

NO. 47781-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ARTURO SPENCER MARTIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Stanley Rumbaugh

No. 12-1-00649-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where defense counsel requested all but one of the five continuances, and those continuances were reasonable to establish a defense and prevent defendant from receiving a life sentence as a persistent offender, has defendant shown the trial court denied him his constitutional right to a speedy trial?
2. Where defendant pleaded guilty to conduct that would have violated the Washington second degree burglary statute, did the trial court properly find defendant's California burglary conviction factually comparable to Washington second degree burglary?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecuting Attorney's Office charged Arturo Spencer Martin (hereinafter "defendant") on February 23, 2012 with second degree assault, felony harassment, and interfering with the reporting of domestic violence, all domestic violence incidents. CP 1-3;

RCW 9A.36.021(1)(a), RCW 9A.46(020(2)(b), RCW 9A.36.150(1), RCW 10.99.020. Investigating officers could not locate defendant. 5RP 24.¹

On January 9, 2014, defendant—who was incarcerated in Wyoming—requested a final disposition in this case through the Interstate Agreement on Detainers (IAD). CP 70–76. After completing the necessary paperwork, Pierce County responded to this request on February 14, 2014. CP 77–78. In early May 2014, Pierce County followed up with the Governor’s Office because their paperwork had not yet been sent. CP 65. The final paperwork was sent on May 5, 2014. CP 65. Defendant arrived at the Pierce County Jail on May 6, 2014 and was arraigned on May 7, 2014. CP 65.

On June 12, 2014, the State and defense counsel entered an agreed order for continuance based on defendant’s substantial out-of-state criminal history. CP 475; (06/12/14)RP 2–3. The original trial date was set for June 30, 2014, but continued until September. CP 475. On August 5, 2014, the State filed a persistent offender notice. CP 13.

On September 3, 2014, defense counsel requested an agreed order for a continuance because of the persistent offender notice and comparability analysis required for defendant’s out-of-state convictions.

¹ The pre-trial verbatim reports of proceedings will be labeled by date, RP, and page number: (###/###/###)RP #. The other verbatim reports of proceedings will be labeled by volume, RP, and page number: #RP #.

CP 476; (09/03/14)RP 2–4. On January 29, 2015, defense counsel again requested an agreed order for a continuance. CP 477. The victim had just been located, and defense counsel had an interview scheduled with her the next week. CP 477. The court also granted defendant pro se status on that date. CP 477; (1/29/15)RP 17. Trial was continued to February 19, 2015. CP 477.

On February 12, 2015, the State requested a continuance to which defendant objected. CP 478. After reviewing the record from the previous hearing where the court permitted defendant to proceed pro se, the State believed there was a need to supplement the record. (02/12/15)RP 3. The court that heard the pro se motion, however, was at recess until February 20. CP 478; (02/12/15)RP 3. A different court granted the State's continuance because the administration of justice required it and there was just and sufficient cause to supplement the pro se record. (02/12/15)RP 8. Trial was continued to February 26, 2015. CP 478. The hearing to supplement the pro se record occurred on February 20, 2015. *See* (02/20/15)RP 3–4. The court reaffirmed that defendant was allowed to proceed pro se and permitted him to have standby counsel. (02/20/15)RP 11.

On February 25, 2015, defendant moved to dismiss the case for a violation of the time requirements of the IAD. CP 99–109. The court

denied defendant's motion, finding, "that within the meaning of the Interstate Act, these continuances were necessary and reasonable and for good cause shown in open court." (02/25/15)RP 4. On February 26, 2015, there was an agreed order continuing trial because the prosecutor was in a different trial and the defendant needed additional time to prepare. CP 479. The new trial date was set for April 9, 2015 with no further continuances allowed. CP 479.

On April 9, 2014, defendant requested that the court appoint him new counsel. 1RP 8. The court denied the request, 1RP 9, and defendant ultimately requested that the court reappoint his original attorney—who was at this point serving as standby counsel—to represent him. 1RP 15. The court granted the request and gave defense counsel a few days to get ready for trial. 1RP 17. Despite defendant's additional request for a continuance or to proceed pro se, 2RP 6, trial began on April 16, 2015. *See* 4RP 1.

