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A. ISSUES

1. Defense counsel needing to prepare for trial in order to provide effective representation for a client is a valid basis for a continuance to be granted in the administration of justice; were this not the case, a defense counsel could obtain a dismissal of the charges by neglecting to prepare a case. Did the trial court properly exercise its discretion by granting several continuances where defense counsel needed additional time to prepare for trial, where the court found that the continuances were necessary in the administration of justice, and where the delay did not prejudice the defendant?

2. To establish that counsel was ineffective at trial, a defendant must show that counsel's conduct was deficient and that this resulted in prejudice. Did Adem's defense counsel provide ineffective assistance when she requested a continuance to interview the victim of the robbery, the only other person who was present besides Adem and his co-defendants when the robbery occurred, and when Adem cannot show that this action prejudiced his defense?

3. Evidence is sufficient to sustain an enhancement or charge if, when viewed in a light most favorable to the State, it

permits a rational trier of fact to find the elements of the enhancement or charge beyond a reasonable doubt. Did the State produce sufficient evidence to prove that the firearm possessed by Adem during the robbery was a real and operable gun when three witnesses provided testimony confirming it was a real gun, it was used in a manner consistent with a real gun, and a live round that would work only on a real gun was found with other evidence of the crime?

4. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. Findings of fact and conclusions of law were signed at sentencing, but were not filed. Were the appropriate findings and conclusions entered when the prosecutor subsequently resubmitted the same findings with no knowledge of the issues on appeal, when there is no indication that the findings were tailored, and when no prejudice can be discerned?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Liban Hassan Adem with robbery in the first degree with a firearm enhancement, and unlawful possession of a firearm in the first degree. CP 1-2, 31-32. The Honorable Hollis Hill received the case for trial on October 4, 2012. RP 2.¹ Adem waived his jury trial right and a bench trial was held. CP 36; RP 4-6. The court convicted Adem on the charged counts and found that he was armed with a firearm at the time of the robbery. CP 126-30; RP 574-75.

The trial court imposed a sentence totaling 125 months, including concurrent standard range sentences of 48 months on the unlawful possession of a firearm charge and 65 months on the robbery charge plus a consecutive 60 month firearm enhancement. CP 107-15; 11/9/12 RP 14. The trial court ordered that this sentence run concurrent to two residential burglaries that the defendant pled guilty to, one of which occurred while Adem was

¹ The Verbatim Report of Proceedings will be cited in the same way as Appellant. Pretrial hearings and sentencing will be referenced as follows: 3/13/12 RP, 4/13/12 RP, 5/4/12 RP, 6/1/12 RP, 7/13/12 RP, 8/3/12 RP, 8/16/12 RP, and 11/9/12 RP. Trial proceedings, which occurred on 10/4/12, 10/8/12, 10/9/12, 10/10/12, 10/15/12, 10/18/12, and 10/25/12, will be referenced as RP 1 through RP 578.

released pending trial on this case. 11/9/12 RP 6-7, 14. Adem timely appealed. CP 116-17.

2. SUBSTANTIVE FACTS.

Around noon on February 9, 2012, while Lang Huynh was working at Ty Kim Huong Jewelry Store² in the White Center neighborhood of Seattle, she was robbed by Liban Adem and three others. RP 50-52, 61-64, 97, 138, 149-50, 153-54, 244-45; Exh. 2. Adem and his accomplices entered the store wearing jackets with hoods and bandanas over their faces to hide their identities. RP 55, 112, 244-45. During the robbery, Adem, who had previously been convicted of attempted robbery in the second degree, was armed with a semiautomatic pistol. RP 44-45, 232-33; Exh. 2. Adem held this semiautomatic pistol to Huynh's head and forced her to turn over \$20,000 to \$30,000 worth of jewelry. RP 151, 155, 169, 232-33. Huynh tried to escape the store, but Adem pushed her down and told her to sit. RP 151, 153.

Huynh's account of the robbery was confirmed by the store's surveillance system, which had four cameras. RP 156, 159. Adem was identified in the security video as the person in the green hooded sweatshirt who was wielding the semiautomatic pistol.

² Lang Huynh's daughter owns the jewelry store where Huynh worked, but only Huynh was working at the time of this incident. RP 149, 150.

RP 63-64, 80, 244; Exh. 2. At one point in the video, Adem pulled back the slide on the gun and it appeared that a live bullet was ejected from the chamber. RP 233; Exh. 2. Adem and the others ransacked the store, taking almost everything in the display case and store. RP 154. They then ran out the back of the store to a gray getaway van that was waiting in the alley. RP 54, 98, 155-56. The getaway driver, Antonio Ortiz, sped away. RP 56, 155. Ortiz³, who identified Adem at trial as one of the robbers, said that Adem was wearing a bright green hooded sweatshirt in the gray van right before and right after the robbery. RP 47-55, 60, 89.

