

No. 43706-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT J. HILL

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Katherine Stolz, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Procedural Facts 2

 2. Testimony at trial 2

D. ARGUMENT 11

 1. REVERSAL AND DISMISSAL IS REQUIRED
 BECAUSE HILL’S SPEEDY TRIAL RIGHTS UNDER
 CrR 3.3 WERE VIOLATED 11

 a. Relevant facts 11

 b. Hill’s speedy trial rights were violated 13

 2. REVERSAL IS ALSO REQUIRED BECAUSE THE
 PROSECUTOR COMMITTED ILL-INTENTIONED
 AND PREJUDICIAL MISCONDUCT WHICH
 CANNOT BE DEEMED “HARMLESS” 21

 a. Relevant facts 21

 b. The argument comparing the degree of certainty
 jurors would need to know where they were after
 looking out some windows to the degree of
 certainty they would need to convict was flagrant,
 prejudicial and ill-intentioned misconduct which
 compels reversal 22

E. CONCLUSION 29

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied
sub nom Campbell v. Washington, 471 U.S. 1094, 105 S. Ct. 2169,
85 L. Ed. 2d 526 (1985) 19

State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024
(2009) 11, 14, 16-17, 20

WASHINGTON COURT OF APPEALS

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review
denied, 170 Wn.2d 1002 (2010) 1, 23-25, 27, 28

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 27

State v. Day, 51 Wn. App. 544, 754 P.2d 1021, review denied, 111
Wn.2d 1016 (1988) 15

State v. Emery/Olson, 161 Wn. App. 172, 253 P.3d 314, affirmed 174
Wn.2d 741 (2012) 27

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review
denied, 131 Wn.2d 1018 (1997) 24, 28

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review
denied, 171 Wn.2d 1013 (2011) 1, 23-25, 27, 28

State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641 (2012). 24, 27

State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009) 14, 16

State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994) 21

State v. Torres, 111 Wn. App. 323, 44 P.3d 903 (2002), review denied,
148 Wn.2d 1005 (2003) 17-19

State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989) 16

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), remanded on other grounds, 164 Wn.2d 724 (2012), affirmed on remand, 2013 WL 703974 (2/25/13) 24

State v. Yuen, 23 Wn. App. 377, 597 P.2d 401 (1979) 15

FEDERAL AND OTHER STATE CASELAW

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). 21

Commonwealth v. Ferreira, 364 N.E. 2d 1264 (Mass. 1977) 25, 26

Scurry v. United States, 347 F.2d 468 (U.S. App. D.C. 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967) 25

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

CrR 3.3 1, 11, 13-15, 18-21, 29

CrR 3.3(b)(5) 14, 15

CrR 3.3(e) 14

CrR 3.3(f) 14, 16, 17

RCW 9A.36.04(1)(2) 2

RCW 9A.48.090(1) 2

A. ASSIGNMENTS OF ERROR

1. The court erred and appellant Robert Hill's CrR 3.3 rights were violated when the court continued the case past the speedy trial date in order to secure the presence of two unnamed officers and one victim without the prosecution providing sufficient evidence or information to prove those witnesses were "unavailable" and a continuance beyond speedy trial should be granted as a matter of law.
2. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct which this Court has now repeatedly condemned and which cannot be deemed "harmless."

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A continuance beyond speedy trial made over a defense objection may only be granted based on absence of a state's witness if the state shows a) that the witness is legally unavailable, b) that the witness will be available in a reasonable amount of time and c) that the state exercised due diligence in trying to secure the presence of the witness for trial.

Over defense objection, the court granted a prosecutorial request to continue the case past the speedy trial date, based on the absence of three state's witnesses. In making the request, the prosecutor did not even name the witnesses, identifying them only as "two officers" and one of the victims. The only information provided for their absence was that the latter was out of the country with the military and the officers were "not available." No further information was provided about the witnesses or their absence.

Did the trial court err and were Mr. Hill's rights under CrR 3.3 violated when the court granted the prosecution's request for the continuance even though the prosecutor failed to sufficiently show they were legally unavailable?

2. Many courts, including this one in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010), and State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011), have recognized that it is misconduct for a prosecutor to compare the certainty required to find that the state has proven its case beyond a reasonable doubt with the certainty jurors need to make even important everyday

decisions.

Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct in misstating and minimizing his burden of proof by comparing the degree of certainty the jurors would need in order to figure out what city they were in after looking out a few windows with the degree of certainty they would need to find the state had proven its case beyond a reasonable doubt?

Further, was the prosecutor's misconduct in this case especially prejudicial and ill-intentioned where the prosecutor here made the improper argument well after this type of argument had been specifically condemned by this Court and the cases in which such condemnation has been leveled involved the very same prosecutor's office?

Given that credibility was the crucial issue, can the error be deemed harmless?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Robert Hill was charged by amended information with malicious mischief in the third degree and three counts of fourth-degree assault. CP 11-12; RCW 9A.36.04(1)(2), RCW 9A.48.090(1). Motions, pretrial and trial proceedings were held before the Honorable Katherine Stolz on January 3, April 6, July 12, 16-18, 2012, after which a jury found Hill guilty as charged. CP 48-51; RP 1, 70.¹

On July 19, 2012, Judge Stolz ordered Hill to serve standard-range sentences. CP 75-81; RP 249-51.

