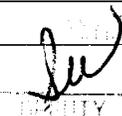


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COURT OF APPEALS

NO. 39321-2-II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NORMAN JACKSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando (motions and trial)
The Honorable Judge Susan K. Serko (Continuances)
The Honorable Ronald E. Culpepper (Continuances)

No. 98-1-00394-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted the evidence where the warrant was supported by probable cause because there was a nexus to the defendant's house where he returned to the house after each sale to the informant?
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3. Whether the prosecutor's closing argument was proper and didn't not constitute misconduct where in arguing reasonable doubt he encouraged the jury to look at the big picture, not the pieces and thereby compared the case to a puzzle?
4. Whether the court properly included the defendant's two California robbery convictions in his offender score where they are comparable to Washington's robbery in the second degree?

B. STATEMENT OF THE CASE.

1. Procedure

On January 27, 1998 the State filed an information charging the defendant, Norman Jackson in Count I with unlawful delivery of a controlled substance, methamphetamine; in Count II with unlawful

delivery of a controlled substance, methamphetamine; Count III with unlawful possession of a controlled substance with intent to deliver, methamphetamine; Count IV, unlawful possession of a firearm in the first degree; Count V, unlawful possession of a firearm in the first degree. CP 1-4. Counts I-III all had a school bus route stop sentence enhancement, and Count III also had a firearm sentence enhancement. CP 1-4.

The defendant failed to appear for trial on October 12, 1998 and a bench warrant was issued for his arrest. CP 9; 345.

The defendant was arrested in California on April 12, 2008 and appeared in court again on May 1, 2008. 1 RP 33, ln. 23-25; CP 346.

From June 17, 2008 through March 16, 2009 there were a number of continuances of the trial date, many of which were due to the unavailability of a key witness for the State who was out of the country, but expected to return and testify at trial within a year. *See* CP 10, 11, 12, 58, 59, 60, 71, 72, 73.

The defense filed a motion to dismiss the firearm sentence enhancement. CP 39, 21-37. The court deferred ruling on that motion until the trial. CP 349-50. The defense also filed a motion to dismiss the evidence as the fruit of an illegal search based on an allegation that the warrant was not supported by probable cause. CP 38, 40-57.

The motions were heard November 25, 2008. 1RP 1-32. The court denied the motion to suppress the evidence for lack of probable cause in the warrant. 1 RP 16, ln. 12-13.

The case was assigned to trial on March 17, 2009. CP 351. That day the defense filed a motion to dismiss for violation of the defendant's rights under CrR 3.3, the time for trial rule.¹ CP 74-112. That motion was denied. CP 32-64. The defendant also filed a motion for dismissal under CrR 4.7 (discovery). CP 113-141.

The State filed an Amended Information on March 25, 2009 that dismissed Counts I and II. CP 152-53. Later that day, the State filed Second Amended Information that dismissed Count V and removed the school bus route stop enhancement from Count III, and altered the firearm sentence enhancement on Count III to a deadly weapon enhancement. CP 181-82. Finally, later that day, the State filed a Corrected Second Amended Information that corrected the deadly weapon enhancement on Count III back to a firearm sentence enhancement. CP 183-84. The court ultimately dismissed the firearm sentence enhancement, finding that there was not a sufficient nexus to connect the firearm to the crime. CP 362.

¹ The State refers to CrR 3.3 as the time for trial rule in order to prevent it being confused with the constitutional right to a speedy trial under the state and federal constitutions.

The jury found the defendant guilty of unlawful possession of a controlled substance in Count III and guilty of unlawful possession of a firearm in the first degree in Count IV. CP 178, 180.

At sentencing the State proved a number of out of State convictions. CP 185-262; 267-280. Based on those offenses and other criminal history, on May 29, 2009 the court sentenced the defendant to serve a total of 90 months, based on a standard range of 87-116 months on Count III. CP 267-280.

The notice of appeal was timely filed on June 1, 2009. CP 287-299.

2. Facts

On January 26, 1998 the Tacoma Police Department served a warrant 1210 S. Sheridan in Tacoma, the address of one Norman Jackson, the defendant. 2 RP 189, ln. 18 to p. 190, ln. 17; p. 221, ln. 17 to p. 223, ln. 15.

In the kitchen the officers found a larger triple beam scale and a smaller digital scale, as well as mail addressed to Jackson at the residence. 2 RP 193, ln. 13-18.