While the robbery was occurring, Nick Crimp, who worked nearby, had just parked in the alley behind the store. RP 96-97. Crimp noticed the gray van parked in the alley with the driver hiding part of his face, which struck him as weird. RP 97. He observed three or four people with faces masked by bandanas running from the back of the jewelry store. RP 98, 112. They ran past him towards the gray van carrying jewelry trays, from which were dropping several gold chains. RP 98, 104, 107, 156. Crimp observed one of the men drop a gun as he ran. RP 98. The gun

³ Ortiz pled guilty and was sentenced prior to Adem's trial. He did not have any kind of agreement with the State to testify as part of his plea and was forced to testify pursuant to a subpoena. RP 66-67.

skidded across the pavement right by the door of Crimp's car and "sounded like metal sliding across pavement." RP 98, 105. He got a relatively good look at the gun and could tell it was a black, semiautomatic pistol. RP 105. After seeing this gun, Crimp ran into his parking lot and hid behind a truck, as the men in masks drove away in the van. RP 98, 105-06. Crimp called the police. RP 107. Police quickly responded and searched the area. RP 107, 125, 139.

Ortiz had driven to the apartment complex where Liban Warfa, Adem's co-defendant and cousin, lived with his family. RP 58-59. Police located the gray van near a dumpster in the apartment complex parking lot. RP 59, 140, 206. Within an hour from calling police, Crimp was taken to an apartment complex about five minutes away to determine whether the van at Warfa's was the one used by the robbers. RP 110-11. He identified the van due to the fact that it was the same body style, same color, and had certain distinct characteristics including damage to the front driver's side and a missing rear view mirror.⁴ RP 102, 106-07, 111-12. Stolen jewelry and a pistol holder were found in the van.

⁴ Crimp noticed that, while a center rearview mirror was not on the ground when Crimp entered the alleyway, he saw one there after the van left. RP 102.

RP 213-14, 220. Jewelry and five display trays were found in a Crown Victoria owned by the Warfa family. RP 214-15, 235, 324.

The van belonged to the Warfa family. RP 144, 324.

Hassan Warfa - Adem's cousin and Liban Warfa's brother - was questioned by police after they learned he was the last family member known to be in possession of the van.⁵ RP 317, 372, 395, 403-04. Hassan Warfa told police that, after his family's gray van pulled back into the parking stall next to the dumpster, he saw several males, including his cousin Adem⁶ and his brother Liban Warfa, exit the van and scatter. RP 327-28, 375, 406-07, 415-16. Hassan Warfa chased Adem around the corner and saw all the males leave in a separate car. RP 407-09. Ortiz, the getaway driver, saw Adem take off his bright green hooded sweatshirt. RP 60. Another individual who lived at the apartment complex, also saw three people running through the parking lot and then a fourth man throw a green article of clothing into the dumpster. RP 174.

⁵ Hassan Warfa testified that, on February 9, 2012, Liban Warfa and Adem were together at his family's apartment around 2 or 3 a.m. and he had allowed Liban Warfa to take the van keys around 10:30 a.m. RP 322-23, 326.

⁶ Hassan Warfa claimed at trial that he did not actually see Adem exit the van, but rather assumed he was there and told police he saw him because he was "peer-pressured" by police. RP 328-30, 345. However, the detective clarified what Warfa actually said during his statement and that he was not coerced. RP 403-10, 415-16.

When police looked on the top of the garbage in the dumpster, they found one of the stolen jewelry trays. RP 156, 225-26, 229; Exh. 40. A live round of .40 caliber Smith & Wesson ammunition was found on the tray. RP 226. That particular round of ammunition is designed for a semiautomatic, the type of pistol held by Adem during the robbery and from which a round was ejected during the robbery. RP 230-31, 233.

They also recovered a bright green North Face hooded sweatshirt from the dumpster. RP 207, 239-40. That green sweatshirt was later tested and found to contain Adem's DNA. RP 239-40, 280-81. A forensic scientist testified that Adem had the major profile, or 75% or greater, of the DNA extracted from the green sweatshirt, and that the estimated probability of randomly selecting an individual from the U.S. population with that profile was 1 in 7.9 quadrillion.⁷ RP 280-81.

When arrested, Adem gave police officers a false name. RP 241. Also, Adem admitted in a jail phone call following Ortiz testimony that, while Ortiz was on the witness stand and the trial

⁷ The forensic scientist also testified that there are approximately 7 billion plus individuals in the United States and that she was not aware of any individuals that have matching DNA reference samples that are not identical twins. RP 295.

judge was not looking, Adem had mouthed to Ortiz a threat to physically harm him. RP 351, 355, 435-36, 439.

C. ARGUMENT

1. ADEM WAS TIMELY TRIED UNDER CrR 3.3.

The seven month delay in bringing Adem to trial, which resulted because of the numerous continuances sought by his own counsel, did not violate his rights to a speedy trial under CrR 3.3. The delay is attributable to Adem because his counsel acted as his agent when seeking continuances to further the defense. Furthermore, the requested continuances were properly granted because they allowed defense counsel to properly prepare for trial.

a. Facts.

