

NO. 44846-7

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID WAYNE WILLIAMS,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

 1. Assignment of Error 1

 2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

 1. Factual History 3

 2. Procedural History 4

D. ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT ORDERED A COMPETENCY EVALUATION AT WESTERN STATE HOSPITAL UNSUPPORTED BY EVIDENCE SUFFICIENT TO JUSTIFY SUCH AN EVALUATION AND WHEN IT DENIED THE DEFENDANT THE RIGHT TO NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE ISSUE. 13

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT’S CONVICTION FOR SECOND DEGREE MALICIOUS MISCHIEF UNDER RCW 9A.48.080(1)(b) BECAUSE NO EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEFENDANT CREATED A SUBSTANTIAL RISK OF INTERRUPTION OR IMPAIRMENT OF SERVICES 19

<p style="text-align: center;">III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE HIS PROPOSED LESSER INCLUDED INSTRUCTION ON THIRD DEGREE MALICIOUS MISCHIEF</p>	<p>25</p>
E. CONCLUSION	28
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	29
2. United States Constitution, Fourteenth Amendment	29
3. RCW 9A.48.080	29
4. RCW 9A.48.090	30
5. RCW 10.77.060	30
6. CrR 3.3	33

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 19

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 20

State Cases

City of Seattle v. Gordon, 39 Wn.App. 437, 693 P.2d 741 (1985) 15

In re Pers. Restraint of Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) .. 15

Johnson v. Washington Dept. of Fish and Wildlife,
175 Wn.App. 765, 305 P.3d 1130 (2013) 16

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 19

State v. Gardner, 104 Wn.App. 541, 16 P.3d 699 (2001) 22, 23

State v. Harris, 122 Wn.App. 498, 94 P.3d 379 (2004) 15

State v. Hernandez, 120 Wn.App. 389, 85 P.3d 398 (2004) 22-24

State v. Kingen, 39 Wn.App. 124, 692 P.2d 215 (1984) 13

State v. Lawrence, 108 Wn.App. 226, 31 P.3d 1198 (2001) 16

State v. LeBlanc, 34 Wn.App. 306, 660 P.2d 1142 (1983) 25

State v. MacMaster, 113 Wn.2d 226, 778 P.2d 1037 (1989) 25

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 25

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 19

<i>State v. O'Neal</i> , 23 Wn.App. 899, 600 P.2d 570 (1979)	15
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984)	26
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	20
<i>State v. Turner</i> , 167 Wn.App. 871, 275 P.3d 356 (2012)	22, 24
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978)	25

Constitutional Provisions

Washington Constitution, Article 1, § 3	14, 16, 19, 25, 27
United States Constitution, Fourteenth Amendment	14, 16, 19, 25, 27

Statutes and Court Rules

RCW 9A.48.080	22, 26
RCW 9A.48.090	20, 27
RCW 10.77.060	14, 15
CrR 3.3	13, 14, 18

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it ordered a competency evaluation at Western State Hospital unsupported by evidence sufficient to justify such an evaluation and when it denied the defendant the right to notice and an opportunity to be heard on the issue.

2. Substantial evidence does not support the defendant's conviction for second degree malicious mischief under RCW 9A.48.080(1)(b) because no evidence supports the conclusion that the defendant created a substantial risk of interruption or impairment of services.

3. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it refused to give his proposed lesser included instruction on third degree malicious mischief.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to speedy trial under CrR 3.3 if it orders a competency evaluation at a state mental hospital unsupported by evidence sufficient to allow for such an evaluation and when it denies that defendant notice and an opportunity to be heard on the issue if the defendant's time for speedy trial runs during that evaluation?

2. Does substantial evidence support a defendant's conviction for second degree malicious mischief under RCW 9A.48.080(1)(b) if no evidence supports the conclusion that the defendant created a substantial risk of interruption or impairment of services?

3. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, if it refuses to give a proposed lesser included instruction that is supported by both the law and the facts?