Officers found a safe in the attic. 3 RP 236, ln. 14-20. Inside the safe officers found about 200 grams of methamphetamine, and 2 x 2 inch Ziploc bags commonly used to package narcotics; 1 x 1 inch Ziploc bags,

razor blades and similar paraphernalia. [Ex. 17A.] 3 RP 270, ln. 23 to p. 271, ln. 14; 274, ln. 20 to p. 275, ln. 4; p. 282, ln. 1 to p. 285, ln. 17; 5 RP 409, ln. 11 to 410, ln. 9. Also within the safe was a letter addressed to the defendant at the searched address, as well as a Montgomery Ward membership card in the defendant's name. 3 RP 272, ln. 15 to p. 273, ln. 6. Within the safe officers also found crib notes that contained possible transaction information. 3 RP 273, ln. 11 to p. 274, ln. 19.

In a closet, officers found a gun case that contained a large bore rifle. 4 RP 309, ln. 13 to p. 310, ln. 8.

In the master bedroom officers found two "rocks" of methamphetamine. [Ex. 17b.] 4 RP 356, ln. 10 to p. 358, ln. 13; 5 RP 405, ln. 3 to p. 407, ln. 25.

Additional facts relevant to specific arguments will be identified within the context of those arguments.

C. ARGUMENT.

1. THE COURT BELOW PROPERLY DENIED THE SUPPRESSION MOTION WHERE THE WARRANT WAS VALID.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court.

State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). See also *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (“Generally, the probable cause determination of the issuing judge is given great deference.”); *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988) (“[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.”). Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984)(citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

When a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967)(quoting, with approval from *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

In reviewing probable cause, the court looks to the four corners of the search warrant itself. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Additionally, when evaluating the determination of probable cause: “The experience and expertise of an officer may be taken into account... In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 505, *review denied*, 119 Wn.2d 1005 (1992).

Because this court reviews the magistrate’s determination of probable cause and decision to issue the warrant for abuse of discretion, the trial court’s assessment of probable cause is an issue of law that is reviewed de novo. *State v. Nelson*, 152 Wn. App. 755, 773-74, 219 P.3d 100 (2009). *See also Neth*, 165 Wn.2d at 182. This court essentially stands in the same position as the trial court when it conducts its review. Accordingly, the trial court’s determination after the suppression hearing is largely moot on appeal, as are the trial court’s findings and conclusions.

Probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *Maxwell*, 114 Wn.2d at 769. As the court in *State v. Mejia* noted, "...an affidavit need not establish proof of criminal activity, but merely probable cause to believe it occurred." *State v. Mejia*, 111 Wn.2d 892, 901, 766 P.2d 454 (1989).

Probable cause for a search warrant requires two nexuses: first, a nexus between criminal activity and the item to be seized; and second, a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A warrant to search for drugs in a particular location must contain specific facts tying the place to be searched to the crime. *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006)(citing *Thein*, 138 Wn.2d at 147). Therefore, it is not sufficient if a warrant relies on generalized beliefs about the habits of drug dealers. *G.M.V.*, 135 Wn. App. at 372. However, it is sufficient if the warrant declaration contains information that the dealer left from or returned to a location before or after selling drugs. *G.M.V.*, 135 Wn. App. at 372.

Here, police had ample evidence providing probable cause to believe that the defendant delivered controlled substances and that

evidence of that crime would be found at his residence. The following facts come from the probable cause declaration. *See* CP 48-50.

According to the probable cause declaration to the search warrant, a confidential informant advised Tacoma police that the informant could purchase controlled substances from a black male known to the informant as "Joe." Joe was about 5'9", of medium build with very short hair. CP 48.

Officers arrange to have the informant purchase narcotics from Joe on January 7, 1998. CP 48. Joe delivered an ounce of methamphetamine to the informant at the informant's apartment in exchange for \$750. CP 48. Officers conducted surveillance of the apartment during the transaction and also used a wire, for which they had obtained authorization. CP 49. The methamphetamine field-tested positive. CP 49.

Joe had arrived at the informant's apartment in a red Chevrolet Suburban. CP 49. Officers followed the suspect after he left the transaction and observed him return to 1210 S. Sheridan St. where he left the vehicle and entered the residence. CP 49.

On January 19, 1998 officers arranged for the informant to make another purchase of narcotics from Joe. CP 49. Joe again delivered an ounce of methamphetamine to the informant's apartment in exchange for payment of \$825. CP 49. The methamphetamine again field tested

positive. CP 49. Officers again used a wire, and conducted surveillance on the informant's apartment. CP 49.

