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DIVISION II

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STATE OF WASHINGTON
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NO. 35237-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JAMES R. KENYON,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00041-2

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in continuing Kenyon's last allowable date for trial by improperly finding an excluded period under CrR 3.3(e)(8).

02. The trial court erred in failing to dismiss with prejudice Kenyon's convictions where he did not receive a timely trial under CrR 3.3.

03. The trial court erred in not taking, count I from the jury for lack of sufficiency of the evidence.

04. The trial court erred in not taking, count II from the jury for lack of sufficiency of the evidence.

05. The trial court erred in not taking, count III from the jury for lack of sufficiency of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in continuing Kenyon's trial and in failing to dismiss with prejudice Kenyon's convictions where he did not receive a timely trial under CrR 3.3? [Assignments of Error Nos. 1 and 2].

02. Whether the trial court erred in not taking, count I from the jury of lack of sufficiency of the evidence? [Assignment of Error No. 3].

03. Whether the trial court erred in not taking, count II from the jury of lack of sufficiency of the evidence? [Assignment of Error No. 4].

04. Whether the trial court erred in not taking, count III from the jury of lack of sufficiency of the evidence? [Assignment of Error No. 5].

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C. STATEMENT OF THE CASE

01. Procedural Facts

James R. Kenyon (Kenyon) was charged by fourth amended information filed in Mason County Superior Court on August 3, 2006, with seven counts of unlawful possession of a firearm in the first degree, contrary to RCW 9.41.040(1)(a). [CP 63-67].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on August 1, 2006, the Honorable James B. Sawyer II presiding. The parties stipulated that for purposes of all counts Kenyon was previously convicted of a felony defined as a serious offense. [RP 123; CP 77]. Neither exceptions nor objections were taken to the jury instructions. [RP 244].

The jury returned verdicts of guilty as charged, in addition to returning special verdicts that (1) the State had proven beyond a reasonable doubt that each crime was committed shortly after Kenyon was released from incarceration and that (2) Kenyon had previously been convicted of numerous felony offenses. [CP 25-27, 30-36; RP 318-320].

Kenyon was given an exceptional sentence of 232 months based on the jury's special verdicts, with counts I-III to be served consecutive to counts IV-VII, and timely notice of this appeal followed. [CP 7, 9-22].

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02. Substantive Facts: Sentencing

Without objection, certified copies of Kenyon's criminal history were introduced into evidence. [RP 304-09]. In addition, without objection, evidence was presented that Kenyon, on different occasions, was in prison until April 29, 2004, December 20, 2004 and April 11, 2005. [RP 313-315].

03. Substantive Facts: Trial

02.1 Counts I-III: 06/25/05 – 06/30/05

On October 14, 2004, Destiny Meehan was in a car with Kenyon who had a gun in his possession that he threw out of the car window when the police chased the two. [RP 159-161, 167, 175]. Meehan later retrieved the gun, which was identified as the firearm in count I. [RP 163, 168-69, 174; CP 64].

During the arrest of David Reading and the search of his trailer on June 30, 2005, the three firearms listed in counts I-III were recovered. [RP 132-36; CP 63-65]. The firearm in count I was found in a red box and the other two in a small gray box. [RP 136]. A day or two before June 30, Kenyon asked David Stiner, who lived near Reading's house, if he knew "anybody that was looking to buy a couple of guns." [RP 144, 147]. "There was two other people there that had (the firearms listed in counts I and II) in their hands. (Kenyon) was doing the talking." [RP 135, 144-

47]. "(H)e said they (the guns) belonged to a friend of his, ... a girlfriend." [RP 153]. On the same day, Kenyon was looking for Jana Newhouse and Dave Reading. [RP 148]. He gave Stiner a small gray box, the same box in which the firearms listed in counts II and III were subsequently found, with instructions to give the box to Newhouse or Reading. [RP 148, 151]. The box was locked and had something in it. [RP 148]. Stiner, who never looked in the box, put it in Newhouse's trailer. [RP 148, 150-51].

02.2 Counts IV: 02/01/05 – 03/13/05

Between February 1, 2005 and March 13, 2005, Kenyon gave Jana Newhouse a shotgun to store for him. [RP 197]. Meehan also remembered Kenyon having possession of a shotgun some unspecified time before the car chase in October 2004. [RP 164-65, 169].

02.3 Counts V-VI: 06/01/04 – 08/31/04

Sometime during June 1, 2004 through August 31, 2004, Joan Goad observed Kenyon with a firearm "in his front pocket, and then he had one in his back pocket...." [RP 181].

02.4 Counts VII: 06/01/05 – 07/31/05

In the summer of 2005, Dale Carrell observed Kenyon with a firearm tucked in his belt. [RP 189-90, 192].

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D. ARGUMENT

01. KENYON'S SPEEDY TRIAL RIGHT WAS VIOLATED AND HIS CONVICTIONS MUST BE REVERSED AND DISMISSED WITH PREJUDICE.

01.1 Relevant Procedure

On June 5, 2006, Kenyon's case was reset for trial on the following June 8, with the speedy trial period to expire on July 5, 2006. [CP 101]. While the trial date was subsequently rescheduled, the final date to start trial remained the same. [CP 97, 100]. Recognizing this on July 5 [RP 07/05/06 1-3], the trial court, over objection, continued Kenyon's last allowable date for trial pursuant to CrR 3.3. by finding an excluded period. [RP 07/05/06 2-5].

