

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63813-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
GARY RAY KING, III,)	
)	
Appellant.)	FILED: November 30, 2009
_____)	

Appelwick, J. — King alleges his convictions for conspiracy to commit robbery and conspiracy to commit burglary violate double jeopardy and are not supported by sufficient evidence. He claims that his three convictions for unlawful imprisonment were merely incidental to the robbery and not separately chargeable. He also contends, and the State concedes, that the evidence was insufficient to support his felony harassment conviction. We reverse and vacate the felony harassment conviction and one of the convictions for unlawful imprisonment, and remand for resentencing.

FACTS

Gary King was convicted of several crimes committed as part of a home invasion. Much of the evidence about the events leading up to the burglary

came from his coconspirator, Ben Harrison. Harrison testified in exchange for reduced charges and a significant reduction in prison time.

King often told people that he was a trained assassin. Harrison said that King had asked him to join his group of assassins. Harrison declined, but King offered him \$5,000 to go to California and meet the boss. Harrison agreed, because he wanted the money. Upon meeting the boss, Harrison explained that he did not want to become an assassin. The boss became angry and apparently told King that he would have to do a couple of free jobs.

On the return drive from California, King told Harrison about a job. According to Harrison, King "said that we had to go in and hold up this guy who was in the military, and . . . he owed a loanshark [sic] 1.2 million dollars." King then gave Harrison a piece of paper with a drawing of the layout of a house he needed to memorize. Later that night, King produced gloves, handcuffs, zip ties, a makeshift mask, and a gun. King parked down the street from the house, gave Harrison a spark plug, and told him to break into the house through the sliding-glass door. After several failed attempts, Harrison finally gained entry into the house by removing an air conditioning unit from the master bedroom window. King then walked in the front door.

Once inside, King told Harrison to keep a lookout from a front window, while he rummaged through the house. The two men stayed in the home for twelve hours, waiting for the occupant to return. The next afternoon, a car pulled into the driveway. Harrison testified that he saw three car doors open. He told King that they had problems. Harrison wanted to leave, but King said "[n]o,

we're going to stay here and hold them up.”

The home belonged to Rita Freed and her husband, who was deployed with the Army. She and her young son had spent the night at her mother's house. Rita returned home with her son, her mother, and her husband's cousin. Upon arriving at her house, Rita noticed that the air conditioning unit was missing from her bedroom window, but thought it had fallen inside. After entering, she went to her bedroom and found it ransacked. She then encountered a masked gunman in the hallway and proceeded to run out of the house. The man followed her outside with the gun, informed her he was the police, and forced her to go back inside. At that point, she was made to lie down on the floor while the man handcuffed her, tied her feet together, and put duct tape over her eyes and mouth.

Harrison testified that King ordered him to bring Rita back into the house and bind her. He was also told to bind Rita's cousin, Mariah Freed. The men left Rita and Mariah bound on the floor. Rita's mother, Leola Johnston, was left free to care for the baby. She was allowed to get the boy some juice and put him in his crib for a nap. At some point, King spoke with Ms. Johnston. He told her they were part of the Japanese Mafia and needed money. He asked about Jay Freed, Rita's brother-in-law, and said that Jay owed them money. He wanted the women to get Jay to come to the house. Johnston told King that Jay would not come to the house, because he and Rita were not on speaking terms. She also told King that he would not find any money in the house. Eventually, King told Harrison to get some bags from the back room. Harrison got the bags and

asked Rita for her car keys. Rita remained bound and blindfolded, so Johnston retrieved the keys. Harrison took the bags to the car while King remained in the house. When Harrison returned, King took the three women to the master bedroom. Johnston sat on the floor by the closet, and King put Mariah and Rita on the bed. He then removed their bindings and blindfolds. King told Harrison to make sure they did not leave evidence behind. Finally, the men left after having held the women in the house for approximately two hours.

When police responded, Rita informed them that she recognized the voice of one of the intruders. She identified him as Gary, the former boyfriend of her friend, Vanessa Perry. Ms. Johnston said that King's accomplice had a tattoo on his arm that said, "The Ben," which matches Harrison's tattoo. That night, the police arrested and questioned Harrison, who did not implicate King at that time. The next day, the police located King and questioned him as well. King confessed to the burglary and robbery at the Freed house. The police also obtained a warrant to search King's home and car.