Joe again arrived at the apartment in a red Suburban. CP 49. After Joe left the informant's apartment, officers followed him. CP 49. A uniformed officer in a marked patrol unit was able to pull the Suburban over and obtain identification from "Joe" who produced a Washington driver's license that identified him as Norman Jackson, d.o.b. 05-17-66. CP 49. The transaction took place at about 1600 hours. CP 49. The suspect was then followed to the Lincoln Lanes bowling alley where he entered and remained for at least two hours after which officers ceased tailing him. CP 49.

However, other officer maintained surveillance at the residence at 1210 Sheridan and at about 2015 hours officers observed the suspect return to the residence in the Suburban and enter the house. CP 50.

On 01-20-98 and 01-21-98 the Suburban was observed in the driveway of the house as well. CP 50.

Here, the officers observed the defendant deliver methamphetamine in two separate transactions. In the first transaction, he was followed back to the residence at 1210 Sheridan immediately after the transaction. That alone is sufficient to establish a nexus to the residence. In the second transaction, the defendant did not return to the residence until four hours after the transaction. However, immediately after the transaction a uniformed patrol officer stopped the defendant and obtained

his identification. The defendant then went to a bowling alley where officers know he remained for over two of those four hours.

The issuance of the warrant was not an abuse of the judge's discretion. It would have been reasonable for the Judge to infer that the defendant likely did not keep his narcotics and paraphernalia at the bowling alley. It would have also been reasonable for the issuing judge to infer that the defendant may have gone to the bowling alley instead of home because he was nervous after being stopped after leaving a drug transaction.

While it is not known if the defendant went anywhere between the bowling alley and the house, the defendant did ultimately return to the house. Where the defendant returned to the house immediately after the first transaction and ultimately returned to the house four hours after the second transaction, there was a sufficient nexus to permit the court to infer that evidence of the crime of delivery of controlled substance might be found at the house. That is especially so where the defendant would have had over \$800 in controlled buy money from the second transaction.

Where the two transactions are taken together and the defendant returned to the home immediately after the first transaction and four hours after the second transaction, and where the defendant obtained large cash payments in each transaction, the issuing judge reasonably concluded there was a nexus between the house and the crime. There was probable cause to believe that at the least the buy money could be found at the

house. In light of the great deference given to the issuing judge, the defendant's challenge is without merit and should be denied.

2. JACKSON'S RIGHTS UNDER THE TIME FOR TRIAL RULE WERE NOT VIOLATED.

The court substantially revised CrR 3.3, the time for trial rule in 2003. The post 2003 version of the rule is the authority that controls this case. For that reason, cases interpreting the earlier version of the rule are generally inapplicable to the present version.

Court rules are interpreted according to the rules of statutory interpretation. *State v. Collins*, 152 Wn. App. 429, 216 P.3d 463 (2009) (citing *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007)).

It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). The rule requires that a defendant be brought to trial within 60 days if the defendant is detained in jail or within 90 days if the defendant is released from jail or was never detained in jail in the first place. CrR 3.3(b)(1)-(2).

The initial date by which trial must commence is the date of arraignment. CrR 3.3(c)(1). However, the commencement date, and thus the time for trial deadline, can be reset based upon any of several different occurrences. CrR 3.3(c)(2). Relevant here are first, waiver by the defendant and second, appellate review or stay. CrR 3.3(c)(2)(i), (iv). There are also a number of periods that shall be excluded from the

computation of the time for trial. CrR 3.3(e). Two of those are relevant to this analysis: continuances; and unavoidable or unforeseen circumstances. CrR 3.3(e)(3), (8).

Continuances may be granted upon written agreement of the parties, or on the motion of the court or a party when required in the administration of justice and the defendant will not be prejudiced in his defense. CrR 3.3(f). A continuance made on the motion of the court or a party must be made before the time for trial has expired, and the court must state on the record or in writing the reasons for the continuance. CrR 3.3(f)(2).

Certain periods, including continuances, are excluded from the computation of the time for trial. CrR 3.3(e). Those periods are referred to in the rule as “excluded periods.” CrR 3.3(b)(5), (e). Additionally, the time for trial shall not expire earlier than 30 days after the excluded period. CrR 3.3(b)(5). The net effect of this provision is that after any excluded period, the time for trial remaining is either the time that was remaining before the continuance, or 30 days, whichever is greater.

