Supreme Court No. 97043-2
(COA No. 49730-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LLEWELLYNE V. HOLCOMB,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Llewellyne Holcomb, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Holcomb seeks review of the decision by the Court of Appeals dated November 14, 2018, for which his motion for reconsideration was denied February 14, 2019. Copies are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court subverted the speedy trial rules by fictitiously declaring the trial as having commenced under CrR 3.3 over Mr. Holcomb's express objection, because it only intended to conduct a pretrial hearing and then adjourn for an extended period of time, the State had a missing witness and was not ready, the judge had planned vacations and could not start the trial, and the court allowed the prosecution to undertake other trials during the time that Mr. Holcomb's trial was fictitiously on-going.

The Court of Appeals decision conflicts with this Court's decision in *Kenyon* and the few Court of Appeals decisions that allow a very minor delay between preliminary proceeding and the actual trial's commencement under CrR 3.3. Here, the ensuing delay was anticipated, planned by the judge and prosecution, and lasted for months. Should this Court grant review of the delay that undermines the plain letter and spirit of the speedy trial rule and conflicts with other decisions?

2. The prosecution's mismanagement further drove the delay in this case because it insisted it needed a witnesses who was unavailable, but this witness was not subpoenaed, was not significant, and the wait for this witness alone caused months of delay. When governmental mismanagement significantly contributes to trial delay, leading to unnecessary continuances, does this violation of CrR 3.3 and CrR 8.3 merit review by this Court, as a matter of substantial public interest?

D. STATEMENT OF THE CASE

Mr. Holcomb was charged with two counts of first degree assault following his arrest on October 6, 2015. CP 43-44. The prosecution added one charge of tampering with a witness and three charges of violating a no-contact order based on recorded phone calls Mr. Holcomb while in jail. CP 44-46.

Mr. Holcomb remained in jail, unable to post bail, throughout the proceedings. He repeatedly insisted he wanted to have his trial as soon as possible. Beginning January 21, 2016, Mr. Holcomb objected to any trial continuances and maintained these objections each time the court announced a delay. 1/22RP 4-5; 2/26RP 4, 6; 3/10RP 4; 3/24RP 6; 4/28RP 5; 6/1RP 3; 6/2RP 5; 6/16RP 4-5; 6/21RP 3; 7/18/16RP 5; 9/7RP 4; 9/8RP 10.

The court refused to reduce his bail as the trial delays mounted. 4/28RP 13, 15. Despite Mr. Holcomb's unwavering insistence that his trial begin as soon as possible, and his attorney's similarly voiced readiness to begin the trial, trial testimony did not start until September 13, 2016, over 11 months from Mr. Holcomb's arrest. 9/13RP 423.

Shortly before the court had a scheduled two week vacation, and knowing it was not available to begin the trial, the court decided to would "bifurcate" the case. It started some pretrial motions in late June 2016, then recessed it due to its own scheduling needs involving other cases or vacations. 6/23RP 4. Mr. Holcomb objected to starting and stopping the trial proceedings. 6/2RP 5. The prosecution was missing a witness, a police officer who was on an extended deployment to the military, and even though this officer's role was somewhat tangential,

the prosecution wanted to call him as a witness for the suppression hearing.

The court held part of the suppression hearing in late June, then took a two week vacation. When the court returned, the prosecutor said he was about to start another trial and the court agreed to delay Mr. Holcomb's case even though it had previously said Mr. Holcomb's case would take priority because the court considered the "trial" to have started in late June. Mr. Holcomb objected. In August, the court took a vacation that turned into more than one month of recess. Mr. Holcomb's case was not called and he did not appear in court from mid-July until mid-September, even though the court treated his trial as if it started as of the late-June pretrial hearings.

Throughout these summer months, the court entered no findings of good cause to continue the case. After the prosecutor asked to again delay the trial so he could attend an out-of-state conference in mid-September, Mr. Holcomb agreed to waive his right to a jury trial so the proceedings could begin. 9/12RP 290-91, 299-300. He also moved to dismiss the prosecution due to the extensive, foreseeable, non-emergency delay. 9/12RP 306. The court denied the motion to dismiss. 9/12RP 311. After a bench trial, the court convicted Mr. Holcomb of

one count of second degree assault and one count of first degree assault, both with firearm enhancements, one count of tampering with a witness, and three counts of violation of a no-contact order. CP 47-55.

