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Division III
State of Washington
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NO. 36634-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOHN TOLBERT HOBBS Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Because the motion to continue dates on September 7, 2018 was brought on behalf of Hobbs, has he waived any objection to the requested delay and has he failed to show that the trial court's decision was based on untenable grounds or that he was prejudiced in the presentation of his defense?
2. Did the trial court comply with CrR 3.3 in resetting dates on December 14, 2018 where the time for trial had not expired yet due to the thirty-day buffer period in CrR 3.3(b)(5)?
3. Has the defendant failed to show a constitutional violation of speedy trial where the 10-month period between charging and trial was mostly caused by the defense?
4. Is a remand for resentencing required to determine if the prior Oregon convictions are factually comparable to a Washington statute?

II. STATEMENT OF THE CASE

On March 2, 2018, the defendant, John Hobbs, was charged with “felony violation of a protection order-domestic violence.” CP 11. On that same date, the defense filed a motion for a competency evaluation. CP 4-10. Proceedings were stayed pending an order finding the defendant competent. CP 10. Diane Hehir was appointed counsel. CP 182.

On March 14, 2018, Hobbs was arraigned, and the defense filed a motion to secure an independent defense evaluation. 3/14/18 RP 7; CP 12-13. Two weeks later, on March 28, 2018, Hobbs was found competent and the court set an omnibus hearing on April 26 and trial on May 7. CP

13. Hobbs objected to the trial date and time for arraignment. 3/14/18 RP 11. However, time for trial did not expire until May 27, 60 days from arraignment. *See* CrR 3.3(b)(1)(i).

Prior to trial, the defense requested multiple continuances. At the omnibus hearing on April 26, 2018, the defendant was considering drug court and was pursuing *Brady* material. 4/26/18 RP 4-5. In addition, the defense investigation was not complete. CP 184.¹ Hobbs' attorney informed the court that they may be moving to continue. 4/26/18 RP 4-5.

The triage hearing was set on May 4, 2018, the day before trial. CP 183, 186. At that time, the defense attorney requested a continuance, stating, "I am in the process of referring Mr. Hobbs to drug court." 5/4/18 RP 4. Trial was continued one week to May 14, 2018, with a status hearing date of May 8, 2018. CP 16.

At the status hearing on May 8, the defense attorney moved to continue the case to May 21 to prepare and because Hobbs no longer wanted drug court. 5/8/18 RP 12. Specifically, defense counsel stated, "...given that—both parties anticipated that we were going to be doing drug court, I would ask that trial be set on May 21st so we can be

¹ The State filed a supplemental designation of clerk's papers on 9/3/20. The State anticipates that these will be numbered CP 182-207 and has cited to them accordingly.

prepared.” 5/8/18 RP 12. The trial court granted the continuance. 5/8/18 RP 13; CP 17. Triage was set for May 18. CP 17.

On May 18, 2018, the Friday before trial, the defense filed two motions that required a response from the State. CP 20. Trial was continued to June 11, with triage on June 8. CP 20. The court found that a continuance was required in the administration of justice and that Hobbs would not be prejudiced by the presentation of his defense. CP 20.

At triage on June 8, the defense and State both sought a continuance. CP 80. On the continuance form, the defense indicated the reason was an “ongoing defense investigation.” CP 80. The State also had witnesses that were unavailable. CP 80. Pre-trial was set on July 11 and trial was set on July 16. CP 80. The defense attorney told the court there was a need for “additional defense investigation” and to disclose witnesses. 6/8/18 RP 5. The trial judge ruled as follows:

I’m going to grant both the defense counsel and the state’s request to continue this matter. There needs to be further investigation. The state’s witnesses are unavailable for trial. And I think it’s very important that Mr. Hobbs’ trial attorney is fully prepared to go to trial.

6/8/18 RP 6. The court found that the continuance was in the administration of justice and that the defendant would not be prejudiced in the presentation of his defense. RP 80.

