

2011
MAY 17 2011
COURT OF APPEALS
JUDGE J. H.
STATE OF WASHINGTON
BX _____

No. 294595

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

BOBBY RAY ZAPIEN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

THE HONORABLE JAMES GAVIN
THE HONORABLE BLAINE GIBSON
THE HONORABLE JAMES LUST
THE HONORABLE MICHAEL MCCARTHY

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court violated Mr. Zapien's Sixth Amendment right to present a complete defense and confront the witnesses against him.
- B. The trial court deprived Mr. Zapien of the right to a speedy trial guaranteed by the Sixth Amendment.
- C. The evidence was insufficient to sustain a conviction for first degree murder.
- D. Mr. Zapien received ineffective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Did the trial court violate Mr. Zapien's Sixth Amendment right of confrontation when it ruled Mr. Zapien could not inquire about immunity or favorable treatment agreements for a witness who, outside the presence of the jury, stated he could not recall and asserted his Fifth Amendment right to not incriminate himself; but after an offer of 'derivative use immunity' testified the next day in the presence of the jury?
- 2. Did the trial court err when it restricted the defendant's cross-examination of Detective Lee of the Yakima Police Department about formal or informal agreements he had or was aware the ATF had with Jeff Rhodes, to act as an informant?

3. Did the trial court violate Mr. Zapien's right to a speedy trial guaranteed by the Sixth Amendment when it granted continuances over a nine-month period?
4. Was the evidence insufficient to sustain a conviction of first-degree murder?
5. Did Mr. Zapien receive ineffective assistance of counsel when counsel failed to request a jury instruction on voluntary intoxication?

II. STATEMENT OF FACTS

A. Pre-Trial Proceedings

On January 21, 2010, Mr. Zapien was charged by information with first-degree murder. (CP 4). At arraignment, February 2, 2010, a trial date was set for March 15, 2010, with an attorney status hearing for February 9, 2010. (CP 8).

On February 9, 2010, a second attorney status hearing was set for February 16, 2010. (CP 153). On February 16, 2010, the attorney status hearing was changed to February 17, 2010. (CP 154). On February 17, 2010, the attorney status hearing was set for February 19, 2010. (CP 155).

On February 19, 2010, in an ex parte hearing before Judge Elofson, defense counsel was appointed for Mr. Zapien. (9RP 2)¹.

Although there was no record of it, on March 9, 2010, the State represented to Judge Gibson that Judge Elofson had granted the State a contested continuance on March 4, 2010, but did not set a new date for trial. (RP 2-3,6). The State outlined its reasons for a needed continuance: the number of necessary witnesses, incomplete discovery, and the seriousness of the charges. (RP 5). The court granted the State's request for a trial date of May 17, 2010. (CP 11). When Mr. Zapien contested the continuance of another 60 days, the court responded, "They're taking the chance if it turns out later on the court says your speedy rights have been violated—" (RP 6).

Two months later, on May 6, 2010, the State represented to the court it was waiting for DNA lab results, receipt of cell phone records, and because of the serious nature of the charges, it needed until June 14, 2010, to be prepared for trial. (CP 12). The court granted another order of continuance over Mr. Zapien's objection.

¹ For purposes of this brief, the hearing dates of 3/9, 7/6, 7/20, 8/13, 8/25/2010 will be referenced as RP page no.; hearing dates 9/7, 9/8, 9/9/2010, will be referred to as 1RP page no.; hearing date 9/10/2010 as 2RP page no; hearing date 9/13/10 as 3RP page no.; hearing date 9/15/10 as 4RP page no.; hearing date 9/16/10 as 5RP page no.; hearing date 9/17/10 as 6RP page no.; hearing date 9/20/10 as 7RP page no.; hearing date 9/24/2010 as 8RP page no.; and hearing dates 2/19, 5/21, 6/11, 6/18, 8/30, 9/01/2010 as 9RP.

On May 21, 2010, the court issued an omnibus order requiring discovery to be completed no later than June 4, 2010. (CP 161). On June 11, 2010, in a triage hearing, defense counsel informed the court that he had filed an extensive discovery motion on May 26, 2010. The State had neither read nor looked at the motion as of June 11, 2010. (9RP 5). Over Mr. Zapien's objection, defense counsel indicated he believed he could not be ready without that discovery information and the necessary preparation time should be treated as an excludable delay. (9RP 5).