The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

E. ARGUMENT

Contrary to *Kenyon* and in violation of CrR 3.3, the court subverted the speedy trial rules by delaying Mr. Holcomb's trial without a record of court congestion and by setting a fictitious start date for the trial when neither the State nor the court were ready and the case was delayed for months after this fictitious trial commencement.

1. The court has the obligation of protecting an accused person's speedy trial rights under CrR 3.3.

Courts protect the accused's speedy trial rights by strictly enforcing CrR 3.3. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime").

"[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *Kenyon*, 167 Wn.2d at 136, quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). "Failure to

strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice." *State v. Raschka*, 124 Wn. App. 103, 112, 100 P.3d 339 (2004) (citing *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988)).

Under CrR 3.3, courtroom congestion never permits a judge to delay trial past the expiration of speedy trial time, without engaging in a meaningful, on-the-record, effort to obtain an available judge and courtroom, including searching for pro tem or visiting judges. *Kenyon*, 167 Wn.2d at 136, 216 P.3d 1024 (2009). Judicial unavailability is not a basis to extend the time for trial, absent a detailed and significant effort to locate a substitute judge. *Id.* Any incremental delay of a trial requires a specific justification, a finding of good cause, and an on-the-record assessment of prejudice upon objection. CrR 3.3(e), (f).

The trial court ignored its obligations two ways. First, it set lengthy unjustified continuances based on its own availability preferences, without ascertaining the availability of another judge as mandated. And second, it falsely "started" trial when it knew it could not complete it in a timely fashion, as a way to skirt the obligations set forth in CrR 3.3. The Court of Appeals opinion supports and justifies this violation of the court rules.

2. *The judge's vacation schedule and other case obligations are not a basis for trial delay without on-the-record evidence of efforts to find another judge.*

Court congestion does not justify a delay beyond the speedy trial period. *Kenyon*, 167 Wn.2d at 137. If congestion arises, the court must try to find another judge, including a pro tem judge, and if none is found, it must definitively document its efforts on the record. *Id.*

The record must show "details of the congestion, such as how many courtrooms were actually in use" and "the availability of visiting judges" to hear criminal cases. *Id.* The court may allow a continuance for court congestion only when "it carefully makes a record of the unavailability of judges and courtrooms and of the availability of judges pro tempore." *Id.*

The Pierce County judge continued Mr. Holcomb's trial several times because the judge herself was unavailable, without making and documenting efforts to locate another available judge. *See, e.g.*, 3/24RP 6; 4/28RP 12; 6/23RP 4; 9/8RP 12; CP 34 (August 8, 2016 continuance for 30 days entered without hearing or explanation). On two occasions the judge claimed to have inquired into other judges' availability, but she did not explain who she contacted, when other judges might be free, or what number of courtrooms could be used. 3/24RP 6; 6/23RP 4. The

judge never checked for a pro tem judge even though *Kenyon* explains the court system purposefully expanded pro tem judge's available so courts could meet their speedy trial obligations. 167 Wn.2d at 138-39.

Pierce County has 22 judicial departments for elected judges, as well as eight full-time superior court commissioners, an established visiting judge program, and pro tem judges.[1] RCW 2.08.150 (explaining authority of visiting judge); RCW 2.08.180 (permitting pro tem judges as any member of the bar upon agreement).[2] RCW 2.08.061 allots Pierce County 24 judges for superior court.

The court's minimal cursory claims that it checked for other judges does not constitute the careful review dictated by *Kenyon* and defies logic as given the likelihood a qualified judicial officer could be found during the many times the preassigned judge was unavailable. The Court of Appeals treated this requirement as inapplicable, without explanation.

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[1] *See* Pierce County Official Website, Judicial Officers, available at: https://www.co.pierce.wa.us/1060/Judicial-Officers

[2] *See* Washington Courts, Elected Judges Pro Tempore, available at:https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.protem&yr=16. (listing elected judges available as pro tem judges in 2016)

3. The court's lengthy recesses subverted the time for trial rules.

CrR 3.3 contains no provisions for a court to simply hold a pretrial hearing and then postpone the case for weeks or months free from the constraints of CrR 3.3 and without justifying the delay under CrR 3.3's strict rules. *State v. Andrews*, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992).