On July 13, 2018, the defense attorney again asked for a continuance because she was trying to work out a global resolution for Hobbs on his county and city cases, and to get an expert if they decided to go to trial. 7/13/18 RP 16-17. She asked for a time within the speedy trial buffer and told the court that her client may consider a global resolution if one is offered. 7/13/18 RP 19. Triage was set on August 3 and trial was set on August 5. CP 90; 7/13/18 RP 19.

At triage on August 3, the defense asked for one additional week to go over a new offer with Hobbs and to go over what is necessary to be ready for trial. 8/3/18 RP 22. She relayed that Hobbs did not want to come to court that day. 8/3/18 RP 21. The court set new dates of August 10 for triage and August 13 for trial. 8/3/18 RP 22; CP 91.

On August 10, 2018, Hobbs' attorney, Ms. Hehir, withdrew due to a conflict of interest. CP 93; 8/10/18 RP 33. Time for trial began anew on that date. 8/10/18 RP 35. Due to the conflict, new dates were set of August 24 for attorney status and September 9 for trial. CP 93.

A new attorney, Craig Webster, was appointed on August 14, but he withdrew on August 23 due to a conflict, as he was currently representing the alleged victim. 8/23/18 RP 23; CP 94. Scott Bruns was then appointed, and an attorney status hearing was set for September 7.

8/23/18 RP 24; CP 191. The new speedy trial expiration was October 23, 2018, given the new commencement date. *See* CrR 3.3(c)(2)(vii).

On September 7, the new attorney, Scott Bruns, appeared on behalf of Hobbs. 9/7/18 RP 26. He asked for a continuance, explaining:

“We’re looking at a continuance on this case for my benefit. I was just assigned as – counsel in this case. And – I don’t even have the file yet. –checked yesterday afternoon and it was not yet in the inbox, so – hopefully today. –looking at continuance on the normal calendar for available dates to 11/28 for omnibus and 12/17 for the trial date. I believe the case may have already gone through an omnibus hearing but I’d like to set it on omnibus anyway. As new counsel there may be changes I want to make.”

9/7/18 RP 26. The court granted the continuance, which meant a new speedy trial buffer period ending on January 16, 2019, thirty days past the December 17 trial date. *See* CrR 3.3(b)(5). The defendant moved to dismiss, and the court denied the motion. 9/7/18 RP 27. The judge ruled:

Well, I’m denying that oral motion. I’m finding that this needs to be continued. When a new counsel such as Mr. Bruns comes on, he’s got to be prepared. If he’s not able to be prepared then that means the defendant isn’t given a fair trial. –find that it’s necessary in the interests of justice. And I’m not finding that Mr. Hobbs is being prejudiced in the presentation of his case.

9/7/18 RP 27.

At omnibus on November 28, 2018, the State moved for a continuance because a new prosecutor was assigned to the case. 11/18/18 RP 29. The motion was denied. CP 192; 12/28/18 RP 35. On November 30, 2018, the State filed an amended witness list which contained eight witnesses that were anticipated to testify. CP 193.

At triage on December 14, 2018, dates were set within the thirty-day speedy trial buffer in CrR 3.3(b)(5). Hobbs' attorney stated, "So, within the thirty-day period we're trying to reset it and we're looking at Wednesday, January 2nd for trial date. And we'll do the 28th for triage date." 12/14/18 RP 5. Defense counsel explained, "I believe we're at thirty days from the 17th," referring to the December 17 trial date. 12/14/18 RP 5. The prosecutor let the court know that they were waiting on fingerprint evidence. 12/14/18 RP 6. The court agreed and set triage on December 28 and trial on January 2. CP 98.

On December 28, 2018, the defense attorney was sick. 12/28/18 RP 34. The prosecutor relayed to the court that Mr. Bruns emailed him and told him he would not be well for trial. 12/28/18 RP 34. The prosecutor indicated that speedy trial expired on January 16. 12/28/18 RP 34. Hobbs objected to any continuances. 12/28/18 RP 36. Dates were set over 1 week, with trial set on January 7, 2019 and triage on January 4. CP 99.