Hill appealed, and this pleading follows. See CP 85-91.

2. Testimony at trial

On November 8, 2011, sometime before 10:30 in the evening,

¹The verbatim report of proceedings consists of two chronologically-paginated volumes, which will be referred to as "RP."

Jamie Offergeld was working as a bartender and server in the downstairs area of the Stonegate bar. RP 102-103. Offergeld, whose father owns the bar, testified that a man named Robert Hill came up to the bar that night, wanting to know who had worked as the bartender the day before because Hill was “owed money.” RP 104. When Hill asked Offergeld for the bartender’s phone number Offergeld told him she was not sure who had worked the night before, that she was very busy and that she did not have time to “deal with him” that day. RP 105. Offergeld said Hill then asked her the same questions a few times more, after which he headed towards the back hallway. RP 105.

Offergeld described the upstairs of the bar as the place where the Stonegate held “events.” RP 106. Offergeld thought, however, that, because it was a weekday, there would be no events going on that night. RP 106.

According to Offergeld, after Hill walked away, a “regular customer” told her that Hill had just gone upstairs. RP 107. Offergeld responded that she thought Hill had an event planned with her father, the bar owner, sometime in the future. RP 107. The customer then supposedly said “[n]o, there was a falling out with that deal.” RP 107. The nameless customer also said “he didn’t think” Hill was “supposed to be there.” RP 107.

At trial, Offergeld admitted that she knew that Hill had made plans to have an event upstairs at the bar. RP 117. In fact, when Offergeld told Hill she did not have time to talk to him and thought he had gone upstairs, Offergeld admitted she “didn’t think anything about” Hill having gone

upstairs, because she knew he was planning on renting out the upstairs room. RP 118.

As a result of what the customer said, however, Offergeld went upstairs, arriving to see Hill behind the upstairs bar. RP 107. Initially, Offergeld testified that Hill did not have permission to be behind the bar. RP 108. In fact, she said, there was no reason whatsoever for Hill to be behind that bar. RP 108. Offergeld's father, Lawrence Call, made a similar claim. RP 154, 166.

On cross-examination, however, Offergeld admitted that the light switch for the upstairs area was, in fact, behind the bar. RP 120. Call also admitted that, in fact, Hill had rented the upstairs area for an election-night party that very night. RP 154.

According to Offergeld, when she got upstairs, Hill hollered that he wanted his money, then picked up a thermos-type object and "slam[med] it into the POS system," the touch-screen ordering system the bar used. RP 107-108. Offergeld then said that Hill was not really "smashing" the POS system but "was just chucking it, like, throwing it." RP 108. The unit was not broken, although the thermos was dented and the microwave Offergeld said Hill had thrown "just around" stopped heating after the incident. RP 123, 160.

Offergeld ultimately conceded that Hill was not throwing things around until Offergeld told him she did not have his money and her father was not there. RP 121. It was at that point that Hill seemed to get "angry." RP 121.

Offergeld also said that she was screaming for Hill to stop and told

him she did not know what he was talking about. RP 109. He said that her dad owed him money for a deposit and wanted her to call the other bartender. RP 109. When asked by the prosecutor to describe Hill's "demeanor," Offergeld testified that it was "[v]ery strange" and he was "very scary, very offensive" to her. RP 109-10.

Offergeld said that, when she told him no one there could help him and he needed to leave, Hill started walking towards her, hollering about his money and blowing on a whistle "over and over." RP 111. She also said when he got there, he grabbed her and shook her a little bit, saying, "I want my money." RP 111. Offergeld said it seemed like Hill grabbed her clothing and shook her and a little. RP 112.

At that point, another woman, Shannon Schardien, got involved. Schardien, Offergeld's friend, was talking to her when Hill came up to the bar initially and said Hill seemed "very agitated." RP 133-36. He was trying to get the attention of the bartenders but Offergeld, who was closest, was busy. RP 136. Schardien saw Hill depart but did not see where he went and then, a short time later, she saw Offergeld run away from the bar and go upstairs. RP 136. Schardien said she heard "commotion" and went upstairs to see what was happening. RP 136.

When Schardien arrived, she said, she saw Hill grabbing Offergeld on the stairs. RP 136. She said he seemed upset and was yelling about his money and blowing on a whistle. RP 136. Schardien also thought that some things upstairs appeared "thrown around." RP 136. She admitted, however, that she did not see anyone throwing things and the only things that looked out of place were some chairs and maybe some paper, "just

random things.” RP 138.

Schardien was concerned by what she saw so she went up the stairs, put her arms in between Offergeld and Hill and told him that he needed to leave, if he was concerned about money he needed to speak to the owner during normal business hours, that “this was not okay” and for him to please go. RP 139. Offergeld thought it appeared that Schardien knew Hill when the other woman said to Hill, very firmly, “Robert, you need to stop.” RP 112. Offergeld said Schardien tried to pull them apart and Hill then grabbed Schardien. RP 112, 149.