Finally, the rule specifically provides that no case shall be dismissed for time-to-trial reasons except as expressly required by the rule, a statute or state or federal constitutions. CrR 3.3(h). Under the rule, a charge not brought to trial within the time limit shall be dismissed. This is the only basis permitting dismissal under the rule. CrR 3.3(h).

A decision to grant or deny a continuance falls within the sound discretion of the trial court. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005)(citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). The reviewing court will not disturb the trial court's decision unless it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Flinn*, 154 Wn.2d at 199 (citing *Downing*, 151 Wn.2d at 272).

When CrR 3.3 is applied to the facts of this case, the case did not persist past the allowable time for trial period.

The State filed the information and the defendant was arraigned on January 27, 1998. CP 1-4; 342-43. The defendant failed to appear for his trial date on October 13, 1998. CP 345. The defendant remained on warrant status until he was arrested in California on April 12, 2008. 1 RP 33, ln. 23-25. He was then transferred to the Pierce County jail and appeared in court again for the first time on May 1, 2008. CP 347-48. That day, trial was set for June 26, 2008. CP 346.

After a failure to appear, the commencement date of the defendant's time for trial was reset and the defendant's new commencement date was the date of the defendant's next appearance in court. CrR 3.3(c)(2)(ii). So the defendant's time for trial re-commenced on May 1, 2008 and was 60 days because he was in custody. CP 347-48. Thus, his time for trial deadline was June 30, 2008.

On June 17, 2008 the court entered an order continuing trial. The order purported to be based on the agreement of the parties. However, under CrR 3.3(f)(1) a continuance on written agreement of the parties must be signed by the defendant. Here the defendant did not sign the order and instead “Refused” was entered on the signature line for the defendant. CP 10.

However, the court can also continue the case on the motion of a party when the continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. CrR 3.3(f)(2). On the continuance form, the reason given for the continuance was that time was needed to prepare the case and interview witnesses. CP 10. Additionally, the defendant indicated he wanted time to get a new attorney on his case and asked the court to postpone the June 17 hearing for another week. RP 06-17-08, p. 4, ln. 4 to p. 6, ln. 11.

The defense does not challenge this continuance, presumably because these reasons also constitute a reason for the continuance required in the administration of justice that would not prejudice the defendant. *See* CrR 3.3(f)(2). This is particularly the case where the motion for the continuance was brought at least in part by the defendant. *See* CP 10.

Because the court could validly continue the trial date for administrative necessity, and counsel’s need to prepare case and interview witnesses was in fact administrative necessity, this continuance did not violate the defendant’s rights under the time for trial rule. This is

particularly so where the bringing of such a motion on behalf of any party waives that party's objection to the requested delay. CrR 3.3(f)(2).

Again, the defense does not challenge the June 17 continuance on appeal. Br. App. 34. The June 17 continuance established a new time for trial deadline of August 9, 2008, which was 30 days after the new trial date of July 10, 2008. *See* CrR 3.39(b)(5); (e)(3).

It is several of the subsequent continuances that the defense challenges on appeal.

On July 1, 2008 the court entered another order continuing the trial date from July 10, 2008 until September 15, 2008. CP 11. That order indicates that the motion was brought by the State, was entered upon agreement of the parties and that the reason was that: "Key witness for State is out of the country and unavailable until mid-September, 2008." CP 11. Again, the defendant refused to sign. CP 11.

However, on the record the defense objected and the court granted the defense motion for the continuance over the defense objection. RP 07-01-08, p. 5, ln. 20-23. The defendant asked the court if that would violate his speedy trial, and the court said it didn't think so or it wouldn't have done it, but that there may be other opinions. RP 07-01-08, p. 6, ln. 3-6.

It is obvious from the record that the defense objected to the continuance and the court granted the continuance over the defense objection. Thus, when the box for agreement of the parties was marked on the order continuing trial, it was clearly a scrivener's error and the court

intended to mark that the continuance was required in the administration of justice. RP 07-01-08, p. 3-6; CP 11.

The July 1, 2008 order continued the case to September 15, 2008, which resulted in a time for trial deadline of October 15, 2008. *See* CP 11; CrR 3.39(b)(5); (e)(3).

On September 15, 2008 the court entered an order continuing the trial date because:

“DPA in trial dept. 4. Defense preassigned Oct. 1, Dept. 15.”
CP 12. No box was checked indicating who brought the motion, whether it was by agreement of the parties or required in the administration of justice. The defendant refused to sign the order. CP 12.

