

NO. 42675-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GINGER LEANNE CRANDALL,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it granted a state's motion to continue based upon the state's failure to prepare its case in a timely manner and based upon the legislature's failure to adequately fund the state crime lab.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement against the defendant for offenses unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court violate the defendant's right's under CrR 3.3 if it granted a state's motion to continue a case beyond the time for speedy trial based upon the state's failure to prepare its case in a timely manner and based upon the legislature's failure to adequately fund the state crime lab?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement against a defendant for offenses unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On March 19, 2010, Marcus Taft returned to his home at 319 Hageman Road in rural Cowlitz County to find that someone had entered his detached garage and stolen a number of items, including presents he had purchased for his wife's birthday, sun glasses, a visor clip for the sunglasses, and a set of keys for his Range Rover. RP 97-102.¹ The total value of the stolen property exceeded \$750.00. *Id.* Upon discovering the theft, Mr. Taft called the Cowlitz County Sheriff's office, who dispatched Deputy Kelly Pattison to the scene. RP 102-105, 111-118. Once Deputy Pattison arrived, Mr. Taft gave a statement of what he had discovered and showed the Deputy a cigarette butt on the garage floor about five foot from a door. *Id.* Since Mr. Taft stated that neither he or his wife smoked, Deputy Pattison took the cigarette butt and put it in a special evidence envelope for DNA testing. RP 116-118. Once back at the Sheriff's Office, Deputy Pattison sent the envelope to the Washington State Patrol crime lab for analysis. CP 93-94.

Six days after the theft from Mr. Taft, Deputy Pattison participated in the execution of a search warrant at a local U-Haul storage unit rented by the defendant's husband, Raymond Crandall. RP 119-123. Among the many

¹The record on appeal includes three volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]".

items in the storage unit, Deputy Pattison found Mr. Taft's Range Rover keys, as well as a checkbook with the defendant's name on it. *Id.* The defendant later told another deputy that she and her husband had been homeless for a number of months and had used the storage unit to safeguard all of their possessions. RP 245-247. Although the defendant stated that she had previously had a key to the unit, she reported that her husband had recently put a second lock on the door for which she did not have a key, thereby effectively locking her out of the unit. RP 247-248. Raymond Crandall later pled guilty to the burglary and theft from Mr Taft, and received a lengthy prison sentence. RP 271.

On October 11, 2010, Deputy Pattison finally received a report from the Washington State Patrol Crime Lab. CP 93-94. According to a later probable cause statement sworn by Deputy Pattison, that report claimed that (1) the lab had been able to recover DNA from the cigarette butt, and (2) that the DNA "matched" that of a sample provided by the defendant, who had previously been convicted of a felony and provided DNA pursuant to that conviction. *Id.* Deputy Pattison's exact language from the PC statement concerning the lab report was as follows:

On 10-11-10 I received a Crime Laboratory Report from the Washington State Patrol. The Crime Lab was able to collect DNA off of the cigarette butt and said they had *located a match from the DNA*. The Crime Lab said the DNA located belonged to Ginger L. Buck. I located Ginger L. Buck in Spillman and learned Ginger Buck

is an alias for Ginger L. Crandall.

CP 93 (emphasis added).

Procedural History

By information filed December 6, 2010, the Cowlitz County Prosecutor charged the defendant Ginger Leanne Crandall with one count of second degree burglary and one count of second degree theft, alleging that she had participated in the burglary and theft from Mr. Taft's property. CP 1-2, 43-44. The defendant appeared for arraignment on December 14, 2010, at which time the court set the case for trial on February 14, 2011. RP 1-4. However, three weeks prior to the first trial date, the defendant filed a speedy trial waiver accepting February 1, 2011, as the new commencement date. CP 7-8. The new trial date set at that time was also reset when the defendant filed a speedy trial waiver on April 14, 2011. CP 13-14. That second waiver accepted May 1, 2011, as the new commencement date. *Id.*