Offergeld admitted she was “not too clear” on what happened, actually, when Schardien approached, because it was “so quick.” RP 113.

Offergeld thought Hill was “getting madder and madder,” so she went downstairs into the bar to try to get help. RP 111-14. Richard Walters, who was in the bar that night, said Offergeld “came running downstairs,” saying, “help” and “he’s crazy.” RP 46-51. At first, Walters thought Offergeld was joking. RP 51. When she repeated the same things, Walters decided to go with her, following her to the stairs where Walters said he saw Hill standing with his back facing towards them. RP 51-52. Walters said Hill was blowing a whistle and screaming, sounding upset and angry. RP 51-52.

Walters first testified that Hill had Shardien “pinned against the wall.” RP 52. Walters later admitted that he just meant that Hill was blowing the whistle “in her face and talking to” Schardien. RP 52. Walters also said he never saw Hill put his hands on Schardien but, a moment later, agreed that he had previously said to the contrary. RP 52.

Walters testified that Hill was on one step and Schardien on another. RP 62-63. Hill was saying, “[w]here’s my money?” RP 53-54. Walters said, “[h]ey, man, what’s going on?” RP 53. Hill turned and blew his whistle in Walters’ face and said, “[w]here’s my money” again. RP 53. Walters said Hill’s face was red and he was spitting in Walter’s face, so that Hill did not look “lucid.” RP 53. It was only at that point what Walters said he saw Schardien and she seemed “distracted.” RP 54.

According to Walters, Hill then released Schardien, turned and put his hands on Walters’ chest “quickly,” which left a “couple marks” and made him start to fall backwards. RP 54. Walters admitted that it was not a “push” but more like Hill was trying to grab at a lapel that Walters did not have. RP 55.

Walters said Hill “basically” fell on top of Walters and the two of them made “kind of a controlled descent down the stairs,” during which Walters was able to gain his footing. RP 55. Walters said that they did not really roll down the stairs but instead had “righted” themselves and continued down the stairs, staying on their feet. RP 65. When they got to the bottom of the stairs, Walters said, he pushed a door to the outside open, “escorted” Hill into the alley and closed the door. RP 55.

According to Walters, after Hill was escorted into the alley, Hill then reopened the alley door and said, “[w]here’s my money” once again. RP 55. In contrast, Offergeld said that, right after Hill was guided into the alley, the door was shut and locked so it could not have been reopened. RP 131.

The bar owner, Call, conceded that Hill had rented the upstairs

room at the bar for an election party on November 8th, election night. RP 154. Apparently, there had been another similar event prior to that night which Hill had held at the Stonegate but then had moved “across the street to another venue” because Call’s bar was not “all ages.” RP 153. As a result, because the first event ended early, Call had agreed to give Hill a discount price on the election night party. RP 154. Hill was to pay \$200 and provide a “deejay” while Call had a “sound guy” who was going to work, too. RP 154.

Call said the “sound guy” showed up around 5:30 or 6 that night and the party was supposed to start about 6 or 7. RP 155. Call thought that Hill was supposed to be there at 6 in order to work out something about the “adapters,” which Call had bought so that a “deejay” could use the system. RP 156-57. When Hill had not arrived by about 7:30, Call left to go somewhere else. RP 157. At 9 p.m., Call told the sound guy to go home because Hill had not shown up and neither had anyone else. RP 158.

Call knew that the party that was being planned was for election night but said he was unaware that Hill was running for office himself. RP 162. The bar owner said that, when someone rented the room, it was “[n]ot necessarily” the normal understanding that the room was rented until the closing of the bar. RP 162. Call admitted, however, that Hill’s function could have gone until 2 or the closing of the bar, however long it happened to last. RP 163. In fact, Call said, he had expected the event to last at least until midnight. RP 163.

Call conceded that Hill had rented the room for the entire night.

RP 166. Because no one had shown up, however, Call said, there was no party. RP 166.

Roxanne White, who was working as a server that night, called the police at Offengeld's behest. RP 74-77, 85, 90, 92. In the 9-1-1 call, White admitted, she told police something about the upstairs room being rented. RP 97. White admitted that what she told the 9-1-1 operator was not what she had perceived but just what she was told that night, probably by Offengeld. RP 94, 97, 102. White herself never went upstairs or saw anything out of the ordinary that night, and "just wasn't sure what was going on." RP 92. Indeed, her recollection of that night was "very blurry." RP 92, 96, 98.

Robert Hill testified that, on November 8, 2011, he was on the ballot as a candidate for city counsel and also had an initiative that he had written which was being decided. RP 173-174. To celebrate, he was planning to have a big party at the Stonegate bar, where he had previously had another party. RP 176.

Hill testified that, when he arrived, he was still thinking the party was going to happen, so he went to the lower bartender area and asked if the sound engineer or Call were there. RP 177. He wanted to know how much he owed for the adapters. RP 178.

When the bartender did not respond, Hill just went upstairs. RP 178. When he got there, he started sort of jumping and hollering, "[i]t's party time, party time." RP 182. He had to go turn the lights on behind the bar and said he was "excited, exuberant." RP 182, 187. Hill also said he was a little angry from something that had happened earlier that day,

when he had been kicked out of City Hall. RP 183.

