

81374-4

No. 35237-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES RYAN KENYON,

Appellant.

FILED APPEALS
COURT OF APPEALS
DIVISION II
07 JUN 11 11 PM 3:55
STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge James B. Sawyer II
Cause No. 06-1-00041-2

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. 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).
2. 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.
3. The trial court erred in not taking, count I from the jury for lack of sufficiency of the evidence.
4. The trial court erred in not taking, count II from the jury for lack of sufficiency of the evidence.
5. 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

1. Did the trial court err by continuing case for trial under CrR 3.3(e)(8) when: (a) court-appointed counsel repeatedly asked for continuances so that he could adequately prepare Kenyon's case; (b) the trial court had only one judge available who was trying a separate case; (c) the deputy prosecutor assigned to the case was unavailable for a week due to a scheduled leave of absence?
2. Did the trial court err in denying defense counsel's motions to dismiss Kenyon's convictions with prejudice when he received a timely trial under CrR 3.3?

3. Did the trial court err in not taking, Counts I, II and/or III from the jury for lack of sufficiency of the evidence when: (a) exhibits were admitted into evidence that continued these guns; (b) several witnesses gave testimony regarding their personal knowledge of how Kenyon handled the guns; after (c) Kenyon stipulated that he had a felony conviction that made it illegal for him to possess firearms?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers will be referred to as "CP." The Supplemental Report of Proceedings will be referred to as "SUPP RP."

D. STATEMENT OF THE CASE

1. Procedural History

The appellant, James Ryan Kenyon, was brought before the trial court on March 13, 2006, for an omnibus hearing. RP 1: 9-10. Counsel for Kenyon requested that omnibus hearing be continued to the pretrial date so that he could "do some further investigation." RP 1: 10-14. This "investigation," according to court-appointed counsel for Kenyon, involved "several witnesses in different statuses of custody." RP 1: 21-22. Because of their need to contact these witnesses, defense counsel was, "not sure how long" it would take for him "to effectively" conduct his investigation. RP 1: 21-24. The attorney for Kenyon also stated to the trial court that he would not make "a strenuous objection to continuing the [initial] trial date if it [came] to that." RP 1: 24-25; 2: 1-2. Kenyon's

omnibus hearing was continued two weeks to the pretrial hearing on March 27, 2006. RP 2: 3-6.

On March 27, 2006, Kenyon appeared before the trial court for his omnibus and pretrial hearings. RP 7: 1-6. Discovery issues were discussed, and Kenyon's attorney noted that he had "an investigator working on [Kenyon's] case," and was "anticipating several different reports" from this investigation" to be completed. RP 10: 10-13. Defense counsel also stated that while he had no objection to continuing the case towards trial, any potential "new information" might give reason for "pause and reconsideration." RP 10: 13-16.

Kenyon's next appearance before the trial court occurred on April 7, 2006, for a readiness hearing. RP 12: 1-7. Due to "a number of outstanding discovery issues," court-appointed counsel for Kenyon requested that the case be continued. RP 12: 11-15; 21-22. Specifically, defense counsel stated that he and his client had, "identified a couple of...persons of interest that [they] want[ed] to interview." RP 13: 4-7. Kenyon waived speedy trial on April 7, 2006, making his final start date June 6, 2006. RP 14: 10-25. The trial court set Kenyon's new readiness hearing date to May 19, 2006. RP 15: 9-10.

On May 19, 2006, Kenyon was brought before the trial court, and discovery issues were again discussed. RP 17: 1-6 Although for Kenyon

requested another continuance, Kenyon himself objected and refused to sign the paperwork. RP 19: 1-5; 22: 17-20. The trial court noted that as of May 19, 2006, the final start date remained June 6, 2006. RP 22: 9-11. Kenyon's case was then scheduled for a readiness hearing on May 26, 2006. RP 22: 21-23.

Kenyon appeared in court for readiness on May 26, 2006, and his attorney stated that Kenyon had faxed him a "Motion for Change of Attorney." RP 24: 1-13. Defense counsel noted that while Kenyon was "frustrated" that the case was "taking a while" and perceived it as "relatively simply litigation," that he saw the case as being "somewhat more complicated than that." RP 25: 7-11. Court-appointed counsel stated that as Kenyon was charged with "six counts of Unlawful Possession of a Firearm in the First Degree," that the potential consequences of conviction could be "quite dire for him." RP 25: 11-14. Kenyon's attorney also noted that there was "a lot of discovery in this case, and that th[e] discovery spann[ed] years of time, too." RP 25: 14-15. Defense counsel also informed the trial court that it did not have a report from his private investigator assigned to the case. RP 25: 19-21.

In response to the trial court's colloquy with Kenyon regarding his desire to change counsel, Kenyon stated:

This ain't just a couple of months...this is a minimum of ten years for one of them, and I have six counts, you know. This ain't just something to play around with. And all I can see he's [defense counsel] wanting to do is sign continuances and postponels (sic)...This [case] is going on five months...[I]f I gotta go do the prison time, let's get it on..."

RP 26: 19-25.

The trial court found Kenyon's motion to change his court-appointed counsel to be without merit and denied his request. RP 27: 12-21. The State informed Kenyon's attorney and the trial court that there were ongoing issues with discovery, and defense counsel noted that it needed to interview at least one person prior to trial and reiterated that there were "ongoing discovery issues." RP 28: 7-24; 31: 8-10. The trial court stated that the final start date for Kenyon's case to go to trial was June 6, 2006. RP 31: 21-23.