On February 28, 2012, Adem was arraigned. CP 123-24. He was brought to trial seven months later, after six continuances. CP 29-30, 118-21; 4/13/12 RP 1-2; 5/4/12 RP 2-3; 6/1/12 RP 1-2; 7/13/12 RP 1-6; 8/3/12 RP 1-2; 8/16/12 RP 1-2; RP 2. Adem wholly agreed to the first two continuances and objected to the subsequent four continuances that his lawyer requested. Id.

Adem's counsel requested these last four continuances⁸ in order to adequately prepare his defense. 6/1/12 RP 1-2; 7/13/12 RP 1-6; 8/3/12 RP 1-2; 8/16/12 RP 1-2. These last four continuances covered an approximately two and a half month period between the last expiration date that Adem agreed to, July 13, 2012, and the date his trial began on October 4, 2012. CP 119; 5/4/12 RP 2; RP 2.

On March 13, 2012, Adem's first case setting hearing, the case was set for trial. CP 124-25; 3/13/12 RP 1-2. At Adem's first and second omnibus hearings, on April 13, 2012 and May 4, 2012 respectively, the court granted agreed motions to continue the trial date. CP 118-19; 4/13/12 RP 1-2; 5/4/12 RP 2-3. As to each continuance, Adem signed under the line stating "I agree to the continuance" on the Order Continuing Trial associated with these hearings. CP 118-19. Additionally, at the May 4, 2012 omnibus hearing, when defense counsel asked Adem whether he was in agreement with the request for a continuance, he responded, "Yeah" before signing the Order. CP 119; 5/4/12 RP 2-3. After the May 4, 2012 hearing, Adem's time-for-trial expiration became July 13, 2012. CP 119.

⁸ Made on June 1st, July 13th, August 3rd, and August 16th of 2012.

On June 1, 2012, defense counsel moved for a continuance to July 16, 2012. CP 120; 6/1/12 RP 1. Defense counsel requested the continuance because she needed to interview a significant number of witnesses in order to be prepared for trial, including Adem's three co-defendants who had pled out and were subpoenaed as State's witnesses, the State's other witnesses who were present at the scene, and possibly a few defense witnesses.

6/1/12 RP 1-2. Defense counsel added:

So, long story short, we're not ready yet. And Mr. Adem has some concerns about this; he's frustrated at the length of time this case has been going on... [he] may not agree with the continuance. When we were walking downstairs, he was thinking about it. But I feel that I cannot be effective.

6/1/12 RP 1-2. The State did not object to this request. CP 120; 6/1/12 RP 1. Adem objected to the continuance requested by his attorney. CP 120; 6/1/12 RP 2. The court, however, granted the continuance finding that it was required in the administration of justice due to counsel's need to prepare for trial. CP 120.

On July 13, 2012, the parties jointly requested a continuance so that they could have additional time to prepare for trial. CP 121; 7/13/12 RP 1-6. Defense counsel wanted to interview the victim in

the case, noting that this was the last witness⁹ she needed to interview before she was ready for trial. CP 121; 7/13/12 RP 1, 3. Defense counsel told the court that Adem was not in agreement with her request, but also expressed her concern about not being ready for trial without having interviewed the robbery victim.¹⁰ 7/13/12 RP 3. The prosecutor's continuance request was due to not yet having received the DNA testing results, which he believed were not yet complete due to the backlog at the Washington State Patrol crime lab. 7/13/12 RP 1. The prosecutor believed that thirty days would be sufficient time for the DNA results to be received, provided to defense, and for defense to determine how to proceed with investigating the tested evidence. 7/13/12 RP 2. The court granted the continuance to August 13, 2012 in the administration of justice. CP 121.

On August 3, 2012, defense counsel requested a continuance to September 5, 2012. CP 29; 8/3/12 RP 1. The prosecutor had just received notification that day that the DNA

⁹ While it is not explicit, defense counsel's statement that the victim was the last witness she needed to interview suggests that the other interviews had been conducted by this time. CP 121; 7/13/12 RP 1, 3.

¹⁰ The prosecutor explained to the court the efforts the parties had made to identify a time when the prosecutor, defense counsel, investigator, victim, and a Vietnamese interpreter were all available for the defense interview. 7/13/12 RP 1.

testing was completed and had verbally provided the results of the testing to defense. 8/3/12 RP 1. Defense counsel needed an opportunity to review the testing results and decide how to proceed with the defense investigation. 8/3/12 RP 1-2. Adem objected to the continuance. 8/3/12 RP 2. However, defense counsel stated, "I feel that it's absolutely critical to effectively be prepared for this case, obviously, and that requires a continuance, and I thought that would be good cause, with this new discovery coming in this morning." Id. The court granted the continuance finding that it was required in the administration of justice and that "[t]here is good cause for continuing the trial date to allow [defense counsel] to be adequately prepared to represent [Adem]." CP 29; 8/3/12 RP 2.