Harrison eventually agreed to testify in return for a plea bargain. The case took two years to come to trial. A jury convicted King of first degree robbery, first degree burglary, conspiracy to commit first degree robbery, conspiracy to commit first degree burglary, three counts of unlawful imprisonment, three counts of theft of a firearm, taking a motor vehicle, and felony harassment. At sentencing, the trial court determined that the unlawful imprisonment of Rita did not constitute an act separate from the robbery for sentencing purposes: "I think that, clearly, the unlawful imprisonment of Ms. Rita

Freed is a matter of the robbery process.” The conviction was not vacated. Instead, the judge excluded the conviction from the calculation of King’s offender score. He imposed the mandatory flat-time firearm enhancement for Rita’s unlawful imprisonment. King received a sentence of 267 months, of which 210 months were mandatory firearm enhancements.

DISCUSSION

I. Conspiracy Convictions and Double Jeopardy

The double jeopardy clauses of both the federal and Washington State Constitutions protect a defendant from multiple punishments for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). This occurs when a defendant has multiple convictions for the violating several statutes or when a defendant is convicted for violating the same statute multiple times. Id. at 633. King contends that his convictions infringe on his double jeopardy protections, because his convictions for conspiracy to commit burglary and conspiracy to commit robbery are for violations of the same criminal conspiracy statute.¹ Claims of double jeopardy are questions of law, reviewed de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

To determine if multiple convictions under the same statute violate double jeopardy, the inquiry focuses on what “unit of prosecution” the Legislature intended to punish. Adel, 136 Wn.2d at 634. Washington courts have

¹ Although King did not raise double jeopardy below, he may raise the issue on appeal, because it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Similarly, sufficiency of evidence is a question of constitutional magnitude and may be raised initially on appeal. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

determined that the “Legislature intended the unit of prosecution for conspiracy, within the meaning of double jeopardy, to be an agreement and an overt act rather than the specific criminal objects of the conspiracy.” State v. Bobic, 140 Wn.2d 250, 266, 996 P.2d 610 (2000). As a result, “the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan.” State v. Knight, 134 Wn. App. 103, 109–10, 138 P.3d 1114 (2006), aff’d, 162 Wn.2d 806 (2008). Generally, this means “one plan, one count.” State v. Williams, 131 Wn. App. 488, 496, 128 P.3d 98 (2006) (citing Bobic, 140 Wn.2d at 261), remanded, 158 Wn.2d 1006 (2006), aff’d, 147 Wn. App. 479 (2008).

In Knight, the defendant and two others agreed to commit a robbery. 134 Wn. App. at 106. The defendant pleaded guilty to conspiracy to commit burglary and conspiracy to commit robbery, but the court found that the record only supported the conspiracy to commit robbery. Id. at 110. The State had charged Knight with conspiracy to commit burglary based on an earlier plan to enter the victim’s hotel room in order to rob him, but this plan “was subsumed in the overall scheme that comprised the single criminal conspiracy.” Id. at 111. As a result, conviction on both conspiracy to commit burglary and conspiracy to commit robbery violated double jeopardy. Id. Similarly, in Bobic the defendant’s involvement in a complex car theft scheme resulted in only one conviction for conspiracy despite his involvement in a “single, ongoing, multiobjective agreement.” 140 Wn.2d at 261.

However, multiple conspiracies may be charged where the facts support

multiple criminal agreements. Id. at 266. For example, in State v. Walker, the court found multiple conspiracies to possess and deliver heroin. 24 Wn. App. 78, 79, 599 P.2d 533 (1979). According to the court, “the agreements occurred between Walker and three separate persons, at different times, places and for somewhat different purposes.” Id. at 81. To determine whether multiple criminal agreements exist, we look to whether the time, persons, places, offenses, and overt acts were distinct. Id.

Because the double jeopardy claim requires an examination of whether the record supports multiple criminal agreements, this analysis is applicable to King’s sufficiency challenge. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence. Id. All reasonable inferences are drawn in favor of the State and against the defendant. Id.

