

74054-7

74054-7

FILED
July 29, 2016
Court of Appeals
Division I
State of Washington

NO. 74054-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARRESON HOWARD,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiv

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR . 3

D. STATEMENT OF THE CASE 5

 1. Attempted robbery and assault of Richard Powell. 5

 2. Prior incident involving Leon Gordon..... 7

 3. Delay caused by court room congestion..... 8

 4. Misconduct in closing argument..... 9

 5. Failure to vacate the attempted robbery charge at sentencing..... 9

E. ARGUMENT..... 11

 1. THE RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE COURT DELAYED MR. HOWARD’S TRIAL BECAUSE OF JUDICIAL UNAVAILABILITY IN AN OFF THE RECORD HEARING. 11

 a. An in custody defendant must be brought to trial within sixty days unless there are valid findings to justify the delay. 11

 b. Court congestion is not a permissible reason for a continuance... .. 13

 c. Mr. Howard’s right to a speedy trial was violated when the court continued his trial because of court congestion..... 14

 d. Because trial was continued based upon no judicial availability and the court failed to make sufficient findings to justify this continuance, Mr. Howard is entitled to dismissal..... 16

 2. MR. HOWARD HAD A RIGHT TO BE PRESENT WHEN THE TRIAL COURT CONTINUED HIS TRIAL BECAUSE OF JUDICIAL UNAVAILABILITY..... 18

a.	Consideration of the time for trial is a critical stage where the right to be present is guaranteed.	18
b.	Mr. Howard’s case was continued numerous times without him being present, preventing him from objecting or requiring the court to make detailed findings justifying the continuance.	19
3.	THE RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT CONTINUED MR. HOWARD’S TRIAL IN WHAT APPEARS TO BE A PRIVATE PROCEEDING.	20
a.	Courtroom closure should only occur after the court has made specific findings supporting closure.	20
b.	The record does not support that Mr. Howard’s case was continued in an open court proceeding and no findings were made to support closure.	21
4.	THE IMPROPERLY ADMITTED PRIOR ACT EVIDENCE DENIED MR. HOWARD HIS RIGHT TO A FAIR TRIAL.	24
a.	The right to a fair trial is denied when the State relies upon evidence of prior acts to prove guilt where such acts are irrelevant and unduly prejudicial.	24
b.	The State improperly relied upon an encounter which occurred the night of the attempted robbery of Mr. Powell to prove Mr. Howard acted as an accomplice to the attempted robbery.	25
c.	The use of prior act evidence to prove Mr. Howard guilty deprived him of his right to a fair trial.	28
5.	THE STATE PRESENTED INSUFFICIENT PROOF OF ACCOMPLICE LIABILITY.	32
a.	To prove accomplice liability, the State must prove the accomplice acted with the knowledge they were aiding in the commission of the offense.	32
b.	The evidence Mr. Garcia-Mendez intended to commit a robbery was insufficient to establish Mr. Howard acted as an accomplice.	33
c.	The State failed to establish Mr. Howard was present when the attempted robbery occurred.	34

d. The State failed to establish the person with Mr. Garcia-Mendez when he attempted to rob Mr. Powell was ready to aid it the commission of the crimes Mr. Garcia-Mendez committed.	36
6. THE STATE COMMITTED FLAGRANT AND ILL INTENTIONED MISCONDUCT WHEN IT ARGUED MR GARCIA-MENDEZ WOULD HAVE “SUCCESSFULLY EXECUTED” MR. POWELL WITHOUT THE INTERVENTION OF MEDICAL AID.	38
a. It is flagrant and ill-intentioned misconduct for the State to make arguments which are not based upon probative evidence and sound reason.	38
b. Misconduct occurred when the State argued Mr. Mendez-Garcia and his accomplices intended to “execute” Mr. Powell.	39
7. THE STATE AND DEFENSE COUNSEL WERE CORRECT IN ARGUING THE ROBBERY CONVICTION SHOULD HAVE BEEN VACATED AT SENTENCING.	41
a. Double jeopardy prohibits multiple punishments for the same offense.	41
b. An assault committed in the furtherance of a robbery may invoke principles of double jeopardy.	42
c. Mr. Howard’s motion and the State’s concession on vacation of the attempted robbery conviction should have been granted.	43
F. CONCLUSION	45

TABLE OF AUTHORITIES

Cases

<i>Albernaz v. United States</i> , 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)	41
<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)	11
<i>In re Fletcher</i> , 113 Wn.2d 42, 776 P.2d 114 (1989)	42
<i>In re Francis</i> , 170 Wn.2d 517, 242 P.3d 866 (2010)	43, 44
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673, 678 (2012)	38, 39
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	32
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	32
<i>Kentucky v. Stincer</i> , 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)	18
<i>Peterson v. Williams</i> , 85 F.3d 39 (2d Cir.1996)	20
<i>Rae v. Konopaski</i> , 2 Wn. App. 92, 467 P.2d 375 (1970).....	32
<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)	18
<i>State v. Allen</i> , 182 Wn.2d 364, 341 P.3d 268 (2015)	33
<i>State v. Asaeli</i> , 150 Wn. App. 543, 208 P.3d 1136, <i>review denied</i> , 167 Wn.2d 1001, 220 P.3d 207 (2009)	30
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899, 905 (2005).....	40
<i>State v. Bone–Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	20
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	20
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995)	42
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	14
<i>State v. Case</i> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	38
<i>State v. Casteneda-Perez</i> , 61 Wn. App. 354, 810 P.2d 74, <i>review denied</i> , 118 Wn.2d 1007, 822 P.2d 287 (1991)	39
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	39
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	22
<i>State v. Embry</i> , 171 Wn. App. 714, 287 P.3d 648, 659 (2012)	30
<i>State v. Emmanuel</i> , 42 Wn.2d 1, 253 P.2d 386 (1953).....	24
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	24, 25
<i>State v. Flinn</i> , 154 Wn.2d 193, 110 P.3d 748 (2005)	13, 14
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	25

