

No. 39321-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

NORMAN JACKSON,

Appellant.

---

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

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FILED  
COURT OF APPEALS  
DIVISION TWO  
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STATE OF WASHINGTON  
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PM 3-4-10

The Honorable James R. Orlando, Judge (trial) and  
The Honorables Susan K. Serko and Ronald E. Culpepper (motions)

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress evidence which was gathered in violation of Norman Jackson's Article I, § 7 and Fourth Amendment rights, because it was based upon a search warrant which was not supported by probable cause.

2. Jackson assigns error to CrR 3.6 Finding of Fact 9, which provides:

During the surveillance, the officers observed the defendant leave and return to the listed residence before and after the transactions.

CP 145.

3. Jackson assigns error to CrR 3.6 Findings as to Disputed Facts 6, which provides:

The defendant's arrival and/or departure time from the drug transactions was consistent with the defendant coming and returning to the residence.

CP 147.

4. Jackson assigns error to CrR 3.6 Conclusion 4, which provides:

The evidence reasonably indicates the defendant left and returned to the residence At [sp], or close in time, to the respective drug transactions.

CP 148.

5. Jackson assigns error to CrR 3.6 Conclusion 5, which provides:

During the surveillance, the officers observed the defendant leave and return to the listed residence before and after the transactions.

CP 148.

6. Jackson's rights to speedy trial were violated when the

prosecution was given multiple lengthy continuances in order to secure the presence of a witness even though the prosecution had not made a good faith effort to ensure the witness appeared.

7. The prosecutor committed constitutionally offensive, prejudicial misconduct.

8. The sentencing court erred in finding several out-of-state convictions “comparable” and in counting those convictions in the offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To be valid, a search warrant must be issued based upon an affidavit which establishes probable cause of a nexus between the defendant and criminal activity and between the evidence of criminal activity and the place to be searched. Jackson was seen going into the apartment of a confidential informant where he allegedly sold the informant drugs. No drug activity was ever seen at Jackson’s residence, and the only link between the drug activity and the residence, aside from Jackson’s living there, was that Jackson returned home after one of the sales but not the other. Did the trial court err in upholding the warrant and failing to suppress the evidence even though the affidavit was insufficient to establish the required nexus between the items sought and that home?

Further, do several of the court’s findings fail to withstand review where they are unsupported by sufficient evidence in the affidavit?

2. The absence of a material state’s witness may support a continuance beyond the CrR 3.3 speedy trial expiration date but only if the state exercises due diligence in seeking that witness’ presence at trial.

“Due diligence” mandates, at a minimum, that the state issue a warrant for the missing witness. Did the trial court err and were Jackson’s speedy trial rights violated when the court repeatedly granted continuances, over defense objection, based upon the absence of a prosecution witness even though the prosecution had not issued a subpoena for that witness?

3. Did the prosecutor commit constitutionally offensive misconduct in using a “puzzle” analogy, comparing the certainty jurors had to have to find that the state had proven its case beyond a reasonable doubt with figuring out what picture was depicted on a puzzle?

4. Washington’s robbery statute requires that the defendant use or threaten to use immediate force, violence or fear of injury. California’s robbery statute, in contrast, only requires such immediacy for certain victims but permits threats of future force, violence or fear of injury to be sufficient for others. Did the sentencing court err in finding two California robbery convictions “comparable” to Washington robberies despite this significant difference and even though there was no evidence to support a finding that the California robberies were factually comparable?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Norman Jackson was charged by corrected second amended information with unlawful possession of methamphetamine with intent to deliver and first-degree unlawful possession of a firearm. CP 183-84; RCW 9.41.040(1)(a); former RCW 69.50.401(a)(1)(ii). The drug possession charge was enhanced with a firearm enhancement, which the

court dismissed at the close of the state's case. CP 183-84; RCW 9.41.010; former RCW 9.94A.310; former RCW 9.94A.370; RP 439.

After motions were held before the Honorable Susan K. Serko (June 17, 2008 and February 18, March 10 and 16, 2009), the Honorable Ronald E. Culpepper (July 1, September 15, November 13 and 20, 2008), and the Honorable James Orlando on November 25, 2008, trial was held before Judge Orlando on March 17-19, 23-25, 2009, after which the jury found Jackson guilty as charged. CP 178-80.<sup>1</sup> Sentencing proceedings occurred before Judge Orlando on May 1, 14 and 29, 2009, after which the judge imposed a standard-range sentence. CP 267-80; RP 550-59.

Jackson appealed and this pleading follows. See CP 287-99.

2. Testimony at trial

On January 26, 1998, Tacoma Police Department (TPD) officers served a search warrant on the home where Norman Jackson lived. RP 187-90, 213, 224. In the kitchen, on the top shelf of a pantry and above eye level, officers found a "triple beam scale" and a small digital scale. RP 192-93, 209. In the master bedroom, in a small jewelry drawer,

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<sup>1</sup>The verbatim report of proceedings consists of 11 bound volumes, which will be referred to as follows:

June 17, 2008, as "1RP;"  
the volume containing July 1, September 15, November 13 and 20, 2008, all of which are chronologically paginated, as "2RP;"  
February 18, 2009, as "3RP;"  
March 10, 2009, as "4RP;"  
March 16, 2009, as "5RP;"  
the chronologically paginated volumes containing  
November 25, 2008, and March 17, 2009,  
March 18, 2009,  
March 19, 2009,  
March 23, 2009,  
March 24, 2009, and  
March 25 and May 1, 14, and 29, 2009, as "RP."

officers found two rocks of suspected methamphetamine. RP 349, 352, 356. In a hall closet, an officer found a gun case with a large bore rifle. RP 309. The rifle was not loaded and there was no ammunition found. RP 316-17. The officer did not recall whether the door to that closet was secured. RP 314. The rifle was later test-fired successfully. RP 155, 157, 162, 167.

An officer "cleared the attic" to make sure it was secure and saw a dark-colored safe there, which officers subsequently brought down. RP 236-37. Another officer took the safe to a locksmith the day after the search, where it was opened. RP 267. The officer then "processed" what was inside, which was 220 grams of a substance which later tested positive for methamphetamine, some "paraphernalia," razor blades, some small ziploc bags "commonly used for the processing, packaging of narcotics" and an envelope with writing on it which looked like a "mathematical equation." RP 269-72, 274, 282, 412.

The clear plastic bags were processed for "prints" but none were found. RP 279, 421. No fingerprints were found on the gun, either. RP 421. There were some bank statements in the master bedroom in Jackson's name, and documents with Jackson's name and the address were on the kitchen table. RP 192-93, 349, 356. In the safe was an envelope with a bill from a cable company addressed to Jackson, as well as a "Montgomery Ward Kendall plan membership card." RP 269-72, 274, 282, 412.

An officer admitted that there was someone other than Jackson at the home when the officers arrived. RP 201. Another officer said that the

house was unoccupied. RP 303. A third officer first denied that the investigation indicated that there was another adult, a female, also living in the house. RP 466. The officer ultimately admitted, however, that Jackson's daughter had told him that another person lived there. RP 466. Indeed, when that officer gave information about who lived at the home to the TPD staff assigned to institute forfeiture proceedings, those proceedings were commenced not only against Jackson but also another adult, a woman named Hwonnie Pagan, at the same address. RP 467-68.

The officer admitted that, once he was told someone else lived in the house, he never went back inside to look for anything that would have belonged to an adult female. RP 468. He explained that, as the case agent, he did not do any searching. RP 468. He said he did not recall seeing anything like that but also that he could not remember anything about where he walked in the house. RP 468. The officer who searched the master bedroom did not recall seeing women's clothing in that room, nor did he remember seeing documents with a woman's name on them. RP 366-67.

Jackson was arrested outside the residence on that day. RP 226, 231. He and his car were searched and no drugs were found. RP 255.

Jackson had been the subject of some surveillance and an officer admitted that, during that time, he had never seen anything like "indicia of drug dealing" or hand-to-hand deals. RP 255-56. The officer also admitted that there was no "high volume of foot traffic to and from" Jackson's residence, or anything similar. RP 256.

It was stipulated that Jackson had a prior conviction for a serious

offense and that his right to possess a firearm had not been restored at the time of the search. RP 421. After Jackson was charged and released in 1998, a bench warrant was issued when he failed to appear for a proceeding. RP 320, 33-35. That warrant was cleared on April 30, 2008. RP 337.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF A CONSTITUTIONALLY INVALID WARRANT

Both Article 1, § 7<sup>2</sup> and Fourth Amendment<sup>3</sup> protect citizens against unreasonable searches and seizures. See State v. Johnson, 104 Wn. App. 409, 16 P.3d 680, review denied, 143 Wn.2d 1024 (2001); Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). The protections afforded under the state and federal constitutions differ, however. While the Fourth Amendment protects only those areas in which a citizen has a “reasonable” expectation of privacy, Article 1, § 7 protects more. See State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

In general, a search is considered reasonable and does not violate our state constitution’s privacy concerns if it is conducted pursuant to a valid search warrant. See State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); Skinner v. Railway Labor Executives Ass’n, 489 U.S.