The jury found defendant guilty of second degree assault and not guilty on the other two counts. 7RP 55–56; CP 179, 182, 184. By special verdict, the jury found it was an aggravated domestic violence offense and that the victim and defendant were members of the same household. 7RP 56; CP 180–81.

At sentencing, the court analyzed each of defendant's out-of-state convictions one at a time. *See* 8RP 5–26. Ultimately, the court declined to sentence defendant as a persistent offender. 8RP 36. The court found defendant's offender score was a 6. 8RP 26. The court imposed a standard range sentence of 43 months, together with an exceptional sentence of 36 months, for a total of 79 months. 8RP 37.

Defendant filed timely notice of appeal. CP 464.

2. Facts

Lisa Jacobs met defendant in late November 2011. 4RP 48. After they met, defendant began helping Jacobs with home improvement projects. 4RP 51. About a week into their relationship, defendant moved in with Jacobs. 4RP 52. Defendant slept on the couch for the first couple of days, but then his relationship with Jacobs became intimate and he slept in her room. 4RP 52. Jacobs considered defendant to be her boyfriend. 4RP 52.

On December 12, 2011, defendant was at home with Jacobs. 4RP 55. After Jacobs showered in the evening, she tried to get into bed with defendant. 4RP 56. But defendant did not want Jacobs to touch him, because she had touched the dogs without washing her hands. 4RP 56. Defendant became angry, and Jacobs tried to apologize. 4RP 56.

Defendant became even angrier, and he punched Jacobs with his fist in the eye. 4RP 57.

Jacobs asked defendant, “Dude, what are you doing?” 4RP 57.

This enraged defendant even more because he believed it to be disrespectful. 4RP 57. Defendant continued to punch Jacobs. 4RP 57.

Defendant used both fists, hitting Jacobs as if he were boxing. 4RP 58.

When she tried to get off the bed, defendant punched her again to knock her back down. 4RP 58. Defendant hit Jacobs in the face, both her eyes, her nose, and her jaw. 4RP 58. Blood was everywhere. 4RP 58. Jacobs’s young daughter was present and witnessed the attack. 4RP 60.

After the attack, defendant wanted Jacobs to start cleaning up the blood. 4RP 61. Defendant got bleach and began scrubbing. 4RP 61. While he cleaned, defendant muttered, “I don’t leave witnesses behind. I don’t leave witnesses behind.” 4RP 61. Defendant took Jacobs’s phone and asked her if it was worth it. 4RP 63. He told her that if she “snitched” on him, he would kill her and her daughter. 4RP 64. Jacobs believed defendant would carry out this threat. 4RP 70.

The next morning, Jacobs’s temporary caregiver, Jennifer Dickenson, arrived. 4RP 66. Dickenson noticed that Jacobs’s face was swollen and bruised, and Jacobs had a bandage over her eye. 5RP 32. While she was there, Dickenson would see defendant randomly. 5RP 33. Eventually defendant left, and Dickenson helped Jacobs change her eye bandage. 5RP 34. Jacobs disclosed to Dickenson that defendant had

caused her injuries. 5RP 35. Dickenson took Jacobs to the urgent care, which directed the women to Saint Anthony's Hospital. 4RP 67.

Jacobs ultimately required seven stitches: three on her nose and four under her eye. 4RP 68. Dr. Dennis Ford treated Jacobs in the emergency room. 5RP 61. Dr. Ford reported that Jacobs had facial injuries, neck pain, and facial swelling. 5RP 62. Jacobs's right eye was swollen shut, and she had cuts below her eye and on her nose, as well as swelling and tenderness on her jaw. 5RP 62. The radiologist report showed her nasal bridge had displaced fractures. 5RP 63. Dr. Mark Bosely was also called in to evaluate Jacobs. 6RP 19. Jacobs disclosed to Dr. Bosely that her companion had hit her in the face several times. 6RP 21.

Pierce County Sheriff Deputy Gerald Tiffany spoke with Jacobs at Saint Anthony's Hospital. 5RP 12. Jacobs was initially too scared to talk to Deputy Tiffany, but she eventually disclosed that defendant had caused her injuries. 5RP 13. Deputy Tanya Terrones interviewed Jacobs for several hours a couple days later. 5RP 22. Jacobs struggled to talk because her facial injuries were so painful. 5RP 22. Jacobs was also afraid for her life and her daughter's life. 5RP 22. Jacobs disclosed that defendant had caused her injuries. 5RP 23. Deputy Terrones unsuccessfully tried to locate defendant and published an all locate bulletin to law enforcement agencies. 5RP 24.

