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Court of Appeals
Division II
State of Washington

NO. 49730-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LLEWELYNE v. HOLCOMB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh & the Honorable Helen G. Whitener

No. 15-1-04002-4

Brief of Respondent

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

1. Are defendant's criticism of how his case progressed to trial incapable of proving a time for trial or speedy trial violation as the challenged delays were caused by the defense and unforeseeable circumstances that did not prejudice his case?

2. Were the firearm enhancements accurately imposed as mandatory terms of sentence when applied to a 38 year old domestic violence offender who fired a rifle into an occupied home?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was arraigned October 8, 2015, on charges of firearm armed enhanced first degree assault with a domestic violence aggravator against his then ex-girlfriend and firearm enhanced first degree assault against her new boyfriend. CP1-4. Defendant fired about 10 large caliber bullets into their occupied bedroom. *Id.* Orders prohibiting defendant's contact with them were issued. CP 116-19.[1] He remained in custody through trial on $250,000 bail. CP 120; RP(9/19) 1.

[1] CP above 115 reflect estimated numbering of supplemental designations.

The case was preassigned to Judge Rumbaugh at arraignment. CP 122. It was reassigned to Judge Whitener on December 23, 2015. CP 123. Ten continuances were granted over the nine months between the October 8, 2015, arraignment and June 23, 2016, when the case was called for trial. CP7-9, 28-33, 88. They addressed scheduling conflicts attending defense counsel's vacation and need to prepare for trial, a prosecutor's vacation, an untimely defense motion, intervening-older cases that had to be tried by defense counsel or the prosecutor as well as unforeseeable unavailability of several witnesses. *Id.*; RP(1/22); (2/26); (3/10); (3/24); (4/28); (6/1); (6/2); (6/16); (6/21); (6/23).

The case was timely called for trial June 23, 2016. RP(6/23). An ER 615 ruling was issued. *Id.* at 99. The court began receiving testimony on defendant's motion to suppress. *Id.* 14. Rulings were entered on most of the parties' motions *in limine* before a recess from June 29, 2016, to July 18, 2016, was called to address witness unavailability, the judge's prescheduled leave and defense counsel's trial appearance in an older third-strike case. RP(6/27) 176-90; (6/28) 245-64, 267-73; (6/29) 249-75.

The recess was extended from July 18th to August 8, 2016, to accommodate the prosecutor's completion of a murder trial in an older case, followed by three days of vacation. RP(7/18) 3-10. Defendant's trial judge had one week of scheduled leave over the same period. *Id.* When the parties

reconvened August 8th, the trial's recess was extended to September 7, 2016, for medical leave his trial judge unforeseeably required. CP 34, 99-100; RP(9/12) 296. The prosecutor was ill for a few days. RP(9/6);(9/7); CP 35-36, 100. Trial resumed September 12, 2016. RP(9/12). Defendant proceeded to bench trial. *Id.* Both parties rested September 19, 2016. RP(9/19) 1030-32. Defendant was convicted as charged September 23, 2016. RP(9/23) 1083-1105; (10/21) 1139; CP 47.

The court imposed sentence December 12, 2016, after granting a continuance defendant requested. RP(10/21) 1141; (12/2) 2. He was 39 years old. RP(12/2) 10. He did not dispute the court's statutory obligation to impose the full term of his two firearm enhancements as he does on appeal. RP(12/2) 10-14, 16-18. His notice of appeal was timely filed. CP 77.

2. Facts

John McMains drove to buy Halloween costumes with his childhood friend, and then girlfriend, Summerlove McClish sometime in the afternoon of October 4, 2015. RP(9/14) 623-25, 647-48. Along the way, McClish began receiving text messages from defendant, her ex-boyfriend. RP(9/14) 626, 634-35. McMains and McClish returned to their Tacoma home at 1213 Pine Street to find windows busted out of a car defendant loaned McClish. RP(9/13) 587; (9/14) 644-46. McClish began "freaking out." RP(9/14) 650. Her face turned red; she started shaking, then yelled: "My fucking rifle is

gone from the trunk[.]" RP(9/14) 650-51; (9/15) 857-58. Sometime before she purchased a .45 caliber assault rifle. RP(9/14) 648-49, 673-91.

It was "enchilada night" for the seven people at the Pine Street house the next day. RP(9/14) 651-53. McMains settled down to watch football after the three teenagers were fed. RP(9/14) 651-53, 679-80. He fell asleep following sex with McClish. RP(9/14) 653-54. He awoke to the sound of her screams with a bullet hole in the wall inches above his head. RP(9/13) 597-601; (9/14) 654-55l; Ex. 57. There were other bullet holes in the room; one in a nearby pillow. RP(9/14) 657-60; Ex.56-62.

McClish first told police defendant tapped on the bedroom window and pointed a gun at McClain while threatening to shoot him. RP(9/14) 661. Defendant's escalating rage was recorded in text messages he sent McClish before the attack. RP(9/15) 835-39; Ex.89-120; CP 48. He responded to McClish's threat to call police by "blasting" bullet holes into the bedroom they once shared. RP(9/14) 661-63; CP 48. Several adults inside hurried to ensure none of the kids had been hit. RP(9/14) 663, 726. McClish averred:

> I heard a noise and came out to the living room, saw [defendant] trying to get in the house at the porch window. He ran off. I ran out to see which way he was going. He was in the alley saying he was going to shoot us. He shot at the house where he knew me and my boyfriend would be sleeping. I dialed 911. I made sure everyone inside was okay.... I do have a restraining order.

RP (9/15) 869; *accord* (9/14)708-09, 726-27, 771-72.

But McClish recanted those accounts after defendant tampered with her testimony through recorded jail calls in violation of an order prohibiting their contact. RP(9/15) 869-90, 909-32; CP 50-53. At trial, she described him as an on-and-off boyfriend who wanted to resume their relationship. RP(9/15) 827-32, 844-45. She wanted her relationship with McMains to anger defendant. RP(9/15) 834, 845. *It worked.* RP(9/15) 845. An amended Information reducing the assault committed against her to a second degree offense was filed to reflect her claim the shooter only threatened her before firing into the house. RP(9/15) 848-52; 869-70, 1026-28; CP 48.

The first 911 report of the Pine Street shooting was logged at 11:07 p.m. RP(9/14) 776. Responding officers saw bullet holes tightly grouped in the wall separating an alley from the bedroom. RP(9/13) 590-601; Ex.11-21. Ten .45 caliber casings were recovered. RP(9/13) 590-601 (9/15) 819-20; CP 48; Ex. 24-37. Police were advised that defendant drove a Maroon Honda Civic. RP(9/14) 771-72; (9/15) 859. Deputies Oetting and Thompson watched it arrive at defendant's Spanaway house 45 minutes after the shooting. RP(9/13) 424-41; CP 48. Oetting saw someone matching defendant's description exit it, then enter the house. RP(9/13) 441-44.