Kenyon went before the trial court on June 2, 2006 for readiness, and both defense counsel and the State indicated that their respective discovery issues had not been resolved. RP 34: 1-6; 35: 1-25; 36: 1-25; 37: 1-25; 38: 1-25; 39: 1-19. Kenyon's attorney noted that the deputy prosecutor handling the case for the State might be in trial on June 6,

2006, and therefore unable to start Kenyon's trial that day. RP 39: 13-14.

The trial court informed Kenyon that:

There is a provision in the rule, Mr. Kenyon, and you should realize this because I don't want you to be shocked by it if it occurs, and that is if an attorney is unavailable then there's a stay of time that it runs against you until that attorney becomes available.

RP 39: 22-25; 40: 1-2.

The case was next heard by the trial court on June 5, 2006. RP 42:

1-6. At that hearing, Kenyon's attorney stated that:

I was hopeful that I might be able to have my complete investigative reports done. They are not done. I talked with my investigator this morning. I was hoping he would be here to present to the [c]ourt on record this afternoon, but he's not [here].

RP 42: 12-17.

Defense counsel also stated that he had "another individual" that he and Kenyon wanted to interview, and that a "thirty day" continuance under *State v. Campbell* "would be good." RP 43: 7-13. Regarding the additional witness interviews, Kenyon's attorney remarked that "everyone's been cooperative and helpful, but [that] it just hasn't been able to be arranged yet." RP 44: 5-8. While Kenyon himself disagreed with any further continuance, his attorney stated that Kenyon understood why he had asked for a continuance as well. RP 44: 15-21. The trial court granted a continuance under *State v. Campbell* with the hope that the remaining interviews could be completed and trial started that week. RP

47: 1-5. Under this continuance granted on June 5, 2006, a new final start date was set 30 days out to July 5, 2006. RP 47: 6-8, 13-17. The trial court then set the case on for readiness on June 7, 2006, with trial to potentially start as early as “the next day, June 8th.” RP 47: 13-15.

On June 7, 2006, Kenyon’s attorney reiterated that he needed to interview several individuals prior to trial, and that “[a]lthough all parties are being cooperative in trying to make this work...there’s a lot of people involved in different situations.” RP 49: 19-24. The trial court set the next readiness hearing for June 23, 2006. On that date, defense counsel indicated that “several of the witnesses still have not been contactable through the Prosecutor’s Office.” RP 52: 11-14. When questioned by the trial court regarding a list of the witnesses that needed to be interviewed, Kenyon’s attorney stated that, “I don’t have the definite names of which ones have been [interviewed] and which ha[ve] not...” RP 53: 19-22. Noting the new final start date of July 5, 2006, the trial court informed both parties that:

My concern is, of course, that we...have actually extend[ed] Mr. Kenyon beyond a primary final start date into a new final start date. I’d like to see us keep this one close to the fire to see if we can’t move it along.
RP 55: 2-7.

On June 26, 2006, defense counsel stated that although he had received “an audio recording” from the Prosecutor’s Office “and a written

transcript,” that he had not “had time to listen to or read that,” and proposed that the case be set for a new readiness hearing on June 30, 2006. RP 57: 19-24. Kenyon’s case was recalled on that date, and the State noted that it had filed an amended information on June 29, 2006. RP 59: 12-14. The trial court also provided the following information to both parties regarding the scheduling of Kenyon’s trial:

The [trial court] started a trial on...Thursday this week, which would be 6/29, which will not be able to reconvene until Wednesday, July 5th. Due to the criminal calendar, we don’t have trials on Mondays, so Monday the 3rd we are not able to continue that additional trial. And Tuesday the 4th of July, of course, is a holiday. So we’ll be back in trial in [*State v. Frazier*]...on July 5th.

And it’s my recollection that Mr. Kenyon’s final start date is also July 5th. So, we will need to have him appear on that day so that we can go to trial if, in fact, the other trial is resolved short of its conclusion, or plan for a[n] additional time period in order to bring the matter to trial.

RP 61: 23-25; 62: 1-10.

In addition, the trial court also stated that “for the month of July there is only one trial court in Mason County,” because one of the two judges would be “on vacation.” RP 62: 11-14. At defense counsel’s request, Kenyon’s case was re-set to July 5, 2006, for a status hearing. RP 62: 22-23.

On July 5, 2006, the trial court stated that *State v. Frazier* remained in progress, and that it (trial court) “anticipat[ed] it to continue

on July 6th as well.” SUPP RP 1: 9-10. The trial court also reminded counsel that, “[w]e [have] also made a record that presently there is only one department of [Superior Court] available,” because the only other judge was on vacation. SUPP RP 1: 10-12. The deputy prosecutor informed the court on July 5 that he would be on leave that he had schedule around another trial. SUPP RP 1: 18-21. Although defense counsel moved for the trial court to dismiss the case “pursuant to the speedy trial rules,” it declined to do so not because of “court congestion,” but because of “unavailability.” SUPP RP 1: 25; 2: 1-7; 26: 3: 10-14. In response to the State’s inquiry about the particular section of CrR 3.3 being applied, the trial court reasoned, it could not start Kenyon’s case on July because the courtroom unavailability constituted:

[A]n unavoidable circumstance. I think it is foreseen that [the second trial court judge] was going on vacation; that’s been planned for quite some time. But, it’s unavoidable, in that this department is currently in a case that hasn’t been concluded yet. So, as soon as that case is concluded, we can begin Mr. Kenyon’s case, unless we have another concern brought up by the State at a later date that the State is unavailable to proceed. SUPP RP 3: 18-23.

The trial court then noted that it would call Kenyon’s case again on July 6, 2006, for a status conference. Defense counsel noted that he would be “available for trial [July 6] if it goes to trial, but that if it’s for a brief status

conference, then I would rather be taking care of my obligations in Pierce County.” SUPP RP 4: 5-7; 15-17.