The court stated, "It's up to the State to produce the evidence and get it to the defense. The State can't just wait until the defense files a motion and has the motion heard." (9RP 7). "...it's the defendant that has the speedy trial right if the State doesn't – if there's material there that you should be giving to him and should have been given to them by now and you haven't, then he's still entitled to assert his speedy trial right and if you don't get the material to them and the speedy trial runs out, the State may be out of luck." (9RP 9). The speedy trial date was July 14, 2010. (9RP 3-4).

On June 17, 2010, the State filed its memorandum in opposition to the defense request for discovery. (CP 138). On June 18, 2010, the State acknowledged it had provided some of the discovery requested by the

defense, but disagreed other requests were material to the case and did not provide them. (9RP 12).

The next hearing was held July 6, 2010. (RP 9). Defense counsel argued the State still had not provided the requested discovery. (RP 8). The court ordered the following requested discovery to be provided to defense counsel:

1. Terms of any agreement verbal or written between law enforcement and/or the Bureau of Alcohol Tobacco and Firearms, and the informant, Jeff Rhodes.
2. Information regarding occasions in which Mr. Rhodes provided information resulting in the arrest and/or conviction of any witness or the deceased in the case.
3. Terms of any informant or favorable treatment in exchange for testimony agreements current or past, between law enforcement and Cole Roberts and also, Christopher McCubbins, and Luis Gonzalez, as it pertained to the current case. (CP17-18; RP 14).

Because of the newly ordered discovery items, defense counsel requested a 30-day continuance. (RP 18; CP 16). Mr. Zapien contested this continuance, stating, “My complaint is, sir, I requested for this discovery all back in March and they’re just getting around to it today. I feel like they had plenty of time. I’ve been locked up since January 17—

seven months.” (RP 18-19). The court granted the continuance but stated, “you’re probably not going to get any more continuances.” (RP 20).

On August 30, 2010, the State requested another continuance to send long-held evidence to the DNA lab. (9RP 22) The court denied that request. (9RP 24).

On September 1, 2010, the court reserved ruling on whether defense counsel could inquire as to whether Jeff Rhodes was a paid informant for the Yakima police department and/or the ATF until it heard his testimony outside the presence of the jury, (9RP 35).

B. Trial

On January 15, 2010, Luis Gonzalez was fatally shot as he worked on his car in the driveway of his friend, Cole Roberts. (CP 6; 1RP 13, 16). Mr. Roberts was unemployed and on electronic home monitoring. (1RP 13,16). Yakima police officers arrived at the scene within minutes of Mr. Roberts call to 9-1-1. (2RP 133; 140). Mr. Roberts told one officer the name of the victim was “Loco,” but told another officer he did not know the victim’s name. (2RP 133; 211).

When questioned moments after the shooting, Mr. Roberts told police he and Mr. Gonzalez had been working on the car speakers and

“I saw a guy walking down the street.’ He described him as about six foot one, about 230-250, and he said he didn’t pay attention to him

‘because people walk down the street all the time’, he said, but then he turned around and was reaching in through this window...and he just heard the gunshot and when he turned back around he saw the guy running away from the scene. And he said that the guy ran to the street and he jumped into a red or maroon minivan...and fled northbound.” (2RP 125;192).

At another point he told officers he saw a light colored minivan drive away. (3RP 241). When police officers clearly asked if he knew who shot Mr. Gonzalez, Mr. Roberts said he did not know. (2RP 134; 192). Later that evening, officers again interviewed Mr. Roberts about the events. Mr. Roberts again stated he did not know who shot Mr. Gonzalez. (3RP 240).

Officers searched the driveway area and collected four cigarette butts, a cell phone, a stocking cap, and a \$100 bill. (3RP 254). No shell casings or a gun were ever recovered. (2RP 179). Later that evening Officer Lynn Thorn collected Mr. Gonzalez’s property at the hospital, which consisted of: three gold rings, a gold Citizen’s watch, a Ziploc bag of methamphetamine, a glass pipe used for smoking methamphetamine, cigarettes, and money. (2RP 167-168).

