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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

QUEZON LUCAS POOR THUNDER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 16-1-00967-2

Brief of Respondent

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

1. Did appellant knowingly and intelligently assert his right to self representation?
2. Was appellant's failure to responsively interact with the trial court a sufficient reason for the trial court to deny appellant's motion to represent himself?
3. Was CrR 3.3 violated in this case?
4. Did appellant make a threshold showing sufficient to invoke the *Barker v. Wingo* analysis?
5. Does the *Barker v. Wingo* analysis in this case demonstrate that appellant received a speedy trial?
6. Are special conditions 9 and 10 of the sentence conditions imposed in Exhibit H of respondent's judgment and sentence valid crime related prohibitions pursuant to RCW 9.94A.703(3)(c).
7. Are special conditions 9 and 10 of the sentence conditions imposed in Exhibit H of respondent's

judgment and sentence valid pursuant to RCW
9.94A.703(3)(f)?

8. Are the State's concessions of error pertaining to
the other challenged sentencing conditions valid?

B. STATEMENT OF THE CASE.

1. PROCEDURE

a. October 5, 2016 Motion for Self-
Representation.

On October 5, 2016, appellant unambiguously told Judge Nelson that he wanted to represent himself. 10/05/16 VRP 3-9. The trial court tried to conduct an inquiry pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), but most of appellant's answers to the trial court's questions were non-responsive. 10/05/16 VRP 5-8.

Appellant did not answer any of the following questions: "And have you any legal training?" 10/05/16 VRP 6. "What do you know about preparing a case for trial?" *Id.* "What do you know about criminal procedure?" *Id.* "What do you know about the rules of evidence?" *Id.* "You refer to knowing your rights. . . . What have you studied to determine these rights?" "What are the charges in this case?"

When asked “Tell me a little bit about the burden of proof.” appellant responded: “Burden of proof? What do you mean by burden of proof? What proof do you want? My motion right here to go sui juris?”

When asked “What is the State’s job in this matter?” appellant responded: “As you work for the State, it’s a conflict of interest. I still want to represent myself. That’s why I’m asking for a certificate of oath. You can’t show it. Why?” 10/05/16 VRP 7.

The following exchange concluded the inquiry:

THE COURT: The ideas that you have about certificates and oaths and --

THE DEFENDANT: Them are rights.

THE COURT: -- and other rights --

THE DEFENDANT: I’ve read constitutional rights, the rights of the state of Washington.

THE COURT: Where have you -- what have you studied that gives you this knowledge?

THE DEFENDANT: It’s private. I want to represent myself.

10/05/16 VRP 7-8.

Appellant’s trial counsel advised appellant that the trial court had to go through the colloquy. *Id.* at 6. But that was unavailing. About all the trial court could learn from this *Faretta* inquiry was that (a) appellant

could not be relied upon to responsively answer the trial court's questions; (b) that appellant had an eleventh grade education, (c) that appellant wanted to represent himself, and (d) that appellant held fixed opinions about the law, of unknown source. *Id.* at 5-8.

The trial court asked appellant's counsel if she could ask any questions to get at what she wanted to determine. *Id.* at 8. Appellant's trial counsel responded that he thought that the court had covered them. *Id.*

Appellant's trial counsel tried to help appellant get past the knowing, voluntary, and intelligent component, but from the record it appears that appellant was being deliberately obtuse. 10/05/16 VRP 17-19. It appears that appellant had fixed beliefs about legal procedure which unshakeably guided his conduct before the trial court:

THE DEFENDANT: And I want to state for the record, next time we come to the courtroom, I would like to see jurisdiction and certificate of oath, and you can smile all you want to because you don't have jurisdiction over me, as soon as you put that black cape on to be a captain on a pirate ship. I'm not retarded. Trying to put sea laws on me, and I'm stating that for the record. You are breaking my laws of the land.

10/5/17 VRP 19-20. At another hearing, appellant made the following statement: “I comprehend. Understand means giving you jurisdiction.” 2 VRP 36.

Appellant’s self-representation motion was denied. *Id.* at 9. The trial court expressed an intention to revisit the self-representation issue at appellant’s next court appearance. *Id.* at 18-19.

b. November 7, 2016 Motion for Self-Representation

Self-representation was addressed before a Judge Schwartz on November 7, 2016. 11/7/16 VRP. Appellant provided his age, but refused to state his level of education at this time. 11/7/16 VRP 4. Instead, appellant stated:

I have studied and done research. I have filed my own motions already. I have proceeded to already look through the rules, looked through the courtroom rules. I have filed already a motion on a speedy trial violation because I have been here for over 225 days. They are not answering it. In the upper courts they answered and just acknowledged that. I even sent in two motions. I feel comfortable enough that I can represent myself.

11/7/16 VRP 4-5. The Court asked his level of education a second time, and appellant stated: “My education does not matter.” 11/7/16 VRP 6.

Petitioner denied being under the care of a medical provider and denied receiving any medication. 11/7/16 VRP 6.

Appellant was asked “Do you understand what the disadvantages are of representing yourself? In other words, giving up your right to an attorney?” Appellant responded with a non sequitur:

My case has already been thrown out the window due to speedy trial violations of courtroom rule 3.3. I filed it already. They are not accepting it.

11/7/16 VRP 8.

Appellant was asked “Do you understand what the disadvantages are of representing yourself?” 11/7/16 VRP 6. Appellant responded: “I want to represent myself.” The trial court then asked appellant to tell him about the “nature and complexity” of his case. The following exchange ensued:

THE DEFENDANT: What do you mean by "nature and complexity" of my case?

THE COURT: What are you charged with?

THE DEFENDANT: I haven't been charged with anything. I'm innocent until proven guilty.

THE COURT: There is an Information filed in this case, all right, which charges you with Rape of a Child in the Second Degree. Are you aware of that?

THE DEFENDANT: I'm not aware of nothing.

THE COURT: Okay. Have you reviewed the charging documents?

THE DEFENDANT: Huh?

THE COURT: Have you reviewed that charging document?

THE DEFENDANT: I haven't been charged with anything. I'm innocent until proven guilty.

THE COURT: All right. Do you understand how serious that charge is?

THE DEFENDANT: I have not been charged with anything.

THE COURT: All right. Do you understand what the potential consequences of a conviction are?

THE DEFENDANT: What, slavery?

THE COURT: No. You could be sentenced to prison.

THE DEFENDANT: That's slavery.

THE COURT: Do you understand that if you are convicted, you can be sent to prison?

THE DEFENDANT: Slavery.

THE COURT: All right. Is this an ISRB case?

MR. HARLASS: Yes, Your Honor.

THE COURT: Do you understand that potentially if you are sentenced to prison you could be held incarcerated for the rest of your life?

THE DEFENDANT: Slavery.

THE COURT: Okay. Do you understand that or no?

THE DEFENDANT: Slavery.

11/7/16 VRP 7-8.

Appellant was then asked whether he understood that he must abide by the rules of courtroom procedure and that he would receive no special privilege because he was not a lawyer, appellant answered nonresponsively: “I have already known procedures, and I already filed a motion to dismiss this case. Can you show me a certification of oath?”

11/7/16 VRP 8. When asked again whether he understood that he would have to abide by the rules, appellant again answered nonresponsively: “Can you show me a certification of oath that you withhold the rights of my land, instead of trying to push the maritime laws on me?” *Id.* at 8-9.

