

29093-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

29093-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT2

 A. THE DEFENDANT HAS NOT SHOWN HE
 WAS DENIED THE CONSTITUTIONAL
 RIGHT TO A SPEEDY TRIAL2

 B. THE DEFENDANT HAS NOT SHOWN
 INEFFECTIVE ASSISTANCE OF COUNSEL9

 C. THERE WAS NO ERROR IN PERMITTING
 AN EYEWITNESS TO IDENTIFY THE
 DEFENDANT IN COURT.....11

CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE PERS. RESTRAINT OF BENN, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 4

STATE V. AARON, 95 Wn. App. 298,
974 P.2d 1284 (1999)..... 9

STATE V. GUZMAN-CUELLAR, 47 Wn. App. 326,
734 P.2d 966 (1987)..... 12, 14

STATE V. LINARES, 98 Wn. App. 397,
989 P.2d 591 (1999), *review denied*,
140 Wn.2d 1027 (2000)..... 12, 14

STATE V. LORD, 117 Wn.2d 829,
822 P.2d 177 (1991)..... 10

STATE V. McFARLAND, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 9

STATE V. MONSON, 84 Wn. App. 703,
929 P.2d 1186 (1997)..... 3

STATE V. PRESTEGARD, 108 Wn. App. 14,
28 P.3d 817 (2001)..... 14

STATE V. SALINAS, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 11

SUPREME COURT CASES

BARKER V. WINGO, 407 U.S. 514,
92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)..... 4

MANSON V. BRATHWAITE, 432 U.S. 98,
97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)..... 12

NEIL V. BIGGERS, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).....	12
SIMMONS V. UNITED STATES, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).....	12
STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	10

CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT	3
U.S. CONST. Amend. VI	3

COURT RULES

CrR 3.3	2, 3
CrR 3.3(a)	7
CrR 3.3(e)	2, 3
CrR 8.3	7

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. William Davis was denied the right to a constitutionally speedy trial under the Sixth Amendment to the United States Constitution and Const. Art. I, sec 22.
2. Mr. Davis did not receive effective assistance of counsel as guaranteed by the same constitutional provisions.
3. The State failed to establish, beyond a reasonable doubt, that Mr. Davis was the person who committed the robbery on November 16, 2008.

II.

ISSUES PRESENTED

- A. WERE THE DEFENDANT'S CONSTITUTIONAL SPEEDY TRIAL RIGHTS VIOLATED?
- B. DID THE DEFENDANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL?
- C. WAS THE ADMISSION OF LARRY ROSCOE'S IN-COURT IDENTIFICATION DEFECTIVE?

III.

STATEMENT OF THE CASE

For purposes of this appeal, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN HE WAS DENIED THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

Unlike CrR 3.3, the constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time.

The defendant first makes an unsupported attempt to claim that CrR 3.3(e) does not say what it clearly does say. Under CrR 3.3(e), competency proceedings are excluded from speedy trial calculations. With no legal support, the defendant states that CrR 3.3(e) does not "contemplate" the delay occurring in this case. Brf. of App. 7. The defendant supplies no rule, caselaw or other ruling that agrees with the defendant's assertions. The rule simply states that all time involved in determining defendant's competency is excluded from speedy trial

calculations. The defendant repeats his mistaken claim at least twice in his appeal briefing.

Not satisfied with the bald claim that CrR 3.3(e) does not state what it states, the defendant next asserts that competency exclusion time ends when the Sanity Commission report is filed with the court. Brf. of App. 8. The plain language of the court rule states that the exclusion terminates when the trial court "...enters a written order finding the defendant to be competent." CrR 3.3(e). Again, the defendant simply makes bald assertions with no support whatsoever.

The defendant all but concedes that there is no violation of the statutory speedy trial rule and moves to violations of the constitutional right to speedy trial.

The Sixth Amendment reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

Unlike CrR 3.3, the constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997).

Courts consider four factors in determining whether a delay in bringing a defendant to trial violates constitutional speedy trial: "the

‘[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.’” *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

Looking at these four factors, the length of the delay is somewhat over a year. Since an exact numerical breakover point is not part of constitutional speedy trial analysis, this factor is of little import in this case.

The reasons for the delay can be seen in the following list of continuances for the purposes of obtaining an expert’s psychological report. These continuances were almost exclusively at the request of the defense counsel.

The defendant did assert his right to a speedy trial, but his defense counsel kept saying he was not ready.

The final factor is prejudice to the defendant. In this case, there was no prejudice that affected the outcome of the trial. As has been noted elsewhere, the defendant had no witnesses whose memories could have been impaired and no destruction of evidence. The only prejudice from the delay was to the State. The State presented witnesses whose memories had surely dimmed over time. Some witnesses had left employment at the

victim business and could not be located. RP 69 Taken as a whole, the passage of time *benefitted* the defendant rather than prejudiced him.