The next day Jeff Rhodes, a confidential informant, telephoned Detective Lee of the Yakima police department. (4RP 389). Mr. Rhodes told the officer that he had been accused by others of the shooting, but claimed Mr. Zapien committed the homicide. (3RP 298; 4RP 389; 403-

404). Detective Lee and ATF agent Floyd met Mr. Rhodes at the ATF office. (4RP 391). They took Mr. Rhodes to meet Mr. Zapien at the Red Carpet Motor Inn, in Yakima. Mr. Rhodes entered and stayed in the motel room for about 30 minutes. (3RP 301-302). After debriefing, officers asked Mr. Rhodes to go back and talk to Mr. Zapien wearing a body wire, which he refused to do. (4RP 395-396). Based on information Mr. Rhodes provided, officers obtained a warrant and arrested Mr. Zapien at the motel, seizing methamphetamine, drug paraphernalia, scales, and a glass pipe. (4RP 348-349).

At the same time, officers brought Mr. Roberts to the police station for another interview. (3RP 308). During that interview, Mr. Roberts told officers Mr. Zapien shot Mr. Gonzalez. (3RP 309). He also told them that Christopher McCubbins was present at the time of the shooting, but fled to avoid being arrested on an outstanding warrant. (3RP 310).

At trial Mr. Roberts testified Mr. Zapien arrived in a minivan shortly before dark, and came up to the three men (Roberts, McCubbins and Gonzalez) and shook their hands. (1RP 20-21). He returned a hat to Mr. Roberts. (1RP 21). Mr. Roberts testified he went to a house window to plug in an extension cord and turned away from where the others were standing. (1RP 26).

He stated: “When I told the cops when they got there that I was leaning in the window, I wasn’t leaning in the window...I had my back turned but I wasn’t in the window. I was looking for the socket...But by the time I turned around Luis had already hit the ground, had fallen, and I panicked.” (1RP 26). He did not remember where Mr. McCubbins stood. (1RP 27). He saw Mr. Zapien try to pick up Mr. Gonzalez and place him in the trunk of the car, and heard him say, “the motherfucker called me a rat, fuck him.” (1RP 27). He saw the brown handle of a gun in Mr. Zapien’s pocket. (1RP 28).

Mr. Roberts explained he lied to officers when he said Mr. Gonzalez “collapsed” into the car trunk “because I didn’t now what else to do. I didn’t know what else to think.” (1RP 54). On cross-examination defense counsel did not ask about Mr. Roberts about his prior felonies.

Mr. McCubbins, also unemployed, testified he was at his own home all day and telephoned Mr. Roberts between 4 and 5 p.m. (1RP 71). According to Mr. McCubbins, he never saw Mr. Roberts go toward the window to plug in the extension cord. (1RP 79). He heard a noise, turned, and saw Mr. Gonzalez on the ground, and Mr. Roberts standing next to him. (1RP 81). He never saw a gun, and never worried Mr. Zapien might shoot him. (1RP 84). Although Mr. McCubbins claimed he used the cell phone to dial 9-1-1, his fingerprints and DNA were not found

on it. (1RP 85; 4RP 366). Mr. McCubbins said he left immediately after Mr. Gonzalez was shot because he had an outstanding warrant and did not want to be arrested when officers arrived. (1RP 87).

During the cross examination of the lead officer, Detective Shaw, defense counsel asked if he had any personal knowledge of an informant agreement between Jeff Rhodes and any law enforcement agency. (4RP 380). Out of the presence of the jury, Detective Shaw stated, "I don't know if there was [a] physical contract with YPD or ATF and Mr. Rhodes. I never saw one... I just knew that he was a source for --I believe specifically Detective Lee. That's all I know....Again I never saw the contract, I just know that he was working in the -- (4RP 380-81). The court ruled defense counsel could not ask Detective Shaw about any agreements in the jury's presence. (4RP 381).