On July 7, 2006, the trial court informed the parties that it was “still trying” *State v. Frazier*, and that it would sign an order regarding an “excluded period.” RP 65: 17-18. Upon signing the order, the trial court stated that the document:

[S]ets out the factual situation with regard to this trial department being involved in an ongoing trial, and the remaining other trial department being unavailable due to a regularly scheduled vacation. The court rule is correctly cited; that being Criminal Rule 3.3(e)(8)...[T]he [trial] court will sign the order regarding [the] excluded period.” RP 65: 17-23; CP 57.

In that order, the trial court found that “[t]here is a 30-day timeframe to bring Mr. Kenyon to trial, “ and that the excluded time would end at the conclusion of the separate case that it was about to conclude. RP 66: 3-6; CP 57. When that separate case did conclude, the trial court stated it would, “set the final start date for Mr. Kenyon’s trial, which will be 30 days after the end of the excluded period.” RP 66: 9-15. The trial court specifically referred to CrR 3.3(e)(8) and CrR 3.3(b)(5) in that order. CP 57. The deputy prosecutor for the State also reminded the trial court that he would be “out of the office” the week of July 9, 2006, “on a long-scheduled matter,” and that a material witness warrant remained

outstanding. RP 66: 16-22. In addition, the State noted that it was prepared to begin a separate trial, *State v. Robbins*, that had, “been specifically set to start [July 7, 2006] with motions and jury selection on [July] 18th. RP 66: 24-25; 67: 1-3. The material witness warrant in Kenyon’s case was served on or around July 10, 2006, and Kenyon’s case was called for a status hearing on July 17, 2006. RP 68: 6-7; 71: 1-9.

At the July 17, 2006, status hearing, it was noted that Kenyon’s case remained in an excluded period, and that the jury remained in deliberations on *State v. Frazier*. RP 71: 19-22. Although defense counsel renewed its request to dismiss due to “court congestion” and speedy trial issues, the trial court reasoned that it:

[D]id enter an order earlier to indicate that we entered an excluded period. The order was entered on July 7th [2006] and indicated that the matter could not proceed because of this Department’s unavailability due to a trial, and that was *State v. Frazier*. That case went to the jury late in the afternoon on Friday [July 14, 2006]. The jury is deliberating at this point. The [trial court] is available at this time to try the *Kenyon* case, so the unavailability period ends today [July 17, 2006]. And at [this] point the [trial court]...has a 30-day timeframe to try Mr. Kenyon. RP 72: 13-17, 18-25; 73: 1-3.

Readiness in Kenyon’s case was scheduled for July 28, and trial on August 1, 2006, with a final start date of August 16, 2006. RP 73: 5-7.

Kenyon’s case went before the trial court for the readiness hearing on July 28, 2006, and the State indicated that it remained in trial on *State v.*

Robbins. RP 74: 1-13. Another readiness hearing was scheduled for August 4, 2006. On July 31, 2006, the trial court called Kenyon's case for readiness early, due to a mistrial being declared in *State v. Robbins*. RP 79: 1-6; 80: 8-9. Because both the State and defense were available to begin jury selection the next day (August 1, 2006), the trial court scheduled Kenyon's trial to begin at that time. RP 81: 3-4.

Kenyon's trial began on August 1, 2006, with his being arraigned on a second amended information, motions in limine and jury selection. RP 83: 5-25; 87: 2-3; 96: 10-17. On August 3, 2006, the jury found Kenyon guilty as charged on a fourth amended information of seven counts Unlawful Possession of a Firearm in the First Degree. RP 292: 21-25; 293: 1-25; 294: 1. Kenyon was sentenced on August 21, 2006. RP 321-334.

2. Statement of Facts Specific to Counts I, II and III¹

On August 1, 2006, Kenyon stipulated to having been convicted of a serious offense as defined by RCW 9.41.010(12)(a); Arson in the Second Degree. RP 84: 3-8. Kenyon was convicted of that offense on October 20th, 1998, in Mason County. RP 123: 7-8.

During Kenyon's trial, David Stiner testified that Kenyon gave him State's Exhibit #5, a "gray metal box," a "week or so prior to June 30th of 2005." RP 148: 6-7; 144: 1-2. Stiner testified that the boxes was a "lock box" with a "combination lock," and stated that State's Exhibit #5 was "probably it" because that particular box had a "combination lock." RP 148: 9-14. Stiner testified that when Kenyon gave him State's Exhibit #5, that "[t]here was something in it," but that the box "was locked." RP 148: 23, 25.

Officer Valley of the Department of Corrections testified that pursuant to his search for David Reading at the address on Little Egypt Road on June 30th, 2005, that there were "three boxes in [a] trailer; a red

State's Exhibit #2: Smith & Wesson nine-millimeter
State's Exhibit #3: Hungarian nine-millimeter
State's Exhibit #5: Gray box
State's Exhibit #6: Smith & Wesson .38

¹ A key to the exhibits frequently cited here has been added for clarification.

box, a locked footlocker, and another little gray box that was located also in the trailer.” RP 134: 8-10; 141: 16-19. The “small gray box” was “inside the big metal footlocker,” and Officer Valley could “not recall... if it [the small gray box] was locked or open.” RP 134: 11-17; 24-25.

In his testimony, Officer Valley also stated that during the search he “found two handguns inside” State’s Exhibit #5: The Hungarian nine-millimeter (State’s Exhibit #3) and a .38 caliber Smith and Wesson (State’s Exhibit #6). RP 135: 12-21; 136: 15-16; 141: 9-19. On cross-examination, Officer Valley also stated that the other nine-millimeter, a Smith & Wesson (State’s Exhibit #2), was “found in a red box in the trailer.” RP 136: 13-16. Exhibits #2, #3 and #6 were admitted into evidence, as was the gray box in State’s Exhibit #5. RP 236: 22-25; 236: 1-12.

