

adequately addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

I believe the additional grounds or additional briefing of grounds for appeal are:

1. Lack of jurisdiction
2. Double jeopardy
3. Multiple time of trial violations
4. Insufficient evidence to convict
5. Trial errors by the court;
 - a) Allowing prosecution witness to testify as to the law,
 - b) Refusing to allow defendant witnesses to testify,
 - c) Failure to provide open administration of justice.
6. Ineffective assistance of counsel.
7. Improper jury instructions and improper verdict form.
8. Prosecutor misconduct;
 - a) failure to provide discovery,
 - b) improper closing arguments.
9. Failure to hold sentencing within statutory time limit.

History of the Case

Factual History:

This case began on November 24, 2006. On that morning I purchased a bicycle at the Chehalis Wal-Mart. Most of the facts about what happened that morning are not in dispute. It is undisputed that two Wal-Mart employees, George Shepherd and Charles Springer watched me pay for the bicycle and place the receipt in my left breast pocket. (RP 3/10/08, pg 107-109, 3/11/08, pg 62, pg 103-104, pg 165) It is further undisputed that George Shepherd and Charles Springer stopped me and told me I could not leave store with my bicycle until I showed them a receipt. (RP 3/11/08, pg 30, pg 67, pg 75, pg 87, pg 105, pg 134-134, pg 170, pg 178) It is finally undisputed that I was not being accused of stealing by Wal-Mart personnel. (RP3/11/0/, pg 63, pg 176-177)

It is next undisputed that I said I was leaving and George Shepherd stepped to his left, into my space, to block me and/or the bicycle. (RP 3/11/08, pg47, pg 78, pg 137, pg 171) What is disputed is whether or not George Shepherd pushed me before I pushed him. I do not deny pushing

George Shepherd in self defense after he stepped to his left in front of me and began advancing on me. I also contend, and it is supported by the video and still pictures, that George Shepherd pushed me with his left shoulder prior to my pushing him.

I was arrested by Officer Holt of the Chehalis Police Department and charged with Fourth Degree Assault in Chehalis Municipal Court.

Procedural History:

Arraignment in Municipal Court was December 12, 2006. On February 14, 2007, during discussion of what date the Knapstad hearing should be held, I waived speedy trial at the request of and for the convenience of the city prosecutor. On February 21, 2007, the charge was dismissed without prejudice with the note it was being referred to Superior Court.

On April 19, 2007, I was charged with Second Degree Assault or in the alternative, Third Degree Assault, by information in Lewis County Superior Court.

Preliminary appearance was on May 4, 2007. Re-arraignment was on May 17, 2007. At that hearing I objected to the arraignment as the

commencement date for speedy trial purposes. (RP 5/17/07, pg 8)¹ Trial setting was delayed until June 8, 2007.

At the hearing on June 8th, I argued time for trial had expired because the time in municipal court had to count and that the clock recommenced ticking with the filing of charges in superior court. CrR 3.3(e)(4) (RP 6/08/07, pg 18) The state argued the charges in Chehalis Municipal Court and Lewis County Superior Court were not related charges because, in spite of being the same facts and circumstances, see CrR 3.3(a)(3)(ii), the charge in municipal court was a misdemeanor and the charge in superior court was a felony. The state also argued the 30 day time for trial minimum under CrR 3.3. The court ruled under Duffy the charges were not related and there was 90 days from arraignment for speedy trial.

Trial was set for the week of July 30, 2007. I filed an objection to the trial date on June 12, 2007, and moved the court to set the trial within the time for trial limits. CP 164

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The transcript of the 5/17/07 hearing was not included in the statement of arrangements. A copy is attached to this brief.

After some more preliminary skirmishing, trial was to commence on July 30, 2007, visiting Judge Gordon Godfrey presiding. While hearing preliminary motions, including time for trial pursuant to my objection to the trial date and motion to dismiss filed July 17, 2007, CP 159, Judge Godfrey ruled the time for trial limits had been exceeded and dismissed the information. (RP 7/30/07, pg 56-60)

On August 1, 2007, the state filed a document titled State's Motion to Reconsider Dismissal. CP 169 On August 16th, a hearing was held before Judge Nelson Hunt for the purpose of setting a date for a hearing before Judge Godfrey. Since Judge Godfrey was on vacation, the hearing was continued to August 30th. The August 16th hearing was the one at which Judge Hunt told me I must attend hearings and I was made to sign a promise to appear under threat of arrest. CP 101

At the August 30th hearing the parties were directed to go to the court administrator's office to get a hearing set with the coordination of the Gray's Harbor court administrator. For convenience, the assigned prosecutor, Christopher Baum, agreed he would arrange a hearing date and

inform my attorney and me.

A hearing ended up being set for November 13, 2007, in the Gray's Harbor Superior Court. On November 9, 2007, the last business day before the hearing, the state filed and served its State's Brief in Support of Motion to Reconsider Dismissal. CP 102-111

The hearing was held before Judge Godfrey, in Gray's Harbor Superior Court, on November 13, 2007. There is no explanation why neither clerk's notes nor a transcript of the hearing exist. This is important because I objected to the late filing of the new brief. Judge Godfrey noted the new brief and ordered the parties to come back for a hearing on state's motion for reconsideration. We went to the Gray's Harbor Court Administrator and agreed on a hearing on December 5, 2007 at the Gray's Harbor Juvenile Facility in Aberdeen. The next day, an officer of the court, Christopher Baum, sent me a notice that I must attend the hearing on December 5th or face arrest.

The hearing on December 5, 2007 was not held due to wind damage and severe flooding. Judge Godfrey signed an order relieving the parties of responsibility for failing to attend the hearing.

