

NO. 44866-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

COURTNIE DANIELLE CROSBY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 12-1-00846-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying defendant's motion to continue on the day of trial to explore the theory of a battered woman syndrome defense?

B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2012, the Pierce County Prosecutor's Office charged COURTNIIE DANIELLE CROSBY, hereinafter "defendant" with one count of assault in the first degree, one count of robbery in the first degree and one count of violation of a court order. CP 1-3. All counts were domestic violence related and the assault and robbery counts included deadly weapon enhancements. CP 1-3. Two other defendants were also charged as co-defendants of Crosby. 1RP¹ 1-2

¹ The verbatim record of proceedings contains ten volumes, which will be referred to as follows:

November 13, 2012, as "1RP";

January 29, 2013, as "2RP";

March 4, 2013, before Judge Chushcoff, as "3RP";

March 4, 2013, before Judge Culpepper, as "4RP";

March 5, 2013 as "5RP"

The chronologically paginated volumes including March 6, 7, 11, 12 and 13, 2013, as "6RP";

May 3, 2013, as "SRP."

Between April of 2012, and November of 2012, defendant's case was continued by agreement of both parties twice for further investigation, preparation and medical reasons. CP 6-8; 1RP 1. On November 17, 2012, all parties except defendant agreed to continue the trial date as one of the other co-defendants had just been assigned a new attorney who needed time to prepare. 1RP 1-2. Defendant objected to the continuance and requested a new attorney. 1RP 2-3. The court granted the continuance and denied defendant's request for a new attorney. 1RP 5-6.

After that hearing, defendant's attorney, Michael Clark, requested the assistance of another defense attorney, Paula Olson, to help him on the case after he and defendant began having a communication breakdown. 2RP 5. On the January 29, 2013, Mr. Clark asked the court to allow him to withdraw from defendant's case and allow Ms. Olson to substitute in as defendant's attorney as she was already familiar with the case. CP 13; 2RP 5.

The State objected, indicating they were ready for trial and were concerned with the amount of time Ms. Olson would need to catch up and prepare for trial. 2RP 6-10. Ms. Olson told the court she had already read the discovery, discussed it numerous times with defendant and Mr. Clark, did not believe she would need to re-interview the victim and indicated she could be ready for trial within a month. 2RP 11-12.

Concerned a month may not be enough time, the court again inquired of Ms. Olson about whether she would be ready. 2RP 13-14. Ms. Olson stated she had been involved in the case for three months, had read through all discovery and had conversations with defendant and Mr. Clark both together and separately regarding the case. 2RP 14. The court continued the case for one month and Ms. Olson substituted in as defendant's attorney. 2RP 16; CP 13-14.

On March 4, 2013, before Judge Bryan Chushcoff, the parties agreed to sever defendant's case from her co-defendant's as his counsel was in trial elsewhere. 3RP 4. The State also declared ready to proceed to trial. 3RP 4. Ms. Olson requested a continuance indicating she had learned two and a half weeks earlier about a history of abuse the defendant suffered and as a result, believed defendant may suffer from battered woman syndrome. 3RP 4-6.

The State objected to the continuance, arguing that the only known history of domestic violence between the parties was the defendant's conviction for assault. The State also pointed out the victim in the case was the subject of a protection order against the defendant. 3RP 6-7. The State questioned the battered woman syndrome defense saying it is generally a claim of self defense and would not apply to the facts of defendant's case where she denied any involvement in the attack. 3RP 7.

After much discussion, the court agreed with the State, unsure of how battered woman syndrome applied to defendant's situation and assigned the case for trial to Judge Ronald Culpepper. 3RP 17-18.

The parties appeared before Judge Culpepper for trial and the State filed an amended information adding one count of residential burglary. 4RP 4-6; CP 25-27. Ms. Olson renewed her request for a continuance and the State objected and requested to proceed to trial. 4RP 7-22. Ms. Olson outlined the defense theory of the case that the defendant was unaware and not involved in any plan to rob or harm the victim. 4RP 24-27. The court stated that he could not see how battered woman syndrome would play any role in the defense theory of the case and denied the continuance noting the case had already been pending for 11 months. 4RP 25-29.