During direct examination, Detective Pittman from the Mason County Sheriff’s Department performed a demonstration with the gray box (State’s Exhibit #5); “the box that was given to Stiner by Kenyon...” RP 230: 20-23. In that demonstration, Detective Pittman showed that when the safety tags had been removed from all three handguns (State’s Exhibits #2, #3, #6), that they “would fit in[side] this [gray] box”;

State’s Exhibit #2: Smith & Wesson nine-millimeter
State’s Exhibit #3: Hungarian nine-millimeter
State’s Exhibit #5: Gray box
State’s Exhibit #6: Smith & Wesson .38

State's Exhibit #5. RP 230: 20-23; 231: 11-21; 232: 6, 12-14.

Stiner also testified that "in the week or so prior to June 30th of 2005," that Kenyon came onto this property and "just asked [him] if [he] knew anybody that was looking to buy a couple of handguns." RP 144: 1-3, 8-10. Stiner stated that "the two nine-millimeters" were physically present when Kenyon "asked if anyone wanted to buy two handguns." RP 146: 5-13. The guns that Stiner identified as being physically present were "these two"; State's Exhibit #2 (Smith & Wesson nine-millimeter) and #3 (Hungarian nine-millimeter). RP 146: 6-12,18-20.

In response to the State's question whether Kenyon ever had these guns in his physical possession, Stiner replied that "he could have," and that Kenyon "was the one who asked" him about whether "anybody wanted to buy" them. RP 145: 2-4, 7-10. According to Stiner, he "just asked" Kenyon "where he'd come up with the two [nine-millimeter guns]," and Kenyon said that "they belonged to a [girl]-friend of his, and that he was trying to sell them." RP 155: 15-21.

State's Exhibit #2: Smith & Wesson nine-millimeter
State's Exhibit #3: Hungarian nine-millimeter
State's Exhibit #5: Gray box
State's Exhibit #6: Smith & Wesson .38

Portions of a conversation between Kenyon and Dave Reading from August 29, 2005, were admitted in State's Exhibit #8, which was both played to and transcribed for the jury. RP 238: 2-16; 216: 1-12. In Excerpt No. 2 of State's Exhibit #8, David Reading and Kenyon discussed "these guns" in a telephone conversation not long after the search that occurred on June 30, 2005. CP 76: Page 1. Reading specifically asked Kenyon whether "any of em [are] stolen," and Kenyon responded "[n]ope." In Excerpt No. 4, Kenyon mentioned to Reading "[t]hey knew that...the one 9 mm..." CP 76: Page 2. Kenyon specifically told Reading again that a "9 mm" was not stolen and that he was "not" lying to him.

(3) Summary of Argument

Kenyon's speedy trial rights under CrR 3.3(e)(8) were not infringed upon because the trial court continued his case for good cause due to unavoidable circumstances, in that the only judge available to hear the case was in trial on a separate case. The court tried Kenyon's case at the earliest possible time after it granted a continuance due to unavoidable circumstances. In addition, Kenyon's attorney moved for and received

State's Exhibit #2: Smith & Wesson nine-millimeter
State's Exhibit #3: Hungarian nine-millimeter
State's Exhibit #5: Gray box
State's Exhibit #6: Smith & Wesson .38

several continuances prior to trial so that he could adequately prepare the case. The trial court's continuance under CrR 3.3(e)(8) due to unavoidable and/or unforeseen circumstances was not manifestly unreasonable, and nor did it subject Kenyon to unfair prejudice. The record does not reflect that the deputy prosecuting attorney's scheduled one-week leave of absence had any material impact on when Kenyon's trial began. The trial court did not err in denying Kenyon's motions to dismiss his convictions with prejudice.

In addition, the trial court did not err in not taking Counts I, II and/or III away from the jury for lack of sufficiency of the evidence because: (a) the guns named in these counts were identified and admitted into evidence at trial; (b) several witnesses testified about their personal knowledge of how Kenyon handled these guns; and (c) Kenyon stipulated that he had a felony conviction that made it illegal for him to possess firearms. The evidence presented regarding these three counts was sufficient because, if viewed in the light most favorable to the State, it could permit any rational trier of fact to find all of the essential elements of the crimes that Kenyon committed beyond a reasonable doubt. The trial court was correct in allowing Counts I, II and III to go to the jury.

The judgment and sentence of the trial court is correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY CONTINUING KENYON'S CASE FOR TRIAL UNDER CrR 3.3(e)(8) BECAUSE:
 - (A) COURT-APPOINTED COUNSEL REPEATEDLY ASKED FOR CONTINUANCES TO ADEQUATELY PREPARE KENYON'S CASE;
 - (B) THE TRIAL COURT HAD ONLY ONE JUDGE AVAILABLE WHO WAS TRYING A SEPARATE CASE; AND
 - (C) THE DEPUTY PROSECUTOR ASSIGNED TO KENYON'S CASE WAS UNAVAILABLE FOR A WEEK DUE TO A SCHEDULED LEAVE OF ABSENCE.

The trial court did not err by continuing Kenyon's case for trial under CrR 3.3(e)(8) because: (a) court-appointed counsel repeatedly asked for continuances to adequately prepare Kenyon's case; (b) the trial court had only one judge available who was trying a separate case; and (c) the deputy prosecutor assigned to Kenyon's case was unavailable for a week due to a scheduled leave of absence.