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<sup>2</sup>Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<sup>3</sup>The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides, in relevant part, that “no warrants shall issue, but upon probable cause.” See Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

602, 619, 109 S. Ct. 1492, 103 L. Ed. 2d 639 (1989). To be valid, a warrant must be issued based upon a showing of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); see, e.g., Kalina v. Fletcher, 522 U.S. 118, 119, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). If a warrant is not so based, any evidence gathered as a result must be suppressed. See State v. Huft, 106 Wn.2d 206, 212, 720 P.2d 838 (1986); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

In this case, the evidence seized in the search of the home should have been suppressed, because the warrant under which that search was conducted was not based upon probable cause, and the search was thus in violation of Jackson's Article 1, § 7 and Fourth Amendment rights.

a. Relevant facts

The affidavit for the search warrant provided in relevant part:

Your Affiant was contacted on 1-5-98 by Confidential and Reliable Informant (C/I) #308 who advised that he/she knew of a subject who dealt in large quantities of methamphetamine. C/I #308 advised that he/she knew the subject by the name of "Joe"; and described him as a black male, 5'9", medium build, with very short hair.

On 1-7-98 Your Affiant directed C/I #308 to contact "Joe" and arrange a narcotics transaction to occur on 1-7-98 at approximately 1200 hours. "Joe" advised the C/I that he would deliver 1 ounce of methamphetamine to him/her at his/her apartment at 1104 Yakima Ave. S. #303 for \$750.00. Your Affiant obtained a 204 wire order. The C/I was searched, given \$750.00 in pre-recorded buy monies, and an intercept device was placed on him/her. He/She was taken to his/her apartment where he/she contacted "Joe" via telephone. "Joe" advised the C/I that he was enroute to the C/I's location.

Your Affiant along with members of the Special Investigations Division (SID) conducted surveillance on the apartment complex. "Joe" arrived at the residence in a red

Chevrolet Suburban bearing Washington license plate 032FJS. "Joe" exited his vehicle and went to the front security door of the apartment complex and pushed the door bell for the C/I's apartment. The C/I allowed "Joe" to enter the complex. He went to the C/I's apartment and delivered [to] the C/I 1 ounce of methamphetamine, and the C/I gave "Joe" the \$750.00 in buy monies. "Joe" gave the C/I \$20.00 back for bonus. "Joe" then left and returned to his vehicle. Your Affiant contacted the C/I and retrieved the narcotics and monies and searched the C/I. Members of SID followed "Joe" to 1210 S. Sheridan St. where he exited the vehicle and entered the residence.

The narcotics were field tested positive and placed into Pierce County properly along with a copy of the \$20.00 in buy monies that "Joe" had returned to the C/I.

On 1-19-98 Your Affiant directed C/I #308 to contact "Joe" and arrange a narcotics transaction to occur on 1-19-98 at approximately 1400 hours. "Joe" advised the C/I that he would deliver 1 ounce of methamphetamine to him/her at his/her apartment at 1104 Yakima Ave. S. #303 for \$825.00. He further advised that the price increase from the last delivery was because this ounce would be [] better quality. Your Affiant obtained a 204 wire order. The C/I was searched, given \$825.00 in buy pre-recorded buy monies, and an intercept device was placed on him/her. He/She was taken to his/her apartment where he/she contacted "Joe" via telephone. "Joe" advised the C/I that he was enroute to the C/I's location.

Your Affiant along with members of the Special Investigations Division (SID) conducted surveillance on the apartment complex. "Joe" arrived at the residence in a red Chevrolet Suburban bearing Washington license plate 032FJS. "Joe" exited his vehicle and went to the front security door of the apartment complex and pushed the door bell for the C/I's apartment. The C/I allowed "Joe" to enter the complex. He went to the C/I's apartment and delivered the C/I 1 ounce of methamphetamine and the C/I gave "Joe" the \$825.00 in buy monies. "Joe" gave the C/I \$20.00 back for bonus. "Joe" then left and returned to his vehicle. Your Affiant contacted the C/I and retrieved the narcotics and monies and searched the C/I. When "Joe" left the apartment in his vehicle members of SIC followed him. I requested the PPO Keen, who was in uniform and in a marked patrol unit, to stop and identify "Joe." PPO Keen was able to stop "Joe" at [] S. Thompson St. "Joe" produced a Washington state driver's license that identified him as Norman Jackson with a date of birth of 5-17-66. After the patrol stop, members of SID followed "Joe" to the Lincoln Lanes bowling alley located at 3900 Yakima Ave., where he entered and remained for at least 2 hours

when the follow was terminated.

The narcotics were field tested positive and placed into Pierce County property along with a copy of the \$20.00 in buy monies that "Joe" returned to the C/I.

On 1-19-98 Your Affiant and PPO Gustason set up on surveillance at 1210 S. Sheridan at approx. 2000 hours. At approximately 2015 hours Your Affiant observed "Joe's" Chevrolet Suburban turn from eastbound on S. 12<sup>th</sup> St. To southbound on S. Sheridan St. where the vehicle parked in front of 1210 S. Sheridan St.. "Joe" exited the vehicle that went to the front door of the residence, opened the screen door, unlocked the front door, entered the residence and turned on the interior lights.

On 1-20-98 and 1-21-98 Your Affiant observed the Chevrolet Suburban in the driveway of 1210 S. Sheridan St.

It is consistent with your Affiant's training and experience that drug dealers often use multiple apartment, residences, vehicles, or locations, away from where they actually reside, to sell/deliver drugs. This makes it more difficult for police to determine where the suspects and/or drugs may be and further allows suspects to store quantities of drugs and drug related assets at locations away from where actual sales/deliveries are made. This further prevents detection from police and prevents theft of drugs/assets from other members of the criminal narcotics community.

It is consistent with Your Affiant's training and experience that drug dealers often use pagers and/or telephones to arrange drug sales. Buyers are then directed to contact the sellers at prearranged locations to complete the sales. This allows dealers to store controlled substances and assets from the drug sales away from locations where the deals are conducted to protect the drugs and assets from detection by the police and from theft from competing drug dealers and or members of the criminal narcotics community. It is further consistent with Your Affiant's training and experience that drug dealers often use vehicles, and/or persons within the vehicles, as well as persons within residences, to conceal and carry the controlled substances to/at places for sale or for storage. When storing or concealing the controlled substances in vehicles, drug dealers often conceal the drugs and/or assets in concealed areas of the vehicle to avoid detection by police.

When storing controlled substances at residences, drug dealers often conceal drugs and drug related assets in hiding places upon the curtelege [sp] of the residence or place to avoid detection by police and to avoid theft from other members of the criminal

narcotics community.

CP 48-52. The affidavit then set forth some information about the reliability of the C/I. CP 48-52.

Before trial, Jackson moved to suppress the evidence seized as a result of the search of his house pursuant to the warrant, arguing that the warrant was not supported by probable cause because the affidavit established an insufficient nexus between any criminal activity and the place to be searched, i.e., his home. RP 2; CP 40-57. He noted that 1) the affidavit did not show any information about where Jackson came from to go to the first delivery, 2) it did not show how many people he contacted between the time of the call with the informant and the time he arrived to make the sale and 3) it similarly did not indicate where Jackson came from before he made the second delivery. RP 2-3. He also pointed out that the officers had not seen Jackson leaving his home after the call with the C/I, nor had they followed him from the home to the C/I's apartment where the delivery had occurred. RP 3. As a result, he argued, there was not sufficient evidence in the affidavit to support the required nexus between the criminal activity and Jackson's home. RP 2-3.

The court then asked about some information contained in a document other than the affidavit, and counsel reminded the court that it was limited to looking at the "four corners of the search warrant." RP 4-5.

In response, the prosecutor argued that the court should find there was a link to the residence because the "time element" between the "placing of the order" and the delivery was "within the same day within a short period of time" for both transactions and because it was clear that

Jackson lived at the home. RP 6-9. The prosecutor stated that it was relevant that the residence was the “only residence associated with the defendant” and “the only other place they saw him was a commercial business” during the surveillance. RP 9.

Counsel responded that there was no connection between where the drugs came from and the residence and Jackson could have been anywhere when he received the call to get the drugs. RP 11. He also objected that the prosecutor’s argument was effectively that there was a “per se” rule that “if a magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person’s residence automatically follows.” RP 12. In addition, he noted, the affidavit itself indicated that the officer believed dealers often use “multiple apartments, residences, vehicles or locations away from where they actually reside to sell/deliver drugs.” RP 14. As a result, he said, the officer’s own affidavit supported suppression. RP 14.

In upholding the warrant, the court first noted that “a search for currency” was included in both the complaint and the warrant. RP 15. While the facts indicated that Jackson was not traced leaving his home and going directly to the C/I’s home for either sale, the court said, he was seen returning to his home after them. RP 15.<sup>4</sup> The court also relied on a “final purchase” after which Jackson was arrested, declaring that, for that purchase, Jackson was “seen at the residence, a call was made from the CI to the defendant by cell phone. The defendant indicated he was on his

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<sup>4</sup>The error in this finding is discussed, *infra*.

way. And he was followed to the CI's apartment where he was arrested."<sup>5</sup>  
RP 15. The court stated that, "looking at all that," there was a "reasonable inference that can be made that the residence was involved in the drug activity." RP 15. The court also said that Jackson did not stop after the first sale anywhere to "drop off the money," so that he took it to his home. RP 15.

