

81750-2

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Respondent,

NO. 25218-3-III

vs.

RICARDO INIGUEZ,

Appellant.

AND

STATE OF WASHINGTON

Respondent,

NO. 25223-0-III

vs.

JIMMY HENRY MCINTOSH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY
BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

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II. BRIEF ANSWERS

- A. THE TIME FOR TRIAL PROVISIONS OF CrR 3.3 WERE NOT VIOLATED WHEN THE TRIAL JUDGE GRANTED A GOOD CAUSE CONTINUANCE OF THE TRIAL AT THE STATE'S REQUEST WHERE THE STATE HAD SUBPOENAED A MATERIAL WITNESS AND THE WITNESS WAS TEMPORARILY IN MEXICO AT THE SCHEDULED TIME OF TRIAL.
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 - 2. THE STATE EXERCISED DUE DILIGENCE WHEN ATTEMPTING TO SECURE THE PRESENCE OF A MATERIAL WITNESS AT TRIAL BY ISSUING MULTIPLE SUBPOENAS TO HIM AND BY LOCATING HIM IN MEXICO DAYS BEFORE TRIAL.
 - 3. THE STATE'S MATERIAL WITNESS WAS UNDER SUBPOENA BECAUSE HE WAS REPEATEDLY SERVED WITH A SUBPOENA BY THE STATE AND WAS NOT RELEASED FROM IT BY THE STATE OR THE COURT.

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B. INIGUEZ' CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE NOT VIOLATED WHERE HE WAS BROUGHT TO TRIAL WITHIN A REASONABLE TIME.

C. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO SEVER THE TRIAL OF INIGUEZ FROM THAT OF McINTOSH.

D. McINTOSH'S JUDGMENT AND SENTENCE IS NOT AMBIGUOUS BECAUSE IT CLEARLY STATES THE AMOUNT OF TIME TO BE SERVED.

III. STATEMENT OF FACTS

On May 31, 2005, appellant McIntosh was charged by Information with Robbery in the First Degree with a Special Firearm Allegation and Burglary in the First Degree. (McIntosh CP 144-145). On the same day, appellant Iniguez was charged by Information with Robbery in the First Degree with a Special Firearm Allegation. (Iniguez CP 222-224). Iniguez and McIntosh were

arraigned on June 7, 2005, and a trial date of July 27, 2005, was set on each case. (RP 6/7/05).

On July 26, 2005, McIntosh executed a stipulated continuance pursuant to CrR 3.3(f)(1) setting his trial date on October 5, 2005. (McIntosh CP 143). Counsel for Iniguez was unavailable for the July 27, 2005, trial date due to a vacation and requested a good cause continuance of the trial date to August 10, 2005. (RP 7/26/05; 5:22). Iniguez refused to consent to extension of his time for trial under CrR 3.3 and the court granted a good cause continuance of his trial date to August 10, 2005. Id. Subpoenas were served on all witnesses, including Gilberto Bahena. (Iniguez CP 246-259 and 272-285, McIntosh CP 165-180).

The State moved to consolidate the trials of McIntosh and Iniguez. (Iniguez CP 201-203, McIntosh CP 193-195). The State's motion was granted with all parties in agreement. (Id., RP 8/9/05; 13:19, RP 8/30/05; 26:12). Iniguez' trial date was moved to October 5, 2005, consistent with McIntosh's trial setting. (RP 8/9/05; 16:14). Witnesses, including Gilberto Bahena, were served with subpoenas for the October 5 trial date. (McIntosh CP 165-180).

On September 27, 2005, McIntosh executed a stipulated continuance pursuant to CrR 3.3(f)(1) setting his next trial date on November 16, 2005. (McIntosh CP 142). Iniguez' trial was continued to the same date as a result of the consolidation. (RP 9/27/05; 4:20).

On November 15, 2005, the day before trial, McIntosh's trial attorney requested, and was granted, a good cause continuance because he was unavailable for the November 16 trial date due to his trial schedule. (RP 11/15/05). The new trial date set was January 4, 2006. McIntosh refused to sign a stipulation to the continuance to accommodate his attorney's schedule despite having previously indicated to counsel that he would do so. (RP 11/8/05; 13:22).

Iniguez objected to the good cause continuance and moved to sever the trials. (RP 11/15/05; 8:12). The motion to sever was denied, leaving the trial date of January 4. (RP 11/22/05; 12:9).