STATEMENT OF THE CASE

Factual History

On July 14, 2012, the defendant David Wayne Williams was incarcerated alone in a cell in the Clark County Jail. RP 244-245. As of that date he had been subsisting on a diet of “nutraloaf” and “nutritious drink”. RP 255. During the evening one of the jail officers noticed a loss of pressure in the fire suppression system in the area in which the defendant was housed. RP 246-247. Upon investigation the officer found the defendant standing near the door to his cell, which had been sprayed throughout with air and oil from one of the fire sprinklers. RP 250-251. In fact, the fire suppression system at the Clark County jail involves a two step phase process. RP 270-273. First, the pipes are filled with compressed air and oil. *Id.* If smoke or heat is detected in the sensors, then the air and oil is released and a separate valve releases the water. *Id.*

Upon determining that the air and oil had been released from the pipes in the defendant’s area, the officer took the defendant out of his jail cell and put him in an empty cell in the same pod. RP 250-251, 266. He then had the jail staff summon a plumber employed by Clark County Maintenance. RP 259-260. Once the plumber arrived he determined that one of the sprinkler heads in the defendant’s cell was damaged. RP 268-269. He then spent about an hour fixing the sprinkler head. *Id.* While he did this a number of

jail inmates working as trustees came in and cleaned the oil off the floor and walls of the defendant's cell. RP 258-259. The plumber later explained that even though a sprinkler is broken and oil and air are released the fire suppression system still functions and water would still be released if a sensor detected fire or smoke. RP 272-273.

The jail officer who found the problem later asked the defendant what had happened. RP 254-255. The defendant responded that he "just couldn't take it any more." *Id.* During his first appearance in court the defendant stated that he had intentionally damaged one of the sprinkler heads in his cell. RP 290.

Procedural History

By information filed July 17, 2012, the Clark County Prosecutor charged the defendant with one count of second degree malicious mischief under RCW 9A.48.080(1)(a), alleging that he "knowingly and maliciously cause[d] physical damage in the amount of or exceeding seven hundred fifty dollars (\$750.00) to the property of another, to-wit: a sprinkler head belonging to Clark County . . .". CP 1. Eight months later on February 15, 2013, the prosecutor amended that information to allege the same crime but this time under the RCW 9A.48.080(1)(b). CP 78. This amended information charged the defendant under the specific wording of the statute and alleged as follows:

That he, DAVID WAYNE WILLIAMS, in the county of Clark, State of Washington, on or about July 14, 2012, did, knowingly and maliciously create a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of transportation, power, or communication; contrary to Revised Code of Washington 9A.48.080(1)(b).

CP 78.

On July 27, 2012, the defendant appeared for arraignment with his attorney at which time the court set a trial date for August 27, 2012, a pretrial for August 8, and a readiness hearing for August 23. RP 1-11¹; CP 16. The defendant was then in custody and remained in custody during the entirety of these proceedings. *Id.* Although the defendant's attorney appeared for the pretrial on the date set, the jail did not bring the defendant into court. RP 12-17; CP 18. Rather, the court informed the defendant's attorney that it had stricken the pretrial in lieu of setting a hearing at another date. *Id.* The defendant's attorney objected to this process. *Id.*

The parties next appeared on August 23rd for the regularly scheduled readiness hearing. RP 18-19; CP 20. The following gives the verbatim report of the entire hearing:

(Court reconvenes on this matter at 10:27:18 AM, on August 23, 2012.)

¹The record on appeal includes three volumes of continuously numbered verbatim reports of 11 pretrial hearings, the jury trial and the sentencing hearing. They are referred to herein as "RP [page#]."

JUDGE WOOLARD: I've got to find the file. We're on the record with regard to State v. Williams, Cause Numbers 12-1-01249 and 01284-9. (Defendant confers with Defense Counsel.) And I only have one file here, but I know there's -- so, custody staff had asked me to have Mr. Williams confined to the jury box. Are we okay with his behavior if he's seated here?

MR. VELJACIC: What kind of behavior are we --

MR. VAUGHN: You can speak.

MR. VELJACIC: -- are we talking about, here?

JUDGE WOOLARD: Spitting, I think, is the concern.

DEFENDANT: Ma'am --

MR. SOWDER: I -- I would prefer to have him here.

DEFENDANT: May I?

JUDGE WOOLARD: Then let's --

DEFENDANT: May I -- may I finish?

JUDGE WOOLARD: If there's going to be issue, then -- then we'll deal --

DEFENDANT: Can I finish?

JUDGE WOOLARD: -- with it --

DEFENDANT: Can I --

JUDGE WOOLARD: No, you talk to your attorney --

DEFENDANT: Ma'am?