When asked whether his waiver was the result of coercion or threats by anyone, appellant responded “By your system.” *Id.* at 9.

Defendant stated that he could read. *Id.* at 10.

Judge Schwartz denied defendant's motion to represent himself. *Id.* at 11. The court based its decision on timeliness and upon fact that defendant did not understand the consequences of his waiver. *Id.*; CP 69.

As the hearing concluded, appellant stated: "I don't understand any of your legal operations that you guys are actually doing in this courtroom." 11/7/16 VRP 15-16. After the Court directed the jailers that they could take appellant back to jail, appellant made it clear that his refusal to answer the trial court's questions was purposeful: "No, because if I answer his questions, it puts me back in the operation. You are operating illegally and violating my rights." *Id.* at 15.

During a subsequent (February 23, 2017) hearing, appellant's trial counsel addressed this issue before the trial court:

MR. UNDERWOOD: And I can follow up on that. He has made a request to proceed pro se previously. He's raised this argument before, and he would not answer the Court's questions. It was before [J]udge Schwartz down in CDPJ. And I explained to him what he would need to do if he wanted to proceed pro se. He wouldn't let me finish my explanation. He has not done what he needs to do to go pro se. He would not answer the Court's colloquy with regards to –

2/23/17 VRP 4. Appellant interrupted his lawyer to state:

THE DEFENDANT: I do not, for the record, understand. I do not understand. Once, again, for the record, I do not understand. I do not give authority to stand over me –

Id.

c. The February 28, 2017 motion for self-representation.

On the day of trial, appellant again moved the trial court for self-representation. Judge Cuthbertson heard this motion. The motion was unambiguous. 2 VRP 31-32. After learning that appellant had been researching the law while incarcerated (*Id.* at 34), and after advising appellant of the charges advised again of the charges against him, (*Id.* at 34-35), the trial court attempted to explain that appellant was facing the possibility of an indeterminate sentence if convicted at trial. *Id.* Appellant demonstrated no understanding of what he was facing:

I comprehend that it is a fee that you guys are trying to charge me with and trying to use the jail time to pay the fee off when I have the right to pay the fee off and not do jail time.

Id. at 35.

Judge Cuthbertson attempted to assess whether the appointment of standby counsel would be a problem for appellant:

THE COURT: No, listen. Let me go. It's my turn. Look at me, please, so I know you're comprehending. If I allow you to proceed

pro se, and I'm going to appoint him as standby, because I'm not going to let you just sit here. You need somebody to assist, to tell you how this thing works, because I don't think you're familiar enough with the rules of evidence. So if I do it, I'm going to appoint standby counsel and it's going to be Mr. Underwood, is that going to be a problem? That's the first question. If you've done all the research I know you've done, you've seen DeWeese and the other cases, you know that it pretty much is required.

2/28/17 VRP 42. Defendant would not answer this question:

THE DEFENDANT: Like I said, I'm using myself as a special appearance underneath Rule E8 without granting jurisdiction. I don't grant you guys jurisdiction.

THE COURT: I understand that. You've preserved all those objections.

THE DEFENDANT: I'm going to keep on saying this on the record. I object.

Id. Judge Cuthbertson tried again:

THE COURT: Excuse me. We have a court of record. It's on the record, so your objections are noted. I have noted the objections, and they're on the record, so we don't have to repeat that old stuff. I need you to tell me, because I want to get this moving. I've got

jurors downstairs. Question one, is it okay if Underwood, Kent Underwood is standby counsel?

Id. at 42-43. Appellant again refused to answer:

THE DEFENDANT: Like I said, I'm here as a special appearance.

Id. at 43. Judge Cuthbertson tried a different question:

THE COURT: Number two, is notwithstanding special appearance, Uniform Commercial Code, all the other legal stuff, are you going to be able to conduct yourself, and this goes back to the first question, in front of the jury and –

THE DEFENDANT: The jury ain't my peers.

THE COURT: Can you conduct yourself in front of the jury, because I'm going to treat you like a lawyer. Like a lawyer.

THE DEFENDANT: Jury is not my peers or any Civil Right Acts of Indian 1968. I'm supposed to be in front of my Indians, Indian Tribe.

THE COURT: Well, that's not my question.

THE DEFENDANT: Well, that's a violation of the Civil Rights Act of 1968. I have an Indian bloodline certificate. I have proceeded with putting my enrollment number, which is U-050173 on the record to let you guys know that I'm Indian. That I'm

supposed to be in front of my peers, Indians. Indians are supposed to be having jurisdiction over me. That's why I'm asking you to prove jurisdiction. I do not grant you jurisdiction. Do you understand? We are having a problem due to the fact that Washington State is the plaintiff and that is not a real human being. That is a nonliving fictitious entity, the capital letter name. It's a legalese terminology of a fiction nonliving fictitious entity. It is not me. I do not claim to be the capital letter name.

THE COURT: All right. So let me --

THE DEFENDANT: You have a conflict of interest.

Id. at 43-44. The trial court then heard from counsel. *Id.* at 44-45.

It is clear from the record that Judge Cuthbertson was carefully considering self-representation with standby counsel:

THE COURT: We are again at the day of trial, and I really need an answer to the last two questions, because if it's not going to work. I mean, I think it possibly could, but it's got to be standby counsel. The other thing is it gets back to the first thing I talked to you about. I don't want a situation where we're here in the middle of the trial and you're being disruptive.

(emphasis added) 2 VRP 45-46. The trial court then asked the following question:

THE COURT: If you're going to represent yourself, are you ready to proceed to trial?

2 VRP 46. Appellant would not answer that question:

THE DEFENDANT: They're not my peers. They may not judge me.

THE COURT: Okay.

THE DEFENDANT: Indian Civil Rights Act of 1968, I have case law in my thing. I am essentially strapped down, so it's hard for me to get paperwork.

Id. The trial court then denied appellant's motion for self representation.

Id. at 46-47. The matter proceeded to trial.

Prior to trial, there were a series of continuances:

3/7/16	Initial court date. Supp. CP 289. Arraignment set over. <i>Id.</i>
3/8/16	Arraignment. CP 276. Trial set on May 7, 2016. <i>Id.</i>
4/15/16	Continuance. Supp. CP 290. Trial set on August 4, 2016. <i>Id.</i> Joint motion for continuance. <i>Id.</i>
6/30/16	Trial date accelerated to July 28, 2016. Supp. CP 292.
7/25/16	Continuance. CP4; 7/25/16 VRP 3-4. Trial set on September 20, 2016. <i>Id.</i> Joint motion for continuance. <i>Id.</i>

- 8/19/16 Continuance. Trial was continued to September 26, 2016 due to appellant's counsel's scheduled vacation. CP 5; 8/19/16 VRP 3-5.
- 9/26/16 Continuance. Trial was continued until November 7, 2016. CP 13. Joint continuance. *Id.*
- 11/7/16 Continuance. Trial was continued for two days because prosecuting attorney received defense motion that day. CP 68. 11/7/16 VRP 12-15. No objections were presented. *Id.*
- 11/9/16 Continuance. Trial continued to December 9, 2016. 11/9/16 VRP 47-48; Supp. CP 293. No objections were presented to this continuance. *Id.*
- 12/9/16 Continuance. Trial continued to February 23, 2017. 12/9/16 VRP 6; CP 121. Joint continuance.
- 2/23/17 Continuance. Trial continued to February 27, 2017. 2/23/17 VRP.
- 2/27/17 Trial commences. 2/27/17 VRP 1-21.