On May 23, 2011, over three weeks after the defendant filed her second speedy trial waiver, the state filed a motion to compel the defendant to provide a DNA sample. CP 15-18. This was over five months from arraignment, and over seven months from the date Deputy Pattison had received the report from the crime lab. RP 1-4; CP 15-18, 93-94. However, while Deputy Pattison's probable cause statement had claimed that the State Crime Lab had "matched" the defendant's DNA to the DNA on the cigarette

butt, the affidavit the prosecutor filed disavowed this claim. CP 18. Rather, the prosecutor stated that “due to the limited amount of DNA available in the comparison sample, the crime lab is unable to make a clear conclusion that the samples are indeed the same individual.” *Id.*

The court first heard the state’s motion to compel the production of DNA on June 2, 2011. RP 5-13. At that time, the court refused to grant the state’s request without more information. *Id.* Thus, the court set the matter over one week. *Id.* At that time, the court again ruled that the information the state provided was confusing and insufficient to compel the defendant to provide a sample. RP 14-18. The court then continued the matter to July 14, 2011, at which time the state called a witness from the state crime lab. RP 14-18, 19-49. Following this testimony, the court held that the state had finally met its burden to compel the defendant to supply the DNA sample, which the defendant did after the hearing. RP 43-44. On July 14, 2011, the state also moved to continue the current trial date beyond the time required for speedy trial. RP 44-48. When the defense objected, the court put the matter over to July 19, 2011, for the state to file a written motion. *Id.* The state thereafter filed a written motion and affidavit. CP 34-38.

On July 19, 2011, the parties appeared before the court on the state’s motion to continue the case beyond the last date available under the defendant’s second speedy trial waiver. RP 50-56. In the affidavit, the

prosecutor indicated that “[t]he State has been attempting to obtain a DNA swab since May 23, 2011, when it filed a motion to compel defendant to provide a DNA saliva swab.” CP 36. However, the supporting affidavit said nothing as to why the state had waited over five months from arraignment and over seven months from the receipt of the crime lab report before first requesting the DNA sample. *Id.* In addition, during argument on the motion, the state also explained that one of the problems was that the crime lab was now generally refusing to even test DNA in burglary cases in lieu of testing DNA in “more major cases.” CP 53. The prosecutor’s statement on this issue was as follows:

Because the State’s crime lab is no longer allowing for evidence of DNA in the prosecution of burglary type cases to take precedent or even to test that information, they are only going to use it for the more major crimes, this was an exception to that rule.

CP 53.

Over the defendant’s continued objection, the court granted the state’s motion to continue and reset the trial for August 29, 2011. CP 55-56. The new trial date was 121 days after the commencement date set in the defendant’s second speedy trial waiver. CP 13-14.

The case finally came on for trial before a jury with the state calling eight witnesses and the defense calling four, including the defendant and her husband. CP 90-291. The state’s witnesses testified to the facts contained

in the preceding factual history. *See* Factual History. In his testimony, the defendant's husband told the jury that he routinely took his wife's old cigarettes out of the ashtray in his car to pinch out the remaining tobacco and use it to roll his own cigarettes, and that he would then discard the old cigarette butts. RP 252-262. He further stated that he had done this on the night in question and left one of his wife's cigarette butts on the floor of Mr. Taft's garage, which he had burglarized alone. RP 260-264. In fact, both the defendant and his wife testified that they had separated earlier that evening, and that the defendant's wife was unaware that he had committed the burglary. RP 252-258, 291-304.

Following the close of the defendant's case, the state put on short rebuttal, and the court instructed the jury. RP 320-322, 345-358. After instruction, the parties presented closing argument and the jury retired for deliberation, eventually returning verdicts of "guilty" on both counts. RP 358-383; CP 71-72. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 74-85, 90.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT GRANTED A STATE'S MOTION TO CONTINUE BASED UPON THE STATE'S FAILURE TO PREPARE ITS CASE IN A TIMELY MANNER AND BASED UPON THE LEGISLATURE'S FAILURE TO ADEQUATELY FUND THE STATE CRIME LAB.

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

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

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

. . . .

(2) Motion by the Court or a Party. On motion of the court or a

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

CrR 3.3(f)(2).

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

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

abused its discretion when it granted the state's motion to continue.