On March 5, 2013, during the CrR 3.5 hearing on the second day of trial, defense counsel filed a brief in support of a continuance to further investigate a battered woman syndrome defense. CP 28-30; 5RP 5-6. After some argument, the court again denied defense counsel's request. 5RP 12.

On March 13, 2013, the jury found defendant guilty of robbery in the first degree, violation of a court order and residential burglary. 6RP 532-533; CP 67-73. The jury also found defendant or an accomplice was armed with a deadly weapon during the robbery and burglary. 6RP 532-533; CP 67-73. The court sentenced defendant to a total of 77 months in custody. SRP 14-15; CP 84-102.

2. Facts

Between June of 2011, and December 28, 2011, Felix Preval and the defendant had a romantic relationship. 6RP 110. The defendant and her two children lived with Mr. Preval before they broke up in December of 2011. 6RP 110. At some point during their relationship, a protection order was entered prohibiting defendant from having contact or living with Mr. Preval. 6RP 112.

On December 28, 2011, the defendant called Mr. Preval and wanted to retrieve some of her belongings from his apartment. 6RP 112-113. After initially going to Mr. Preval's and getting into an argument and leaving, the defendant returned to his home again later that night. 6RP 118. Mr. Preval helped defendant carry two loads of her things to her car when he felt something strike him near his right eye and he dropped to the floor. 6RP 118-121. Mr. Preval felt arms around his neck choking him. 6RP 121-122. Defendant did nothing. 6RP 122-123. Mr. Preval looked to his side and saw an individual wearing a gray mask with white eyes and big ears. 6RP 122-123. The man holding Mr. Preval and the masked man began hitting Mr. Preval. 6RP 123-124. Mr. Preval saw the defendant lean down and kiss one of the men. 6RP 124.

The two men dragged Mr. Preval inside his home and began asking him where the money and drugs were. 6RP 124-128. Mr. Preval asked them not to hurt him and he showed them a closet where he had \$19,000

hidden. 6RP 128-130. The two men got the money and grabbed a knife. 6RP 130-131. The man not wearing a mask lifted Mr. Preval up from the floor with his arm. 6RP 131. The two men stabbed Mr. Preval four times in the midsection, but he could not tell which one did the stabbing. 6RP 131-132. The defendant was in the same room facing Mr. Preval while this happened. 6RP 132.

After they stabbed Mr. Preval, the masked man took him to the kitchen. 6RP 146. He held Mr. Preval's face near a burner while he looked for something to light the burner with. 6RP 147. Mr. Preval attempted to fight, but the man hit him and Mr. Preval began to lose consciousness. 6RP 146-48. Someone yelled "the police" and the man released Mr. Preval before running away. 6RP 148. After everyone was gone, Mr. Preval lay unconscious for a short period before he was able to lock his front door and call the police. 6RP 148-149; 176. Police and medics arrived shortly thereafter and found Mr. Preval lying on the floor bleeding heavily and moaning from pain. 6RP 226-227. They attempted to stop the bleeding and treat Mr. Preval before he was transported to the hospital. 6RP 149-151; 227.

Officers found a knife, a barbeque fork and a plastic gun in Mr. Preval's home. 6RP 217. A K-9 track for the suspects was unsuccessful. 6RP 218-221. As part of their follow up investigation, police officers confirmed the no contact order preventing the defendant from contacting

Mr. Preval was valid and in effect on the date of the incident. 6RP 198-199.

Mr. Preval spent three days in the hospital. 6RP 151-152. When he arrived, doctors had to perform surgery and cut Mr. Preval from his rib cage to his belly button in order to determine the level of injury the stab wounds had caused. 6RP 247. Doctors had to sew up four holes in Mr. Preval's stomach that were caused by the stab wounds that if left untreated would have killed him. 6RP 247-248. While Mr. Preval was recovering in the hospital, the defendant sent him multiple text messages asking how he was feeling. 6RP 152-154. The defendant also told Mr. Preval she had been raped. 6RP 153. About a month after the incident, Mr. Preval was shown a photo montage and identified the man without a mask as Darnell Jones. 6RP 181, 323. He was unable to identify the person who wore a mask. 6RP 182, 326.