After reporting ready at pre-trial on December 27, 2005, it was brought to the State's attention that Gilberto Bahena, a victim and material witness, was unavailable due to the fact that he had gone to Mexico without notifying the State. (RP 1/3/06; 4:24). Bahena's absence was only discovered when the State attempted

to serve him with a third subpoena. Id. He had previously been subpoenaed for trial but was in Mexico when the State attempted to notify him of the new trial setting which resulted from McIntosh's trial counsel requesting a continuance of the November 16, 2005, trial date to January 4, 2006. (Id. at 5:24, McIntosh CP 165-180, Iniguez CP 246-259 and 272-285).

On January 3, 2006, the Court granted the State's motion for a good cause continuance of the January 4, 2006, trial date. The Court concluded that the State's witness was under subpoena having previously been served with a subpoena, that the trial had previously been continued at the defendants' request, that the State had exercised due diligence in bringing the State's material witness to trial and that there was no prejudice to the defendants upon a brief continuation of trial dates in order to procure the attendance of a material witness. The Court also noted that it would be impractical for the State to return their witness from Mexico in time for the current trial setting. The Court set a new trial date of February 8, 2006. (RP 1/3/06; 10:24).

Trial counsel for McIntosh objected to the State's motion solely on the basis that his client was prejudiced for some unspecified reason by the delay in going to trial. He did not

question the State's diligence with regard to procuring the attendance of its missing witness. (Id. at 8:18). Trial counsel for Iniguez made a similar objection, again failing to question whether the State's witness was under subpoena or if the State had exercised due diligence in procuring his attendance at trial. (Id. at 9:22).

On February 8, 2006, McIntosh and Iniguez were charged by Second Amended Information filed in Franklin County Superior Court with four counts of first degree robbery and also alleging that they or an accomplice were armed with a firearm at the time of the offense. (Iniguez CP 165-167, McIntosh CP 100-102).

Trial on the Second Amended Information commenced on February 8, 2006, with jury selection. (RP 2/8/06). The evidentiary portion of the trial began on February 15, 2006, and was completed on February 16, 2006 with the Court declaring a mistrial. (RP 2/15/06 – 2/16/06).

On February 16, 2006, the trial date was set for April 12, 2006. (RP 2/21/06; 35:7).

Jury trial commenced on April 12, 2006, and ended with a verdict of guilty for both defendants, each on four counts of Robbery in the First Degree. The jury also found that the

defendants or an accomplice were armed with a firearm when the crime was committed. (RP 4/12/06-4/17/06). Iniguez was sentenced on May 23, 2006. (Iniguez CP 17-33). McIntosh was sentenced on May 31, 2006. (McIntosh CP 17-33).

IV. ARGUMENT

A. THERE WAS NO VIOLATION OF CrR 3.3 WHERE THE COURT GRANTED THE STATE A GOOD CAUSE CONTINUANCE BECAUSE A MATERIAL WITNESS FOR THE STATE HAD LEFT THE COUNTRY TEMPORARILY WHILE REMAINING UNDER SUBPOENA.

1. THE CONTINUANCE WAS NOT AN ABUSE OF DISCRETION.

Both appellants claim that CrR 3.3 was violated by trial commencing on February 8, 2006. The trial court granted the State a good cause continuance to that date in order to procure the attendance of a victim, a material witness, at trial. The trial court granted the motion after the witness left the country prior to the January 4, 2006, trial date without informing the State of his plans.

The instant case is governed by the revised version of CrR 3.3 that became effective on September 1, 2003. The Washington Supreme Court has recognized that the current version of the rule is unlikely to result in dismissal of criminal charges because "[t]he new provisions allow a trial court more flexibility in avoiding the

harsh remedy of dismissal with prejudice[.]” State v. Flinn, 154 Wn.2d 193, 199 n.1, 110 P.3d 748 (2005).

A defendant who remains in custody generally must be brought to trial within 60 days after the date of arraignment. CrR 3.3(b)(1). However, a trial court may grant continuances on the motion of a party when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense. CrR 3.3(f)(2). If any period of time is excluded pursuant to a CrR 3.3 waiver or good cause continuance, the allowable time for trial does not expire earlier than 30 days after the end of the excluded period. CrR 3.3(b)(5). The plain language of 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. State v. Farnsworth, 133 Wn. App. 1, 12, 130 P.3d 389 (2006). Even where there is not good cause for a continuance, the trial court can grant a one-time “cure period” under CrR 3.3(g). A cure period requires only a finding that the defendant “will not be substantially prejudiced in the presentation of his or her defense” and does not require good cause. The period of delay may be for up to 14 days if the defendant is held in custody or 28 days if released.