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

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

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

While it is an abuse of discretion to grant a motion to continue outside the time for speedy trial based solely upon the need to find "possible" or

“potential” state’s witnesses, the unavailability of a material state witness is an acceptable ground for continuing a criminal trial if there is valid reason for unavailability, the witness will become available within reasonable time, and there is no substantial prejudice to the defendant. *State v. Nguyen* , 68 Wn.App. 906, 847 P.2d 936 (1993). However, the failure of the state to make adequate arrangements to prepare its case is not a valid ground for a continuance beyond the time for speedy trial. *State v. Wake*, 56 Wn.App. 472, 783 P.2d 1131 (1989).

For example, in *State v. Wake, supra*, the state charged the defendant with three counts of possession of a controlled substance with intent to deliver. One day before trial the state moved to continue to a new date outside the time for speedy trial on the basis that the forensic scientist from the crime lab who tested the controlled substances was unavailable on the date set. The defense objected, arguing that the state had been aware of this problem for over two weeks and could have made alternative arrangements for another expert to testify. Apparently the unavailability of the witness was related to chronic under staffing at the state crime lab. The court granted the continuance. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state’s motion to continue.

The rationale of Mack is equally applicable to the use of expert

witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints. As noted by the court here, the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem. Additionally, the prosecutor knew of the conflict almost 2 weeks before trial was scheduled, and had an opportunity to make alternative arrangements. Thus, this was not an unavoidable circumstance beyond the control of the State.

Additionally, the issuance of a subpoena is a critical factor in granting a continuance. In *State v. Alford*, 25 Wn.App. 661, 665, 611 P.2d 1268 (1980) and *State v. Yuen*, 23 Wn.App. 377, 379, 597 P.2d 401, *review denied*, 92 Wn.2d 1030 (1979) continuances were affirmed because the witnesses were under subpoena. Conversely, in *State v. Smith*, 56 Wash.2d 368, 370, 353 P.2d 155 (1960) and *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972) the failure to issue subpoenas was grounds to deny motions for continuance. The issuance of a subpoena ensures a record will be made regarding the reasons for the absence of a witness and allows the opposing party an opportunity to argue the merits of unavailability. Here, there was no such record.

The court abused its discretion in granting the continuance under CrR 3.3(h)(2); the judgment is reversed and the charges are dismissed.

State v. Wake, 56 Wn.App. at 475-476.

In the case at bar, the state's failure to adequately prepare its case well exceeded the lack of diligence in *Wake*. In the case at bar, the state knew from outset that the DNA sample from the cigarette butt was the critical piece of evidence required to convict the defendant. Indeed, the state did not even charge this case until it received a report from the state crime lab in October of 2010, that the defendant's DNA "matched" the DNA on the

cigarette butt. In spite of this fact, the state went over seven months from the receipt of the crime lab report and over five months from arraignment before even asking the court to compel the defendant to provide a new DNA sample. The state did not even attempt to explain this gross lapse in preparation. In addition, while the state knew who its witnesses were and that one of its witness had moved to Canada, the state made no provisions to bring that witness back in a timely manner on the date set for trial.

Finally, as in *Wake*, part of the state's inability to adequately prepare in this case also arose from the fact that the state crime lab had significantly cut down on the types of cases for which it would even do DNA analysis, let alone a timely DNA analysis. All of these factors demonstrate that the sole basis for seeking the continuance was the state's unexcused failure to prepare its case in even a remotely timely manner. Thus, as in *Wake*, the trial court abused its discretion when it denied the state's motion to continue beyond the time required for trial under CrR 3.3. As a result, this court should vacate the defendant's convictions and remand with instructions to dismiss.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST THE DEFENDANT FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with second degree burglary and second degree theft. In her response, the defendant did not dispute the existence of these two crimes. Rather, she simply argued that the evidence was insufficient to prove that she had participated in or promoted her husband’s commission of these offenses. In this case, only three pieces of evidence link the defendant to these offenses. The first piece of evidence was the fact that her check book was found in the locker in which Mr. Taft’s car keys were found, a locker to which she previously had some access. The second piece of evidence was the testimony that she did smoke cigarettes. The third piece of evidence was her DNA on the cigarette butt found in Mr. Taft’s garage.