At triage, the parties both signed off and presented a trial status

order, agreeing that “speedy trial time expires 1/16/19.” CP 194; 1/4/19 RP 83. Hobbs filed a handwritten motion to dismiss, CP 104, which was set to be heard at the trial date. 1/4/19 RP 83-84

Trial began on January 7, 2019, nine months and 10 days after Hobbs was found competent to stand trial. 1/7/19 RP 1-3. The trial judge addressed Hobbs’ motion to dismiss for speedy trial violations:

I’ve reviewed the record of this case dating back to its origin last year. It does appear to me that the speedy trial rule has been complied with in every regard and that we are well within the existing speedy trial window as we speak here today.

I recognize that there are a number of motions to continue that were made perhaps over Mr. Hobbs’ objection. There were actually two different lawyers who were conflicted out before Mr. Bruns came on board. It appears to me that the speedy trial rule has been followed and that there’s no basis for the court to dismiss the prosecution for violation of speedy trial.

1/7/19 RP 20. The trial court also addressed the attorneys’ motions in limine. 1/7/19 RP 3-26; CP 195-204.

On January 9, the defendant was found guilty. CP 146. He was sentenced to 60 months in prison. CP 148. His offender score was calculated to be eight, which included three Oregon convictions. CP 147. This appeal followed.

III. ARGUMENT

A. Hobbs received a speedy trial.

1. The trial court complied with CrR 3.3.

CrR 3.3 provides a framework for the disposition of criminal proceedings without establishing any constitutional standards. 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 1207, at 256 (3d ed. 2004). As a result, “a violation of the rules is not necessarily a constitutional deprivation.” *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (citing *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980)).

- a. **Because the motion to continue dates on September 7, 2018 was brought on behalf of Hobbs, any objection to the requested delay was waived and Hobbs has not shown that the trial court’s decision was based on untenable grounds or that he was prejudiced in the presentation of his defense.**

CrR 3.3 is a procedural rule that may be waived by counsel over the objection of his client. *State v. Finch*, 137 Wn.2d 792, 805-06, 975 P.2d 967, cert. denied, 528 U.S. 922, 145 L. Ed. 2d 239, 120 S. Ct. 285 (1999). A trial court’s grant or denial of a motion for a CrR 3.3 continuance or extension will not be disturbed absent a showing of a manifest abuse of discretion.” *State v. Williams*, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001) (citing *State v. Cannon*, 130 Wn.2d 313, 326, 922

P.2d 1293 (1996)). Discretion is abused only when it is exercised on untenable grounds or for untenable reasons. *Williams*, 104 Wn. App. at 521. And granting defense counsel’s request for more time to prepare for trial, even “over defendant’s objection, to ensure effective representation and a fair trial,” is not necessarily an abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *Williams*, 104 Wn. App. at 523.

CrR 3.3(f)(2) states:

(f) Continuances. Continuances or other delays may be granted as follows: (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party’s objection to the requested delay.

On September 7, 2018, Hobbs’ new attorney, Mr. Bruns, appeared on his behalf for the first time because prior counsel had been disqualified.

9/7/18 RP 26. At that time, Mr. Bruns asked for a continuance:

We’re looking at a continuance on this case for my benefit. I was just assigned as – counsel in this case. And – I don’t even

have the file yet. –checked yesterday afternoon and it was not yet in the inbox, so – hopefully today. –looking at continuance on the normal calendar for available dates to 11/28 for omnibus and 12/17 for the trial date. I believe the case may have already gone through an omnibus hearing but I’d like to set it on omnibus anyway. As new counsel there may be changes I want to make.

9/7/18 RP 26. The speedy trial expiration at the time was October 23, 2018, given the new commencement date. *See* CrR 3.3(c)(2)(vii). The State did not object to the continuance. 9/7/18 RP 26. The defendant, however, moved to dismiss the case. 9/7/18 RP 27. He stated, “—burden of proof upon the court—I feel that my rights have been strongly violated, as far as representation of counsel and speedy trial processes. And—I motion for dismissal. I don’t have anything else to say.” 9/7/18 RP 27.