CP 96 A new hearing was set for December 17, 2007. I filed a motion to strike and a supplemental brief pointing out it was not possible to have a motion for reconsideration on a ruling dismissing a case for violation of the time for trial rules. CP 99-100 and 97-98

After 140 days of continuing to be subject to conditions of release, of continued anxiety and uncertainty, hearing was held on December 17, 2007, Judge Godfrey presiding. I was present *pro se* and without counsel. I argued the motion to reconsider was not proper and referred to my supplemental brief for the legal authorities. CP 97-98 (RP 12/17/07, pg 3, pg 5) Judge Godfrey denied my motion to strike, ruling the state's motion was proper and timely under CrR 7.8. Judge Godfrey further ruled CrR 7.8 allowed him to correct a clerical mistake and therefore, state's motion to reconsider would be treated as a motion for relief from judgment pursuant to CrR 7.8. (RP, pg 5-6)

After both sides argued speedy trial again, both from the original point of view and new points of view, Judge Godfrey ruled:

- 1) Speedy trial time had not been violated (RP, pg 23, line 24-25),
- 2) The cases in municipal court and superior court were related cases (RP, pg 24, line 11),
- 3) The waiver of speedy trial filed in municipal court did carry over into superior court (line 16-19),
- 4) Although the charges were re-filed on April 19, 2007 the speedy trial commencement date for the superior court proceedings was re-arraignment on May 17, 2007 (RP, pg 24, line 19-22),
- 5) A total of 81 days had expired on July 30, 2007 (RP, pg 25, line 6-8),
- 6) The court dismissed the charges in error (RP, line 9-10), 7) The charges were reinstated (RP, pg 26, line 5).

The state asked to have the commencement date reset to zero as a new trial under CrR 3.3(c)(2)(iii). Judge Godfrey ruled the new time for trial would be within 90 days of that day. (RP, page 26) Judge Godfrey also noted he expected me to appeal and ordered the prosecutor, Christopher Baum, to get findings and conclusions noted quickly so I could file an appeal. (RP, page

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The new trial setting hearing was held on December 20, 2007, before Judge Richard Brosey as presiding judge in Lewis County Superior Court. I entered an objection that speedy trial would be no more than 30 days from December 17, 2007 under CrR 3.3(b)(5). (RP 12/20/07, pg 2) I then specifically requested trial be set to commence no later than January 16, 2008. (RP, pg 3-4) Judge Brosey acknowledged the proposed trial dates were well beyond the 30 day speedy trial period but set the trial for the week of February 25, 2008. For the record, I brought up the Constitutional issue of speedy trial. (RP, pg 10) For the record, I also brought up the fact that during the period from July 30 to December 17, 2007, I was subject to conditions of release in that I was required to attend hearings or face arrest. (RP, pg 13)

I filed a written objection to the trial date on December 28, 2007. CP 95

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The findings and conclusions were finally served on me and my attorney and presented to Judge Godfrey on April 17, 2008, 35 days after the conclusion of the trial so I was not able to file a request for discretionary review. I would also note the court did not have a written mandate to proceed without that order.

A hearing was held on January 3, 2008, Judge Richard Brosey presiding. Judge Brosey observed, "Nobody here, that I'm aware of, is agreeable to hear this case." (RP 1/03/08, pg 5)

On February 13, 2008, a hearing was held in Lewis County Superior Court, Judge Gordon Godfrey presiding by telephone. I did not consent to a telephone hearing. I brought up the failure of the state to present findings of fact, conclusions of law and order from the hearing held December 17, 2007. Christopher Baum for the state admitted to failing to prepare the findings even though he had a transcript of the hearing since January 4, 2008. (RP 2/13/08, pg 7-8) Judge Godfrey ordered Mr. Baum to prepare findings, but noted "an oral order is as valid as a written order under the law of this state and just about every other state that I am aware of." (RP, pg 9)³

My speedy trial objections were brushed off by both the state and Judge Godfrey.

In discussing discovery, the state denied the

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The findings of fact and conclusions of law were finally presented on April 17, 2008, over a month after the trial and were signed by Judge Godfrey, over my objection, on May 23, 2008.

existence of any additional medical records. (RP, pg 17)⁴

Trial ended up being delayed until March 10, 2008, because both the prosecutor and my attorney were involved in a murder trial that was expected to last into the week of February 25, 2008. (RP 2/21/08, pg 2)

Trial finally commenced March 10, 2008, Judge Gordon Godfrey presiding. Trial lasted a total of three days. On March 12, 2008, the jury returned verdicts of Not Guilty of Assault in the Second Degree, Not Guilty of Assault in the Third Degree and Guilty of the lesser included offense of Assault in the Fourth Degree. Sentencing was set for April 17, 2008 and I was released on the previous conditions and instructed to have no contact with George Shepherd.

On April 17, 2008, the sentencing hearing commenced with the state noting they had findings of fact and conclusions of law from the December

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Note at the end of the first day of trial, on March 10, 2008, state provided a large volume of additional medical reports and a comprehensive job description for George Shepherd. The medical issues are moot, but the job description would have been very useful in cross examination if time had existed to find it in the over 280 pages of discovery. (RP 3/11/08, pg 6)

17, 2007 hearing and my attorney presenting a motion for a new trial or dismissal due to faulty jury instructions and verdict form on Assault in the Fourth Degree. CP 20-34 The motion was denied. (RP 4/17/08, pg 2-7)

The court then considered findings and conclusions. My attorney noted that he had not seen the findings and conclusions before that day, and, for the record, neither had I. (RP 4/18/08, pg 7) Although we were not prepared to go ahead with entry of findings and conclusions, my attorney was very clear that we were prepared to go forward with sentencing. (RP, pg 8) However, Judge Godfrey refused to proceed with sentencing unless I agreed to waive argument regarding entry of the findings and conclusions. Since the findings and conclusions were ordered to be prepared and presented by the state on two prior occasions and contained errors, I was not willing to waive that argument. Judge Godfrey ordered another hearing be set for entry of findings of fact and conclusions of law and sentencing, ruling the prosecutor's delay in presenting the finding and conclusions constituted good cause. (RP, pg 8)

Sentencing was held on May 23, 2008, more

than 40 days after the verdict. Judge Godfrey signed the previously presented findings of fact and conclusions of law. CP 16-19 Judge Godfrey refused to consider my motion regarding the failure to sentence within 40 days. I was sentenced and this appeal was filed.