Detective Robert Baker first spoke with defendant on February 1st at the Tacoma Police Department. 6RP 296-298. She said the night of the incident an unknown individual tackled Mr. Preval. 6RP 303. Defendant said she tried to call 911 with her cell phone, but she was tackled to the ground by another person who took her phone. 6RP 303. Defendant cried as she told detective she was sexually assaulted in a back bedroom in the home. 6RP 305-306. She described how one of the suspects hit her with a

black cord, forced her to strip naked, took photographs of her and then raped her. 6RP 306-307. She said at one point she tried to escape, but the door was locked and the suspect cut her wrist with a knife. 6RP 307. Defendant said she bled all over the floor. 6RP 307.

Defendant said the suspect eventually left and she got dressed and was able to get out of the bedroom. 6RP 307. When the men left Mr. Preval's home, defendant said she drove home, showered and threw away her clothes. 6RP 311-312. She said she did not call 911 because she did not want to be blamed for the robbery. 6RP 312.

After the interview, detectives got a search warrant to look for evidence of the sexual assault in Mr. Preval's home. 6RP 320-321. Technicians tested suspected liquids from the carpet in Mr. Preval's bedroom and were unable to find any evidence of a sexual assault. 6RP 322. On March 8, after being read her rights, the defendant was interviewed at the Tacoma Police Department by Detective Heath Holden. 6RP 272-287. Detective Robert Baker observed the interview in another room. 6RP 326-327.

After her interview with Detective Holden, Detective Baker spoke with defendant. 6RP 327. He confronted her about discrepancies between the two interviews and told her they knew she had set up the robbery. 6RP 327-328. Defendant began crying uncontrollably and admitted she had

received \$2,300 from the robbery. RP 328, 351. Defendant identified one of the participants as Darnell Jones from the same photo montage that was shown to Mr. Preval. 6RP 330-331.

Defendant told Detective Baker she called Darnell to help her get her stuff from Mr. Preval. 6RP 333. She denied intending to rob Mr. Preval of drugs or jewelry, but admitted the plan was to rob him of money. 6RP 333-334. She also said Darnell had worn a mask because Mr. Preval had met him earlier and they were concerned Mr. Preval would be able to identify him. 6RP 336. She also admitted a man named YG was the other man who helped with the robbery. 6RP 335-336. She admitted she had not been sexually assaulted. 6RP 337.

On March 9th, defendant asked to speak with Detective Baker from the jail. 6RP 337-339. She said that during the incident, Darnell instructed her to go to the back bedroom, move things around and make it sound like she was getting hit. 6RP 342. She said she found an airsoft gun, went into the kitchen and pointed it at YG threatening to shoot him. 6RP 339, 342. He told her to do it and she put the gun down and left the residence. 6RP 342.

Defendant chose to testify during the trial. 6RP 360. She admitted there was a protection order in place that prevented her from talking to Mr. Preval. 6RP 383, 441-442. She testified that on the night of the incident she drove Darnell Jones' car with him and another man named YG to Mr. Preval's home to collect her belongings. 6RP 390-393. On the way there, YG jokingly said they were going to rob Mr. Preval. 6RP 394. Defendant said she told them they couldn't because there were security cameras and bars on the windows that would catch them unless they walked along a certain side of the house. 6RP 394, 444. Defendant said she dropped YG and Darnell off a block before she went to Mr. Preval's. 6RP 395.

Defendant claimed when she and Mr. Preval were attacked, one man was wearing a mask and she did not recognize the other. 6RP 398-402. She said she eventually recognized Darnell's voice when they were inside the home. 6RP 403. Defendant testified she was panicking during the incident, ran inside a room to try to get out and saw a BB gun. 6RP 405-406. She said she risked her life by taking the BB gun and pointing it at YG and Darnell saying she would shoot if they did not leave. 6RP 406. Defendant said Darnell took the gun from her and hit her on the side of the face causing an injury to her eye. 6RP 406-407.

