 214.

In spite of the defendant's statement "Talk to my attorney. I'm done," the officers continued the interview. RP 175-176. A little later in the interrogation, the defendant said, "You need to talk with my attorney." RP 178. The first officer's testimony on direct about this issue went as follows:

> Q. So, just to be clear, he says, "You need to talk with my attorney," and then continues talking with you about sex offenders and him and what he knows and sees?
>
> A. He says, "You need to talk to my attorney," and then he continues on a dialogue on his own.

RP 178.

On cross-examination, this same officer described this portion of his interrogation of the defendant as follows:

> Q. On your statement it says, "I asked Womack when he did – he first hear about these charges. Womack said, "I heard about these from one time yesterday. You guys need to talk to my lawyer at this point." Now, that's exactly what I said, correct?
>
> A. ""Womack said, "I heard about this for the first time yesterday. You guys need to talk to my lawyer at this point."" And then you continued talking.
>
> Q. And then the next paragraph down it says, "I asked Womack if he would consent to a polygraph test."
>
> A. I did.
>
> Q. So, you asked after I said, "You guys need to talk to my lawyer at this point," is that correct?
>
> A. I asked about the polygraph test.
>
> Q. So, anything after I said, "You guys need to talk to my lawyer

at this point," you still continued to ask questions.

A. No. I asked about a polygraph test.

Q. (Inaudible).

A. If you would consent to a polygraph test.

Q. So, asking for a polygraph test, this is not asking a question in the way you're interpreting that to mean?

A. You didn't say you would not talk to me, sir. You didn't request to have a lawyer, sir.

Q. So, "You guys need to talk to my lawyer at this point," you wouldn't read – you wouldn't define that as I didn't want to talk to you anymore?

A. No, I'd define it –

RP 206-207.

Following argument on the motion, the court ruled that the defendant had not really invoked his right to remain silent or to counsel and that as a result, his statements were admissible in the state's case-in-chief. RP 221-237. As far as appellate counsel can determine, the state did not prepare or present findings of fact and conclusions of law following this hearing. CP 1-410.

After the hearing under CrR 3.5 and *voir dire*, the case proceeded to trial with the state calling eight witnesses, including the first officer who had interviewed the defendant in Illinois and transported him to the Cowlitz County Jail. RP 432-912, 805-884. This officer testified to a number of

statements he claimed the defendant made during interrogation, including the following: (1) that he knew there was a rape charge against him, (2) that he claimed everyone was lying, (3) that he had spent $20,000.00 to obtain custody of A.W. and "This is how she repays me," (4) that he was a bad father, (5) that he drank to excess and took pain pills, (6) that A.W. had lied about the abuse so she could go live with her grandparents, (7) that the defendant had no answer other than claiming that everyone was lying when confronted with the fact that A.W. was already living with her grandparents when she first made the allegations of abuse so the defendant's claim that she lied in order to go live with her grandparents made no sense, (8) that his family was dead to him, (9) that he didn't think he could forgive A.W., and (10) that he knew facts that were going to make people in law enforcement look bad. RP 816-825.

After the state closed its case, the defense called 10 witnesses. RP 913-1189. The court then instructed the jury with the defendant objecting to the court's decision to give an instruction defining the term "accomplice." RP 1155-1163. The defendant had also objected to the court's decision to give the jury special verdict forms on the aggravating factors alleged in the amended information. RP 1146-1147. These aggravating factors were as follows: (1) that the defendant knew or should have known that the victim was particularly vulnerable, and (2) that the crimes were part of an ongoing

pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time. CP 59-63.

After closing argument the jury retired for deliberation. 1287. During deliberation, the jury sent out the following two questions:

> 1. Does the jury vote have to be unanimous regarding a special verdict?
>
> 2. Can we have a more detailed definition of what constitutes "particularly vulerable [sic]."

CP 262-263.

The court responded to these questions with written responses as follows:

> 1. Please refer to jury instruction No. 28.
>
> 2. Please refer to the jury instructions.

CP 262-263.

The jury later returned verdicts of "guilty" on each count charged and an answer of "yes" to each special interrogatory. CP 264-285; RP 1292-1300. Upon receiving the verdicts the court revoked bail and ordered a pre-sentence investigation report. RP 1298-1300.