Additional Ground 1, Jurisdiction

The Superior Court lost jurisdiction on August 29, 2007, when the state failed to file an appeal of the court's ruling dismissing the case for violation of the time for trial rule. See *State v. Keller*, 32 Wn.App. 135, 647 P.2d 35 (1982) Although *Keller* refers to CR 60, CrR 7.8 was the successor rule to CR 60, see *State v. Brand*, 120 Wn.2d 365, P.2d 470 (1992)

On July 30, 2007, the court considered my motion for dismissal due to violation of the speedy trial rule. CP 159, CP 150-158, CP 160-163, (RP 7/30/07, pg 13-20, 48-60) The court found the speedy trial rule had been violated and stated an estimated 151 days had elapsed. The exact words used were, "Well, Good luck in the Court of Appeals." (RP pg 52) The court offered the state a chance to get the exact number of days on the

record if they wished to file an appeal. The court's exact wording was, "I have technically, as I look at it, if you compute the city time...I have technically around 151 days may have expired here. Now, give or take, I think I'm in the ballpark, but I know I'm beyond the 90 and/or what was ruled prior. And all I can say is I'm doing the best I can and that's the way I'm going to rule. I'm going to order speedy trial was violated based on the circumstances I've outlined, and I'm going to order the case be dismissed, and if you want to enter finding based on the parameters, please send me copies and we'll note it up and I'll drive over here and we'll get the fine points out." He then ordered the jury dismissed. (RP page 59) When my attorney offered a written order of dismissal the judge declined, noting he had ordered the matter orally on the record. (RP, pg 60) Under CrR 3.3(h) "A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice."

There was nothing tentative about the order of dismissal. The state made an oral motion for reconsideration, which was denied. (RP pg 55-56)

The only equivocation was with regard to the exact number of days by which 90 had been exceeded. Because the order of dismissal did not require findings of fact and conclusions of law, it was a final, appealable order. *State v. Hunnel*, 52 Wn.App. 380 (1988) *State v. Dowling*, 98 Wn.App. 542 (1983)

In any case, neither the dismissal nor the number of days is in dispute. On May 23, 2008, the court signed the Findings of Fact and Conclusions of Law from the December 17, 2007 hearing presented by Deputy Prosecuting Attorney Colin P. Hayes. CP 151 Finding of fact 1.17 states, "The court ultimately decided to dismiss the case on speedy trial grounds." Finding of fact 1.18 states, "The court determined that approximately 151 days of speedy trial had expired."

The state had 30 days to file an appeal and filing a motion for reconsideration, valid or not, does not extend that period. *State v. Keller*, 32 Wn.App. 135 (1982) My appeal attorney has pretty thoroughly discussed how *State v. Dennis*, 67 Wn.App. 865 (1992) shows that a CrR 7.8 motion was

not appropriate "because mistakes of law may not be corrected by a motion for relief from judgment and must be raised on appeal."

State v. Klump, 80 Wn.App. 391 (1996)

clarifies the issue further with the direct statement, "An intentional act by the court cannot be a clerical error. In *re Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990)" *Dennis* addresses not using CrR 7.8(b)(5) as a catchall provision for mistakes of law as the court did on December 17, 2007. (RP, pg 6) Therefore, finding of fact number 1.19 was in error. CP 18

In this case, the state further waived appeal by letting the case drag another 106 days before filing anything in support of a pathetically anemic motion for reconsideration. CP 169, CP 102-111 After this, it was another 34 days (although 12 of those days were due to storm delay) before a hearing was held.

Conclusion of law number 2.1 was in error. CP 18 A dismissal with prejudice terminates jurisdiction and charges cannot be re-filed or reinstated.

Additional Ground 2, Double Jeopardy

This is very simple. On December 17, 2007, the court ordered a new trial. This is not in dispute. The state proposed a new trial under CrR 3.3(c)(2)(iii) which applies to new trials and mistrials only. The court agreed and found the new time for trial was 90 days from that day. (RP 12/17/07, pg 26) The Findings of Fact and Conclusions of Law entered on May 23, 2008, stated in Conclusion of Law 2.4 "The court...grants a new trial." By granting a new trial, the court acknowledged there was a trial and jeopardy had attached on July 30, 2007. There was no mistrial and a new trial comes under CrR 7.5. CrR 7.5 is a defendant's motion. I think *State V. Dowling*, 98 Wn.2d 542 (1983) may apply here. The judge's oral ruling of dismissal was read into the record. Judge Godfrey was quite clear about it, when my backup counsel offered a written dismissal order Judge Godfrey stated, "I've ordered the matter orally for the record." (RP 7/30/07, pg 59-60) *Under State v. Carlyle*, 84 Wn.App. 33 (1996), a defendant is brought to trial when the judge calls the case and hears preliminary motions. In this

case, preliminary motions were heard and then the case was dismissed. It was not continued, it was dismissed. There was no mistrial, it was dismissed. (RP 7/30/07) Obviously then, there could also not be a new trial under CrR 7.4 or 7.5 since both are defendants motions, basically applicable after a conviction. After that date, under the unique circumstances of this case, any trial constituted double jeopardy. Ordering a new trial under CrR 7.8 doesn't change the double jeopardy because relief from judgment implies judgment terminating proceedings in favor of the defendant.