<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005)	41, 42, 43
<i>State v. Frohs</i> , 83 Wn. App. 803, 924 P.2d 384 (1996)	43
<i>State v. Goebel</i> , 36 Wn.2d 367, 218 P.2d 300 (1950)	24, 28
<i>State v. Huson</i> , 73 Wn.2d 660, 440 P.2d 192 (1968), <i>cert. denied</i> , 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969)	39
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009)	11
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	39
<i>State v. Jackson</i> , 87 Wn. App. 801, 944 P.2d 403 (1997), <i>aff'd</i> , 137 Wn.2d 712, 976 P.2d 1229 (1999)	36
<i>State v. Jenkins</i> , 76 Wn. App. 378, 884 P.2d 1356 (1994), <i>review denied</i> , 126 Wn.2d 1025, 896 P.2d 64 (1995)	12
<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307, 311 (2008)	39
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009)	passim
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212, 214 (2008)	41
<i>State v. Kokot</i> , 42 Wn. App. 733, 713 P.2d 1121, <i>review denied</i> , 105 Wn.2d 1023 (1986)	14
<i>State v. Lackey</i> , 153 Wn. App. 791, 223 P.3d 1215 (2009), <i>review denied</i> , 168 Wn.2d 1034, 230 P.3d 1061 (2010)	12
<i>State v. Longshore</i> , 141 Wn.2d 414, 5 P.3d 1256 (2000)	32
<i>State v. Mack</i> , 89 Wn.2d 788, 576 P.2d 44 (1978)	13
<i>State v. Mewes</i> , 84 Wn. App. 620, 929 P.2d 505 (1997)	32
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011)	38, 40
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	32
<i>State v. Petersen</i> , 54 Wn. App. 75, 772 P.2d 513 (1989)	33
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984)	38
<i>State v. Ross</i> , 98 Wn. App. 1, 981 P.2d 88, <i>opinion amended</i> , 990 P.2d 962 (1999), <i>review denied</i> , 140 Wn.2d 1022, 10 P.3d 405 (2000) ..	11, 12
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210, 215 (1987), <i>cert. denied</i> , 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934, <i>reh’g denied</i> , 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988)	18
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982)	24, 31
<i>State v. Shipp</i> , 93 Wn.2d 510, 610 P.2d 1322 (1980)	33
<i>State v. Smith</i> , 104 Wn. App. 244, 15 P.3d 711 (2001)	14
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986)	24
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049 (2014)	21
<i>State v. Striker</i> , 87 Wn.2d 870, 557 P.2d 847 (1976)	23

<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	20, 21, 23
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	39
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976)	40
<i>State v. Trout</i> , 125 Wn. App. 403, 105 P.3d 69 (2005)	36
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	41
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	38
<i>State v. Warren</i> , 96 Wn. App. 306, 979 P.2d 915, opinion amended, 989 P.2d 587 (1999).....	14
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	20, 21
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	21
<i>Whalen v. United States</i> , 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).....	42

Statutes

RCW 9A.08.020	33
---------------------	----

Other Authorities

ABA Standards for Criminal Justice 3-6.9	40
George C. Thomas III, <i>Double Jeopardy: The History, the Law</i> (1998)	42

Rules

CrR 3.3.....	passim
CrR 7.4.....	33
ER 401	29, 31
ER 402	25
ER 403	31
ER 404	24, 25, 28, 31

Constitutional Provisions

Const. art. I, § 22	11, 22, 32
Const. art. I, § 9	41
U.S. Const. amend. V	41
U.S. Const. amend. VI.....	11
U.S. Const. amend. XIV	32

A. INTRODUCTION

When the court continued Darreson Howard's case in what appears to be an off the record hearing, without the presence of Mr. Howard or his counsel, Mr. Howard's right to object to the continuance was made meaningless. The two continuances which were based upon courtroom congestion were not supported by findings and denied Mr. Howard his right to a speedy trial.

Mr. Howard was denied a fair trial when the State relied upon prior act evidence to prove he attempted to rob and assault Richard Powell. This evidence had no probative value and was highly prejudicial. Both with and without this evidence, the State failed to present sufficient evidence Mr. Howard was present when the crimes were committed against Mr. Powell or that he had any intention to participate in the crimes.

The State's characterization of the crimes as an "execution", where there was no evidence to support this charge was flagrant and ill-intentioned misconduct.

The court erred in failing to vacate the attempted robbery conviction at sentencing. The State's concession at trial on this issue comports with double jeopardy analysis and should have been granted.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and violated Mr. Howard's right to a speedy trial when the court continued Mr. Howard's trial because no judicial officer was present.

2. The trial court violated Mr. Howard's right to be present when the court continued Mr. Howard's trial when neither he nor his counsel were present. As a result, Mr. Howard had no opportunity to timely object to the continuance.

3. The trial court violated Mr. Howard's right to a public trial when it entered orders continuing Mr. Howard's trial in a non-public proceeding.

4. The trial court improperly admitted prior act evidence, which was irrelevant and the prejudice of which highly outweighed its probative value.

5. The State presented insufficient evidence Mr. Howard intended to act as an accomplice and was present when the crimes occurred.

6. The State presented insufficient evidence Mr. Howard was not merely present when the crimes occurred.

7. The State committed flagrant and ill-intentioned misconduct when it argued Mr. Howard or his accomplices intended to “execute” Mr. Powell.

8. The court erred in failing to vacate the sentence for attempted robbery in the first degree.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and violate Mr. Howard’s right to a speedy trial when it continued his case because no judicial officer was available without making findings to support that ruling?

2. Did the court violate Mr. Howard’s right to be present and his right to counsel when the court continued his trial twice without Mr. Howard or his attorney being present, giving Mr. Howard no opportunity to timely object to the continuance of his trial?

3. Did the court violate Mr. Howard’s right to a public trial when it entered continuance orders in what appears to be an off the record proceeding?

4. Was Mr. Howard denied a fair trial when the court improperly admitted prior act evidence which was not relevant to any

elements of the charged crimes, where the prejudicial effect of such evidence greatly outweighed its probative value?

5. Did the State commit misconduct when it argued Mr. Howard or an accomplice intended to execute Mr. Powell?

6. Did the court err in failing to grant Mr. Howard's motion to vacate the attempted robbery conviction, which had been conceded to by the State?

D. STATEMENT OF THE CASE

1. Attempted robbery and assault of Richard Powell.

When Richard Powell was almost robbed and shot by his assailant, suspicion that Juan Garcia-Mendez had been the man who shot him and then fled the scene developed quickly. RP 786-87. Mr. Garcia-Mendez was located close to the scene of the attempted robbery, wounded by a gun shot. RP 782.

Mr. Powell was working on April 1, 2013 as a town car driver when he stopped near Charleston and Avalon Streets in Seattle to smoke a cigarette after dropping off a fare. RP 675, 679. According to him, a car pulled up and two men jumped out. RP 675. The only other thing Mr. Powell remembered from that night was that the man with the gun told him to empty his pockets. RP 675. Mr. Powell took out his own gun and a firefight took place, leaving him and Mr. Garcia-Mendez injured. RP 675. Mr. Powell was shot in the chest three times. RP 684. He required significant medical aid to survive and recover. RP 816. There were no other eyewitnesses to the crime, although neighbors did hear someone say “let’s go, let’s go, we gotta go.” RP 751. Another witness testified he heard popping sounds and saw a silver car parked outside his house take off and speed away. RP 727.