On August 16, 2012, defense counsel requested to continue trial to October 1, 2012. CP 30; 8/16/12 RP 2. Defense counsel wanted to determine whether a DNA defense expert would be utilized, but she was in a trial lasting another two weeks. 8/16/12 RP 1-2. Adem objected to defense counsel's request for a continuance; however, defense stated that, "In order to be effective, I am not ready for trial." 8/16/12 RP 3. Based on defense counsel's representations about her schedule and what steps she needed to take to be prepared to go to trial, the court granted the

continuance, finding that there was good cause and that it was “necessary in the interest of justice.” CP 30; 8/16/12 RP 3-4.

On September 28, 2012, the prosecutor and defense counsel confirmed that they were ready for trial. CP 33-35.

Adem’s trial started on October 4, 2012. RP 2. Defense counsel did not move to dismiss the case for a violation of CrR 3.3 at any point prior to or during trial.

b. Adem’s Rule-Based Time-To-Trial Claim Was Waived By Trial Counsel’s Request For Continuances.

A defendant has a right to a speedy trial under the Sixth Amendment and article I, section 22 of the Washington State Constitution. See State v. Carson, 128 Wn.2d 805, 820 & nn.63-64, 912 P.2d 1016 (1996). Although CrR 3.3(b)(1)(i) requires trial within 60 days of arraignment when the defendant is in custody, this requirement “is not a constitutional mandate.” Carson, 128 Wn.2d at 821 (quoting State v. Terranova, 105 Wn.2d 632, 651, 716 P.2d 295 (1986)). Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial, but CrR 3.3(e) excludes the time allowed based on valid continuances and other delays of the speedy trial

period.¹¹ Excluded periods under CrR 3.3(e) include delays “granted by the court pursuant to section (f).” CrR 3.3(e)(3).

A court may grant a continuance based on “written agreement of the parties, which must be signed by the defendant” or “on motion of the court or a party” where a continuance “is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(1),(2).

An appellate court reviews for abuse of discretion a trial court’s decision to grant a motion for a continuance in a criminal case. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Granting defense counsel’s request for more time to prepare, even over defendant’s objection, to ensure effective representation and a fair trial, is a proper exercise of discretion. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (regarding rule-based right, “[c]ounsel was properly granted the right to waive trial in 60 days, over defendant’s objection, to ensure effective representation and a fair trial”). See also State v. Ollivier, No. 86633-3, (Wash.S.Ct., 10/31/13), slip op. at 15-19, 21, (“Delay caused by defense counsel is chargeable to the defendant.”), citing

¹¹ In exercising its discretion to grant or deny a continuance, a trial court is to consider all relevant factors. State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Scheduling conflicts may be considered in granting continuances. See State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003).

Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283, 1290-91, 173 L. Ed 2d 31 (2009).

Adem claims that the trial court erred by not making a more searching inquiry into the basis for continuances requested by his lawyer.¹² Appellant's Brief at 16. He asserts that the court should have asked why the interviews were not conducted sooner and why the State needed additional time to obtain DNA evidence. This argument must be rejected.

The Washington Supreme Court recently considered and rejected an argument much like Adem's. Ollivier, No. 86633-3, (Wash.S.Ct., 10/31/13). It held that under CrR 3.3(f)(2), defense counsel's request for a continuance of trial waives any appellate argument under CrR 3.3. Id. at 6. That holding controls this case. Adem's own counsel asked for a number of continuances in order to prepare for trial and, as 3.3(f)(2) expressly provides, any objection is therefore waived. Id. CrR 3.3 does not require a different standard for a continuance when a defendant personally objects. CrR 3.3(f)(2); Ollivier, slip op. at 6. Reversal and dismissal of the case is not required.

¹² Adem does not assert that his constitutional speedy trial right was violated. See Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

Adem also argues that the trial court's rulings did not comply with the form required by CrR 3.3 in that they were not sufficiently specific as to the legal or factual basis for the ruling. This argument, too, has been waived by trial counsel's requests.

Even if this argument is considered, however, it fails. Defense counsel requested continuances on June 1st, July 13th, August 3rd, and August 16th of 2012, respectively, in order to interview a significant number of witnesses, interview the victim, review the recently completed DNA testing results, and determine whether a DNA defense expert would be utilized. 6/1/12 RP 1-2; 7/13/12 RP 1, 3; 8/3/12 RP 1-2; 8/16/12 RP 1-2. The continuances were clearly proper because, like in Ollivier, they allowed defense counsel to properly investigate and prepare a defense to some very damaging evidence.¹³ If the court had required Adem to go to trial before his counsel had completed these important steps, Adem's defense counsel would not have been fully prepared to deal with the evidence amassed by the State and, as she told the court, she would have been ineffective. 6/1/12 RP 2; 7/13/12 RP 3; 8/3/12 RP 2; 8/16/12 RP 3. The continuances were granted in oral and

¹³ Adem argues the reason the court granted the continuance on July 13, 2012 was because Adem was in jail on other charges. Appellant's Brief at pg. 22. However, there is nothing in the record to support that contention. CP 121; 7/13/12 RP 1-4.

written orders that identified the legal basis for the court's rulings—the administration of justice—and that explained why the defendant would not be prejudiced. CP 29-30, 120-21; 6/1/12 RP 1-2; 7/13/12 RP 1-3; 8/3/12 RP 1-2; 8/16/12 RP 1-4. The propriety of those rulings cannot be undermined unless it is shown that trial counsel was ineffective.