The court agreed that there would be "insufficient basis to search the bowling alley" where Jackson had gone after the second sale, but then cited the "final" purchase information again, stating Jackson "did return to his residence after receiving the marked money or the money from the confidential informant on the final attempted purchase or alleged purchase he was seen exiting the residence, was followed to the CI's apartment where he was arrested." RP 16. The court concluded that that was "sufficient nexus between the residence and the alleged criminal activity and the defendant to justify issuance of the warrant." RP 16.

The court later signed CrR 3.6 findings and conclusions drafted by the prosecutor. CP 144-48.

- b. The trial court erred in refusing to suppress the evidence because the warrant was not supported by probable cause

The trial court erred in failing to suppress the evidence seized from the home based on the warrant, because the warrant was not supported by probable cause and thus was constitutionally invalid under both the Fourth Amendment and Article I, § 7.

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<sup>5</sup>The court's error in relying on this information, not contained in the affidavit, is discussed, *infra*.

A warrant only issues upon probable cause when the affidavit for the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring and that evidence of that activity is likely to be found at the place to be searched at the time of the search. Thein, 138 Wn.2d at 140. Put another way, probable cause to search - and thus a valid warrant - requires that the affidavit for the warrant establish both 1) a nexus between the criminal activity and the items to be seized and 2) a nexus between the items to be seized and the place to be searched. Id.

In general, a magistrate's determination that a warrant should issue is reviewed for abuse of discretion, and the affidavit relied on in issuing a warrant is interpreted in a commonsense, not hypertechnical manner. See In re Kim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). Nevertheless, both the first nexus and the second one must be established. Thein, 132 Wn.2d at 145, 148-49. Further, they must not be based upon generalizations or assumptions by an officer of the habits of drug dealers in general. Thein, 132 Wn.2d at 145, 148-49.

In its review of a warrant, the trial court is limited in what it is permitted to consider. As the unanimous Supreme Court recently declared, the trial court's role is quasi-appellate. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). As a result, the trial court is "limited to the four corners of the affidavit" in making its determination and may not consider other information. Id. In addition, the trial court's determination that probable cause existed is a legal conclusion which this Court reviews de novo. Id.

On review in this case, this Court should reverse, because the affidavit in support of the search warrant was insufficient to establish the nexus between the criminal activity and Jackson's home.

As a threshold matter, the court's findings of fact in support of its conclusion that probable cause existed and the warrant was thus properly issued do not withstand review. Findings must be supported by substantial evidence, defined as evidence sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This standard applies not only to findings properly designated as such but also to findings which are incorrectly listed as "conclusions." See State v. Marcum, 24 Wn. App. 441, 445, 601 P.2d 975 (1979).

In this case, several of the findings - including some improperly designated as "conclusions" - are not supported by substantial evidence and thus must not be considered by this Court on review.

All of the unsupported findings relate to the crucial question of whether Jackson was seen leaving and returning to the home directly before and after the two transactions detailed in the affidavit. In Finding 9, for example, the court found that, "[d]uring the surveillance, the officers observed the defendant leave and return to the listed residence before and after the transactions." CP 145. In Findings as to Disputed Facts 6, the court further declared that "[t]he defendant's arrival and/or departure time from the drug transactions was consistent with the defendant coming and returning to the residence." CP 147.

Similar findings were improperly designated as conclusions 4 and

5. Conclusion 4 provided that “[t]he evidence reasonably indicates the defendant left and returned to the residence At [sp], or close in time, to the respective drug transactions.” CP 148. And Conclusion 5 declared that, “[d]uring the surveillance, the officers observed the defendant leave and return to the listed residence before and after the transactions.” CP 148.

Conclusions 4 and 5 were not conclusions of law but rather findings of fact. A finding of fact is “an assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” Leschi v. Highway Comm’n, 84 Wn.2d 271, 283, 525 P.2d 774 (1974). Conclusions 4 and 5 were declarations about what the court found had occurred and thus are findings, reviewable as such. See Marcum, 24 Wn. App. at 445.

The bulk of these findings was not supported by substantial evidence. Again, the trial court was limited to the four corners of the affidavit in determining whether there was, in fact, probable cause to support the issuance of the warrant. Neth, 165 Wn.2d at 182. But *nothing* in the affidavit indicated that the officers saw Jackson leave his residence just before each transaction, as Finding 9 and Conclusion 5 declare. CP 48-52. For the first transaction on 1-7-98, the affidavit indicates only that the C/I contacted “Joe” to arrange the transaction and officers were at the C/I’s apartment when “Joe” arrived, not that they also saw “Joe” leave any particular address. CP 49-50. For the second transaction, on 1-19-98, the affidavit again indicated that the officers were watching the C/I’s apartment when “Joe” arrived, again indicating nothing about where “Joe”

came from. CP 49-50.

Similarly, the affidavit does not support the findings indicating that officers saw Jackson return to the residence after both buys, as Finding 9 and Conclusion 5 indicate. Instead, "Joe" was seen going to the Sheridan Street address after the first "buy" only. CP 49-50. After the second "buy," the affidavit establishes, he went to a bowling alley and was still there, 2 hours later, when officers ended their "follow." CP 49-50.

Equally unsupported are the findings regarding Jackson's "arrival and/or departure time from the drug transactions" as being "consistent with the defendant coming and returning to the residence" (Disputed Facts 6) and that "[t]he evidence reasonably indicates the defendant left and returned to the residence At [sp], or close in time, to the respective drug transactions" (Conclusion 4). CP 147-48. Again, the affidavit clearly established that Jackson did *not* return to the residence after the second transaction and was instead at a bowling alley for *at least* two hours. CP 49-50. Indeed, the affidavit specifically declares that, while the C/I was supposed to try to arrange the transaction to occur at "1400 hours" or so, and while there was no indication what time it actually occurred, "Joe" was not seen returning to the S. Sheridan address until "2015" fours, fully 6 hours later. CP 50-51.

With respect to the other timing, the affidavit indicates only the times when the officers asked the C/I to arrange for the transactions to occur. For the 1-7-98 transaction, he/she was asked to make it occur at "approximately 1200 hours," but nothing in the affidavit indicates at what time the telephone call was made asking for that delivery or what time

“Joe” arrived - only that he said, like any good salesman, that he was on his way. CP 48-52. Similarly, for the 1-19-98 transaction, the C/I was asked to arrange for a delivery at “approximately 1400 hours” but nothing in the affidavit indicated when the phone call was made to “Joe” or how long it took “Joe” to arrive, simply that he again said he was “enroute” to make the sale. CP 48-52.

Thus, nothing in the affidavit provides any information about how long it took “Joe” to make it to the C/I’s home after the calls were made. Even more significant, nothing in the affidavit indicated *anything* about the actual distance between the S. Sheridan address and the C/I’s home, sufficient for the court to make any assumptions about whether the time between the calls and the arrival at the C/I’s apartment somehow indicated that “Joe” was coming from the S. Sheridan residence. The court’s findings on these points are completely unsupported by the affidavit and thus cannot be relied on in this appeal. See Hill, 123 Wn.2d at 647.

Notably, in its oral findings, the court made comments indicating that it was not limiting itself to the affidavit in upholding the warrant. In its oral rulings, the court cited a third, “final purchase” after which Jackson was arrested at the CI’s apartment. RP 15-16. The court apparently relied on what it believed were the facts relating to that purchase in reaching its oral conclusion. RP 15-16. But the affidavit only discusses two sales, not three and contains no information about a “final” purchase and arrest. CP 48-52. And again, the court was required to limit itself to the four-corners of the affidavit and not consider anything else in

making its decision. Neth, 165 Wn.2d at 182.

Without the improper findings, the defects in the affidavit and its failure to establish the required second nexus become obvious. Nothing in the affidavit supported the conclusion that the evidence to be seized - evidence of drug dealing - was in the place to be searched - Jackson's home. Instead, the only "evidence" in the affidavit was that 1) Jackson appeared to live at the S. Sheridan address, 2) his car was seen there and was the car he used when he delivered the drugs to the C/I, 3) he was seen going back home after one of the sales but not both, 3) it was "consistent with" the affiant/officer's "training and experience" that drug dealers may store controlled substances at residences in concealed places and 4) it was "consistent with" that same training and experience that drug dealers often sell and deliver drugs from "multiple apartments, residences, vehicles or locations, *away from where they actually reside.*" CP 50-52 (emphasis added).

That was simply not enough. The nexus between evidence of drug dealing and a home is not proven simply because a suspected drug dealer lives there, even if an officer claims that it is common for drug dealers to have drugs or other evidence at their homes. Thein, 138 Wn.2d at 151; see State v. Goble, 88 Wn. App. 503, 512-13, 945 P.2d 263 (1997); State v. Olson, 73 Wn. App. 348, 357, 869 P.2d 110, review denied, 124 Wn.2d 1029 (1994).