The court heard testimony from Jeff Rhodes, the confidential informant, outside the presence of the jury. (4RP 408-412). An attorney was present to assist Mr. Rhodes, as he had numerous pending cases. (4RP 407). Mr. Rhodes testified he could not recall whether he went to the Red Carpet Motel on January 16, 2010, or whether he had talked to Mr. Zapien on any day in January, 2010. (4RP 410). Mr. Rhodes asserted his Fifth Amendment right and his attorney explained to the court that Mr. Rhodes was worried that if he made statements that were inconsistent with

“statements that he made in relation to the conversation he may or may not have had with Mr. Zapien or law enforcement, he’s subjecting himself to state and/or federal prosecution.” (4RP 411). The prosecutor offered “derivative use immunity” for his testimony, but neither the court nor the state could offer federal immunity. (4RP 411). The court made no further inquiry. Mr. Rhodes was excused, subject to recall. (4RP 412).

The next day, Mr. Rhodes was recalled to the stand. He testified Mr. Zapien told him he shot Mr. Gonzalez. (5RP 514). On cross-examination, defense counsel asked Mr. Rhodes whether he had an informant agreement or some understanding with a law enforcement agency in which he would be given favorable treatment in return for his testimony. (5RP 516). After objections and outside the jury’s presence, Mr. Rhodes said, “Nobody’s given me nothing. I mean, I don’t--” (5RP 517). The court ruled defense counsel could not question him on that issue in front of the jury. (5RP 517).

When questioned about his prior inconsistent statement, Mr. Rhodes said, “Why should anything from yesterday change from yesterday to today?... I don’t believe that’s what I said. If that’s what I said, then I apologize for that because I do. ..” (5RP 521).

Mr. Zapien took the stand in his own defense. (6RP 552). He testified he was a drug dealer with a drug addiction. (6RP 555). Because

of his drug usage, Mr. Zapien had been awake for several days. (6RP 556). On January 14, 2010, he arranged to meet Mr. Gonzalez to sell methamphetamines to him at Cole Robert's home the next day. (6RP 556). When he arrived, he saw Mr. Gonzalez, Mr. McCubbins, and Mr. Roberts working on the car. (6RP 557). Mr. Zapien placed the bag of drugs on one of the speakers in the car trunk and asked for the money. (6RP 557). Mr. Gonzalez did not have the full amount, but offered Mr. Zapien a bag of money and four guns to make up the difference. (6RP 558; 559). Mr. Zapien said he looked away and then heard a shot. When he looked up he saw Mr. McCubbins had grabbed the bags and was running away. Mr. Zapien ran from the scene, got in his van and drove away. (6RP 560). He testified he called Mr. Rhodes to come to his motel room the next day, to do some tattoos for him. Mr. Rhodes was concerned he himself was a suspect. (6RP 565).

Mr. Zapien was convicted of first-degree murder, with a special verdict of being armed with a firearm at the time of the commission of the crime. (7RP 636; CP 95,96). He was sentenced to 668 months, which included a 120-month firearm enhancement. (CP 105).

III. ARGUMENT

- A. Mr. Zapien Was Denied His Constitutional Right To Present A Complete Defense And Confront The Witnesses Against Him.

1. Jeff Rhodes was improperly allowed to assert his Fifth Amendment right against self-incrimination and then later allowed to testify without any cross-examination on the offer of state and federal immunity for his testimony.

Whether a trial court has violated a defendant's right to confrontation is reviewed de novo. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002). Mr. Zapien contends the court made two errors with regard to the testimony of Jeff Rhodes. First, once Mr. Rhodes asserted his Fifth Amendment privilege to not incriminate himself, the court failed to determine whether his silence was justified. Next, precluding the defense from questioning Mr. Rhodes about an immunity agreement for his testimony was prejudicial error.

Outside the presence of the jury, Jeff Rhodes was called as a witness to recount his conversations with Mr. Zapien the day after the homicide. (4RP 409-411). In response to questioning by the prosecutor, Mr. Rhodes answered each question by saying he could not recall. When asked specifically, "...do you have any memory of Bobby Zapien talking to you about the death of Luis Gonzalez?" He answered, "No I don't think that (inaudible) incriminate myself." (4RP 411). His attorney explained to the court that Mr. Rhodes was concerned "if he was to make statements that were inconsistent to some statements that he made in relation to the conversation he may or may not have had with Mr. Zapien or law

enforcement, he's subjecting himself to state and/or federal prosecution. That's what (inaudible) asserting (inaudible)." The State quickly offered "use or derivative use immunity". (4RP 411).