Mr. Garcia-Mendez was arrested a short time later on the 5600 block of Delridge Avenue in Seattle. RP 782. Mr. Garcia-Mendez had several small wounds, although the officer who arrested him did not see any significant bleeding. RP 783. A silver four door Kia Spectra with blood in the back seat was found nearby. RP 788.

Investigation of this crime involved a number of police officers and detectives. The police conducted DNA tests on blood left at the scene and on clothing recovered close to where Mr. Garcia-Mendez had been arrested. The police found a car which matched the description of the car used to flee the attempted robbery close to where Mr. Garcia-Mendez had been arrested. RP 788. The police recovered both fingerprints and DNA evidence from the car. Mr. Howard's fingerprints were recovered from the vehicle. RP 885, 887. His DNA was recovered from a bandana recovered near to Mr. Garcia-Mendez's arrest and in the vehicle. RP 1301. The police also tracked Mr. Howard's phone records and were able to determine his phone had been used in the vicinity of the attempted robbery, close in time to when the robbery occurred. RP 1147-48, 1161. Mr. Howard made statements, denying he had been in Seattle when the attempted robbery had taken place. RP 1201.

The State also submitted grainy surveillance video from the area where Mr. Powell and Mr. Garcia-Mendez exchanged fire. The police manipulated this video to observe “shadows and reflections” in order to determine there had been two men who fired at each other five times in total. RP 1509. They were also able to determine there was a second person who was in close proximity to one of the shooters and who began to flee as soon as the shooting began. RP 1088.

2. Prior incident involving Leon Gordon.

At trial, the State introduced evidence of a prior incident involving a man named Leon Gordon, who was approached earlier the same night by two men. Mr. Gordon was concerned he was going to be the victim of a “drive by” when he saw a car drive by him while he was walking the Alki neighborhood in Seattle. RP 1340. Two men then approached him and asked him if he was “gang banging.” RP 1345. He told them he was not, and then turned around and left. RP 1345.

Although the faces of these men were covered in scarves or some other item, Mr. Gordon identified Mr. Garcia-Mendez as one of the men he had contact with because of his high cheekbones. RP 1345, 1210.

3. *Delay caused by court room congestion.*

Mr. Howard's case took an extraordinarily long time to be brought to trial. Initially charged on May 6, 2013, trial did not commence until August 10, 2015. CP 1, RP 190. Reasons for the continuances included the appointment of new counsel, discovery, and the failure of the State to disclose *Brady* information. RP 30, 38, 55, 108, 132. When all of the pre-trial issues were resolved, the case was then continued at least ten more times because the prosecutor was in trial.

On August 3, 2015, the trial court continued the trial to August 5, 2015. Supp. CP ____ (Order Continuing Trial filed 8/3/15, attached as App. A). On August 5, 2015, the trial was continued to August 6, 2015. A judge checked a box on a form that stated "no judicial availability." Supp. CP ____ (Order Continuing Trial filed 8/5/15, attached as App. B). This order appears to have been entered without a hearing. The defendant and counsel did not sign the Order. On August 6, 2015, the trial was again continued to August 10, 2015. A judge checked a box on a form that stated "no judicial availability." Supp. CP ____ (Order Continuing Trial filed 8/6/15, attached as App. C). Again,

this order appears to have been entered without a hearing. And again, the defendant and counsel did not sign the Order.

4. Misconduct in closing argument.

In its closing, the State argued Mr. Garcia-Mendez and his accomplices would have “successfully executed” Mr. Powell, had it not been for medical intervention. RP 1509. The State began its closing as follows:

Thank you, Your Honor. Counsel, ladies and gentlemen of the jury, it should be very clear to you now that on April 1st, 2013, Richard Powell was the victim of horrific violence. Unprovoked, senseless stranger violence, the type of violence that we may hope to only ever see on TV....

Without the heroic efforts of the first responding officers, the first responding medics, and Harborview Medical Center, you would be sitting here on a homicide trial. But for medical intervention, the defendants would have successfully executed Mr. Powell.

RP 1509.

5. Failure to vacate the attempted robbery charge at sentencing.

Mr. Howard was found guilty of assault in the first degree and attempted robbery in the first degree, both with firearm enhancements. Mr. Howard moved to vacate the attempted robbery conviction on double jeopardy grounds. CP 86. The State agreed that the facts of this

case were appropriate for vacation, stating “we are conceding, as defense noted in their brief, the double jeopardy motion raised by defense and [are] asking the Court for double jeopardy purposed to vacate Count 2.” RP 1630. The court denied Mr. Howard’s motion. RP 1631.

E. ARGUMENT

1. THE RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE COURT DELAYED MR. HOWARD'S TRIAL BECAUSE OF JUDICIAL UNAVAILABILITY IN AN OFF THE RECORD HEARING.

a. An in custody defendant must be brought to trial within sixty days unless there are valid findings to justify the delay.

An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right “is as fundamental as any of the rights secured by the Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting *Barker*, 407 U.S. at 515 n.2).

This right is also fundamental under Washington's speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88, *opinion amended*, 990 P.2d 962 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (2000). An in custody defendant such as Mr. Howard must be brought to trial within 60 days, or the trial court must dismiss the charge. CrR 3.3. It is the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime. *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009).

Not all the time a person waits for trial is calculated against the sixty days. Valid continuances granted by the court and avoidable or unforeseen circumstances constitute excludable time. CrR 3.3(f); (e)(3), (8). If time for trial is excluded under 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). The court must state the reasons for the delay on the record. CrR 3.3(f)(2); *Kenyon*, 167 Wn.2d at 139.

Although the rule is “not a constitutional mandate,” its purpose is to protect the constitutional right to a speedy trial. *Kenyon*, 167 Wn.2d at 136. And “it is the trial court which bears the ultimate responsibility to ensure a trial is held within the speedy trial period.” *State v. Jenkins*, 76 Wn. App. 378, 382-83, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995). The State also bears responsibility for seeing that a defendant is timely tried and must uphold its duty in good faith and act with due diligence. *Ross*, 98 Wn. App. at 4.

Applying the speedy trial rule to the facts of a particular case is reviewed de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009), *review denied*, 168 Wn.2d 1034, 230 P.3d 1061 (2010); *see, e.g., Kenyon*, 167 Wn.2d 130 (speedy trial violation found through

de novo review of the court's compliance with the rules regarding the continuance decision, not the discretionary decision itself). Although applying CrR 3.3 is reviewed de novo, a trial court's factual determination to grant a continuance is reviewed for abuse of discretion. *Kenyon*, 167 Wn.2d at 135.

b. Court congestion is not a permissible reason for a continuance.