Defendant chose to testify. *See* 6RP 41–99. According to defendant, he and Jacobs never had a romantic or sexual relationship. 6RP

45, 49. Rather, defendant was taking advantage of an opportunity to grow medical marijuana with Jacobs, who needed a friend. 6RP 43. Defendant claimed to have been with his friends Molly and Maggie² in the days around December 11, 2011. 6RP 63, 68–69. Around 10:00 a.m. on the 11th, defendant went to Jacobs’s house to check on the marijuana plants. 6RP 73. He saw the bandage over her eye. 6RP 74. Defendant recalled, “[Jacobs] said that they came over and they was going to kill me because, you know, she shouldn’t have a nigger in the house.” 6RP 74–75. Jacobs then told defendant it would be a good idea for him to leave for a couple weeks and she would take care of the plants. 6RP 75. Defendant took her advice, left, and went back to Maggie’s house. 6RP 75.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT DENY DEFENDANT HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL BECAUSE ALL CONTINUANCES WERE REASONABLE EFFORTS TO PREVENT DEFENDANT FROM RECEIVING A LIFE SENTENCE AND DEFENSE COUNSEL BROUGHT ALL BUT ONE OF THE CONTINUANCES.

The Washington Constitution and United States Constitution protect a defendant’s right to a speedy trial. WASH. CONST. art. I, § 22; U.S. CONST. amend. VI.³ To determine if a defendant has been denied his

² The State intends no disrespect by referring to the women by their first names. During his testimony, defendant could not remember their last names. 6RP 51.

³ Defendant’s right to a speedy trial is also protected in part by the IAD and CrR 3.3(b).

constitutional right to a speedy trial, courts apply a balancing test. *State v. Carpenter*, 24 Wn. App. 41, 45, 599 P.2d 1 (1979) (citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). Among the non-exclusive *Barker* factors the court considers are: (1) the length of delay, (2) the reason for delay, (3) defendant’s assertion of his right, and (4) any prejudice to the defendant. *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013). None of these factors are necessary or sufficient, but they assist the court in determining if the right to a speedy trial has been denied. *Id.*

To trigger the *Barker* factors, this court must find a threshold showing of “presumptively prejudicial” delay. A defendant must allege that the time between accusation and trial has “crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Ollivier*, 178 Wn.2d at 827 (quoting *Doggett v. United States*, 505 U.S. 647, 651–52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). The length of delay is both the trigger for analysis under the *Barker* factors and one of the factors for the court to consider. *Ollivier*, 178 Wn.2d at 828 (citing *United States v. Colombo*, 852 F.2d 19, 24 (1st Cir. 1988)). The Court has rejected a bright-line rule for how much time is presumptively prejudicial because the inquiry is fact-specific. *State v. Iniguez*, 167 Wn.2d 273, 283, 217

Because defendant only assigns error to his constitutional right to speedy trial, it is the only one the State will address.

P.3d 768 (2009). But if the threshold showing is made, the court must consider the rest of the *Barker* factors.

In this case, the State arraigned defendant on May 7, 2014. CP 65. Five continuances were granted. CP 475–79. Trial began on April 16, 2015. *See* 4RP 1. Therefore, just under one year elapsed between arraignment and trial. But the length of delay is not the only thing to consider; the court should also examine the complexity of the charges and reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292. Although significant time passed between arraignment and trial where defendant was in custody, courts also look to whether the delay was highly disproportional to the complexity of the issues and counsel’s need for preparation. *Ollivier*, 178 Wn.2d at 830.

Defendant asserts that this case was not complex. *See* Br. of App. p. 15. But this overlooks the aspects of the case that were complex. Most significantly, defendant was facing a life sentence as a persistent offender. (09/03/14)RP 2–4. Defendant had multiple convictions from various states, all of which had to be tracked down and analyzed for comparability. (09/03/14)RP 2–4. Defense counsel also needed time to prepare a mitigation package in an attempt to help defendant avoid a life sentence. (09/03/14)RP 3. Given the persistent offender allegation, the delay in this case was not disproportional to counsel’s need to prepare adequately to help defendant avoid a life sentence. Thus the first factor does not weigh in favor of defendant.