Additional Ground 3, Time for Trial Violation

There are multiple speedy trial violations in this case. The simplest and most obvious is from the reinstatement of charges on December 17, 2007. This was at best a recommencement under CrR 3.3(e)(4), which excludes the time between dismissal and refiling of the same charge. Under CrR 3.3(b)(5), the allowable time after an excluded period is not less than 30 days. The state argued for a 90 day time for trial from December 17, 2007, under the clearly incorrect application of CrR 3.3(c)(2)(iii), by calling the

reinstatement of charges previously dismissed with prejudice, a new trial.

As argued by my attorney the first day of trial on March 10, 2008, no matter how you compute time before July 30, 2007, the maximum time left on the clock was less than 30 days. I repeatedly requested trial be set within the 30 day time for trial allowed (RP 12/20/07), I also filed an objection to trial date. CP 95 Therefore, the most obvious time for trial violation was in going past January 16, 2008. But not the only one:

The first time for trial violation was just days after the re-filing of charges on April 19, 2007. As was argued in court on July 30, 2007, the waiver of speedy trial I signed in Chehalis Municipal Court could not, and did not carry over into superior court. This was thoroughly and carefully laid out in my brief of July 10, 2007. CP 160-163 The only exception being the oral argument of *Ekstedt*. My error in briefing and arguing the issue was my failure to cite the proper court rule on when the speedy trial clock started ticking again. This was April 19, 2007 in accordance with CrR 3.3(e)(4). There is no way to get around the wording of CrR 3.3(a)(3)(ii)

"Related charge" means a charge based on the same conduct as the pending charge that is ultimately file(d) in the superior court.

I am quite confident the state will argue time in district court no longer counts in a case ultimately filed in superior court.

Unfortunately, there is no such rule.

However, the time for trial rules left the court many outs for this dilemma. The first was CrR 3.3(b)(5) which allowed 30 days following an excluded period. This only gets the court up to May 19, 2007. However, the court then had CrR 3.3(g), the catchall cure period intended to insure no case was dismissed for violation of the time for trial rules. All the state or court had to do was move to continue the case by May 24, 2007. Under the rule, this would have extended the speedy trial period by 28 days, to June 22, 2007. State argued on July 30, 2007 they could have been ready for trial in 30 days from re-filing or trial setting, depending on how you read their argument. (RP 7/30/07, pg 55-56) In fact, I would argue that my objection to trial date filed June 12, 2007 (CP 164), gave the state and the court another five day window of opportunity to

extend the time for trial date out to July 15, 2007 under CrR 3.3(g).

Therefore, it really doesn't matter whether the time for trial clock re-start date was the date of re-filing or the date of re-arraignment in superior court. Either way, the time used in municipal court carried over into superior court, while the speedy trial waiver did not. However, it is also relevant that I objected to the arraignment date for speedy trial purposes. (RP 5/17/07, pg 8) It is odd that the transcript for that hearing was left out of the statement of arrangements.

I do not think I need to argue the 140 day period from July 30, 2007 to December 17, 2007. The information was either dismissed on July 30, 2007, or it was not. If it was dismissed, the state had 30 days to file an appeal. If it was not dismissed, the time for trial clock kept running. The state wants it both ways. The clock stopped, but they were not required to file an appeal. Still, even if the clock did stop and started running again on December 17, 2007, there was still that 30 day CrR 3.3(b)(5) time limit.

As a final note on the time for trial rule, I

object most strenuously to overriding the clear language of the rule by referring to any notes of the time for trial committee. If a rule is plain on its face, the courts may not insert additional provisions. *State v. Hardesty*, 110 Wn.App. 702 (2002)

Constitutional Right to Speedy Trial:

The only thing I wish to add to the brief as filed by my appeal counsel is regarding *State v. Iniguez*, 143 Wn.App. 845 (2008). After noting several courts have found an eight month delay presumptively prejudicial and Division II of the Washington Court of Appeals had already found in *Corrado* a delay of 11 months was presumptively prejudicial, Division III found an eight month delay is presumptively prejudicial and Mr. Iniguez was denied his constitutional right to a speedy trial. In this action, delays brought about by dismissal, refiling, dismissal, reinstatement extended the time from arrest to trial out to over 15 months. Of that time, only during the period from February 21, 2007 to April 19, 2007 could it be argued the clock was not ticking. Even if you extend it until re-arraignment in Superior Court,

you still end up with over a year of speedy trial clock time.

I felt subject to conditions of release during the entire period from July 30, 2007 to December 17, 2007, and basically from the date of my arrest on November 24, 2006 until trial on March 10, 2008: Fifteen and one half months.

**Additional Ground 4, Insufficient Evidence
to Convict**

The conviction being appealed is Assault in the Fourth Degree. The question is whether the state proved the absence of self defense beyond a reasonable doubt. The answer is no.

Certain facts are not even in dispute in this action. It is not even remotely disputed that the employees of Wal-Mart did not suspect me of shoplifting. I cannot point to a place in the record on this, because no one testified I was suspected of shoplifting. All I can do is refer to the transcripts of March 11, 2008 and the testimony of George Shepherd, Charles Springer, Summer Keene, Tonja West and Donald Lynch.