McIntosh erroneously contends at page 11 of his brief that January 15, 2006 was the last day his trial could have begun without further action by the trial court. In so arguing, he overlooks the 30 day "buffer period" provided by CrR 3.3(b)(5). The date 30 days after the expiration of the previously excluded periods (which ended on January 4, 2006) was February 3, 2006. Trial actually commenced just five days later on February 8, 2006. Even if there had not been a good cause continuance, the trial date was within the time available for a cure period under CrR 3.3(g). A trial court's decision to grant a continuance will not be disturbed absent a showing of a manifest abuse of discretion. State v. Heredia-Juarez, 119 Wn. App. 150, 153, 79 P.3d 987 (2003); Flinn, 154 Wn.2d at 199. An abuse of discretion occurs when the trial court relies on untenable grounds or reasons. Id.

Allowing counsel time to prepare for trial is a valid basis for a continuance, even over the defendant's objection. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995); Flinn, 154 Wn.2d at 200. Scheduling conflicts may be considered in granting continuances. Flinn, 154 Wn.2d at 200. See also State v. Eaves, 39 Wn. App. 16, 20-21, 691 P.2d 245 (1984) (defense counsel's

involvement in another trial constituted good cause justifying a discretionary trial court continuance of trial beyond the limits established by CrR 3.3); State v. Kelley, 64 Wn. App. 755, 762-63, 828 P.2d 1106 (1992) (same result where prosecutor was involved in another trial); State v. Carson, 128 Wn.2d 805, 814-15, 912 P.2d 1016 (1996) (same result where judge, prosecutor and defense counsel were all involved in another trial).

The unavailability of a material State witness may provide a valid basis for the trial court to continue the trial for a reasonable time. State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). A court does not abuse its discretion in granting a continuance based on witness unavailability if there is a valid reason for the witness's unavailability, the witness will become available within a reasonable time, and the continuance will not substantially prejudice the defendant. State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). Washington appellate courts have affirmed in several cases where continuances were granted when the reason for the unavailability of the witness was a vacation or other similar commitment. See, e.g., State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992) (police officer's vacation); Kelley, 64 Wn. App. at

767 (deputy prosecutor's vacation); Nguyen, 68 Wn. App. at 915 (national guard duty).

In support of a motion for continuance, a prosecutor may make oral representations to the trial court on the record; the trial court has discretion to accept those representations as facts in granting the continuance, especially where the defendant does not materially dispute them. See State v. Walker, 16 Wn. App. 637, 639, 557 P.2d 1330 (1976).

In this case, the trial judge had a legitimate reason to grant the continuance. The trial court's reason was not "untenable grounds or reasons." The absence of the witness was for a legitimate reason: He had gone to Mexico for the holidays to visit with family and his children. (12/30/05 RP, at 5:17-20; 01/03/06 RP, at 9:18-21). The witness had been extremely cooperative throughout the proceedings: He had come into the prosecutor's office to speak with the deputy prosecutor and to be interviewed at the request of defense counsel. (12/30/05 RP, 13:16-21). While he had left on his vacation without contacting the prosecutor's office, he had not yet received a subpoena with the new trial date and there is no reason to believe he acted in bad faith or intentionally

brought about a continuance of the trial. (12/30/05 RP, at 13:1-3; 12/30/05 RP, at 5:12-20; 01/03/06 RP, at 9:6-15).

He would become available within a reasonable time. He advised the detective by telephone from Mexico that he would be returning to Pasco, Washington, on February 1 or 2, 2006. (01/03/06 RP, at 6:1-2). The first trial setting after the witness became available was February 8, 2006. (01/03/06 RP, at 6:2-3). As explained above, the trial date of February 8, 2006, was only five days beyond the time that would have been available for trial without further action by the trial court, and within the time available for a cure period even without finding good cause for a continuance.