JUDGE WOOLARD: -- thank you.

MR. SOWDER: What you're going to probably –

DEFENDANT: I'm not coming to this chicken-shit, fucking place.

JUDGE WOOLARD: Okay. End of hearing.

DEFENDANT: Right.

JUDGE WOOLARD: He's gone.

OFFICER: Let's go, David.

MR. SOWDER: Well, that was – (Recording ends midsentence.)

(Court recesses on this matter at 10:28:20 AM.)

RP 18-19.

At this point Judge Woolard stood up, stated that she would entertain a motion for a competency evaluation and then walked out of the courtroom into chambers without giving either counsel an opportunity to be heard. RP 137-138, 141-142, 150. Up to this point neither counsel had moved for such an evaluation, and neither counsel did thereafter. RP 20-22, 137-138. Once in chambers Judge Woolard told her legal assistant to contact the prosecutor and tell her to prepare an order sending the defendant to Western State for an evaluation. RP 159-160. The assistant did so, and that afternoon defense counsel and a different prosecuting attorney appeared before Judge Melnick who signed the order on behalf of Judge Woolard. CP 21, 180-183. The defendant's attorney did not sign the order. *Id.* This order not only required

that the defendant undergo a competency evaluation, but it also required that this evaluation be performed at Western State Hospital instead of at the Clark County Jail. CP 182. The order stated the following on this latter issue:

[x] 2. The court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation; or

[x] 3. The court finds that an evaluation outside the jail setting is necessary for the health, safety, or welfare of the defendant.

CP 182.

Two months after the court signed the order remanding the defendant to Western State Hospital the court reconvened the case and entered an agreed order of competency. RP 20-27; CP 37. This agreed order was based upon the report from Western State Hospital that found that the defendant's only Axis I diagnoses were Polysubstance Dependence and Alcohol Dependence. CP 32. His sole Axis II diagnosis was Antisocial Personality Disorder. *Id.* After entering the order of competency the court set a new trial date of July 27, 2012. CP 39; RP 26-68. The defendant objected that this date and any date the court could set would be outside the time for speedy trial. RP 26-28.

About a week later the defendant's attorney filed a Motion to Dismiss for violation of the speedy trial rule. CP 40-43. He then moved to withdraw on the basis that he would be a critical witness in the Motion to Dismiss. RP

28-34. The court granted the latter request and appointed a new attorney for the defendant. *Id.* Over the next few months the court granted two further requests from the defendant to replace his court-appointed attorney. RP 46-56, 66-88. Each change of attorney resulted in a continuance of the trial date then pending. *Id.*

Finally, on April 8, 2012, the parties appeared to argue the defendant's speedy trial motion. RP 101. At that time the defendant was being represented by his fourth court-appointed attorney in the case. RP 66-88, 101. During the motion the defense called the defendant's first appointed attorney, who testified that during the August 23, 2012, hearing neither he nor the prosecutor asked for a competency evaluation, that the judge had summarily terminated the hearing and then stated that she would entertain an order for a competency evaluation, and that she had then left the courtroom without giving him an opportunity to speak to the issue or object. RP 134-158.

Following the testimony of the defendant's first attorney, the state called the Judge Woolard's assistant and a deputy prosecutor as its witnesses. RP 159-163, 163-174. Judge Woolard's assistant explained that after court on August 23rd Judge Woolard walked into chambers and instructed her to contact the prosecutor's office and tell them to prepare an order sending the defendant to Western State Hospital for a competency evaluation, which she

did. RP 159-163 In fact she exchanged e-mails with a deputy prosecutor as to whether the judge wanted the defendant evaluated at the Clark County Jail or at Western State Hospital. Exhibit 1. She responded that the judge wanted him sent to Western State Hospital. *Id.* The deputy prosecutor testified that the defendant was unruly and profane at his first appearance. RP 163-170.