However, during the prosecution's redirect, Summer Keene testified that no one was to be

allowed to leave the store without having their receipt checked. (RP 3/11/08, pg 30)

There is a problem with the testimony of Charles Springer, since he changed his account between his written statement to the police on November 24, 2006 and trial testimony on March 10, 2008. (RP, pg 63, 73-75) His testimony that I spoke first was also contradicted by both myself and George Shepherd. (RP, pg 103, 177) Still, Charles Springer testified that he told me I could not leave the store with the merchandise. (RP, pg 75, 86)

George Shepherd testified he watched me pay for the bicycle and place the receipt in my left breast pocket. (RP 3/11/08, pg

The responding officer, Robin Holt, confirmed he determined I did have a receipt on me. (RP, pg 150, line 11-13)

Having told me I could not leave the store, and ignoring the clear wording of RCW 9A.16.080,

In any criminal action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such

investigation or questioning by a peace officer, by the owner of the mercantile establishment, or by the owner's authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

George Shepherd then attempted to keep me in the store by force. (RP 3/11/08, pg 64, 67, 78, 87, 106, 136-137, 150, 171)

It is disputed that Mr. Shepherd pushed me before I pushed him, but the video evidence shows Mr. Shepherd step to his left, lower his left shoulder and push me backwards before I reacted and pushed him away using my right hand only and pushing across my chest. (Exhibits 1-12) This was also my testimony. (RP 3/11/08, pg 170-173)

When reviewing a challenge to the sufficiency of the evidence, the court must determine, considering the evidence in the light most favorable to the State, whether "any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The court can draw all reasonable inferences from the evidence in the State's favor, and interpret the evidence most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

RCW 9A.40.040 defines unlawful imprisonment, "(1) A person is guilty of unlawful imprisonment if he knowingly restrains another person. (2) Unlawful imprisonment is a class C felony."

We further have the definition of Assault in the Second Degree, RCW 9A.36.021 "(1)(e) With intent to commit a felony, assaults another." and "(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony." See also RCW 4.24.220.

Intent does not require knowledge that the law defines the action as a felony, Jury instruction 7 properly defined intent, "A person

acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."

The evidence is clear: the store personnel not only did not suspect me of any shoplifting, they knew I had paid for the bicycle in my possession as I attempted to leave the store. Yet they stopped me and told me I could not leave the store with my property.

The law on self defense is clear, RCW 9A.16.020(3) allows a person to use force in self defense:

Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary

RCW 9A.16.050 allows the use of deadly force in defending against the commission of a felony.

Unlawful imprisonment and defense against a felony instructions were requested, and denied by the court, in error. (RP 3/12/08, pg 2-4) I actually don't understand how the judge could allow the self defense instruction, but then deny a basis for the self defense instruction.

What happened instead was the trial court allowed the prosecutor and the witnesses to mislead the jury with regard to the law on ownership of private property, the Constitutional⁵ right to be free from unlawful search and seizure, and the right of self defense against unlawful imprisonment, assault and battery. On November 24, 2006, I defended against all three, but did not actually act in self defense until battery was committed against me. All three prosecution witnesses, Tonja West, Charles Springer and George Shepherd testified Mr. Shepherd would not allow me to leave and stepped to his left to block me from leaving. (RP 3/11/08) *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984), *State v. Walden*, 131 Wn.2d 469 (1997), *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983), *State v. Hanton*, 94 Wn.2d 129, 614 P.2d 1280 (1980)

The state will continue to argue I used

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Washington State Constitution, Article I, Section 7, No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

United State Constitution, Amendment 4, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

excessive force. This is not supported by the evidence not only because there is evidence Charles Springer gave George Shepherd an additional push after I pushed him away, but the State's case for injury was not supported by any evidence. This resulted in "Not Guilty" verdicts on both of the felony charges of assault. It is hard to argue excessive force when there is no injury.

Even viewing the evidence presented most favorably to the State, it is impossible for a reasonable trier of fact, fully informed on the law, to find the essential elements of the crime and the absence of self defense beyond a reasonable doubt.

Additional Ground 5, Trial Errors by the Court

A. Allowing prosecution witness to testify as to the law:

Prosecution witness Summer Keene testified store personnel have the legal right to detain a customer who would not submit to a demand to check their receipt, even though they knew the customer was not shoplifting. (RP 3/10/08, pg 107-108, pg 113-114, RP 3/11/08, pg 30) This misled the jury

as to the law and my right to self defense since it left the jury with the impression Wal-Mart employees were legally justified in using force against me because I would not show a receipt for property they already knew was mine.

B. Refusing to allow defense witnesses to testify:

I had two witnesses on self defense I intended to call at trial. The judge denied my ability to call a defense expert, Marty Hayes, who is a certified use-of-force expert and law enforcement defensive tactics instructor. He would have testified at trial that in viewing the video-tape of the incident, he identified several pre-assault body language cues which likely would have led a reasonable person to believe he was about to be assaulted. Denying his testimony denied me the ability to present my case for self defense. (RP 7/30/07, pg 2-7)

The second witness is Sheriff Steven Mansfield. (RP 7/30/07, pg 11-12) The state was allowed to call Chehalis Police Officer Robin Holt as a witness and he testified he saw an assault on the video. (RP 3/11/08, pg 149) However, I could not have a more experienced police officer, Sheriff Mansfield, testify to what he saw when he

viewed the same video. Again, I was denied the opportunity to present my argument for self defense.

Every opportunity for the state, as little as possible for the defense.

C. Failure to provide open administration of justice:

At the end of the second day of trial, the court recessed to discuss the jury instructions. (RP 3/11/08, pg 196) Basically, all of the decisions regarding what would and would not be in the jury instructions were made in this "informal" discussion. I am guaranteed a fair and open trial by both the Federal and State Constitutions. This was denied to me when the jury instructions were not discussed on the record.

**Additional Ground 6, Ineffective Assistance
of Counsel**

My appeal counsel has already laid out the legal arguments regarding ineffective assistance of counsel in the appeal brief she filed. Therefore, I will not repeat them.

There were several points at which my

representation was deficient.⁶ The first was during the testimony of Summer Keene. Summer Keene testified, incorrectly, on the law regarding the legal authority of a store to stop and detain a customer. (RP 3/10/08, pg 107-108, pg 113-114, RP 3/11/08, pg 30) At this point counsel should have asked for corrective instructions from the court, or asked for instructions from the court as part of the jury instructions.

The next instance was in my attorney failing to object to the improper instruction on assault in the fourth degree and his failure to object to the improper Verdict Form C for Assault in the Fourth Degree.