Unless it is obvious that a question would clearly incriminate a witness, the claim of a privilege against answering it must be supported by the facts and "use of 'reasonable judicial imagination' to conceive of a sound basis for the claim." *Eastham v Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981), *rev.denied*. 95 Wn.2d 1028 (1981). That did not occur here.

Mr. Rhodes initiated contact with Detective Lee and cooperated with both Detective Lee and ATF agent Floyd to obtain incriminating statements by Mr. Zapien. Those statements alone served as the basis for probable cause and the warrant for Mr. Zapien's arrest. There was no physical evidence linking Mr. Zapien to the crime.

Mr. Rhodes refusal to testify, based on his purported concern about making statements under oath, should have triggered inquiry by the court. In fact, where the danger of self-incrimination is not obvious, the court is compelled to inquire and use its discretion to determine whether the silence is justified, as the court is the final judge of validity of the claim. *Hoffman v. United States*, 341 U.S. 479 486-87, 71 S.Ct. 814, 95 L.Ed.

1118 (1951); *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988).

In *State v. Hobble*, the court addressed the question of whether Hobble's claim of the privilege against self-incrimination was a claim of lawful authority to refuse to answer questions regarding his use of aliases. *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995). Hobble had been given transactional immunity both for his actions and the statements he offered to police on the night of the crime. When called to testify, he asserted his Fifth Amendment right to not incriminate himself. By way of explanation, counsel raised the concern about other possible crimes, and when the court responded, "Such as?" counsel said he could not "reveal too much." *Id.* at 292. The trial court then held an *in camera* hearing to determine whether the witness's fear that his admission about using an alias could later be used against him if some "possible unspecified crime were uncovered at some unspecified time in the future" was real and substantial. *Id.* at 291. At that hearing, counsel did not offer any further basis for asserting a claim of privilege. *Id.* at 292. On review, the Court held the trial court was correct in ruling that Mr. Hobble did not have a right to refuse to testify. *Id.* at 292.

Here, despite the significant impact of Mr. Rhodes' statements in establishing probable cause to arrest Mr. Zapien, the court made no

inquiry as to the basis for his refusal to answer questions. There is no all-inclusive Fifth Amendment right to refuse to answer questions based on an assertion that any or all questions might be incriminatory. *Eastham*, 28 Wn. App. at 532. By excusing the witness, without further inquiry, the court essentially found the privilege against self-incrimination applied. Such a finding is reviewed for abuse of discretion. *Id.*

Compounding the problem, the next day Mr. Rhodes was called to testify in the presence of the jury. On direct examination, he in effect gave a narrative of admissions Mr. Zapien allegedly made to him. On cross-examination, counsel asked him if he had an informant agreement or whether he was being given favorable treatment in exchange for his testimony. (5RP 516). Despite the fact that he had been granted state immunity, on the record, the day before, Mr. Rhodes answered, “Nobody’s given me nothing. I mean, I don’t.” (5RP 517). The court then ruled defense counsel could not make further inquiry into any expectation of favorable treatment.

The right to cross-examine and to test the credibility of a witness is a fundamental right guaranteed by both the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10). Here, it was clear Mr. Rhodes had some understanding or agreement simply based on the State’s offer the day before. The question at the end

of that day was whether Mr. Rhodes would also obtain some type of federal immunity as well. The terms of an immunity agreement may be referenced on cross-examination to impeach the credibility of a witness. ER 611 (b); *Davis v. Alaska*, 415 U.S. 308, 945 S.Ct. 1105, 39 L.Ed. 347 (1974); *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010); *State v. Jessup*, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982).

Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. *State v. Jasper*, 158 Wn. App. 518, 534, 245 P.3d 228 (2010). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same verdict in the absence of the error. *Id.* at 535, (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). The restriction on the right to cross-examine and make plain potential bias and motivation to conform testimony by the witness was not harmless error.