Following argument the court denied the Motion to Dismiss, eventually entering the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The disputed time period in this case relates to the time excluded from the speedy trial calculation while the defendant was subject to a competency evaluation and related proceedings.
2. The order for a competency evaluation occurred on the motion of a trial court on August 23, 2012.
3. The court, not either party, initiated the competency evaluation, and ordered the same.
4. The same judge was present on hearings with the defendant on July 16, 2012, and August 23, 2012.
5. At both hearings, the defendant used profanity & shouted during the proceedings. (Transcript of hearings incorporated by reference - to be file separately).
6. At both hearings, the defendant was wearing a padded "suicide smock" provided by jail staff.
7. The defendant was evaluated for competency to stand trial by a clinical psychiatrist at Western State Hospital.
8. The clinical psychiatrist stated in her report that she had previously supervised the defendant in the Mental Health Unit of the

state prison at Monroe.

9. The clinical psychiatrist stated in her report that the defendant had a history of mental health treatment in the community up until 2011.

10. The clinical psychiatrist stated in her report that it was her opinion that the defendant was competent to stand trial.

CONCLUSIONS OF LAW

1. A trial court may order, on its own motion, that a defendant be evaluated for his or her competency to stand trial.

2. The trial court judge in this case had the opportunity to observe the defendant in two hearings separated by approximately five weeks.

3. It was not an abuse of discretion for the trial court judge to order that the defendant be evaluated for competency in light of the trial court's observations of the defendant's manner, appearance, speech and behavior at two separate hearings.

4. Therefore, the proceedings related to a determination of competency in this matter were properly excluded from the defendant's speedy trial calculation under CrR 3.3.

CP 170-172.

Two days after the court denied the defendant's speedy trial motion the case came on for trial before a jury with the state calling three witnesses: the jail officer who took the defendant out of his cell, the maintenance worker who fixed the broken sprinkler head, and a deputy prosecutor who was present at the defendant's first appearance when he said he intentionally broke the sprinkler head. RP 241-268, 268-286, 287-290. They testified to

the facts contained in the preceding factual history. *See* Factual History, *supra*.

At the end of the trial the defense proposed a lesser included instruction on third degree malicious mischief. RP232-234. Following argument the court denied the request. RP 312-323, 329-333. The court then instructed the jury without further objection and the parties presented their closing arguments. CP 117-132; RP 342-354, 354-385. Following deliberation the jury returned a verdict of guilty. RP 393-398; CP 133. A few days later the court sentenced the defendant within the standard ranges and the defendant then filed timely notice of appeal. CP 145-164, 165.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT ORDERED A COMPETENCY EVALUATION AT WESTERN STATE HOSPITAL UNSUPPORTED BY EVIDENCE SUFFICIENT TO JUSTIFY SUCH AN EVALUATION AND WHEN IT DENIED THE DEFENDANT THE RIGHT TO NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE ISSUE.

Under CrR 3.3(b), 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 “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(e)(1), when the trial court orders a competency evaluation the time from the entry of the order to the entry of a subsequent order of competency is excluded from the time in which the court is required to bring the defendant to trial. This provision states:

(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.

CrR 3.3(e)(1).

In the case at bar the defendant's arraignment was held on July 27, 2012. CP 16. Since he was in custody his right to a speedy trial under the rule ran out on September 20, 2012. The trial court set the trial on August 27, 2013, 24 days before the expiration of speedy trial. CP 16. August 23, 2013, the trial court signed an order sending the defendant to Western State Hospital, and on October 23, 2012, the court entered an order of competency. CP 180-183. This ostensibly excluded the time between these two dates from the defendant's speedy trial calculation. However, as the following argues the trial court abused its discretion and denied the defendant his due process rights under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered the first order. As a result, the defendant argues that this time period should not be excluded under the rule and that his time for trial expired on September 20, 2012.

Under RCW 10.77.060(1)(a) a trial court may order a defendant evaluated for current competency on its own motion, on the motion of the defense or on the motion of the state if "there is reason to doubt" the defendant's competency. This statute provides as follows:

(1)(a) Whenever a defendant has pleaded not guilty by reason of

insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a).

In this context, the test for competency to stand trial is whether or not the defendant (1) understands the nature of the charges, and (2) is capable of assisting in his or her defense. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001). “A reason to doubt” competency is not a definitive term and vests a trial court with a large measure of discretion. *City of Seattle v. Gordon*, 39 Wn.App. 437, 441, 693 P.2d 741 (1985). Although there are no “fixed signs” which always require a hearing, factors to be considered include evidence of irrational behavior, demeanor, medical opinions on competency and particularly the opinion of defense counsel who presumably has the closest contact with the defendant. *State v. O’Neal*, 23 Wn.App. 899, 902, 600 P.2d 570 (1979); *State v. Harris*, 122 Wn.App. 498, 505, 94 P.3d 379 (2004) (“Defense counsel’s opinion as to the defendant’s competence is a factor that carries considerable weight with the court.”)