The trial court's granting of the continuance did not prejudice the appellants' ability to present a defense. In fact, the only objection voiced by the appellants was that they would be forced to remain incarcerated for the duration of the continuance. There was never any indication that the defendants would not be able to adequately present their case. The trial court expressly asked counsel for McIntosh, "Other than the stay in jail, how would your client be prejudiced by a delay from today's date until February 8th?" (01/03/06 RP, at 8:15-17). Counsel replied, "Your Honor, the

only prejudice I can fathom at this point is he has been in custody for an extended period of time.” (01/03/06 RP, at 8:18-20). Counsel for Iniguez stated, “He’s been in jail since the latter part of May. Other than that we cannot demonstrate any prejudice.” (01/03/06 RP, at 10:10-12). But this was the first request for continuance brought by State, and previous delays in the trial were not attributable to the prosecution. (01/03/06 RP, at 5:5-8). A trial court may consider whether there were previous continuances granted in the case in deciding whether to grant a motion to continue. State v. Honton, 85 Wn. App. 415, 423, 932 P.2d 1276 (1997). Here, there were previous continuances at the request of one of the defendants that created the conflict with the vacation of the witness.

The Court found that the material witness was under subpoena for the trial setting but left the country before the State could notify him of the new trial date, a date which was set after repeated requests for continuances from McIntosh. The Court also found that the State had taken reasonable steps to notify a subpoenaed witness. (01/03/06 RP, at 10:24-25, 11:1-25, 12:1-22). The trial judge’s decision was certainly not a manifest abuse of

discretion. It was a reasonable decision which facilitated the orderly disposition of a very important trial.

Once a valid continuance is granted, the wise discretion of the trial court may be used in exceptional circumstances to set cases beyond the 60-day limit of CrR 3.3. Flinn, 154 Wn.2d at 200; State v. Perez, 16 Wn. App. 154, 156, 553 P.2d 1107 (1976). As with the initial decision to grant a continuance, the duration of the continuance is a matter that falls within the trial court's discretion. Flinn, 154 Wn.2d at 201; State v. Guajardo, 50 Wn. App. 16, 18, 756 P.2d 1231 (1987). Where a continuance was granted for good cause, the appellate court, "will not second-guess the trial judge's discretion in placing the trial on the court's calendar." Flinn, 154 Wn.2d at 201. When scheduling a trial after finding good cause for a continuance, "the trial judge can consider known competing conflicts on the calendar." Id. While there is a point at which the length of the continuance would be unreasonable, a continuance of five weeks was found to be reasonable in Flinn despite the fact the defendant was being held in custody pending trial. Id.

In the instant case, the trial was continued for a period of just over four weeks, from January 4, 2006, to February 8, 2006. The trial was placed on the first trial setting after the witness returned

from visiting his family and children in Mexico over the holidays. In light of the CrR 3.3(b)(5) buffer period, the new trial date was just five days beyond the time that would have been available for trial without any further action by the trial court. Even if there had not been good cause for a continuance, the new trial date was within the time available for a cure period under CrR 3.3(g). Considering the court's calendar and the reasons for the continuance, the trial court certainly did not abuse its discretion in setting the trial date to February 8, 2006.

2. THE STATE EXERCISED DUE DILIGENCE IN ATTEMPTING TO PROCURE THE ATTENDANCE OF A MATERIAL WITNESS.

Appellants argue that the State did not exercise due diligence in attempting to procure the attendance of the State's material witness.

In order for the trial court to grant a continuance due to the absence of a material witness, the moving party must show that it exercised due diligence to secure the attendance of the witness. State v. Kelly, 32 Wn. App. 112, 115, 645 P.2d 1146 (1982). Where a material witness is under subpoena, the party issuing the subpoena has complied with the basic requirement of due

diligence. State v. Henderson, 26 Wn. App. 187, 191, 611 P.2d 1365 (1980). Where a party has exercised due diligence by placing a material witness under subpoena, it is not an abuse of discretion to grant a continuance in order to secure the attendance of that witness.