> This matter having come before the court on June 5, 2005 (sic) for trial status, the court having made a record that this matter could not be called out for trial due to the court being presently involved in an ongoing trial and the remaining department's judge being unavailable due to a regularly scheduled vacation, the court having made a record that an excluded period thereby existed as envisioned by CrR 3.3(e)(8),[1] now, therefore, it is hereby
>
> ORDERED, that the trial of this mater shall be reset within the allowable thirty days from the end of such excluded period provided by CrR 3.3(b)(5) when such date is established.

[CP 141].

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[1] CrR 3.3(e)(8) provides, in part, that the following period shall be excluded in computing the time for trial: "Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties...."

01.2 Argument

A criminal charge must be dismissed with prejudice if it is not brought to trial within the time limit determined under CrR 3.3. CrR 3.3(h). The trial court bears the ultimate responsibility to ensure that the trial is held within the speedy trial period. CrR 3.3(a)(i); State v. Jenkins, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994).

In reviewing an alleged violation of the speedy trial rule, the court applies the rule to the particular facts to determine whether there exists a violation that mandates dismissal. State v. Carlyle, 84 Wn. App. 33, 35, 925 P.2d 635 (1996). The application of a court rule to particular facts is a question of law reviewed de novo. Carlyle, 84 Wn. App. at 35.

The courts have "consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated." State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

> . . . [P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.

State v. Striker, 87 Wn.2d 870, 876-77, 557 P.2d 847 (1976) (citations omitted).

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice or

prosecutorial misconduct. Instead, failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. State v. Ralph Vernon G., 90 Wn. App. 16, 20-21, 950 P.2d 971 (1998).

As the record demonstrates that the resetting of the trial beyond the last allowable date for trial of July 5 was not required for the administration of justice and was done without "good cause," dismissal with prejudice is the remedy. See State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978). Court congestion and/or courtroom unavailability do not constitute good cause to continue a criminal trial beyond the prescribed time period. State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978).

In State v. Warren, 96 Wn. App. 306, 309, 979 P.2d 915 (1999), this court noted:

> Court congestion is not "good cause" to continue a criminal trial beyond the prescribed time period. State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978). And courtroom unavailability is synonymous with "court congestion," State v. Kokot, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986). Further, without "'good cause' for the delay, dismissal is required." Mack, 89 Wn.2d at 794 (citing State v. Williams, 85 Wn.2d 29, 32, 530 P.2d 225 (1975)).

In order to comply with Mack in granting continuances beyond the speedy trial period, this court went on to hold that the trial court must consider the length of the continuance, the likelihood of additional delays,

establish on the record why each superior court department is unavailable, and whether a pro tempore could be used. State v. Warren, 96 Wn. App. at 310.

Despite the fact that Kenyon's "speedy trial right required trial by July 5, the trial court improperly continued the trial beyond the required speedy trial limit based on an assertion of courtroom unavailability, that is, that there was no superior court department available to hear the case. [CP 141].

In failing to comply with Mack, and in failing to establish unavoidable circumstances beyond the control of the court or the parties to justify the continuance beyond Kenyon's speedy trial limit, or to establish that the administration of justice required such a continuance, the trial court made no mention and the record is void of any consideration of a pro tempore hearing the case, as required by Warren, in order to afford Kenyon his right to a speedy trial.[2]

Under Mack and Warren, since the court erred in continuing Kenyon's trial beyond the speedy trial time limit of CrR 3.3, Kenyon's convictions must be reversed and dismissed with prejudice because he did not receive a timely trial. Ralph Vernon G., 90 Wn. App. at 20-21.

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[2] Of note, there are three commissioners in Mason County, in addition to one family law commissioner. [CP 5].

02. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD KENYON'S CRIMINAL CONVICTIONS FOR COUNTS I-III.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The elements of each of the three crimes are the same, with the exception of the specific firearm: (1) That during the period of June 23, 2005 through June 30, 2005, Kenyon knowingly owned or had in his possession or control a firearm, (2) that Kenyon had previously been convicted of a serious offense and (3) that the acts occurred in the State of

Washington. [CP 55-57]. The circumstances of this case do not evince proof beyond a reasonable doubt that Kenyon was guilty of these offenses.

Possession may be actual or constructive. State v. Escheverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). "Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). No single factor is dispositive in establishing dominion and control. The totality of the circumstances must be considered. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995).

The evidence of Kenyon's dominion and control of any of the three firearms was insufficient. It is undisputed that the facts do not establish actual possession since the weapons were seized from inside Reading's trailer. And although the box given to Stiner by Kenyon to give to Reading had something in it, no direct evidence was presented as to what the box contained.

Concomitantly, the evidence presented was insufficient to prove that Kenyon constructively possessed or owned any of the three guns. No evidence connected him to the weapon in count III (Smith & Wesson .38

caliber revolver) and there was a paucity of other evidence linking him to the weapons in counts I and II. Even though Stiner testified that Kenyon asked him if he knew anybody who was looking to purchase a couple of guns, the fact that there were two other people present holding what Stiner identified as the weapons listed in counts I and II, without more, is insufficient to establish Kenyon's dominion and control over these two firearms, especially since no fingerprints were taken from any of the guns.

The above facts and all reasonable inferences to be drawn therefrom demonstrate that Kenyon did not have actual or constructive possession or own any of the three firearms listed in counts I-III, with the result that his convictions for these counts should be reversed and dismissed.

E. CONCLUSION

Based on the above, Kenyon respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

DATED this 10th day of April 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 10th day of April 2007.

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