In Thein, the Supreme Court specifically reiterated this rule, rejecting the idea that a magistrate may assume that a person apparently involved in drug activity or sales would probably keep items related to

that activity at his home. 138 Wn.2d at 147-48. Indeed, the Court declared, “[p]robable cause to believe that a man has committed a crime . . . does not necessarily give rise to probable cause to search his home.” 138 Wn.2d at 148, quoting, State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994). Instead, there must be additional facts which support the reasonable inference that “*this* drug dealer probably keeps drugs at *his or her* residence,” in particular. State v. McGovern, 111 Wn. App. 495, 500 45 P.3d 624 (2002) (emphasis in original). Further, the link cannot be based upon mere conclusions, general declarations, suspicions or personal belief. See Thein, 138 Wn.2d at 148.

Here, there were no such additional facts. No one ever saw Jackson sell drugs to anyone from the home. Compare, e.g., State v. Mejia, 111 Wn.2d 892, 895-96, 766 P.2d 454 (1989). No one saw him buy drugs and take them back to the home. There was no informant who claimed to have and was seen buying drugs from him there. Compare, e.g., State v. Maddox, 116 Wn. App. 796, 803, 67 P.3d 1135 (2003), affirmed, 152 Wn.2d 499, 98 P.3d 1199 (2004). Nor was he seen leaving his home and going directly to a drug sale, something which might indicate the drugs were kept at the home. Compare, e.g., State v. G.M.V., 135 Wn. App. 366, 144 P.3d 358 (2006), review denied sub nom State v. Vargas, 160 Wn.2d 1024 (2007).

Further, the general declarations of the affidavit, while insufficient to support probable cause, were themselves conflicting on whether evidence of drug dealing was expected to be found at a suspected drug dealer’s residence. Not only did the affiant declare that it was “consistent

with” the officer’s training and experience that drug dealers may store controlled substances at residences in concealed places, he also declared that dealers often sell and deliver drugs from “multiple apartments, residences, vehicles or locations, *away from where they actually reside.*” CP 49-52 (emphasis added).

Indeed, the only evidence possibly linking the alleged drug sales to the home, aside from Jackson’s living there, is that Jackson returned there with the money he made on one of the sales. See CP 48-52. But that conduct occurred on January 7, fully 16 days before the date of the affidavit. CP 48-52. Nothing in the affidavit indicated that it was consistent with the officer’s training and experience that drug dealers who have gotten “buy” money keep it around their houses rather than spending it for such a period of time, sufficient to support probable cause that such money would still be in the home at the time of the search. CP 48-52. This is especially so given that Jackson was seen going somewhere else with his money after the second sale. See, e.g., State v. Bittner, 66 Wn. App. 541, 832 P.2d 529 (1992), review denied, 120 Wn.2d 1031 (1993).

Notably, the affidavit and warrant were not limited to searching merely for “buy” money but were instead looking for controlled substances, scales, measuring devices, utensils, materials used to package, mix and prepare controlled substances for sale, firearms and ammunition, crib notes, letters and documents, photographs, pagers, cellular telephones, and other evidence of alleged drug dealing, so that the warrant was, effectively, a general warrant for all incriminating evidence rather than a warrant based upon probable cause to believe all or even most of

the items sought would be at the home. CP 48-52; see e.g., Maddox, 116 Wn. App. at 805.

The trial court erred in upholding the warrant, which was not based upon probable cause. The evidence seized pursuant to the warrant should have been suppressed. Because the prosecution's case against Jackson depended upon that evidence, the charges against Jackson should have been dismissed. Reversal and dismissal is now required.

2. JACKSON'S SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN THE PROSECUTION WAS GRANTED MULTIPLE CONTINUANCES BEYOND THE EXPIRATION DATE TO ENSURE THE PRESENCE OF A WITNESS THE PROSECUTION HAD FAILED TO SUBPOENA

Reversal and dismissal is also required because Jackson's CrR 3.3 speedy trial rights were violated. While the rights conferred by the speedy trial rule are not of constitutional magnitude, the rule nevertheless has the purpose of protecting those rights. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). The trial court is responsible for ensuring compliance with the speedy trial rules, which mandate a trial date within 60 days of arraignment, if the defendant is in custody. 167 Wn.2d at 136. Where a defendant's speedy trial rights under the rule are violated, the court is required to dismiss the charges, with prejudice. Id.

In this case, Jackson's speedy trial rights were violated and his case should have been dismissed, because the prosecution was granted multiple continuances, over defense objection, based upon the absence of a witness, even though the prosecution failed to exercise due diligence in seeking that witness' presence for trial.

a. Relevant facts

Jackson was originally charged on January 27, 1998, but, due to his failure to appear, the case was only resumed on April 30, 2008, when the bench warrant for Jackson was “cleared.” CP 1-4, 9.

On June 17, 2008, the parties appeared before Judge Serko and, based upon Jackson’s desire to hire a new attorney, the court granted a continuance. 1RP 8. The written order for the continuance indicated that request was “upon agreement of the parties” although the signature line for the defendant was not signed, with the word “refused” written in. CP 10. The reason given was “TIME NEEDED TO PREPARE CASE AND INTERVIEW WITNESSES.” CP 10. The trial date was continued to July 10, 2008, with a new expiration date listed as August 9, 2008. CP 10.

When the parties next appeared on July 1, 2008, the prosecutor asked for a continuance of the July 10 trial date. 2RP 3. The prosecutor told the court that a “key” witness for the state, a former police officer, Officer Kelstrup, was now working as a consultant in the Middle East and would be going back there “from about the first to mid part of July until roughly September 11.” 2RP 3. The prosecutor said the witness was “unavailable,” asking for a new trial date of September 15. 2RP 3.

Jackson objected that he had been back in custody since mid-April and wanted to go to trial. 2RP 4. Judge Culpepper then inquired about the missing witness, and the prosecutor declared that the witness “was one of the main police officers that conducted a search and discovered a number of the items that the State would be seeking to admit at trial.” 2RP 5. Counsel then pointed out that the search in question was a search

warrant on a house so that there were “probably seven or eight different officers” involved. 2RP 5. The prosecutor said that the witness was relevant to what “may end up being the primary count,” because the case was charged years ago, Mr. Jackson had “skipped bail” and the informant might now be deceased. 2RP 4-5.

The court then declared that it would grant the motion to continue over the defendant’s objection, because “[t]he key witness is out of the country, apparently, in Iraq, until mid-September.” 2RP 5. Trial was to be set as soon as possible after September 15. 2RP 6.

In the written order, Judge Culpepper indicated both that the motion was brought by the state and that it was “upon agreement of the parties.” CP 11. Again, the signature line for the defendant was not signed. CP 11. Instead, “[r]efused to sign” was written in. CP 11. The reason for the continuance was listed as “Key witness for state is out of the country and unavailable until mid-September, 2008.” CP 11. The trial date was continued to September 15, with the new expiration date listed as October 15, 2008. CP 11.

At that time, the prosecution had not issued any subpoenas for the current trial. On September 11 and 12, 2008, it issued four subpoenas. See CP 303-306. None of them were for Kelstrup. CP 303-306. Kelstrup was also not listed on the witness list the prosecution filed on September 12<sup>th</sup>. CP 307-308.

When the parties appeared again on September 15, the prosecutor was in trial. 2RP 7-8. Defense counsel asked for Judge Culpepper to start the case that day, noting that there were “some discovery issues.” 2RP 8.

The court asked if “[r]ealistically” the prosecutor would not be able to start the trial on the following Monday and whether that would work for the defense, and counsel said he had a pre-assigned case set for October 1 which he had to be at and that he would be gone on vacation the last week in October, so that the “date of the 13<sup>th</sup>” of November for trial was “realistic.” 2RP 9. Mr. Jackson objected that he wanted to have trial as soon as possible. 2RP 9. At that point, the court asked why the case had been delayed 10 years from the charging and was told it was on “warrant status” because Jackson had failed to appear for trial. 2RP 9. The judge then said:

So Mr. Jackson failed to appear for trial years ago resulting in a warrant and today he doesn’t want to waive speedy trial. Well, I’m going to grant the motion to continue.

2RP 9. The written order on the motion to continue indicated that the continuance was because “DPA IN TRIAL DEPT. 4. DEFENSE PREASSIGNED OCT. 1 DEPT. 5.” CP 12. Jackson again did not sign; the notation that he “declines to sign” was on his signature line. CP 12. Trial was continued to November 13, 2008, with the new expiration date listed as December 12, 2008. CP 12.

On November 13, the prosecutor was ill, so a continuance for a week was requested. 2RP 12. Mr. Jackson again objected. 2RP 12. The written order indicated that Jackson was “to be informed” and that the new expiration date was December 19, 2008. CP 58.