Looking at this evidence in the light most favorable to the state still

leaves the state short of proof beyond a reasonable doubt that the defendant participated in the crimes. The primary reason supporting this conclusion is that the DNA evidence only proves that the defendant at one time had the cigarette butt in her possession. It does not explain when that occurred and how the cigarette butt got into Mr. Taft's garage. While the jury was entitled to discount the entirety of both the defendant and her husband's testimony, as well as the evidence of the other defense witnesses on these points, it still leaves the fatal flaw of lack of proof on when the defendant's DNA got on the cigarette butt, and how the cigarette butt got into Mr. Taft's garage. Thus, in the case at bar, the court erred when it sentenced the defendant on the two offenses because the convictions are not supported by substantial evidence.

CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to dismiss with prejudice because the trial court violated the defendant's right to speedy trial, and substantial evidence does not support either conviction.

DATED this 9th day of May, 2012.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CrR 3.3

(a) General Provisions.

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

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

(3) Definitions. For purposes of this rule:

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

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

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

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

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

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

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

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

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

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

(b) Time for Trial.

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

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

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

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

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

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

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

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

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

(c) Commencement Date.

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

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

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

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

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

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

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

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

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

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

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

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

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

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

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

(1) Competency Proceedings. All proceedings relating to the

competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

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

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

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

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

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

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

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

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

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

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

(2) Motion by the Court or a Party. On motion of the court or a party,

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

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

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

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

STATE OF WASHINGTON,
Respondent,

vs.

GINGER LEANNE CRANDALL,
Appellant.

NO. 42675-7-II

AFFIRMATION OF
OF SERVICE

Cathy E. Russell, states the following under penalty of perjury under the laws of Washington State. On May 9th, 2012, I personally E-Filed and/or placed in the United States Mail the following documents with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE
3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

SUSAN I. BAUR
COWLITZ COUNTY PROS ATTY
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GINGER CRANDALL
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Dated this 9th day of May, 2012 at LONGVIEW, Washington.

/s/

Cathy Russell
Legal Assistant to John A. Hays

NO. 42675-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GINGER LEANNE CRANDALL,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it granted a state's motion to continue based upon the state's failure to prepare its case in a timely manner and based upon the legislature's failure to adequately fund the state crime lab.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement against the defendant for offenses unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court violate the defendant's right's under CrR 3.3 if it granted a state's motion to continue a case beyond the time for speedy trial based upon the state's failure to prepare its case in a timely manner and based upon the legislature's failure to adequately fund the state crime lab?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement against a defendant for offenses unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On March 19, 2010, Marcus Taft returned to his home at 319 Hageman Road in rural Cowlitz County to find that someone had entered his detached garage and stolen a number of items, including presents he had purchased for his wife's birthday, sun glasses, a visor clip for the sunglasses, and a set of keys for his Range Rover. RP 97-102.¹ The total value of the stolen property exceeded \$750.00. *Id.* Upon discovering the theft, Mr. Taft called the Cowlitz County Sheriff's office, who dispatched Deputy Kelly Pattison to the scene. RP 102-105, 111-118. Once Deputy Pattison arrived, Mr. Taft gave a statement of what he had discovered and showed the Deputy a cigarette butt on the garage floor about five foot from a door. *Id.* Since Mr. Taft stated that neither he or his wife smoked, Deputy Pattison took the cigarette butt and put it in a special evidence envelope for DNA testing. RP 116-118. Once back at the Sheriff's Office, Deputy Pattison sent the envelope to the Washington State Patrol crime lab for analysis. CP 93-94.

Six days after the theft from Mr. Taft, Deputy Pattison participated in the execution of a search warrant at a local U-Haul storage unit rented by the defendant's husband, Raymond Crandall. RP 119-123. Among the many

¹The record on appeal includes three volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]".

items in the storage unit, Deputy Pattison found Mr. Taft's Range Rover keys, as well as a checkbook with the defendant's name on it. *Id.* The defendant later told another deputy that she and her husband had been homeless for a number of months and had used the storage unit to safeguard all of their possessions. RP 245-247. Although the defendant stated that she had previously had a key to the unit, she reported that her husband had recently put a second lock on the door for which she did not have a key, thereby effectively locking her out of the unit. RP 247-248. Raymond Crandall later pled guilty to the burglary and theft from Mr Taft, and received a lengthy prison sentence. RP 271.