Hill said he was sort of “touching stuff” by him and “releasing energy” by tipping over things like menu stands, napkin things, and “stuff against the wall” but did not recall if he was throwing things. RP 185.

Hill said his understanding was that the bar opened at 4 p.m. and he had the place up until closing. RP 178.

While Hill was upstairs, Offengeld came up and yelled, “[w]hat’s going on.” RP 187. Hill was saying, “[i]t’s party time” and “[s]how me the money.” RP 187. He was also asking where was the sound engineer and she was saying “I don’t know” and “[c]alm down.” RP 187.

According to Hill, Offengeld grabbed Hill’s right arm with one or both of her hands. RP 188. She started tugging on his arm and after a moment he started tugging back. RP 189. When Schardien arrived, Hill recalled her introducing herself by her Facebook name and he thought it was strange because he did not know her. RP 191. She was telling him he was not supposed to be there and to calm down but he was still wanting to talk to Call. RP 191. Hill thought it was possible that Schardien might know where Call and the sound engineer were because she might have been there for awhile that night. RP 191.

Schardien grabbed Hill’s left arm, so that she was on one side and Offengeld the other. RP 192. Hill, who was still blowing his whistle, said he tried to jerk back but did not grab anyone. RP 192-93. Instead, he thought the two women had their hands on him until he was at the bottom of the stairs. RP 193. When Walters got involved, Hill was concerned because he had things he was wearing around his neck and he was afraid

someone would pull on them and he would fall down the steps. RP 195. Hill and Walters ended up sort of pulling back and forth although Hill did not think he grabbed Walters by the shirt or lapel area. RP 196. Hill was by this time trying to disengage but they all sort of ended up walking down the stairs. RP 196.

Hill testified that all of his physical contact with Walters, Offengeld and Schardien that night were reactions and his effort to try to avoid being injured. RP 197.

D. ARGUMENT

1. REVERSAL AND DISMISSAL IS REQUIRED
BECAUSE HILL'S SPEEDY TRIAL RIGHTS UNDER
CrR 3.3 WERE VIOLATED

Under CrR 3.3, the “speedy trial” rule, a trial must be held within 60 days of arraignment, if the defendant is in custody. See State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). The trial court is responsible for ensuring compliance with the rule and, when a defendant's rights under the rule are violated, the court must dismiss the charges with prejudice. Id.

In this case, reversal and dismissal is required because Hill's speedy trial rights under CrR 3.3 were violated.

a. Relevant facts

Mr. Hill was initially charged on November 14, 2011, when the first information was filed. CP 1-2. On January 3, 2012, the parties appeared before Judge Stolz to discuss whether bail should be reduced. RP 1-8. The judge also granted a continuance, with the written order indicating the reason as follows: “[d]efense needs additional time for

investigation.” CP 5. The order continued the trial date to February 1, 2012, calculating the new expiration date as March 2, 2012. CP 5.

No hearing was held on January 23, 2012, but a notation was made in the court file that the matter had been scheduled but “due to inclement weather conditions was cancelled.” Supp. CP __ (clerk’s minute entry, filed January 24, 2012).²

On February 1, 2012, an order of continuance was entered, giving the reason of “additional time needed for interviews/negotiations” and indicating the extension was by agreement of the parties. CP 6. The order continued the trial from February 1 to February 15, stating the expiration date was now March 16. CP 6. Another order continuing trial was entered on February 15, 2012, indicating that the “plea fell through parties need to interview witnesses and prepare for trial” and that extension was by agreement of the parties. CP 7. The trial date was extended to March 20, with the new expiration date noted as April 19. CP 7.

When March 20 arrived, the case was further continued, this time because the prosecution was going to file an amended information and more time was needed for investigation. CP 8. The trial date of March 20 was continued to April 16, with the expiration date now set at May 16. CP 8.

On April 16, 2012, the parties again appeared before Judge Stolz. RP 8. The judge stated her understanding that there was a request to continue the trial because one of the assault victims was “out of the

²A supplemental designation of clerk’s papers for this document is being filed herewith.

country with the military” and two law enforcement officers were “not available.” RP 8. The court noted the case was 154 days old and there had been four prior continuances. RP 8.

The prosecutor told the court that Hill would not be “prejudiced” by a continuance because he was “currently serving a prison sentence” for another offense. RP 8. Counsel for Hill told the court, “[w]e’re opposed to any continuance of this matter.” RP 9. He said Hill wanted to go to trial and that it seemed “these scheduling issues” with witnesses “could have been known when the trial was last set.” RP 9. The court held that there was “good cause under State vs. Campbell to continue this matter.” RP 9. The written order indicated that the current trial date of April 16 was continued to May 22, with the expiration date thus changing to June 23. CP 9.