From the record it is clear that the court continued the trial because the deputy prosecutor was in trial on another matter, and that this continuance was over the express objection of the defendant. RP 09-15-09, p. 9, ln. 22 to p. 10, ln. 3. Accordingly, it is obvious from the record that the court continued the case because doing so was required in the administration of justice. It is also clear that once it decided to grant the continuance, the court considered defense counsel’s trial schedule in another case on which counsel was preassigned for trial and continued this case beyond that date. RP 09-15-09, p. 7-10.

On September 15, the case was continued to November 13, 2008, resulting in a new time for trial deadline of December 13, 2008.² *See* CP 12; CrR 3.39(b)(5); (e)(3).

On November 13, 2008 the case was continued on the motion of the State because: “DPA ill.” CP 58. Again, the court failed to check the box indicating that the continuance was required in the administration of justice (or any other basis). CP 58. The defendant’s signature block is marked “To be informed.” CP 58. However, it is clear from the record that the defendant was present as he expressed his objection to the court. RP 11-13-08, p. 12, ln. 19-22. The court continued the matter over the defendant’s objection. RP 11-13-08, p. 12, ln. 23-24. Once again, it is clear from the record that the continuance was granted as required in the administration of justice, even though the court did not explicitly so indicate.

The case was continued to November 20, 2008 resulting in a new time for trial deadline of December 20, 2008. *See* CP 58; CrR 3.39(b)(5); (e)(3).³

On November 20, 2008, the court granted a continuance on the motion of the State because: “Crucial witness (Kelstrup) is serving out of the country and unavailable until February, 2009 if Def’s motion is

² The order incorrectly lists the “expiration date” as 12-12-08.

³ Once again, the order incorrectly lists the “expiration date” as 12/19/08.

denied, the trial will likely be continued to accommodate Kelstrup's return." CP 59⁴. This time the court did check the box to indicate the continuance was required in the administration of justice. CP 59.

That the continuance was due to the unavailability of the witness is also clear from the transcript of the proceeding. *See* RP 11-20-08, p. 17, ln. 15 to p. 20, ln. 13. The court continued the case to November 25, 2008 resulting in a new time for trial deadline of December 25, 2008, although the court did not fill out the time for trial deadline on the form. *See* CP 59; RP 11-20-08, p. 19, ln. 21 to p. 20, ln. 6. The court also advised the defendant that if he did not prevail on his motions and witness Kelstrup was necessary for trial the case would be continued until February when the witness would again be available. RP 19, ln. 7 to p. 20, ln. 13.

On November 25, the court continued the trial date until February 18, 2009 because Witness Kelstrup was unavailable. CP 60. The court granted the continuance because it was required in the administration of justice. CP 60. The new time for trial deadline was March 20, 2009. CP 60; CrR 3.39(b)(5); (e)(3).⁵ *See also* 1 RP 32-36.

On February 18, 2009 the case was continued to March 10, 2009 because witness Kelstrup was not yet available, but would be soon. CP 71. The continuance was ordered as required in the administration of

⁴ The defense had a number of motions to suppress evidence, dismiss the firearm enhancement, etc. *See* CP 21-37, 38; 39; 47-50; RP 11-13-08, p. 12, ln. 24 to p. 13, ln. 6; RP 11-20-08, p. 14, ln. 17 to p. 15, ln. 6.

justice. CP 71. The new time for trial deadline was April 9, 2009 [which was correctly listed on the form].

On March 10, 2010 case was continued to March 16 for the reason: “Primary (3.5) witness unavailable for 1 week due to death in family (out of state).” CP 72. *See also* RP 03-10-09, p. 3-4. The continuance was granted as required in the administration of justice. CP 72. This continuance resulted in a new time for trial deadline of April 15, 2009. *See* CP 72; CrR 3.39(b)(5); (e)(3).

On March 16, 2009 the case was continued because no courtrooms were available. CP 73. The court maintained the same time for trial deadline of April 15, 2009 and reduced the count of days remaining for trial by 1 to 29. CP 73.

On March 17, the case was assigned to the Honorable James Orlando for trial. CP 351.

In support of the argument on appeal that the time for trial deadline was violated, the defense argues that that witness Kelstrup was not on the State’s witness list and had not been subpoenaed. That argument is without merit. First, defense counsel did not object to the lack of inclusion of former Officer Kelstrup on the witness list because the officer was identified in the discovery and it was well known to the defense the State intended to call him as a witness. The State did not issue him a

⁵ Again, the “expiration date” was incorrectly listed on the order as 3-18-2009.

subpoena because it could not legally serve him when he was out of the country.⁶ The State did exercise due diligence to do what it lawfully could to maintain contact with the witness and have him testify when the State could lawfully do so.