2. FACTS

Appellant's Brief adequately relates the facts at trial as they pertain to appellant's sentencing conditions.

C. ARGUMENT.

1. APPELLANT'S MOTIONS FOR SELF-REPRESENTATION WERE PROPERLY DENIED.

The denial of a request for pro se status is reviewed under an abuse of discretion standard. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714, 717 (2010). The trial court must indulge "every reasonable presumption" against a defendant's waiver of the constitutional right to

counsel. *Id.* (citing *In re Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) and *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

Each separate motion for self representation made by appellant must be examined independently to determine if the requirements for pro se status were met. *Id.* at 505.

The threshold question is whether the request for self representation is unequivocal and timely. *Madsen*, 168 Wn.2d at 504. “Absent a finding that the request was equivocal or untimely, the court must then determine if the defendant’s request is voluntary, knowing, and intelligent, usually by colloquy.” *Id.* at 504 (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994)).

In this case, all of appellant’s motions for self-representation were unequivocal, and appellant consistently demanded self-representation from well before trial until trial commenced.¹

¹ The State does not rely upon untimeliness in this appeal. The trial court held that the November 7, 2016 motion was untimely. 11/7/16 VRP 11. However, the actual trial did not commence until February, 2017 (1 VRP – 10 VRP). The February 28, 2017 motion for self representation was made as trial was about to commence, but it was for all practical purposes just a continuation of the motion that appellant had been making for weeks.

Each of the three judges who considered appellant's self-representation motion attempted to conduct a proper colloquy pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) to determine whether appellant's decision to represent himself was knowing, voluntary, and intelligent. Appellant frustrated each of those attempts.

In the October 5 and November 7 hearings, appellant refused to answer the trial court's *Faretta* colloquy questions. 10/5/16 VRP 5-8; 11/7/16 VRP 6-8. That refusal kept the trial court from determining whether appellant understood the nature of the charges against him and the disadvantages of self-representation. *Id.* In the November 7 hearing, Judge Schwartz tried to approach appellant on this issue, and appellant, seemingly obtusely, refused to even acknowledge that he had been charged with a crime. 11/7/16 VRP 7.

Defendant's lack of cooperation precluded Judges Nelson and Schwartz from concluding that appellant's assertion of his right to self representation was knowing, voluntary, and intelligent. Indulging every reasonable presumption against self-representation, this Court should not find that either trial court abused its discretion when it denied appellant's October 5, 2016 and November 7, 2016 motions for self representation.

This roadblock—the refusal to answer questions—was not a secret kept from appellant. His lawyer tried to help him get past this issue:

MR. UNDERWOOD: And I can follow up on that. He has made a request to proceed pro se previously. He's raised this argument before, and he would not answer the Court's questions. It was before judge Schwartz down in CDPJ. And I explained to him what he would need to do if he wanted to proceed pro se. He wouldn't let me finish my explanation. He has not done what he needs to do to go pro se. He would not answer the Court's colloquy with regards to –

THE DEFENDANT: I do not, for the record, understand. I do not understand. Once, again, for the record, I do not understand. I do not give authority to stand over me –

2/23/17 VRP 4. Appellant's professed lack of "understanding," was not a lack of comprehension as the word is commonly understood—it was just a component of a belief set that denied the trial court's power over him. Appellant openly expressed this during his last motion for self representation:

THE DEFENDANT: I comprehend that it is a fee that you guys are trying to charge me with and trying to use the jail time to pay the fee off when I have the right to pay the fee off and not do jail time.

THE COURT: Okay. But you understand –

THE DEFENDANT: I comprehend. Understand means giving you jurisdiction.

2/27/17 VRP 35.

Appellant persisted with his non-responsive behavior in the February 28 colloquy regarding self-representation. 2 VRP 33-47. However, in that hearing, Judge Cuthbertson was able to proceed further down the colloquy path than Judges Nelson and Schwartz had. Judge Cuthbertson learned that appellant had “been incarcerated long enough and done enough research to know [his] rights in the proceedings.” *Id.* at 34.

Judge Cuthbertson was also able to advise appellant that he was charged with rape of a child in the fourth degree and was facing an indeterminate sentence of up to life in prison. 2 VRP 34. Unfortunately appellant’s comprehension of that advisement is not at all clear. *See* 2 VRP at 34-35. The nonresponsiveness of appellant’s answers could be the result of deliberate obtuseness, or the result of a genuine lack of understanding. *Id.* Appellant’s refusal to responsively interact with the court caused those problems.

At any event, Judge Cuthbertson expressed that he was considering self representation with standby counsel. 2 VRP at 41-42. In other words, appellant was told that he then stood at the threshold of self-representation. The trial court then posed two questions to appellant. First, he asked whether appointing Mr. Underwood (appellant’s lawyer) as standby counsel would be a problem. 2 VRP 42. Appellant refused to

answer that question. *Id.* Judge Cuthbertson then asked appellant if he would be able to conduct himself in front of the jury. *Id.* at 43. Appellant refused to answer that question. After hearing from the prosecutor and defense counsel, Judge Cuthbertson asked a third question: “If you're going to represent yourself, are you ready to proceed to trial?” *Id.* at 46. Appellant refused to answer that question. *Id.* Appellant’s response to each of those questions was pointedly nonresponsive. The first non-answer was a denial of the trial court’s jurisdiction. *Id.* at 42. The second and third non-answers were a challenge to the composition of the jury. *Id.* at 43, 46.

Indulging every reasonable presumption against self-representation, this Court should not conclude that appellant sincerely intended to represent himself before the trial court when he would not even tell the trial court whether or not he was ready to go to trial. 2 VRP 46-47. The February 28, 2017 *Faretta* colloquy failed as a consequence of appellant’s obstructive behavior, just like the prior two *Faretta* colloquies failed. Appellant’s refusal to responsively interact with the trial court was either the product of appellant’s own obstructive intent or his failure to understand that one vital consequence of self representation was responsive interaction with the trial court judge. However phrased, Judge

Cuthbertson did not abuse his discretion when he denied appellant self representation on February 28.²

We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Of course, a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.

The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.

Faretta v. California, 422 U.S. at 834 n.46. This Court should review the transcripts of each of the pretrial motions and consider appellant’s continually obstructive and disruptive behavior. Self representation would have been completely impracticable given appellant’s consistent and complete refusal to interact meaningfully with the trial court.

² This Court may want to consider *United States v. Ezekiel*, 3:17-CR-01195-L, 2017 WL 4044439 (S.D. Cal. Sept. 11, 2017) (A case of no precedential value, not binding on any court, cited only for such persuasive value as this Court deems appropriate. GR 14.1). It is an example of a trial judge expressing his attempt to address self-representation in the context of a defendant advancing bizarre legal theories while refusing to interact meaningfully with the court.

2. APPELLANT RECEIVED A TIMELY TRIAL PURSUANT TO CRR 3.3.

- a. The objections presented by appellant himself are irrelevant in the CrR 3.3 analysis because appellant's own counsel sought the continuances about which appellant complains.