Although CrR 3.3 does not expressly detail when a trial "starts" for purposes of the CrR 3.3(c)(1) calculation, a few Court of Appeals cases say the effectively starts when the case is called for trial and the court "hears and disposes of preliminary motions." *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). In *Carson*, the trial commenced for speedy trial purposes when the court called the case for trial, denied a defense motion to continue, and set the case over for the next day when trial actually began in earnest. *Id.* at 810, 820.

The Court of Appeals relied on *Andrews* to find this delay permissible. Slip op. at 6 n.1.[3] But *Andrews* involved three

[3] Although footnote one also cites *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002), this citation is only another way to cite *Andrews* regarding when a trial commences for speedy trial purposes. *Vermillion* involves a request to proceed pro se, not a speedy trial delay, but cites to Andrews as an analogy on speedy trial law.

consolidated cases where three defendants each complained that the courts used rulings on insignificant motions to claim the trial started for purposes of CrR 3.3. 66 Wn. App. at 810. In each case, the trials actually started promptly after the preliminary motions. The *Andrews* Court ruled that it would not weigh the importance of a pretrial motion to the outcome of a case when deciding speedy trial issues. *Id.* The minimal nature of the delays were central to the court's holdings. *Id.* at 811.

Significantly, *Andrews* recognized it would be "different" if "an undue delay of the remainder of the trial" followed a preliminary motion hearing. 66 Wn. App. at 811. It explained that the speedy trial rules do not authorize circumstances where someone has "taken advantage of the rule to justify an undue delay" of the trial. *Id.*

Unlike *Carson* or *Andrews*, extended delay was precisely the aim of the prosecution and court when it fictitiously deemed the trial started with preliminary motions in late June. Due to the judge's July and August vacations, one witness's military leave who the prosecution later insisted it did not need for the suppression hearing, and another lengthy trial the court let the start *during* Mr. Holcomb's trial

proceedings, the court continued the case for an extended time without legitimate justification after the late-June proceedings.

Once the court started a pretrial hearing, it acted as if it fully satisfied Mr. Holcomb's right to a speedy trial even if the trial was delayed for months afterward. It no longer entered orders explaining the basis of the continuances. It never again entered rulings of good cause and the lack of prejudice under the speedy trial rules to extend the time for trial. In August, the court continued the case for over one month without even holding a hearing or explaining the reason on the record. The court gave itself free reign to take vacation, or extended leaves of absence for weeks or months, without ever needing to satisfy the obligations of CrR 3.3.

The court subverted CrR 3.3's time for trial rules by recessing from June until September, implicitly treating the case as if trial had started, and thereby creating an open-ended continuance, contrary to CrR 3.3(e) and (f)'s strict rules limiting the court's authority to grant continuances and requiring constant reassessment of the necessity or prejudice involved in a continuance. Having decided to simply start a few days of pretrial proceedings and then recess the case for several months, despite Mr. Holcomb's in-custody status and his plainly voiced

desire for a speedy trial, the court exceeded its authority by recessing the case outside of the confines of CrR 3.3. The court took advantage of the few days of pretrial hearings to obviate the court congestion issue that would have otherwise required dismissal under CrR 3.3(h).

CrR 3.3 makes the court ultimately responsible for ensuring a defendant receives a timely trial under CrR 3.3. *Kenyon*, 167 Wn.2d at 136; CrR 3.3(a)(1). There is no incentive to comply with the provisions of CrR 3.3 if an indefinite recess is available to avoid the rule altogether. The procedure employed in this case not only eliminates the protections of CrR 3.3, it undermines the integrity of the process. *See Kenyon,* 167 Wn.2d at 136.

4. The prosecution is required to exercise due diligence at the outset of its case, under CrR 3.3, CrR 8.3, and the constitutional rights to a fair, speedy trial on which these court rules are based.

Under CrR 3.3 (f)(2), a court may grant a continuance where a material witness is unavailable if (1) there is a valid reason for the unavailability, (2) the witness will be available within a reasonable time frame, and (3) the defendant incurs no substantial prejudice from the continuance. *State v. Nguyen,* 68 Wn. App. 906, 914, 847 P.2d 936

(1993). The prosecution must act with due diligence in securing the witness's presence. *Id.* at 915-16.

The prosecution did not diligently ascertain its witnesses' availability. *See State v. Wake*, 56 Wn. App. 472, 475-76, 783 P.3d 1131 (1989). If a material witness will be unavailable, the prosecution may try to accelerate the trial date or make other accommodations, but it cannot indefinitely extend a case due to some witness scheduling issues. *Id.* at 475-76 & n.3.