The defendant tries to put the “blame” for the length of delay in his trial upon the State or the court. In an application of illogic, the defendant contends that the defense counsel’s actions are actually prosecutorial mismanagement or error on the part of the court. An examination of the court file shows the true picture.

	Date Entered	Date Cont.	
Order setting stay	2/7/08	2/14/08	CP 447
Order for sanity stay	2/14/08	3/14/08	CP 12
Sanity Commission Stay	2/15/08		CP 13-22
Stay Hearing	3/17/08	3/28/08	CP 54
Stay Hearing Cont.	3/20/08	4/4/08	CP 55
Order transport of Def. (to ESH for Def. Eval.)	4/9/2008		CP 448-449
Request to lift stay	5/23/08	5/29/08	CP 450
Request to lift stay	05/29/08	6/20/08	CP 68
Request to lift stay cont.	06/20/08	7/18/08	CP 69
Request to lift stay cont.	7/18/08	8/15/08	CP 70
Request to lift stay cont. (Def. Must show reasons)	8/15/08	8/29/08	CP 71

Request to lift stay cont.	8/29/08	10/03/08	CP 72
Request to lift stay cont.	10/3/08	10/17/08	CP 73
Request to lift stay cont.	10/17/08	10/31/08	CP 74
Request to lift stay cont.	10/31/08	11/21/08	CP 75
Request to lift stay cont.	11/21/08	12/5/08	CP 77
Request to lift stay cont.	12/5/08	1/9/09	CP 78
Request to lift stay cont.	1/9/09	1/16/09	CP 79
Status conf. And evaluation Of Def. Expert's report.	1/23/09	1/30/09	CP 80
Cont. for def. Expert's Report.	1/30/09	2/13/09	CP 81
Cont. for def. expert's Report.	2/13/09	2/27/09	CP 82
Review of expert's report	2/27/09	3/13/09	CP 83
Sanity Stay Lifted	3/13/09		CP 84
Order Lifting Stay	3/16/09		CP 85-86
Order Setting Trial	5/5/09	10/12/09	CP 87
Motion Discharge Counsel for Defendant	9/18/09		CP 451-453
New Appointment of Defense Counsel	10/8/09	3/15/10	CP 104
Defense in Pre-Assigned Murder Case	2/16/10	4/19/10	CP 258

JT cont.	4/15/10	CP 268
Jury Trial	4/19/10	See VRP

The vast majority of the continuances, and certainly the continuances involving the lifting of the mental health stay, were all at the request of the defendant and none at the request of the State. In fact, an examination of the ongoing series of continuances of the hearing to lift the stay show that the State attempted to force the defendant to trial.

While blaming the State and the trial court for the delays, the defendant fails to explain how, exactly, the State was supposed to force the trial court to lift the stay while the defense is asking for time to get the evaluation report from the defendant's expert. Had the court, either *sua sponte* or at the request of the State, simply lifted the stay and forced the defendant to trial without the benefit of his expert's report, the defendant would surely have appealed on the grounds of being forced to trial before being ready.

The defendant cites CrR 3.3(a) as support for the idea that a defense-requested delay can be imputed to the State. Brf. of App. at 11. There is no such language in CrR 3.3(a). The defendant also cites to CrR 8.3, which explains the defendant's continuing attempts to change the defense requested continuances into State actions. The defendant is trying

to present a strained combination of court rules in an effort to justify a dismissal of this case. CrR 8.3 addresses dismissal of a case due to State actions. If the defendant could convert defense actions into State actions, the defendant could then seek dismissal under CrR 8.3. The problem for the defense on appeal is that it was not the State that requested the continuances leading to a lengthy pre-trial wait. While a few of the continuance forms are scrawled in illegible writing, the vast majority of continuances showed reasons that were defense requests for time to complete a psychological evaluation. Interestingly, the trial court appeared to be losing patience with the continuing delays and entered orders that the defense needed to show reasons if requesting additional continuances. There is nothing in the record to show that the court's efforts to get the case to trial were successful. At one point, the trial court stated that if another continuance was requested, the court required that Dr. Mays appear to explain the delays. CP 82. Again, there is nothing in the record to explain what happened to that order.

An unexplored sub-text woven throughout the defendant's speedy trial briefing is an insinuation (and sometimes outright broadside) that trial defense counsel did not perform adequately and delays were caused by defense counsel's lack of action.

B. THE DEFENDANT HAS NOT SHOWN
INEFFECTIVE ASSISTANCE OF COUNSEL.

To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The defendant does not outline a complete section on ineffective assistance of counsel showing the standards and the various items required to meet those standards. Instead, the defendant scatters insinuation and bald accusations throughout his speedy trial argument. At times, the defendant assigns blame--for what he considers a long speedy trial time--

to the defense counsel. At other times, the defendant blames the State and the trial court.