State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009)

introduced the concepts of “personal consent” and “personal objection” into the CrR 3.3 speedy trial analysis. *Saunders*, 153 Wn. App. at 217-18. Even though defendant’s lawyer in *Saunders* did not object to the three continuances at issue in that case, defendant’s personal resistance sufficed as an adequate objection. *Saunders*, 153 Wn. App. at 220-21. The facts supporting those three continuances were reviewed by the Court of Appeals in *Saunders* because that personal resistance was held to constitute a valid objection.³ The first continuance at issue in *Saunders* was a joint continuance,⁴ and the next two continuances were motions by the State.⁵

³ The Court of Appeals also, without any citation to authority, relied upon the trial court’s “own duty to see that Saunders received a timely trial.” *Saunders*, 153 Wn. App. at 217-18. This reasoning cannot be reconciled with either CrR 3.3 (d) (the waiver provisions) or CrR 3.3(h) which expressly states that “[n]o case shall be dismissed for time to trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.”

⁴ *Saunders*, 153 Wn. App. at 212 (“The State and Saunders’s attorney moved for a continuance until February 20 for “further negotiations.”).

⁵ *Saunders*, 153 Wn. App. at 214 (the February 20 continuance) and *Saunders*, 153 Wn. App. at 214-15 (the March 18 continuance).

As applied to defense motions for continuance and joint motions for continuance, *Saunders* is no longer good law after *State v. Ollivier*, 178 Wn.2d at 819. In *Ollivier*, the Supreme Court held “the delay in bringing Ollivier to trial did not violate speedy trial rights when defendant's own counsel requested the continuances causing the delay and no claim of ineffective counsel is made related to those continuances.”⁶ *Ollivier*, 178 Wn.2d at 819.⁷ All of the continuances requested in this case (excepting one unobjected-to two day continuance for good cause), individually addressed *infra*, were either requested by defense counsel or were jointly requested by defense counsel and the State. Defendant’s “personal consent” or “personal objection” to those continuances is irrelevant in the CrR 3.3 analysis.

- b. Appellant’s CrR 3.3 claim should be denied because appellant has failed to address any individual motion for continuance.

When evaluating compliance with CrR 3.3, each continuance must be assessed individually. *State v. Ollivier*, 178 Wn.2d 813, 825, 312 P.3d 1, 10 (2013).⁸

⁶ “Here, Ollivier's own counsel sought the continuances about which he complains, and as the rule expressly provides, any objection is therefore waived.” *Id.* at 824.

⁷ *Ollivier* explicitly addressed joint continuances: “Some of the requested continuances mentioned circumstances involving the State and some motions were joined by the State.” *Id.* at 821.

⁸ In *Ollivier*, the defendant’s factual concession that each of the individual continuances granted in his case were not an abuse of discretion compelled the legal conclusion that the defendant’s speedy trial rights were not violated under CrR 3.3. *Id.*

In *Saunders*, the defendant's "personal objection" was relevant only to the extent that it allowed him to present his substantive claims to the Court of Appeals. See *Saunders*, 153 Wn. App. at 216-221. That objection only served to get the defendant over the waiver hurdle. The defendant in *Saunders* still had to convince the Court of Appeals that each individual continuance should not have been granted. This distinction was recognized in *Ollivier*:

In *Saunders*, three continuances at issue were granted that the Court of Appeals found to be unsupported by convincing and valid reasons. Indeed, the continuances were granted to permit ongoing plea negotiations over the defendant's objection and contrary to his desire to go to trial. As the State points out in the present case, whether to plead guilty is an objective of representation controlled by the defendant and not a matter of trial strategy to achieve an objective. In contrast, under CrR 3.3, counsel has authority to make binding decisions to seek continuances. *Saunders* is unlike Mr. Ollivier's case because here the continuances were sought to enable defense investigation and preparation for trial.

(citations omitted) *Ollivier*, 178 Wn.2d at 824-25. In this case, appellant does not address any individual continuance requests. See Appellant's Brief at 37-47. Appellant's CrR 3.3 claim should be denied for the alternative reason that appellant does not assign error to any specific continuance and does not present any argument that any specific continuance was improperly granted.

c. Each of the continuances in this case was proper. Appellant waived objection to each of the continuances in this case.

3/7/16 Charges filed. CP 1-3. Scheduling order, noting that appellant was removed from the courtroom, set arraignment date for 3/8/16. Supp. CP 289.

3/8/16 Appellant arraigned.⁹ An omnibus hearing was set for 4/15/16 and a trial date set for 5/3/16. CP 276.

The March 8, 2016 arraignment date is the initial commencement day for speedy trial purposes. CrR 3.3(c)(1).¹⁰ The speedy trial expiration date, because appellant was in custody, was Monday, May 7, 2016.¹¹ CrR 3.3(b)(1)(i).

Appellant identifies no timely objection to this date setting. Accordingly, on April 1, 2016, appellant waived any CrR 3.3 objection to that trial date setting pursuant to CrR 3.3(d)(1).

4/15/16 The scheduled omnibus hearing date. The trial date was continued to August 4, 2016. Supp. CP 290.

The trial court found that this continuance (made jointly by the State and appellant's attorney) was required in the administration of justice pursuant to CrR 3.3(f)(2) and that the defendant would not be prejudiced in his defense. Supp. CP 290. No error has been assigned to

⁹ Appellant has not provided a transcript of his arraignment. However, the State agrees with appellant that appellant was arraigned on 3/8/2016. See CP 276; Appellant's Brief at 2.

¹⁰ Time is calculated pursuant to CR 6. CrR 8.1. CR 6(a) specifies that the first day of the period is not counted in the calculation.

¹¹ The 60th day was on Sunday. CrR 8.1, CR 6.

that finding of fact and it is a verity on appeal.¹² The continuance order recites that the motion was a joint motion based upon: “New Case. Parties need to prepare case for trial.” Supp. CP 290. That finding is also unchallenged. Appellant presented no valid objection to this continuance requested by his own lawyer. *State v. Ollivier*, 178 Wn.2d at 824. Accordingly any objection was waived pursuant to CrR 3.3(d)(3).

Appellant incorrectly claims that an objection was made to this continuance. Appellant’s Brief at 3, 30. Appellant was represented by counsel at this hearing.¹³ Appellant has failed to meet his burden of providing a record sufficient to review this continuance hearing because the record includes no transcript of this proceeding. The record on appeal is devoid of any objection made by counsel. Continuance upon motion by counsel is an excluded period. CrR 3.3(f)(2); CrR 3.3(e)(3). CrR 3.3 does not incorporate unstated, but implied, requirements. CrR 3.3(h).

This continuance, for good cause, was an excluded period pursuant to CrR 3.3(e)(3) and CrR 3.3(f)(2). The end of that excluded period was August 4, 2016. *Id.* Thirty days after the end of that excluded period was

¹² “We treat unchallenged findings of facts and findings of fact supported by substantial evidence as verities on appeal.” *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182, 185 (2014). Appellant has not provided a transcript of this hearing for review.

¹³ Appellant does not challenge either the propriety or the adequacy of defense counsel’s representation at this hearing.

September 3, 2016. That was the new speedy trial expiration date. CrR 3.3(b)(5).

6/13/16 Scheduling Order and Order for Competency Entered. CP 291.