In this case, evidence shows that King initially proposed the scheme as a burglary and robbery of the military man who lived in the house. Harrison’s testimony includes two statements about his understanding of the plan. First, he testified that they “had to go in and hold up this guy who was in the military, and . . . he owed a loanshark [sic] 1.2 million dollars.” He also stated, “I was told that we were there to hold up a man that owned [sic] a loanshark [sic] money.” This evidence suggests that, at the outset, King and Harrison entered the home with

the intent to take money from a military man—Rita Freed’s husband. However, while King and Harrison took substantial steps to accomplish this by breaking into the home and awaiting their victim, they had to abandon the plan when the intended target failed to arrive. When Rita and the other women arrived, Harrison admitted the failure of their plan and wanted to leave. But, King proposed that they remain in the house to rob them: “[W]e’re going to stay here and hold them up.”

King argues that he entered into only one overarching plan—to enter the home and steal money—so that the burglary and robbery were part of the same scheme. But, King had established the “military man” as his intended victim. When the man never came home, his plan to rob the man failed. The arrival of the women presented a new opportunity, and King created a new plan with new targets. There is a defined break between the first conspiracy and the decision to embark on a new scheme. The failure and termination of the first plan and the formation of the next plan to rob new victims, while at the same residence, yields two conspiracies.

The evidence presented was sufficient to support the existence of multiple plans. The evidence is also sufficient to sustain the convictions on both the conspiracy to commit burglary and conspiracy to commit robbery without violating double jeopardy. We affirm both conspiracy convictions.

II. Insufficient Evidence of Felony Harassment

The State charged King with felony harassment for comments made to Rita about killing Jay Freed if he did not pay his debts. Felony harassment

requires a threat to kill the person threatened or any other person. RCW 9A.46.020(2)(b). “[T]he person threatened must find out about the threat . . . ; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.” State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001). A third party’s reasonable fear that the threat will be carried out does not prove felony harassment. See State v. Kiehl, 128 Wn. App. 88, 93, 113 P.3d 528 (2005). Here, the State presented no evidence that Jay heard or feared the threats. Instead, the State argued that Rita heard and feared the threat. This does not satisfy the elements of felony harassment. The State properly concedes that the evidence was insufficient to support the conviction. Furthermore, the State also properly concedes that the to-convict jury instruction misstates the elements of felony harassment by failing to include the element that Jay heard the threat and was placed in reasonable fear. As a result, we vacate the felony harassment conviction and accompanying firearm enhancement.

III. Robbery and Unlawful Imprisonment

King argues that the three unlawful imprisonment convictions should be reversed and dismissed, because they were merely incidental to the commission of the robbery. The State contends that Rita, Mariah and Ms. Johnston were unlawfully imprisoned for a reason distinct from the robbery—to terrorize them into luring Jay Freed to the house.

The concept of the unlawful imprisonment as “incidental” to the robbery stems from a line of cases originating from State v. Johnson, 92 Wn.2d 671,

678, 600 P.2d 1249 (1979), which invoked the idea to prevent the “pyramiding” of charges to increase punishment. Johnson involved convictions for first degree rape, first degree kidnapping, and first degree assault. Id. at 672. The court overturned the kidnapping and assault charges, because the legislature did not intend separate punishments for first degree rape and the assault and kidnapping. Id. at 676–77. “[T]he legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime.” Id. at 676. The court concluded, “an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” Id. at 680.

All of the analysis on these “incidental” crimes involves kidnapping and an additional crime. See, e.g., State v. Green, 94 Wn.2d 216, 226–27, 616 P.2d 628 (1980) (movement of the victim was incidental to the homicide and did not support additional kidnapping conviction); State v. Korum, 120 Wn. App. 686, 703, 86 P.3d 166 (2004) (restraint of victims during a robbery was solely to facilitate robberies and not kidnappings), aff’d in part, reversed in part on other grounds, 157 Wn.2d 614 (2006); State v. Saunders, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (kidnapping was not merely incidental to rape); State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984) (rational trier of fact could reasonably have found the abduction as a separate offense from the rape). These cases explain that “mere incidental restraint and movement of the victim

during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.” State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995). The concern is whether the restraint or movement has independent purpose. None of the case law applies the “incidental” analysis to unlawful imprisonment. But, unlawful imprisonment is a lesser included offense of kidnapping and requires knowing restraint of another person. RCW 9A.40.040(1); State v. Russell, 104 Wn. App. 422, 449, 16 P.3d 664 (2001). The restraint issue, at the heart of the “incidental” kidnapping, is present in unlawful imprisonment. Therefore, the kidnapping cases provide instruction on determining whether King’s unlawful imprisonment charges had independent purpose or were incidental to the robbery.