Defendant testified after Darnell and YG got the money and left, she ran out of the home because she was terrified and just wanted to get

out. 6RP 414. She said as she was driving away in Darnell's car, Darnell and YG made her stop and they got in. 6RP 415-416. She said they told her not to call the police and gave her an envelope, but she didn't know there was money in it until later. 6RP 416-417.

Defendant said the first time she talked with Detective Baker, Darnell told her what to say, including the lie about the rape. 6RP 426. She said she had bad anxiety and had a panic attack during the interview. 6RP 429. Defendant said the second time she spoke to Detective Baker she told him a different story, but not the truth because she was scared of YG and Darnell. 6RP 433. The third time she talked to Detective Baker from the jail, defendant said she told Detective Baker what he wanted to hear so she would not have to spend 20 years in prison. 6RP 438-440.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO CONTINUE ON THE DAY OF TRIAL TO EXPLORE THE THEORY OF A BATTERED WOMAN SYNDROME DEFENSE.

The defendant is not entitled to a continuance as a matter of right. The decision whether to grant or deny a continuance rests within the sound discretion of the trial court and is reviewed under an abuse of discretion

standard. *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Discretion is abused only "if no reasonable person would have taken the view adopted by the trial court". *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983)(citing *State v. Cadena*, 74 Wn.2d 185, 188-189, 443 P.2d 826 (1968)). The decision is discretionary because the court must consider various factors including diligence, materiality, due process, a need for an orderly procedure, and the possible impact on the result of trial. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

There is no mechanical test to determine whether the denial of a continuance deprived the defendant of a fair trial. The appellate court should examine the totality of the circumstances in each case. *State v. Kelly*, 32 Wn. App 112, 114-115, 645 P.2d 1146 (1982) at 114-115. To show the trial court abused its discretion, the appellant must make a "clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Dowing*, 151 Wn.2d at 272-273 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Defendant in the present case contends the court should apply a de novo standard of review to the issue at hand. See Appellant's Opening Brief 20-21. However, in accordance with *State v. Sutherland*, the denial of a motion for a continuance is reviewed under an abuse of discretion standard even though Sixth amendment rights are at issue. 3 Wn. App. 20,

22, 472 P.2d 584 (1970). Whether a trial court's denial of a continuance violated a defendant's constitutional right to present a defense is reviewed on a case by case basis, examining "the circumstances present in the particular case." **Downing**, 151 Wn.2d at 275 n. 7 (*quoting Eller*, 84 Wn.2d at 96).

Even where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (*citing Eller*, 84 Wn.2d at 95-96; *see also State v. Edwards*, 68 Wn.2d 246, 255, 412 P.2d 747 (1966)).

In the present case, the trial court did not abuse its discretion in denying defendant's motion for a continuance when the decision is viewed in light of the totality of the circumstances and the particular facts of the case. Defendant cannot be said to have been prejudiced by the denial of the continuance given the length of time both counsels had to prepare the case and the fact that it is speculative at best to assume the battered woman syndrome defense would have even been applicable to defendant's case. Further, it cannot be said that defendant's trial would have been different if the continuance were granted given the uncertainty of the

admissibility of the defense and the overwhelming evidence against defendant that was presented at trial.

- a. Defendant cannot show she was prejudiced by the denial of the continuance.

Defendant had two attorneys investigating and preparing her case for trial for just under a year. Michael Clark was the initial attorney assigned to the case who investigated and prepared for trial between April of 2012 and January of 2013. The case was not complex or daunting in comparison to others. There were four charges, each stemming from the single incident on the night of December 28, 2011. CP 1-3;25-27. The State's list of witnesses contained a limited number of witnesses and consisted of the victim, a doctor, the 911 tape analyst and ten Tacoma Police Department officers. CP 123-126.

As a result of a deteriorating relationship with defendant in November of 2012, Michael Clark enlisted the assistance of another attorney, Paula Olson, to assist in defendant's case. 2RP 5. At a hearing on January 29, 2013, Mr. Clark asked to be allowed to withdraw from the case and have Ms. Olson substitute in for him. 2RP 4-6. The State and the court expressed significant concern over the ability of Ms. Olson to take over the case at that point and be ready for trial in one month on the March 4th trial date. 2RP 6-12. Ms. Olson assured the court she was

already familiar with the case and had been involved with the case for approximately three months. 2RP 13-14. She assured the court multiple times she would be ready for trial on March 4th. 2RP 11-15. She described reviewing discovery and having discussions with the defendant, and Mr. Clark numerous times about the case. 2RP 11-12.