On November 13, 2012, the court called this case for sentencing. RP 1305. After hearing arguments from both sides, the court imposed a standard range sentence on each conviction. CP 310-325. However, based upon the aggravating factors found by the jury, the court imposed a sentence in excess

of the standard range by ordering that counts V, VI and VII run consecutive to Counts I, II and III. *Id.* As a result, the court sentenced the defendant to six terms of life in prison with a minimum mandatory time of 819 months to serve before the defendant could first be considered for release. *Id.* The defendant thereafter filed timely notice of appeal. CP 332.

ARGUMENT

I. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CHARGES DISMISSED WITH PREJUDICE BECAUSE THE TRIAL COURT VIOLATED THE DEFENDANT'S STATUTORY RIGHT TO SPEEDY TRIAL.

Under CrR 3.3(b), the time for trial for a person held in jail is "60 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." CrR 3.3(b)(1)(i)&(ii). The "[t]he initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

> (f) Continuances. Continuances or other delays may be granted as follows:
>
> . . .
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the

> defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra*, a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

> The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the defendant was in custody the entire time of this trial. As a result, the 60 day rule applies as opposed to the 90 day rule. He was arraigned on January 25, 2011. On March 10, 2011, the defendant filed

a speedy trial waiver that ran until May 15, 2011. The court then reset this case for trial on dates after May 15th on a number of occasions at the request of his attorney and at the request of the state, each time over the defendant's objection. On one of these occasions, occurring on August 18, 2011, the court granted the state's motion to continue after the court allowed the defendant to appear *pro se* following a lengthy colloquy. The state brought this motion orally and did not support it with any oath or affirmation. Rather, it appears that the state simply was not ready for trial even though the case had been pending for almost eight months. Indeed, one of the defendant's primary reasons for wanting to represent himself was to avoid his attorney's desire to again continue the case. In this instance the court abused its discretion in granting yet another motion to continue by the state.

In this appeal the state may argue that the defense cannot now claim that the trial court erred when it granted the state's August 18, 2011, motion to continue because the defendant did not file a motion to reset the trial date within 10 days of the trial setting to which the defendant objected as is required under CrR 3.3(d)(3). This provision states:

> (3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial

commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3).

In the case at bar, this provision does not apply to preclude the defendant from relief based upon the trial court's failure to bring the defendant to trial within the speedy trial rule following the August 18th hearing. The reason is that on August 18th, the defendant specifically objected that the court was violating the speedy trial rule when it granted the state's motion to continue. Although the defendant later did bring a written motion to dismiss based upon the court's decision to grant the state's request for a new trial date, the fact of the matter is that on August 18th the state and the court were put on notice that the defendant was objecting to the state's request to reset the trial date. Thus, under CrR 3.3(h), this court should reverse the defendant's convictions and remand with instructions to dismiss with prejudice.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF THE DEFENDANT'S CUSTODIAL STATEMENTS TAKEN IN VIOLATION OF THE DEFENDANT'S RIGHT TO SILENCE AND COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 & § 22, AND UNITED STATES CONSTITUTION, FIFTH AND SIXTH AMENDMENTS.

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, Washington Constitution, Article 1, § 9 states that "[n]o

person shall be compelled in any criminal case to give evidence against himself." The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In addition, under United States Constitution, Sixth Amendment, a defendant has the right to consult an attorney prior to answering any questions during custodial interrogation. This protection is also guaranteed under Washington Constitution, Article 1, § 22.

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant's "custodial statements" may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted

as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogations." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "'any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that,

absent a waiver, must be followed prior to the admission of a defendant's post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5, which states in part:

> (a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.
>
> (b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.
>
> (c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

As CrR 3.5(c) states, the trial court has the duty to enter written findings of fact and conclusions of law following a CrR 3.5 hearing. These written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). As a result, the court's failure to enter such findings and conclusions as required

under CrR 3.5(c) is error and is not harmless unless the court's oral findings are sufficient for appellate review of the issue. *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998).

In the case at bar the trial court has not entered written findings of fact and conclusions of law on the CrR 3.5 hearing. This failure prevents adequate appellate review, particularly given the testimony of the officers during the CrR 3.5 hearing that the defendant specifically stated "Talk to my attorney - I'm done" and "You guys need to talk to my lawyer at this point." However, as the following explains, even if the trial court's oral ruling is sufficient to allow for appellate review, the trial court erred when it allowed the prosecutor to elicit the statements the defendant made during custodial interrogation after the defendant invoked his right to counsel and silence.