The two deputies surveilled the house from different locations. *Id.* Oetting did not see anyone exit through his field of view near defendant's front door prior to defendant stepping out for a cigarette 7 minutes later. *Id.*

The Pit Bull with him detected Oetting. *Id.* at 444-46, 485. Defendant was detained. *Id.* at 446-47. He claimed to have been at home all night. *Id.* When confronted with the observed arrival of his Honda, he said his friend Steve dropped it off before running out the front door. *Id.* The crime lab concluded .45 caliber casings police seized from defendant's kitchen were fired in the gun that fired .45 caliber casings recovered from the Pine Street scene. RP(9/13) 538-40, 556-78; (9/15) 943-49; CP 48; Ex. 40-48, 73-74.

C. ARGUMENT.

1. DEFENDANT'S CRITICISM OF HOW HIS CASE PROGRESSED CANNOT PROVE A TIME FOR TRIAL OR SPEEDY TRIAL VIOLATION AS THE DELAYS WERE BROUGHT ABOUT BY THE DEFENSE OR UNFORESEEABLE EVENTS THAT DID NOT PREJUDICE HIS CASE.

"It is recognized… some pretrial delay is often inevitable and wholly justifiable." ***State v. Iniquez***, 167 Wn.2d 273, 282, 217 P.3d 768 (2009); ***Dogget v. United States***, 505 U.S. 647, 656, 112 S.Ct. 2686 (1992). "The government may need time to collect witnesses against the accused [or] oppose [] pretrial motions." ***Dogget***, 505 U.S. at 656. It is further recognized trial courts require wide latitude to manage the demands of their calendars, even when that management impacts a defendant's constitutional trial rights. ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 152, 126 S.Ct. 2257 (2006) (citing ***Wheat v. United States***, 486 U.S. 153, 163-64, 108 S.Ct. 1692

(1998); ***Morris v. Slappy***, 461 U.S. 1, 11-12, 103 S.Ct. 1610 (1983)). Not the least of a trial court's problems is that of assembling witnesses, lawyers and jurors at the same place at the same time. ***Morris***, 461 U.S. at 11-12; ***Ungar v. Sarafite***, 376 U.S. 575, 589, 84 S.Ct. 841 (1964).

CrR 3.3 requires jailed defendants to be tried in 60 days unless one of several events occurs, such as a continuance granted based on agreement, unforeseeable or unavoidable circumstances, or a continuance advances the administration of justice in a way that does not prejudice the defendant. CrR 3.3(b)(1)(i), (c), (e)(a), (f)(1)-(2). The decision to grant a continuance will not be reversed absent an abuse of discretion, which only occurs when a court relies on untenable grounds or reasons. ***State v. Heredia-Juarez***, 119 Wn.App. 150, 153, 79 P.3d 987 (2003). Pretrial delay alleged to impinge upon a defendant's constitutional right to a speedy trial receives *de novo* review. ***Iniquez***, 167 Wn.2d at 281. Defendants ordinarily must prove actual prejudice before a speedy trial right violation will be recognized. ***State v. Ollivier***, 178 Wn.2d 840, 312 P.3d 1 (2013).

Defendant's vague-aggregated claims of undue pretrial delay require a detailed overview of the nine months between his arraignment and when his trial began as well as the unforeseeable circumstances that necessitated several periods of mid-trial recess. He was arraigned Thursday, October 8, 2015, on two firearm enhanced class A felonies. CP 3. Orders prohibiting

his contact with two victims were issued. CP 115-19. He remained in jail. *E.g.* RP(6/23) 3. His case was preassigned to Judge Rumbaugh. CP 122. An unchallenged initial trial date was set November 30, 2015. CP 88. An agreed CrR 3.3(f)(1) continuance, *signed by defendant*, was granted November 20, 2015—17 days before time for trial expired. *Id.*

Trial was set February 25, 2016. That advanced the administration of justice under CrR 3.3(f)(2) as the defense needed time to prepare for trial around defense counsel's month-long vacation between December 4, 2015, and January 5, 2016, as well as his counsel's "older" trials. *Id.*; RP (1/22) 5. Time for trial moved to March 28, 2016. CP 88. Defendant's case was reassigned to Judge Whitener on December 23, 2015. CP 123. Two days later, his victimized and tampered with ex-girlfriend filed a letter recanting her identification of him as the shooter. CP 5; RP (9/15) 869.

A second continuance was granted January 22, 2016, through CrR 3.3(f)(1) agreement of counsel over defendant's objection. CP 7. The trial moved to March 3, 2016, which advanced the administration of justice under CrR 3.3(f)(2) by enabling defense investigation delayed by counsel's month-long vacation. *Id.* Counsel had not disclosed statements from his witnesses. RP (1/22) 3-4. There was an out-of-state witness he was trying secure, which is why the February 26, 2016, status conference was set. *Id.*

The delay accommodated two weeks of leave the prosecutor scheduled for mid-February. *Id.* Time for trial extended to April 3, 2016. *Id.*

The omnibus order marked the State's compliance with discovery rules. CP 126; RP(1/22) 3. Additional forensic testing was underway along with interview scheduling. *Id.* Counsel gave the State redacted discovery to review for distribution to defendant on January 22, 2016, in response to a request defendant made prior to counsel's December leave. *Id.* at 5. Despite his delay, counsel asked the prosecutor to complete the task within a few days. *Id.* at 5-6. The prosecutor agreed without complaint. *Id.* The State's witness list was filed February 1, 2016—days ahead of schedule. CP 89.

A third continuance was granted February 26, 2016, according to CrR 3.3(f)(1) agreement of counsel over defendant's objection. CP 8; RP (2/26) 3. Defense counsel still had not disclosed his witnesses. *Id.* Yet he identified interviews he wanted. *Id.* The prosecutor agreed to facilitate, but they could not be accomplished before the March 3, 2016, trial date. *Id.* Counsel needed time to contact his witnesses. RP (2/26) 3-4. His request for the continuance was based on ***State v. Campbell***, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (counsel granted the right to waive time for trial rule over defendant's objection to ensure effective representation). *Id.*

Counsel confirmed receipt of the test results pending at the omnibus hearing. *Id.* By January 29, 2016, defendant timely received the redacted

discovery the prosecutor agreed to provide. *Id.* at 6. The status-conference order documented continued uncertainty regarding the status of defendant's out-of-state witness. CP 128. Also documented was the witness tampering and VPO charges the State planned to add for crimes defendant committed after arraignment. *Id.*; RP (2/26) 10. So a continuance to March 10, 2016, largely served the administration of justice *for defendant. Id.*

A fourth continuance was granted to advance the administration of justice under CrR 3.3(f)(2) over defendant's objection on March 10, 2016, because the prosecutor was unavailable due to his assignment in a different trial that was anticipated to take another week or so to complete. CP 9; RP (3/10) 3. Defense counsel had two other trials set that day, with another likely to begin a week later. RP (3/10) 6. He filed his witness list and trial memorandum that day. *Id.* Twelve days later he filed a motion to suppress .45 caliber casings seized from defendant's kitchen. CP 17. Motions were scheduled for the new trial date of March 24, 2016. *Id.* That date was set to complete defendant's trial prior to the court's April recess. RP (3/10) 4. Time for trial extended to April 25, 2016. CP 9.