2. The Trial Court Violated Mr. Zapien's Sixth Amendment Right To Confront Witnesses When It Restricted Inquiry of Law Enforcement Officers About Any Informant Agreements.

In making its ruling on whether defense counsel could question police officers about informant agreements with Mr. Rhodes, the court made a mistake. Detective Shaw was questioned by the court as to

whether *he* was aware of any agreement between the Yakima police department, the ATF and Mr. Rhodes. He answered “I don’t know if there was [a] physical contract between YPD or ATF and Mr. Rhodes. I never saw one.” (4RP 380). When questioned, “...and were you aware of any other type of contract, informal or oral, whatever?” Detective Shaw answered, “I just knew that he was a source for – I believe specifically Detective Lee. That’s all I know.” (4RP 381). The court relied on the testimony of Detective Shaw, who admittedly did not know, to ascertain whether there were any informant agreements, rather than questioning Detective Lee.

Mr. Rhodes worked as a confidential informant for Detective Lee of the Yakima police department. He met with both Detective Lee and an ATF agent prior to and after going to the motel to attempt to get incriminating statements from Mr. Zapien. Detective Lee testified Mr. Rhodes served as a confidential informant for him. (4RP 389). Defense counsel was precluded from asking Detective Lee if he had an informant agreement with Mr. Rhodes, what its terms were, or if he knew of any federal informant agreement. Detective Lee would have had the information, not Detective Shaw. Further, Mr. Rhodes was concerned about the potential for federal prosecution if his statements were inconsistent with what he had previously reported. It was much more

likely Detective Lee would have known of any federal informant agreements because he and Agent Floyd of the ATF had been involved in obtaining information from Mr. Rhodes. Defense counsel should have been allowed to question Detective Lee about informant agreements.

B. Mr. Zapien's Constitutional Right To A Speedy Trial Was Violated.

The Sixth Amendment provides that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.” U.S. Const. Amend. VI. A Sixth Amendment speedy trial claim is reviewed *de novo* and the analysis is identical with Article 1 §22 of the Washington Constitution. *State v. Iniguez*, 157 Wn.2d 273, 280,290, 217 P.3d 768 (2009). Mr. Zapien argues his constitutional right to a speedy trial was violated when the almost full nine-month delay between his arrest and trial was attributable to the State's failure to have evidence tested or produce discovery to the defense in a timely manner.

To determine whether Mr. Zapien's constitutional right to a speedy trial was violated, the first concern is whether “the length of the delay crossed the line from ordinary to presumptively prejudicial.” *Id.* at 283. Presumptive prejudice is determined by the facts of the particular case, which include length of delay, complexity of the charges, and reliance on eyewitness testimony. *Barker v. Wingo*, 407 U.S. 514, 530-531, 92 S.Ct.

2182, 33 L.Ed.2d 101 (1972); *Iniguez*, 167 Wn.2d at 292; *State v. Ollivier*, --P.3d ----, *2, 011 WL 459594 (2011).

Here, between his arrest and the trial Mr. Zapien was in the county jail. Second, although charged with first-degree murder, the charges were not particularly complex. As the *Iniguez* court noted, complex charges are charges which include “multiple actors, such as with conspiracy charges, which might necessitate greater pretrial delay.” *Iniguez*, 167 Wn.2d at 292. And, like *Iniguez*, the State’s case rested on eyewitness testimony and the testimony of an informant, which underscored “the importance of avoiding delays that could result in witnesses becoming unavailable or their memories fading.” *Id.* Similar to *Iniguez*, in light of the specific case facts, the delay is presumptively prejudicial.

The second step requires a balancing of factors: the length of and reasons for the delay, whether Mr. Zapien asserted his right to a speedy trial, and the resultant prejudice to him because of the delay. *Id.* at 292-293. The *Iniguez* court used a bit of an ad hoc measuring system to assign weight to the various factors. Without much explanation, the court found that the eight plus months Mr. Iniguez spent in jail awaiting trial was not necessarily an undue delay, and weighed the factor only “slightly” against the State. *Id.* at 293. Assuming the assigned weight is appropriate, the delay here should also count against the State.