Issuing a subpoena to a witness "is a critical factor in granting a continuance." *Wake*, 56 Wn. App. at 476. A subpoena indicates efforts to secure the witness if the State supplied sufficient notice. *Id.* at 475-76. The bulk of the prosecution's delay centered on Officer Thompson, yet he was never subpoenaed as a witness.[4]

At best, Officer Thompson was a minimally relevant witness. He was present with another officer when Mr. Holcomb was arrested. The prosecutor wanted to call Officer Thompson for the suppression hearing because he had presumably watched Mr. Holcomb's home without

[4] The court's docket contains many returns on subpoenas, but none are addressed to Officer Thompson. Should the court or opposing counsel request further information, counsel will designate the subpoenas contained in the court docket to show they were not addressed to Officer Thompson.

interruption. 6/2RP 2-3. It does not appear that prosecutor had interviewed Officer Thompson when determining his importance to the case.

Officer Thompson ultimately never testified and the prosecutor said he did not need him. 9/12RP 294. The prosecution never explained what the officer's military leave entailed, when it received notice of the leave, or if the officer could attend court during the leave. The prosecutor did not try to arrange a deposition for Officer Thompson, unlike his efforts for Deputy Oetting's vacation in August. 7/22RP 279. Despite being on military leave, Officer Thompson got married in September, demonstrating he was not in a remote location or totally inaccessible. 9/12RP 291.

The ambiguous, extended leave of an officer who was of dubious importance to the case without evidence that the prosecution formally advised the officer of the necessity of his testimony in writing, by subpoena, does not justify months of continuances for his testimony. This mismanagement of a police witness delayed Mr. Holcomb's trial far beyond the speedy trial time, demonstrating prejudicial mismanagement. *See Brooks*, 149 Wn. App. at 391 (delayed discovery

preventing counsel from proceeding to trial within original speedy trial time constitutes prejudicial mismanagement under CrR 8.3).

5. *This Court should grant review of the Court of Appeals decision because it fundamentally undermines the protections of CrR 3.3.*

The Court of Appeals adopted a new rule, mandating the defendant prove "bad faith" and actual prejudice to the defendant by a court recess when it occurs after the court nominally and fictitiously deemed trial "started" for purposes of complying with CrR 3.3 months before opening statements or testimony was set to start. Slip op. at 7 n.1. *Andrews* never mentioned bad faith in any capacity as a threshold requirement. Similarly, it never demanded proof of actual prejudice, and only discussed "any showing of prejudice" as the threshold triggering a different analysis. The Court of Appeals ruling misapplies *Andrews* and uses it create a proof of bad faith or actual prejudice that the case does not require.

The Court of Appeals also cited *State v. Edwards*, 68 Wn.2d 246, 258, 412 P.2d 747 (1966) for the new test of bad faith and prejudice, but *Edwards* does not require this showing by an appellant. *Edwards* spoke to the propriety of a judge briefly continuing a case over the lunch hour because defense witnesses failed to appear as

expected. *Id.* at 25. The *Edwards* Court ruled that a "short recess" was appropriate, because the defendant's request for this additional time was made in "good faith and in honest hope that the witnesses were available," and would appear after lunch that same day. *Id.* at 257-58.

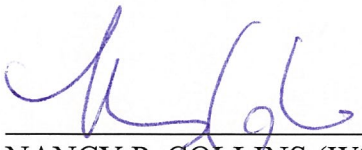
The Court of Appeals opinion imposes an improperly heightened evidentiary threshold for a violation of procedural rules designed to ensure an incarcerated defendant receives a speedy trial when the defendant has repeatedly demanded a speedy resolution of the charges against him. CrR 3.3 does not allow a court to start a preliminary hearing in a bifurcated fashion and thereafter disregard its obligation to enforce CrR 3.3.

F. CONCLUSION

Based on the foregoing, Petitioner Llewellyne Holcomb respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 18th day of March 2019.