On November 20, the prosecutor was present and told Judge Culpepper that the parties were there for a “motion to continue” and other matters. 2RP 14. The court told the parties that it had asked if any judges

were available to hear the potentially dispositive motions in the case but everyone was apparently in trial or ill. 2RP 14-15. The prosecutor then asked for a new date for the motion hearing and the court said it could be the following Tuesday. 2RP 15. Jackson objected, noting this was the date he was scheduled for trial and he wanted to go forward. 2RP 15.

The court responded:

Well, there are no courtrooms available this afternoon. If you want, we can set the trial over until Monday, but that won't get the motions heard before trial. If we assign the whole thing out, they can be heard by the trial judge.

2RP 16.

At that point, the prosecutor told the court she had "witness issues," because the "very key witness" was now in Afghanistan. 2RP 16. The prosecutor said she had tried to find other witnesses who could testify about the same thing as that witness but had not really had much luck.

2RP 16. She said the witness was going to be back probably about the second week of February, so she wanted a trial date within the second or third week of that month. 2RP 17. The court then granted the motion to continue stating that, while Jackson had been waiting for awhile for trial,

this is a 1998 case and he was out on warrant status for about 10 years, so it's not really surprising the State might have some problems with witnesses after ten years and a crucial witness apparently is serving in Afghanistan and will be back, so we'll set it some date soon after his return.

2RP 18. Counsel objected that, if the motion to suppress was granted, the state would not need that witness and trial could go forward on the other counts. 2RP 18. He asked the court not to set a trial date for February but instead to set the motion and trial date for earlier. 2RP 18. The court then

said it would set a trial and motion date for earlier, the following Tuesday the 25th, for the motion to suppress, and the case could be continued if the motion was denied. 2RP 19.

In the written order, Judge Culpepper indicated the continuance was required “in the administration of justice” and that the reason was:

Crucial witness (Kelstrup) is serving out of the country and unavailable until February, 2009. If Def’s motion is denied, the trial will likely be continued to accommodate Kelstrup’s return.

CP 59. Jackson did not sign. CP 59.

The prosecution had not yet subpoenaed Kelstrup at that time and in fact had issued no subpoenas since those issued in September. See CP 303-311.

On November 25, 2008, Judge Orlando heard and denied the CrR 3.6 motion to suppress. RP 15-16. After discussion of some other issues and a motion the defendant had regarding the enhancement, the court asked the “current trial date” and the parties told him it was that same day, “[s]omewhat artificially.” RP 32. The prosecutor told the court that the situation was “one of my key officers, the officer who inventoried the case, is Sean Kelstrup; he is now serving in Afghanistan” and was anticipated to be back in February. RP 32. The prosecutor said that the court had set the motion so that it could be heard and that it was anticipated with “then-Officer Kelstrup’s unavailability it would be continued until February.” RP 33. The prosecutor then reiterated that Kelstrup was “critical” and that “setting a February date would be consistent with Officer Kelstrup being able to appear.” RP 33. She said if

she could find an officer to “similarly testify” he would notify the defense and that she had no desire to have Jackson “sit here any longer than he has to, but there is no way I can get Kelstrup back from Afghanistan on my subpoena.” RP 33.

Counsel objected that Jackson was arrested in California on April 12, 2008, and had been in Pierce County since April 30. RP 13-14. The court then stated:

Well, under the old speedy trial rule, it would appear that the State has indicated [a] problem with a significant witness who is unavailable due to military commitment serving out of the country. That would appear to be good cause to continue the trial date to a date when that witness can be back absent there being other witnesses that could come forward and provide the same kind of testimony.

RP 34. The court also said the witness was out of the prosecutor’s “ability to return him to the US at this point.” RP 34. Counsel then pointed out that the contractor “was here sometime earlier,” that he is here for “stints” which appeared to be three months on and three months off but that he had been “around before during the pendency of this case.” RP 34.

Counsel was sure that the officer had been available to testify at some point between April 30 of 2008 and November 25, 2008, that day. RP 35.

At that point, the prosecutor said she inherited the case from another prosecutor at some point and her understanding was that the stints were 90 days in Afghanistan with a week on either end to get there and then five days in the interim to meet with family. RP 35. She said “I do not consider him available because, in fact, the meeting doesn’t even take place in this state. So for all intents and purposes, for court purposes, he is unavailable in excess of 90 days.” RP 35. The prosecutor stated that

she noted that a continuance to September was that she was in trial and defense counsel was unavailable because he was preassigned on another case. RP 35. She said that was “the limited knowledge” she had about the officer’s “availability” but that she did not think it impacted her position “or the good cause.” RP 36. She recommended February 18<sup>th</sup>. RP 36. The court then granted the continuance. RP 36-37.

In the written order, the new trial date was set at February 18, 2009, with the new expiration date set as March 18, 2009. CP 60. The judge indicated that the continuance was required “in the administration of justice” and that the reason was

Key state’s witness (S. Kelstrup) currently out [of] country on job and unavailable to state. Good cause/unavailability of wit[ness] to State.

CP 60. Jackson did not sign. CP 60.

Although the prosecution issued some subpoenas on February 6, 2009, none of them was for Kelstrup. See CP 309-11. The list of witnesses filed that day, however, listed Kelstrup as a state’s witness. CP 312-13. Subpoenas filed February 9, 10, 13 and 17 were not for Kelstrup, either. CP 314-20.

On February 18, 2009, when the parties appeared again, the prosecution asked for another continuance based on Kelstrup’s absence. 3RP 3. The prosecutor declared Kelstrup was a “necessary” witness, was “currently in Kabul” and would be back “within the next couple of days,” but that the prosecutor then had a “preplanned vacation.” 3RP 3. The prosecutor asked for a trial date of March 10. 3RP 3.

Jackson objected yet again. 3RP 3. After stating that it seemed

“realistic and good cause” to continue the case “based on the State’s witness,” the judge asked if Kelstrup was deployed with the military. 3RP 4. The prosecutor said he was a civilian contractor whom the prosecutor assumed worked with the military. 3RP 4. The court then asked if there was a risk of Kelstrup leaving again, but the prosecutor said it would not be an issue with the new trial date. 3RP 5. Over Jackson’s objection, the court said there was “[g]ood cause” to continue the case in order to ensure Kelstrup’s presence. 3RP 5. The written order continued the trial to March 10, with the new expiration date of April 9, 2009. CP 71. The reason for the continuance was listed as “Civilian contractor for the military - trial set to ensure his presence. State’s witness will return to US in the next couple of days. DPA on vacation 2/26 & 3/2.” CP 71. Jackson did not sign; the signature line indicated “objects.” CP 71.

None of the subpoenas filed by the prosecutor on February 26 or 27 were for Kelstrup, although he was again listed as a witness on the state’s witness list. CP 321-29. It was only in a set of subpoenas filed on March 3, 2009, dated February 27, 2009, that the prosecutor finally issued a subpoena for Kelstrup. CP 330-38.

On March 10, the prosecutor asked for another continuance because another officer was out of state for a family death. 4RP 3. Jackson objected and the court found “good cause” to continue the case to March 16. 4RP 3-4. The court’s order indicated the new expiration date as April 15, 2009. CP 72.

On March 16, the prosecutor asked for another continuance because there were no available courtrooms. 5RP 3. Jackson objected

and the court granted the continuance but held there were “29 days time for trial tomorrow.” 5RP 4. The order reflected that holding. CP 73.

On March 17, Jackson moved to dismiss based on the violations of his speedy trial rights. RP 101. He reminded the court of all of the prior continuances, including the repeated, lengthy continuances which had been granted over his objection based on Kelstrup’s unavailability, i.e., the continuance from July 1-September 1, 2008, from November 20-November 25, 2008, and from November 25, 2008, to February 18, 2009. RP 102-03.

During all that time, counsel said, the prosecutor had never issued a subpoena for Kelstrup. RP 103. It was only in late February of 2009, counsel noted, that the prosecutor finally issued a subpoena to try to ensure Kelstrup’s presence at trial. RP 105.

Counsel argued that, had the prosecutor informed the court that the state had not issued a subpoena for Kelstrup prior to requesting the lengthy continuances, the court had granted the continuances without the full picture and in error. RP 103-104. At some point, counsel said, the court could have ordered Kelstrup’s testimony preserved by some other means and the case could have gone forward. RP 103. During all of this time, counsel noted, the prosecutor had managed to get further testing done on evidence, to Jackson’s detriment. RP 103-105

The prosecutor argued that the delays had been based upon “good cause” because Kelstrup was “unavailable.” RP 106-107. While admitting that Kelstrup had not been subpoenaed, the prosecutor argued, Kelstrup had always made himself available for trial whenever he was in

the country. RP 109. The prosecutor reminded the court that the initial lengthy delay in the case prior to the new proceedings commencing had been because of Jackson's failure to appear, and claimed there was no "prejudice" in the continuances. RP 107-109.

In denying the motion to dismiss, the court stated that it was reasonable for someone to be out of the country if they were working with the military. RP 109-11. The court also said, "[i]t's hard to find any substantial prejudice to Mr. Jackson when his ten year absconding led to the death of a key witness." RP 110-11. The court therefore denied the motion to dismiss. RP 110-11. When Kelstrup later testified, he said he was only contacted about the case by email in summer of 2008 and again in early January or February of 2009. RP 288-90.

b. Jackson's speedy trial rights were violated

The trial court erred in denying the motion to dismiss the case, because Jackson's speedy trial rights were violated by the repeated continuances over Jackson's objection, based upon Kelstrup's absence, when the prosecution had failed to use due diligence to secure his presence.