In the same hearing, the court again expressed concern about the defendant changing lawyers saying the case was already 326 days old and again asking Ms. Olson:

THE COURT: Ms. Olson, really, really, really, really, you can be ready on March 4th? If you were a brand-new lawyer walking into this thing, I really don't feel like I can hold you to that. You have actually seen the discovery and talked to the defendant, so you should have a basis --

MS. OLSON: Your Honor, I would say I have been involved in this case, you know -- I'm going to say approximately three months.

THE COURT: So, you feel confident.

2RP 13-14. Wanting to ensure everyone was on the same page, the State went on to make a record that there were no more plea negotiations taking place in defendant's case, and unless defendant chose to plead guilty as charged, the case would be proceeding to trial on March 4th. 2RP 14-16. The court reiterated that sentiment saying "Ms. Olson knows that she's going to have to actually really, really be ready for trial probably." 2RP 16.

Both counsel had ample opportunity to investigate and prepare the case. Defendant's case had been pending for almost exactly a year when trial began on March 4, 2013. Michael Clark had investigated the case for seven months and Ms. Olson was on the case for approximately four months before the March 4th trial date. There is no question that despite the denial of the motion to continue for further investigation of the battered woman's syndrome defense, defendant's case had been thoroughly investigated and prepared for trial by competent defense counsels. Defendant cannot argue either counsel was unprepared given the amount of time both counsels had to prepare her case and the fact that Ms. Olson reassured the court numerous times she would be ready on the March 4th trial date.

Defendant further fails to show she was prejudiced by the denial of the continuance when the battered woman syndrome defense was merely a theory of a defense and it would be speculative at best to assume it would have even been allowed as a defense. Despite two attorneys investigating and preparing the case for trial for just under a year, it was not until two weeks before the March 4th trial date that the potential for a battered woman syndrome defense was ever contemplated. In fact, Michael Clark, defendant's first defense attorney, spent seven months investigating and researching a potential defense in defendant's case and was unable to come up with one. On November 13, 2012, defendant asked the court for a new attorney saying:

That's another reason why I want to get a new attorney because Michael Clark has also told me I think the last time I was here that, well, we have no defense for you.... And he's telling me, well, he has no defense. Well, there's no defense for you or there's no this, there's no that, but he's suppose to be my attorney. He's suppose to have at least something instead of just a deal.

1RP 5. Per defendant's own statements, it appears that after seven months of investigation, Mr. Clark did not believe defendant had an arguable defense in the case and was attempting to negotiate a plea deal.

Similarly, Ms. Olson spent three and a half months investigating the case, reviewing discovery and speaking with defendant and Mr. Clark about the case. It was not until that day when the parties appeared before the Criminal Division Presiding Judge waiting to be sent out to a courtroom that Ms. Olson notified the court about the potential for a battered woman syndrome defense. 3RP 4-5. Ms. Olson told the court she had learned two and a half weeks earlier about defendant's history of abuse between the ages of 2 and 13 and allegations involving the victim in the present case, Mr. Preval. 3RP 5.

The fact that two defense attorneys worked on the case for a year and it was not until two weeks before the trial that the potential for such a defense came to light tends to suggest that such a defense was merely an attempt to grasp at straws when nothing else was available. Further, the State pointed out that while Ms. Olson claimed Mr. Preval had been

physically abusive to defendant during their relationship, the only evidence of physical abuse was where the defendant herself was the aggressor. Defendant had previously been convicted of assault against Mr. Preval and that was the basis for the underlying protection order prohibiting her from contacting Mr. Preval. 3RP 6-7. Ms. Olson also admitted that neither of the two psychologists who believed defendant suffered from battered woman syndrome had ever met or even spoken with defendant. 4RP 14. Judge Culpepper himself questioned how two psychologists would be able to make an accurate diagnosis that way. 4RP 14.