Respectfully submitted,



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 14, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LLEWELLYNE V. HOLCOMB Appellant	No. 49730-1-II UNPUBLISHED OPINION

LEE, J. — Llewellyne V. Holcomb appeals his convictions and sentence for first degree assault with a firearm enhancement, second degree assault with a firearm enhancement, tampering with a witness, and three counts of violation of a no-contact order. Holcomb argues that the trial court (1) violated the time for trial rule, (2) violated his constitutional speedy trial right, (3) erred in denying his CrR 8.3 motion to dismiss, and (4) abused its discretion in ordering his firearm enhancements to run consecutive to each other. We affirm Holcomb's convictions, but we reverse Holcomb's sentence and remand for resentencing.

FACTS

A. CHARGES AND ARRAIGNMENT

On October 8, 2015, the State charged Holcomb with two counts of first degree assault with firearm enhancements after Holcomb fired several shots into an occupied house. The trial

court set an initial trial date of November 30, 2015. The trial court then set bail, but Holcomb did not post bail and remained in custody.

B. CONTINUANCES

Holcomb's case was continued several times over the next 11 months. From November 2015 to February 2016, Holcomb's case was continued three times by agreement of both parties. On March 10, 2016, the State moved for a continuance. The prosecutor was in trial in another case and would be unavailable the next two weeks. Defense counsel asked that trial be set on March 24 and acknowledged that the trial court had an upcoming recess in April. Defense counsel noted Holcomb's objection to the continuance. The trial court found good cause for a continuance because the prosecutor and the trial court were both in trial, granted the motion, and continued the trial date to March 24.

On March 22, Holcomb filed a CrR 3.6 motion to suppress the shell casings found in his home. On March 24, the State amended the information to include two counts of first degree assault with firearm enhancements, one count of tampering with a witness, and three counts of violation of a no-contact order.

That same day, the State moved for a continuance. The State had just received Holcomb's motion to suppress and needed time to respond. Also, one of the State's witnesses was unavailable that day. A defense witness was also unavailable until later in the day and additional forensic testing needed to be completed. Defense counsel proposed setting trial for April 25 after he returned from a conference. Defense counsel also noted Holcomb's objection to continuing the trial date. The trial court stated that it was starting trial in a different case that was 348 days old,

as compared to Holcomb's 168-day-old case. The trial court also stated that it had inquired into sending the case to another courtroom but none were available. The trial court found good cause for a continuance, granted the motion, and continued the trial date to April 28.

On April 28, the State moved for a continuance. The prosecutor represented that several officers were unavailable and that those officers were essential to responding to Holcomb's motion to suppress and for the State's case in chief. But the prosecutor said that he could make the case work without one of the deputies being available. Defense counsel objected to the motion for continuance. The trial court found good cause for a continuance because of the severity of the charges, the previous requests for continuances were from the defense, and the State's witnesses' unavailability. The trial court granted the motion and continued the trial date to June 1.

On June 1, Holcomb's defense counsel moved for a continuance because counsel was in trial on another case. Holcomb objected to the continuance. The State noted that it now believed that the deputy the State previously thought was not necessary was now a necessary witness and that deputy would not return from military leave until June 27. The trial court found good cause, granted the motion, and continued the trial date to June 2.

On June 2, the State moved for a continuance. The prosecutor represented that after interviewing another officer the prior week, he now believed a deputy the State previously thought was not a necessary witness was now a necessary witness. But that deputy would not be available until July 1. The prosecutor proposed continuing the trial date to July 1 or starting trial that day and completing as much of it as possible, then recessing until the deputy became available. The prosecutor noted that he attempted to have the deputy video call in but because of his military

status, that was not possible. Also, the prosecutor stated he was going to be in trial in another case before the trial court. The trial court confirmed that it was calling the prosecutor's other case for trial. The trial court noted that it had checked other courtrooms and that none were available, and there were a limited number of jurors. The trial court found good cause because the prosecutor was in trial in another matter before the trial court, granted the motion, and continued the trial date to June 16.

On June 16, the State moved for a continuance because the prosecutor and trial court were still in another trial. Defense counsel objected to a continuance. The trial court granted the motion and continued the trial date to June 21 because the prosecutor was in trial.

On June 21, the State moved for another continuance because the prosecutor and trial court were still in the other trial. Holcomb objected to a continuance. The trial court noted that the other trial was anticipated to end on June 23, granted the motion, and continued the trial date to June 23.

