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No. 36634-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOHN TOLBERT HOBBS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF YAKIMA

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Mr. Hobbs had been in jail for nearly six months when his trial commencement date was reset for the single, simple charge of violation of a no-contact order. Rather than reset Mr. Hobbs's trial within 60 days as required by court rule, the trial court granted his newly appointed attorney's request to reset his trial 115 days from the new commencement date over Mr. Hobbs's objection. This violated Mr. Hobbs's right to a speedy trial, as did the trial court's subsequent continuance beyond this last available day for trial.

This Court should accept the State's concession that remand is required for a new sentencing hearing. The State wrongly concludes, however, that the trial court did not determine comparability and must do so on remand. To the contrary, the trial court found Mr. Hobbs's prior Oregon burglary convictions were comparable to Washington burglary statutes and included them in Mr. Hobbs's offender score. This was error. Because the State's evidence did not establish comparability of these out-of-state convictions, they must be excluded from Mr. Hobbs's offender score on remand.

B. ARGUMENT IN REPLY

1. The trial court violated Mr. Hobbs's speedy trial right both in setting his trial date well beyond the 60-day limit and then by failing to comply with the statutory requirement for continuing his trial beyond this last available day for trial.

- a. Trial counsel's generic request for additional time to prepare for trial was not a valid basis to set Mr. Hobbs's trial out nearly twice the 60 days allowed for trial, especially when Mr. Hobbs had already been in jail for six months awaiting trial.

The State mistakenly treats the court's resetting of Mr. Hobbs's trial date as a discretionary continuance under CrR 3.3(f)(2), rather than a resetting of his trial date pursuant to recommencement, which requires a 60-day day trial set under CrR3.3(b)(1)(i). This trial setting within 60 days is mandatory, Mr. Hobbs objected, and the trial court lacked a valid basis for resetting trial so far in excess of the mandatory 60 days. This was error that violated Mr. Hobbs's speedy trial right, requiring reversal for dismissal of his conviction.

The State cites to October 23, 2018 as the "new speedy trial expiration" based on the new commencement date August 24, 2018, when Mr. Hobbs's second attorney, Mr. Webster withdrew due to a conflict. Br. of Resp. at 5; CrR 3.3(c)(2)(vii)); CP 94 (counsel withdraws due to conflict). This is correct. However, the trial court

failed to set Mr. Hobbs's new trial date within this 60-day period as required by the speedy trial rules.

When an attorney is disqualified and a new commencement period begins "the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set." CrR 3.3(d)(2). When Mr. Webster withdrew as counsel on August 24, the court set a status hearing for August 31, but did not set a new trial date:

MR. WEBSTER: So, for Mr. Hobbs I'm just putting it on the record. My -- My reading of the speedy trial sets October 9th currently, but this disqualification -- counsel's disqualified. I believe unfortunately that will recommence speedy trial as of today.

THE COURT: All right. Well, Mr. Hobbs currently has a trial date of September 10th. So we're going to set this matter for attorney status next Friday, and that's -- we're not going to change any of the other dates today.

8/24/18 RP 24.

The trial court did not reset Mr. Hobbs's new trial date pursuant to this period of recommencement until Mr. Hobbs's third attorney, Mr. Bruns, was appointed and appeared at the status hearing on September 7, 2018. However, rather than comply with the mandatory 60-day rule, setting trial before October 23, 2018, the trial court set his trial

115 days from the date of his recommencement, on December 17, over Mr. Hobbs's personal objection. 9/7/18 RP 26-27.

Though Mr. Bruns called this trial resetting on September 7 a "continuance" for his benefit, it was in fact a resetting of his trial date to which Mr. Hobbs objected. 9/7/18 RP 27.

Under CrR 3.3(b)(1), a defendant who is detained in jail **shall** be brought to trial within the longer of: (i) 60 days after the commencement date specified in this rule, or (ii) the time specified under subsection (b)(5). Section (i) applies here, because this was a trial set based on a new commencement period.