The trial court denied the defendant’s motion:

Well, I’m denying that oral motion. I’m finding that this needs to be continued. When a new counsel such as Mr. Bruns comes on, he’s got to be prepared. If he’s not able to be prepared then that means the defendant isn’t given a fair trial. –find that it’s necessary in the interests of justice. And I’m not finding that Mr. Hobbs is being prejudiced in the presentation of his case.

9/7/18 RP 27. Omnibus was set on 11/28/18 trial was set for 12/17/18.

CP 96. This resulted in a new speedy trial end date 30 days after the end of the excluded period, or after December 17. *See* CrR 3.3(b)(5).

The thirty-day buffer provision states as follows:

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

CrR 3.3(b)(5). An excluded period is defined in as follows:

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial... (3) Continuances. Delay granted by the court pursuant to section (f).

CrR 3.3(e)(3). Continuances by either party are one of the causes of delay listed in section (f). CrR 3.3(f)(2) states:

(f) Continuances. Continuances or other delays may be granted as follows... (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

In this case, the defense continuance created a new excluded prior that ended on December 17, 2018. See CrR 3.3(e)(3), (f)(2). Therefore, the new speedy trial end date was thirty days thereafter, or January 16, 2019. See CrR 3.3(b)(5).

Given the trial court's broad discretion in granting a continuance and the absence of any prejudice, the trial court did not abuse its discretion in granting a continuance based on the defense attorney's need to work on the case. In addition, the bringing of such motion by or on behalf of any party waives that party's objection to the requested delay. CrR 3.3(f)(2).

In addition, under the invited error doctrine, a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). In determining whether the invited error doctrine applies, courts have considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *Id.* Here, by a continuance being sought on behalf of the defendant by his attorney, in order to benefit the defendant, Hobbs cannot now claim that the action is error on appeal. Because the trial court did not abuse its discretion in granting the continuance, the trial court did not violate Hobbs' time for trial right.

Hobbs relies on two cases, *State v. Campbell*, 103 Wn.2d , 691 P.2d 929 (1984), and *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009) for his argument that the trial court erred in continuing the case. In *Campbell*, the court found no prejudice where the defense attorney continued a trial from June 29 to September 7 over the defendant's objection. The court stated:

The fact that trial began within 6 months of arraignment, albeit with more evidence, did not prejudice Campbell's defense. Trial within 60 days is not a constitutional mandate. Counsel was properly granted the right to waive trial in 60 days, over defendant's objection, to ensure effective representation and a fair trial.

Similarly, Hobbs has not shown any prejudice to his case by the court continuing it 55 days past the end of speedy trial.

In *Saunders*, the facts are distinguishable from those in the case at hand. In that case, the court found that "Absent convincing and valid reasons for the continuances granted on [3 separate dates], the trial court's orders...were manifestly unreasonable, [and] for untenable reasons." 153 Wn. App. at 221. The problem with the first continuance is that the defense wanted to continue it for further negotiations, but the defendant objected. *Id.* at 212. This was without acknowledging the defense attorney's duties under RPC 1.2(a). *Id.* at 218. The second continuance,

sought by the State, was granted after no meaningful explanation was given. *Id.* The court actually stated, “I’m going to grant one more continuance, last continuance, without good explanation, which I haven’t actually heard.” *Id.* The third continuance, sought by the State, was granted despite the trial court indicating that the State should have reassigned a prosecutor a month prior when negotiations failed. *Id.* at 219. The Court of Appeals noted that the parties used standby defense attorneys or assigned prosecutors to present contested orders and that the standbys, when questioned by the court, “knew nothing substantive about the status of the case.” *Id.* at 220-1. Unlike the defendant in *Saunders*, the defense attorney here made a record about why he needed a continuance and Hobbs made no argument as to how he would be prejudiced if his case were continued. *See* 9/7/18 RP 27.