C. TRIAL AND RECESSES

On June 23, the trial court made numerous attempts to reassign the case to the Criminal Division Presiding Judge because the trial could not be completed before the trial court's scheduled July recess, but there were no courtrooms available. Thus, the trial court called the case for trial and began hearing pre-trial motions in Holcomb's case, noting that recesses may be necessary to accommodate scheduling. The trial court held a CrR 3.6 hearing to suppress the shell casings found in Holcomb's home. The trial court concluded the CrR 3.6 hearing and other pretrial motions on June 29 and then recessed the trial due to the trial court's prescheduled July recess.

On July 18, the parties reconvened for a status conference. The prosecutor represented that he was starting trial in another murder case that day that was anticipated to last two weeks and he had a prescheduled vacation from August 4 to 6. Defense counsel noted that the CrR 3.6 hearing was not completed. Holcomb expressed his desire to begin trial that day. The trial court found that in the interests of justice, the murder case took precedence over Holcomb's case and that Holcomb would not be prejudiced in any way. The trial court continued Holcomb's case to August 8.

On August 8, the trial court set trial for September 7 because the trial court was out on "medical." Verbatim Report of Proceedings (VRP) (Sept. 12, 2016) at 296. On September 7, the trial court set the case over one day because the prosecutor was out sick. Defense counsel expressed Holcomb's continuing objection. The next day, the prosecutor was still out sick and requested the matter be set over until the following Monday, September 12. Defense counsel again expressed Holcomb's continuing objection. The trial court set the matter over to September 12.

On September 12, the State represented that it was ready to proceed without the deputy because the deputy's military leave was extended until October 2016. Holcomb waived his right to a jury trial.

Holcomb moved to dismiss the case under CrR 8.3 based on prosecutorial mismanagement of the case and the number of continuances. The trial court denied Holcomb's motion to dismiss finding that the State's representations to the trial court were in good faith and that Holcomb was not prejudiced. However, the trial court excluded the deputy's testimony. The trial court also denied Holcomb's CrR 3.6 motion.

Before resting its case in chief, the State moved to amend the information to include one count of second degree assault with a firearm enhancement—domestic violence, one count of first degree assault with a firearm enhancement—domestic violence, one count of tampering with a witness—domestic violence, and three counts of violation of a no-contact order pre-sentence—domestic violence. The trial court granted the State's motion to amend.

The trial court found Holcomb guilty as charged in the information amended at trial.

D. SENTENCING

The trial court sentenced Holcomb to low-end standard range sentences on all counts. The trial court suspended the sentence for the three violation of a no-contact order convictions for two years. The trial court also ordered the firearm enhancement sentences to run consecutive to the sentence on the felony convictions and to each other, stating, "I can't even do anything about that, so they are 60 months and they are consecutive because they're flat time on those." VRP (Dec. 2, 2016) at 17.

Holcomb appeals.

ANALYSIS

A. TIME FOR TRIAL

Holcomb argues that the trial court violated the time for trial rule by continuing his trial due to court congestion. Specifically, Holcomb raises issue with the continuances granted on March 24, April 28, and June 1, 2, 16, and 21.[1] We disagree.

[1] Holcomb also argues that the trial court erred by granting the continuances from late June through September. But these continuances are not subject to CrR 3.3. The trial court called Holcomb's case for trial on June 23 and began hearing pretrial motions. This satisfies the CrR 3.3 time for

" '[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.' " *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (alteration in original) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). We will not disturb the trial court's decision unless there is a clear showing that the trial court's discretion was manifestly unreasonable, or exercised on untenable grounds, or made for untenable reasons. *Id.* at 200.

Under CrR 3.3(a)(1), "It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." A defendant who is detained in jail shall be brought to trial within 60 days of arraignment. CrR 3.3(b)(1)(i). Certain periods are excluded from the time for trial including (1) unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties and (2) continuances granted by the court. CrR 3.3(e)(3), (8). "A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." CrR 3.3(h).

Under CrR 3.3(f), a trial court may grant a continuance "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his

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trial requirement. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003). Holcomb further argues that not subjecting the recesses after June 23 to CrR 3.3 allows the trial court to subvert the CrR time for trial rules. However, the test for determining whether recesses taken after trial begins requires showing the recess was requested or granted in bad faith and the recess prejudiced the defendant. *State v. Andrews*, 66 Wn. App. 804, 811-12, 832 P.2d 1373 (1992), *review denied*, 120 Wn.2d 1022 (1993); *see also State v. Edwards*, 68 Wn.2d 246, 258, 412 P.2d 747 (1966). Because Holcomb fails to make any argument regarding bad faith or prejudice regarding the recesses following June 23, we decline to address them as part of Holcomb's time for trial argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

or her defense." Court congestion is not good cause for a continuance beyond the time for trial period. *State v. Kenyon*, 167 Wn.2d 130, 137, 216 P.3d 1024 (2009). But "a showing of specific additional circumstances [may] warrant a contrary result." *See State v. Smith*, 104 Wn. App. 244, 252, 15 P.3d 711 (2001).