A fifth continuance was granted to advance the administration of justice under CrR 3.3(f)(1) over defendant's objection on March 24, 2016. CP 28. Several factors necessitated the delay: (1) Two days prior defendant filed his motion to suppress casings that linked him to the shooting, so the

State required court-rule guaranteed time to respond; (2) A deputy sought to proceed with the hearing was unavailable; (3) Defense counsel had just interviewed a new witness present during the search of defendant's home; (4) Defendant's witness would not be available until an hour before court closed; (5) Court's intervening recess to attend a two day conference; (6) time for defense counsel to attend a WACDL conference in Winthrop; (7) Unanticipated additional forensic testing; (8); A detective's unavailability during what would have been the first week of trial; (9) Court's need to call a 348-day-old case followed by a 230-day-old case before defendant's then 168-day-old case; and lastly (10) Unavailability of other judges to try his case. CP 28; RP(3/24) 1-9. An amended Information was filed. CP 24. It added a witness tampering count for defendant's inducement of McClish to testify falsely with three other counts for him violating the order prohibiting their contact. *Id.*; RP(3/24) 10-11. An April 28, 2016, trial date was set, extending time for trial to May 28, 2016. CP 28.

A sixth continuance was granted to advance the administration of justice under CrR 3.3(f)(1) over defendant's objection April 28, 2016. CP 29. The State was represented by a different prosecutor. *E.g.*, RP (4/28) 1, 9. He remained on the case through sentencing. *E.g.*, RP (4/28) 1, 5. Four or five of his police witnesses had scheduling conflicts that necessitated a continuance of at least a few weeks. RP(4/28) 2. Deputy Thompson was

anticipated to remain on military leave until July 1, 2016. *Id.* Defendant's investigator asked to interview Thompson the day before. *Id.*

Thompson was one of two deputies who observed defendant return home from the shooting. RP(9/12) 313-17. Thompson had a different view than the other deputy. *Id.* That perspective appeared fatal to defendant's claim a friend delivered his car, then ran away. *Id.* A defense investigator sought an interview with Oetting, the other deputy who saw defendant return home. RP (4/28) 4, 7. The State tried to facilitate his request. *Id.* Other unavailable officers (Nettleton and Logan) were present at both the shooting scene and the secondary scene at defendant's house. RP (4/28) 2-3, 11. A week before, the crime lab reported casings found at the shooting scene were fired in the same gun as casings found in defendant's kitchen. *Id.* Counsel requested additional discovery in response. RP(4/28) 2-3, 5-6.

The court observed that up until April 24th most of the continuances were granted at defense counsel's request. *Id.* at 10-12. They were warranted by the demands of preparing class A felonies for trial. *Id.* So a continuance to ensure officer availability was deemed appropriate. *Id.*; CP 29. A June 1, 2016, trial date was set, extending time for trial to July 1, 2016. *Id.* The State's motions *in limine* with a response to defendant's motion to suppress were timely filed prior to the new trial date. CP 129.

A seventh continuance was granted June 1, 2016, pursuant to CrR 3.3(f)(1) agreement of counsel over defendant's objection to accommodate defense counsel's unavailability due to his appearance in a different trial. CP 30; RP(6/1) 2-3. The motion was made by defense counsel's colleague. *Id.* Defendant's recent interview with Oetting revealed new relevance to Thompson's testimony. RP(6/1) at 3-4. The prosecutor proposed calling defendant's case for trial June 2, 2016, completing as much as possible, then recessing until Thompson returned from military leave June 27, 2016. *Id.* at 4. The trial was moved one day to June 2, 2016, extending time for trial to July 1, 2016. CP 30.

An eighth continuance was granted June 2, 2016, to advance the administration of justice under CrR 3.3(f)(2) over defendant's objection to accommodate unavailability of the prosecutor, who was completing another trial before Judge Whitener (*i.e.*, *State v. Hernandez*: four counts of first degree child molestation that had been pending trial longer than defendant's case). CP 31, 94. The utility of Thompson's testimony was reiterated; *i.e.*, it was recently revealed he had a unique vantage of defendant's house between the moment defendant returned from the shooting and his arrest, which contradicted defendant's claim he never left home. RP(6/2) 3.

The prosecutor proposed two options for Thompson's testimony: (1) Continue the case until his July 1st return, or (2) Begin trial, complete as

much as possible, then recess until he returned. *Id.* The prosecutor explored the option of having him testify via Skype but his military service made it impossible. *Id.* Defendant objected to starting trial. *Id.* at 5. Defense counsel urged the court to schedule trial for a date that would not require interrupted testimony. *Id.* A new trial date of June 16, 2016, was set, extending time for trial to July 16, 2016. CP 31. Additional evidence of defendant's prohibited contacts with McClish was revealed. RP (6/2) at 7-8. The prosecutor proceeded to trial in *Hernandez* before Judge Whitener. RP(6/2) 7.

The prosecutor's continued appearance in the older multiple count first degree child molestation trial before Judge Whitener required a ninth continuance to advance the administration of justice under CrR 3.3(f)(2) over defendant's objection June 16, 2016. CP 32. That trial was anticipated to run into the following week. RP(6/16) 3. Several of the police witnesses needed for defendant's trial had staggered unavailability June 20th through June 28th and June 20th to July 21st. *Id.* 3-4. Thompson remained on military leave until July 1st, yet the prosecutor was willing to press on with the CrR 3.6 hearing. The lead detective was unavailable from June 27th to July 8th. *Id.* A June 21, 2016, trial date was set, extending time to July 21, 2016. *Id.*

A tenth continuance was granted June 21, 2016, to advance the interests of justice under CrR 3.3(f)(2) over defendant's objection as the prosecutor remained unavailable because of his ongoing appearance in the

child molestation trial before defendant's preassigned trial judge. *Id.*; RP (6/21) 2-3. The prosecutor reiterated witness issues affecting his ability to proceed. RP (6/21) 2-3, 6-7. New scheduling conflicts were revealed as a consequence of the State having to inquire further into its witnesses' future schedules as the trial date moved. *Id.* A June 23, 2016, trial date was set, extending time for trial to July 23, 2016. CP 83. The court conveyed the need to begin trial and complete it "in parts until it gets done" to address the court's schedule as well as witness unavailability. RP(6/21) 3-5.

Jurors reached a verdict in the child molestation trial before Judge Whitener Thursday June 23, 2016. RP(6/23) 6, 120. Defendant's case was called while they deliberated, tolling the time for trial one month before it expired. RP (6/23) 4. Testimony was anticipated to be interrupted by trial in an older—660 day old—case before Judge Whitener. *Id.* Numerous attempts were made to reassign defendant's case to avoid the disruption, but her courtroom was the only available to start his trial that day. *Id.* at 5. Testimony was adduced from the State's first CrR 3.6 witness. *Id.* at 13-78. Two defense witnesses were called out-of-order to expedite the proceeding amid a period when several police witnesses remained unavailable. *Id.* 79-120. The court ruled on an ER 615 motion to preclude witnesses from discussing their testimony with other witnesses. RP(6/23) 99.