The new version of CrR 3.3, the speedy trial rule, went into effect on September 1, 2003. *State v. Johnson*, 132 Wash.App. 400, 411, 132 P.2d 737 (Div.II 2006). The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court. *State v. Flinn*, 154 Wash.2d 193, 199, 110 P.3d 748 (2005); *see State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004). The trial court's decision to grant or deny a motion for continuance will not be disturbed unless the

appellant or petitioner makes “a clear showing...[that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (quoting *State v. ex. rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

The following perio[d] 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. CrR 3.3(e)(8). This exclusion also applies to the cure period of section (g). The court may continue [a] case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. CrR 3.3(g). Such a continuance may be granted only once in the case upon finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail...from the date that the continuance is granted.

Under CrR 3.3 prior to its revision on September 1, 2003, court congestion was not considered to be “good cause” for continuing a criminal trial beyond the prescribed time period. *State v. Warren*, 96 Wash.App. 306, 309, 979 P.2d 915 (Div. II 1999); see *State v. Mack*, 89 Wash.2d 788, 794, 576 P.2d 44 (1978). Court unavailability was also considered synonymous with “court congestion.” Also see *State v. Kokot*,

42 Wash.App. 733, 737, 713 P.2d 1121 (1986). Further, without “good cause” for the delay, dismissal was required. *Also see Mack* at 794 (citations omitted).

But, the *Mack* rule has not been rigidly applied. In *Kokot*, Division III suggested that a five-day extension might have been permitted if the record had shown “how many courtrooms were actually in use at the time of [the] continuance, the availability of visiting judges to hear criminal cases in unoccupied courtrooms, etc. *Kokot* at 309-310. Without these facts a continuance granted for court congestion was an abuse of discretion. *Also see Kokot* at 737, *citing Mack* at 795 (citations omitted).

Allowing counsel time to prepare for trial is a valid basis for continuance. *Flinn* at 200, *see State v. Campbell*, 103 Wash.2d 1, 15, 691 P.2d 929 (1984). Scheduling conflicts may be considered in granting continuances. *Also see State v. Heredia-Juarez*, 119 Wash.App. 150, 153-155, 79 P.3d 987 (2003). A prosecutor’s responsibly scheduled vacation is a valid basis for granting a continuance. *Also see Heredia-Juarez* at 153.

The facts of *Flinn* are analogous to Kenyon’s because they involve a trial court continuing a case for good cause. In *Flinn*, the defendant was arraigned on several felony charges on May 21, 2002, with a trial date set for July 18, 2002. *Flinn* at 196. On July 5, 2002, Flinn sought and obtained a continuance until August 14, 2002. On August 2, 2002, Flinn

requested and received a second continuance for expert witness preparation until August 21, 2002. On August 21, 2002, Flinn requested a third continuance until September 9, 2002, notified the State of his intent to assert a diminished capacity defense, and gave the State a copy of a written medical report. The State learned for the first time on September 9, 2002, that it certain information that it requested in discovery did not exist, and asked for a continuance to review both the medical report and to interview the doctor. Flinn objected to the State's request for continuance, arguing that it had had ample time before September 9, 2002, to prepare its case. After consulting with both the prosecution and defense as to scheduling Flinn's trial date, the trial court stated:

I am also working around [a] judicial conference...[and] am trying to work [Flinn's case] in as short a period of time as I can but still make it so that we're not back here again pushing for another week or two.

Flinn's case was continued to October 15, 2002, on which date it went to trial. At trial, Flinn was acquitted on two felony charges, but was convicted on one. Flinn appealed, arguing that under CrR 3.3, the trial court erred by: (1) continuing his trial without a showing of good cause, and (2) considering the fall judicial conference in determining the length of the continuance. The Court of Appeals held that CrR 3.3 had not been

violated in Flinn's case and affirmed his conviction. The Washington State Supreme Court also affirmed the conviction, reasoning that:

Because the continuance was granted for good cause, we will not second-guess the trial judge's discretion in placing the trial on the court's calendar. In this situation, a five-week continuance was reasonable. First, the trial court granted three continuances at Flinn's request before this request by the State. Second, the trial judge offered to accelerate the trial date if the State was prepared in fewer than five weeks. And finally, the judge wanted to give the State ample preparation time to avoid yet another continuance. There is a point at which the length of the continuance would be unreasonable, but five weeks under these circumstances was not. *Flinn* at 201.

The State Supreme Court also reasoned that "[w]hen scheduling a hearing after finding good cause for a continuance, the trial judge can consider known competing conflicts on the calendar."

Compared with *Flinn*, the facts and procedure of Kenyon's case are quite similar. As with Flinn, Kenyon's original trial date was continued at the request of his attorney so that he could prepare, and later because of scheduling conflicts on the court calendar. In Kenyon's case, the trial court reasoned correctly that while his attorney needed time to prepare, the case itself should be called for readiness at every reasonable opportunity so that his trial could begin. As the trial court reasoned in Kenyon's case, on July 5, 2006, it could not start Kenyon's trial that day was because another trial was currently in progress, and also because there

was no other trial court available due to the regularly scheduled vacation of the only other superior court judge in Mason County. RP 61: 23-25; 62: 1-10, 11-14.

Because of that situation, the trial court signed a written order on July 7, 2006, continuing Kenyon's under CrR 3.3(e)(8) case for 30 days after its unavailability ended when the separate case it was trying (*State v. Frazier*) concluded. When the deputy prosecutor handling Kenyon's case returned from his schedule leave and the case in *State v. Frazier* had gone to the jury, the trial court stated on July 17, 2006, that it was now available to try Kenyon's case within 30 days. RP 72: 13-17, 18-25; 73: 1-3. The trial court then set Kenyon's last day to begin trial on August 16, 2006. RP 73: 5-7. Kenyon went to trial perhaps earlier than expected on August 1, 2006, after a mistrial was declared in *State v. Robbins*.