Since the decision whether or not to order a competency evaluation lies within the sound discretion of the trial court, it will not be overturned absent an abuse of that discretion. *City of Seattle v. Gordon, supra*. 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). As the following sets out in this case Judge Woolard’s decision to order a competency evaluation for the defendant at Western State Hospital was arbitrary and ultimately did rest on “untenable grounds or untenable reasons.” The following supports this conclusion.

In this case the arbitrary nature of the judge’s decision is best illustrated by the fact that she made it off the record, did not consider the input of either the prosecutor or defense counsel, and did not even give the defense notice of her decision much less an opportunity to be heard. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the minimum requirements of procedural due process are notice and an opportunity to be heard. In *Johnson v. Washington Dept. of Fish and Wildlife*, 175 Wn.App. 765, 305 P.3d 1130 (2013), this court states as follows on this issue:

At a minimum, due process requires notice and an opportunity to be heard. Notice must be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. The opportunity to be heard must be meaningful in time and manner. To determine how much process is due, we balance the private interest involved; the risk of erroneous deprivation through the procedures involved and the value of additional procedures; and the government’s interest, including the burdens that accompany additional procedures. Due process is a flexible concept and the procedures required depend on the circumstances of a particular situation.

Johnson v. Washington Dept. of Fish and Wildlife, 175 Wn.App. at 772-773.

In the case at bar Judge Woolard's off the record statement that she "would entertain a motion for a competency evaluation" before walking off the bench was not "notice reasonably calculated to inform the affected part of the pending action." Neither did it give the defendant any opportunity at all to object and be heard, much less an opportunity to be heard that was "meaningful in time and manner." These facts stand in stark contrast to the fact that there was no reason whatsoever to arbitrarily terminate the hearing and thereby refuse to hear argument or evidence from counsel. Certainly the court had the right to find the defendant in contempt and have him removed from the courtroom. But the court did not have the right to terminate the hearing. This was particularly egregious in the context of ordering a competency evaluation for two reasons. First, the law recognizes that it is the defendant's counsel who can usually give the best input to the court on the issue of competency. Second, in this case defense counsel was uniquely situated to present an opinion to the court because he had known the defendant for many years and had represented him on prior occasions. Thus, the trial court's decision to order a competency evaluation off the record and without giving either counsel the opportunity to be heard was arbitrary and constituted an abuse of discretion.

In this case the state may argue that the defense did have notice and an opportunity to be heard because it was actually Judge Melnick and not

Judge Woolard who signed the order for the evaluation and that the defense could have objected at that time. The problem with this argument is that Judge Melnick did not sign the order after exercising his discretion. As the findings of fact and conclusions of law on the defendant's motion to dismiss make crystal clear, it was Judge Woolard who exercised her discretion and made the decision to order the evaluation, not Judge Melnick. Indeed, the two facts cited in the findings to justify Judge Woolard's decision were the two observations of the defendant, one at his first appearance and one that day. Thus, as the findings imply, Judge Melnick was merely signing the order for Judge Woolard.

Since the court abused its discretion and acted arbitrarily in ordering the competency evaluation, the time taken for the evaluation should not be excluded from the calculation of the time for speedy trial under CrR 3.3. Thus, the time form speedy trial ran out on September 20, 2012, more that a month after the defendant's next court appearance on October 23, 2012. As a result, the trial court erred when it denied the defendant's motion to dismiss under CrR 3.3(h).

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT’S CONVICTION FOR SECOND DEGREE MALICIOUS MISCHIEF UNDER RCW 9A.48.080(1)(b) BECAUSE NO EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEFENDANT CREATED A SUBSTANTIAL RISK OF INTERRUPTION OR IMPAIRMENT OF SERVICES.

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 the case at bar the state initially charged the defendant with second degree malicious mischief under RCW 9A.48.090(1)(a) by alleging that he caused over \$750.00 damage to the property of Clark County “to wit: a sprinkler head.” CP 1. The second degree malicious mischief statutes states:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars; or

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.090(1).