The determination of whether a kidnapping is incidental to another crime requires a case-by-case factual analysis. “Whether actions are merely incidental to or distinct from the actual crime charged is determined from all the facts and circumstances surrounding the crime and the nature of the acts and their relation to the crime.” Harris, 36 Wn. App. at 752–53.

Korum provides an example of kidnappings incidental to robberies. In Korum the State charged the defendant with several kidnapping charges stemming from a conspiracy to rob drug dealers in a series of home invasions. 120 Wn. App. at 689. In that case, the perpetrators restrained the victims with duct tape while searching the homes and stealing drugs, money, and other valuables. Id. at 690–92. The court determined that this restraint of the victims did not constitute separate kidnappings:

[W]e hold as a matter of law that the kidnappings here were incidental to the robberies for the following reasons: (1) The restraints were for the sole purpose of facilitating the robberies—to prevent the victims’ interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Id. at 707 (footnotes omitted) (citing Green, 94 Wn.2d at 216).

The unlawful restraint of Rita, the victim of the robbery, resembles Korum. She was restrained so that King and Harrison could complete the robbery and flee. She was not transported away from her home, and the restraints did not create a significant danger to her outside of the robbery. The State argues that King bagged the personal property for removal before Rita returned home, yet still detained her, and the others, for two hours. While King and Harrison could have completed the robbery quickly after Rita and the others arrived at the house, the property was not actually taken until King told Harrison to retrieve the bags and they left. Because the crime was not complete until King and Harrison departed with the stolen property, Rita was not bound for longer than necessary to accomplish the robbery. Rita’s unlawful imprisonment was incidental to the charged robbery.

Unlike Rita, Mariah and Ms. Johnston were not the victims of the robbery. They are distinct victims of unlawful imprisonment. As a result, their unlawful imprisonments cannot be considered part of the robbery committed against Rita.

“Crimes against multiple victims are not merely incidental to each other, but have ‘independent purpose or effect’ and are not subject to the doctrine of merger.” State v. Larkin, 70 Wn. App. 349, 358, 853 P.2d 451 (1993) (quoting State v. Hudlow, 36 Wn. App. 630, 633, 676 P.2d 553 (1984)). In Hudlow, codefendant Harper was convicted of two counts of kidnapping and one count of rape. Hudlow, 36 Wn. App. at 631. The court determined that only one of the kidnapping counts merged with the rape, because the defendant had not raped the other kidnapping victim. Id. at 633. Similarly, unlawful imprisonment was the only crime committed against Mariah and Ms. Johnston. As a result, their unlawful imprisonments were not incidental to the robbery conviction, and these convictions are affirmed. But, Rita’s unlawful imprisonment was incidental to the robbery. The conviction for her unlawful imprisonment and the accompanying firearm enhancement are vacated.

At sentencing, the trial court considered Rita’s unlawful imprisonment as part of the robbery in progress. As a result, the judge did not include this unlawful imprisonment conviction for the purposes of calculating King’s offender score. But, King was sentenced for the mandatory firearm enhancement associated with this unlawful imprisonment. The sentence and accompanying firearm enhancement are vacated.

IV. Statement of Additional Grounds

King raises several issues pro se.

A. Probable Cause to Arrest

King makes allegations that the arresting officer lied and had no probable

cause to arrest him. The record provides no evidence to support this contention. Rita Freed identified Gary King as one of the assailants, providing probable cause.

B. Search Warrant

King claims that a detective lied on the probable cause report to obtain the warrant. "Everything on the report was correct Except [sic] the Name [sic] from what I can tell is [sic] she wrote up the Probable Cause report 1st to search Ben harrison [sic] house . . . she just change[d] the name." The record does not contain the search warrant or any evidence that the detective included incorrect information.