A number of cases deal with the issue of what statement or lack of statement by a defendant during custodial interrogations constitutes an invocation of a defendant's right to silence or counsel. For example, in *State v. Hodges*, 118 Wn.App. 668, 77 P.3d 375 (2003), the defendant initially waived his right to silence and counsel during custodial interrogation when he spoke with law enforcement after having been given his *Miranda* warnings. Rather, he claimed on appeal that during the interrogation he refused to answer a question, and that this refusal constituted an unequivocal assertion of his right to silence such that all questioning should have ceased.

However, the court held that the failure to respond to a single question was not a clear and unequivocal invocation of the right to silence because the defendant did not, in fact, remain silent and instead answered other questions. Under the totality of these circumstances, the court held that the defendant did not clearly and unequivocally invoke his right to silence. *State v. Hodges*, 118 Wn.App. at 673, 77 P.3d 375.

By contrast, in *State v. Grieb*, 52 Wash.App. 573, 761 P.2d 970 (1988), a state appealed the dismissal of a charge for want of evidence after the trial court suppressed the defendant's confession. The basis for the court's ruling was that the defendant had unequivocally invoked both his right to silence and his right to counsel when he stated "I don't wanna waive my rights" during custodial interrogation. On appeal, the Washington Supreme Court affirmed, that this statement did constitute an unambiguous assertion of the defendant's right to silence and counsel.

In the case at bar, the defendant initially made the following statement to the police during custodial interrogation: "Talk to my attorney. I'm done." He later stated: "You guys need to talk to my lawyer at this point." Both of these statements constitute unambiguous invocations of the defendant's right to silence and the right to counsel similar to the invocation of that right in *Grieb*. Thus, in the case at bar, the trial court erred when it held that the defendant's statements to the police following these invocations were

admissible.

Since the trial court's admission of the defendant's statements constitutes a violation of the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, the defendant is entitled to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, *supra*. "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

A careful review of the evidence in this case reveals that the state cannot meet this high standard. In essence, the only evidence to support the state's claims on all but the last charges came from the claims of the state's two witnesses A.W. Womack and Tami Ashley. No physical evidence supported these allegations and the defendant made no admission to anyone other than the admission that Tami claimed he made. Indeed, the defendant took the stand and absolutely denied any abuse. Under these circumstances, the admission of unfavorable evidence that casts the defendant in a bad light, as did the officer's testimony of the defendant's statements, is sufficient to tilt the balance in the jury's mind from acquittal to conviction. In such a

close case the state cannot meet its burden of proving the error harmless beyond a reasonable doubt. As a result, the defendant is entitled to a new trial based upon the trial court's erroneous admission of the defendant's statements during custodial interrogation.

III. THE TRIAL COURT'S ACCEPTANCE OF THE DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, BECAUSE THE DEFENDANT DID NOT INTELLIGENTLY, KNOWINGLY AND VOLUNTARILY ENTER THAT WAIVER.

Under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, a defendant has the right to effective assistance of counsel as well as the opposite right of self-representation. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed. 2d (1975); *State v. Kolocotronis*, 73 Wn.2d 92, 436 P.2d 774 (1968). Because of the tension between the right to counsel and the right to self-representation, a defendant wishing to proceed *pro se* must make an unequivocal request to do so and the trial court must ensure itself that the waiver of counsel is knowing, voluntary, and intelligent. *State v. Bebb*, 108 Wn.2d 515, 740 P.2d 829 (1987); *State v. Buelna*, 83 Wn. App. 658, 922 P.2d 1371 (1996).

There is no specific formula for determining the validity of a defendant's waiver of the right to counsel. *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991). Rather, the best method of determining whether a

defendant's waiver of counsel is knowing, intelligent, and voluntary is for the trial court to conduct an on-the-record colloquy "detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the defendant's knowledge of technical, procedural rules governing the presentation of the accused's defense." *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

This court has recommended that trial courts deciding this issue follow the colloquy suggested in *State v. Christensen*, 40 Wn. App. 290, 295-96, n. 2, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985). *State v. Buelna*, 83 Wn. App. at 662. If the trial court does not conduct a colloquy, a waiver may still be valid if a reviewing court determines from the record that the accused was fully apprised of these factors and other risks associated with self-representation that would indicate that the defendant made this decision with his or her "eyes open." *Silva*, 108 Wn. App. at 540. However, "rarely will adequate information exist on the record, in the absence of a colloquy, to show the [defendant's] required awareness of the risks of self-representation. " *Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). The defendant has the burden of demonstrating that his waiver of the right to counsel was invalid. *State v. Hahn*, 106 Wn.2d 885, 901, 726 P.2d 25 (1986). A trial court's determination of a valid waiver is reviewed for abuse of discretion. *State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742

(1986).