On June 13, 2016, a competency hearing was scheduled. Supp. CP 291. An order for examination of the defendant for competency was also entered at this time. CP 277-82.

The propriety of the order for competency evaluation is not challenged on appeal. Appellant has not challenged the trial court's finding that "there being reason to doubt the defendant's competency to proceed and/or there may be entered a mental defense to one or more charges." CP 277. That unchallenged finding is also a verity on appeal. The order was requested by appellant's counsel. CP 282. Appellant has provided no record of this hearing. The time for trial period was tolled starting on this date. CrR 3.3(e)(1).

6/30/16 Competency Hearing and Acceleration of Trial Date.

On June 30, 2016, appellant was found competent to stand trial. CP 283-84. A scheduling order set a motion for continuance and an omnibus hearing for July 25, and accelerated the trial date to July 28, 2016. Supp. CP 292. The seventeen days between the June 13 order for evaluation and the June 30 order establishing competency were excluded

for speedy trial purposes. CrR 3.3(e)(1). The speedy trial deadline remained September 3, 2016.

7/25/16 Continuance

On July 25, 2016, the trial was continued—by joint motion—because the case had been assigned to a new deputy prosecutor and because defense counsel needed time for trial preparation. CP 4; 7/25/16 VRP 3-4. That continuance was required in the administration of justice pursuant to CrR 3.3(f) and defendant was not prejudiced in his defense. *Id.* Appellant has not challenged these findings. They are verities on appeal.

Appellant, not through counsel, stated that he objected to the proceedings. This “objection” is irrelevant. CrR 3.3(f)(2); *State v. Ollivier*, 178 Wn.2d 813, 824 312 P.3d 1 (2013); *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *See generally State v. Finch*, 137 Wn.2d 792, 806, 975 P.2d 967 (1999). Moreover, even if there could be an underlying issue regarding the procedural waivers at this hearing, it must necessarily involve the legitimacy of the request for a continuance. *State v. Ollivier*, 178 Wn.2d at 824. Appellant presents no argument that his lawyer’s request for this continuance was illegitimate in any way.¹⁴

¹⁴ As noted above, continuance upon motion by counsel is an excluded period. CrR 3.3(f)(2); CrR 3.3(e)(3). CrR 3.3 does not incorporate unstated, but implied, requirements. CrR 3.3(h).

The trial was continued from July 28, 2016 (Supp. CP 292) to September 20, 2016 (CP 285). September 20, 2016 was the end of that excluded period, pursuant to CrR 3.3(e)(3) and CrR 3.3(f)(2), so pursuant to CrR 3.3(b)(5) the new speedy trial deadline was October 20, 2016.

Appellant identifies no proper objection to this continuance within the ten days that followed the continuance hearing on July 25, 2016. Accordingly any objection was waived pursuant to CrR 3.3(d)(3).

8/19/2016 Continuance

On August 19, 2016, defense counsel moved for a continuance due to defense counsel's vacation. 8/19/16 VRP 3-5. Appellant was present for this hearing. *Id.* at 4. Appellant's counsel said this:

I talked to Mr. Poor Thunder briefly. He refused to respond at all. Based on what he has said in the past, I'm assuming that he is objecting, and I wrote down, "Objects," and he refused to sign, but quite accurately, he simply did not respond. So I'm making a bit of a presumption with regard to his objection. And I can –

Id. at 5. The trial was continued until September 26, 2016. CP 5. The speedy trial expiration date was October 26, 2016. CrR 3.3(b)(5), CrR 3.3(e)(3), CrR 3.3(f)(2). Due to appellant's non-interaction with the trial court, appellant's agreement or non-agreement to this continuance is unknown.

Appellant identifies no proper objection to this continuance in the ten days following the continuance hearing of August 19, 2016.

Accordingly, any objection was waived pursuant to CrR 3.3(d)(3).

9/26/16 Continuance

On September 26, 2016, the scheduled trial date, the trial was continued until November 7, 2016 by joint motion. CP 13. The prosecutor awaited DNA test results, and defense counsel was unavailable on that day of trial. Defense counsel requested a “1-5 week continuance/recess.” *Id.* The trial court found that the continuance was required in the administration of justice pursuant to CrR 3.3(f) and defendant was not prejudiced in his defense. *Id.* Appellant has not challenged these findings. They are verities on appeal. Appellant’s failure to provide a record of this proceeding precludes any argument that the trial court abused its discretion.

The new speedy trial deadline was December 7, 2016. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2).

Appellant identifies no proper objection to this continuance in the ten days following the continuance hearing of September 26, 2016. Accordingly, any CrR 3.3 objection was waived pursuant to CrR 3.3(d)(3).

11/7/16 Continuance

On the trial date, November 7, 2016, after hearing defendant's second motion for self-representation, the trial court continued the trial date two days. CP 68. This continuance was within the speedy trial period. That continuance was required in the administration of justice pursuant to CrR 3.3(f) and defendant was not prejudiced in his defense. *Id.* Appellant has not challenged these findings. They are verities on appeal.

The reason for the continuance is straightforward: On that same day defense counsel filed a motion to dismiss based upon alleged speedy trial and prosecutorial mismanagement. CP 15-67. The prosecutor needed time to respond. CP 68. Defense counsel interposed no objection. 11/7/16 VRP 12-15. CrR 3.3 incorporates no unstated, but implied, requirements. CrR 3.3(h).

The new speedy trial deadline was December 9, 2016. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2).

11/9/16 Motion to Dismiss for Prosecutorial Misconduct and
Motion to Dismiss for Violation of Speedy Trial.
Continuance Ordered.

Appellant presented a motion to dismiss based upon speedy trial at the November 9, 2016 hearing. CP 17-23; 11/9/16 VRP 34-36. At the time that objection was made, appellant had waived all prior objections,

except his objection to the November 9, 2016 two day continuance pursuant to either CrR 3.3(d)(1) or CrR 3.3(d)(3). The two day continuance of November 7, 2016 was obviously a good cause continuance because appellant had just presented both the court and the state with a 52 page motion on the day of the motion. CP 15-67.

Also, on November 9, 2016, defendant made a motion to dismiss pursuant to CrR 8.3(b). CP 23-24; 11/9/16 VRP 22. The motion was based upon reassignment of a deputy prosecuting attorney during the pendency of the case and upon delay in securing DNA comparison evidence. CP 24. That motion was denied. CP 73. No error is assigned to the trial court's denial of that motion. Appellant's Brief at 1. Defendant cannot recast a claimed CrR 8.3(b) violation as a speedy trial rule violation. CrR 3.3(h) unambiguously states: "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."

Following the denial of defense motions to dismiss, on November 9, 2016, the trial date was continued to December 9, 2016. This continuance was within speedy trial period.¹⁵

¹⁵ The establishment of that deadline is discussed with the November 9, 2016, continuance motion.

A continuance order with findings and conclusions does not appear to have been entered in this hearing, but a scheduling order was entered. Supp. CP 293. Appellant's trial counsel suggested a trial date of January 19, 2017 ("a little bit longer than eight weeks because of [his] trial schedule")¹⁶ and did not object to the December 9, 2016 date fixed by the court. 11/9/16 VRP 47-48; Supp. CP 293.