Hobbs also relies on later court documents to argue that the trial court abused its discretion on September 7. However, the fact that the parties did not later enter a new omnibus order in November is not evidence that the trial court abused its discretion in September in allowing the case to be continued. Similarly, the court’s comment in November that the case did not sound complicated was based on the court’s impression of the case in November and does not provide evidence that the court abused its discretion on September 7.

b. The trial court complied with CrR 3.3 in resetting dates on December 14, 2018 because the time for trial had not expired yet due to the thirty-day buffer period in CrR 3.3(b)(5).

On September 7, the trial court granted a continuance to December 17, which meant a new speedy trial buffer period ending on January 16, 2019, thirty days past the December 17 trial date. *See* CrR 3.3(b)(5). At triage on December 14, 2018, Hobbs' attorney stated, "So, within the thirty-day period we're trying to reset it and we're looking at Wednesday, January 2nd for trial date. And we'll do the 28th for triage date."

12/14/18 RP 5. Defense counsel explained, "I believe we're at thirty days from the 17th," referring to the December 17 trial date. 12/14/18 RP 5.

This was a correct calculation of speedy trial. The prosecutor let the court know that they were waiting on fingerprint evidence. 12/14/18 RP 6. The court agreed and set triage on December 28 and trial on January 2. CP 98.

The effect of the September continuance to December 17, 2018 was to exclude that period of time from the sixty-day limits and bring into play the buffer period of subsection CrR 3.3(b)(5). This provision, designed to assist the management of busy calendars, prevents courts from having to move previously scheduled cases in order to hear a case that was just continued to the date. Effectively, the continuance to December 17 required a trial by January 16, 2019. The trial date of January 2 was well

within the thirty-day buffer period. There were fourteen more days left to start the case.

2. The defendant has failed to show a violation of his constitutional right to a speedy trial where the 10-month period between charging and trial was mostly caused by the defense.

The Sixth Amendment reads in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI. It is recognized that some pretrial delay is often “inevitable and wholly justifiable.” *Doggett v. United States*, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial.” Article I, section 22 requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights. *State v. Iniguez*, 167 Wash. 2d 273, 290, 217 P.3d 768, 776 (2009)

The Court in *Barker v. Wingo* adopted an ad hoc balancing test that examines the conduct of both the State and the defendant to determine whether speedy trial rights have been denied. 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). As a threshold to the *Barker* inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial. *Id.* This inquiry is necessarily

dependent on the specific circumstances of each case. *Id.* at 530-31.

While dependent on the nature of the charges, lower courts have in general found presumptively prejudicial delay at least at the point at which it approaches one year. *Doggett*, 505 U.S. at 652 n.1.

Here, only ten months passed between charges being filed on March 3, 2018 and the start of trial, January 7, 2019. This is not presumptively prejudicial, and the court need not analyze the *Barker* factors.

Even if ten months was presumptively prejudicial, a showing of presumptive prejudice cannot, by itself, prove a speedy trial violation—more is required. *Doggett*, 505 U.S. at 655-56 (citations omitted). A court has to consider such factors as the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay causes prejudice to the defendant. *Barker*, 407 U.S. at 530. These are not exclusive factors, as other circumstances may be relevant in the inquiry. *Id.* at 533. Nor are any of the factors, by themselves, necessary or sufficient. *Id.*

The first factor in the *Barker* inquiry, the length of the delay, focuses on the extent to which the delay stretches past the bare minimum needed to trigger the *Barker* analysis. *Doggett*, 505 U.S. at 652. Here, Hobbs was tried within ten months of being charged. However, the first

month (March 2 thru March 28) involved delay due to a competency evaluation requested by the defense. And there were two defense attorneys who had to withdraw due to conflicts, both requiring resets of time so new counsel could get up to speed on the case. There were a few requests made by defense to continue to pursue drug court or a global offer with other cases. But many of the continuances were sought so that defense counsel could investigate the defendant's case. The length of delay was reasonably necessary for defense preparation and weighs against the defendant.