On October 11, 2010, Deputy Pattison finally received a report from the Washington State Patrol Crime Lab. CP 93-94. According to a later probable cause statement sworn by Deputy Pattison, that report claimed that (1) the lab had been able to recover DNA from the cigarette butt, and (2) that the DNA "matched" that of a sample provided by the defendant, who had previously been convicted of a felony and provided DNA pursuant to that conviction. *Id.* Deputy Pattison's exact language from the PC statement concerning the lab report was as follows:

On 10-11-10 I received a Crime Laboratory Report from the Washington State Patrol. The Crime Lab was able to collect DNA off of the cigarette butt and said they had *located a match from the DNA*. The Crime Lab said the DNA located belonged to Ginger L. Buck. I located Ginger L. Buck in Spillman and learned Ginger Buck

is an alias for Ginger L. Crandall.

CP 93 (emphasis added).

Procedural History

By information filed December 6, 2010, the Cowlitz County Prosecutor charged the defendant Ginger Leanne Crandall with one count of second degree burglary and one count of second degree theft, alleging that she had participated in the burglary and theft from Mr. Taft's property. CP 1-2, 43-44. The defendant appeared for arraignment on December 14, 2010, at which time the court set the case for trial on February 14, 2011. RP 1-4. However, three weeks prior to the first trial date, the defendant filed a speedy trial waiver accepting February 1, 2011, as the new commencement date. CP 7-8. The new trial date set at that time was also reset when the defendant filed a speedy trial waiver on April 14, 2011. CP 13-14. That second waiver accepted May 1, 2011, as the new commencement date. *Id.*

On May 23, 2011, over three weeks after the defendant filed her second speedy trial waiver, the state filed a motion to compel the defendant to provide a DNA sample. CP 15-18. This was over five months from arraignment, and over seven months from the date Deputy Pattison had received the report from the crime lab. RP 1-4; CP 15-18, 93-94. However, while Deputy Pattison's probable cause statement had claimed that the State Crime Lab had "matched" the defendant's DNA to the DNA on the cigarette

butt, the affidavit the prosecutor filed disavowed this claim. CP 18. Rather, the prosecutor stated that “due to the limited amount of DNA available in the comparison sample, the crime lab is unable to make a clear conclusion that the samples are indeed the same individual.” *Id.*

The court first heard the state’s motion to compel the production of DNA on June 2, 2011. RP 5-13. At that time, the court refused to grant the state’s request without more information. *Id.* Thus, the court set the matter over one week. *Id.* At that time, the court again ruled that the information the state provided was confusing and insufficient to compel the defendant to provide a sample. RP 14-18. The court then continued the matter to July 14, 2011, at which time the state called a witness from the state crime lab. RP 14-18, 19-49. Following this testimony, the court held that the state had finally met its burden to compel the defendant to supply the DNA sample, which the defendant did after the hearing. RP 43-44. On July 14, 2011, the state also moved to continue the current trial date beyond the time required for speedy trial. RP 44-48. When the defense objected, the court put the matter over to July 19, 2011, for the state to file a written motion. *Id.* The state thereafter filed a written motion and affidavit. CP 34-38.

On July 19, 2011, the parties appeared before the court on the state’s motion to continue the case beyond the last date available under the defendant’s second speedy trial waiver. RP 50-56. In the affidavit, the

prosecutor indicated that “[t]he State has been attempting to obtain a DNA swab since May 23, 2011, when it filed a motion to compel defendant to provide a DNA saliva swab.” CP 36. However, the supporting affidavit said nothing as to why the state had waited over five months from arraignment and over seven months from the receipt of the crime lab report before first requesting the DNA sample. *Id.* In addition, during argument on the motion, the state also explained that one of the problems was that the crime lab was now generally refusing to even test DNA in burglary cases in lieu of testing DNA in “more major cases.” CP 53. The prosecutor’s statement on this issue was as follows:

Because the State’s crime lab is no longer allowing for evidence of DNA in the prosecution of burglary type cases to take precedent or even to test that information, they are only going to use it for the more major crimes, this was an exception to that rule.

CP 53.

Over the defendant’s continued objection, the court granted the state’s motion to continue and reset the trial for August 29, 2011. CP 55-56. The new trial date was 121 days after the commencement date set in the defendant’s second speedy trial waiver. CP 13-14.