On May 22, the court continued the case again, this time because the defense had “recently received new information” regarding witnesses and needed time to “locate” and interview them. CP 10. The trial date of May 22, 2012, was continued to July 12, 2012, with the expiration date now listed as August 22, 2012. CP 10. Pretrial proceedings started on July 12. RP 10.

b. Hill’s speedy trial rights were violated

Hill’s convictions should be reversed and dismissed with prejudice, because the trial court erred in granting the April 16 continuance over Hill’s objection and the result was a violation of Hill’s CrR 3.3 speedy trial rights.

While in general, a trial court’s decision to grant or deny a motion

for a continuance is reviewed for abuse of discretion, that is not the standard used when the speedy trial rule applies. See State v. Saunders, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009). Instead, when the question is whether there was a violation of the speedy trial rule, that issue is reviewed de novo. Kenyon, 167 Wn.2d at 135. Further, a defendant need not show that he suffered any specific prejudice from a violation of CrR 3.3, unlike in a case where the constitutional speedy trial rule is raised. Kenyon, 167 Wn.2d at 136.

Under CrR 3.3, a defendant who is in custody must be brought to trial within 60 days of arraignment. Under CrR 3.3(e), however, certain times are excluded from the 60 day calculation, such as continuances granted by the court upon written agreement of the parties or a motion of a party arguing the extension is “required in the administration of justice.” CrR 3.3(e); CrR 3.3(f). Time which is excluded from the 60 day calculation under CrR 3.3(e) extends the time for trial, so that the “allowable” time for trial then expires “30 days after the end of that excluded period.” CrR 3.3(b)(5).

Here, the first continuance, on January 3, was apparently at defense request, continuing the trial date to February 1 and thus extending speedy trial to March 2, 2012. CP 5. The February 1, 2012, continuance to February 15 for “additional time needed for interviews/negotiations” then extended speedy trial to March 16. CP 6. The February 15 continuance due to the plea negotiations falling through extended the trial date to March 20, with the new expiration date of April 19. CP 7. The March 20 continuance, based on the filing of the amended information, reset the trial

date to April 16, thus extending speedy trial to May 16 under the rule, i.e., 30 days later. CP 8.

It was the April 16, 2012, continuance, granted over Mr. Hill's objection, which was improper under CrR 3.3. That continuance, which was from April 16 to May 22, purported to reset the expiration for speedy trial to the date of June 23. See CP 10. And if it had been proper, it would have had that effect under CrR 3.3(b)(5).

But the continuance was not, in fact, proper. The prosecutor's request was apparently based on the prosecutor's declarations that one of the victims was "out of the country with the military" and two law enforcement officers were "not available." RP 8. But the prosecutor presented no other information than that to justify the request to extend trial more than a month. RP 8-9.

This was simply insufficient to support a continuance in this case. In general, the unavailability of a material state's witness may be a valid ground for granting a continuance beyond speedy trial if 1) there is a valid reason the witness is not available, 2) the witness will become available within a reasonable time and 3) the continuance will not cause substantial prejudice to the defendant. See State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988). To satisfy these requirements, the prosecution must make a sufficient showing that the witnesses are, in fact, unavailable. See, e.g., State v. Yuen, 23 Wn. App. 377, 597 P.2d 401 (1979) (where the prosecutor gave details about physical illness of an absent witness, a death in the family and expected return of another and the efforts made to try to locate another, sufficient

showing made); compare, State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989) (reversal and dismissal was required where the prosecution moved for a continuance based on the unavailability of its expert witness from the crime lab, without giving any written or oral reason for that absence).

Further, under CrR 3.3(f), if a court grants a continuance brought by a party “in the administration of justice,” the court “must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2). As a result, the trial court must “articulate an adequate basis” for “continuances beyond the speedy trial limits,” including providing specifics as to the relevant facts which support granting the continuance. See Saunders, 153 Wn. App. at 219-220; Kenyon, 167 Wn.2d at 138-39.

Thus, in Kenyon, the Supreme Court reversed and dismissed the defendant’s conviction after multiple continuances, including one which was granted because the trial court was presiding over another case and was thus unavailable. 167 Wn.2d at 135-37. The trial court had held that this was an “unavoidable circumstance” and this Court had held that the “conflict” between the judge’s schedule and the trial was due to the defendant’s own requests for extension, made by his counsel, so that there was no issue. 167 Wn.2d at 138. This Court had also found that the trial court had been “careful to document” the reason for each continuance and thus the speedy trial rule was not violated. Id. But the Supreme Court disagreed, finding the record insufficient to support the continuance due to the judge’s unavailability, because there was “no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tempores” who could have heard the case, nor was

there anything in the record noting what other courtrooms or judges might have been available. Id.

Put simply, under CrR 3.3(f)(2), the Court noted, the trial court was required to state on the record or in writing the reasons supporting the continuance and the failure to document the relevant facts resulted in an improper continuance, in violation of the defendant's rights to speedy trial. 167 Wn.2d at 139.

Similarly, in State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), review denied, 148 Wn.2d 1005 (2003), the prosecution failed to provide sufficient evidence to support granting a continuance over defense objection. The state moved for a continuance because its investigator was scheduled to go through some training on the relevant day. 111 Wn. App. at 328. On appeal, the defendant noted that the court had "made no inquiry whatsoever on the record" about whether the training was "out of the ordinary" or essential or that it "could not be rescheduled." Id. While speculating that such an inquiry might have been made in a case which was ultimately consolidated with the case on appeal, the Court noted that the record from that other case was not before it. 111 Wn. App. at 331.

