

61468-1

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No. 61468-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARWAN HASAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

JAN TRASEN
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A. ARGUMENT.

1. WHERE APPELLANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED, PREJUDICE NEED NOT BE SHOWN AND DISMISSAL IS REQUIRED.

a. Mr. Hasan's timely objection to the trial continuance was not waived by his counsel. On December 14, 2007, the date that Mr. Hasan's trial was scheduled to commence, trial counsel appeared and stated that she needed to request a continuance, in order to further investigate the case. 12/14/07 RP 3. Defense counsel also noted that Mr. Hasan did not agree with the motion to continue, but nonetheless she still requested the continuance over his objection. Id.

Mr. Hasan proceeded to explain his objection to the continuance on the record, and informed the court that he refused to sign an agreement concerning the continuance. 12/14/07 RP 4-5. Mr. Hasan's signature does not appear on the Trial Continuance Order; in fact, Mr. Hasan vehemently objected to the continuance in open court. 12/14/07 RP 2-5.¹

¹ The continuance order attached to the prosecutor's brief actually refers to the continuance on February 15, not to the continuance discussed here, and is unsigned by Mr. Hasan. See Response Brief at 5. The signed continuance order referred to by the prosecutor relates to this later February 15 continuance.

b. Mr. Hasan was not duly tried within 60 days of arraignment, which must result in reversal and dismissal. The continuance on December 14, 2007 was granted over Mr. Hasan's objection, and trial did not commence until March 3, 2008 – almost three months later.
3/3/08 RP 1.

Under Criminal Rule 3.3, an accused is ensured the right to a speedy trial. State v. Huffmeyer, 145 Wn.2d 52, 56, 32 P.3d 996 (2001). Although the trial court is ultimately responsible for enforcing the speedy trial rule, the State is primarily charged with seeing that the defendant is tried in a timely manner. State v. Ross, 98 Wn. App. 1, 4, 981 P.2d 888 (1999).

Even where no prejudice has occurred as a result of a speedy trial violation, Washington courts have consistently sanctioned dismissal as a remedy for a violation of the speedy trial right. See, e.g., State v. Mack, 89 Wn.2d 788, 794-95, 576 P.2d 44 (1978) (absent a showing of good cause, court congestion does not excuse delay beyond speedy trial expiration date), approved by State v. Dearbone, 125 Wn.2d 173, 180, 883 P.2d 303 (1994); accord State ex rel Moore v. Houser, 91 Wn.2d 269, 274, 588 P.2d 219 (1978) (dismissal required whether defendant prejudiced or not); State v. Ross, 98 Wn.App. at 5.

The prosecution's failure to acknowledge the validity of Mr. Hasan's objection to the December 14 continuance does not alter the fact that he loudly disagreed with the adjournment on the record, thus preserving this important issue. 12/14/07 RP 4-5. Since Mr. Hasan did not receive a speedy trial, which is his right as the accused, reversal and dismissal must follow.

2. THE SENTENCING COURT ERRED BY NOT FINDING THAT THE THREE MALICIOUS MISCHIEF COUNTS CONCERNING CITY PROPERTY CONSTITUTED THE SAME CRIMINAL CONDUCT; THUS, MR. HASAN'S OFFENDER SCORE WAS CALCULATED IN ERROR, AND THE MATTER MUST BE REMANDED FOR RESENTENCING.

a. In the sentencing context, the same criminal conduct encompasses offenses with identical statutory intents, locations, and victims. Multiple offenses encompass the same criminal conduct for purposes of the Sentencing Reform Act (S.R.A.) when they involve the same overarching criminal intent, occur at the same time and place, and involve the same victim. In re Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001); State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (finding two "sequential drug sales occurred as closely in time as they could without being simultaneous" and thus fit the "same time and place" portion of the same criminal conduct test);

State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004) (holding that to determine whether offenses shared the same criminal intent, “we look objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal objective”).

Here, the three city buildings that the jury found to be vandalized by Mr. Hasan were essentially one entity – the City of Everett. 3/3/08 RP 72-75; 3/4/08 RP 86; 3/21/08 RP 516. Specifically, the Everett Housing Authority, the Everett Municipal Courthouse, and the Everett Transit Center are all city buildings; thus, they constitute one victim, and it was error for the trial court not to recognize them as such at sentencing.

b. The State failed to meet its burden to show that the three Everett victims were not identical; therefore, Mr. Hasan’s offender score was calculated in error, and the matter must be remanded for resentencing. “A criminal defendant is simply not obligated to disprove the State’s position, at least insofar as the State has failed to meet its primary burden of proof. The State does not meet its burden through bare assertions, unsupported by evidence.” State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999).

At sentencing, Mr. Hasan specifically challenged the State’s

calculation of his offender score, arguing that the convictions for malicious mischief against city property constituted the same course of criminal conduct. 3/21/08 RP 516-17. The State offered no response to counter this assertion. In the absence of any argument by the State, the sentencing court merely issued the conclusory statement that the city buildings were not the same victim. Id. at 519.²

“Bare assertions” by the State do not demonstrate that the offenses were not part of the same objective intent. Ford, 137 Wn.2d at 482. Because the State had the burden to prove that the current convictions did not constitute the same course of criminal conduct, the sentencing court erred in ruling against Mr. Hasan as to his offender score.³

Where, as here, the State has failed to meet its burden to show that a defendant’s offender score has been properly calculated, remand and resentencing is required. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002) (prosecution fails to meet

² The court stated: “It’s similar in that rocks were used to destroy or break windows there, but it is not the same general course of conduct involving the same victim.” 3/21/08 RP 519.

³ State v. Rivers, 130 Wn.App. 689, 705, 128 P.3d 608 (2005), rev. denied, 158 Wn.2d 1008 (2006) (noting that on remand, the prosecution may not introduce additional evidence where a specific objection was made to the calculation of an offender score, and where the State failed to meet its burden).

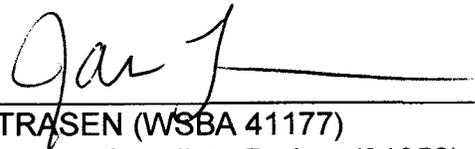
sentencing burden without obtaining necessary supporting evidence).

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Mr. Hasan respectfully requests this Court reverse his convictions and order a new trial.

DATED this 10th day of June, 2009.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jan Trasen", is written over a horizontal line. The signature is positioned above the printed name and title.

JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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 Respondent,)

MARWAN HASAN,)
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 Appellant.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JUNE, 2009, 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:

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