While in general, a trial court's decision to grant or deny a motion for a continuance is reviewed for abuse of discretion, abuse of discretion is not the standard for review of a violation of the speedy trial rule. State v. Saunders, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009). An alleged violation of the speedy trial rule, however, is reviewed de novo. Kenyon, 167 Wn.2d at 135. Reversal and dismissal of the charges with prejudice is required for violations of the speedy trial rule regardless

whether the defendant shows that he suffered some specific prejudice as a result, in contrast to cases where violations of the constitutional speedy trial rights are alleged. See Kenyon, 167 Wn.2d at 136; Saunders, 153 Wn. App. at 220.

In this case, the charges against Jackson should be dismissed with prejudice based upon the multiple violations of his CrR 3.3 speedy trial rights. Under CrR 3.3(b)(1)(i), a defendant who is in custody must be brought to trial within 60 days of arraignment. Under CrR 3.3(c)(2), however, the “commencement date” for the running of the speedy trial rules is reset when the defendant fails to appear, so that the new commencement date starts at the date of the defendant’s next appearance. CrR 3.3(c)(2)(ii). It appears that Jackson’s first appearance after the return on the bench warrant was May 1, 2008, the date the court set conditions for his release, such as bail.

Under CrR 3.3(e), certain times are excluded from the 60 day calculation. CrR 3.3(e)(3) excludes continuances granted by the court if they are granted under CrR 3.3(f), i.e., either upon a written agreement of the parties or based upon a motion by the court or a party permitting a continuance “required in the administration of justice.” An “administration of justice” continuance can only be granted if it will not prejudice the defendant. CrR 3.3(f).

When a time is excluded from the 60-day calculation under CrR 3.3(e), the “allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5).

In this case, the first continuance granted on June 17, 2008, was

based in part upon Jackson's desire to hire new counsel. 1RP 8; CP 10. With a new expiration date of August 9, 2008, the time for trial period thus expired on September 8, 2008.

The next extension, on July 1, 2008, was at the prosecutor's request and over Jackson's objection, based upon Kelstrup's absence. 2RP 3-4. The continuance was to September 15. CP 11. This extension is the first one Jackson contends was invalid and in violation of his rights to speedy trial, because the prosecution failed to exercise due diligence in securing Kelstrup's presence for trial prior to requesting the lengthy extension.

In general, the unavailability of a material state's witness may be a valid basis for granting a continuance beyond the speedy trial date provided 1) there is a valid reason for the unavailability, 2) the witness will become available within a reasonable time and 3) there is no substantial prejudice to the defendant. State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988). There is an additional requirement, however, which is that the party seeking the continuance must show that it exercised due diligence in trying to secure the absent witness' presence for trial. See State v. Adamski, 111 Wn.2d 574, 579, 761 P.2d 621 (1988). Put another way, a party's "failure to make 'timely use of the legal mechanisms available to compel the witness' presence in court' preclude[s] granting a continuance for the purpose of securing the witness' presence at a subsequent date." Id., quoting, State v. Toliver, 6 Wn. App. 531, 533, 494 P.2d 514 (1972). And this means issuing a subpoena. Adamski, 111 Wn.2d at 579.

In Adamski, the Supreme Court reiterated that it had “long held” the position that “due diligence requires the proper issuance of subpoenas to essential witnesses.” 111 Wn.2d at 578. As a result, “the issuance of a subpoena is a critical factor in granting a continuance” to secure a witness’ presence. State v. Wake, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989). Indeed, it is an abuse of discretion to grant a continuance beyond the speedy trial date based upon the need to secure a witness’ presence if the party seeking the continuance failed to issue a subpoena for that witness, because that failure amounts to a lack of due diligence. See State v. Hairychin, 136 Wn.2d 862, 864, 968 P.2d 410 (1998).

Here, as the prosecutor would concede months later, no current valid subpoena had been issued for Kelstrup as of July, 2008. Yet the prosecution sought - and received - a several month long continuance beyond the speedy trial expiration date, over Jackson’s objection, in order to secure Kelstrup’s absence. Because the prosecution had failed to exercise due diligence by issuing a subpoena for Kelstrup, the continuance was an abuse of discretion and a violation of Jackson’s speedy trial rights under CrR 3.3.

Jackson’s speedy trial rights were not only violated by the July 1, 2008, extension but also on several other continuances. The continuance from September 15 to November 13, based upon the unavailability of counsel, would have been valid had Jackson’s speedy trial rights not already been violated by that time. With the new expiration date of December 12, 2008, under CrR 3.3(b)(5), the time for trial expiration would have been January 11, 2009. The continuance on November 13,

based on the prosecutor's illness, validly would have changed the new expiration date to December 19, 2008, and would have extended the final date to January 18, 2009. In granting the extension from November 20 to November 25, the trial court did not indicate a change in the new expiration date. On November 25, 2008, however, the court granted the prosecution's request for an extension of the time for trial beyond the January 18 date, to February 18, setting the new expiration date as March 18. RP 36-37.

With the extension from November 25, 2008, to February 18, 2009 Jackson's CrR 3.3 rights were again violated. Again, the court granted another lengthy extension over Jackson's objection, based upon Kelstrup's absence. RP 32-33. Again, the court was misled into believing the prosecution had established "good cause" for the continuance based on valid "unavailability" of the witness. See CP 60. Indeed, in asking for this extension, the prosecutor actually implied that she had made an effort to serve a subpoena on Kelstrup, declaring that she could not get him back from Afghanistan "on my subpoena." RP 33.

Yet the prosecution had *still* failed to issue a subpoena for Kelstrup. As a result, it had still failed to exercise the minimal requirements of due diligence to seek Kelstrup's presence. The multiple month long continuance was thus granted in error and there was a further violation of Jackson's CrR 3.3 rights.

Those rights were violated yet again on February 18, 2009, when the court granted a further continuance based on Kelstrup's absence, over Jackson's objection. 3RP 5; CP 71. This continuance, to March 10, was

again beyond the valid expiration date in January. And even after repeatedly declaring Kelstrup's importance as a witness and the necessity of having him present for trial, the prosecution *still* had not issued a subpoena for him as of February 18, 2009, nearly 7 months after the first continuance had been granted to ensure his presence. Again, this continuance was in violation of Jackson's CrR 3.3 and an abuse of the court's discretion, because the state had not used due diligence.

The continuances granted by the court, over Jackson's objection, in order to secure Kelstrup's presence, violated Jackson's CrR 3.3 speedy trial rights, because the prosecution had not even bothered to subpoena Kelstrup and thus had failed to exercise due diligence as required.

Notably, in denying the motion to dismiss based upon the CrR 3.3 violations, the trial court focused on whether it was "reasonable" for someone to be out of the country, like Kelstrup. RP 109-11. But the question is not whether it is "reasonable" for a witness to be unavailable - the question is whether the prosecution has made the required minimal effort to try to ensure the witness' availability. See, e.g., Adamski, 111 Wn.2d at 579. If anything, the fact that the witness was likely to be absent from the state actually makes the issuance of a subpoena even more important, because such a document creates a legal obligation to appear. See, e.g., State v. Goddard, 38 Wn. App. 509, 685 P.2d 674 (1984). By failing to even issue a subpoena for Kelstrup, the prosecutor effectively - and impermissibly - left Jackson's speedy trial rights up to the vagaries of Kelstrup's schedule.

Further, the trial court's focus on whether there was "prejudice" to

Jackson from the violation of his CrR 3.3 rights was in error. See RP 107-109. CrR 3.3(h) does not provide that a defendant must establish “prejudice” in order to be entitled to dismissal with prejudice of the charges when the rule is violated. Nor is proof of prejudice required. Kenyon, 167 Wn.2d at 136; Saunders, 153 Wn. App. at 220; see also, State v. Raschka, 124 Wn. App. 103, 111, 100 P.3d 339 (2004).

Indeed, it appeared that the trial court was, in effect, punishing Jackson for “his ten year absconding,” over and over. Not just in denying the motion to dismiss but indeed during several of the motion hearings, the court commented on Jackson’s failure to appear, apparently relying on that failure as justification for granting continuances over Jackson’s objection. RP 110-11, 2RP 9, 18.

There is no question that the court was frustrated that Jackson, who had caused lengthy delay by failing to appear, wanted to stand on his speedy trial rights. But the speedy trial rule is not erased or suddenly inapplicable to a defendant because they at some point failed to appear. Instead, the rule specifically provides the remedy for that conduct: resetting the speedy trial period. CrR 3.3(c)(2)(ii).

Further, Jackson had already been given consequences for fleeing. Not only was the prosecution allowed to introduce evidence of his flight at trial, the prosecutor relied on it, repeatedly, in closing argument as evidence of “consciousness of guilt” and breaking “the promise” he made to appear. RP 496-98.