The final error was in not objecting to the comments of the prosecutor during closing arguments when the prosecutor effectively told the jury to disregard the instruction on self defense. "If you're not buying off on self defense, you don't have to look at that instruction." (RP 3/12/08, pg 45)

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I mean no disrespect to Mr. Blair, or to otherwise impugn his reputation, as I believe he did an excellent job under frustrating circumstances.

Additional Ground 7, Improper Jury Instructions

and

Improper Verdict Form

Again, the improper jury instructions with regard to Assault the Fourth Degree were pretty well discussed in the appeal brief. The jury instructions for Assault in the Third Degree were also incorrect in No. 22 which told the jury Assault in the Third Degree is a lesser crime of Assault in the Second Degree. The question is moot on the charge of Assault in the Third Degree, but could have given the jury more of a legal understanding that Assault in the Fourth Degree is a lesser included crime in Assault in the Third Degree.

The confusion was compounded by the verdict forms. Verdict Form B defined Assault in the Third Degree as a lesser included crime of Assault in the Second Degree. Verdict Form C defined Assault in the Fourth Degree as a lesser included crime of Assault in the Third Degree. Neither is correct and the result was to completely mislead the jury. *State v. Sample*, 52 Wn.App 52 (1988) found simple assault is not a lesser included

offense of assault by criminal negligence (Assault in the Third Degree). *State v. Wilkins*, 72 Wn. App. 753 (1994) found simple assault is not a lesser included offense of reckless assault (Assault in the Second Degree).

The court also failed to include self defense instructions on defense against a felony, unlawful imprisonment and the law on when a business could detain a customer. These were brought up by my attorney but denied by the court. (RP 3/12/08, pg 1-4)

Additional Ground 8, Prosecutor Misconduct

A. Failure to provide discovery:

At the end of the first day of trial, on the order of the court, state provided over 280 pages of additional discovery. (RP 3/10/08, pg 63-67) Of this, approximately 150 pages were new material. (RP 3/11/08, pg 5) I was acquitted of the charges relating to any injury to Mr. Shepherd, therefore, most of the additional discovery was not relevant to the final outcome. However, included in the additional papers was a detailed job description for George Shepherd as a greeter. These papers were requested repeatedly

throughout the trial ordeal, starting in May, 2007, again in January 2008 and in discovery motions in 2007 and 2008. During all that time, the papers were obviously in the prosecution's possession or control and subject to discovery. Failure to provide them was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The job description in the papers in question were the subject of a motion I filed on November 12, 2008, in Superior Court. However, on November 19, 2008, Judge Godfrey ruled it was a matter for the Court of Appeals.

B. Misconduct during closing arguments:

From his opening remarks at the beginning of trial, the strategy of the prosecutor was to inflame the passions of the jury against me. Unfortunately, the opening remarks are not part of the record on review. However, it is the closing arguments that are most damaging.

The prosecutor started off by telling the jurors what was in my mind and resorting to name calling. (RP 3/12/08, pg 22) He commented on his personal belief in the credibility of George Shepherd, he called me "biased" and implied that I

was not credible since I had heard the testimony of the other witnesses. (RP, pg 24)

He falsely characterized my testimony when he said I called Mr. Shepherd a "rogue Wal Mart Greeter."

Then he improperly commented on both the law on self defense and the evidence and/or testified when he stated, "First off, Mr. Shepherd never touched the defendant." (RP, pg 43) He confused the jury on the law on self defense when he stated, incorrectly, "Use of force upon another person is lawful when used by a person who, one, reasonably believes he is about to be injured." (RP, pg 43) No discussion of my right to defend my property per instruction 18. Only, I had to believe I was about to be injured.

However, those remarks were tame compared to the next one, "if you're not buying off on the self-defense, you don't have to look at that instruction." (RP, pg 45) What that came down to was an impermissible direction to ignore the law. Basically, he told the jury if you don't think it was self defense, don't read the jury instruction to see what the law says, ignore the instruction. I believe this is called "jury nullification." It

is misconduct when a juror does it. *State v. Elmore*, 155 Wn.2d 758 (2005) Jury nullification is a juror's knowing and deliberate rejection of the evidence or refusal to apply the law.⁷ It is improper when a defendant wants the jury instructed that they can ignore the law if they do not agree with it. A juror who does not believe he should follow the law should not be seated and can be removed. *Elmore*, *State v. Brown*, 130 Wn.App. 767 (2005), *State v. Meggyesy*, 90 Wn.App. 693 (1998) Somehow though, the prosecutor thought it would be okay to tell the jury "You don't have to look at that instruction." In doing so, the prosecutor told the jury to ignore the law. If nothing else was reversible error, this was.

Additional Ground 9, Failure to Hold Sentencing

Within Statutory Time Limit

Under RCW 9.94A.500, the court was required to hold a sentencing hearing within 40 days, unless the time was extended for good cause found. Sentencing was scheduled for April 17,

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BLACK'S LAW DICTIONARY 875 (8th ed. 2004) *State v. Elmore*, 155 Wn.2d 758 (2005)

2008. However, on that day, the state presented and served findings of fact and conclusions of law from the December 17, 2007 hearing. My counsel and I were not prepared to argue those findings and conclusions, but did ask the court to proceed with sentencing. Judge Godfrey refused to proceed with sentencing unless I would waive the argument that findings of fact and conclusions of law should have been entered prior to sentencing. Since the finding of fact and conclusions of law were long past due, I was not willing to waive that argument. Judge Godfrey ruled that constituted good cause and ordered sentencing delayed another month. (RP 4/17/08, pg 7-8)

Unfortunately, the statute does not provide any penalty for failure to sentence in a timely manner. I suggest the only proper remedy is dismissal.

Cumulative Error

When you look at all the errors committed by the court and by the state in this case, you cannot deny cumulative error. Each error justifies dismissal or at least reversal and remand for a new trial. I so move. The remedy for cumulative error is reversal and dismissal. I

so move.

