

67926-1

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NO. 67926-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KRIS PEDERSON

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

APPELLANT'S REPLY BRIEF

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APPELLATE DIVISION  
COURT OF APPEALS  
STATE OF WASHINGTON  
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A. ARGUMENT.

1. **Pederson was denied his right to a speedy trial by the one-year delay in his trial contrary to his explicit objection**

As detailed in Mr. Pederson's opening brief, his Statement of Additional Grounds for Review, and his response to the State's brief filed pro se, the court improperly continued Mr. Pederson's trial over his objections. The court did not adhere to the plain requirements of CrR 3.3, including the mandate that a continuance may be granted only upon a finding by the court that the delay does not prejudice the accused. As Mr. Pederson explained in his several objections to the delays in starting his trial, this delay prejudiced him, the court did not comply with the requirements of CrR 3.3, and the denial of a speedy trial requires dismissal.

2. **The State properly concedes the court denied Pederson a peremptory challenge to which he was entitled.**

The State admits the court erroneously denied Mr. Pederson his right to exercise peremptory challenges for alternate jurors who were selected and who served on the deliberating jury. Opening Brief at 18-20; Response Brief at 17, 19. It also concedes, as it must, that "[a]ny impairment of a party's right to exercise a peremptory challenge

constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.” State v. Vreen, 143 Wn.2d 923, 931, 26 P.3d 236 (2001); Response Brief at 20.

The prosecution tries to save the conviction by incorrectly contending that Mr. Pederson did not object to the trial court’s decision to limit the peremptory challenges and therefore the issue is waived.

Before jury selection started, the court instructed the parties that they would receive only six peremptory challenges, and even though they would select alternate jurors, the court would not permit additional peremptory challenges for alternate jurors. 9/8/11RP 6. The prosecutor immediately asked why the court was imposing this unusual limitation but the court did not alter its ruling. 9/8/11RP 6-7. Both the prosecutor and defense counsel informed the court that this practice was contrary to their experience and, although neither attorney cited CrR 6.5, defense counsel asked for a peremptory challenge for each alternate seat as CrR 6.5 dictates. 9/8/11RP 19.

Later, during jury selection, the parties realized there were insufficient numbers of prospective jurors if the parties exercised all peremptory strikes. 13/11RP 43. The prosecution asked the court to bring in some additional prospective jurors so that each party would

retain the right to strike an alternate. Id. The court declined. Id. at 40-41. Defense counsel asked the court to sit only a single alternate, so Mr. Pederson would not face trial by jury without having the right to exercise a peremptory strike to which he was entitled. Id. The State asked for two alternates to sit on the jury and the court agreed. Id. at 40. Defense counsel refused to give up a peremptory strike. Id. at 41. The court ruled “I’ll say only six peremptories [total]. I think I have discretion to do that.” 9/13/11RP 43.

Under CrR 6.5, the defense was “entitled” to at least one peremptory challenge for each alternate selected. Both the prosecutor and defense attorneys discouraged from the court improperly limiting the peremptory strikes they expected to receive, including the strikes permitted for each alternate seat. Defense counsel expressed a clear preference for being given the number of peremptory challenges permitted under this court rule. The trial court ruled that it had the discretion to alter the number of peremptory challenges allowed. The prosecution’s brief twists the words of defense counsel, taking them out of context, to make it appear that counsel suggested or sought fewer alternates when the opposite is true. Response Brief at 21.

The parties objected to being denied peremptory challenges and the court understood this objection. See e.g., State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (evidentiary objection preserved when basis of objection is “apparent from the context”). The court did not misunderstand the nature of the objection, but rather misapprehended its discretion under the law. The court was well aware that the parties wanted additional peremptory challenges but the court believed it had discretion to deny those requests.

The prosecution cites State v. Bird, 136 Wn.App. 127, 134, 148 P.3d 1058 (2006), as an example of a case involving an attorney’s objection to a court’s error in the allotment of peremptory challenges, but Bird is substantially different. In Bird, the court miscalculated the number of peremptory challenges used by defense counsel. Id. at 131-33. Defense counsel initially acquiesced, agreeing with the court’s math, but later, once defense counsel understood that the court erroneously treated his decision to accept the panel as the equivalent of exercising a peremptory strike, defense counsel objected and filed a motion for a new trial. Id. The trial court decided that the objection came too late, but the Court of Appeals reversed, citing a rule that an error may be preserved if raised in a motion for a new trial.

Unlike Bird, both defense counsel and the prosecution asked the court to provide the correct number of peremptory challenges. The court had time to correct the error but instead it refused to bring additional prospective jurors to the courtroom so counsel could have the opportunity to exercise the correct number of challenges. Pederson advised the court of the error and objected to the court's limitation on his exercise of peremptory strikes at a time when the court could have corrected the error, and thus did not waive it.

As Bird properly explained, "Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply." 136 Wn.App. at 134 (quoting Vreen, 143 Wn.2d at 931 and State v. Evans, 100 Wn.App. 757, 774, 998 P.2d 373 (2000)). Limiting Pederson's right to challenge prospective jurors constitutes reversible error.

**3. The State confuses the potential relevancy of firearm possession with its impermissible likelihood to cause undue prejudice.**

The prosecution relies on State v. Barnes, 158 Wn.App. 602, 243 P.3d 165 (2010), as justification for the admission into evidence of a firearm that was not connected to the charged offenses. But Barnes

addresses, in a few short sentences, the proposition that possessing a gun may be relevant to a felony harassment prosecution under ER 401. Id. at 610. The opinion made no mention whatsoever of ER 404(b), ER 403, or the potential for undue prejudice. Barnes is inapposite because it does not discuss the unduly prejudicial effect of Pederson's possession of two guns at the time of his arrest, many miles away and more distant in time than the incident at issue in Barnes, which was used by the prosecution to make Pederson appear extremely dangerous.

The prosecution introduced extensive testimony that Pederson had a rifle, and ammunition, in his car even though Pederson was not alleged to have used the rifle and he legally possessed and stored it. 9/14/11RP 13; 9/15/11RP 22. The rifle and ammunition were not only mentioned, but physically admitted into evidence and available for the jury to observe. Ex. 26; 9/13/11RP 45. The prosecution also introduced into evidence a revolver Pederson had with him when arrested. This gun was not forensically connected to the shooting, but may have been the gun Pederson used when he fired a single shot at his brother's home on October 27, 2010. 9/13/10RP 77. The rifle was not alleged to have been used.

The court denied Pederson's request to limit the firearm evidence admitted in the case, and the prosecution was able to use this evidence to show Pederson was a violent and dangerous person. The erroneous admission of a rifle, along with ammunition for that rifle, unfairly affected the jury's deliberations and requires reversal. See State v. Freeburg, 105 Wn.App. 492, 501, 20 P.3d 984 (2001); State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980); see also State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984).

B. CONCLUSION.

For the foregoing reasons as well as those presented in Appellant's Opening Brief and Statement of Additional Grounds for Review, Mr. Pederson respectfully requests this Court order the reversal and dismissal of his convictions.

DATED this 29<sup>th</sup> day of April 2013.

Respectfully submitted,



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STATE OF WASHINGTON,	)	
	)	
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	)	
KRISTOPHER PEDERSON,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TOMAS GAHAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF APRIL, 2013.

X \_\_\_\_\_ 

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