Jackson’s speedy trial rights under CrR 3.3 were repeatedly violated. Reversal and dismissal with prejudice is required.

3. THE PROSECUTOR COMMITTED SERIOUS,  
PREJUDICIAL AND CONSTITUTIONALLY  
OFFENSIVE MISCONDUCT

Even if reversal and dismissal was not required based upon the error in failing to suppress the evidence and the violations of Jackson's CrR 3.3 rights, reversal and remand for a new trial would be required based on the prosecutor's constitutionally offensive misconduct.

a. Relevant facts

In rebuttal closing argument, the prosecutor read the reasonable doubt instruction, telling the jury that reasonable doubt was "a concept that's difficult to define." RP 513. A few moments later, the prosecutor apparently showed the jurors the image of puzzle pieces, using that image as an analogy for reasonable doubt:

I submit to you that this example may illustrate what reasonable doubt in fact is. Right? So you, the jury, are the fact finders. And you have been asked to determine if you can figure out what state this is, okay? And you start off at the beginning of the fact finder of the trial like in this case with zero information. And then one witness testifies and give you kind of the general shape and not a very good shape.

RP 517. At that point, counsel objected, stating the prosecutor was "minimizing [the] burden of proof." RP 517. The court then stated the jury had "been instructed as to the burden of proof required in the State, and the fact [the] State has the burden of proof." RP 517. The prosecutor then went on:

And so, you get one witness who gives you a shape, right? But that's only a small piece of the puzzle. Is that Detective Vold says it's a gun. Not much other evidence at that time.

And so witness after witness, comes in and someone testifies, you know, "There's this little city that's kind of on the water, I think, I am not sure, I don't know the name of it, but I

know that there's something called the Space Needle. I am sure of that."

But you know? Not sure of the name.

Okay? Again you get a little bit more evidence, another witness comes in and says, "Okay, yeah I am not really sure about any of all that, but I know that there's an ocean to the west, if this is north, "and there's an ocean to the west of this state. And I think it starts with a 'P," I am not sure."

RP 518. Counsel again objected and the following exchange occurred:

[COUNSEL]: Once again, Your Honor, I am going to renew my objection, this minimizes the burden of proof.

[PROSECUTOR]: Closing argument, Your Honor.

[COUNSEL]: Line of argument.

THE COURT: Well, again, this is argument; it's not evidence. The jury's instructed as to what the burden of proof is, and they will need to recall that in their deliberations.

RP 518. The prosecutor went on:

So you get that witness, right, who testifies that there's an ocean, you get another witness, "There's an international border here, I know that. And that's Canada. I know that north of this state that we don't know the name of that you, will be charged with finding what the name is. We know Canada is to the north.

Again more witnesses and [the] puzzle starts to be put together.

Well, we know that there's a state over here, don't know the name, famous for their potatoes, right? And you get more little bits and pieces. "Yeah, there's a mountain range. I think there's a mountain down here that erupted at some point."

And so I submit to you, part of argument, that in determining what the name of the State is, you have to look at the big picture. Like this case. You can't focus on one little individual item with your blinders on, right? Because a scale by itself is just a scale.

RP 519. A moment later, the prosecutor told the jury that the witnesses "provided pieces of the puzzle" and that when the jurors took "a step

back” and looked at “the big picture, they could say the puzzle depicted the State of Washington beyond a reasonable doubt, in the same way they could reach the conclusion that Jackson was guilty in this case. RP 519.

b. The arguments were constitutionally offensive misconduct

In making these arguments, the prosecutor committed serious, prejudicial misconduct, in violation of Jackson’s due process rights to have the state carry its constitutionally mandated burden of proof. Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Further, it is misconduct for a public prosecutor, with all of the weight of his office behind him, to misstate the applicable law when arguing the case to the jury, and this is especially true where the misstatements affect the defendant’s constitutional rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

That is exactly what the prosecutor did in this case when he made his lengthy “puzzle” analogy. Recently, in, State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), this Court condemned the very same kind of argument:

The prosecutor’s comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury’s role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require**

**when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper.**

153 Wn. App. at 431 (emphasis added).

Indeed, many courts have disapproved of comparing the decision-making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977). This is because “[t]he degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so.” 364 N.E.2d at 1273 (quotation omitted) (emphasis added).

Here, the prosecutor did not compare the certainty required to decide the case with that required to make *important* personal decisions -

he compared it to the trivial matter of what picture is shown on a jigsaw puzzle. RP 517-19. Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor's constitutional burden, the prosecutor's arguments trivialized the juror's decision into something far less. As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure that it a puzzle depicted a certain picture when there was only half of the puzzle completed. The prosecutor's arguments thus told the jury that it effectively had to be convinced of guilt only by a preponderance i.e., that it was more likely than not that Mr. Jackson was guilty - the same standard they would use in deciding the incredibly trivial question of what picture was on a puzzle.

These arguments - and the misstatements - were not trivial but went to the heart of the entire case against Jackson. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the "touchstone" of that system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the Supreme Court has recognized, correct application of the standard is the primary "instrument for reducing the risk of convictions resting on factual error." Id.

Further, as this Court noted in Anderson, the correct standard of

reasonable doubt is the means by which the presumption of innocence is guaranteed, so that it absolutely essential to ensure that the jury is not misled as to the correct standard. Anderson, 153 Wn. App. at 431-32; see State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

Because this misconduct misstated and minimized the prosecutor's constitutionally mandated burden of proof and the jury's proper role, it directly affected Jackson's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him. As a result, the constitutional "harmless error" standard applies. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard requires the prosecution to shoulder a very heavy burden, which the prosecution cannot meet unless it can convince this Court that *any* reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is not met simply if there was sufficient evidence to support a conviction under the "sufficiency of the evidence" standard. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Instead, there must be "overwhelming, untainted evidence" establishing guilt. Id.

Here, there is not such evidence. The prosecution did not introduce evidence at trial regarding the alleged drug sales to the informant. Instead, the only evidence upon which it relied was the evidence seized in the search. While that evidence indicated that someone who lived at the home was likely involved in drug dealing, there was also another person living there, who could have been the culprit and

could have had access to Jackson's paperwork and put them into the safe. Put simply, a jury which was not improperly misled as to the true burden of proof the prosecution had to shoulder could well have found that the state failed to prove Jackson's guilt beyond a reasonable doubt. Because the evidence was disputed, the jury "could have been swayed" by the misconduct into applying an improper, lesser standard of the prosecutor's burden, the misconduct cannot be deemed harmless, and reversal is required. See Romero, 113 Wn. App. at 795-96.

Indeed, reversal would be required even under the non-constitutional harmless error standard. Because counsel repeatedly objected to the misconduct, reversal is required if there is a substantial likelihood the misconduct affected the verdict. See, e.g., In re Personal Restraint of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998). Improper remarks are considered in light of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). In this case, the remarks went to the heart of the state's case and its constitutional burden of proof. Further, the remarks pervaded the prosecutor's argument. Finally, the instructions given were insufficient, given the complexity of the concept of reasonable doubt and the effectiveness of the improper analogy in swaying the jury. Reversal is therefore required, regardless which standard is applied.

4. THE SENTENCING COURT ERRED IN COUNTING  
THE CALIFORNIA CONVICTIONS IN THE OFFENDER  
SCORE

Even if the convictions are not reversed based upon the other

errors, reversal and remand for resentencing is required, because the sentencing court erred in counting the prior California robbery convictions in Jackson's offender score.

a. Relevant facts

At sentencing on May 14, 2009, Jackson argued, *inter alia*, that the robbery convictions out of California were not comparable to Washington felonies. RP 543. After a few moments, the court set the case over because it wanted to look at the issues in more depth. RP 543-45.

When the parties next appeared, the prosecutor argued that the two robbery counts were comparable to Washington felonies for sentencing purposes and should add a point to the offender score because they were served concurrently and committed prior to 1986. RP 550. The prosecutor then argued that, while Washington's robbery statutes required immediacy of the threat, the state was not required to prove that the crimes "matched word-for-word the Washington equivalent." RP 551.

At that point, the court cited to an unpublished decision of the court of appeals in which the California and Washington statutes were found comparable, State v. Labarbera, 138 Wn. App. 1007, 2007 WL 1129575 (2007), review denied, 163 Wn.2d 1002 (2008). RP 552. The prosecutor declared that the case was "correct." RP 552.

Counsel disagreed. RP 554. He pointed out that Labarbera did not address an important difference between the Washington and California crimes - the immediacy of the threat. RP 543. He noted that, in Washington, under cases such as State v. Gallaher, 24 Wn. App. 819, 604 P.2d 185 (1979), the force or fear must be immediate and must be used to

obtain or retain possession of the property or prevent or overcome resistance to the taking. RP 554. In contrast, he pointed out, under the California statute, the “fear” element of robbery was more broadly defined and included threats of harm in the future. RP 555. As a result, counsel argued, while both statutes require taking by force or fear, only Washington requires that the force or fear be immediate and that it be used to obtain or retain possession or prevent or overcome resistance, so that the California statute was broader. RP 555.