The state later amended that charge to allege that the defendant

committed the same crime but under the (1)(b) alternative of the same statute.

Thus, under this amended information the state had the burden of proving the following elements beyond a reasonable doubt:

- (1) that the defendant “knowingly and maliciously,”
- (2) created a substantial risk of interruption or impairment,
- (3) of service rendered to the public,
- (4) by physically damaging or tampering with
- (5) an emergency vehicle or property of
- (6) the state, a political subdivision thereof, a public utility or a mode of public transportation, power, or communication.

In the case at bar the defendant does not dispute that substantial evidence supports the conclusion that (1) the defendant “knowingly and maliciously” (4) physically damaged (5) property of (6) a political subdivision of the state. However, the defendant does dispute that his conduct (2) created a substantial risk of interruption or impairment (3) of services rendered to the public. The following addresses these two missing elements.

The undisputed testimony of both the jail employee as well as the maintenance employee in this case reveals a number of facts. The first is that the defendant’s conduct did not create any risk of interruption or impairment of the fire suppression system at the Clark County jail, much less a “substantial impairment,” as the statute requires. Second, although his conduct did require that he be moved to an adjoining empty cell and did require a maintenance employee to expend about an hour of time in fixing the

sprinkler head (and did require some jail inmates some time in cleaning the cell), this in no way caused an impairment of the jail's "service rendered to the public." The decisions in *State v. Hernandez*, 120 Wn.App. 389, 85 P.3d 398 (2004), and *State v. Turner*, 167 Wn.App. 871, 275 P.3d 356 (2012), support this conclusion.

In *State v. Hernandez, supra*, the state convicted the defendant of second degree malicious mischief under RCW 9A.48.080(1)(b) after he spit repeatedly in the back of a patrol car while being taken to jail. Once the defendant was removed the officer had to spend about 15 minutes cleaning out the back of his patrol vehicle with disinfectant. The defendant appealed his conviction, arguing that substantial evidence did not support the conclusion that his conduct (1) constituted physical damaging or tampering, or (2) that he created a substantial risk of interruption or impairment to either service rendered to the public or to an emergency vehicle.

The state responded to the defendant's argument by citing the decision in *State v. Gardner*, 104 Wn.App. 541, 16 P.3d 699 (2001). In that case the defendant was convicted of second degree malicious mischief after he obtained access to a police radio and repeatedly pressed the transmitting button. His actions produced disruptive clicking sounds that briefly interfered with the police communication system. On appeal the court agreed that the defendant's conduct (repeatedly pushing the transmit button on the

radio) was sufficient to establish the element of “physically damaging or tampering” required under the statute. The defendant in *Hernandez* argued that this case actually supported his arguments because it illustrated the point that there has to be some type of substantial interruption in service which he argued did not occur in his case. The court of appeals agreed with the defendant’s argument and reversed, holding as follows:

Under the plain terms of RCW 9A.48.080(1), we find insufficient evidence that Mr. Hernandez knowingly and maliciously damaged or tampered with the police vehicle or that he consequently created a substantial risk of interruption or impairment of its service to the public. Unlike the defendant in *Gardner*, Mr. Hernandez did not disrupt emergency services by physically manipulating a device crucial to those services. His actions simply did not rise to the level of knowing and malicious creation of a substantial risk of interruption or impairment of service to the public. Accordingly, we find that the evidence is insufficient to establish second degree malicious mischief beyond a reasonable doubt.

State v. Garner, 104 Wn.App. at 400.

By contrast in *State v. Turner, supra*, a defendant convicted of second degree malicious mischief under the (1)(b) alternative for kicking out a patrol vehicle back window appealed his conviction arguing that under the decision in *State v. Garner*, his conduct also did not create a substantial risk of interruption or impairment to the patrol vehicle because at most it would only take a day to replace the window. After reviewing the decision in *Garner* the court rejected the defendant’s argument, holding that conduct which took a patrol vehicle out of service for a day did constitute a substantial interruption

of service. The court held:

Police cannot use patrol cars with broken rear windows. Breaking a rear window in a patrol car necessarily causes the patrol car to be unavailable for some period of time. Here, the car was unavailable for a day. The jury here could then easily infer that not having the car available created a substantial risk of interrupting or impairing service to the public. The Grant County Sheriff's Department had one less patrol car available to use and the jury was free to conclude that having less patrol cars available may impair service to the public. There was substantial evidence that Mr. Turner's actions "[c]reate[d] a substantial risk of interruption or impairment of service rendered to the public." RCW 9A.48.080(1)(b).