The case finally came on for trial before a jury with the state calling eight witnesses and the defense calling four, including the defendant and her husband. CP 90-291. The state’s witnesses testified to the facts contained

in the preceding factual history. *See* Factual History. In his testimony, the defendant's husband told the jury that he routinely took his wife's old cigarettes out of the ashtray in his car to pinch out the remaining tobacco and use it to roll his own cigarettes, and that he would then discard the old cigarette butts. RP 252-262. He further stated that he had done this on the night in question and left one of his wife's cigarette butts on the floor of Mr. Taft's garage, which he had burglarized alone. RP 260-264. In fact, both the defendant and his wife testified that they had separated earlier that evening, and that the defendant's wife was unaware that he had committed the burglary. RP 252-258, 291-304.

Following the close of the defendant's case, the state put on short rebuttal, and the court instructed the jury. RP 320-322, 345-358. After instruction, the parties presented closing argument and the jury retired for deliberation, eventually returning verdicts of "guilty" on both counts. RP 358-383; CP 71-72. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 74-85, 90.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT GRANTED A STATE'S MOTION TO CONTINUE BASED UPON THE STATE'S FAILURE TO PREPARE ITS CASE IN A TIMELY MANNER AND BASED UPON THE LEGISLATURE'S FAILURE TO ADEQUATELY FUND THE STATE CRIME LAB.

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

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

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

. . . .

(2) Motion by the Court or a Party. On motion of the court or a

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

CrR 3.3(f)(2).

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

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

abused its discretion when it granted the state's motion to continue.

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

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

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

While it is an abuse of discretion to grant a motion to continue outside the time for speedy trial based solely upon the need to find "possible" or

“potential” state’s witnesses, the unavailability of a material state witness is an acceptable ground for continuing a criminal trial if there is valid reason for unavailability, the witness will become available within reasonable time, and there is no substantial prejudice to the defendant. *State v. Nguyen* , 68 Wn.App. 906, 847 P.2d 936 (1993). However, the failure of the state to make adequate arrangements to prepare its case is not a valid ground for a continuance beyond the time for speedy trial. *State v. Wake*, 56 Wn.App. 472, 783 P.2d 1131 (1989).

For example, in *State v. Wake, supra*, the state charged the defendant with three counts of possession of a controlled substance with intent to deliver. One day before trial the state moved to continue to a new date outside the time for speedy trial on the basis that the forensic scientist from the crime lab who tested the controlled substances was unavailable on the date set. The defense objected, arguing that the state had been aware of this problem for over two weeks and could have made alternative arrangements for another expert to testify. Apparently the unavailability of the witness was related to chronic under staffing at the state crime lab. The court granted the continuance. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state’s motion to continue.

The rationale of Mack is equally applicable to the use of expert

witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints. As noted by the court here, the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem. Additionally, the prosecutor knew of the conflict almost 2 weeks before trial was scheduled, and had an opportunity to make alternative arrangements. Thus, this was not an unavoidable circumstance beyond the control of the State.

Additionally, the issuance of a subpoena is a critical factor in granting a continuance. In *State v. Alford*, 25 Wn.App. 661, 665, 611 P.2d 1268 (1980) and *State v. Yuen*, 23 Wn.App. 377, 379, 597 P.2d 401, *review denied*, 92 Wn.2d 1030 (1979) continuances were affirmed because the witnesses were under subpoena. Conversely, in *State v. Smith*, 56 Wash.2d 368, 370, 353 P.2d 155 (1960) and *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972) the failure to issue subpoenas was grounds to deny motions for continuance. The issuance of a subpoena ensures a record will be made regarding the reasons for the absence of a witness and allows the opposing party an opportunity to argue the merits of unavailability. Here, there was no such record.

The court abused its discretion in granting the continuance under CrR 3.3(h)(2); the judgment is reversed and the charges are dismissed.

State v. Wake, 56 Wn.App. at 475-476.