While King does not raise this particular issue, controversy did arise about the search warrant for King's home and car during the trial. A detective obtained a telephonic warrant for the search. The warrant was faxed to the judge and back with the signature. The detective's testimony suggested that she had some initial conversation with the judge and began reading the warrant before they agreed to fax the document. King's attorney became concerned that the required recording of that conversation had not been made. This was raised several times outside the presence of the jury. In the end, counsel does not appear to have made a formal motion to exclude or for a mistrial. The testimony by the detective was equivocal and unclear about any conversation she had with the judge before faxing the warrant, but she was clear that the warrant was obtained after receipt of signature by fax. The evidence is insufficient to review whether the warrant was improperly obtained.

C. King's Statement

King contends that the judge improperly admitted his statement to the police after the 3.5 hearing (CrR 3.5). He claims that, because he was exhausted and coming down from an acid trip, his statement was not a product of rational intellect and therefore not voluntary. A reviewing court "will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

During the 3.5 hearing, King testified that he had been partying, drinking, and doing drugs for the 72 hours before his police interview. As a result, he was exhausted and coming down from an acid trip when he confessed. King's attorney argued that he did not understand his rights or that he had waived them. The trial court heard the testimony and commented on his credibility: "His answers are a mix of admissions and don't remembers. He vacillates. He doesn't remember signing, but does indicate that his signature is authentic."

In addition to King's testimony, the trial court heard from the two detectives involved in the questioning. The two detectives said that King never indicated that he did not understand his rights. The lead detective testified that, based on his experience, King did not appear intoxicated or under the influence of drugs. Examination of the taped statement showed the court that King understood the questions, responded properly, did not backtrack or require repetition. As a result, the trial court ruled that the statement was admissible:

“There is no apparent indication that he’s under the influence to the extent that he doesn’t understand what is happening or couldn’t voluntarily waive his rights.”

Substantial evidence supports the trial court’s determination that King knowingly and voluntarily waived his rights. The statement was properly admitted.

King also complains that his attorney did not “let the Jury [sic] hear about why people confessing [sic] to crimes they didn’t commit” and did not try to counter his damning statement to the police. The record proves otherwise. His attorney presented evidence about his partying and drug use to the jury. She elicited testimony that he was scared and was trying to help the police with a statement implicating Harrison. She also included reference to his activities in her closing, and said “you can hear him mumble, and you can hear him talk pretty slowly, and you can hear him really kind of sound like he’s not really there.” She attacked the credibility of the statement by raising King’s allegedly impaired state while making his statement and tried to give the jury a reason he would confess to something he did not do. King’s complaints are unfounded.

D. Closing Argument

King claims that his attorney essentially admitted his guilt during closing arguments. In her closing, defense counsel asserted the general defense that King was not involved in the events that transpired at the Freed house. She told the jury that Harrison testified in order to get back at King for his statement about Harrison’s involvement. In addition, she told the jury, “[i]f you want to think that Gary was there, he’s the person who takes Leola back into the bedroom and

says take care of the baby. Here, let's get some juice for the baby." She made similar statements throughout her closing. For example, "if you believe Gary committed this crime, he's only guilty of unlawful imprisonment for this crime" and "Gary, if he was there"

Defense counsel faced a difficult situation. She presented a general denial defense, but faced significant evidence of King's involvement in the incident, including Harrison's testimony and King's statement to the police. As a result, she could have reasonably concluded the tactical need to spin King's presence in a positive light in an attempt to mitigate that evidence. Furthermore, she may have felt the tactical need to argue in the alternative in order to persuade the jury as to lesser included offenses. This tactic succeeded in that the jury found that King was guilty of unlawful imprisonment of Rita instead of kidnapping her.

Defense counsel did not admit guilt to the jury and was not deficient in her performance.

E. Speedy Trial Rights

This case was subject to twelve continuances and took almost two years to come to trial. As a result, King alleges that his speedy trial rights were violated.