The third factor is the reason for the delay. *Barker*, 407 U.S. at 531. Each continuance here was based on the need of the State to complete discovery, or precipitated by the State by not turning over some of the requested discovery until ordered to do so.

Mr. Zapien's DNA was not gathered until February 18, 2010, a full month after he had been jailed and only one month before speedy trial ended. (5RP 475). The DNA and collected cigarette butts were mailed to the crime lab on February 23, 2010. (5RP 482). A report on the DNA material on the cigarette butts was not made until August 18, 2010. (5RP 498). The only explanation offered by the State, on June 11, 2010, was "The last continuances were by the State's request but it was because of mailing issues with DNA evidence that was sent to the State Patrol Crime Lab on the west side. We finally got that information. That was a big part of it." (9RP 7). It was never explained exactly what "mailing issue" required so many continuances. It is not likely that it took six months for the crime lab to complete the DNA testing, as the prosecution at another point requested a continuance for more DNA testing and said it would take about two weeks. (RP 25).

The failure of the State to read and respond to the defense motion for discovery precipitated the third contested order of continuance. (RP 18). The defense filed a motion for discovery on May 26, 2010 and as of

June 11, 2010, the State had not responded or produced the discovery. The court noted “– if there’s material there that you should be giving to him and should have been given to them by now and you haven’t, then he’s still entitled to assert his speedy trial right and if you don’t get the material to them and the speedy trial runs out, the State may be out of luck.” (9RP 9). Speedy trial was set for July 14, 2010. In fact, the court did order several pieces of the required discovery to be handed over to the defense on July 6, 2010. (CP 17).

On July 20, 2010, the State represented to the court that the discovery ordered on July 6 had still not been turned over. (RP 21). These continuances should be weighed heavily against the State.

Mr. Zapien asserted his right to a speedy trial at every hearing in which the State requested a continuance. The *Iniguez* court that the ‘frequency and force of a defendant’s objections should be taken into consideration’ and gave ‘strong evidentiary weight’ to a defendant’s assertion of his speedy trial right. *Iniguez*, 167 Wn.2d at 295, quoting *Barker*, 407 U.S. at 531-532. Here, this also weighs heavily against the State.

Lastly, the prejudice to Mr. Zapien because of the delay was significant. In *Doggett v. U.S.*, 505 U.S. 647, 654, 112 S.Ct. 2686, 120 L.Ed. 2d 520 (1992), quoting *Barker*, 407 U.S. at 532, the court defined

prejudice as involving the following: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; (3) possibility that the defense will be impaired by loss of exculpatory evidence and dimming memories of witnesses.

It is clear he was both concerned and upset that he was held in custody for so many months without a trial. Mr. Zapien addressed the court on July 6, 2010 and stated, "...I requested for this discovery all back in March and they're just getting around to it today. I feel like they had plenty of time. If they want to continue this, release me and continue it. All of my family is right here. I ain't going nowhere...I've never had a failure to appear or anything. And they can have all the time in the world they want." (RP 19).

Further, because he was held in custody, Mr. Zapien was unable to fully assist in the preparation of his defense. The Supreme Court held that a defendant "is not required to substantiate actual prejudice to his ability to defend himself because 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. Courts presume this prejudice to the accused intensifies over time.'" *Iniguez*, 167 Wn.2d 285, quoting *Doggett*, 505 U.S. at 652,655. Obviously, any efforts by Mr. Zapien to gather evidence or contact witnesses on his own behalf were impeded. Over the course of time,

defense witnesses who had been subpoenaed were making themselves unavailable, and in fact, none testified. (RP 24). This should also be weighted against the State.

On balance, the lengthy delay between arraignment and trial can be attributed to dilatory action by the State. The trial court made the State aware it was taking a gamble if it did not produce the discovery in a timely way. (9RP 7-8). The charges in this case should be dismissed as the circumstances here justify the remedy.