Signed this 17th day of March, 2009.



Donald J. Lynch
182 Shiloh Road
PO Box 11
Winlock, WA 98596
360-785-4519

1 May 17, 2007

2 * * * * *

3 MR. BAUM: State of Washington versus Donald
4 Lynch, 07-1-268-0. Matter's on for arraignment and
5 trial setting. We also need to do an administrative
6 booking. Chris Baum for the state. Mr. Lynch is
7 present, not in custody, and he's not currently
8 represented by an attorney.

9 THE COURT: Mr. Lynch is representing himself.

10 MR. BAUM: I realize that, but didn't he
11 request standby counsel?

12 THE COURT: He did, and he doesn't -- I
13 determined he didn't qualify, so I did not appoint
14 standby counsel. That doesn't mean he isn't free to
15 retain standby counsel. The record reflects that the
16 named defendant Mr. Lynch is present. Have you had a
17 chance to review the information, Mr. Lynch?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Okay. Do you have any question
20 about your rights relative to trial?

21 THE DEFENDANT: I have several questions, and
22 first of all, he mentioned something about booking.
23 I've been booked already, Your Honor.

24 THE COURT: We'll come back to that.

25 THE DEFENDANT: Okay. Can I ask, I filed a

1 question for the court regarding an appeal I filed in
2 Chehalis Municipal Court with regards to the dismissal
3 there. And it just seems to me that we have two cases
4 going on in superior court in the same case at the same
5 time. And is that proper?

6 **THE COURT:** Well, I can't make a ruling
7 whether it's proper or not, but it appears to me that
8 what you're really saying is that the -- that you are
9 the subject of existing prosecution in municipal court,
10 if I'm paraphrasing you correctly, and that that was
11 dismissed, apparently, to allow it to be refiled here as
12 a felony charge, and you've appealed that dismissal. Is
13 that correct?

14 **THE DEFENDANT:** Yes, Your Honor.

15 **THE COURT:** And as far as you're concerned,
16 the issue of whether the case should have been dismissed
17 from the municipal court needs to be dealt with?

18 **THE DEFENDANT:** Yes, Your Honor.

19 **THE COURT:** Okay. Do you have a response to
20 that? Did you get a copy of those pleadings?

21 **MR. BAUM:** I don't. I don't have a copy of
22 those.

23 **THE COURT:** Okay. Well, I'm going to take
24 that as a motion for dismissal or at least a stay of
25 these proceedings pending resolution of the issue of his

1 appeal. And I think it needs to be briefed, and I think
2 it needs to be argued.

3 MR. BAUM: So is the court going to make
4 Mr. Lynch abide by the court rule, he has to file a
5 written motion to that effect?

6 THE COURT: I'll deal with that. What I would
7 like to do is proceed to an arraignment, enter a plea,
8 which I presume will be not guilty, and have you file a
9 written motion along the lines suggested by your
10 question, and once you file the written motion, then
11 Mr. Baum will get a copy of it, set it for argument and
12 we'll have a decision on it.

13 THE DEFENDANT: Okay. Do I need to do
14 something to set it for argument?

15 THE COURT: Yeah.

16 THE DEFENDANT: What do I need to do?

17 THE COURT: I'll explain it to you in a
18 minute. In the meantime, do you have a question -- any
19 other questions about your rights relative to trial?

20 THE DEFENDANT: I don't think so.

21 THE COURT: Do you understand what it is
22 they're accusing you of doing?

23 THE DEFENDANT: I believe I do, yes.

24 THE COURT: Okay. So let me ask you, what is
25 your plea to assault in the second degree, or in the

1 alternative, assault in the third degree? Guilty or not
2 guilty?

3 THE DEFENDANT: Not guilty.

4 THE COURT: Very well. All right. First
5 things first, what about the claim about administrative
6 booking? If Mr. Lynch was booked, then it appears to me
7 that administrative booking is not necessary. Did they
8 take your picture and take your fingerprints?

9 THE DEFENDANT: Yeah, they did it all, Your
10 Honor.

11 MR. BAUM: Well, I wasn't aware of that.

12 THE COURT: Okay.

13 THE DEFENDANT: It was on November 24th, Lewis
14 County Jail.

15 THE COURT: That's -- that resolves that
16 issue.

17 MR. BAUM: That's fine.

18 THE COURT: Administrative booking is nothing
19 other than a request for -- some people are not
20 arrested. They're charged and they're not arrested, and
21 when they're not arrested, they don't have their
22 fingerprints taken, they don't have their picture taken,
23 and sometimes the prosecutor comes in and says, "I'd
24 like to have someone administratively booked," which
25 basically means that they go down and they have their

1 pictures taken and fingerprints taken, and that's all it
2 is. It if's been done to you, it's unnecessary. That
3 resolves that issue.

4 Now, what you need to do is you need to couch your
5 motion with respect to -- which is a written request --
6 for what you want the court to do with respect to the
7 pendency of your appeal and whatever else happened in
8 municipal court, and I'm not familiar with it, and
9 frankly, I hadn't seen this stuff until I looked at the
10 file today. You need to put that in writing, you need
11 to send a copy to the prosecutor's office, and you need
12 to note it for a Thursday at 4 o'clock.

13 THE DEFENDANT: Just a Thursday at 4 o'clock?

14 THE COURT: A Thursday. And at that time,
15 whoever's handling the calendar, whether it be me or one
16 of the other judges, will set the matter for argument.
17 In other words, it won't be argued on the docket because
18 it's a criminal docket. It's not -- we don't have time
19 to do actual arguments on motions on the docket given
20 the volume, but we'll set it at that time for a time,
21 depending upon how much time you need, whether it be an
22 hour or longer, to argue your motion. And the state
23 then has notice of it, and if they want to file a brief
24 or whatever in response, they can do that. That's the
25 way it works.