As did the court in *Flinn*, the trial court in Kenyon's case made a clear record as to why it continued his trial date. Unlike Flinn's case, however, which was continued for roughly five weeks from September 9 through October 14, 2002, Kenyon's was continued about three and half weeks; July 5, 2006 through July 31, 2006, with his trial starting on August 1, 2006. Unlike *Flinn*, the continuance with Kenyon was not because of the State's request, but because the only trial court judge available was trying another case. The fundamental reasoning of the *Flinn*

court is sound when applied to Kenyon's case even though Flinn's trial was heard prior to CrR 3.3's revision because there is little reason to "second guess" the trial court's judgment here: The Kenyon trial court followed the revised CrR 3.3 and its subsections properly in determining when Kenyon's final start date should be.

The trial court in Kenyon also reasoned correctly that it was simply "unavailable" to try Kenyon's case on July 5, 2006, and made a clear record of its decision under CrR 3.3(e)(8). The record in Kenyon's case is devoid of any decision by the trial court that could be considered "manifestly unreasonable." While Kenyon's argument may have been more persuasive under *Mack* and the "congestion" vs. "unavailability" argument that was advanced prior to September 1, 2003, the revised CrR 3.3 that applied to his case is not so strict. The deputy prosecutor's scheduled leave apparently did not affect Kenyon's final start date, as the court was still involved in trying *State v. Frazier* while he may have been away. The trial court acted with both sound discretion and had good cause to continue Kenyon's case, and his speedy trial rights under the current CrR 3.3 were not violated.

2. THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE COUNSEL'S MOTIONS TO DISMISS KENYON'S CONVICTIONS WITH PREJUDICE BECAUSE KENYON RECEIVED A TIMELY TRIAL UNDER CrR 3.3.

The trial court did not err in denying defense counsel's motions to dismiss Kenyon's convictions with prejudice because Kenyon received a timely trial under CrR 3.3.

The new version of CrR 3.3, the speedy trial rule, went into effect on September 1, 2003. *State v. Johnson*, 132 Wash.App. 400, 411, 132 P.2d 737 (Div.II 2006). Statutory construction and interpretation are questions of law that are reviewed de novo. *State v. Farnsworth*, 133 Wash.App 1, 11, 130 P.3d 389 (Div. II 2006); *see Pasco v. Pub. Empl. Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992). As with statutes, the plain meaning of a rule's language must be considered. *Also see Dep't of Licensing v. Lax*, 125 Wash.2d 818, 822, 888 P.2d 1190 (1995). When construing a statute or rule, it should be read in its entirety, giving effect to all language so that no portion is rendered meaningless or superfluous. *Also see State v. Keller*, 143 Wash.2d 267, 277, 19 P.3d 1030 (2001). In addition, each provision in a statute or rule should be viewed in relation to other provisions to harmonize them.

Under CrR 3.3(c)(1), a criminal defendant who is incarcerated must be brought to trial no later than 60 days after arraignment.

Farnsworth at 11. There is, however, no constitutional mandate that a trial be held within 60 days of arraignment. *Also see State v. Terrovona*, 105 Wash.2d 632, 651, 716 P.2d 295 (1986). On the contrary, CrR 3.3(c)(2) provides a list of exceptions that may delay or extend the trial date beyond 60 days. *Also see* CrR 3.3(b)(5) (Excluded Periods); CrR 3.3(d) (Loss of Right to Object); CrR 3.3(f) (Continuances); and CrR 3.3(g) (Cure Period).

Under the former CrR 3.3(c)(1)(2002), a criminal defendant who was held in custody had to be brought to trial within 60 days of arraignment. *Flinn* at 199. If an incarcerated defendant had not been brought to trial within 60 under the old rule, the court had to dismiss the case with prejudice. *Also see* Former CrR 3.3(c)(1).

Under the new rules, any period of time is excluded pursuant to section (e) under CrR 3.3(b)(5), the allowable time for trial shall not expire *earlier than 30 days* after the end of that excluded period. *Farnsworth* at 12; *emphasis in the original*. Under its plain language, CrR 3.3(b)(5) allows a trial court to extend the trial start date *at least 30 days* beyond the end of an excluded period. Furthermore, beginning a trial more than 30 days after the end of a CrR 3.3 excluded period does not necessarily violate the speedy trial rule.

It is worth noting that the current time for trial rules are different from those that were in effect in 2002. The new provisions allow a trial court more flexibility in avoiding the harsh remedy of dismissal with prejudice, while simultaneously protecting a defendant's statutory time for trial rights.

The right of a speedy trial is necessarily relative. *State v. Corrado*, 94 Wn.App. 228, 232, 972 P.2d 515 (Div. II 1999). It is consistent with delays and depends on the circumstances. It secures rights to a defendant, [but] it does not preclude the rights of public justice. Whether delay in completing a prosecution...amounts to an unconstitutional deprivation of rights depends upon the circumstances...The delay must not be purposeful or oppressive. *Also see U.S. v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966)(citations omitted)(alteration in original).

The facts and procedure of *Farnsworth* are analogous to Kenyon's case because they involve speedy trial issues under the revised CrR 3.3. In *Farnsworth*, the defendant was arraigned on two counts first degree robbery on March 17, 2004. *Farnsworth* at 393. On April 8, 2004, the State requested that the defendant have mental competency examination, and the trial court stayed the proceedings pending this examination. The defendant did not object. On June 10, 2004, the trial court found the defendant to be competent and reset his trial for July 27, 2004. The

defendant did not object to the resetting of his trial date. On July 27, 2004, the defendant moved to dismiss the charges because his trial had not commenced within the 60-day period required under CrR 3.3. Defendant Farnsworth contended that by July 27, 2004, 69 days had passed since his arraignment, excluding the time for his competency proceedings. The trial court denied his motion, ruling that because Farnsworth had failed to object within 10 days of notice of the July 27, 2004, trial date, he had waived his right to object under CrR 3.3.