Two judges denied defendant's request for a continuance after thorough discussions with both counsels about the particulars of the case. Both pointed out and expressed concern that the case had already been pending for almost a year while defendant sat in custody. 3RP 9; 4RP 29. Both judges also questioned how a battered woman syndrome defense would fit within the facts of defendant's case discussing how battered woman syndrome is a self-defense claim where an individual admits their actions and involves some imminence of a threat. 3RP 10-17; 4RP 13-29.

In defendant's case, she repeatedly and continually denied having been involved in the actions of her co-defendants and claimed she was unaware they were going to rob or injure Mr. Preval. The State explained:

I've done cases of battered women's syndrome, a murder case on Cindy Musgrove, and believe I am up to speed on the general nature of the defense, and it applies when the woman is under the stress of the relationship and the history included in that stress and she acts basically in self-defense in assaulting, killing, whatever, the victim.

In this case the State's unaware to now and still unaware of any prior assaultive behavior of Mr. Preval toward the victim. There has been no offer by defense to the State, no anything other than a statement to the Court that she suffers from it, that there's some sort of history that there's no factual support for that the State's aware of, not even a paragraph. And then on top of that, as I just recanted or recited, there is not statement in this case, no theory that she did anything physically to Mr. Preval, so I'm unaware of any legal issue involving other people who are incorporated into the assault in a battered woman situation, and I think those legal issues should be resolved by now where Ms. Olson said she would be ready today, so I have no offer of proof factually, nothing, and it appears to the State, again, to be a delay tactic, trying to find a defense for Ms. Crosby, which Ms. Olson has her job to do, but, frankly, in this case there just isn't one.

4RP 21-22. Ms. Olson even acknowledged that the battered woman syndrome defense did not apply to the actual robbery and assault of Mr. Preval, but attempted to argue that it was relevant to explain defendant's behavior and statements to the officers afterwards. 3RP 17; 4RP 26-27. However, the fact that defendant exhibited odd behavior and changed her story after the incident took place does not qualify her as a battered

woman. With no evidence to support the claim as a battered woman, it is absolute speculation to assume it was a relevant and viable defense in the case and that defendant was prejudiced by not being able to present it.

In the end, Ms. Olson was able to argue her continuance motion three times to two separate judges who both denied it. Both cited the length of time the case had been pending, the fact that two attorneys had worked the case for eleven months and only recently come up with this as a possible defense and the fact that defendant had been in custody for eleven months already as their reasons. 3RP 18; 4RP 28-29; 5RP 12. They also questioned the likelihood that battered woman syndrome would even be applicable to the facts of the case and both agreed such a defense lacked merit. Judge Culpepper summed it up saying:

I'm going to deny the motion to continue. I'm not sure from what I have been told here that battered women's syndrome defense would really apply here. Ms. Olson says it might apply to explain why she said something to the officers. That's kind of an expansive view of how the syndrome works, at least my understanding of it.

And then the other thing is, of course, Judge Chushcoff, I'm sure, asked all these questions when Ms. Olson substituted. The Court has some interest in moving cases along. Ms. Crosby has now been in custody about a year. This incident occurred over a year ago. At some point we have to get things resolved, and we were probably at that point when you substituted at 11 months and we're certainly at the point now, so I'm going to deny the motion to continue.

4RP 29.

Given the amount of time two attorneys had to prepare the case, the fact defendant was in custody for 11 months, the lack of merit that the battered woman syndrome defense had in relation to the particular facts of this case, and the consideration and analysis two judges undertook in deciding to deny the motion to continue, defendant cannot show she was prejudiced by the court's denial of the continuance. The trial court did not abuse its discretion in denying the motion to continue when the battered woman syndrome defense was merely a theory at that point and it is purely speculative to assume it would have been an arguable defense in her case at that time.

- b. Defendant cannot show the result of the trial would likely have been different had the continuance been granted.