The Torres Court then declared that the record before it was "insufficient to support a continuance past the speedy trial period," that the trial court "simply accepted at face value" the prosecutor's "assertion that officer training was good cause for delay." Id. And the Court noted that the trial court had made "no factual inquiry and no findings," never asking things like whether the testimony was crucial to the state's case, whether the training was different, special or just routine, or whether it could be

rescheduled. Id. The Court affirmed on other grounds, however, because the parties agreed to have the case consolidated with another which was sufficient reason for the delay. Id.

Here, the only information in the record was the declarations that one of the victims, unnamed, was “out of the country with the military” and two law enforcement officers were “not available.” RP 8. The written order of continuance parroted these declarations and also included the prosecution’s declaration that Hill was “also currently serving [a] sentence for [an]other matter.” CP 9.

This was simply insufficient to prove the requirements for granting a continuance beyond the speedy trial over defense objection. The record is devoid of any information whatsoever about why the law enforcement officers were “not available” or even to which officers the prosecutor referred, let alone whether they were so necessary to the state’s case that a continuance beyond speedy was warranted. RP 8-9. Indeed, the prosecutor did not name the missing *victim*, let alone provide information such as how long the prosecutor had known the witnesses would not be available, what efforts the prosecutor made to try to get the victim and officers to court on time, when the missing witnesses were expected back, etc., to prove that the witnesses were, in fact, “unavailable” as a matter of law and that they would become available within a reasonable time or even within the nearly six week continuance that the prosecutor was asking the court to grant.

But a witness is not “unavailable” for the purposes of CrR 3.3 simply because they are not physically present in court. Torres, 111 Wn.

App. at 331. Instead, as the Torres Court noted, “[f]or the purposes of CrR 3.3, an ‘unavailable’ witness is one whose testimony cannot be contrived by any means,” and “[t]he word ‘unavailable’ is not used in the social sense of having a previous engagement.” Torres, 111 Wn. App. at 330-31.

Further, the trial court’s decision appears to have also relied on caselaw which did not apply. In ruling, orally, the trial court also declared that there was “good cause under State vs. Campbell to continue this matter.” RP 9.

That case, however, did not support the continuance in this case. In State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied sub nom Campbell v. Washington, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985), a murder trial, defense counsel asked for a continuance over the defendant’s objection because of the magnitude and complexity of the case. The question on review was whether it was an abuse of discretion or a violation of the defendant’s speedy trial rights to grant such a continuance despite the defendant’s personal objection. 103 Wn.2d at 13-14. In that context, the Supreme Court held that there was “good cause” to permit a continuance when counsel was unprepared to go to trial and, if forced to go forward, would likely have committed ineffective assistance. Id. The continuance was proper, the Court held, in order to “ensure effective representation and a fair trial.” Id.

Here, however, it was not *counsel* who requested the continuance - it was the state. RP 8. The question was not between the two evils of violating a defendant’s rights to speedy trial or violating his rights to have adequate assistance of counsel as in Campbell; it was whether to grant a

continuance over defense objection based on “unavailability” of crucial state’s witnesses.

Further, to the extent the court’s decision was based on the belief that Hill would not suffer “prejudice” because he was already serving a sentence in a different case, CrR 3.3 does not authorize granting a continuance over defense objection simply because the defendant cannot show he would be “prejudiced” by the delay. Instead, it sets forth specific requirements for granting such delay, requiring the trial court to first determine that the missing witness was legally unavailable and would become available within a reasonable time.

And again, under CrR 3.3, when a continuance is improperly granted past the speedy trial date, this Court does not look at whether there is evidence of “prejudice” caused by the delay - reversal and dismissal is required. Kenyon, 167 Wn.2d at 136.

The continuance on April 16, 2012, was improperly granted. The prosecution failed to provide sufficient support or evidence to show that the missing witnesses were actually legally and truly “unavailable” and that they would become available within a reasonable time. As a result, the order of March 20 controlled and the speedy trial expiration date was 30 days past the trial date set in that order, i.e., May 16. See CP 8. But the parties did not appear and trial did not start by May 16. Indeed, from the improper continuance granted on April 16 to May 22, the parties did not appear. The next continuance was not granted until May 22, six days after speedy trial had already run. Hill’s CrR 3.3 rights to a speedy trial were violated in this case and reversal and dismissal with prejudice of all

charges is thus required.

2. REVERSAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR COMMITTED ILL-INTENTIONED AND PREJUDICIAL MISCONDUCT WHICH CANNOT BE DEEMED “HARMLESS”

Even if the violation of Mr. Hill’s CrR 3.3 speedy trial rights did not compel reversal and dismissal of the charges, reversal and remand for a new trial would be required based on the prosecutorial misconduct in this case.