In the case at bar, the state's failure to adequately prepare its case well exceeded the lack of diligence in *Wake*. In the case at bar, the state knew from outset that the DNA sample from the cigarette butt was the critical piece of evidence required to convict the defendant. Indeed, the state did not even charge this case until it received a report from the state crime lab in October of 2010, that the defendant's DNA "matched" the DNA on the

cigarette butt. In spite of this fact, the state went over seven months from the receipt of the crime lab report and over five months from arraignment before even asking the court to compel the defendant to provide a new DNA sample. The state did not even attempt to explain this gross lapse in preparation. In addition, while the state knew who its witnesses were and that one of its witness had moved to Canada, the state made no provisions to bring that witness back in a timely manner on the date set for trial.

Finally, as in *Wake*, part of the state's inability to adequately prepare in this case also arose from the fact that the state crime lab had significantly cut down on the types of cases for which it would even do DNA analysis, let alone a timely DNA analysis. All of these factors demonstrate that the sole basis for seeking the continuance was the state's unexcused failure to prepare its case in even a remotely timely manner. Thus, as in *Wake*, the trial court abused its discretion when it denied the state's motion to continue beyond the time required for trial under CrR 3.3. As a result, this court should vacate the defendant's convictions and remand with instructions to dismiss.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST THE DEFENDANT FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with second degree burglary and second degree theft. In her response, the defendant did not dispute the existence of these two crimes. Rather, she simply argued that the evidence was insufficient to prove that she had participated in or promoted her husband’s commission of these offenses. In this case, only three pieces of evidence link the defendant to these offenses. The first piece of evidence was the fact that her check book was found in the locker in which Mr. Taft’s car keys were found, a locker to which she previously had some access. The second piece of evidence was the testimony that she did smoke cigarettes. The third piece of evidence was her DNA on the cigarette butt found in Mr. Taft’s garage.

Looking at this evidence in the light most favorable to the state still

leaves the state short of proof beyond a reasonable doubt that the defendant participated in the crimes. The primary reason supporting this conclusion is that the DNA evidence only proves that the defendant at one time had the cigarette butt in her possession. It does not explain when that occurred and how the cigarette butt got into Mr. Taft's garage. While the jury was entitled to discount the entirety of both the defendant and her husband's testimony, as well as the evidence of the other defense witnesses on these points, it still leaves the fatal flaw of lack of proof on when the defendant's DNA got on the cigarette butt, and how the cigarette butt got into Mr. Taft's garage. Thus, in the case at bar, the court erred when it sentenced the defendant on the two offenses because the convictions are not supported by substantial evidence.

CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to dismiss with prejudice because the trial court violated the defendant's right to speedy trial, and substantial evidence does not support either conviction.

DATED this 9th day of May, 2012.

Respectfully submitted,

A handwritten signature in cursive script that reads "John A. Hays". The signature is written in black ink and is positioned above a horizontal line.

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CrR 3.3

(a) General Provisions.

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

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

(3) Definitions. For purposes of this rule:

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

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

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

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

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

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

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

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

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

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

(b) Time for Trial.

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

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

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

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

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

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

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

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

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

(c) Commencement Date.

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

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

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

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

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

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

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

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

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

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

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

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

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

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

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

(1) Competency Proceedings. All proceedings relating to the

competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

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

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

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

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

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

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

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

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

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

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

(2) Motion by the Court or a Party. On motion of the court or a party,

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

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

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

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

STATE OF WASHINGTON,
Respondent,

vs.

GINGER LEANNE CRANDALL,
Appellant.

NO. 42675-7-II

AFFIRMATION OF
OF SERVICE

Cathy E. Russell, states the following under penalty of perjury under the laws of Washington State. On May 9th, 2012, I personally E-Filed and/or placed in the United States Mail the following documents with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE
3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

SUSAN I. BAUR
COWLITZ COUNTY PROS ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

GINGER CRANDALL
1735 GRADE ST.
KELSO, WA 98626

Dated this 9th day of May, 2012 at LONGVIEW, Washington.

/s/

Cathy Russell
Legal Assistant to John A. Hays

HAYS LAW OFFICE

May 09, 2012 - 4:33 PM

Transmittal Letter

Document Uploaded: 426757-Appellant's Brief.pdf

Case Name: State vs. Crandall

Court of Appeals Case Number: 42675-7

Is this a Personal Restraint Petition? Yes No

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

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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

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

sasserm@co.cowlitz.wa.us