The court's refusal to set Mr. Hobbs's new trial date within the 60 days mandated by court rule was a violation of his speedy trial rights to which he objected, and he is entitled to dismissal. Amend. Brief of App. at 16; CrR 3.3(h).

But even if this Court finds that because Mr. Hobbs's counsel requested this date, or that Mr. Hobbs's personal objection was insufficient, the trial court abused its discretion by not requiring valid reasons for setting Mr. Hobbs's trial date so far beyond the 60 days mandated by court rule.

A court must “state on the record or in writing” the reasons for a granting a continuance. *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009). There should be “convincing and valid reasons for the continuances” granted over the defendant’s objections. *State v. Saunders*, 153 Wn. App. 209, 221, 220 P.3d 1238 (2009). If, as in *Saunders*, a convincing and valid reason must be given for a court’s discretionary decision to continue over a defendant’s objection, this must certainly be required for CrR 3.3(b)(1)(i)’s mandatory 60-day trial set at issue here.

In Mr. Hobbs’s case, Mr. Bruns stated he had not even received Mr. Hobbs’s file yet, so he could not have provided informed reasons for why the court should not adhere to the mandatory 60-day time for trial. 9/7/18 RP 26.

The State argues that the court’s recognition that Mr. Hobbs’s case was not complicated at the omnibus hearing in November does not mean the court could have known that when setting Mr. Hobbs’s trial date in September. Br. of Resp. at 14. But the court had no additional information about Mr. Hobbs’s case between the September trial set and the November omnibus hearing because there had been no additional court date or motions filed in his case. 11/28/18 RP 28-32.

Mr. Bruns even used the same omnibus form that had been entered prior to Mr. Hobbs's speedy trial recommencing in August. 11/28/18 RP 30. The court could have made the very same determination about the lack of complexity in Mr. Hobbs's case on September 7 when the court reset his trial date. Its failure to do so before extending the trial date so far beyond the 60 days allowed by court rule was an abuse of discretion. *Cf. State v. Campbell*, 103 Wn.2d 1, 6-16, 691 P.2d 929 (1984) (in triple murder homicide death penalty case, the court found an additional continuance was needed "because of the complexity and length of this case").

Certainly the court should have required more than a generic statement about the need to prepare for trial where Mr. Hobbs had already spent nearly six months in jail when his recommencement period began.

The court erred in setting Mr. Hobbs's trial 115 days past the recommencement of speedy trial, rather than the 60 days permitted by court rule. Mr. Hobbs's conviction should be reversed for this violation and his right to speedy trial. CrR 3.3(b)(1)(i); CrR 3.3(h).

- b. The State mistakenly relies on CrR 3.3(b)(5)'s "speedy trial buffer" to justify the court's additional continuance of Mr. Hobbs's trial past the December 17 trial date.

The State mistakenly treats Mr. Hobbs's December 17 trial date as if it were set pursuant to a continuance under CrR 3.3(e), which would make it subject to CrR (b)(5)'s 30-day "speedy trial buffer." Br. of Resp. at 5. However the "speedy trial buffer" does not apply to Mr. Hobbs's December 17 trial date because it was set pursuant to disqualification of his attorney under CrR 3.3(c)(2), not a period of exclusion under CrR3.3(e).

CrR 3.3(b)(5)'s "speedy trial buffer" applies only when the trial date was set after an excluded period: "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5).

Excluded periods include competency proceedings, continuances granted by the court pursuant to section (f), the period between dismissal and refiling, disposition of a related charge, when the defendant is subject to a foreign jurisdiction, all proceedings in juvenile court, unavoidable or unforeseen circumstances, or

disqualification of a judge, none of which applied when the trial court reset Mr. Hobbs's trial for December 17.

Rather, Mr. Hobbs's December 17 trial date was established through a "resetting of commencement date" under CrR 3.3(c)(2) due to a disqualification of counsel. CrR 3.3(c)(2)(vii). When the court determines that the trial date should be reset for a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set. CrR 3.3(d)(3).