Assuming arguendo that defendant could show a presumptively prejudicial delay to trigger the *Barker* factors, those factors also do not weigh in his favor. Therefore defendant has not shown that the trial court denied him his constitutional right to a speedy trial.

The second *Barker* factor looks at the reason for delay. This factor weighs in favor of the State because defense counsel brought all but one of the continuances. Further, all continuances sought were for good cause and in the interest of case preparation where defendant was facing a life sentence. “Delay caused by defense counsel is chargeable to the defendant.” *Ollivier*, 178 Wn.2d at 832. Defense counsel is defendant’s agent when acting, or failing to act, in furtherance of the trial. *Id.* at 833 (citing *Vermont v. Brillon*, 556 U.S. 81, 90, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009)). That the defendant objected to these continuances does not change this analysis. *Id.* at 834–35 (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *State v. Lucas*, 167 Wn. App. 100, 112, 271 P.3d 394 (2012)). Because defense counsel brought all but one continuance, the second factor weighs in favor of the State.

Defendant argues that the State was responsible for two of the five continuances. *See* Br. of App. p. 17. But this argument is not supported by the record. The State brought only one continuance, the continuance on February 12, 2015. CP 478. The State requested this continuance to protect defendant’s rights because there were concerns that the earlier pro se colloquy was inadequate. (02/12/15)RP 1–2. Particularly because this

was a persistent offender case, the State wanted to ensure the court made an informed decision to allow defendant to exercise his constitutional right to proceed pro se. (02/12/15)RP 2. The court found that the continuance was required for the administration of justice. CP 478. This continuance was for only seven days. CP 478.

The other continuance that defendant points to was brought on a joint motion by the State and defendant. CP 479. And the reasons for the continuance specifically state, “Defendant has requested more time to prepare.” CP 479. Therefore, the record does not support that the State was primarily responsible for that final continuance.

The third factor looks to the defendant’s assertion of his right to a speedy trial. *Ollivier*, 178 Wn.2d at 837. Although defendant repeatedly objected to the continuances, this factor does not weigh in his favor. In *Ollivier*, the Court was faced with a similar unusual situation—where the defendant objected to continuances brought by his own attorney. *Id.* at 839. But the Court nonetheless found the third factor did not weigh in the defendant’s favor because defense counsel acted as his agent and the continuances furthered defendant’s right to counsel. *Id.* This case is analogous to *Ollivier*; therefore, the third factor does not weigh in favor of defendant.

The fourth factor looks at prejudice. This factor weighs in favor of the State because defendant has not shown that the benefits of the continuances were outweighed by prejudice. Prejudice is not always

presumed; a defendant must establish actual prejudice before a court will recognize a violation of his constitutional right to a speedy trial. *Ollivier*, 178 Wn.2d at 841. The types of prejudice include: oppressive pre-trial incarceration, anxiety and concern of the defendant, and possible impairment of the defendant's ability to present a defense by dimming memories or loss of evidence. *Id.* at 844. Defendant in this case focuses only on the third type of prejudice. *See* Br. of App. p. 19.

In this case, defendant benefitted from the continuances. Defense counsel requested most of the continuances to have sufficient time to investigate and prepare a defense in a case with very serious consequences. CP 475–77, 479. Thus any impairment must be weighed against the benefits obtained from those continuances. *Ollivier*, 178 Wn.2d at 845. The primary reason defense counsel needed more time to prepare was because the State had filed a persistent offender notice against defendant. *See* CP 476, (09/03/15)RP 2–4. Defendant was facing life in prison, thus requiring defense counsel to carefully consider defendant's prior convictions. *See* (09/03/14)RP 4.

Ultimately, because of defense counsel's preparation, the court did not sentence defendant as a persistent offender. 8RP 36. Specifically, the court at sentencing explained that the comparability analysis for defendant's 1981 conviction for assault with great bodily injury allowed defendant to escape a life sentence. 8RP 36. This comparability analysis was prepared and argued in depth by defense counsel—and the court

adopted defense counsel's rationale. *See* 8RP 20–23. If this conviction had been found comparable, defendant would have been sentenced to life in prison as a persistent offender. Thus defendant got the benefit of avoiding life in prison because of defense counsel's preparation. Defendant has failed to show particularized prejudice.

Considering all the ***Barker*** factors, defendant has not established that the trial court denied him his constitutional right to a speedy trial.