Holcomb's argument fails because the continuances were not based solely on court congestion. The March 24 continuance was granted to allow the attorneys to prepare for trial. The April 28 continuance was granted because of officer unavailability. And the continuances granted in the beginning of June were because the attorneys were in trial on other cases. Because there were specific circumstances in addition to court congestion, the trial court did not violate CrR 3.3 by improperly granting continuances.

B. CONSTITUTIONAL SPEEDY TRIAL RIGHT

Holcomb also argues that his constitutional speedy trial right was violated because of the delay caused by the continuances issued in his case. We disagree.

We review an alleged constitutional speedy trial right violation de novo. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). "If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice." *State v. Iniguez*, 167 Wn.2d 273, 282, 217 P.3d 768 (2009).

We use the balancing test set out in *Barker*[2] to determine whether a constitutional speedy trial right violation has occurred. *Ollivier*, 178 Wn.2d at 827. The analysis is fact-specific and dependent upon the specific circumstances of the case. *Id.* None of the factors are sufficient or

[2] *Barker v. Wingo*, 407 U.S. 514, 530-31, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

necessary for a violation, but they assist our determination of whether a defendant has been denied the right to a speedy trial. *Id.* The nonexclusive factors are (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.*

1. Length of Delay

The length-of-delay analysis is a two-part inquiry. *Id.* The first part requires an allegation that the delay was more than ordinary and presumptively prejudicial. *Id.* An eight month delay has been held to be presumptively prejudicial and sufficient to trigger a *Barker* analysis. *Id.* at 828. The second part requires consideration of the " 'extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.' " *Id* (quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).

Here, Holcomb meets the presumptively prejudicial threshold because the delay from arraignment to trial was 11 months. *See Id.* at 828. Thus, the delay is sufficient to trigger a *Barker* analysis.

However, the delay did not stretch for a significant amount of time beyond the bare minimum needed to trigger such analysis. An eight month delay has been held to be sufficient to trigger a *Barker* analysis. *Ollivier*, 178 Wn.2d at 828. But here, the delay was only three months beyond the bare minimum. Moreover, the first four months of delay were attributable to Holcomb and the need for additional time to prepare his defense. Thus, this factor weighs against finding a speedy trial violation.

2. Reason for Delay

Pretrial delay is often inevitable and justifiable. *Id.* at 831. As a result, "careful assessment of the reasons for the delay is necessary to sort the legitimate or neutral reasons for delay from improper reasons." *Id.* We look to each party's responsibility for the delay, and weigh the blameworthiness and the impact of the delay on defendant's right to a fair trial. *Id.* At one end, the defendant who requests or agrees to the delay waives his speedy trial rights. *Id.* At the other end, when the government deliberately delays the trial to frustrate the defense, such conduct will be weighed heavily against the State. *Id.* at 832. "[I]f the delay is due to the government's negligence or overcrowded courts," the delay is also weighed against the State, but to a lesser extent. *Id.*

Here, Holcomb was responsible for the initial delays. The first four months of delay were attributable, at least in part, to Holcomb. These initial delays are weighed against finding a speedy trial violation.

Delays over the next seven months were primarily attributable to the State and the trial court. These delays were based on witness unavailability, scheduling conflicts, and sickness, and they appear closer to the middle of the spectrum, rather than towards the end of deliberate delay. *Id.* Thus, on balance, this factor weighs against finding a speedy trial violation.

3. Assertion of Right

Assertion of the speedy trial right is important in the inquiry. *Id.* at 838 Here, Holcomb consistently objected to continuing his trial. Holcomb's assertion of his right to speedy trial was consistent. Thus, this factor weighs in favor of finding a speedy trial violation.