It is also apparent that Adem was not prejudiced in any substantial way by the continuances, nor does Adem assert that there was any actual prejudice to the presentation of his defense.¹⁴ Ollivier, slip op. at 25; see also Doggett v. United States, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (“When the government prosecutes a case with reasonable diligence, a defendant who cannot demonstrate how his defense was prejudiced with specificity will not make out a speedy trial claim no matter how great the ensuing delay.”).

Adem cites two cases to support his arguments but both were distinguished in Ollivier. Regarding State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009), the Court in Ollivier noted

¹⁴ Adem does, however, imply that defense counsel's August 3, 2012 continuance request is what enabled the State to obtain the incriminating DNA results. Appellant's Brief at 25-26. This argument, which pertains to Adem's ineffective assistance claim, will be addressed in greater detail below. See section C2, infra.

that Saunders was a special case in that the three continuances at issue were granted to permit ongoing plea negotiations over the defendant's objection and contrary to his desire to go to trial.¹⁵ Ollivier, slip op. at 7. In contrast, defense counsel had authority to make binding decisions to seek continuances. Ollivier, slip op. at 8.

Nor is State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), controlling. In Kenyon, charges were dismissed because the record failed to sufficiently document details showing that no judge was available to try the case, as required by precedent. Id. at 138. The Court in Ollivier held that Kenyon involved continuances for far different reasons than in Ollivier's case, specifically to accommodate missing judges, not to prepare for trial. Ollivier, slip op. at 8. The same is true here.

For these reasons, Adem's rule-based claims must be rejected.

2. TRIAL COUNSEL WAS EFFECTIVE.

Adem contends that defense counsel provided ineffective assistance of counsel when she requested a continuance of the trial date at the same time that the State was asking for an even

¹⁵ Whether to plead guilty is an objective of representation controlled by the defendant and not a matter of trial strategy to achieve an objective. See Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

longer continuance to obtain DNA evidence. 7/13/12 RP 1-3.

Adem's argument should be rejected because he is unable to show that his defense counsel's actions were deficient or that he was prejudiced by her representation.

a. Facts.

The topic of obtaining DNA results was first discussed on the record on July 13, 2012.¹⁶ 7/13/12 RP 1-2. On that day, the prosecutor joined defense counsel's request for a continuance, so that the crime lab could complete the DNA testing and the parties could evaluate the results. The prosecutor clarified that the DNA analysis was requested a number of months prior and that he believed the crime lab had already started the testing since Adem's DNA was already in CODIS¹⁷ due to his prior convictions. 7/13/12 RP 4, 6. Additionally, the State asked for Adem's DNA so that a reference sample could be generated for purposes of confirming the DNA test results. Id., RP 279-80.

¹⁶ However, at the first omnibus, defense counsel told the court that she had "received some additional discovery in the last few weeks. The results of [inaudible] aren't quite ready yet." 4/13/12 RP 1. Defense counsel was likely referring to the results of the DNA testing when she made this partially inaudible statement because the green hooded sweatshirt was the only evidence item that underwent testing. RP 287.

¹⁷ The Combined DNA Index System is a national, searchable database of DNA profiles of convicted offenders.

Adem argues that the request to obtain DNA results “was made more than 180 days after charges were filed, and the State had not yet even obtained a sample DNA from the defendant.” Appellant’s Brief at 21. This suggests that the State waited to begin its DNA analysis on the green sweatshirt until obtaining a DNA sample from Adem on July 24, 2012. *Id.* at 21-22; CP 28. However, the record demonstrates that this assertion is inaccurate. The reference sample taken from Adem was used for the purpose of confirming the DNA test results, not so that the crime lab could begin their testing process. 7/13/12 RP 4, 6; RP 279-80.

b. Trial Counsel Properly Sought Continuances To Effectively Defend Adem.

A criminal defendant has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, Adem must show both that defense counsel’s representation was deficient, i.e., that it “fell below an objective standard of reasonableness based on consideration of all the circumstances” (the performance prong), and that defense counsel’s deficient performance prejudiced the defendant (the

prejudice prong). In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland, 466 U.S. at 687). The benchmark for judging a claim of ineffective assistance of counsel is whether the counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. If the court decides that one prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance is highly deferential. Strickland, 466 U.S. at 689. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689. In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy.

Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. Adem must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Adem argues that defense counsel's July 13, 2012 request for a continuance amounted to ineffective assistance. However, Adem has not shown, and cannot show, that his defense counsel performed deficiently by wanting to interview the crime victim who would be testifying at his trial. Defense counsel's decision to interview the victim of the robbery, Huynh, prior to going to trial was clearly a sound strategic decision. This is evident from the concern defense counsel expressed to Adem and the court about proceeding to trial without having interviewed the victim. 7/13/12 RP at 3.

The tactic Adem now recommends on appeal is classic hindsight. Not interviewing the victim would have been risky, as Huynh was an important material witness for the State. New details often emerge during a follow-up interview by a defense counsel. Language barriers and the victim's shock and trauma at the time of taking the original statement, or law enforcement having different objectives than defense counsel, may all contribute to defense counsel's success in eliciting new information. All of those factors could have been at issue here. RP 148, 155-56, 223. Defense counsel thus took an appropriate tactical approach.

Adem argues that defense counsel's desire to interview the victim was unreasonable, or deficient, because Huynh "saw nothing." Appellant's Brief at 25. Huynh was not able to see any of the robbers' faces at the time because she "was so scared. [She] didn't dare looking (sic) at them in the eyes." RP 154. However, even if Huynh did not have identification evidence, she provided other important circumstantial evidence relevant to identification. RP 148-71. Additionally, Huynh described what happened during the robbery, the actions of the robbers inside the store, the use of the gun and that it was held to her head, as well as part of the authentication of the surveillance video. Id.

To forego the opportunity to interview Huynh simply to derail (perhaps) DNA identification evidence would not be sound tactics. The State already had identification evidence and the DNA results just added to that already convincing evidence. Even if Adem's suggestion was a plausible approach, defense counsel's approach was also reasonable so that she could be prepared for Huynh's cross-examination and the trial overall.

Adem also argues that defense counsel's performance was deficient because, "any reasonable attorney would recognize that the threat of DNA evidence was a greater threat than the need to interview a witness whom had already given statements to the police."¹⁸ Appellant's Brief at pg. 25. His argument erroneously presumes that the court would have denied the State's request for a continuance and suppressed the DNA evidence. Nothing in the record supports this assumption. The fact that the court granted the prosecutor's request for a longer continuance than the timeframe being requested by defense demonstrates that the Court could well have found good cause to continue based on the prosecutor's request alone, regardless of what was being requested by defense. 7/13/12 RP 1-6.

¹⁸ Defense counsel had no way of knowing whether the DNA evidence would be incriminating or exculpatory for her client.

Moreover, regardless of whether the DNA evidence was ever admitted, defense counsel would still have to deal with all the other incriminating evidence against Adem, including the testimony of the victim. Trial counsel reasonably balanced that risk against the highly likely fact that DNA evidence would be admitted, and chose to interview the victim. Counsel's choice was not deficient.¹⁹

Adem also has not affirmatively shown prejudice—a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. In essence, Adem asks this Court to find that, but for defense counsel requesting a continuance to interview the victim, the judge would have acquitted Adem on the charged offenses. This is pure speculation. First, it assumes that a continuance for DNA results would not have been granted but for the fact that defense counsel was also seeking a continuance. This is incorrect. Adem never argued at trial or on appeal that the prosecutor should not have gotten a continuance for this purpose. Thus, if the prosecutor could have obtained DNA anyway, counsel's request for a simultaneous continuance is not prejudicial; it would have changed nothing.

¹⁹ An important part of investigating any robbery case is interviewing the victim, which is underscored by the fact that Adem could have raised ineffective assistance on appeal if defense counsel had not interviewed Huynh.

Second, assuming arguendo, that the court did not grant any continuance on July 13, 2012 and that the State did not obtain the DNA results, the State would still have proven beyond a reasonable doubt that Adem committed these crimes. While the DNA evidence supports the fact that Adem was wearing the bright green hooded sweatshirt, Ortiz' testimony also linked Adem to this sweatshirt and this is the same sweatshirt worn by the person holding the gun in the security video during the robbery. Additionally, even Adem's own cousin indicated he saw Adem running from the van used in the commission of the robbery. The trial court's findings show that identity was established in a myriad of ways. CP 126-30 (Ortiz testimony, Warfa's testimony, video, green jacket); RP 570-75.

Adem has failed to meet his burden of establishing either deficient performance or prejudice. Thus, this Court should deny Adem's request to reverse based on ineffective assistance of counsel.

3. SUFFICIENT EVIDENCE WAS PRESENTED TO PROVE ADEM WAS ARMED WITH A FIREARM.

Adem contends the evidence is insufficient to support the trial court's findings as to the firearm enhancement and the first

degree unlawful possession of a firearm charge.²⁰ More specifically, he argues that the State failed to prove beyond a reasonable doubt that the gun was operable because the State failed to produce the alleged firearm and the purported weapon was never discharged. This argument should be rejected because both the direct and circumstantial evidence, taken together, established beyond a reasonable doubt that the gun was a real and operable gun in fact.