In the instant case, the State had subpoenaed Gilberto Bahena. Contrary to what Iniguez implies, the clerk's papers clearly show he was personally served with subpoenas on July 31, 2005 (CP 278) and again on September 13, 2005 (CP 258). Multiple trial dates had been continued, all at the request of McIntosh or his counsel. When it appeared that the trial would actually occur on January 4, 2006, rather than being continued yet again, the State took reasonable steps to notify Bahena. With the inability to communicate with Bahena in Spanish, the State sent a law enforcement officer to serve him with a another subpoena, whereupon it was discovered he had gone to Mexico on vacation. The only other thing the State arguably could have done to secure the attendance of Bahena at an earlier time would have been to transport him back from Mexico to Franklin County prior to the end of his vacation. In addition to being impractical, it would have interfered with his rare opportunity to spend time with his family and

children in Mexico; after all, his only involvement with the criminal justice system was having the misfortune to be the victim of a crime. The trial court properly concluded the State made reasonable efforts to secure the attendance of the witness.

3. THE STATE'S MATERIAL WITNESS
WAS UNDER SUBPOENA.

Finally, appellants argue that Gilberto Bahena, both a victim and a material witness, was not under subpoena for the January 4, 2006, trial date, despite having been served with a subpoena for previous trial settings.

Requiring the issuance of a new subpoena upon the setting of each new trial date would place an unnecessary burden on the courts, the parties, and those subpoenaed to appear as witnesses. State v. Tatum, 74 Wn. App. 81, 85, 871 P.2d 1123 (1994). A subpoena ordinarily imposes upon the summoned party a continuing obligation to appear until discharged by the court or the summoning party. Id. at 86.

There can be no doubt from the record that Bahena and other witnesses were properly served with a subpoena. (CP 258, 278). Any issuance of a new subpoena would have been a formality done in order to simply notify him of a new trial date. The

original service placed him under subpoena and he was never released by the Court or by the parties, and thus, under subpoena at the time the Court granted the good cause continuance to the State.

4. EVEN IF GOOD CAUSE DID NOT EXIST TO GRANT A CONTINUANCE, THE TRIAL COURT'S ACTION IS AFFIRMABLE ON AN ALTERNATIVE BASIS. IN THE ALTERNATIVE, ANY ERROR IN GRANTING THE CONTINUANCE WAS HARMLESS.

A trial court decision may be affirmed on any basis within the pleadings and proof, regardless of whether that basis was considered or relied on by the trial court. RAP 2.5(a); City of Sunnyside v. Lopez, 50 Wn. App. 786, 794 n.6, 751 P.2d 313 (1988). Even if good cause did not exist for a continuance under CrR 3.3(f), the trial court's action may be affirmed as a cure period under CrR 3.3(g). The latter rule allows the time for trial for an in-custody defendant to be extended for to up to 14 days without any finding of good cause. In light of the 30 day "buffer period" of CrR 3.3(b)(5), trial could have commenced as late as February 3, 2006 without any further action by the trial court. Accordingly, the trial

date of February 8, 2006 was within the time available for a cure period under CrR 3.3(g).

In addition, an accused cannot avail himself of error as a ground for reversal unless it has been prejudicial. State v. Eaton, 30 Wn. App. 288, 295, 633 P.2d 921 (1981). The trial court was obviously willing to have trial commence on February 8, 2006. Had it not found good cause for a continuance under CrR 3.3(f), it would have granted a cure period under CrR 3.3(g). The result would have been the same: trial commencing February 8, 2006. Any error in granting the continuance was harmless.

B. INIGUEZ' CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE NOT VIOLATED WHERE HE WAS BROUGHT TO TRIAL WITHIN A REASONABLE TIME.

Appellant Iniguez argues that the delay in trial caused by a missing witness constitutes a violation of his constitutional right to a speedy trial. Both the United States and Washington State Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. vi; Const. art 1, §22. The constitutional right to a speedy trial should not be employed, "as a sword for the defendant's escape, but rather as a shield for his protection." State v. Davis, 2 Wn. App. 380, 383, 467 P.2d 875 (1970) (quoting United

States v. Birrell, 276 F. Supp. 798, 820 (S.D.N.Y. 1967). A defendant's claim of a speedy trial violation should be viewed in light of, "the almost universal experience that delay in criminal cases is welcomed by defendants as it usually works in their favor." Id.

"Trial within 60 days is not a constitutional mandate." State v. Carson, 128 Wn.2d 805, 821, 912 P.2d 1016 (1996). There is no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. Id. Unlike CrR 3.3, the constitutional right to a speedy trial is violated not at the expiration of a fixed time but at the expiration of a reasonable time. State v. Higley, 78 Wn. App. 172, 184-85, 902 P.2d 659 (1995). What constitutes a reasonable time depends on the factors present in a particular case. Id. at 185. Four major factors to be considered are the length of delay, the reason for the delay, whether and when the defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. Id.