For example, in *State v. Buelna, supra*, the state charged the defendant with felony eluding, second degree assault, and first degree malicious mischief. During trial the defendant abruptly told the court that he wished to represent himself. The judge then told the defendant that he could (1) declare a mistrial, appoint new counsel, and schedule a new trial; (2) deny the request and allow the current attorney to continue his representation; or (3) allow the defendant to represent himself with the current attorney as "standby counsel to confer with you on legal issues, evidentiary issues, instructions, things of that nature." The defendant responded that he would represent himself, with the current attorney as standby counsel to provide "legal knowledge, advice or expertise." The court then asked the defendant questions about his education and legal knowledge. After asking these questions the court allowed the defendant to represent himself with standby counsel available.

The defendant was eventually convicted and he then filed a notice of appeal, arguing that the trial court had erred when it accepted his waiver of counsel. The state responded that since the defendant had standby counsel he could not argue on appeal that the trial court erred when it allowed him to represent himself. In addressing these arguments the court first noted the following:

> A defendant has the constitutional right to represent himself at trial. *Faretta*, 422 U.S. 806, 95 S.Ct. 2525. The request to proceed pro se must be unequivocal. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). A trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of his constitutional right to the assistance of counsel. *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984).

State v. Buelna, 83 Wn.App. at 659.

The court then went on to reverse the conviction finding an insufficient waiver of the right to counsel. The court held:

> We hold that Buelna's waiver of his right to the assistance of counsel was an uninformed and unintelligent waiver, because Buelna said that he did not understand the charges and because the record does not establish that Buelna was properly advised of the nature and seriousness of the charges and the possible penalties. The presence of standby counsel does not obviate the need for establishing the defendant's intelligent and knowing waiver of his right to assistance of counsel. We recommend that trial courts deciding to give a defendant the opportunity to proceed pro se follow the colloquy suggested in *State v. Christensen*, 40 Wn.App. 290, 295-96 n. 2, 698 P.2d 1069, review denied, 104 Wash.2d 1003 (1985), to assure that the defendant understands the risks of self-representation. We reverse Buelna's convictions and remand the case for a new trial.

State v. Buelna, 83 Wn.App. at 661-662.

In the case at bar the record reveals that the defendant's waiver of counsel was far from "unequivocal" as the court in *Buelna* notes it must be. In fact, the record reveals that the defendant's request to represent himself was centered on his desire to go to trial without any further continuances. The initial colloquy with the court went as follows:

JUDGE EVANS: Tell me why you think you would be in a better position than he to represent yourself, recognizing that he has got a lot more experience and familiarity with the law than, I'm assuming you would admit, than yourself.

DEFENDANT: Oh, of course. One thing I – supposed to have a speedy trial. I signed a 60 – day waiver, due to the fact that I had some DNA evidence that I wanted processed that I gave to him numerous months ago, before March tenth, which I signed that waiver. It is 102 days later, now, to this date, since I've signed. The end of that waiver's been up. And he had not had the time to either do anything with the evidence, and – nor he just does a continuance after continuance after continuance. I have denied every continuance that's been set. On August 2nd I was in front of Stonier, and he said there would be no more continuance, so they just forced another court date for two days later, and a continuance was onto the 22nd. I just want my chance to go to trial. I would be more than happy to represent myself at this time. The State's had over a year to come up with a case. Obviously, you know, I don't really think they need any more time. I'm ready to just go to trial.

RP 26-27.

Based upon the fact that defendant's real objection was to the failure to get his case to trial in a timely manner, the court denied the defendant's request to represent himself. RP 27-28. This denial would have ended the matter but for the prosecutor's objection. She stated the following after the court denied the motion.

MS. HUNTER: Your Honor, I have some concerns. I don't have my usual colloquy with me that typically I have when somebody wants to represent themselves.

RP 28.