4. Prejudice

"A defendant ordinarily must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." *Id.* at 840. Such prejudice may consist of (1) oppressive pretrial incarceration, (2) anxiety and concern, and (3) the possibility of an impaired defense due to fading memories and loss of exculpatory evidence. *Id.* Courts have generally presumed prejudice is sufficient in cases of extraordinary delay lasting at least five years or when the government's conduct is more egregious than mere negligence. *Id.* at 842. "This analysis requires a showing of particularized prejudice when shorter delays and no government bad faith are involved." *Id.*

Here, the period of delay was insufficient to presume actual prejudice. *See Id.* (Presumed prejudice is generally found in cases of extraordinary delay lasting at least five years or when the government's conduct is more egregious than mere negligence). Thus, prejudice cannot be presumed, and Holcomb must make a particularized showing.

First, Holcomb fails to show that the 11 months he spent incarcerated was oppressive. *See Id.* at 844 (periods of incarceration 19, 22, and 27 months are not oppressive). Second, Holcomb fails to show that he experienced any unusual anxiety or delay. With delay, anxiety and concern " 'is always present to some extent, and thus absent some unusual showing is not likely to be determinative in defendant's favor.' " *Id.* at 845 (quoting Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure §18.2(e) (3d ed. 2007) (footnote omitted). Third, Holcomb fails to show that his defense was impaired. Holcomb argues that the delay impaired his defense because he was unable to question the deputy before the court decided his

motion to suppress and that the delay caused him to waive his right to a jury trial. However, the deputy was unavailable due to military service and there is no evidence in the record supporting Holcomb's claim he waived his right to a jury trial because of the delay.

5. Balancing Factors

Balancing the *Barker* factors clearly weighs against finding a speedy trial violation. Although Holcomb may have consistently asserted his right to speedy trial, the delay was not unduly long; the reasons for the delay were either attributable to the defense for trial preparation, legitimate, or neutral; and Holcomb fails to show actual prejudice. Therefore, we hold that Holcomb's constitutional right to speedy trial was not violated.

C. PROSECUTORIAL MISMANAGEMENT

Holcomb argues that the trial court erred when it denied his CrR 8.3 motion to dismiss because of prosecutorial mismanagement. We disagree.

We review a trial court's decision on a motion to dismiss a criminal prosecution due to governmental misconduct for an abuse of discretion. *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.*

Under CrR 8.3(b), "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." The defendant must also show that the mismanagement actually prejudiced his right to a fair trial, which may include his right to a speedy trial. *Brooks*, 149 Wn. App. at 384. However,

"dismissal under CrR 8.3 is an extraordinary remedy, one that the trial court should use only as a last resort." *Id.*; *see, e.g.*, *State v. Michielli*, 132 Wn.2d 229, 245-45, 937 P.2d 587 (1997).

Here, even if the State mismanaged the case in terms of the deputy's availability, Holcomb fails to show actual prejudice. Holcomb argues that he was prejudiced because his right to a speedy trial was violated. But as explained above, Holcomb's right to a speedy trial was not violated. Therefore, Holcomb fails to show prejudice required under CrR 8.3. Accordingly, the trial court did not abuse its discretion in denying Holcomb's CrR 8.3 motion.

D. EXCEPTIONAL SENTENCE

Holcomb argues that the trial court abused its discretion in imposing his sentence because it misunderstood its sentencing authority. We agree.

In *State v. McFarland*, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017), our Supreme Court held that when multiple firearm enhancements result in a presumptive sentence that is clearly excessive, the trial court may run the firearm enhancements concurrently as part of an exceptional mitigated sentence under RCW 9.94A.535(1)(g). And even in cases where a defendant did not request an "exceptional, mitigated sentence," remand is appropriate when the "record suggests at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59.

Here, the trial court indicated that it "can't even do anything about" running the firearm enhancements consecutively. VRP (Dec. 2, 2016) at 17. Therefore, the record suggests that, had the trial court understood that it had the discretion to run the firearm enhancements concurrently as part of an exceptional, mitigated sentence, it may have done so. Accordingly, remand to the

trial court is the appropriate remedy despite Holcomb never requesting an exceptional, mitigated sentence.

We affirm Holcomb's conviction, but we reverse his sentence and remand to the trial court for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Worswick, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 14, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LLEWELLYNE V. HOLCOMB, Appellant.	No. 49730-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Llewellyne V. Holcomb, filed a motion for reconsideration of this court's unpublished opinion filed on November 14, 2018. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, Maxa, Lee

J.

LEE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 49730-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Jesse Williams, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 18, 2019

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