Testimony from another witness was adduced Monday, June 27, 2016. RP(6/27) 125-26, 130-172. News that Thompson's military leave had been extended to July 4th was reported. *Id.* In an effort to make progress in defendant's trial, the prosecutor proposed proceeding to jury selection. *Id.* The court decline, perceiving it would be unfair to begin *voir dire* until the defense had the benefit of its rulings. *Id.* at 27. Defendant did not object to the court's *sua sponte* effort to protect his interests. *Id.* His counsel agreed trial could beneficially proceed. *Id.* at 5.

Several motions *in limine* received rulings. *Id.* at 179-190.[2] Defense counsel's witness required some accommodation. *Id.* at 5. Testimony from two more CrR 3.6 witnesses was adduced June 28, 2016. RP(6/28) 195-244. The court ruled on the admissibility of a 911 call. RP(6/28) 245-63. Another witness gave CrR 3.6 testimony June 29, 2016. RP(6/29) 249-69. Technical difficulties confounded the court's effort to rule on the admissibility of jail calls proffered as evidence of witness tampering and VPO. *Id.* at 270-75.

The court's impending recess from July 4th to July 15th was noted, with recognition a longer recess may be required if the prosecutor's murder case was called for trial. *Id.* at 267-270. This is the so called "bifurcation"

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[2] Exclude witnesses. RP(6/27) 179. References to punishment. *Id.* Self-serving hearsay. *Id.* Exclusion of defendant's prior offenses. *Id.* at 182. Exclusion of hearsay. *Id.* at 183-84. Exclude defendant's prior police contacts. *Id.* Require dignified treatment of participants. *Id.* at 187. Exclude witness opinions on the veracity of other witnesses. *Id.* at 188.

defendant challenges as a "subvert[ion]" of the time-for-trial rule. RP(6/28) 268-69; Def.Br. at i. Defense counsel had a third-strike trial he anticipated needing to try during that period. RP(6/28) at 269. Those factors, combined with the unavailability of several police witnesses, prompted a recess of defendant's trial until July 18, 2016. *Id.* at 269-71. It was believed jury selection would begin by July 19, 2016, and the trial would end July 26, 2016. *Id.* at 271-73. He did not object. RP(6/29) 275.

When the parties reconvened July 18, 2016, the prosecutor reported that trial began in his murder case. RP(7/18) 3-4. That 517-day-old case (*State v. Blair*, Pierce County No. 15-1-00472-9) was 8 months older than defendant's case. *Id.* at 3-4, 6-7. The prosecutor was responsible for expert testimony regarding the blood-spatter, DNA, fingerprint analysis as well as anticipated defense experts. RP(7/18) 4. The Criminal Division's Presiding Judge decided further continuances of *Blair* would not be granted. CP 99. Trial was expected to take two weeks; thereafter, the prosecutor had 3 days of vacation from August 4th through the 6th, which ran into Judge Whitener's 1-week recess. *Id.* at 4. She ruled *Blair* took priority over the resumption of defendant's trial based on her finding he would not be unduly prejudiced by the delay. *Id.* at 7.

The recess was extended to August 8, 2016. *Id.* That date pushed defendant's case into conflict with his arresting officer's vacation. RP(7/18)

8-11. For Deputy Oetting would be out-of-town beginning August 5, 2016, for leave requested 6 months earlier. RP (7/22) 279. The prosecutor tried to remedy the conflict by moving for a preservation deposition. RP(7/18) 8-11; RP(7/22) 278-80. That effort to expedite trial was opposed by defendant, then rejected by the court. RP(7/22) 280-85. The conflict never occurred, as the Judge's recess expanded into 1 month of medical leave. CP36, 100; RP(9/12) 296. A transcript of the August 8, 2016, hearing was not adduced. The recess was extended to September 7, 2016, then September 12, 2016, because the prosecutor was ill. CP 34; 4RP 9-15; RP(9/7) 3-5.

When trial resumed September 12, 2016, the prosecutor confirmed receiving discovery provided by the defense a week before. RP(9/12) 287-89. The prosecutor was ready despite just receiving notice Thompson was on a honeymoon vacation and his military leave had been extended until October. *Id.* at 292-94, 298-99. There was reason to believe he could appear September 19, 2016. *Id.* Defendant waived his right to a jury. *Id.* 299-305.

Defendant's motion to dismiss for mismanagement was denied, in part because the prosecutor's scheduling issues were raised in good faith and prejudice had not been proved. RP(9/12) 306-12. The ruling focused on witness unavailability and leave the court refused to grant for the prosecutor to attend a LGBTQ leadership summit followed by a convention where he was to earn CLE credit. *Id.*; CP 94-101. Omitted from the analysis was how

scheduling was impacted by the month of leave defense counsel was granted with additional time for a WACDL convention. Or the two weeks of leave the judge took, or the medical issues that kept her off bench through August, or the recess she took to attend a conference.

The court granted defendant's motion to exclude Thompson from the State's case even though his unavailability was due to military leave beyond state control. RP(9/12) 313-23. Defendant elected not to call him after conducting an interview with him that had been facilitated by the State. *Id.*; RP(9/12) 350-61; (9/19) 1029-30. Several motions were decided. *Id.* at 362-411. Trial testimony commenced September 13, 2016. RP(9/13) 423. Defendant exploited Thompson's absence to argue an alibi Oetting could not *alone* foreclose due to his differing vantage of defendant's house when he returned home from the shooting. *Id.* at 313-17; 489-93, 508, 514-16; (9/19) 1056-58. The trial proceeded to verdict. *Id.*

a. The rule against setting trial dates outside time-for-trial for congestion does not apply to motions based on events affecting assigned judges after an agreed continuance.

A time-for-trial expiration date may be less significant once there has been a speedy trial waiver and continuance beyond the initial expiration date. ***State v. Angulo***, 69 Wn.App. 337, 333, 848 P.2d 1276 (1993). "Cases are frequently continued for varying lengths of time [] for reasons unrelated

to the true age of those cases. Once the initial [time for trial] expiration date, which is actually based on the date of arraignment, has passed, it begins to lose its real relationship to the reasons for and purpose of the [time for trial] rule." *Id.* (citing CrR 1.2). Considering motions to continue predicated on specific scheduling conflicts of the trial judge and counsel is distinguishable from relying on docket congestion to set trial dates that do not comply with the time for trial rule. ***State v. Cannon***, 130 Wn.2d 313, 327-28, 922 P.2d 1293 (1996).