The defense also argues that in granting the continuances the court was punishing the defendant for his long absence. However, a review of the record indicates that was not the case. Rather, the court referred to the defendant's long absence as one of the reasons causing the trial to be delayed until such a point that former Officer Kelstrup was unavailable. In other words, the court was making a record that the defendant's own long absence was itself a partial cause of the delay that resulted from Kelstrup's unavailability.

Here the court clearly granted all the continuances over the defendant's objections as required in the administration of justice, even if that basis was not always clearly articulated. The court had such authority to grant the continuances under the facts of this case. Accordingly, the defendant's argument should be denied as without merit.

⁶ Indeed, the reason he was not on the witness list was because including him on it would have cause a subpoena to be automatically electronically generated each time subpoenas were reissued. In many jurisdictions it can be a crime for officers from another state to attempt to serve persons directly without following the process established by the foreign jurisdiction.

3. THE PROSECUTOR DID NOT COMMIT ERROR IN CLOSING.

On a claim of prosecutorial misconduct the defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) "remarks must be read in context." *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the

misconduct affected the jury's verdict. *Finch*, 137 Wn.2d 792 at 839.

The trial court is best suited to evaluate the prejudice of the statement.

State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

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Here, the defense argued reasonable doubt in its closing. *See* 6 RP 500-501. In rebuttal the State's argument addressed the issue of reasonable doubt. The defense has challenged some of the argument by the State, claiming that it misstated the applicable law and trivialized the State's burden of proof beyond a reasonable doubt. Br. App. 41. *See generally*, Br. App. 39-45. However, the State's argument neither misstates the law, nor trivialized the State's burden. Rather, it encouraged the jury to consider the totality of the evidence together rather than individual pieces in isolation and that if it did so, it could make a finding beyond a reasonable doubt.

The relevant argument is as follows:

MR. SANCHEZ [Deputy Prosecutor]: Defense counsel stated mere knowledge is not enough. Again, look at your packet. You can determine whether or not mere knowledge, that statement, "mere knowledge," is not enough is inside the packet.

And reasonable doubt again being difficult to define. 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 gives you kind of the general shape and not a very good shape.

MR. WHITEHEAD [Defense Counsel]: Your Honor, I object to this line of questioning, minimizing the burden of proof.

THE COURT: Well, again, the jury has been instructed as to the burden of proof required in the State, and the fact State has the burden of proof.

MR. SANCHEZ: Thank you.

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 Volds 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."

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

MR. SANCHEZ: Closing argument, Your Honor.

MR. WHITEHEAD: 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.

MR SANCHEZ: 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 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.

And if you put the blinders on, and say, that's only a potato, how can you possibly make a determination as to what the State is?

And so then, when you take a step back and you say, you know what? Couple witnesses weren't 100 percent; but they provided pieces of the puzzle.

So when you take a step back and you look at the big picture, you can say, "That is the State of Washington beyond a reasonable doubt," the same way that when you take off your blinders, and you reasonable jurors look at the overwhelming evidence, you will come to the conclusion that the defendant is guilty of unlawful possession of a controlled substance with intent to deliver methamphetamine, and unlawful possession of a firearm in the second degree beyond a reasonable doubt.

Thank you.

This argument does not trivialize reasonable doubt. Rather, it asks the jury to consider the totality of the evidence, the "big picture" rather than focusing on the individual pieces of evidence in isolation. Thus, the State's argument in this case can be distinguished from the case relied on by the defense. *See* Br. App. 41 (*citing State v. Anderson*, 153 Wn. App.

417, 220 P.3d 1273 (2009). In *Anderson*, the prosecutor argued that “reasonable doubt” is a standard that the jury applies every single day and then went to compare it to the choice to have elective surgery, dental surgery, whether to get a second opinion, but that if they go ahead with the surgery they were convinced beyond a reasonable doubt. *Anderson*, 153 Wn. App. at 425. The prosecutor in *Anderson* went on to also compare reasonable doubt to the decision to leave children with a babysitter, or changing lanes on the freeway. *Anderson*, 153 Wn. App. at 425.

The court in *Anderson* held it was error for the prosecutor there to compare reasonable doubt to everyday decision making because it “minimized the importance of the reasonable doubt standard and of the jury’s role in determining whether the State has met its burden.” *Anderson*, 153 Wn App. at 431. Nonetheless, the court did not reverse based on that error because the statements were not so flagrant and ill intentioned as to warrant reversal where the defendant did not object and any prejudice to the defendant could have been cured by the court. *Anderson*, 153 Wn. App. at 432.