This is the timeline of continuances:

- 9/27/2005, case age 54 days, first continuance granted under CrR 3.3(f)(2) to 12/5/05 as requested by State, because codefendant Harrison's trial was set over to 12/5/05 and State witness was unavailable

- the last two weeks of November 2005. King objected to continuance.
- 12/5/05, case age 123 days, second continuance granted to 2/21/06 as requested by State because of additional counts, outstanding motion to sever, 3.5 and 3.6 (CrR 3.6) hearings, and defendant's motion for new attorney. King objected to continuance.
 - 1/25/06, King's motion to substitute counsel is granted.
 - 2/8/06, King's motion for continuance granted to 4/27/06.
 - 4/12/06, motion to sever heard.
 - 4/27/06, fourth continuance granted to 7/11/06. Both State and defendant request additional time, because Harrison agreed to plead guilty and become a testimonial witness. King signs and does not object.
 - 7/11/06, trial continued to 7/26 as requested by the State. Assigned prosecutor is in trial and Harrison had not yet been interviewed. King refused to sign.
 - 7/26/06, trial continued to 11/6/06 over King's objection. Lead detective who took King's statement is unavailable for the 3.5 hearing until August. Defense attorney's schedule did not permit a new trial until 11/6. King was offered a new attorney and earlier trial date but declined.
 - 11/2/06, defense counsel unavailable due to another trial. Continuance granted to 11/30/06.
 - 11/30/06, defense counsel is in another trial. She requests and receives a continuance to 12/13/06. King signs the order.
 - 12/13/06, defense counsel is in another trial. She requests and receives

- a continuance to 1/16/07. King signs the order.
- 1/16/07, State and defense counsel have a murder trial together and are both unavailable. King does not object to continuance to 2/26/07.
 - 2/26/07, administrative necessity requires extension to 2/27/07 due to lack of courtrooms.
 - 2/27/07, administrative necessity requires extension to 2/28/07 due to lack of courtrooms.
 - 2/28/07, administrative necessity requires extension to 3/7/07 due to lack of courtrooms. State agrees that commencement date is not reset.
 - 3/7/07, administrative necessity requires extension to 3/8/07 due to lack of courtrooms.
 - 3/8/07, re-arraignment and motion to exclude witnesses.
 - 3/12/07, 3.5 hearing. Jurors sworn.

This case experienced massive delay, but in each case the trial court determined that the defendant was not prejudiced by the continuance. The trial court's grant of a motion for a CrR 3.3 continuance or extension will not be disturbed without a showing of a manifest abuse of discretion. State v. Williams, 104 Wn. App. 516, 520–21, 17 P.3d 648 (2001). This requires a showing that discretion was exercised on untenable grounds or for untenable reasons. Id. at 521. This court has determined that it is not an abuse of discretion to grant continuances due to counsel unavailability and scheduling conflicts or to give defense counsel time to prepare. Id. at 523; see also, State v. Jones, 117 Wn. App. 721, 729–30, 72 P.3d 1110 (2003). The first continuance was

granted—over King’s objection—so that King and his coconspirator, Harrison, could be tried together and because of material witness unavailability. The trial court found that King was not prejudiced. This was not an abuse of discretion.

Furthermore, the majority of the continuances under CrR 3.3(f)(1) were granted due to schedule conflicts. The longest continuance, from 7/26/06 to 11/6/06 was due to defense counsel’s schedule. Given the long continuance, the trial court gave King the option of an earlier trial date with a new attorney or waiting until November with his current attorney. King reluctantly chose to delay the court date. This long continuance was also not an abuse of discretion under Jones and Williams.

The multiple extensions because of courtroom unavailability also do not violate King’s speedy trial rights. The commencement date was reset by the 1/16/07 order which granted a continuance until 2/26/07, with the expiration date given as 3/24/07. The trial began before this expiration date, despite the administrative delays. Even though this case took almost two years to come to trial, the continuances were not an abuse of discretion and King’s speedy trial rights were not violated.

We affirm the two conspiracy convictions. However, we vacate the convictions for felony harassment, the unlawful imprisonment of Rita Freed, and the accompanying firearm enhancements. We remand for resentencing in accordance with this opinion.

Appelwick, J.

WE CONCUR:

Jau, J.

Cox, J.