Routine court congestion is not a permissible reason for a continuance. *State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978). Delay based upon court congestion is “contrary to the public interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion.” *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *Kenyon*, 167 Wn.2d at 134 (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the “trial court should have documented the availability of pro tempore judges and unoccupied courtrooms” because, under CrR

3.3(f), it is “required to ‘state on the record or in writing the reasons for the continuance’ when made in a motion by the court or by a party”); *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance); *State v. Smith*, 104 Wn. App. 244, 251-52, 15 P.3d 711 (2001) (routine court congestion not good cause for continuance); *State v. Warren*, 96 Wn. App. 306, 309, 979 P.2d 915, opinion amended, 989 P.2d 587 (1999) (courtroom unavailability is synonymous with court congestion) (*citing State v. Kokot*, 42 Wn. App. 733, 737, 713 P.2d 1121, *review denied*, 105 Wn.2d 1023 (1986)). Specifically, “[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms.” *Flinn*, 154 Wn.2d at 200.

c. Mr. Howard’s right to a speedy trial was violated when the court continued his trial because of court congestion.

Mr. Howard was originally charged with robbery in the first degree on May 6, 2013. CP 1. His case was continued an exceptionally long time over a number of dates. Reasons for the continuances

included the appointment of new counsel, discovery, and the failure of the State to disclose *Brady* information. RP 30, 38, 55, 108, 132. Mr. Garcia-Mendez's case was then severed from Mr. Howard's case and tried first. When Mr. Garcia-Mendez finally went to trial in July 2015, Mr. Howard's case was continued until the conclusion of that case. RP 172.

Mr. Howard's case did not go forward when the prosecutors again became available for trial after completing Mr. Garcia-Mendez's trial. Instead, the court continued Mr. Howard's case on August 5, 2015 to August 6, 2015, entering an order which had a box checked stating "no judicial availability." App. B. Neither Mr. Howard nor his attorney appear to have been present when this order was entered. It is not signed by the parties.

On August 6, 2015, the court continued Mr. Howard's case to August 10, 2016. Again, the court entered an order with a box checked stating "no judicial availability." App. C. This order appears to have been entered without a hearing. Neither Mr. Howard nor his attorney signed the order.

d. Because trial was continued based upon no judicial availability and the court failed to make sufficient findings to justify this continuance, Mr. Howard is entitled to dismissal.

Our Supreme Court examined whether no judicial availability is a valid basis for continuing a trial in *State v. Kenyon*. In *Kenyon*, on the eve of the confined defendant's speedy trial deadline, the trial court granted a continuance due to the unavailability of a judge – the presiding judge was presiding over another criminal case and the other county superior court judge was on vacation. *Kenyon*, 167 Wn.2d at 134. The court made no other findings, but extended the speedy trial date during the continuance period. The Supreme Court found court congestion and courtroom unavailability are not valid bases for a continuance. *Id.* at 137. The Court held “simply because the rule now allows ‘unavoidable or unforeseen circumstances’ to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms.” *Id.* at 139. Because the record contained no information on the number or availability of unoccupied courtrooms or the availability of visiting or pro tempore judges to hear criminal cases, the defendant's speedy trial right was violated. *Id.* at 137, 139.

Here, the record contains no information regarding the details of unavailable judges and courtrooms. The court entered no findings about whether there were visiting judges or pro tempores who could have heard Mr. Howard's cases in an unoccupied courtroom.

Just as critically, these continuances appear to have been entered outside the presence of Mr. Howard and his attorney. Mr. Howard had no opportunity to object or insist upon compliance with CrR 3.3. There do not appear to be clerk's minutes, suggesting the orders were entered in chambers rather than in open court. The record does not indicate Mr. Howard was ever served with this order or how he learned his trial would commence on August 10, 2015.

The State cannot demonstrate this error was harmless beyond a reasonable doubt. Mr. Howard's trial was continued without a valid reason, off the record and in a way that deprived him of the opportunity to object. He is entitled to dismissal.

2. MR. HOWARD HAD A RIGHT TO BE PRESENT WHEN THE TRIAL COURT CONTINUED HIS TRIAL BECAUSE OF JUDICIAL UNAVAILABILITY.

a. Consideration of the time for trial is a critical stage where the right to be present is guaranteed.

“[E]ven in situations where an accused is not actually confronting witnesses or evidence against him, he has a due process right ‘to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.’” *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)). An accused is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if that person’s presence would contribute to the fairness of the procedure. *Id.*

An accused is also guaranteed the right to counsel at all critical stages of the proceedings even if he is not present. Consideration of the time for setting the trial is a critical stage. *See, e.g., State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210, 215 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934, *reh’g denied*, 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988) (Defendant had the right to have counsel present when the resentencing trial date was set).

b. Mr. Howard's case was continued numerous times without him being present, preventing him from objecting or requiring the court to make detailed findings justifying the continuance.

From what the record appears to indicate, the trial court reset Mr. Howard's matter for trial a number of times because the State was trying the co-defendant's case, which had been severed. After the State became available, the court then reset the matter for trial because no judges were available to hear the case. *See*, App. B; App. C.

Had Mr. Howard been present in court, he would have been able to object to these last two continuances and required the court to make detailed findings tied to specific, articulable facts, rather than generalized assertions.

Mr. Howard's absence deprived him of the opportunity to object in a timely fashion, as required by CrR 3.3. By the time Mr. Howard and his attorney appeared in court, he had no remedy for his delay.

Because the State cannot demonstrate these errors were harmless beyond a reasonable doubt, Mr. Howard is entitled to dismissal.

3. THE RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT CONTINUED MR. HOWARD'S TRIAL IN WHAT APPEARS TO BE A PRIVATE PROCEEDING.

a. Courtroom closure should only occur after the court has made specific findings supporting closure.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). This right requires proceedings be held in open court unless the court makes specific findings to support closure of the courtroom. *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). A strong presumption exists that courts are to be open at all stages of the trial. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

The purpose of the rule is to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)) citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir.1996)). The right to a public trial is only overcome to serve an overriding interest based upon findings closure is essential and

narrowly tailored to preserve higher values. *Sublett*, 176 Wn.2d at 70, citing *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

In analyzing public trial right cases, this Court examines (1) whether the public trial right is implicated; (2) if so, whether there was a closure; and (3) if there was a closure, whether it was justified. *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014) (citing *Sublett*, 176 Wn.2d at 92 (Madsen, C.J., concurrence)). The court has adopted an experience and logic test to determine when a closed courtroom violation does not implicate the core values the public right to trial serves. *Id.* at 72. A violation of the right to public trial is structural and a violation of the right is presumed prejudicial. *Wise*, 176 Wn.2d at 13-14. Because it is a question of law, the right to a public trial is subject to de novo review by this Court. *Smith*, 181 Wn.2d at 508.

b. The record does not support that Mr. Howard's case was continued in an open court proceeding and no findings were made to support closure.