Unlike all other attorneys in our criminal justice system, prosecutors, as “quasi-judicial” officers, enjoy a special status and, in turn, have special duties. See, Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). One of those duties is to act in ways which ensure fairness in a criminal proceeding even at the expense of “losing” a conviction. Id.; see State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In this case, the prosecutor failed in those duties by misstating and minimizing the prosecutor’s constitutional burden of proof beyond a reasonable doubt. Further, the prosecutor did so even after this Court publicly condemned the very same kind of misconduct as flagrant and ill-intentioned. Given the facts of the case, the misconduct cannot be deemed “harmless.”

a. Relevant facts

In rebuttal closing argument, the prosecutor told the jury that he was going to use his “artistic abilities and demonstrate reasonable doubt.”

RP 234. He went on:

If I were to take you from the building and drive you around in the back seat of a limousine with a blindfold on for 40 minutes, okay, so 40 minutes - you can go 40 minutes this way, that way, or you can go around in a big circle, you don't know where you're going - - and I bring you up to a building that has ten flights of stairs, and I put you in a room, and I take your blindfold off, and you see three windows and a chair in the middle, and I have you sit in the middle, and then I say, let's do a little experiment here; go look out that first window and see what you see, and you do; you go out, and you look out the first window, and you see a mountain, and then I tell you - - you know, I say, **can you tell me beyond a reasonable doubt where you are?** You know you're in Washington because you didn't go that far in the car. You went 40 minutes; but you say to me, I can still be in Tacoma because I can see that beautiful mountain from right out there on the highway, and I show you a body of water. I ask you to look out the next window, and you do; and of course, you see this large body of water and you say, wait a minute, you know. I say, **can you tell me beyond a reasonable doubt where you are?** And you say, of course not. I can see the water from Tacoma. I can see it from Seattle. I don't know where I am beyond a reasonable doubt. But then I say, look out the third window, and you do, and you see this thing that you recognize right there, and it's the Space Needle, and it's as big as day, and you see it. **You know beyond a reasonable doubt you're in Seattle, and I don't have to show you the EMP.** I don't have to show you the Seattle Art Museum. I don't have to show you - - I don't have to show you a hundred things. I don't have to show you a thousand things. I've showed you three things, and you were convinced beyond a reasonable doubt; so the argument where there's evidence or lack thereof, there's not a lack of evidence here, folks. There's enough evidence for you to find the defendant guilty beyond a reasonable doubt.

RP 235-36 (emphasis added).

- b. The argument comparing the degree of certainty jurors would need to know where they were after looking out some windows to the degree of certainty they would need to convict was flagrant, prejudicial and ill-intentioned misconduct which compels reversal

The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct in making these arguments. Indeed, there can be no question that these arguments were misconduct because, at the time they were

made, this Court had already condemned them.

Beginning with Anderson, supra, this Court specifically declared that it was improper and misconduct for a prosecutor to compare the standard of proof beyond a reasonable doubt to the degree of certainty people used when making everyday decisions. 153 Wn. App. at 431-32.

This Court declared:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions - both important decisions and relatively minor ones - the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant].**

153 Wn. App. at 431 (emphasis added).

Shortly after Anderson was decided, this Court reiterated its holding and reasoning in a case where the prosecutor used the analogy of figuring out what picture was depicted on a puzzle when the jurors only had half of it done to deciding whether the prosecution had met its burden of proving the defendant's guilt beyond a reasonable doubt in that case. Johnson, 158 Wn. App. at 682. The prosecutor told the jury that, "at this point, even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." On review, this Court found Anderson controlling and declared:

the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to.

Johnson, 158 Wn. App. at 684-85. Even though defense counsel failed to object below, this Court reversed, finding that the misconduct was so flagrant and ill-intentioned, the prejudice was incurable and thus compelled reversal. 158 Wn. App. at 685.

Indeed, the Court found that such reversal was required even though the arguments were made by the trial prosecutor in Johnson before Anderson had been decided. Johnson, 158 Wn. App. at 686. This Court noted that, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), it had been held that misconduct was flagrant, prejudicial and ill-intentioned in part because it was made after a published decision condemning it. Johnson, 158 Wn. App. at 685. This Court nevertheless held that the misconduct was so serious and prejudicial that reversal could still be predicated on its making even though there was no previous published decision finding the argument improper. Id.

This Court reiterated its holding in State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), remanded on other grounds, 164 Wn.2d 724 (2012), affirmed on remand, 2013 WL 703974 (2/25/13). In that case, the prosecutor compared the decision jurors had to make in deciding guilt to decisions like having surgery and leaving children with a babysitter. 164 Wn. App. at 732. Quoting Anderson, this Court again held that such arguments “minimized the importance of the reasonable doubt standard and of the jury’s role in determining whether the State had met its burden.” Walker, 164 Wn. App. at 732; see also, State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641 (2012).

The decisions in Anderson and Johnson brought our state in line with the many courts which have condemned comparing the unique decision-making which occurs in a criminal case with decision-making jurors engage in outside the courtroom every day, making decisions on even extremely important personal matters. For example, more than 40 years ago, a federal court recognized the distinction, noting that a prudent person acting even in “an important business or family matter would certainly gravely weigh that decision but still would not “necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). The duty a juror has to determine a defendant’s guilt is “awesome,” a Massachusetts court declared, so that comparing that duty to making even important decisions “understated and tended to trivialize” it. Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1272 (Mass. 1977).