While the defendant does not plainly describe his burdens in an ineffective assistance of counsel argument, the reality is that there are two burdens: 1. The defendant must show that defense counsel performed in a substandard manner. 2. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant must be able to prove both deficient performance *and* prejudice. If the defendant cannot show prejudice, the analysis ends with no need to examine defense counsel's performance. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

In this case, the defendant cannot show a reasonable probability that the outcome of the trial was affected by any alleged defective defense counsel actions. Even if it is assumed (*arguendo*) that the defendant trial counsel caused unnecessary delays, the defendant has not shown how the delays harmed anything in the defendant's case.

The defendant did not present a case, resting without presenting any witnesses or proof. Therefore, any delay did not deprive the defendant of witnesses or dim potential witness' memories. A long delay

cannot strengthen the State's case as witnesses are lost, memories fade, etc. If anything, the delay in this case *helped* the defendant immensely.

The defendant claims the delay in the start of his trial created "...anxiety and worry on the part..." of the defendant. The defendant does not explain how this alleged anxiety affected the outcome of the trial. It is important to examine the defendant's brief carefully and separate the speedy trial arguments from the ineffective assistance of counsel arguments. They are intertwined in multiple locations. RP 13.

C. THERE WAS NO ERROR IN PERMITTING AN EYEWITNESS TO IDENTIFY THE DEFENDANT IN COURT.

The defendant argues in the alternative that the State did not present sufficient evidence to prove the defendant committed the crime. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The defendant apparently wishes to argue issues related to in-court identification. Given the defense raised, in this case, arguing in-court identification is beyond Washington law pertaining to sufficiency of the evidence. This is in conflict with well established Washington law. By raising a sufficiency of the evidence argument there cannot be arguments

claiming that one part of the State's case was defective. A sufficiency of the evidence argument admits the truth of the State's evidence and all inferences from that evidence. *Salinas, supra*.

The State submits that the defendant's assignment of error on this topic is plainly a sufficiency of the evidence argument. Thus, the remainder of the defendant's brief is irrelevant.

In the alternative, if the court undertakes an analysis of the identification issue, the State submits the following.

Washington law on suggestive identification procedures developed mainly from three U.S. Supreme Court cases: *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); and *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

In order to prevail on a suggestiveness claim, the defendant must first show that an identification procedure is unnecessarily suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). "If, and only if, it is, [suggestive] the court must determine whether, considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification." *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), *review denied*, 140 Wn.2d 1027 (2000). It may consider (1) the opportunity of the witness to view

the criminal at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Id.* at 401.

Looking at the five factors listed: 1. the witness viewed the defendant from an arm's length distance. RP 71-72. 2. The defendant was displaying what appeared to be a handgun. That would attract anyone's full attention. 3. This factor does not apply well to this case as the record does not address the witness' description or that a description was given to police prior to the show-up. 4. The record indicates that the witness remembered the tone of the defendant's skin, his clothing and some facial features. RP 70. 5. The time in numerical amounts is not indicated in the record, but from the general outline given by the witness, he was taken very soon after the event to view a suspect. The witness testified that the show-up happened "very close" to the store where the events occurred. RP 70.

The total of the factors discussed above show that even if the show-up had been unnecessarily suggestive, there was little chance of an "irreparable misidentification."

In trying to bolster his arguments, the defendant states on appeal that he was handcuffed and with officers nearby at the time of the show-

up. There is nothing in the record to indicate that the defendant was handcuffed when viewed by the witness. The defendant had been handcuffed but it is not in the record that the handcuffs remained on the defendant during the witness viewing. The defendant's arguments on suggestiveness are based on the assertions that the defendant was the only suspect present, he was in handcuffs and there were police officers nearby. Ultimately, the number of suspects, handcuffs and officer's presence is not enough to show suggestiveness. *State v. Guzman-Cuellar*, 47 Wn. App. at 336.

Since the defendant has not shown (or even convincingly argued) how the show-up was unnecessarily suggestive, analysis should end. *State v. Linares*, 98 Wn. App. at 401.

The defendant also states that the in-court identification was not "reliable" because the witness stated "I think I do" when asked if he recognized anyone in the courtroom. Brf. of App. 14. This is an acceptable argument before the jury, but of no import on appeal. It was up to the jury to decide whether the witness made a convincing identification in court. "We give deference to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence." *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

Even assuming, arguendo, that the “show-up” was unnecessarily suggestive, the defendant cannot prevail as there is little evidence leading to the conclusion that there was a chance of misidentification.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 16th day of December, 2010.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29093-0-III
 v.)
)
WILLIAM DAVIS,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on December 16, 2010, I mailed a copy of the Respondent's Brief in this matter, addressed to:

Dennis W. Morgan
Attorney at Law
120 West Main Ave
Ritzville, WA 99169

and to:

William Davis
DOC #954646
1313 North 13th Ave
Walla Walla, WA 99362

12/16/2010
(Date)

Spokane, WA
(Place)

Patricia S. Green
(Signature)