The record does not support that the continuances the court granted for court congestion were conducted in open court. There does not appear to be a transcript of a hearing where the order was entered. Other than the judge, there are no signatures on any of the orders to

indicate that anyone was present, other than the court. There is no indication Mr. Howard or any other member of the public was present when the court continued Mr. Howard's trial in what appears to be a non-public proceeding.

Under the experience and logic test which has been adopted by the court, a proceeding at which the court determines whether a matter should be continued, especially where the defendant is not waiving his right to a speedy trial, is one in which the public trial right is implicated.

Determining whether to continue a case where the defendant has not waived his right to speedy trial implicates both constitutional and statutory concerns. Const. art. I, § 22. CrR 3.3. Because of this, continuance hearings have historically been held in open court. *See*, Const. art. I, §22 (“the accused shall have the right to ... a speedy public trial”); *see also*, *Kenyon*, 167 Wn.2d at 136. Requiring hearings to be held in public allows the accused to object to the continuance, and also holds the court accountable for delays when the court continues a case for unjustifiable reasons. In this way, the court promotes its “interest in protecting the transparency and fairness” of the criminal trial. *State v. Easterling*, 157 Wn.2d 167, 178, 137 P.3d 825 (2006).

Requiring continuance hearings to be held in open court also satisfies the logic test. Ensuring the public has access to hearings where continuances are granted “plays a significant positive role in the functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73. Trial delay and courtroom congestion are historical concerns of the public. *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976) (Strict application of the speedy trial rule upholds the “integrity of the judicial process”). Where a case is continued because of court congestion, the court is required to make findings regarding unavailability and efforts the court made to try the case within the bounds of the speedy trial rule. *Kenyon*, 167 Wn.2d at 134. The rule requires objections to be made to continuances outside of the time for speedy trial, which requires notice to the parties and an opportunity to be hearing. CrR 3.3. Logic should also dictate that the right to a public trial applies to trial continuance hearings.

Entering the continuance orders in what appears to be an off the record proceeding does not satisfy the requirement that hearings be held in public, unless the court has made findings which justify closure. Because Mr. Howard’s trial was continued at least two times in private hearings, he is entitled to relief. This structural error requires reversal.

4. THE IMPROPERLY ADMITTED PRIOR ACT EVIDENCE DENIED MR. HOWARD HIS RIGHT TO A FAIR TRIAL.

Mr. Howard's right to a fair trial was denied when the State introduced evidence suggesting he had been involved in an unrelated and irrelevant attempted robbery the same night Mr. Garcia-Mendez attempted to rob Mr. Powell.

a. The right to a fair trial is denied when the State relies upon evidence of prior acts to prove guilt where such acts are irrelevant and unduly prejudicial.

Evidence of other acts is generally inadmissible. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Courts must be wary of the potential risk prior act evidence has in prejudicing an accused and be aware of situations "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). The potential high risk of prejudice requires courts to closely scrutinize evidence of prior acts and only admit it if certain criteria are met. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Prior to admitting evidence of prior bad acts, a trial court must find by a preponderance of the evidence the prior act occurred, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007). The evidence must also be relevant to be admissible. *Fisher*, 165 Wn.2d at 949; ER 402.

b. The State improperly relied upon an encounter which occurred the night of the attempted robbery of Mr. Powell to prove Mr. Howard acted as an accomplice to the attempted robbery.

The State introduced considerable evidence implying Mr. Howard had been involved in an attempted robbery prior to the incident with Mr. Powell. This prior act evidence was not relevant to the crimes committed against Mr. Powell. The prejudicial effect of this evidence deprived Mr. Howard of his right to a fair trial.

Mr. Howard moved in limine for the exclusion of all prior act evidence. CP 46. In discussing obligations under ER 404(b), the State declared to the court it did not “anticipate any.” RP 218. The State further stated it would not be offering evidence of “gang validation or anything like that.” RP 219-20. Despite these declarations, the State

relied heavily upon prior act evidence to establish Mr. Howard had attempted to rob Mr. Powell and that he had been “gang banging.”

The State elicited testimony a prior encounter between Mr. Gordon and two men. According to Mr. Gordon, he was walking in the Alki neighborhood in West Seattle when he was approached by two men who were completely covered up. RP 1340. Mr. Gordon testified he thought he “was getting a drive-by done” on him. RP 1341. He then told the jury two men approached him, in a slightly staggered formation. RP 1343. Mr. Gordon testified the men asked him if he was “gang banging.” RP 1345. Mr. Gordon then walked away without further incident. RP 1345.

The State focused on the incident with Mr. Gordon to establish Mr. Howard was an accomplice of Mr. Garcia-Mendez’s attempted robbery of Mr. Powell. In opening statements, the State used this incident to imply Mr. Howard was involved in gang activity. RP 603. The State returned to this incident later in the opening statement directly tying it to the later attempted robbery of Mr. Powell, stating:

This was something planned, something orchestrated. Three individuals, two of whom you have before you in court today, were active participants in this, looking for a target, starting with Leon Gordon. He was maybe a little too big, a little too scary, and they chose not to take him on.

RP 605.

In Mr. Howard's motion to dismiss, he argued the incident with Mr. Gordon required the jurors to engage in speculation there was an attempt to rob him, when there was no evidence to support that theory.

RP 1480-81.

In closing arguments, the State again focused upon the incident with Mr. Gordon, making it a predominant theme of the closing argument and directly tying it to the later attempted robbery of Mr. Powell. The State focused upon how the two men who attempted to rob Mr. Powell were standing in a similar posture when they encountered Mr. Gordon. RP 1513. The State also argued they were similar in size to the men arrested for attempting to rob Mr. Powell. RP 1524.

The State discussed why it believed Mr. Gordon was an "extremely important" witness. RP 1523. The only "reasonable inference" jurors could draw from the interaction with Mr. Gordon was that he had been assessed as a potential victim of a robbery by the persons who attempted to rob Mr. Powell. RP 1523-24. The State argued that "[f]or some reason that only they will never know, they decided to not rob and shoot Leon Gordon." RP 1524. It was only

because Mr. Gordon was too big or decided to walk away, the State asserted, that he was let go. RP 1524.

c. The use of prior act evidence to prove Mr. Howard guilty deprived him of his right to a fair trial.

Rather than convict Mr. Howard based upon the evidence of the attempted robbery of Mr. Powell, the State urged the jurors to use the prior act incident to find Mr. Howard guilty. It was offered for no other purpose than to show Mr. Howard acted in conformity with the prior action when the State claimed Mr. Howard attempted to rob Mr. Powell. *See*, ER 404(b).