Even if Mr. Hobbs had not personally objected to his trial being set 115 days, rather than 60 days from the date of recommencement as provided under CrR 3.3(b)(1)(i), the December 17 trial date was the last allowable date for trial:

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

CrR 3.3(d)(3). This last available date for trial is subject to CrR 3.3(g)'s cure period or an excluded period under (e), which includes, in

relevant part, “*Continuances* granted by the court pursuant to section (f).” CrR 3.3(e)(3). CrR 3.3(b)(5)’s 30-day buffer period would only follow after an excluded period under section (e).

As argued in Mr. Hobbs’s opening brief, the court failed to follow the requirements for extending Mr. Hobbs’s trial beyond this last allowable day for trial—December 17—because it did not state on the record the basis for extending the trial date as required by both CrR 3.3(e) or (f). Amend. Br of App. at 18-21. Because these are the only ways in which the court could have extended Mr. Hobbs’s trial date beyond this last available day for trial, and the court failed to meet the requirements of the rule, Mr. Hobbs’s speedy trial right was violated and he is entitled to reversal and remand for dismissal of his conviction. CrR 3.3(h).

- c. Mr. Hobbs need not establish prejudice when the trial court fails to comply with the criminal speedy trial rules.

The State appears to argue that Mr. Hobbs is required to show prejudice when the court violates his speedy trial rules under CrR 3.3. Br. of Resp. at 12. This is wrong. Both the court rule and case law interpreting it are clear: “failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show

prejudice.” *State v. Raschka*, 124 Wn. App. 103, 112, 100 P.3d 339 (2004); CrR 3.3(h).

d. The “invited error” doctrine does not apply.

The State cites no authority for the proposition that a defendant’s personal, adamant objection becomes invited error when his attorney acts contrary to the defendant’s stated request and objection. Br. of Resp. at 12.

Where a defendant’s actions are not voluntary, the court does not apply the doctrine of invited error. *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000). Mr. Hobbs’s repeated, adamant objections to the court setting his speedy trial courts make clear he took no action to invite the court’s error. Moreover, it is the duty of the court to ensure the speedy trial rules are complied with. CrR 3.3(a)(1).

Mr. Hobbs presented his objection and motions for dismissal for speedy trial violations and the trial court ruled on them with a decision adverse to Mr. Hobbs. This is a preserved error subject to review by this Court, not invited error.

2. This Court should accept the State's concession and remand for a new sentencing hearing. On remand, Mr. Hobbs's three Oregon offenses may not be included in his offender score based on the documentation provided by the State.

The State acknowledges that this Court conducts de novo review of a sentencing court's comparability analysis. Br. of Resp. at 23 (citing *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014)). In Mr. Hobbs's opening brief, he establishes that the documents provided by the State do not establish comparability to any Washington burglary statute. Amend. Br. of App. at 27-41.

The State rightly concedes Mr. Hobbs is entitled to a new sentencing hearing. Br. of Resp. at 27. However, rather than concede the court erroneously determined that Mr. Hobbs's prior Oregon convictions were comparable to Washington's residential burglary or second degree burglary statutes based on the documents provided by the State at sentencing, the State claims "[t]here is no record that the trial court conducted any factual comparability analysis with respect to Hobbs's first-degree burglary convictions." Br. of Resp. at 27. The State argues remand is required on this basis, rather than on the court's legal error. *Id.* This is wrong. Reversal and remand for a new sentencing hearing is required because the court erroneously

determined Mr. Hobbs's three prior Oregon burglary convictions were comparable based on the argument and documentation provided by the State at Mr. Hobbs's sentencing hearing.

- a. The trial court erroneously determined Mr. Hobbs's three prior Oregon offenses were comparable to Washington burglary statutes.

At Mr. Hobbs's sentencing hearing the State sought to prove that Mr. Hobbs's prior Oregon burglary convictions were comparable to either Washington's burglary in the second degree or residential burglary statutes. 2/19/19 RP 8-12;¹ CP 129-35; Ex. F-H.