Based upon this objection and further argument by the state, the court

renewed its colloquy with the defendant and asked him whether or not he still wanted to represent himself after considering all of the difficulties in self-representation. RP 36-37. The defendant did not respond in the affirmative to this question. RP 37. Rather, he asked if he could have a new attorney. RP 37. This exchange went as follows:

> JUDGE EVANS: So, considering the dangers that we've talked about, the disadvantages that we have talked about of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer? Or do you want to step back from that position?
>
> DEFENDANT: Am I allowed to get a different attorney?

RP 37.

The court responded to this question with "Let's finish up with this, and then we can talk about that." *Id.* The court then asked a number of follow up questions with the defendant consistently answering that he wanted to represent himself. RP 37-42. The court then asked:

> JUDGE EVANS: Okay. So, if you were given a new attorney, you might have an opportunity to talk to that attorney about the case, and do you think that might change your mind?
>
> DEFENDANT: Possibly.
>
> JUDGE EVANS: Okay. So, if that's the case, do you think you might want to be represented by an attorney?
>
> DEFENDANT: At this point, I would just rather, you know, the attorney, as far as you were saying the, you know, there's a lot to, you know, with all the witnesses and all that. Most of the work's been done. I just need to go to trial. You know, I realize that there's some

definite legal procedures that I need to get hip on, and I would ask that from now until the trial date that I could use the law library as much as possible, and I think I'll be alright.

RP 42-43.

The court then continued with its colloquy, after which the state interjected that it was worried that the defendant had stated that what he really wanted was a new attorney. RP 43-44. Although the defendant initially stated that he simply wanted to represent himself, the following exchange then took place. RP 44-45.

> JUDGE EVANS: Okay. So. with that understanding, again, talking about if you had a different attorney, do you think that would make a difference, that you would be willing to proceed to trial with a different attorney?
>
> DEFENDANT: I don't think we have any court appointed attorneys that are from out of town, do we?
>
> JUDGE EVANS: Court-appointed attorneys are appointed on a random basis. Sometimes if there's conflicts there's attorneys that come from out of the county who represent clients, and it's just kind of based on a rotating schedule.
>
> DEFENDANT: It's random. I'd rather take my chances with myself.

RP 44-45.

The trial court's initial decision in this case was correct in denying the defendant's equivocal request to represent himself. The court's further colloquy with the defendant did not reveal a determination on the part of the defendant to represent himself. Rather, it again revealed the fact that the

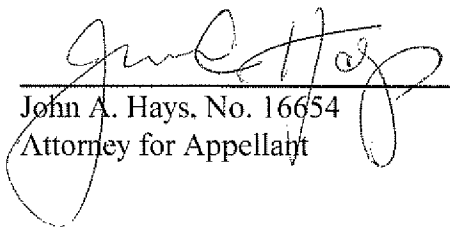
defendant wanted to do what was necessary to do to avoid any further continuances of his trial date. Under these facts, the trial court's erroneous acceptance of the defendant's equivocal invocation of the desire to represent himself denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, the court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to dismiss based upon the denial of the defendant's right to speedy trial. In the alternative, this court should vacate the defendant's convictions and remand for a new trial based upon the erroneous admission of the defendant's custodial statements and the erroneous decision to allow the defendant to proceed *pro se*.

DATED this 19th day of November, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CrR 3.3

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) 'Pending charge' means the charge for which the allowable time for trial is being computed.

(ii) 'Related charge' means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) 'Appearance' means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) 'Arraignment' means the date determined under CrR 4.1(b).

(v) 'Detained in jail' means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of

venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice--Objections--Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to Foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as

follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **WILLIAM C. WOMACK,** **Appellant.**	**NO. 42999-3-II** **AFFIRMATION OF OF SERVICE**

John A. Hays states the following under penalty of perjury under the laws of Washington State. On November 19, 2013, I personally e-filed and/or placed in the United States Mail the following documents with postage paid to the indicated parties:

1. Brief of Appellant
2. Affirmation of Service

Ms Susan Baur
Cowlitz Co. Pros Atty
312 S.W. First Ave
Kelso, WA 98626

William Womak, No. 354117
Washington State Prison
1313 13th Avenue
Walla Walla, WA 99362

Dated this 19th day of November, 2013, at Longview, Washington.

John A. Hays, No. 16654
Attorney at Law

HAYS LAW OFFICE

November 19, 2013 - 9:20 AM

Transmittal Letter

Document Uploaded: 429993-Amended Appellant's Brief.pdf

Case Name: State v. William Womack

Court of Appeals Case Number: 42999-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us
HunterA@co.cowlitz.wa.us