The prior act evidence failed to meet the criteria for admission under ER 404(b). It was not logically relevant because it was not “relevant *and* necessary to prove an essential element of the crime charged.” *Goebel*, 40 Wn.2d at 21 (emphasis added). Importantly, the Gordon event has no bearing on any elements of the crime which occurred against Mr. Powell. Mr. Gordon was not assaulted; no one ever attempted to take any property from him. At most, Mr. Gordon was approached by two men looking to “gang bang,” a term never explained to the jury and which appears to have no relationship to a robbery. Mr. Gordon’s brief encounter with these two men did not involve a firearm and ended when Mr. Gordon walked away.

While Mr. Powell certainly testified he was approached by two men, he did not testify they likewise had their faces covered by a scarf or some other item. RP 1345. Other than the fact that Mr. Powell was approached by two men, the similarities between the two incidents are few. Mr. Garcia-Mendez was armed when he approached Mr. Powell and pulled out his gun right away. RP 675. Mr. Powell was immediately told to empty his pockets. RP 675. He was not asked about whether he was gang banging. There is no evidence the faces of the men who attempted to rob Mr. Powell were covered. And while there was some evidence one of the men who spoke with Mr. Gordon had high cheekbones and was therefore potentially Mr. Garcia-Mendez, this is not sufficient to satisfy even the low threshold required for ER 401.

While this evidence was not relevant, it was highly prejudicial. The State characterized this encounter as an attempted robbery, describing Mr. Gordon as a potential victim who was lucky enough to turn around and walk away when approached by two men. RP 1524. Mr. Gordon told the jurors he believed he was going to be a victim of a drive by. RP 1341. The State intimated it was only because he was too big or simply decided to walk away that he was not also robbed and assaulted. RP 1524.

While the State also argued the statements made to Mr. Gordon were not evidence of gang related activity, the arguments and testimony of the State betray this not to be the case. Evidence of gang related activity is prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009) (noting “the inflammatory nature of gang evidence generally”). In order for gang evidence to be admissible, the State must demonstrate there is a nexus between the gang activity, the crime and gang members. *State v. Embry*, 171 Wn. App. 714, 734, 287 P.3d 648, 659 (2012).

The State declared in arguing against being able to use prior act evidence that it would “limit” the testimony about gang activity. RP 219. In opening statements, the State concentrated on the Gordon incident, telling the jury that the men who approached him used the phrase, “Hey, are you gang banging?” RP 603. This phrase was elicited during testimony. RP 1345. It was again a focus of the State’s closing argument. RP 1524. Use of this evidence was prejudicial, used to cause the jurors to speculate about how dangerous Mr. Howard and his co-defendants were. The court abused its discretion in admitting the evidence and its use by the State prevented Mr. Howard from receiving a fair trial.

The rules of evidence require the court to establish the relevance of prior act evidence. *Saltarelli*, 98 Wn.2d at 362. Only after the court has concluded the evidence satisfies the requirements of ER 401 and ER 404(b) can the court appropriately balance the probative value against the prejudicial effect, as required by ER 403. *Id.* at 636. Where, as here, the evidence fails to meet the logically relevant test and the prejudicial effect of the evidence outweighs its probative value, the court errs in admitting the prior act evidence. Because this error prevented Mr. Howard from having a fair trial, he is entitled to reversal.

5. THE STATE PRESENTED INSUFFICIENT PROOF OF ACCOMPLICE LIABILITY.

- a. To prove accomplice liability, the State must prove the accomplice acted with the knowledge they were aiding in the commission of the offense.*

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. XIV; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When viewing evidence in the light most favorable to the State, evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (citing *Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

Under the accomplice liability theory, the State must prove the substantive charge was committed and the accomplice acted with knowledge they were aiding in the commission of the offense. *State v.*

Petersen, 54 Wn. App. 75, 78-78, 772 P.2d 513 (1989). The State must prove the accomplice, with knowledge their actions would promote or facilitate a crime, (i) solicited, commanded, encouraged, or requested the other person commit the charged crime; or (ii) aided or agreed to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a). The evidence must establish the accomplices actually knew they were promoting or facilitating the principal in the commission of the crime. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); *see also State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980) (Accomplice must have actual knowledge that principal was engaging in the crime eventually charged.).

b. The evidence Mr. Garcia-Mendez intended to commit a robbery was insufficient to establish Mr. Howard acted as an accomplice.

Mr. Howard moved to dismiss after the State had presented its case in chief. RP 1478. Mr. Howard renewed his motion for a new trial under CrR 7.4(b).

Mr. Howard argued to the court that the State had attempted to use prior act evidence to establish there was a plan to rob somebody the night Mr. Garcia-Mendez attempted to rob Mr. Powell. RP 1480. Mr. Howard highlighted the irony of this attempt in his motion to dismiss,

pointing out there was no evidence Mr. Gordon had been robbed or was otherwise the victim of either an assault or robbery. RP 1480. Mr. Howard also argued there was no evidence he was aware of anything Mr. Garcia-Mendez intended to do or that he assisted in any way in the crime Mr. Garcia-Mendez committed. RP 1481.

In denying the motion to dismiss, the court found the incident with Mr. Gordon to be “important.” RP 1484. It showed there was a coordination between the defendants to commit the later crime. RP 1485. The court found there to be a reasonable inference that “Mr. Gordon was targeted” and that the defendants had a criminal plan to commit robbery and assault. RP 1484. The court also found there was a reasonable inference to believe the man who was in the car with Mr. Garcia-Mendez was Mr. Howard. RP 1485. The court then found it was reasonable to presume by being present at the scene, Mr. Howard was ready to assist in the commission of the crime. RP 1485. Focusing on the forensic evidence, the court found this established Mr. Howard as an accomplice to Mr. Garcia-Mendez’s crimes. RP 1486.

c. The State failed to establish Mr. Howard was present when the attempted robbery occurred.

This court should find the evidence Mr. Howard acted as an accomplice to be insufficient. The reliance upon the prior incident with

Mr. Gordon was improper. The forensic evidence only established Mr. Howard had been in contact with Mr. Garcia-Mendez and the vehicle he used at some time prior to the attempted robbery of Mr. Powell. This is insufficient to establish Mr. Howard's guilt.

The State relied upon cell phone use to establish Mr. Howard had been present when Mr. Powell was shot. RP 1147-48, 1161. While this evidence established the cell phone had been used in the same area where Mr. Powell was shot, it did not establish Mr. Howard was present when the crime occurred. When cell phone use is mapped, it does not give the forensic examiner a precise location, but only which cell phone towers the caller was using. RP 1171. At best, this evidence establishes the phone was used in the vicinity of the tower and cannot pinpoint its locations. RP 1171.