1 THE DEFENDANT: Okay. I would point out that
2 Mr. Baum should be aware of the case number for the
3 appeal because it's in the papers I filed. It says
4 question for the court.

5 THE COURT: Okay.

6 MR. BAUM: I've got the case number. I just
7 don't have the documents.

8 THE COURT: Okay. Anything else?

9 MR. BAUM: We need to set the next hearing, so
10 I don't know if the court wants to set a trial right
11 now.

12 THE COURT: How soon can you get your motion
13 put together in motion form? Can you do that in a week
14 or do you need longer than a week?

15 THE DEFENDANT: I can do it right away.

16 THE COURT: Then I'll continue the matter one
17 week for setting of Mr. Lynch's motion. You need to get
18 your motion filed and get it to Mr. Baum. You don't
19 have to have the briefing with it, but at least the
20 motion so he knows where you're coming from and what
21 your issues are, I would say by next -- let's say by
22 Tuesday of next week at 5 o'clock.

23 THE DEFENDANT: And then there will be a
24 hearing --

25 THE COURT: I'll set a hearing next Thursday.

1 I will set it. We're not going to have the hearing that
2 day, but I will set the hearing, because the hearing's
3 going to take longer than five or 10 minutes.

4 THE DEFENDANT: Right. But next Thursday I
5 need to appear for you to set the hearing?

6 THE COURT: Right, because I won't set the
7 hearing unless I know you're available, and you need to
8 tell me your dates of availability. For example, if I
9 say, how much time do you need? You tell me you need an
10 hour, then I need to know on a certain date you'll be
11 available for an hour to do the hearing, or if it's
12 going to take longer than an hour, that you'll be
13 available for longer than an hour.

14 THE DEFENDANT: Okay. There's one other issue
15 I forgot to bring up, and that is I do wish to enter an
16 objection to the arraignment date for speedy trial
17 purposes.

18 THE COURT: Okay. Noted. All right. And I
19 want to make it abundantly clear, Mr. Lynch, as far as
20 I'm concerned, I'm treating you no differently than I
21 would if you were an attorney representing a client. In
22 other words you're representing yourself, and as far as
23 I'm concerned, you're entitled to the same consideration
24 from the state and the court as anybody else.

25 Is there anything else I need to do on this case

1 today? Okay. And the issue of trial setting will be
2 set over also until we have this issue of the propriety
3 of what was done apparently in municipal court resolved.

4 MR. BAUM: Does Your Honor have an idea of
5 when there will be a decision made upon that appeal?

6 THE COURT: I haven't seen the appeal yet. If
7 it's a RALJ -- if it amounts to a RALJ appeal, we have a
8 process whereby we assign RALJ appeals when they're
9 ready to the last presiding judge. Right now, if a RALJ
10 appeal were ready to be argued it would be assigned to
11 Judge Hall, who was the last presiding judge, and the
12 RALJs are usually given no more than 30 minutes for
13 argument, and they're basically -- whoever gets it has
14 read the file, has read the pleadings, has read the
15 transcript, if there is one, and then the parties come
16 in and argue and then the judge issues a written
17 decision.

18 MR. BAUM: I guess my concern is I think we'll
19 be spinning our wheels if we don't have a decision on
20 the RALJ appeal. And we'll basically come in and
21 there's not a decision made.

22 THE COURT: Where was this -- was this
23 Chehalis Municipal Court?

24 THE DEFENDANT: Chehalis Municipal Court. And
25 I have filed my appeal brief, and time for the

1 prosecutor for the city to file their appeal brief is
2 almost up, so it should be moving right along.

3 THE COURT: Okay. All right.

4 MR. BAUM: I guess we can revisit it next
5 week.

6 THE COURT: Well, if worse comes to worse, Mr.
7 Baum, you might go to the clerk's office and ask to look
8 at the file on the appeal and see what the status is.

9 MR. BAUM: Well, I can do that.

10 THE COURT: If necessary, you can contact the
11 attorney for the city and say, "Get your brief in so we
12 can get this decision so we know where we are with our
13 prosecution in superior court."

14 MR. BAUM: Yeah. Well, I think without a
15 decision, it will be difficult to resolve the issue, but
16 I'll look into it.

17 THE COURT: Anything else?

18 THE DEFENDANT: I think we've covered it.

19 THE COURT: Okay.

20 (Conclusion of proceedings).
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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Kellie A. Smith, Notary Public, in and for the State of Washington, County of Pierce, residing at Puyallup, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings, Arraignment, was reported by me and reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct transcript of the proceedings heard before Judge Richard L. Brosey on the 17th day of May, 2007, at the Lewis County Courthouse, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS _____ day of _____, 2007.

Notary Public, in and for
the State of Washington,
residing at Puyallup.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR
LEWIS COUNTY

STATE OF WASHINGTON,
Plaintiff,

No. 07-1-268-0

vs.

ORDER

Denard Lynch,
Defendant.

On motion of the DEFENDANT;
 By stipulation of the parties;

IT IS HEREBY ORDERED:

THE CHARGES AGAINST THE DEFENDANT ARE
DISMISSED WITH PREJUDICE FOR VIOLATION
OF SPEEDY TRIAL.

DATED this _____ day of _____, 20 _____

SUPERIOR COURT JUDGE

PRESENTED BY:

APPROVED BY:

Deputy Prosecuting Attorney
WSBA # _____

Attorney for Defendant
WSBA # _____

Anne M. Cruser
PO Box 1670
Kalama, WA 98625

and to:

Lewis County Clerk
345 W. Main St. 2nd Floor
Chehalis, WA 98532

I declare under penalty of perjury of the laws of the state
of Washington that the foregoing is true and correct.

Signed this 17th day of March, 2009.



Donald J. Lynch
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Winlock, WA 98596
360-785-4519