The second factor in the inquiry is the reason for the delay. *Barker*, 407 U.S. at 531. “[D]ifferent weights [are to be] assigned to different reasons’ for delay.” *Doggett*, 505 U.S. at 657 (second alteration in original) (quoting *Barker*, 407 U.S. at 531). As explained in *State v. Ollivier*, “in numerous cases courts have not regarded delay as exceptionally long where the delay was as long as or longer than here, particularly when the delay was attributable to the defense.” 178 Wash. 2d 813, 828, 312 P.3d 1, 11 (2013).

Here, the delay caused by defense counsel is chargeable to the defendant. *Vermont v. Brillon*, 556 U.S. 81, 89-91, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009); see, e.g. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998). Nearly all of the continuances in this case were

caused by the defense. Here is a summary of the continuances and the reason:

DATE	REASON CONTINUED	DELAY CAUSED BY:
3/2	Motion for competency evaluation	Defense
4/26	Defense investigation, seeking <i>Brady</i> material, pursuing drug court.	Defense
5/4	Defendant wants drug court.	Defense
5/8	Trial prep.	Defense
5/18	Defense filed two motions three days before trial.	Defense
6/8	Defense investigation and State's witness unavailable	Defense/State
7/13	Working on global resolution, getting expert.	Defense
8/3	Going over new offer with defendant, Trial prep.	Defense
8/10	Reset due to 1st attorney disqualification.	Defense
8/23	Reset due to 2nd attorney disqualification.	Defense
9/7	Trial prep.	Defense
12/14	Agreed reset. State waiting on fingerprints.	Defense/State
12/28	Defense attorney sick.	Defense

Moreover, while it is true that Hobbs objected to some of these continuances, it does not follow that granting them violated his right to a speedy trial. Many courts hold that even where continuances are sought over the defendant's objection, delay caused by the defendant's counsel is charged against the defendant under the *Barker* balancing test if the continuances were sought in order to provide professional assistance in the

defendant's interests. *See, e.g., State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (“[c]ounsel was properly granted the right to waive trial in 60 days, over defendant’s objection, to ensure effective representation and a fair trial”); *State v. Lucas*, 167 Wn. App. 100, 112, 271 P.3d 394 (2012); *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001).

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

The third factor is the extent to which the defendant asserts his speedy trial right. *Barker*, 407 U.S. at 514. Like the defendant in *Ollivier*, Hobbs object to nearly all of the continuances sought by his own attorney. But these objections do not weigh in favor of the conclusion that constitutional speedy trial violations occurred. The delays in this case were for a competency evaluation, pursuing drug court, getting a global offer, two attorneys being disqualified, and trial preparation. Each request for a continuance was a legitimate request for an extension of time to pursue matters in preparation of his defense. And like in *Ollivier*, delay resulting from such continuances must be attributed to the defense because “delays caused by defense counsel are properly attributable to the

defendant.” *Ollivier*, 178 Wash. 2d 813, 838, 312 P.3d 1, 16 (2013). The third factor, whether the defendant has asserted his speedy trial rights, does not weigh in Hobbs’ favor, given that his objections cannot be given effect when his own counsel sought continuances to prepare for trial. *See id.* at 839-40.

The fourth factor is prejudice to the defendant as a result of the delay. Presumed prejudice is recognized only in the case of extraordinary delay, except when the government’s conduct is more egregious than mere negligence. *State v. Ollivier*, 178 Wash. 2d 813, 842, 312 P.3d 1, 18 (2013) (citation omitted). The ten months in Hobbs’ case is not lengthy enough to constitute extreme delay warranting the presumption of prejudice. *See, e.g., United States v. Toombs*, 574 F.3d 1262, 1275 (10th Cir. 2009) (22-month delay does not constitute extreme delay); *United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (3 year and 9 month delay insufficient); *United States v. Williams*, 557 F.3d 943, 950 (8th Cir. 2009) (400-day delay insufficient).