The State also relied upon DNA evidence to establish Mr. Howard participated in the attempted robbery of Mr. Powell. DNA evidence tied to Mr. Howard was recovered from the vehicle seized from Mr. Garcia-Mendez's arrest scene. RP 1283. It was also recovered from a bandana which was found at the same arrest scene. RP 1309. While this evidence certainly establishes Mr. Howard had contact with

this bandana at some point, it does not establish he was actually present when Mr. Garcia-Mendez attempted to rob Mr. Powell.

d. The State failed to establish the person with Mr. Garcia-Mendez when he attempted to rob Mr. Powell was ready to aid in the commission of the crimes Mr. Garcia-Mendez committed.

More importantly, there is no evidence to establish the person with Mr. Garcia-Mendez knew Mr. Garcia-Mendez intended to rob Mr. Powell. No words were spoken by the second individual. He was not armed. He did not act in any way to facilitate the robbery. At most, he remained in close proximity for the very short encounter which took place between Mr. Garcia-Mendez and Mr. Powell. Mere presence is insufficient to establish accomplice liability. *See, State v. Jackson*, 87 Wn. App. 801, 816, 944 P.2d 403 (1997), *aff'd*, 137 Wn.2d 712, 976 P.2d 1229 (1999); *see also, State v. Trout*, 125 Wn. App. 403, 428, 105 P.3d 69 (2005) (One must be both present and ready to aid in the commission of a crime to establish accomplice liability.)

When the State introduced evidence caught on a nearby video camera it had enhanced to show how Mr. Powell had been shot, it was clear only one person had fired at Mr. Powell. RP 1083. As soon as the gun shots began, the second person with Mr. Garcia-Mendez became a

“motion blur.” RP 1084. The detective concluded the second person began fleeing the scene before the shooting had finished. RP 1088.

Even under the standard required for sufficiency, the evidence does not establish the second person with Mr. Garcia-Mendez was ready to aid in the commission of the crimes committed against Mr. Powell. At best, the evidence establishes his mere presence, which is insufficient to establish all the essential elements of the offense beyond a reasonable doubt.

6. THE STATE COMMITTED FLAGRANT AND ILL INTENTIONED MISCONDUCT WHEN IT ARGUED MR GARCIA-MENDEZ WOULD HAVE “SUCCESSFULLY EXECUTED” MR. POWELL WITHOUT THE INTERVENTION OF MEDICAL AID.

a. It is flagrant and ill-intentioned misconduct for the State to make arguments which are not based upon probative evidence and sound reason.

“As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). A “fair trial” is one in which the prosecutor representing the State does not throw the prestige of their public office and the expression of their own belief of guilt into the “scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)); *see also State v. Reed*, 102 Wn.2d 140, 145–47, 684 P.2d 699 (1984). In addition to representing the State, a prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated. *Monday*, 171 at 676.

Misconduct requires a showing that the prosecutor’s conduct is both improper and prejudicial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438,

442, 258 P.3d 43 (2011)). Establishing prejudice requires the court to find there was a substantial likelihood the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where there is no objection at trial, the errors may be waived unless the court finds the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. In such cases, reversal is required if the misconduct caused an enduring and resulting prejudice. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

b. Misconduct occurred when the State argued Mr. Mendez-Garcia and his accomplices intended to “execute” Mr. Powell.

A prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). “[T]he scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor’s conduct.” *Glasmann*, 175 Wn.2d at 705. Hence, a prosecutor may not refer to

charges not brought against the defendant. *State v. Boehning*, 127 Wn. App. 511, 522, 111 P.3d 899, 905 (2005); *State v. Torres*, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976); ABA Standards for Criminal Justice 3-6.9.

The State committed flagrant and ill-intentioned misconduct when it argued Mr. Garcia-Mendez and his accomplices would have “successfully executed” Mr. Powell, had it not been for medical intervention. RP 1509. Had the accomplices intended to commit a murder, the State could have brought those charges. By making this argument instead, the State improperly implied the State spared Mr. Howard the exposure this more serious charge would have brought.

At no time was it ever suggested Mr. Garcia-Mendez and his accomplices intended to murder Mr. Powell. This argument was made to inflame the jury and to ensure a conviction for emotional rather than factual reasons. By making this statement, the State improperly appealed to the jurors’ bias. *See, e.g., Monday*, 171 Wn.2d at 678. This misconduct was flagrant and ill intentioned. Mr. Howard is entitled to a new trial.

7. THE STATE AND DEFENSE COUNSEL WERE CORRECT IN ARGUING THE ROBBERY CONVICTION SHOULD HAVE BEEN VACATED AT SENTENCING.

a. Double jeopardy prohibits multiple punishments for the same offense.

The state and federal constitutions prohibit multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212, 214 (2008); *see also State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); U.S. Const. amend. V; Const. art. I, § 9. While the State may bring multiple charges arising from the same criminal conduct in a single proceeding, vacation is required where sentences for both offend principles of double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

The dispositive question for determining whether vacation is required is to ascertain whether the legislature intended to punish the crimes charged separately. *Freeman*, 153 Wn.2d at 771. If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended. *Id.* Some legislation, however, cannot be applied without violating double jeopardy. *Id.* at n. 2 (citing *Whalen v. United States*, 445 U.S. 684, 688–89, 100 S.Ct. 1432, 63 L.Ed.2d

715 (1980) n. 3 (acknowledging constitutional limits on legislative power to provide cumulative punishments) and George C. Thomas III, *Double Jeopardy: The History, the Law* 25–27 (1998)).

Where intent is not clear, the question of whether double jeopardy applies is generally resolved by resorting to the “same evidence test,” which requires the court to determine if the two offenses are the “same in fact” and the “same in law.” *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Offenses are the same in fact if they are proved by the same evidence. *In re Fletcher*, 113 Wn.2d 42, 47–48, 776 P.2d 114 (1989). They are the same in law if proof of one crime would always prove the other. *Calle*, 125 Wn.2d at 779.

b. An assault committed in the furtherance of a robbery may invoke principles of double jeopardy.

The question of whether it is possible to punish robbery in the first degree and assault in the first degree separately was not completely resolved by *Freeman*. *Freeman*, 153 Wn.2d at 771 n. 2. The court found there were circumstances where the legislature intended to punish first degree assault and first degree robbery separately, but did not completely preclude the possibility that double jeopardy could be applied in some cases. *Id.* at 775.

And while the court concluded there was some evidence of an intent to punish separately, the court also affirmed the analysis conducted in *State v. Frohs*, which is less focused upon abstract legislative intent and more focused on the facts of the individual case. *See State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996). Under this test, courts will not vacate a charge where the violence used was “gratuitous” or had some other and independent purpose or effect. *Freeman*, 153 Wn.2d at 779; *see also In re Francis*, 170 Wn.2d 517, 524, 242 P.3d 866 (2010). Where the violence does not have an independent purpose, courts have applied the double jeopardy rules to order vacation. *Id.*

c. Mr. Howard’s motion and the State’s concession on vacation of the attempted robbery conviction should have been granted.