Evidence is sufficient to sustain an enhancement or charge if, when viewed in a light most favorable to the State, it permits a rational trier of fact to find the elements of the enhancement or charge beyond a reasonable doubt. State v. McKee, 141 Wn. App. 22, 30, 167 P.3d 575 (2007). A defendant challenging the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial and direct evidence are equally probative, and an appellate court defers to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. Id. at 874-75.

²⁰ Appellant's Brief refers to 'possession of unlawful weapon' (at pg. 1, assignment of error #3) and 'unlawful display of a weapon' (at pg. 35), but those were not charged in this case. The second count was unlawful possession of a firearm in the first degree. CP 1-2, 31-32.

In this case, to enhance Adem's sentence and convict him of unlawful possession of a firearm in the first degree, the State had the burden of proving that he or an accomplice was armed during commission of the crime with a "firearm" – i.e., "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." RCW 9.41.010(9).²¹

Operability may be inferred from evidence showing a threat to use a real gun. In State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983), *aff'd*, 102 Wn.2d 537, 688 P.2d 859 (1984), this Court held that the State proved the defendant "used a real and operable gun" with testimony of two robbery eyewitnesses who described the guns and the defendant's express or implied threat to use them. Similarly, in State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273, *review denied*, 101 Wn.2d 1015 (1984), eyewitness testimony describing a "real" gun and recounting a threat to use it was sufficient to establish "the existence of a real, operable gun *in fact*." (Court's emphasis); see also State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) ("eyewitness testimony to a real gun that is neither discharged nor recovered is sufficient to support deadly weapons and/or firearms penalty enhancements"); State v.

²¹ Previously RCW 9.41.010(7).

Goforth, 33 Wn. App. 405, 412, 655 P.2d 714 (1982) (evidence was sufficient to support inference that “gun was operable in fact” where witnesses who were familiar with shotguns testified that the defendant used a real shotgun); McKee, 141 Wn. App. at 29-32 (evidence was sufficient to support firearm enhancement given victim’s description of the weight and feel of the gun, the way in which defendant wielded it, and evidence that defendant had a real gun and had access to other guns).

Here, victim Hunyh testified that a gun was held to her head. She was confident that it was, in fact, a gun. (“It was a gun that was pointed at me...It was pointed right at me and it was held with both hands...I know it was a gun. It was right in my face.” RP 169.) Additionally, witness Crimp said that he got a good look at the gun when it slid across the pavement right by the door of his car. RP 98, 105. He could identify the gun as a black semiautomatic pistol. RP 105. As the gun skidded on the ground, Crimp noted that it sounded like metal sliding across pavement, as opposed to plastic or some type of squirt gun. RP 98, 105.

Additionally, the primary detective on the case testified that, for fifteen years, he was issued a .40 caliber semiautomatic pistol by the Seattle Police Department. RP 231-32. He could tell from

looking at the firearm contained in the store's surveillance video that it was a semiautomatic pistol. Exh. 2; RP 233. He could also tell that it was a semiautomatic pistol from the way that the slide was racked by the person holding it on the video. Id. When the slide was racked, one of the rounds actually cycled out of the chamber of the handgun. Id. The detective also testified that the racking of a gun can cause ejection of an unspent cartridge if there is a round chambered and that a gun that used live ammunition is not a toy gun. RP 247, 256.

The semiautomatic pistol was also used in a manner that was consistent with a real firearm. In addition to sliding the rack back, Adem pointed the pistol at Huynh's head and pushed her down in order to intimidate her. RP 151, 155, 169, 233. A pistol holder was also found in the gray van when law enforcement searched it. RP 220.

Furthermore, when police looked in the dumpster while collecting evidence for this case, they found on top of the garbage a live .40 caliber round in one of the stolen jewelry trays. RP 156, 225-26, 229. That particular round of ammunition is designed for a semiautomatic pistol, the type used during the robbery. RP 230-31, 233. Additionally, the semiautomatic round found in the dumpster,

like other semiautomatic rounds, are smooth all the way down, so that an extractor can grab onto the bullet after it is fired, pull it back, and fling it out of the gun so that the next round can feed. The found round is consistent with a semiautomatic pistol, the type of handgun seen in the video. These facts establish that the Defendant committed the crime while armed with the firearm.

Nevertheless, Adem contends the State is required to prove the firearm was "operable," even though the statute does not use that word. (See, e.g., State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983); State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) ("We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement."); State v. Pierce, 155 Wn. App. 701, 714 n.11, 230 P.3d 237 (2010) (Where the firearm is not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.")).

However, Adem's argument is inaccurate because it was sufficient to show that Adem used a real gun. See State v. Raleigh, 157 Wn. App. 728, 734-35, 238 P.3d 1211 (2010) (firearm need not be operable during commission of crime to constitute a firearm; statement in Recuenco is dicta), *review denied*, 170 Wn.2d 1029

(2011); State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (“a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm), *review denied*, 139 Wn.2d 1003 (1999); State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) (language in Pam on operability refers to the difference between a toy gun and a gun in fact; a gun incapable of being fired due to a mechanical defect is still a firearm).