None of the challenged continuances or periods of recess conflicted with the first trial date, which defendant waived by agreement. CP 88. That and later delays requested by his counsel for his benefit affected later events, contributing to delays for which he blames the State. *E.g.*, ***Heredia-Juarez,*** 119 Wn.App.at 155 (State's continuance necessitated by defense). Early continuances counsel sought to prepare are attributed to defendant. ***Ollivier***, 178 Wn.2d at 838-39. Courts will not reward gamesmanship of defendants who try to create CrR 3.3 escape hatches by objecting to continuances that advance their interests. *Id.*; ***State v. Flinn***, 154 Wn.2d 193, 201, 110 P.3d 748 (2005) (three continuances at the defense's request before State granted five week delay); *Cf.* ***State v. Kenyon***, 167 Wn.2d 130, 216 P.3d 1024 (2009).

b. A time-for-trial claim is not preserved through general objections.

Objections pursuant to CrR 3.3 must be specific enough to alert the court to the type of error involved. ***State v. Greenwood***, 120 Wn.2d 585, 610, 845 P.2d 971 (1993); ***State v. Bernhard***, 45 Wn.App. 590, 600, 726 P.2d 991 (1986) (objection waived by failure to give basis). Given the many facets of this technical rule, its several amendments and the many decisions interpreting its provisions:

> the trial court cannot reasonably be expected, nor does it have the obligation, to rule on every possible aspect of CrR 3.3 every time there is a general incantation of the rule's applicability or an issue raised concerning one of its provisions. A motion [] addressed to the specific rule provision gives trial court[s] the opportunity to determine whether or not the applicable time limits have elapsed. It also enables the court in appropriate cases to find as a fact whether [] any excluded periods apply and to make a record of such things for possible appellate review.

Id. (*quoting* ***State v. Barton***, 28 Wn.App. 690, 693, 626 P.2d 509 (1981)).

Defendant's objections to the continuances generally asserted his preference for trial. He never articulated how CrR 3.3 was violated by the continuances. And up until April 24th, 2016, most of the continuances were granted at his counsel's request. RP(4/28) 10-12. Another one was granted for the defense June 1, 2016. RP(6/1) 2-3. The next advanced the interests of justice due to the prosecutor's involvement in an older multi-count child sex case. CP 31, 94; RP(6/2) 3. Defendant cited no exception to the rule's

tolerance of that delay. His counsel opposed the State's effort to proceed to trial, as counsel *preferred* to wait until Thompson's return from leave would obviate the need to interrupt testimony. *Id.* at 5. The same is true of the continuance to June 23, 2016, when trial began. CP 32; RP(6/16) 3-4. So this time for trial claim was waived.

c. Continuances are properly granted to give defense counsel time to prepare for class A felony trials.

Even when the defendant objects, the granting of a continuance to facilitate counsel's preparation and to ensure effective representation does not constitute an abuse of discretion. ***Ollivier***, 161 Wn.App. 307, 313, 254 P.3d 883 (2011) (affirmed 178 Wn.2d at 813); ***Campbell***, 103 Wn.2d at 1. The risk of proceeding without adequate discovery or proper investigation outweighs delay in going to trial. *Id.* Our society has a profound interest in ensuring defendants receive constitutionally effective representation. ***State v. A.N.J.,*** 168 Wn.2d 91, 225 P.3d 956 (2010); ***Strickland v. Washington***, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984). Counsel must reasonably prepare for trial. *Id.* Scrutiny of counsel's choices regarding investigation, discovery, or interviews are highly deferential. *Id.* Continuances enabling review of new or pending forensic evidence are proper. ***Cannon***, 130 Wn.2d at 327. (pending DNA results).

Defendant agreed to the first continuance as it enabled his counsel's month-long vacation and case preparation. CP 88. By the next continuance, counsel was still catching up from leave. CP 7; RP(1/22) 3-4. And at the next, counsel invoked ***Campbell*** to secure a continuance over defendant's objection to ensure he received a fair trial. RP(2/26) 3-4. At the March 10th hearing, counsel had two other trials in the queue with another one likely to go the following week. RP(3/10) 6. His motion to suppress was not filed until two days before the March 24th continuance, invoking the State rule-based time to respond. CP 17, 28; RP(3/24) 1-9. Counsel also had plans to attend a WACDL conference no doubt to sharpen his skills. Counsel was seeking additional discovery from the crime lab when the April 28th hearing on further delay came around. RP(4/28) 2-3, 5-6. It was only after his dance card cleared June 2nd that he joined in pressing for trial. RP(6/2).

d. Continuances should be granted when counsel is involved in other trials or material witnesses are unavailable.

When a prosecutor, the defendant's counsel or the assigned judge is unavailable because of involvement in another trial, a continuance of the defendant's case may be granted unless it would prejudice the presentation of his defense. ***State v. Carson***, 128 Wn.2d 805, 814-15, 912 P.2d 1016 (1996) (continuance warranted where counsel and the trial judge were in

another case); ***Cannon*** 130 Wn.2d at 326; ***State v. Jones***, 117 Wn.App. 721, 728-29, 72 P.3d 1110 (2003); ***State v. Raper***, 47 Wn.App. 530, 535, 736 P.2d 680 (1987). The propriety of continuing one trial in order to let counsel proceed through trial in a different case can turn on a comparison of factors like case age, complexity, trial length, periods of pretrial detention and the like. ***Angulo***, 69 Wn.App. at 342.

CrR 3.3's phrase "administration of justice" is not limited to the administration of justice in one case seen in isolation from others awaiting trial. Courts consider factors affecting all the defendants whose cases are scheduled to go out for trial in deciding whether a continuance should be granted. *Id.* at 343. A material witness's unavailability can likewise justify a continuance when there is a valid reason for the unavailability, the witness can appear within a reasonable time and there is no substantial prejudice to the defense. ***State v. Nguyen***, 68 Wn.App. 906, 914-15, 847 P.2d 936 (1993) (continuance properly granted when State's police witness was called up for immediate National Guard service). Unavailability due to military service is also deemed to be an involuntary-unforeseeable circumstance. *Id.* at 916.

Several of the challenged continuances were properly granted due to both counsels' need to try prioritized cases. RP(1/22) 5 (defense counsel's "older" trials); RP (3/10) (prosecutor and counsel); (6/1) 2-3 (counsel); (6/2) (prosecutor); (6/16) (prosecutor and trial judge in another case); (6/21) 2-3

(prosecutor and trial judge). The prosecutor's need to appear in an older murder trial likewise accounted for a recess after time for trial tolled June 23, 2016. RP (6/28); (6/29). Counsel's third-strike case was anticipated to begin within a corresponding period. RP(6/28) 269. Defendant's case was pushed into the court's mid-trial medical leave by the prosecutor's murder trial. CP 36, 100; RP (9/12) 296.

Defendant chased some witnesses for a while. RP(2/26) 3; (3/10) 3; (3/24). Several police witnesses had fluctuating availability as the trial date repeatedly moved to accommodate other issues, beginning April 28, 2016—four months after the original trial date defendant waived. RP(4/28) 2 (four or five police scheduling conflicts; one on military leave until July 1); (6/16) (lead detective out until July 27th). Each continuance was well within the court's discretion to grant.

e. Continuances are properly granted so defense counsel, police, judges, and prosecutors can take vacations.