Prejudice to the defendant as a result of delay may consist of oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused’s defense will be impaired by dimming memories and loss of exculpatory evidence. *Doggett*, 505 U.S. at 654. However, Hobbs has also failed to argue any specific prejudice, other than

to say that he was incarcerated and that he also had a mental illness. App. Amend. Opening Br. at 26. But there was nothing oppressive about his pretrial incarceration. As explained in *Olliver*:

While Ollivier spent almost two years in jail awaiting his trial this is not, on its face, oppressive. Periods of incarceration as long or longer have been found not oppressive. *E.g.*, *Hartridge v. United States*, 896 A.2d 198 (D.C. 2006) (27 months); *United States v. Leeper*, No. 08-CR-69S-5,12, 2009 WL 5171831, at *6, 2009 U.S. Dist. LEXIS 119813, at *15 (W.D.N.Y. Dec. 23, 2009) (unpublished) (22 months; this amount of time, without more, cannot show undue oppression); *United States v. Herman*, 576 F.2d 1139, 1147 (1978) (22 months); *State v. Couture*, 2010 MT 201, 357 Mont. 398, 418-19, 240 P.3d 987 (924 days); *see also Smith v. State*, 275 Ga. 261, 263, 564 S.E.2d 441 (2002) (19-month incarceration; no evidence this “was oppressive to a degree beyond that which necessarily attends imprisonment”). Moreover, his complaints about jail conditions do not suggest that conditions were oppressive; rather, the conditions are common to incarceration.

178 Wash.2d at 844.

Balancing the *Barker* factors in this case clearly weighs against Hobbs. The delay was not unduly long; the reasons for the delay are primarily attributable to the defense because defense counsel sought numerous continuances to facilitate investigation and preparation of the defense. Although Hobbs objected to most of the continuances, this factor

does not strongly weigh in his favor in light of the reasons for the continuances and the absence of actual prejudice. And because the delay was not sufficiently extraordinary to be presumed prejudicial, Hobbs was required to show particularized prejudice, and he has made an insufficient showing to tip the scales in his favor. As such, there was no violation of Hobbs' constitutional right to a speedy trial under the Sixth Amendment and article I, section 22.

B. Remand for resentencing is required to determine if the prior Oregon convictions are factually comparable to a Washington statute.

Courts conduct de novo review of a sentencing court's comparability analysis in calculating a defendant's offender score. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

If a defendant has out-of-state convictions, the SRA directs that those offenses be classified by determining comparable Washington offenses. *State v Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994); *see also* RCW 9.94A.525(3). To compare offenses, the courts use a two-part test. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The State bears the burden to prove by a preponderance of evidence the existence and comparability of a defendant's prior out-of-state conviction. *State v. Collins*, 144 Wn. App. 547, 554, 182 P.3d 1016 (2008), *review denied*, 165 Wn.2d 1032 (2009). A preponderance of the

evidence “means that considering all the evidence, the proposition asserted must be more probably true than not true.” *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

First, the court analyzes legal comparability by comparing the elements of the out-of-state offense to the most comparable Washington offense. *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). The conviction counts if its statutory definition “is identical to or narrower than the Washington statute and thus contains all the most serious elements of the Washington statute.” *Olsen*, 180 Wn.2d at 473. If the crimes are legally comparable, the analysis ends and the crimes are included in the offender score.

If the statutory definition of the relevant conviction is broader than its Washington equivalent, then the trial court proceeds to the factual step. *Id.* at 478. Offenses are factually comparable when the defendant’s conduct would have violated a Washington statute. *Morley*, 134 Wn.2d at 606. In making this determination, the trial court considers “only facts that were admitted, stipulated to, or proved beyond a reasonable doubt.” *Olsen*, 180 Wn.2d at 478. Any other “[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.” *Morley*, 134 Wn.2d at 606.