Mr. Howard moved to vacate the attempted robbery in the first degree conviction on the grounds that it violated double jeopardy. CP 86. The State agreed that the facts of this case were appropriate for vacation, stating “we are conceding, as defense noted in their brief, the double jeopardy motion raised by defense and [are] asking the Court for double jeopardy purposed to vacate Count 2.” RP 1630. The court denied Mr. Howard’s motion. RP 1631.

The court should have granted the motion. Like *Francis*, the attempted robbery and the assault of Mr. Powell were not “separate and distinct” from each other. *See, e.g., Francis*, 170 Wn.2d at 525. The assaultive conduct of Mr. Garcia-Mendez was a necessary element of the attempted robbery. Mr. Howard was only charged with attempted robbery *in the first degree* because there had been actual injury to Mr. Powell.

Vacation of the robbery conviction is in accord with the case law which has developed regarding double jeopardy principles. There was no suggestion the assault of Mr. Powell was gratuitous or had some independent purpose. It was committed in the course of the robbery. The assault was not committed as some sort of retaliation or because the parties knew each other. As soon as the shooting between Mr. Powell and Mr. Garcia-Mendez was concluded, the assailants fled the scene.

Mr. Howard asks this Court to vacate his conviction for attempted robbery in the first degree. Mr. Howard’s motion at trial, which the State agreed should have been granted, was denied in error. Mr. Howard is entitled to a new sentencing hearing.

F. CONCLUSION

Mr. Howard respectfully requests this Court grant him the relief asked for in this brief.

The violation of Mr. Howard's speedy trial rights require dismissal. The court's decision to continue Mr. Howard's trial because of courtroom congestion was not supported with the required findings. The court's decision to continue Mr. Howard's trial without his presence in what appears to be a closed courtroom proceeding is structural error requiring reversal.

The court abused its discretion in allowing the State to introduce irrelevant prior act evidence. The prejudicial effect of this evidence outweighed its probative value and should not have been allowed.

The State also introduced insufficient evidence Mr. Howard was an accomplice to Mr. Garcia-Mendez's crime or that he was not merely present when Mr. Garcia-Mendez committed his crimes.

The State committed flagrant and ill-intentioned misconduct when it used the phrase "executed" to describe conduct which did not support a charge of attempted murder.

Finally, Mr. Howard's motion to vacate the robbery conviction, supported by the State at trial, should have been granted.

DATED this 29th day of July 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON

AUG 03 2015

SUPERIOR COURT CLERK

**SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY**

STATE OF WASHINGTON
Plaintiff/Petitioner

vs

HOWARD, DARRESON CHESTER
Defendant/Respondent
CCN:1913025

NO. 13-1-09602-8 SEA

ORDER CONTINUING TRIAL

(ORCTD)
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff Defendant The Court

It is hereby ORDERED that the trial, currently set for 08/03/2015 is continued to 08/05/2015.

Upon agreement of the parties [CrR 3.3(f)(1)] Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial; No judicial availability; Defense counsel in trial;

Other: _____

It is further ORDERED:

Omnibus hearing date is: _____ Expiration date is: 09/04/2015

Expiration date remains the same

DONE IN OPEN COURT this 3 day of August, 2015.

Judge ~~Jim Rogers~~ *Bill Bowman*

Approved for entry:

Deputy Prosecuting Attorney WSBA No. _____

Attorney for Defendant WSBA No. _____

I agree to the continuance:

Defendant (signature required only for agreed continuance)

I am fluent in the _____ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

King County, Washington

Interpreter
APP PAGE # 1

APPENDIX A

116

FILED
KING COUNTY, WASHINGTON

AUG 05 2015

SUPERIOR COURT CLERK
BY Matthew Hodgman
DEPUTY

**SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY**

STATE OF WASHINGTON
Plaintiff/Petitioner

vs

HOWARD, DARRESON CHESTER
Defendant/Respondent
CCN: 1913025

NO. 13-1-09602-8 SEA

ORDER CONTINUING TRIAL

(ORCTD)
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff Defendant The Court

It is hereby ORDERED that the trial, currently set for 08/05/2015 is continued to 08/06/2015.

Upon agreement of the parties [CrR 3.3(f)(1)] Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial; No judicial availability; Defense counsel in trial;

Other: _____

It is further ORDERED:

Omnibus hearing date is: _____ Expiration date is: 09/04/2015
 Expiration date remains the same

DONE IN OPEN COURT this 5 day of August, 2015.

Judge ~~Jim Rogers~~ *Bill Bowman*

Approved for entry:

Deputy Prosecuting Attorney WSBA No. _____
I agree to the continuance:

Attorney for Defendant WSBA No. _____

Defendant (signature required only for agreed continuance)

I am fluent in the _____ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

King County, Washington

Interpreter
APP PAGE # 2

APPENDIX B

118

FILED
KING COUNTY, WASHINGTON

AUG 06 2015

SUPERIOR COURT CLERK
BY Matthew Hodgman
DEPUTY

**SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY**

STATE OF WASHINGTON
Plaintiff/Petitioner

vs

HOWARD, DARRESON CHESTER
Defendant/Respondent
CCN:1913025

NO. 13-1-09602-8 SEA

ORDER CONTINUING TRIAL

(ORCTD)
(Clerk's Action Required)

This matter came before the court for consideration of a motion for continuance brought by

Plaintiff Defendant The Court

It is hereby ORDERED that the trial, currently set for 08/06/2015 is continued to 08/10/2015.

Upon agreement of the parties [CrR 3.3(f)(1)] Required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

Plaintiff's counsel in trial; No judicial availability; Defense counsel in trial;

Other: _____

It is further ORDERED:

Omnibus hearing date is: _____

Expiration date is: 09/04/2015

Expiration date remains the same

DONE IN OPEN COURT this 6 day of August, 2015.

Judge ~~Jim Rogers~~ *Bill Bowman*

Approved for entry:

Deputy Prosecuting Attorney WSBA No. _____
I agree to the continuance:

Attorney for Defendant WSBA No. _____

Defendant (signature required only for agreed continuance)

I am fluent in the _____ language and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Interpreter

APP PAGE # 3

King County, Washington

APPENDIX C

121

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74054-7-I
v.)	
)	
DARRESON HOWARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING 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] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] DARRESON HOWARD	(X)	U.S. MAIL
344206	()	HAND DELIVERY
MONROE CORRECTIONAL COMPLEX	()	_____
PO BOX 7002		
MONROE, WA 98272		

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710