On appeal, Farnsworth argued that the trial court denied his right to speedy trial under CrR 3.3 because it failed to begin his trial within 30 days after the excluded competency hearing period as required under CrR 3.3(b)(5). The Court of Appeals reasoned that CrR 3.3(c)(2) provides a list of exceptions that might delay or extend the trial date beyond 60 days. Specifically, the Court reasoned that because Farnsworth failed to object within 10 days notice of his trial date, the trial court properly denied his motion to dismiss under CrR 3.3.

A distinction to be made between *Farnsworth* and Kenyon's case is that Kenyon's attorney did object to having the case continued, especially after the July 5, 2006 hearing. The Mason County trial court did not err by continuing Kenyon's case under CrR 3.3(b)(5), however, as that rule allows a trial court to extend the trial start date at least 30 days

beyond the end of an excluded period. The excluded period in Kenyon's case was well documented by the trial court, in that it was unavoidable under CrR 3.3(e)(8) that it would still be in trial on another case while Kenyon's trial was still pending, especially when the only other elected judge in Mason County Superior Court was on a regularly scheduled vacation. There is nothing in the record that the delay in having Kenyon's case go to trial was either purposeful or oppressive, but rather that it was simply unavoidable.

In addition, the record does not show that Kenyon was subject to substantial or unfair prejudice because of the three and a half week continuance due to the unavailability of a superior court trial judge from July 5 through July 31, 2006. Because Kenyon's attorney had noted that the potential consequences of conviction could be "quite dire for [Kenyon]," that there was, "a lot of discovery in this case, and that th[e] discovery spann[ed] years of time," the continuance potentially helped them prepare for the trial that ultimately began on August 1, 2006. RP 25: 11-15. The trial court did not err in denying defense counsel's motions to dismiss Kenyon's convictions with prejudice because Kenyon received a timely trial under CrR 3.3.

3. THE TRIAL COURT DID NOT ERR IN NOT TAKING COUNTS I, II AND/OR III FROM THE JURY FOR LACK OF SUFFICIENCY OF THE EVIDENCE BECAUSE:
- (A) THE GUNS SPECIFIED IN THESE COUNTS WERE ADMITTED INTO EVIDENCE;
 - (B) SEVERAL WITNESSES GAVE TESTIMONY REGARDING THEIR PERSONAL KNOWLEDGE OF HOW KENYON HANDLED THESE GUNS; AND
 - (C) KENYON STIPULATED THAT HE HAD A FELONY CONVICTION THAT MADE IT ILLEGAL FOR HIM TO POSSESS FIREARMS.

The trial court did not err in not taking Counts I, II and/or III from the jury for lack of sufficiency of the evidence because: (a) the guns specified in those counts were admitted into evidence; (b) several witnesses gave testimony regarding their personal knowledge of how Kenyon handled these guns; and (c) Kenyon stipulated that he had a felony conviction that made it illegal for him to possess firearms.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Holt*, 119 Wash.App. 712, 720, 82 P.3d 688 (2004); *see State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Ware*, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); *cited by State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all

reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992); *State v. Rooth*, 129 Wash.App. 761, 773, 121 P.3d 755 (Div. II 2005).

A person is forbidden to possess firearm(s) if he or she has been previously convicted of any serious offense. RCW 9.41.040(1)(a); *see State v. Stevens*, 153 P.3d 903, 906 (Div. III 2007). A serious offense includes "any federal or out of state conviction for an offense that under the law of [Washington] would be a felony classified as a serious offense. *See* RCW 9.41.010(12)(o). Firearm means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder. RCW 9.41.010.

Possession of property may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *see State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1957). Actual possession means that the goods are in the personal custody of the person charged with possession. Constructive possession means that the goods are not in actual, physically possession, but that the person has dominion and control over them. In determining dominion and control, no one factor is dispositive, as the totality of circumstances must be considered. *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243 (1995).

A person acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he or she has information that would lead an ordinary person in the same situation to believe that facts exist that are described by a statute as defining an offense. *State v. Sarausad*, 109 Wash. App. 824, 837-838, 39 P.3d 308 (Div. I 2001).

The facts of *Callahan* are partially analogous to Kenyon's case. In *Callahan*, officers executed a search warrant on Callahan, who lived on a houseboat. *Callahan* at 28. When the officers entered the living room of the houseboat, they found the defendant and a co-defendant sitting at a desk on which were various pills and hypodermic syringes. A cigar box filled with various drugs was on the floor between the two men. Other

drugs were found in the kitchen and bedroom of the premises. Callahan admitted that he had handled the drugs that day, and that he had stayed on the houseboat for 2 or 3 days prior to his arrest.

The court in *Callahan* found that in order for the jury to find the defendant guilty of actual possession of the drugs, they had to find that they were in his personal custody. No evidence was introduced at trial that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that he had handled the drugs earlier. The *Callahan* court did not find that the defendant could have constructively possessed the drugs because possession entails actual control, and not a passing control that involves only a momentary handling.

In Kenyon's case, two critical distinction to be made are that the objects in question were firearms, not drugs, and that Kenyon's actual and/or constructive possession of the nine-millimeter Smith & Wesson (Count I), the Hungarian nine-millimeter (Count II) and/or the Smith & Wesson .38 caliber revolver (Count III), given his felony history, constituted Unlawful Possession of a Firearm in the First Degree. CP 80: Pages 1-2.