This case is nowhere close to the trivializing statements in *Anderson*. The point of the argument was that the jury should look at the totality of the evidence, the “big picture” rather than the individual pieces

of evidence in isolation. That argument was reasonable and proper.

Accordingly, the defendant's argument should be denied as without merit.

4. THE COURT DID NOT ERR WHEN IT INCLUDED
THE DEFENDANT'S CALIFORNIA ROBBERY
CONVICTIONS IN THE OFFENDER SCORE.

At sentencing, the State has the burden to prove the defendant's prior criminal history by a preponderance of evidence. RCW 9.94A.500; *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). Likewise, the State has the burden to prove by a preponderance the existence and comparability of a defendant's prior out-of-state-convictions. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). The State has the burden of proving that a foreign conviction is comparable to a Washington crime by preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is a felony in Washington. *State v. Weiland*, 66 Wn. App. 29, 831 P.2d 749 (1992). The appellate court reviews the sentencing court's calculation of the offender score de novo. *State v. Rivers*, 130 Wn. App. 689, 128 P.3d 608 (2005).

To prove the defendant's prior criminal history, the State may introduce a certified copy of a judgment or other comparable documents

of record of prior proceedings. *State v. Ford*, 137 Wn.2d 472, 480, 973 P. 2d 452 (1999), citing *State v. Cabrera*, 73 Wn. App. 165, 868 P. 2d 179 (1994). In cases where the defendant does not challenge the previous criminal history, the state may introduce Washington judgments that used out-of-state convictions to calculate the offender score to prove an out-of-state conviction is comparable to a Washington felony. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). If the State alleges the existence of prior convictions and the defense not only fails to object, but agrees with the State's depiction of the defendant's criminal history, the defendant waives his right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007).

A defendant's offender score is calculated according to RCW 9.94A.525. Where a defendant has out-of-state criminal history, the court must classify those convictions according to comparable Washington law. RCW 9.94A.525(3); *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005).

Sentencing courts must employ a two stage test to determine the comparability of a foreign offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First the court looks to the foreign conviction to determine if it is legally comparable to a Washington offense. If the

offense is not legally comparable, the court may then look at the foreign offense to determine if it is factually comparable. *See also In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). If a foreign offense is either legally or factually comparable, it counts in the defendant's offender score. *See Thieffault*, 160 Wn.2d at 415. But a foreign conviction is neither legally nor factually comparable, it shall not count in the offender score. *See Thieffault*, 160 Wn.2d at 415.

A foreign offense is legally comparable "if the elements of the foreign offense are substantially similar to the elements of the Washington offense" that was in effect at the time the foreign offense was committed. *Thieffault*, 160 Wn.2d at 415; *State v. Morley*, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998).⁷ *See also Lavery*, 154 Wn.2d at 255 (citing *Morley*, 134 Wn.2d at 605-606). To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Morley*, 134 Wn.2d at 606. The elements of the foreign conviction must be substantially similar to the Washington elements. *Thieffault*, 160 Wn.2d at 415. If the elements of the two statutes are not substantially similar, and especially if the foreign statute is broader than the Washington definition of the particular crime,

the two crimes are not legally comparable. *State v. Morley*, 134 Wn.2d at 606.

If the two crimes are not legally comparable, the trial court must then determine whether the foreign offense is factually comparable. *Morley*, 134 Wn.2d at 606. In making a factual comparison, the sentencing court may only rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *Thiefault* 160 Wn.2d at 415.

The defendant was convicted in 1985 of two counts of robbery as defined in California Penal Code 211. *See* CP 199. “Robbery” in California is defined as:

[T]he taking of personal property in the possession of another against the will and from the person or immediate presence of that person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.

Compare, People v. Davis, (2009) 94 Cal.Rptr.3d 322, 387, 46 Cal.4th 539, 609, 208 P.3d 78, 133 and (App. 4 Dist. 1980) *People v. Cortez*, 163 Cal.Rptr. 1, 3, 103 Cal.App.3d 491, 496. *See also People v. Pham* (App. 1 Dist. 1993) 18 Cal.Rptr.2d 636, 638, 15 Cal.App.4th 61, 65. As these cases show, this definition of robbery has been consistent in

⁷ The court in *Morley* used the word “identical,” rather than “substantially similar.”