Put another way, the court stated, comparisons with even the certainty jurors have when they make important decisions is improper and a misstatement of the constitutional burden because such comparisons, “far from emphasizing the seriousness of the decision” before the jury, “detracted both from the seriousness of the decision” and the state’s burden of proof. Ferreira, 365 N.Ed. 2d at 1273. Further, the arguments misstated the jurors’ task because, the Court declared, “the degree of certainty required to convict is unique to the criminal law.” Id. Indeed, the Court declared:

We do not think that people customarily make private

decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

Ferreira, 364 N.E. 2d at 1273 (quotation omitted) (emphasis added).

Here, the analogy the prosecutor used was essentially the same as the puzzle analogy this Court had already condemned by the time this trial occurred. The prosecutor's closing argument walked jurors through the analogy as people, telling them to imagine themselves in the situation where he had blindfolded them and driven them in a car for 40 minutes, then taken them to a room and shown them one window after another to see if they could figure out, "beyond a reasonable doubt," where they were. RP 235-36. And in case jurors missed the inference, the prosecutor then made it clear he was comparing knowing where you were when you looked out each window to deciding whether Hill was guilty beyond a reasonable doubt of the crimes with which he was charged. He linked it, asking jurors if they would be able to answer the question of where they were "beyond a reasonable doubt" if, already knowing they were in Washington, after looking out the first window and seeing a mountain, the second window and seeing water and then the third window and seeing the Space Needle, they would be convinced beyond a reasonable doubt they were in Seattle. RP 235-36.

Further, he quantified the amount of evidence needed, saying he did not have to show them more than three things and they could be convinced beyond a reasonable doubt where they were, just as he did not have to provide more evidence to prove his case. RP 235-36.

Even though all of these cases, save Lindsay, were decided before trial here and even though nearly every case on this point involved the same prosecutor's office as in this case, the prosecutor in this case specifically made the **very same kind of argument** this Court had disavowed.

There is no question that, under Anderson and Johnson, the prosecutor's arguments in this case were misconduct which misstated and minimized the prosecutor's constitutionally mandated burden of proof, inviting the jury to convict on far less proof than actually required.

Reversal is required. Where there is no objection below, reversal is required for misconduct where it is so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). As this Court held in Johnson, this type of argument is so prejudicial that it may compel reversal. Johnson, 158 Wn. App. at 684-85. The question is whether there is conflicting evidence and/or credibility is crucial. See, e.g., State v. Emery/Olson, 161 Wn. App. 172, 195, 253 P.3d 314, affirmed 174 Wn.2d 741 (2012).

Here, those standards are met. Mr. Hill's version of events was starkly different than the version given by the prosecution's witnesses. His credibility and that of those witnesses was the only issue in the case. Thus, this was a case where the proper definition of proof beyond a reasonable doubt was especially important, to ensure a just verdict, properly rendered by a jury which understood the constitutional burden the prosecution had to bear. Clearly, given the lack of strong evidence in this

case, a reasonable jury could well have been affected by the prosecutor's improper arguments. And a reasonable juror could well have decided the case based upon far less than proof beyond a reasonable doubt, because of the prosecutor's flagrant misstatements.

Further, there is another reason the argument was flagrant and ill-intentioned, as well as prejudicial. In Fleming, *supra*, the Court found that certain arguments met those standards in large part because the prosecutor made them even after they had been condemned in a published case. 83 Wn. App. at 214. And in Johnson, this Court held that the a similar analogy was so flagrant, prejudicial and ill-intentioned that it compelled reversal even though at the time the prosecutor made the improper argument, Anderson had not yet been decided. Johnson, 158 Wn. App. at 684-85.

Here, not only had Anderson been decided before the prosecutor had made the arguments - so had Johnson. Thus, there was binding, precedential caselaw from this Court directed specifically at the very same prosecutor's office, holding the arguments made here improper. There can thus be no question that the prosecutor was or should have been aware of this Court's decision in Johnson condemning comparing deciding a criminal case with figuring out something trivial, like figuring out if you were in a particular city based on looking out a few windows.

As the Court said in Fleming, "trained and experienced prosecutors do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." 83 Wn. App. at 215-16.

The misconduct in this case was flagrant, prejudicial and, given its timing, clearly ill-intentioned. Further, it invited the jurors to convict based upon far less than the constitutionally mandated burden of proof. The error was not harmless and not “cured” by general instructions. Even if this Court does not grant reversal and dismissal based upon the violation of Hill’s speedy trial rights under CrR 3.3, reversal and remand for a new trial is required based upon the flagrant, prejudicial and ill-intentioned misconduct in this case. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Hill the relief to which he is entitled.

DATED this 20th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant’s Opening Brief to opposing counsel by e-filing through this Court’s system this date, and by first-class mail, postage prepaid, to Mr. Robert Hill, . . . BKG 2012227012, 910 Tacoma Ave. S., Tacoma, Wa. 98402.

DATED this 20th day of March, 2013.

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