Appellant mischaracterizes this continuance:

Defense counsel requested, and was granted a continuance to January 19, 2017,¹⁷ to allow time to obtain expert testimony. RP 48 ((November 9, 2016). Thunder again objected. RP 50. (November 9, 2016).

(emphasis added) Appellant's Brief at 5. This characterization is not borne out by the record. Appellant's trial counsel (with appellant present) made the following statement to the trial court:

MR. UNDERWOOD: Your Honor, I have spoken to Wild Spirit. I asked him if he wanted me to have the DNA results looked at by an expert and he said yes. So I will ask the Court for an eight-week continuance and if I get things done sooner that we can accelerate, I will let everyone know. However, having worked with these folks in the past, I think that is probably –

11/9/17 VRP 43. This statement implies no objection. Furthermore, on the November 9, 2016 scheduling order setting that December 9, 2016

¹⁶ 11/9/17 VRP 48.

¹⁷ Appellant is incorrect about that date. Appellant's lawyer asked for January 19th (11/9/17 VRP 48), but the status conference was set for December 9th (11/9/17 VRP 47) and the parties ultimately agreed to set the trial on the same day as the status conference. *Id.* at 48. This is memorialized in the court's scheduling order. Supp. CP 293.

trial date, appellant did not purport to assert an objection. CP 293.

Rather, appellant stated: “I’m not the vessel. I reserve my rights without prejudice. UCC 1-308.” In light of his previous statement consenting to a DNA expert, appellant cannot fairly claim that purported reservation of rights amounts to an objection to a continuance—especially in light of appellant’s prior unequivocal expressions of objection. See CP 13,¹⁸ CP 5,¹⁹ CP 4,²⁰ Supp. CP 290.²¹ Appellant’s Brief claims that an objection is to be found at 11/9/16 VRP 50,²² but all appellant said on that page “I would make a note for the record, I’m signing it. I reserve my right without prejudice, UCC 3-08.”²³

The new speedy trial deadline was January 8, 2016. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2).

12/9/16 Continuance

On December 9, 2016, the trial was continued to February 23, 2017. CP 121; 12/9/16 VRP 6. The trial court found that that continuance

¹⁸ “objects – Refused to sign, present.” CP 13.

¹⁹ “objects – refused to sign” CP 5.

²⁰ “I object Under slave treat Never sign from attorney” CP 4.

²¹ “Refused to sign – objects” Supp CP 290.

²² Appellant’s Brief at 5.

²³ Appellant’s most insistent complaint was that he believed that the trial court had no jurisdiction over him unless the trial court could prove to appellant’s satisfaction that the trial court had jurisdiction over him. 12/9/16 VRP 5, 2/23/17 VRP 2, 7, and 2/27/17 VRP 25 are three examples out of many more.

was “upon agreement of the parties pursuant to CrR 3.3(f)(1)”²⁴ and was “required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant [would] not be prejudiced in his or her defense.” CP 121. The reasons were expressed in the court’s order: “Defense to retain expert witness. Motion to suppress recently argued and denied. Defense has filed a supplemental discovery request last week that the State still needs to respond to.” Appellant has not assigned error to this factual finding and it is therefore a verity on appeal.

This continuance was also a joint continuance. CP 121; 12/9/16 VRP 3-8. It is apparent from the record that this continuance was agreed upon by counsel and accompanied by appellant’s complaint.

Appellant identifies no proper objection to this continuance in the ten days following the continuance hearing of December 9, 2016. Accordingly, any CrR 3.3 objection was waived pursuant to CrR 3.3(d)(3).

The new speedy trial deadline was March 25, 2017. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2).

2/23/17 Continuance

On February 23, 2017 the trial was continued four days, to Monday, February 27, 2017. 2/23/17 VRP 7. This continuance was

²⁴ The State acknowledges the invalidity of this basis for the continuance (because appellant refused to sign) and does not rely upon it in this appeal.

within the speedy trial period. It is apparent from the record that this four day continuance was for administrative convenience because the assigned judge was currently in trial. 2/23/17 VRP. There was no objection to this continuance.²⁵

Appellant identifies no objection to this continuance in the ten days following the continuance hearing of February 23, 2017. Accordingly, any CrR 3.3 objection was waived pursuant to CrR 3.3(d)(3).

2/27/17 Trial Commences. 2/27/17 VRP.

After resolving appellant's motion for self representation, trial commenced. 2/27/17 VRP 1-21.

d. Appellant's time to trial conformed with CrR 3.3.

Appellant asks this court to conclude that "the defense and prosecution paid lip service to the need for time to prepare in a simple case that did not require much time for preparation."²⁶ Appellant's Brief at 45. This argument fails to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial

²⁵ Appellant interposed no "personal objection." See 2/23/17 VRP 1-7.

²⁶ Appellant's Brief does not evaluate any aspect of appellant's trial for its alleged simplicity. Appellant's Brief only addresses the pretrial motions for self representation, speedy trial, and sentencing. Appellant does present one paragraph outlining the trial. Appellant's Brief at 2.

strategy.” (internal quotation omitted) *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Speedy trial rights are not violated “when defendant's own counsel requested the continuances causing the delay and no claim of ineffective counsel is made related to those continuances.” *State v. Ollivier*, 178 Wn.2d at 820. That is the situation presented by this case.

3. APPELLANT RECEIVED A SPEEDY TRIAL PURSUANT TO THE STATE AND FEDERAL CONSTITUTIONS.

- a. The delay of just under one year in this case is not long enough to trigger the *Barker v. Wingo* analysis.

Appellant was charged with four counts of rape of a child in the second degree. CP 1-3. The grave seriousness of these charges is apparent in the sentence appellant received: 280 months. CP 33.

The charging period for each of respondent’s rape allegations terminated six days before appellant’s first court appearance on March 7, 2017. CP 1-3; Supp. CP 289. A valid prosecutorial goal—protection of the public—was aided by the prompt charging of alleged rape.

This case implicated the State’s need to acquire, test and compare appellant’s DNA. On July 8, 2016, 123 days after charges were filed in this case, the State learned that trace amounts of male DNA were found in the alleged victim’s vaginal and perineal areas. CP 76. On August 5,

2016, appellant's DNA was obtained. *Id.* On October 24, 2016, a match with appellant's DNA was discovered and reported to appellant's trial counsel. CP 19, CP 59. The two hundred and thirty one days spent acquiring these DNA results was either appropriate or, alternatively, was not prejudicial to appellant.²⁷

Once the State presented the DNA match to appellant, defense counsel was required to understand, investigate, and prepare a response to that DNA evidence. *See* 6 VRP 397-441 (DNA testimony at trial).

Appellant's unusually trying and obstructive behavior presented another complication not present in most trials. His unusually persistent and insistent legal opinions were presented obstructively throughout the record of proceedings, in every pretrial volume presented on appeal, except 8/19/16.²⁸ Dealing with such a difficult personality required extra

²⁷ On November 9, 2016, the trial court addressed appellant's challenge to the time spent in acquiring the DNA evidence. 11/9/16 VRP 20-50. The motion was denied. *Id.* at 50; CP 73. No error has been assigned to the trial court's order denying appellant's speedy trial/CrR 8.3(b) motion (CP 73). Nor does Appellant's Brief assert that the court's order of November 9, 2017 (CP 73) was not supported by substantial evidence. Failure to assign error and failure to brief each preclude review. RAP 10.3(a)(4); RAP 10.3(a)(6); *State v. Cruz*, 189 Wn.2d 588, 404 P.3d 70 (2017). Unfortunately, the order does not include findings and conclusions, so the most that can be concluded is that the trial court came to one of three conclusions: (1) there was no governmental misconduct; or (2) there was no prejudice; or (3) there was no governmental misconduct and there was no prejudice. *Id.* The trial court orally expressed her reasoning at 11/9/17 VRP 41-43.