California since 1980, and therefore since the date of the defendant's crime in 1985.

In Washington, the statutory provision controlling robbery is RCW 9A.56.210. There, robbery is defined as:

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 anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

State v. Johnson, 150 Wn. App. 663, 678, 208 P.3d 1265 (2009) (quoting RCW 9A.56.190).

These elements are substantially similar. Moreover, the court has recently held that the elements of robbery in California and Washington are substantially similar. *See State v. Sublett*, --- Wn. App. ---, 231 P.3d 231 (2010).

The defense attempts to argue that the California elements of robbery are broader than Washington. This argument relies on the fact the use of the word "immediate" in the Washington definition of robbery, which requires the unlawful taking of property from the person of another by use or threatened use of "immediate force," violence or fear of injury.

The defense argues that the California statute does not require the use of “immediate force.”

However, in California, robbery is accomplished by a taking from the person or “immediate presence” of that person by use of force or the threat of force. The defendant’s argument is without merit because where a California robbery involves a taking from a person or immediate presence of that person by force or threat of force, the force is necessarily always immediate.

While the defendant attempts to distinguish between California’s “immediate presence” and Washington’s “immediate force” that distinction fails when the crime of robbery is properly considered as a whole. “Immediate” in the context of robbery is synonymous with “present.” However, both “immediate” and “present” suffer the same ambiguity of meaning because they each can be interpreted with the same different meanings. “Immediate” can mean “present” in space as physically present, or it can mean present in time in the sense of “now” or “at this moment.” Thus, “immediate” means:

...**3 a** : occurring, acting, or accomplished without loss of time : made or done at once: INSTANT... **b** of time : near to or related to the present...

but also means:

... 4 : characterized by contiguity : existing without intervening space or substance ... : being near at hand : not far apart or distant...

WEBSTER'S THIRD NEW WORLD DICTIONARY 648 (2002)

The defendant's argument attempts exploit this equivocal meaning by availing himself of one meaning of "immediate" [space] under the California definition of robbery and then using the other meaning of "immediate" [time] under the Washington definition of robbery.

However, when the crime of robbery is considered as a whole, it is clear that under both the California and Washington definitions of robbery the use of "immediate" can only mean the same thing. First, both definitions derive from the common law. Under the common law, robbery was defined as, "[t]he illegal taking of property from the person of another, or in the person's presence, by violence or intimidation..." See BLACK'S LAW DICTIONARY, 8th ed, p. 1354.

The crime of robbery differs from theft or larceny in that the taking of property is accomplished by means of the use or threatened use of force. See *State v. Shcherenkov*, 146 Wn. App. 619, 629, 191 P.3d 99 (2008); *People v. Smith*, 177 (2009) Cal.App.4th 1478, 1489-90, 100 Cal.Rptr.3d 24, 32. When the crime of robbery is considered as a whole, the crime is always "immediate" because it is involves taking property

from a person, in their presence by the use of force. Said otherwise, robbery always has to be an immediate crime. It is always committed in the victim's immediate presence by means of force or fear that is therefore also immediate. It thus means the same thing to "take property by force in the victim's immediate presence" or to "take personal property by immediate force." Given the nature of the crime of robbery, the two definitions, California and Washington, say the same thing by different means.

Thus, in *People v. Brito*, the court held that "Robbery's element of a taking by force or fear in the victim's immediate presence, is satisfied if force or fear cause the victim to part with his property. *People v. Brito* (1991) 232 Cal.App.3d 316, 325, 283 Cal.Rptr. 441, 446.

Robbery in California is not broader than in Washington and the defendant's argument should be denied as without merit.

D. CONCLUSION.

The court properly admitted the evidence because probable cause supported the warrant where there was a nexus to the defendant's house when he returned there after each sale of methamphetamine to the informant.

The court properly continued the trial date over the defendant's objections and the time for trial did not expire where it was clear that the

court continued the trial as required in the administration of justice because a necessary witness could return from being out of the country.

The prosecutor's rebuttal argument was proper where in addressing reasonable doubt he argued the jury should look at the big picture rather than the individual pieces and thereby analogized the case to a puzzle.

The court properly included the defendant's two California robbery convictions in his offender score where the California and Washington robbery elements are comparable.

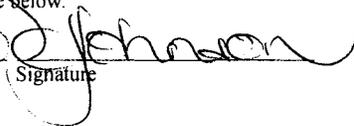
DATED: JULY 6, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/6/10
Date

Signature

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STATE OF WASHINGTON
BY