Vacations can be vital to the administration of justice. To deprive personnel essential to our system of justice periodic reprieve from their duties would eventually result in less effective justice. ***Heredia-Juarez***, 119 Wn.App. at 153 (prosecutor's vacation). A vacation reasonably scheduled by defense counsel, a presiding judge, a police witness or prosecutor is recognized to be a valid basis for continuing a criminal defendant's trial. *Id.*;

State v. Torres, 11 Wn.App. 323, 331, 44 P.3d 903 (2002). This is necessary to preserve the dignity of police officers and officers of the court alike, for the unrelenting sea of criminal trials would otherwise preclude vacation. *Id.*; ***State v. Selam***, 97 Wn.App. 140, 143, 982 P.2d 679 (1999) (counsel's vacation); ***State v. Grilley***, 67 Wn.App. 795, 799, 840 P.2d 903 (1992) (investigating officers).

Defense counsel took a month off from December, 2015, to January, 2016. CP 88; RP(1/22) 5. The first assigned prosecutor took 2 weeks mid-February. RP(1/22) 3-4. Defense counsel took more time for a WACDL conference between March and April, 2016. CP 28; RP (3/24). This was followed by the detective's June 27th vacation. RP(6/16) 3-4. Other officers had staggered unavailability June 20th to the 28th and June 20th through July 21st. *Id.;* RP(4/28). The second prosecutor took three days in August. RP(7/18). Thompson's military leave ran from about April, 2016, through October, 2016, with a honeymoon in between, yet he still arrived for a defense interview and was available for trial on September 19th when defendant decided not to call him. RP(9/12) 287-89; (9/19) 1029-30. Deputy Oetting, the officer watching with Thompson as defendant came home from the shooting had prescheduled vacation in August. RP(7/22) 279. Defendant resisted the State's effort to eliminate the conflict by way of a preservation

deposition. RP(7/22) 280-85. If this seems a bit unwieldy, the reason for a trial court's broad discretion to manage scheduling just moved into view.

f. Recesses can be granted or extended when an assigned judge or counsel become unavailable due to illness or a prioritized trial or to accommodate a material witness's schedule.

"In both the state and federal judicial systems, it is customary for a trial judge to handle more than one case at a time. Neither system could function, especially when cases are preassigned to a judge, if the trial court had no ability to manage cases and set priorities, so long as its procedures do not prejudice or interfere with a constitutional right of a party. The right to a trial does not mean that the defendant has a right to all the court's time every day for as many consecutive days as it takes to complete the trial. ***State v. Andrews,*** 66 Wn.App. 804, 812, 832 P.2d 1373 (1992). It has therefore long been the rule that time for trial tolls when the assigned judge rules on a preliminary motion such as a motion to exclude witnesses absent prejudice to the accused. *Id.*; ***Carson***, 128 Wn.2d at 820; ***State v. Carlyle***, 84 Wn.App. 33, 36-37, 925 P.2d 635 (1996); ***State v. Estabrook***, 68 Wn.App. 309, 313, 842 P.2d 1001 (1993).

Once trial begins, a recess can be properly called or extended so long as it is not designed to delay, harry or obstruct the trial's orderly process.

State v. Edwards, 68 Wn.2d 246, 285, 412 P.2d 747 (1966). Illness that befalls a trial's essential participant or material witness is an unforeseeable circumstance that justifies delay. ***State v. Andrews***, 66 Wn.App. 804, 812-13, 832 P.2d 1373 (1992) (judge's dental emergency) (citing CrR 3.3(d)(8)); ***State v. Greene***, 49 Wn.App 55-56, 742 P.2d 152 (1987) (prosecutor's illness); ***State v. Smith***, 104 Wn.App. 244, 249, fn.18, 15 P.3d 711 (2001) (defense counsel's illness); ***State v. Lillard***, 122 Wn.App. 422, 436, 93 P.3d 969 (2004) (witness's illness).

The same holds true for unavailability brought about by the court or counsel's need to prioritize other trials or a material witness's schedule. *See* ***Carson***, 128 Wn.2d at 815; ***Cannon*** 130 Wn.2d at 326; ***Nguyen***, 68 Wn.App. at 914; ***Jones***, 117 Wn.App. at 728; ***Raper***, 47 Wn.App. at 535; ***Angulo***, 69 Wn.App. at 342. A court's decision to grant or extend a recess will not be disturbed absent an abuse of discretion. ***State v. Mays***, 65 Wn.2d 58, 62, 395 P.2d 758 (1964); ***State v. Berrysmith***, 87 Wn.App. 268, 280, 944 P.2d 397 (1997) (time for trial rule not violated by 3 week recess to enable preparation); ***City of Seattle v. Clewis***, 159 Wn.App. 842, 849, 247 P.3d 449 (2011) (discretion to delay trial for witness's work).

The notion recesses subvert the time for trial rule was rejected. The clock stops when a case is called for trial and a preliminary ruling is issued. Far from a pretext to manipulate CrR 3.3, a great deal of progress was made

in defendant's trial after the ER 615 ruling was entered. Several witnesses gave CrR 3.6 testimony over several days. RP (6/23); (6/27); (6/28); (6/29). The court ruled on the admissibility of the 911 call. RP(6/28) 245-63. Most motions *in limine* were decided. RP(6/27) 179-90. Technical difficulties prevented the court from doing more. RP(6/28) 270-75. Defendant did not object when the court denied the State's request to proceed to jury selection, and the rest of trial, so there would only be a brief recess at the end to accommodate Thompson's testimony. RP (6/27) 125-27. There is nothing but proof of a court working to make real progress in defendant's case.

g. There is not a speedy trial violation in delay caused by defendant or valid reasons without prejudicial effect.

"Some pretrial delay is [] inevitable and wholly justifiable." ***State v. Shemesh***, 187 Wn.App. 136, 144, 347 P.3d 1096 (2015) (40-month delay did not violate speedy trial); ***Doggett***, 505 U.S. at 656. Inquiry into speedy trial claims necessitates a functional analysis of the right within a case's particular context. *Id.*; ***Barker v. Wingo***, 407 U.S. 514, 522, 92 S.Ct. 2182 (1972). The reasonableness of delay is ascertained through assessment of: (1) length of delay; (2) reason for delay; (3) right's assertion; and (4) prejudice to the defense. *Id.* To avoid skating over the same lines cut in the overlapping time-for-trial response, facts pertinent to the speedy-trial claim are summarized to invoke events detailed above.

i. Defendant cannot establish presumptive prejudice as he must to win review.