The court noted it "looked through" the certified documents provided by the State. 2/19/19 RP 12. The court stated that it understood the State was arguing that Mr. Hobbs's Oregon burglary convictions were comparable to second-degree burglary or residential burglary, both class B felonies. 2/19/19 RP 11. Mr. Hobbs refused to stipulate to comparability: "My client is unwilling to stipulate to any of the convictions, Your Honor, or any of the facts as presented by the

¹ Though the record of proceedings referred to Appellant's Amended Opening Brief referred to the report of proceedings filed by Kenneth Beck, for clarity, this reply brief will refer to the record of proceedings prepared by Tina Steinmetz since this was used in Respondent's Opening Brief.

State with regard to his criminal history.”² 2/19/19 RP 11. Having reviewed the State’s evidence and understanding its argument, the court then included these prior Oregon convictions in Mr. Hobbs’s offender score when it sentenced him. CP 137.

Even though the State acknowledges “The court did indicate it was admitting the State’s exhibits regarding criminal history,” Br. of Resp. at 28, and these exhibits are now part of the record on appeal, still, the State claims there is “lack of a record for this Court to resolve the issue of whether Hobbs’ Oregon convictions should have been included in his offender score.” Br. of Resp. at 28. This is simply wrong. The State argued and presented evidence below that Mr. Hobbs’s prior Oregon convictions were comparable to Washington Burglary in the second degree of residential burglary. The record is fully developed for review on appeal as evidenced by Mr. Hobbs’s comparability analysis based on this evidence and argument below in his opening brief. Amend. Br. of App. at 27-41. The documents

² The State claims “the defense seemed to agree it would be comparable to the second-degree burglary statute.” Br. of Resp. at 27. This is based on Mr. Hobbs at first tentatively agreeing to the State’s claim based on misunderstanding the State’s argument, but after this was clarified, Mr. Hobbs unambiguously refused to stipulate to either the State’s documents or legal analysis. 2/19/19 RP 9-11.

provided by the State do not establish Mr. Hobbs's prior Oregon offenses are comparable to Washington burglary statutes.

The State faults Mr. Hobbs because he "made no argument regarding factual comparability at the sentencing hearing." Br. of Resp. at 28. It is the State's burden to prove comparability of prior convictions at sentencing by a preponderance of the evidence. *State v. Jones*, 182 Wn.2d 1, 9, 338 P.3d 278 (2014). Because this was the State's burden, Mr. Hobbs had no obligation to produce contrary evidence or argument. *See, e.g., State v. Cate*, 194 Wn.2d 909, 913, 453 P.3d 990 (2019) (neither the defendant's failure to object nor his appellate counsel's failure to argue that the calculation was incorrect satisfies the State's burden of proof).

There is simply no basis to claim the trial court did not make a comparability analysis when the argument and evidence was presented to the court, the court heard and reviewed this argument and evidence and then included these prior conviction in Mr. Hobbs's offender score.

The State provides no argument contrary to Mr. Hobbs's analysis of the court's erroneous determination that the State's evidence established comparability. This should be deemed a concession.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issue not addressed in the brief is waived).

Because the State did not establish Mr. Hobbs's prior Oregon convictions were comparable under Washington law, reversal for resentencing on the correct offender score is required. On remand these Oregon prior convictions may not be included in Mr. Hobbs's offender score unless the State can provide other evidence to establish comparability. *Jones*, 182 Wn.2d at 10.

C. CONCLUSION

The trial court twice violated Mr. Hobbs's speedy trial rights, and he is entitled to reversal and remand for dismissal of his conviction. Alternatively, this Court should accept the State's concession and remand for a new resentencing hearing where only comparable crimes will be included in Mr. Hobbs's offender score.

DATED this 25th day of September, 2020.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
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v.)	NO. 36634-1-III
)	
JOHN HOBBS,)	
)	
Appellant.)	

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