The relevant Oregon statutes, in pertinent part, are as follows:

Burglary in the first degree

(1) A person commits the crime of burglary in the first degree if the person violates ORS 164.215 (Burglary in the second degree) and the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom the person: (a) Is armed with a burglary tool or theft device as defined in ORS 164.235 (Possession of a burglary tool or theft device) or a deadly weapon; (b) Causes or attempts to cause physical injury to any person; or (c) Uses or threatens to use a dangerous weapon.

Burglary in the second degree

(1) Except as otherwise provided in ORS 164.255 (Criminal trespass in the first degree), a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein.

ORS 164.215, 164.225.

The relevant Oregon definitions are as follows:

(1) “Building,” in addition to its ordinary meaning, includes any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) “Dwelling” means a building which regularly or intermittently is occupied by a

person lodging therein at night, whether or not a person is actually present.

ORS 164.205.

The possible Washington crimes that could be comparable are as follows:

Burglary in the first degree.

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

Burglary in the second degree.

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Residential burglary.

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.020(1), RCW 9A.52.025(1), RCW 9A.52.030(1).

The Oregon statute for burglary in the first degree is not legally comparable to Washington's first-degree burglary statute because it is broader. It is also not legally comparable to Washington's second-degree

burglary or residential burglary because of the language in those statutes that excludes “a vehicle.” More specifically, Washington’s second-degree burglary statute requires that the State prove that the building was not a vehicle or a dwelling. RCW 9A.52.030. The residential burglary statute refers to a “dwelling other than a vehicle.” RCW 9A.52.025. However, ORS 164.215 includes the term “dwelling,” which could include a vehicle. ORS 164.205(1), (2).

Similarly, Oregon’s second-degree burglary statute is not factually comparable to Washington’s burglary in the second degree or residential burglary because Oregon’s statute uses the term “building” which could include a vehicle. ORS 164.205(1).

In this case, the State filed a sentencing memorandum, agreeing that first degree burglary was not legally comparable to Washington’s first-degree burglary, but that it could be punishable under the second-degree burglary or residential burglary statutes. CP 132. The defense seemed to agree that it would be comparable to the second-degree burglary statute. 2/19/20 RP 10.² There is no record that the trial court conducted any factual comparability analysis with respect to Hobbs’ first-degree burglary convictions. As such, remand for resentencing is the

² For the sentencing transcript, the State will refer to the transcript filed on 4/23/20 by authorized transcriptionist Tina Steinmetz.

appropriate remedy. *See State v. Ford*, 137 Wn.2d 472, 285-86, 973 P.2d 452 (2018).

In its briefing, the State also conceded that the second-degree burglary conviction in Oregon was not legally comparable to a Washington statute, and asked the court to conduct a factual inquiry on the record. CP 133. The State relied on an address search to show that 230 NW 10th referred to a physical address. CP 133. With respect to this conviction, at the sentencing hearing, the defense merely argued, “My client is unwilling to stipulate to any of the convictions, Your Honor, or any of the facts as presented by the State with regard to his criminal history.” 2/19/20 RP 11. The defense made no argument regarding factual comparability at the sentencing hearing and the court made no record of conducting a factual comparability analysis. The court did indicate it was admitting the State’s exhibits regarding criminal history. 2/19/20 RP 19.

Given the lack of a record for this Court to resolve the issue of whether Hobbs’ Oregon convictions should have been included in his offender score, the State asks that the court remand the case for a resentencing hearing. At resentencing, the State retains an opportunity to satisfy its burden. *State v. Jones*, 182 Wn.2d 1, 10-11, 338 P.3d 278 (204). As such, Hobbs should be appointed counsel for the hearing and

the parties should be allowed to full argue comparability of the out-of-state convictions.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Hobbs' convictions and remand for a resentencing.

Respectfully submitted this 4th day of September, 2020,

s/Tamara A. Hanlon
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Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on September 4, 2020, via the portal, I emailed the Brief of Respondent to Kate L. Benward. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of September, 2020 at Yakima, Washington.

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