Defendants seeking review of a speedy-trial claim must establish presumptive prejudice. ***Shemesh,*** 187 Wn.App. at 145. Courts assessing if the threshold is met consider the duration of pretrial custody, complexity of the charges and the extent to which a case involves reliance on eyewitness testimony. *Id.*; ***Iniquez***, 167 Wn.2d at 292. An eight month delay has been deemed "*just beyond* the bare minimum needed to trigger a ***Barker*** inquiry," but only because the accused remained in custody for noncomplex charges dependent on ostensibly evanescent eyewitness testimony. ***Shemesh***, 187 Wn.App. at 145 (emphasis added).

Approximately nine months passed between the date of defendant's *first arraignment* and trial. Had his charges remained static from beginning to end, his case would probably have been comparable enough to ***Iniquez*** for review triggering prejudice to be found. But his case evolved. Over the intervening period he decided to tamper with the testimony of his DV victim through numerous jail calls in violation of the order prohibiting that contact. The witness tampering occurred on or about the period between October 8, 2015, and February 26, 2016. CP 25. Phone calls that proved the VPO charges were made from the 13th to the 15th of December, 2016. *Id.* Proof

of his success in tampering with his victim's testimony arrived December, 31, 2015, when she filed her recantation letter. CP 5. Defendant's post-arraignment crimes required new investigation and relied on recordings and a court order. The State moved to stop his misuse of the jail phone February 16, 2016. RP(2/16) 8-10. Arraignment for those new crimes was held March 24, 2016. CP 24; RP(3/24) 10.

Defendant cannot cry foul about delay that he contributed to by committing new crimes to obstruct justice. Once the several month period of his custodial-crime spree is deducted, his case's age falls below the 8 months found to be presumptively prejudicial in ***Iniquez***. The complexity added to the original charges by his tampering with the only eyewitness combined with resources proof of it required to drag his case further back from the gateway to review. To permit defendant to profit from crimes so pernicious to the administration of justice would be contrary to public policy not to mention common sense. *See* ***State v. Hernandez***, 192 Wn.App. 673, 681-82, 368 P.3d 500 (2016) (defendants responsible for a witness's unavailability forfeit Sixth Amendment right to confrontation). But if presumptive prejudice could be found in these facts, it would only trigger a ***Barker*** inquiry. ***Iniquez***, 167 Wn2d at 283.

ii. The length of delay falls far short of periods found to be acceptable whether or not one discounts time taken to address his mid-case crimes.

Regardless of whether one reads the clock in terms of the 9 months between defendant's arraignment and trial, the 11 months separating his arraignment from verdict, or some discounted period under 9 months due to his intervening criminal conduct, far longer periods have not been regarded exceptionally long. ***Ollivier***, 178 Wn.2d at 828-29 (non-violative delays ranging from 21 to 58 months). An attribute of defendant's case common to the many cases cited in ***Ollivier*** is the responsibility he shared for the delay. At least half of the continuances can be directly attributed to the defense. That rough hew does not account for the portion attributable to the crimes he committed from jail. This ***Barker*** factor heavily weighs against him.

iii. Be it unavailability due to prioritized trials, vacations, illness or witnesses, they are all valid reasons for delay.

The reason for a challenged delay is the focal inquiry. ***Ollivier***, 178 Wn.2d at 831. Courts sort neutral reasons attending the administration of justice from improper reasons for which a party can bear blame. *Id.* At one end of the spectrum are speedy-trial right waiving agreements to a delay, like the one that moved defendant's November, 2015, trial date to February,

25, 2016. CP 88. His trial began 4 months after that waived period and concluded 3 months later. At the spectrum's other end is deliberate delay aimed at frustrating the defense. *Id.* Shifting back toward neutrality while tilting toward the defense is delay brought about by negligence or courtroom overcrowding. *Id.* at 832.

On balance the delay in this case is chargeable to the defense due to the number of defense-accommodating continuances combined with time required to redress defendant's intervening crimes. *Id.* at 833. Other delay necessitated by illness, defense counsel's responsibilities or vacation are not chargeable to the State. Nor is delay caused by time needed for the State's response to defense motions, discovery requests and the like. Nor is the unavailability of material witnesses for a trial date that moved further into the future, many times for the defense. All of this outweighs any blame attributable to time the court and counsel took to complete prioritized trials amid a system overburdened by rampant crime.

iv. Assertion of the right only occurred after initial delays benefitted the defense.

"Because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by [a] defendant's counsel is [] charged against the defendant." ***Ollivier***, 178 Wn.2d at 833; ***Vermont v. Brillon***, 556 U.S. 81, 90-91, 129 S.Ct. 1283 (2009). Defense

counsel's inability or unwillingness to move a case forward may not be attributed to the State even where counsel is assigned by the court. *Id.* And delays caused by defense counsel's discovery demands of third parties cannot be counted against the prosecution. ***Ollivier***, 178 Wn.2d at 836.

As in ***Olliver***, most of the early continuances in this case served defense counsel's investigation, preparation or vacation in some way. Two months before trial defense counsel requested additional discovery from the crime lab, which is a nonparty, so resulting delay cannot be charged to the State. RP(4/28) 2-3, 5-6; ***Ollivier***, 178 Wn.2d 837. Other delays were partly brought about by his need to complete trials competing for his time. The resulting delay affected everything that followed. For it forced defendant's trial date into conflict with other trials as well as events affecting witness availability and the judge's unforeseeable illness *after trial began.*

Defense counsel *eventually* joined in protesting further delay—once his vacation, preparation and competing trials were complete. Our speedy-trial rule cannot be asserted à la carte—waived so long as beneficial then offensively asserted at the moment conditions beyond State control impede its capacity to effectively proceed. Most delays are interrelated, with early continuances for the defense casting cases further into an uncertain future. Time needed to overcome hardships attending that future is not improper when sought by the State. This is especially true if the case could have been

tried earlier, but was not as an accommodation to the defense. The speedy trial right is not a game of musical chairs in which the defendant gets to start *then stop* the music whenever he is comfortably seated.

v. The defense benefited from, and was not prejudiced by, the challenged delays.

Defendant heavily relies on ***Iniquez***, but fails to cite ***Ollivier***, which clarified ***Iniquez***' explanation of the prejudice prong:

> To the extent that our decision in *Iniquez* may have been less than clear on this point, we clarify it now. A defendant ordinary must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized.

Ollivier, 178 Wn.2d at 840. The presumption of prejudice defendant urges this Court to indulge is only appropriately applied in cases where the post-charge delay lasted "at least five years." *Id.* at 842.

Even if one put the entire age of his case on the board, it would fall far below that bar. *Id.* at 844 (*e.g.*, ***United States v. Toombs,*** 574 F.3d 1262 (10th Cir. 2009); ***United States v. Serna-Villarreal***, 352 F.3d 225, 232 (5th Cir. 2003). Unable to lean on presumptive prejudice, defendant must prove the delay impeded his defense or deprived him a fair trial. *Id.* But neither occurred. The delay did enable him to argue a theory of alibi he conceded could have been foreclosed had the court refrained from excluding Deputy Thompson's testimony for the delay. RP(9/12) 313-23. Defendant's delivery

of discovery to the State one week before trial resumed September 12, 2016, proves he benefited from time he bills to the State. RP(9/12) 287-89. But he cannot eat his cake and have it too. Nor can he load this factor's empty plate with generic claims of oppressive pre-trial incarceration or undue anxiety, for longer periods have failed to bend the balance toward prejudice. ***Ollivier***, 178 Wn.2d at 844. His case's pace was not ideal, but it was speedy enough.

h. No mismanagement can be found in a prosecutor who tried a child-sex case, murder case and an *evolving* firearm assault, witness tampering and VPO case in the relevant period.