²⁸ Supp. CP 289 (arraignment set over); 7/25/16 VRP 6-7; 9/16/16 VRP (most of the volume); 10/5/16 VRP (most of the volume—including refusal to answer questions); 11/7/16 VRP (most of the volume—including refusal to answer questions); 11/9/16 VRP 2-13; 12/9/16 VRP 5-8; 2/23/17 VRP (most of the volume).

time—as evidenced by the three attempts to address self-representation presented in this appeal.

“Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from “presumptively prejudicial” delay, since, by definition, he cannot complain that the government has denied him a “speedy” trial if it has, in fact, prosecuted his case with customary promptness.” *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). This case was, by no means, a run of the mill case.²⁹

The three factors presented here, (1) the grave nature of the rape charges, (2) the need to acquire, present and defend against DNA evidence, and (3) the difficulty of trying, prosecuting, and defending an extremely difficult client, all taken together, warrant this Court concluding that the 357 day delay in bringing defendant to trial was not presumptively prejudicial, and does not trigger application of constitutional speedy trial analysis of *Barker v. Wingo* 407 U.S. 514, 524, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).³⁰

²⁹ See *Commonwealth v. Lebaron*, 90 Mass. App. Ct. 1109, 60 N.E.3d 1197 (2016), review denied, 476 Mass. 1109, 75 N.E.3d 1130 (2017).

³⁰ Respondent agrees with appellant that the Washington Constitution’s speedy trial standard is the same as the United States Constitution’s speedy trial standard. *Ollivier*, 178 Wn.2d at 827.

- b. Alternatively, application of the *Barker v. Wingo* factors demonstrates that appellant received a speedy trial.
- i. The length of the delay was not highly disproportionate to the complexity of the issues presented in this case and counsel's need for preparation.

If the *Barker v. Wingo* analysis is triggered in this case, it is just barely triggered. This case does not even cross the one year threshold. When that duration is weighed against the gravity of the case, the DNA issues presented, and the issues presented by appellant's behavior, it cannot be said that the delay in bringing appellant to trial was "highly disproportionate to the complexity of the issues and counsel's need for preparation." *Ollivier*, 178 Wn.2d at 830.

- ii. The reasons for the delay are almost all attributable to appellant.

It took 357 days to bring defendant to trial. 306 days are allocated to joint continuances,³¹ 38 days to the initial trial setting, 6 days to defense

³¹ The April 15, 2016 continuance motion (extending the trial date until August 4) accounts for 111 days. Supp. CP 290; (Appellant provided no transcript.). The July 25, 2016 continuance motion (extending the trial date until September 20) accounts for 47 days. CP 4; 7/25/16 VRP 3-4. The September 26, 2016 joint motion for continuance (extending the trial date to November 7) accounts for 42 days. CP 19; (Appellant provided no transcript). The November 9, 2016 joint motion for continuance (extending the trial date to December 9) accounts for 30 days. Supp. CP 293; 11/9/17 VRP 47-48. The December 9, 2016 joint motion for continuance (extending the trial date to February 23) accounts for 76 days. CP 121; 12/9/16 VRP 6.

continuances,³² 4 days to court congestion,³³ 2 days to prosecutor continuances,³⁴ and 1 day to appellant's disruptiveness on his March 7, 2016 initial appearance.³⁵

In this case, like in *Ollivier*, "nearly all the continuances were sought so that defense counsel could be prepared to defend. This is an extremely important aspect of the balancing and leads us to conclude that the length of delay was reasonably necessary for defense preparation and weighs against the defendant." *Id.*, 178 Wn.2d at 831. Each of the 306 days continued by joint request were continued in part due to defense preparation needs.³⁶ When the one day delay caused by appellant's behavior at his initial arraignment and defense counsel's six day vacation request are added to those 306 days, all that remains is 44 days. Those 44 days consist of 38 days for the initial trial setting, two days requested by

³² The August 19, 2016 continuance motion for defense counsel's vacation (extending the trial date to September 26) accounts for six days. CP 5; 8/19/16 VRP 3-5.

³³ The February 23, 2016 to February 7, 2016 continuance due to administrative convenience accounts for four days. 2/23/17 VRP 7.

³⁴ The November 7, 2016 continuance motion allowing the prosecutor time to respond to defense motions (extending the trial date to November 9) accounts for two days. CP 68; 11/7/16 VRP 13.

³⁵ Supp. CP 289.

³⁶ The April 15, 2016 continuance was because "[p]arties need to prepare case for trial." Supp. CP 290. The July 25, 2016 continuance was partly because defense counsel needed time for trial preparation. CP 4; 7/25/16 VRP 3-4. The September 26 continuance was partly because of defense unavailability. CP 13. The November 9, 2016 motion was based partly upon the defense need to get an expert to examine the DNA evidence. Supp. CP 293. The December 9 continuance was again for the purpose of securing an expert to examine the DNA evidence. CP 121.

the prosecuting attorney, for demonstrably good cause, and four days for court congestion, as trial was about to commence.

Appellant argues that *Ollivier* stands for the proposition that “for a motion for a continuance to be attributable to the defendant, the defendant must either agree with defense counsel’s request for a continuance or remain silent.” Appellant’s Brief at 31. As authority for this interpretation, appellant cites to 178 Wn.2d at 829-30. That citation does not support the proposition appellant asserts. *Ollivier*, 178 Wn.2d at 829-830 (the pages cited by appellant) pertains to “length of the delay,” not “reason for delay.”

Under “reason for the delay,” in *Ollivier*, 178 Wn.2d at 831-837 the Supreme Court relied upon *Vermont v. Brillion*, 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), and several other cases to come to the conclusion

In summary, most of the continuances were sought by defense counsel to provide time for investigation and preparation of the defense. Time requested by the defense to prepare a defense is chargeable to the defendant, and this factor weighs heavily against the defendant.

Ollivier, 178 Wn.2d at 837.³⁷

³⁷ “Some of the requested continuances mentioned circumstances involving the State and some motions were joined by the State.” *Ollivier*, 178 Wn.2d at 821.

The “reason for delay” factor weighs strongly in favor of the State.³⁸

- iii. The assertion of rights factor does not weigh in favor of either party.

Appellant claims that “In *Ollivier*, there was no evidence that the defendant objected to any of defense counsel’s continuances . . .”

Appellant’s Brief at 35. This Court should consider:

It may be fairly unusual for a defendant to object to nearly all of a large number of continuances sought by his own attorney. Here, however, Ollivier repeatedly objected to counsel's motions for continuances, and he maintains that therefore his rights to a speedy trial were timely asserted. But under the circumstances, these objections do not weigh in favor of the conclusion that constitutional speedy trial violations occurred.

(emphasis added) *Ollivier*, 178 Wn.2d at 838. This fact, along with the fact that—as in this case—the appellant has not raised a claim of ineffective assistance of counsel, compels the conclusion that this factor is neutral—it weighs neither in favor of appellant nor the State. *State v. Ollivier*, 178 Wn.2d at 839-40.