In this case, Iniguez lodged a pro se objection to the continuance as a violation of his right to a speedy trial. However, analysis of the remaining factors leads to the conclusion that he was brought to trial within a reasonable time.

Here, the length of delay, particularly in light of all the previous continuances initiated by the defendants and the lack of any initiated by the State, was insignificant. The delay, just over one month, was only long enough for the State to produce its missing witness and no more. Trial was commenced as soon as possible after his return to the country.

The reason for the delay was a missing witness. Not just any witness but a critical witness and victim of the crime. Although he was under subpoena, the witness left the country without informing the State of his unavailability. The State had no means of knowing that he would leave the country and had made every attempt to produce him for trial. The reason for the delay in trial was unavoidable. There was no way for the State to know their primary witness would leave the country. Every indication was that he would cooperate and appear for trial, having previously been subpoenaed twice and cooperating with the investigation and prosecution of the crime. When it was discovered that he was out of the country, the State made every attempt to contact him in Mexico and to return him for trial.

Finally, the delay in Iniguez' trial caused by the State's missing witness did not prejudice the defendant. The only reason

for prejudice the defendant could come up with was that he had to sit in jail for another month, an insignificant amount of time given the time already spent in custody. His ability to present his defense of general denial and to call witnesses in his defense was in no way compromised.

The delay in trial was minimal. The reason for the delay was justified and in no way caused by the State. There was no prejudice to the defendant caused by the delay because he was still able to present his defense and call witnesses in support. Iniguez was brought to trial in a reasonable time and his Constitutional rights to a speedy trial were not violated by the brief continuance of his trial date.

C. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO SEVER THE TRIAL OF INIGUEZ FROM THAT OF MCINTOSH.

Iniguez argues his trial should have been severed from that of McIntosh in order to provide him a speedy trial. However, the trial court acted within its discretion in leaving the two defendants joined for trial.

The right to a speedy trial must sometimes yield to the interests of judicial economy. State v. Nguyen, 131 Wn. App. 815,

820, 129 P.3d 821 (2006). Separate trials are not favored. Id.; State v. Torres, 111 Wn. App. 323, 332, 44 P.3d 903 (2002). A court may properly rely on the policy favoring joint trial and continue a defendant's case so that it will coincide with the trial of another defendant charged with a related crime. Nguyen, 131 Wn. App. at 820; State v. Melton, 63 Wn. App. 63, 66-67, 817 P.2d 413 (1991). When defendants are jointly charged, severance to protect the speedy trial rights of one of the defendants is not mandatory. Nguyen, 131 Wn. App. at 820; Eaves, 39 Wn. App. at 19.

The final continuance granted to the State on January 3, 2006 (to secure the presence of a witness who had left the United States on vacation), applied equally to both defendants. Thus, it is not relevant to the issue of severance.

All of the other continuances were at the request of counsel for McIntosh, to provide counsel time for trial preparation and to accommodate counsel's trial schedule. As discussed earlier in this brief, these were valid reasons for continuances and could be granted even over the personal objection of the defendant. See Campbell, 103 Wn.2d at 15; Luvane, 127 Wn.2d at 699; Flinn, 154 Wn.2d at 200; Eaves, 39 Wn. App. at 20-21; and Carson, 128 Wn.2d at 814-15.

Iniguez argues the continuances requested by counsel for McIntosh should somehow be attributed to the State. However, the Washington court rules clearly recognize that a motion for continuance by one defendant in a consolidated trial also delays the trial of his or her co-defendants. CrR 4.4(2)(i) provides the severance may be granted before trial if, "it is deemed necessary to protect a defendant's right to a speedy trial." If a continuance requested by one defendant did not also delay the trials of co-defendants with whom he or she was joined for trial, it would never be necessary to grant severance to protect a defendant's right to a speedy trial.

Iniguez appears to use the term "speedy trial" to refer to both the constitutional right to a speedy trial and to CrR 3.3. However, CrR 3.3 uses the term "time for trial"; the words "speedy trial" do not appear anywhere in that rule. In contrast, CrR 4.4(2)(i) speaks in terms of severance, "to protect a defendant's right to a speedy trial." "When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature." State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). The Legislature is deemed to intend a different meaning when it uses different terms in different statutes. State v. Roggenkamp, 153

Wn.2d 614, 625-26, 106 P.3d 196 (2005). The term, "time for trial" is used in CrR 3.3 and the term "speedy trial" is used in CrR 4.4(2)(i). Accordingly, CrR 4.4(2)(i) refers only to the constitutional right to a speedy trial and not to CrR 3.3. As explained in section I(B) of this brief, Iniguez' constitutional right to a speedy trial was not violated.