C. The Evidence Was Insufficient To Sustain A Conviction For First Degree Murder.

The Due Process Clause of the Fourteenth Amendment and Article 1, §§ 3, 22 Washington State Constitution require the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Const. art. 1, §§ 3, 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v Colquitt*, 133 Wn. App. 789, 137 P.3d 892

(2006). Whether the evidence is sufficient to support a conviction is an issue of law. *State v. Knapstad*, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986). An appellate court reviews issues of law *de novo*. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Mr. Zapien of murder in the first degree, the State was required to prove (1) premeditation (2) with intent to cause the death of another (3) and that he caused the death of that person. RCW 9A.32.030(1)(a). Under RCW 9A.32.020, premeditation requires more than a moment in time, and is separate from the element of intent. RCW 9A.080.10(1)(a); *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

Here, there was no evidence to substantiate a finding of premeditation, the necessary element for first-degree murder that distinguishes it from second degree. RCW 9A.32.050(1)(a). In fact, testimony shows just the opposite. Mr. Rhodes, testified Mr. Zapien said he shot Mr. Gonzalez that day “Because he called him rat ...but I must say he said it was light split decision—it just happened. I mean, just an explosive situation. I guess, right there. He had a pistol in his pocket, just

snapped, I guess.” (SRP 514). Mr. Roberts testified Mr. Zapien said he shot Mr. Gonzalez, because “the mother fucker called me a rat, fuck him.” (RP 22-23, 27). Both accounts clearly indicate there was not time enough to deliberate because the action was instantaneous. The evidence is not sufficient to sustain the conviction for first-degree murder.

D. Mr. Zapien Received Ineffective Assistance of Counsel When Counsel Did Not Ask For A Jury Instruction On Voluntary Intoxication.

A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d601 (2001). To establish ineffective assistance, Mr. Zapien must show counsel’s performance was deficient and that deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Courts have found trial counsel ineffective for failure to propose jury instructions which correctly state the law and to which the defendant was entitled. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

An instruction on voluntary intoxication is warranted where the crime involves a particular mental state and there is substantial evidence that the defendant was in fact intoxicated at the time the crime was committed and that the intoxication affected his ability to acquire the

requisite mental state.

State v. Hackett, 64 Wn. App. 780, 785 n.2, 827 P.2d 1013 (1992).

The jury here was instructed that to convict Mr. Zapien of first degree murder, they must find both premeditation and intent. In *Brooks*, the court clearly reasoned that while intoxicated one may be incapable of deliberation or forming a premeditated intent to take the life of another.”. *Brooks*, 97 Wn.2d at 877. Similarly, one may also be incapable of intent because of intoxication.

Defense counsel here should have requested a jury instruction on voluntary intoxication. There was sufficient evidence that Mr. Zapien had been using methamphetamine on the day Mr. Gonzalez died: Mr. Zapien, himself, stated he used drugs and had been awake for three days. (6RP 556). Mr. Rhodes testified that when he saw Mr. Zapien a day later he was still “strung out.” (5RP 526). When officers arrested Mr. Zapien at the motel, they confiscated large amounts of methamphetamine. Without an instruction on voluntary intoxication, the jury had no way of assessing whether he was capable of either intent or premeditation because of intoxication.

Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). With an

instruction in voluntary intoxication, a jury could reasonable have returned a different verdict. Mr. Zapien was prejudiced by counsel's failure to request the instruction. A failure to meet basic standards requires a new hearing when a defendant has been prejudiced by that failure. *McFarland*, 127 Wn.2d at 334-35.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Zapien asks this court to dismiss his conviction with prejudice for violation of his constitutional right to a speedy trial. In the alternative, he asks this court to remand for a new trial based on insufficient evidence to sustain a conviction for first-degree murder and ineffective assistance of counsel.

May 27, 2011

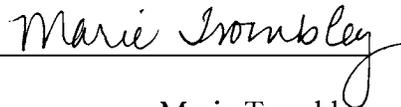
Respectfully submitted,



Marie Trombley, WSBA No. 41410

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Bobby Ray Zapien, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that a true and correct copy of the Opening Brief of Appellant was sent by first class mail, postage prepaid, on May 27, 2011, to Bobby Ray Zapien, DOC No. 721778, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326; Kevin Eilmes, Yakima Prosecuting Attorney's Office, 128 N. 2nd St. Rm 211, Yakima, WA 98901.



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