³⁸ “Where, as here, a postponement is the result of the unavailability of DNA evidence, and there is no evidence that the State failed to act in a diligent manner, the grounds for postponement are essentially neutral and justified.” *State v. Kanneh*, 403 Md. 678, 690, 944 A.2d 516, 523 (2008) (citing *Glover v. State*, 368 Md. 211, 226, 792 A.2d 1160 (2002)). Appellant has not assigned error to the trial court’s decision that there was no prosecutorial misconduct causing prejudice in this case (CrR 8.3(b)). CP 73.

iv. Appellant has not demonstrated prejudice.

The 357 day delay in bringing this case to trial is not long enough to constitute extreme delay warranting the presumption of prejudice. *State v. Ollivier*, 178 Wn.2d at 843-44.³⁹ Appellant must prove prejudice in order to implicate this factor.

Appellant cannot establish “oppressive pretrial incarceration” because the delay is too short. *Ollivier*, 178 Wn.2d at 844-45.

Appellant has not established undue anxiety and concern. “Anxiety and concern are often experienced by defendants awaiting trial. “[T]he second type of prejudice ... is always present to some extent, and thus absent some unusual showing is not likely to be determinative in defendant's favor.” *Ollivier*, 178 Wn.2d at 845 (citing WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.2(e) (3d ed.2007)). Defendant merely argues that the delay in this case, combined with governmental mismanagement and the unwanted imposition of a lawyer caused him “heightened anxiety and concern.” Appellant’s Brief at 36. No error has been assigned to the trial court’s order finding no governmental mismanagement causing prejudice pursuant to CrR 8.3(b). CP 73. The imposition of a lawyer on appellant was necessary. *See* argument, *supra*. Appellant has failed to take the

³⁹ The delay in *Ollivier* was 23 months.

anxiety and concern presented in his case outside the realm of the anxiety and concern presented in an ordinary case where a person is charged with four counts of rape of a child in the second degree.

Appellant claims no impairment of his defense as a consequence of the delay. Appellant's Brief at 35-36. This is the most important of the three prejudice sub-factors. *Ollivier*, 178 Wn.2d at 845.

- v. A balancing of the relevant factors leads to the clear conclusion that appellant's constitutional speedy trial rights were not violated.

One factor in this case, assertion of the right, is neutral. All of the remaining factors favor the State. The delay was not unduly long, the reasons for the delay were primarily attributable to the defense, and respondent has made an insufficient showing of prejudice. Appellant's speedy trial rights were not violated. *Ollivier*, 178 Wn.2d at 847.

4. THE STATE CONCEDES SENTENCING ERROR REGARDING THE "USE OR CONSUME" LANGUAGE OF SPECIAL CONDITION 11 OF APPENDIX H.

Appellant correctly cites *State v. Norris*, 1 Wn.App.2d 87, 404 P.3d 83, 90 (2017) for the proposition that the court did not have authority to order appellant to refrain from the "use" of alcohol. Appellant's Brief at 51-52. This court should impose the same directory remedy upon the trial court that the Court imposed in *Norris*: "Because former RCW

9.94A.703(3)(e) authorizes the imposition of a condition only on “consuming alcohol,” on remand, the court shall strike the words “use or” from condition [11].⁴⁰”

5. THE STATE CONCEDES SENTENCING ERROR WITH RESPECT TO PARAGRAPHS 23 AND 24 OF THE SPECIAL CONDITIONS TO APPENDIX H.

The State concedes that paragraph 23 prohibiting appellant from using the Internet without prior approval of his community corrections order, and paragraph 24 limiting appellant’s use of a computer or other devices are not valid crime-related prohibitions, given the facts of this case. The State agrees with the reasoning of *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262, 1263 (2008). The State asks this Court to impose the directory remedy of striking the provisions of paragraphs 23 and 24 of the special conditions to Appendix H. After reviewing the testimony of the alleged victim at 5 VRP, the State can identify no indication that computer use was related to the offenses appellant committed.

⁴⁰ In *Norris*, the condition was numbered “11” in the order imposing sentencing conditions. *Norris*, 1 Wn.App.2d at 199-200.

6. THE STATE CONCEDES SENTENCING ERROR WITH RESPECT TO PARAGRAPH 22 OF THE SPECIAL CONDITIONS TO APPENDIX H.

After reviewing 5 VRP, the alleged victim's testimony, the State cannot develop an argument that alcohol or drugs contributed to appellant's crimes. See *State v. Munoz-Rivera* 190 Wn. App. 870, 893-94, 361 P.3d 182 (2015). The State asks this court to impose the directory remedy of directing the trial court to strike paragraph 22 of the special conditions of Appendix H requiring alcohol evaluation and treatment.

7. PARAGRAPHS 9 AND 10 OF THE SPECIAL CONDITIONS OF APPENDIX H WERE VALIDLY IMPOSED CRIME RELATED PROHIBITIONS.

The trial court imposed the following two provisions among the provisions of appellant's sentence:

9. Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material. – Absent approval of treatment provider.

10. Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 243. These provisions are appropriate. *State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016).

Alternatively, each provision, by its own plain terms, reasonably relates to monitoring appellant's progress in sexual deviancy treatment. The trial court did not abuse its discretion when it imposed them. "Participate in crime-related treatment or counseling services" is a valid condition of community supervision that the sentencing court has statutory discretion to impose. RCW 9.94A.703(3)(c). These conditions are distinguishable from the conditions addressed in *State v. Norris*, 1 Wn.App.2d 87, 97-98, 404 P.3d 83 (2017) because the conditions in *Norris* were not linked to the treatment provider and did not conform to RCW 9.94A.703(3)(f). *Id.* RCW 9.94A.703(c)(3) was not addressed. *Id.*

Appellant's conviction demonstrates that appellant has the capacity to make catastrophic choices in his manner of sexual expression. Requiring appellant to seek approval of his treatment provider before making future sexually oriented choices is rationally related to the success of the treatment authorized by RCW 9.94A.703(3)(f). Furthermore, an approval process provides the treatment provider with information regarding appellant's sexually related choices which may inform the treatment provider's decisions pertaining to sexual offender treatment direction and focus. This Court should not conclude that the trial court abused its discretion when it imposed the approval requirements of Conditions 9 and 10 of the special conditions of Appendix H.

D. CONCLUSION.

Appellant stridently demanded self representation as he stridently refused to responsively interact with the trial court. Appellant either did not understand that responsive interaction with the trial court was a consequence of self representation (self representation fails for lack of a knowing and intelligent assertion of the right) or understood that responsive interaction with the trial court was a consequence of self representation but refused to interact with the trial court anyway (self representation fails for appellant's obstructive behavior). Either way, self representation was properly denied in this case.

A continuance-by-continuance review demonstrates that CrR 3.3 was not violated.

Given the facts of this case, the delay in this case does not trigger application of the *Barker v. Wingo* analysis. Alternatively, the *Barker v. Wingo* factors are satisfied in this case.

The State agrees with appellant that four of the challenged sentencing conditions in this case should be reversed. However, Special Conditions 9 and 10 of Exhibit H should be affirmed.

DATED: February 21, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

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

2-22-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 22, 2018 - 4:04 PM

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