Defendants seeking CrR 8.3 relief must prove mismanagement that actually prejudiced their right to a fair trial. ***State v. Flinn***, 119 Wn.App. 232, 247, 80 P.3d 171 (2003). The possibility of prejudice is not enough. ***State v. Rohrich***, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). Dismissal is a last resort remedy only used in egregious cases. *Id.*; ***State v. Michielli***, 132 Wn.2d 229, 239, 938 P.2d 587 (1997). Denial of a CrR 8.3 motion should be affirmed absent an abuse of discretion. ***State v. Kone***, 164 Wn.App. 420, 433, 266 P.3d 916 (2011).

Neither mismanagement nor prejudice has been proved. Each of the continuances was predicated on at least one, often several, valid reasons for delay. About half of the continuances were at least partially purposed to further the preparation of defendant's case. Another was based on the timing

of his CrR 3.6 motion. Another enabled his counsel's vacation. Others were based on the need for counsel to try prioritized-older cases. Others were based on witness unavailability affected by the associated movement of defendant's trial date. One witness was on protracted military leave outside the State's control. And there was the trial judge's extended illness after she had issued rulings and heard testimony in defendant's case.

Defendant's claim is doubly meritless because he has not identified actual prejudice attending his trial's timing or pace. Being without actual prejudice, he offers abstract-notional prejudice by focusing attention on his inability to conduct a pre-suppression hearing interview of a witness he otherwise characterizes as being mostly irrelevant. And defendant has not explained how the interview would have altered the hearing's outcome. It can be inferred defendant perceived the witness to be more trouble than he was worth based on defendant's decision to forego his exclusive right to call the witness at trial after an interview was facilitated by the State.

The prosecutor defendant feels comfortable characterizing as having "bungled" this case tried a multiple count class A sex case, a multiple count firearm enhanced DV assault case that evolved with defendant's post-arraignment crimes and a first degree murder case over the relevant several month period. All of which was accomplished with about half the leave time taken by the court and counsel. One wonders if his critic could do so much,

or fare so well under those circumstances. Either way, each delay was based on at least one recognized ground. Defendant has not identified any actual prejudice he endured as a result. So nothing establishes the court manifestly abused its discretion in denying his CrR 8.3 motion to dismiss. The court did grant his motion to exclude Thompson, which was extreme since his absence was attributable to military leave; however, the ruling was true to the court's duty to take intermediate remedial steps to address a perceived irregularity. ***State v. Koerber***, 85 Wn.App. 1, 4, 931 P.2d 904 (1996). The CrR 8.3 claim should fail with the rest.

2. THE ENHANCEMENTS WERE CORRECTLY IMPOSED AS MANDATORY TIME FOR AN ADULT DV OFFENDER WHO FIRED A RIFLE INTO AN OCCUPIED HOME.

In the "Hard Time for Armed Crime Act" of 1995, the people of the State of Washington recognized that armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death." ***State v. Eckenrode***, 159 Wn.2d 488, 490, 150 P.3d 1116 (2007) (citing Laws of 1995, ch. 129, § 1(1)(a) (initiative 159 (I-159)). "Under the enhancement statute, firearm enhancements are clearly mandatory for all enhancement-eligible offenses irrespective of the terms of the sentencing statute." ***State v. Mandanas***, 168 Wn.2d 84, 88, 228 P.3d 13 (2010); RCW 9.94A.533(3)(e) (2015). Subpart (3) provides firearm enhancements "must

be added to the total period of confinement for all offenses, which is further clarified by subpart (3)(e):

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm ... enhancements, for all offenses sentenced under this chapter.

Id. This is the unambiguous law as applied to adult offenders. *Id.*; *see* ***State v. Houston-Sconiers***, 188 Wn.2d 1, 20-21, 391 P.3d 409 (2017). Courts interpreting statutes through *de novo* review are to give effect to a statute's plain language unless it leads to an unconstitutional or absurd result. *Id.*

The trial court correctly imposed defendant's firearm enhancements as mandatory terms of sentence. Defendant had long since passed the age of minority when he shot up his ex-girlfriend's house at the age of 38. So the plain language of the mandatory firearm enhancements applied to his acts of assaulting McMains in the first degree and McClish in the second degree with a .45 caliber rifle. CP 47, 72. These mandatory enhancements were controlled by the plain language of RCW 9.94A.533(3)(a)-(b) and (e). Yet defendant urges this Court to interpret them as discretionary through reliance on two Supreme Court cases that interpret RCW 9.94A.589 (a)-(c) pursuant to RCW 9.94A.535. App.Br. at 36-37 (citing ***State v. McFarland***, 189 Wn.2d 47, 399 P.3d 1106 (2017); ***In re Pers. Restraint of Mulholland***, 161 Wn.2d 322, 166 P.3d 677 (2007)). Those cases cannot qualify the

mandatory quality of firearm enhancements as they "must" be added to base sentences "[n]otwithstanding any other provision of law," such as those on which defendant mistakenly relies.

The second flaw is defendant's reliance on the ***Houston-Sconiers*** concurrence to argue the SRA enables avoidance of enhancements through exceptional sentences. There are many problems with this position. The first is procedural. Defendant cannot win review of an exceptional sentence he never sought below. RAP 2.5; RP(12/2) 1-23; ***State v. Knight***, 176 Wn.App. 936, 957, 309 P.3d 766 (2013). He does not claim counsel was ineffective for failing to seek it, so the alleged statutory error is unreviewable. *Id.* The next problem is substantive. The argument depends on a construction only embraced by two members of the Court. ***Houston-Sconiers***, 188 Wn.2d at 34-40. The six-justice majority required courts to consider "the youth of any juvenile" when imposing firearm enhancements. *Id.* at 22-26. This limited exception derived from reading the statute with our Juvenile Justice Act to reach a construction that would not violate the Eighth Amendment *as applied to juveniles*. *Id.* It did not free courts to withhold enhancements from adults. And the evidence did not support of doing so in defendant's case.

D. CONCLUSION.

There was no violation of the time for trial or speedy trial rules as the less than extraordinary delays in defendant's case were attributable to the defense or unforeseeable circumstances that did not prejudice his case. No sentencing error has been proved, for the firearm enhancements were correctly treated as mandatory components of his sentence. His convictions and sentence should be affirmed.

RESPECTFULLY SUBMITTED: October 23, 2017

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

10/23/17 Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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