State v. Turner, 167 Wn.App. at 867.

The operative facts in the case at bar are much closer to those in *Hernandez* than they are to those in *Turner*. First, the time period it took to remedy the defendant's conduct in the case at bar was one hour, which was much closer to the 15 minutes in *Hernandez* than it was to the 24 hours in *Turner*. Second, unlike *Turner* in which the police department was down one patrol vehicle, in the case at bar the loss of a jail cell for one hour did not cause any disruption of service because there was an available empty cell in which to house the defendant. Third, as in *Turner* in which the patrol vehicle was not damaged to the point that it would not function, so in the case at bar the defendant's conduct did not in any way disable the fire prevention system in the jail. Thus, in the case at bar, as in *Turner*, the evidence presented at trial did not prove that the defendant's conduct created a substantial risk of interruption or impairment of services rendered to the public. As a result this

court should reverse the defendant's conviction and remand with instructions to dismiss with prejudice.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE HIS PROPOSED LESSER INCLUDED INSTRUCTION ON THIRD DEGREE MALICIOUS MISCHIEF.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to

have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, *inter alia*, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant with malicious mischief under RCW 9A.48.080(1)(b). The defendant moved to instruct the jury on third degree malicious mischief under RCW 9A.48.090(1)(a). This statute states:

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree; or

RCW 9A.48.090(1)(a).

Under the (1)(a) alternative the gravamen of the offense to “cause[] physical damage” to the property of another. No valuation element is included. Similarly, under RCW 9A.48.080(1)(b) there is a requirement of some type of physical damage with no valuation requirement. This statute states:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

. . . .

(b) Creates a substantial risk of interruption or impairment of

service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.090(1).

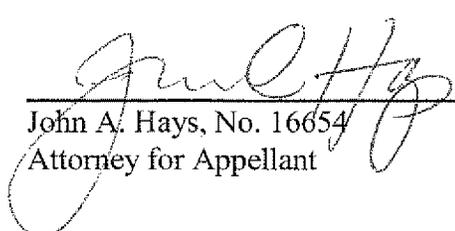
Although the statute creates a number of alternatives for commission of this offense under the (1)(b) alternative, the crux of the crime is to physically damage or tamper with a specific type of property listed. Since the third degree malicious mischief statute requires physical damage as does the second degree malicious mischief statute, every commission of the second degree malicious mischief statute would necessarily constitute a commission of the third degree malicious mischief statute. As a result, the latter statute is legally a lesser included offense of the greater. In addition, in the case at bar the evidence factually supported the lesser included offense because it was not disputed that the defendant did intentionally damage the sprinkler head in his cell. Thus, in this case 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 denied the defendant's request for a lesser included offense instruction.

CONCLUSION

The defendant's conviction should be vacated and remanded for dismissal with prejudice because the trial court did not bring the defendant to trial within the time required under the speedy trial rule and because substantial evidence did not prove each necessary element of the offense. In the alternative this court should vacate the defendant's conviction and remand for a new trial based upon the trial court's erroneous decision to refuse to give a lesser included offense instruction on third degree malicious mischief.

DATED this 4th day of December, 2013.

Respectfully submitted,



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.

RCW 9A.48.080

Malicious Mischief in the Second Degree

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars; or

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

(2) Malicious mischief in the second degree is a class C felony.

RCW 9A.48.090
Malicious Mischief in the Third Degree

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree; or

(b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.

(2) Malicious mischief in the third degree is a gross misdemeanor.

RCW 10.77.060
Plea of Not Guilty Due to Insanity
Doubt as to Competency – Evaluation – Bail – Report

(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

(b) The signed order of the court shall serve as authority for the evaluator to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. If the court is advised by any party that the defendant may have a developmental disability, the evaluation must be performed by a developmental disabilities professional.