Indeed, counsel noted, another unpublished case, State v. Dukes, 120 Wn. App. 1028, 2004 WL 370766 (2004), which had examined the “immediacy” issue had concluded that the California and Washington statutes were not comparable as a result. RP 543.

Because the California crime was broader, counsel argued, the “comparability” analysis as it had previously existed required the court to examine the facts underlying the prior conviction in order to determine whether they were comparable to the Washington crime. RP 555. Counsel argued, however, that it was not proper to do so any longer, because such fact-finding ran afoul of our new understanding of a defendant’s rights to trial by jury after Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), but could no longer do so without violating the defendant’s constitutional rights under Blakely and its progeny. RP 555.

In sentencing Jackson, the court first found that the California robbery convictions were “comparable” to Washington robberies, relying on the unpublished decision as the authority for that proposition. RP 558.

The court said both require taking personal property from another or in his immediate presence, against his will, by the use of force or fear, with a specific intent to steal. RP 558. The court found that “sufficient.” RP 559.

The court then counted the California robberies as one point towards Jackson’s offender score towards each offense. CP 267-80.

b. The court erred in counting the robberies in the offender score because they were not comparable

This Court should reverse and remand for resentencing, because the sentencing court’s ruling on the comparability of the California robberies was in error.

Under RCW 9.94A.525(3), when a prior conviction is from out-of-state, the prosecution bears the burden of proving not only the existence of that conviction but also that the conviction was “comparable” to a Washington state felony. See State v. Ford, 137 Wn.2d 472, 475-76, 973 P.2d 452 (1999). This is not simply a matter of form but is instead a “mandatory step in the sentencing process” which the court is required to engage. 137 Wn.2d at 482; see RCW 9.94A.525(3).

There are two separate inquiries in relation to “comparability.” State v. Morley, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1988). First, the court must ask if there is “legal comparability,” i.e., if the elements of the out-of-state and in-state crimes at the time of the out-of-state crime were “substantially similar.” See, In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If there is legal comparability, the out-of-state conviction is properly counted in the offender score and the

inquiry ends. Id. If, however, the elements of the two crimes are not “substantially similar,” the “factual comparability” test is applied. Id. Under that analysis, the sentencing court looks at certain evidence regarding the out-of-state crime, in order to determine if the conduct committed out-of-state would have violated a comparable Washington statute. Lavery, 154 Wn.2d at 255.

Prior to Blakely, supra, there were no limits on the “factual comparability” test. See, e.g., Lavery, 154 Wn.2d at 258. Since Blakely was decided, however, courts conducting that test are limited to the fact finding in which they may engage. Lavery, 154 Wn.2d at 258. As a result, sentencing courts may only examine facts that were admitted, stipulated to or proved to a finder of fact beyond a reasonable doubt in conducting a “factual” comparability analysis. Lavery, 154 Wn.2d at 258. To engage in any further examination of the “underlying facts of a foreign conviction” would be “problematic” in light of the defendant’s rights to trial by jury under Blakely. Lavery, 154 Wn.2d at 258. This is especially so where the foreign statute is broader than Washington’s, because “there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” 154 Wn.2d at 257-58; see also, State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), review denied in part, granted in part and on other grounds, 154 Wn.2d 1031 (2005), further proceedings, 131 Wn. App. 591, 128 P.3d 146 (2006), review denied, 160 Wn.2d 1002 (2007).<sup>6</sup>

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<sup>6</sup>The remand was based upon a Blakely issue. See Ortega, 131 Wn. App. at 595.

In this case, the prosecution alleged - and the sentencing court found - that the 1985 California robbery convictions were legally comparable to robbery in Washington state. CP 187-89; RP 550-54. The court erred in making that ruling, because the California statute was actually broader and no factual comparability could be established.

As a threshold matter, the court - and the parties - erred in relying on unpublished cases of the courts of appeals on this issue. It is absolutely true that, in Dukes, supra, the appellate court declared that the California robbery statute was not comparable to the Washington statute, while in Labarbera, supra, a different court held to the contrary.

Neither of these holdings, however, could be applied to this case. Unpublished cases have no precedential authority and may not be cited or relied on as setting forth the law. See State v. Acrey, 97 Wn. App. 784, 786 n.1, 988 P.2d 17 (1999) (under former RAP 10.4(h)); see GR 14.1(a). Further, since September 1, 2007, it has been clear that these mandates apply not only to appellate court proceedings but also to those in trial court. See GR 14.1(a) (effective September 1, 2007).

Thus, it was wholly improper for the court and parties to rely on either Labarbera<sup>7</sup> or Dukes. To the extent the sentencing court's decision depended upon such reliance, that decision was in error.

Further, the court erred in finding that the California and Washington crimes were legally comparable. To decide legal

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<sup>7</sup>In the interests of full disclosure, counsel for appellant was also counsel for Labarbera. See Labarbera, 138 Wn. App. at 1007; Acrey, 97 Wn. App. at 786 n. 1 (proper to rely on unpublished cases for facts which were established therein in relation to relevant parties).

comparability, the sentencing court “must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” Ford, 137 Wn.2d at 479. In 1985 (as now), the Washington robbery statute, RCW 9A.56.190, defined the crime as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of another. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. Such taking constitutes robbery whenever it appears that, although the taking is fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Thus, in this state, a robbery is only committed when the defendant either uses or threatens to use “*immediate* force, violence or fear of injury” to a protected person. RCW 9A.56.190 (emphasis added). It is not enough that there be a threat of *future* force, violence or fear of injury, because the threatened harm must be immediate, which Washington courts have defined as while the robbery is taking place. Gallaher, 24 Wn. App. at 822; see State v. Shcherenkov, 146 Wn. App. 619, 191 P.3d 99 (2008), review denied, 165 Wn.2d 1037 (2009).

In California, however, the crime of robbery does not require such immediacy in all cases. California Penal Code § 211 defines robbery as follows:

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

California Penal Code § 212 further defines the “fear” element contained in § 211, as follows:

The fear mentioned in Section 211 may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

Cal. Penal Code § 212. Thus, unlike the Washington statute, the California statute omits the immediacy requirement for certain cases, i.e., when the fear is of an unlawful injury to the person or property of either the person robber or any relative of his or member of his family. As a result, in California, unlike in this state, a defendant “can commit robbery by a nonimmediate threat of injury to [certain] persons or property.” See People v. Lockwood, 186 A.D.2d 985, 985, 589 N.Y.S.2d 129 (1992).

Thus, the California statute defines robbery more broadly than the offense is defined in Washington and the two offenses are not legally comparable.

Further, the “factual comparability test” was not met. For that test, the sentencing court must look at whether the defendant’s conduct in the foreign state would have violated the comparable Washington statute. See In re Personal Restraint of Crawford, 150 Wn. App. 787, 797, 209 P.3d 507 (2009). In reaching this conclusion, the sentencing court is limited to looking at and relying on only those facts presented by the prosecution which were admitted, stipulated to or proven beyond a reasonable doubt in the other state. Lavery, 154 Wn.2d at 258. Only if the record establishes that the out-of-state court necessarily found facts that would support each element of the comparable Washington crime can the out-of-state

conviction count towards the offender score. See State v. Russell, 104 Wn. App. 422, 442-43, 16 P.3d 664 (2001).

The record did not establish such facts in this case. Below, the evidence the prosecution presented of the California robberies was contained in Exhibit C of the sentencing memorandum. CP 195-201. That evidence consisted of an “Abstract of Judgment” and another document, which simply listed the two counts as “robbery,” citing the relevant California code section number (211) and the date of conviction as 12/24/85, and indicated a date of arrest as 9/12/85 with a charge listed as “209(B) PC KIDNAPPING TO COMMIT ROBBERY.” CP 195-201.

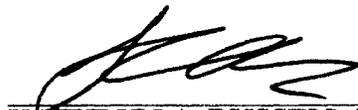
Nothing in those documents established that the California robberies were based upon immediate force, fear or threat, rather than on the broader definition of robbery permitted in that state. As a result, even if the trial court had properly found that there was not legal comparability, it could not have found factual comparability. Because the sentencing court erred in counting the California robberies in the offender score, even if this Court does not reverse and dismiss based upon the other errors detailed herein, reversal and remand for resentencing is required.

E. CONCLUSION

Because the warrant was not supported by probable cause, the evidence seized which formed the entire basis for the state's case should have been suppressed. Further, Jackson's CrR 3.3 rights were violated when the prosecution was granted multiple continuances to secure a witness' presence even though the prosecutor had failed to exercise due diligence by issuing a subpoena for that witness. In the alternative, the trial was tainted and a new trial should be granted based on the serious, prejudicial misconduct. Finally, the sentencing court erred in counting the California robberies in the offender score. This Court should so hold.

DATED this 4th day of March, 2010.

Respectfully submitted,



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I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,  
Tacoma, WA. 98402;

TO: Norman Jackson, DOC 331280, Coyote Ridge CC, P.O. Box 769,  
Connell, WA. 99326-0769.

DATED this 4<sup>th</sup> day of March, 2010.

  
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