2. DEFENDANT'S 1983 CALIFORNIA
CONVICTION FOR SECOND DEGREE
BURGLARY IS FACTUALLY COMPARABLE
TO WASHINGTON'S SECOND DEGREE
BURGLARY; THEREFORE, THE SENTENCING
COURT DID NOT ERR.

To determine the comparability of a foreign conviction, the court applies a two part test. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the court determines legal comparability: "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Id.* Second, if the elements of the foreign offense are broader than Washington's, the court must determine factual comparability: "whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Id.* In determining factual comparability, the court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *Id.*

In the present case, defendant challenged the comparability of his 1983 California conviction for second degree burglary at sentencing, 8RP 5–8, and he renews that challenge on appeal. *See* Br. of App. p. 1. After reading the briefing and listening to the arguments of both parties, the sentencing court found the 1983 burglary factually comparable:

When the statute requires if [sic] somebody willfully and unlawfully enters, and that’s what the complaint was, that’s not the language that’s used for vacant lots. Enter implies that there is a building or other structure that you are entering into. . . . I think that the common use of the word “enter” implies that there is something that’s being entered, not a trespass on some vacant lot that [defendant] stumbled across. *So I think that as to the 1983 conviction, it is comparable with our Burglary 2 statute.*

8RP 7–8 (emphasis added). The trial court did not err in finding this foreign conviction factually comparable.

In 1983 under the California Penal Code, burglary was defined as:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the door of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, “inhabited” means currently being used for dwelling purpose, whether occupied or not.

Cal. Penal Code § 459 (1983). Further, “every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the

inhabited portion of any other building, is burglary of the first degree. All other kinds of burglary are of the second degree.” Cal. Penal Code § 460 (1983). Defendant pleaded guilty to second degree burglary. CP 355.

In Washington in 1983, second degree burglary was defined as: “if, with intent to commit a crime against a person or property therein, [a person] enters or remains unlawfully in a building other than a vehicle.” RCW 9A.52.030 (1983). Because the elements of California’s statute are broader than Washington’s, the offenses are not legally comparable. *See e.g., State v. Thomas*, 135 Wn. App. 474, 483, 144 P.3d 1178 (2006).

The convictions, however, are factually comparable. In the complaint from defendant’s 1983 California conviction, it states that defendant “did willfully and unlawful enter 800 Admiral Callaghan Lane, Vallejo, California, with the intent to commit a theft.” CP 355. Defendant pleaded guilty to this felony. CP 355. As the trial court below found, the word “enter,” followed by an address, implies defendant entered a building or other structure. Therefore, defendant’s conduct would have violated the Washington statute and the two offenses are factually comparable.

Under Washington law, a building, “in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein.” RCW 9A.04.110(5) (1983). Therefore, the

term “building” under RCW 9A.52.030 (1983) encompasses many of the same structures as those listed in Cal. Penal Code § 459 (1983).

A sentencing court can engage in limited fact finding to determine comparability. *Thomas*, 135 Wn. App. at 481 (citing *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)). For example, the sentencing court can rely on facts that were admitted, stipulated to, or proved beyond a reasonable doubt. *Lavery*, 154 Wn.2d at 258. The trial court here properly reasoned that—from the facts of the complaint—defendant’s conduct in California would have violated the Washington statute. Therefore the offenses were factually comparable, and the trial court did not err in calculating defendant’s offender score.

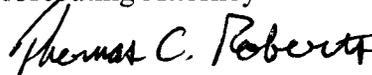
D. CONCLUSION.

The trial court did not deny defendant his right to a speedy trial under the constitution because all continuances were reasonable efforts to prevent defendant from receiving a life sentence and defense counsel agreed to all but one of the continuances. Therefore the *Barker* factors do not weigh in his favor. Further, the trial court did not miscalculate defendant’s offender score because defendant’s California second degree burglary conviction is factually comparable to second degree burglary in Washington.

The State respectfully requests this court affirm defendant's conviction and sentence.

DATED: FEBRUARY 23, 2016.

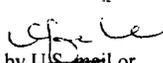
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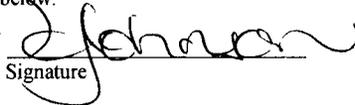


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Rule 9

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Date Signature

PIERCE COUNTY PROSECUTOR

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