Even if CrR 4.4(2)(i) did refer to CrR 3.3, the trial court properly denied severance. As previously explained, all of the continuances were granted for legitimate reasons and properly extended the time for trial under CrR 3.3.

Finally, even if the failure to sever did impact the speedy trial rights of one defendant, there was no error. As noted above, such severance is not mandatory; concerns for a speedy trial may yield to those for judicial economy.

The trial court acted within its discretion in denying severance. As late as the last defense motion for continuance on November 8, 2005, counsel for McIntosh stated: "The entire time this has been pending, we have been trying to prepare for trial. To this point, we still have witnesses we have not secured to come in, but we know they are there. We have all sorts of problems with the preparation as well, so I just need to put that on the record."

(11/08/05 RP, at 14:17-22). Certainly Iniguez benefited from this additional trial preparation as much as McIntosh. A trial court need not yield to a defendant's foolhardy desire to proceed to trial without adequate preparation. See Campbell, 103 Wn.2d at 15; Luvane, 127 Wn.2d at 691. This was not a case where the co-defendants were only tangentially related; they were accused of acting in concert. Severance would have required two separate trials of a very serious and complex case. The trial court acted within its discretion in leaving them joined for trial.

D. MCINTOSH'S JUDGMENT AND SENTENCE IS NOT AMBIGUOUS BECAUSE IT CLEARLY STATES THE AMOUNT OF TIME TO BE SERVED.

McIntosh argues that his Judgment and Sentence is ambiguous because the trial court did not distinguish the underlying sentence from the time assessed under the firearm enhancements. There can be no doubt that the trial court's intent was to sentence McIntosh to 390 months including the underlying sentence and firearm enhancements. There is no dispute as to this sentence. If this Court finds an ambiguity in McIntosh's Judgment and Sentence, an ambiguity in a trial court's written decision may be clarified by the court's oral ruling. State v. Smith, 82 Wn. App. 153,

159, 916 P.2d 960 (1996) (citing In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986)). Clarification is easily found in the trial court's oral ruling.

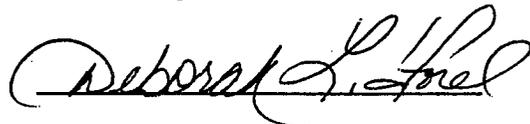
While only indicating 390 months as a sentence in the written document, the judge accurately indicated on the record that for each count the sentence was 150 months, concurrent with each other, and 4 firearm enhancements on each count to be served consecutively to each other and to the underlying sentence. (RP 5/16/06; 7:24-8:8). The trial court made a sufficient record which shows there is no ambiguity in the appellant's Judgment and Sentence.

Moreover, an accused cannot avail himself of error as a ground of reversal unless it has been prejudicial. Eaton, 30 Wn. App. at 295. McIntosh does not claim the total term of confinement indicated in his Judgment and Sentence is in any way inaccurate. Even if there is some error in the Judgment and Sentence, it does not work to his prejudice.

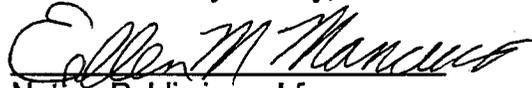
V. CONCLUSION

The State respectfully requests this court to affirm the

I hereby certify that on the 7th day of May, 2007, a copy of the foregoing was delivered to Jimmy Henry McIntosh, Appellant, #775829, McNeil Correctional Center, 16700 177th Avenue, SE, Monroe, Washington 98272; and to Ricardo Iniguez, Appellant, #895746, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, Washington 99362; and to opposing counsel, Eric J. Nielsen, Nielsen, Broman, & Koch PLLA, 1908 E. Madison Street, Seattle, Washington 98122-2842 by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to James Egan, opposing counsel, 315 West Kennewick Avenue, Kennewick, Washington 99336 by depositing it into Inter-City Legal Processing and Messenger Service.



Signed and sworn to before me this 7th day of May, 2007.


Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
8/29/2010

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