When viewed in a light most favorable to the State, the evidence presented by the State at trial is sufficient to support an inference that Adem was armed with a firearm during the robbery and that he committed first degree unlawful possession of a firearm.

4. FINDINGS AND CONCLUSIONS OF LAW WERE PRESENTED BUT NOT FILED; REVERSAL IS UNNECESSARY.

a. Facts.

On October 25, 2012, after the trial court issued its ruling finding Adem guilty of all charges, the prosecutor agreed to prepare findings of fact and conclusions of law. RP 575-76. At the sentencing hearing on November 9, 2012, after the court imposed sentence, the prosecutor stated, “Your Honor, we have supplied the

court with a copy of the findings of fact and conclusions of law with regards to the trial under 6.1(d), and it is signed by both parties and presented to the court.” 11/9/12 RP 16. The court responded, “I have reviewed those findings and conclusions and have approved them and signed them.” Id.

The findings of fact and conclusions of law that were signed by the parties and court were somehow not filed in the electronic court record. When this became clear based on the appellant's brief, the trial prosecutor first looked in the prosecutor's office file to see if the original findings were in the file. CP 131-32. When they were not located there, the prosecutor located an electronic copy of the same findings and once again presented them for approval to defense counsel and the trial court. Id. These findings of fact and conclusions of law were signed again, without any changes, and filed on September 11, 2013. CP 126-30. The prosecutor had no knowledge of the appellate issues being raised in this matter, nor had he reviewed any documentation or had any conversations about the issues being raised on appeal. CP 131-32.

b. Reversal Is Not Required.

Adem contends that his case should be remanded for entry of findings of fact and conclusions of law under CrR 6.1(d). This

argument should fail because findings of fact and conclusions of law were presented and signed, but not filed. CP 126-30; 11/9/12 RP 16. Additionally, when it became clear the signed findings had not actually been filed, the prosecutor presented the original findings and conclusions of law again, having no knowledge of the issues on appeal. CP 131-32. Furthermore, Adem cannot show any prejudice.

Whenever a case is tried without a jury, the court must enter findings of fact and conclusions of law. CrR 6.1(d). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), *review denied*, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the

findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Adem's appeal. There is no resulting prejudice.

The trial court's findings of fact and conclusions of law satisfy 6.1(d). The record clearly shows that the findings were approved and signed by both parties and the court at the November 9, 2012 sentencing.²² 11/9/12 RP 16. These same findings were signed again on September 11, 2013 and this time entered into the court file. CP 126-32.

Adem cannot establish unfairness or prejudice resulting from the delay or content of these findings. Adem has not argued that he was prejudiced by delay, and no actual prejudice can be discerned from the record or appellant's brief. Additionally, a review of the findings demonstrates that the State did not tailor them to address Adem's claims on appeal. The findings essentially repeat the Judge's oral ruling made on October 25, 2012. CP 126-30; RP 570-75. The written findings did not deviate from, nor substantively add to, the terms articulated at oral ruling. Id.

²² Adem's trial attorney also confirmed that the findings had been previously signed by the court. CP 131-32.

Moreover, at the time the trial prosecutor resubmitted the findings, he had no knowledge of the issues in this appeal. CP 131-32.

In light of the above, Adem cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 6.1 findings of fact and conclusions of law are properly before this Court. Thus, no remand is necessary for entry of the findings of fact and conclusions of law.

Adem further complains that the court did not make a finding of guilt on the charge of first degree unlawful possession of a firearm. While the Judge may not have explicitly stated "guilty" in regards to this charge, she did find that all of the disputed elements were proven by the State. The court found Adem was armed with a firearm on the date in question in Washington. RP 570, 574-75. It was undisputed that Adem had previously been convicted of the crime of attempted robbery in the second degree. Indeed, the prosecutor had admitted a certified copy of Adem's judgment and sentence for this conviction. RP 44-45. Defense counsel did not object to its admission, nor at any time challenge the veracity of this certified court document. Id. It was clear to both parties that Adem had been found guilty of the first degree unlawful possession of a firearm charge. This is evidenced by the fact that neither party

asked for clarification at any point after the court read its oral rulings or at the subsequent sentencing hearing. RP 575-77; 11/9/12 RP 2-19. Furthermore, the court has now entered written findings of fact and conclusions of law with respect to this charge. CP 126-30. Thus, this Court should not remand for the trial court to again confirm that Adem was guilty of first degree unlawful possession of a firearm.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Adem's convictions and sentence.

DATED this 5th day of November, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James R. Dixon, the attorney for the appellant, at Dixon & Cannon, Ltd., 601 Union Street, Suite 3230, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. LIBAN ADEM, Cause No. 69552-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5 day of November, 2013



Name Bora Ly
Done in Seattle, Washington