The trial court had sufficient evidence and testimony to allow Counts I, II and III to go to the jury. Dave Stiner testified that prior to the week of June 30, 2006, that Kenyon personally gave him State's Exhibit #5, which was a gray box with a combination lock. RP 148: 6-7; 144: 1-2; 148: 9-14. To Stiner, it felt like there was something in the box and that it was locked. RP 148: 23, 25. Were this the only evidence that Kenyon possessed these guns, there would have been insufficient evidence for Counts I-III to go the jury under *Callahan*.

When Officer Valley seized that lock-box on June 30, 2006, however, he found State's Exhibit #3 (Hungarian nine-millimeter) and State's Exhibit #6 (Smith & Wesson .38 revolver). RP 132: 5-9; 135: 12-21; 136: 15-16; 141: 9-19. During Detective Pittman's demonstration in court, he showed that all three guns, including State's Exhibit #2 (Smith & Wesson nine-millimeter), could fit into the gray box. RP 230: 20-23; 231: 11-21; 232: 6, 12-14. Because of the close proximity in time between when Kenyon handed the locked box to Stiner coupled with the guns that were found inside of it approximately a week later, the jury had sufficient evidence to at least deliberate on whether Kenyon possessed them.

In addition, Stiner testified that not only had Kenyon given him the gray box with "something" in it, but that Kenyon had also come onto the property "in the week or so prior to June 30th of 2005" and asked him if he

knew anyone who was looking to purchase handguns. RP 144: 1-2, 8-10. The handguns that Kenyon referred to were “the two nine-millimeters”; the Smith & Wesson and the Hungarian, which were physically present when Kenyon made his inquiry. RP 144: 14-21; 146: 6-12, 18-20.

Kenyon was positively identified by Stiner in court as the person who made this inquiry. RP 144: 11-13. Stiner stated that Kenyon “could have” had these two nine-millimeters in his physical possession. RP 145: 2-4, 7-10. Under *Callahan*, the jury had this additional evidence to contemplate whether Kenyon actually or constructively possessed any or all of these three guns. Because evidence was presented that Kenyon knew that the .38 and the Hungarian nine-millimeter were in the locked box when he gave it to Stiner, the jury could find that he was in actual possession of them.

Conversely, the presence of the Hungarian and Smith & Wesson nine-millimeters when Kenyon inquired whether anyone wanted to buy them demonstrates that he had constructive possession of them: The guns were his personal property that he was trying to sell. Under *Callahan*, Kenyon’s actions go beyond the mere “handling” of an object, such as the drugs in that case, but instead demonstrates his dominion and control over these firearms. This was confirmed in the conversation that the jury heard

between Kenyon and Reading on August 29, 2005, after the guns had been seized on June 30, 2005.

In that conversation, Reading specifically asked him whether he knew “for a fact” whether “any of ‘em are stolen,” to which Kenyon replied “[n]ope.” RP CP 76: Pages 1-2. The two were specifically talking about “these guns,” plural, because Kenyon mentions “...the one 9 mm,” and how “the day after [he] got locked up,” that the authorities were “trying to go federal” with the investigation. In another conversation between Kenyon and Destiny Meehan on October 22, 2004, Kenyon told her in reference to firearms that she had “better quit trying to sell my shit, woman,” and “you know how I am about my guns.” CP 75: Page 1. Through these statements, Kenyon demonstrates that he exercised strong dominion and control over his personal property, particularly firearms.

By admitting the truth of the State’s evidence, drawing all reasonable inferences in favor of the State and interpreting it most strongly against the defendant, the trial court was correct to allow Counts I-III to go to the jury. Deference was correctly given to the trier of fact in Kenyon’s case, which clearly resolved any conflicting testimony, evaluated the credibility of witnesses, and weighed the persuasiveness of the evidence. The jury had sufficient evidence to deliberate whether Kenyon was in

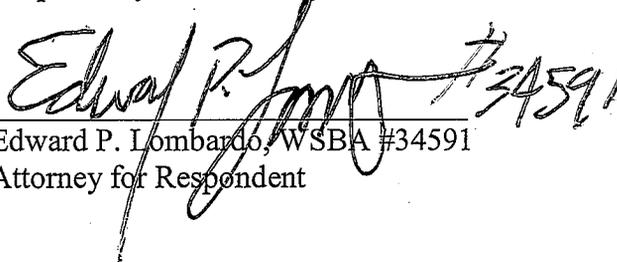
actual or constructive possession of the firearms specifically charged in these counts, and the action of the trial court was correct.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 11TH day of June, 2007

Respectfully submitted by:

 #34591

Edward P. Lombardo, WSBA #34591
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 JAMES RYAN KENYON,)
)
 Appellant,)
 _____)

No. 35237-1-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

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DIVISION II
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STATE OF WASHINGTON
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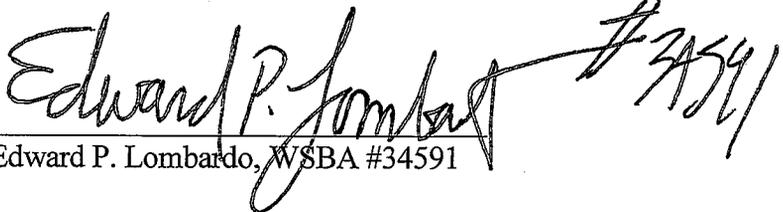
I, EDWARD P. LOMBARDO, declare and state as follows:

On JUNE 11, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 11th day of JUNE, 2007, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591