(c) The evaluator shall assess the defendant in a jail, detention facility, in the community, or in court to determine whether a period of inpatient commitment will be necessary to complete an accurate evaluation. If inpatient

commitment is needed, the signed order of the court shall serve as authority for the evaluator to request the jail or detention facility to transport the defendant to a hospital or secure mental health facility for a period of commitment not to exceed fifteen days from the time of admission to the facility. Otherwise, the evaluator shall complete the evaluation.

(d) The court may commit the defendant for evaluation to a hospital or secure mental health facility without an assessment if: (i) The defendant is charged with murder in the first or second degree; (ii) the court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation; or (iii) the court finds that an evaluation outside the jail setting is necessary for the health, safety, or welfare of the defendant. The court shall not order an initial inpatient evaluation for any purpose other than a competency evaluation.

(e) The order shall indicate whether, in the event the defendant is committed to a hospital or secure mental health facility for evaluation, all parties agree to waive the presence of the defendant or to the defendant's remote participation at a subsequent competency hearing or presentation of an agreed order if the recommendation of the evaluator is for continuation of the stay of criminal proceedings, or if the opinion of the evaluator is that the defendant remains incompetent and there is no remaining restoration period, and the hearing is held prior to the expiration of the authorized commitment period.

(f) When a defendant is ordered to be committed for inpatient evaluation under this subsection (1), the court may delay granting bail until the defendant has been evaluated for competency or sanity and appears before the court. Following the evaluation, in determining bail the court shall consider: (i) Recommendations of the evaluator regarding the defendant's competency, sanity, or diminished capacity; (ii) whether the defendant has a recent history of one or more violent acts; (iii) whether the defendant has previously been acquitted by reason of insanity or found incompetent; (iv) whether it is reasonably likely the defendant will fail to appear for a future court hearing; and (v) whether the defendant is a threat to public safety.

(2) The court may direct that a qualified expert or professional person retained by or appointed for the defendant be permitted to witness the evaluation authorized by subsection (1) of this section, and that the defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional person shall

have the right to file his or her own report following the guidelines of subsection (3) of this section. If the defendant is indigent, the court shall upon the request of the defendant assist him or her in obtaining an expert or professional person.

(3) The report of the evaluation shall include the following:

(a) A description of the nature of the evaluation;

(b) A diagnosis or description of the current mental status of the defendant;

(c) If the defendant suffers from a mental disease or defect, or has a developmental disability, an opinion as to competency;

(d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, and an evaluation and report by an expert or professional person has been provided concluding that the defendant was criminally insane at the time of the alleged offense, an opinion as to the defendant's sanity at the time of the act, and an opinion as to whether the defendant presents a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, provided that no opinion shall be rendered under this subsection (3)(d) unless the evaluator or court determines that the defendant is competent to stand trial;

(e) When directed by the court, if an evaluation and report by an expert or professional person has been provided concluding that the defendant lacked the capacity at the time of the offense to form the mental state necessary to commit the charged offense, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;

(f) An opinion as to whether the defendant should be evaluated by a designated mental health professional under chapter 71.05 RCW.

(4) The secretary may execute such agreements as appropriate and necessary to implement this section and may choose to designate more than one evaluator.

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 WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**DAVID WAYNE WILLIAMS,
Appellant.**

NO. 44846-7-II

**AFFIRMATION OF
OF SERVICE**

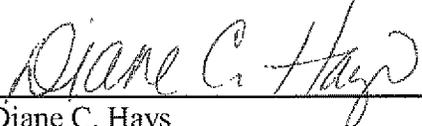
Diane C. Hays states the following under penalty of perjury under the laws of Washington State. On December 4, 2013, I personally e-filed and/or placed in the United States Mail the following documents with postage paid to the indicated parties:

1. Brief of Appellant
2. Affirmation of Service

David Wayne Williams, DOC# 263517
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Tony Golik
Clark Co. Prosecutor
1200 Franklin St.
Vancouver, WA 98666

Dated this 4th day of December 2013, at Longview, Washington.



Diane C. Hays
Legal Assistant

HAYS LAW OFFICE

December 04, 2013 - 4:42 PM

Transmittal Letter

Document Uploaded: 448467-Appellants' Brief.pdf

Case Name: State v. David W. Williams

Court of Appeals Case Number: 44846-7

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellants'

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

Petition for Review (PRV)

Other: _____

Comments:

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