Even if the court had granted the continuance, a brief analysis of battered woman syndrome explains how inapplicable it was to defendant's case. In a self-defense case, the primary purpose of battered woman syndrome is to assist the jury in evaluating the reasonableness of the defendant's use of force and the degree of force used. *State v. Walker*, 40 Wn. App. 658, 664-65, 700 P.2d 1168 (1985). The evidence may explain why the defendant believed herself in imminent danger, under circumstances where an average person would not perceive any danger. *State v. Allery*, 101 Wn.2d 591, 597, 682 P.2d 312 (1984).

However, the fact a defendant is the victim of a battering relationship is not alone sufficient evidence to submit the issue of self defense to the jury. It is the perceived imminence of danger that supplies the justification for the use of deadly force. *Walker*, 40 Wn. App. 665. Furthermore, the evidence cannot be used to explain the woman's fear of someone other than the batterer. *State v. Riker*, 123 Wn.2d 351, 358-66, 869 P.2d 43 (1994).

Without even knowing what the experts would have said with regard to whether defendant suffered from battered woman syndrome since neither of them had ever met or spoken with her, a review of defendant's testimony shows how inapplicable the theory of a battered woman syndrome defense was to her case from a purely legal standpoint. Defendant denied any involvement in the planning or execution of the robbery and actually portrayed herself as another victim of Darnell and YG's, initially telling the police she was raped by one of the men. 6RP 398-431. By her own testimony, defendant essentially argued the defense of general denial to the jury. Mr. Preval testified defendant never stabbed him or used any force against him, but stood by watching while it happened. 6RP 131-132. Without any admission of force or even any claim that defendant used force, a battered woman syndrome defense is wholly incompatible with defendant's own testimony.

Further, in her motions to the court, Ms. Olson argued that the battered woman syndrome defense would be relevant to explain defendant's behavior after the incident in her interactions with YG and Darnell and conversations with police. 3RP 17; 4RP 26-27. However, *State v. Riker* makes clear that the evidence cannot be used to explain the woman's fear of someone other than the batterer. 123 Wn.2d at 358-366. Defendant claimed Mr. Preval battered her; under the law on battered women syndrome defense, she would not have been allowed to argue that that fear contributed to her behavior with the police and YG and Darnell. Instead, defendant would have the opportunity to take the stand and explain the reasons for her behavior herself, which is exactly what happened in the case.

Not only was the battered woman syndrome defense merely a theory of a defense that in all likelihood would not have been allowed given the law and the facts of the case, there was overwhelming evidence that defendant was involved in the burglary and robbery of Mr. Preval and violating the court order. Defendant herself admitted she knew she was violating the court order by coming to Mr. Preval's home. 6RP 441-443. She was the only individual between herself, YG and Darnell who knew

how to alter the security cameras without being seen. 6RP 443-446. She was also the only one who knew Mr. Preval had a large amount of cash in his home. 6RP 443-446.

Defendant never called the police during the incident or ran away despite being left alone in a room. 6RP 399-424. She claimed not to know who the two men were despite driving around with them a few minutes before the attack when they joked about robbing Mr. Preval. 6RP 448-451. Defendant claimed she drove away frightened from the attack and just wanted to get home, but still let YG and Darnell get into her car and accepted money from them. 6RP 413-419. She lied to the police and claimed she was raped by one of the men the first time they spoke with her. 6RP 424-431. She also changed her story two more times when she spoke to the police, first with Detective Baker at the station and then from the jail. 6RP 431-440. Ultimately, a review of the defendant's own testimony shows not only how inapplicable the theory of a battered woman syndrome defense was to her case, it also shows the significant amount of evidence that existed suggesting she was involved in the planning and execution of the attack.

Given the analysis above, defendant cannot show the result of the trial would have likely been different had the continuance been granted. It is unknown whether the court would have even allowed the battered

woman syndrome defense given it was merely a theory of a defense at the time the continuance was requested. It is not as if it was a viable defense defendant was precluded from arguing. Rather, it was a purely speculative theory that cannot be said would have even been allowed. As a result, it is not possible for defendant to show she was prejudiced by something that may not have even been allowed in the first place.

Further, by reviewing the defendant's own testimony (while acknowledging that at the time the trial court did not have this information), it is easy to see how incompatible this theory of a defense was with defendant's claims. This, combined with the overwhelming evidence against defendant implicating her in the robbery and burglary, allows this Court to evaluate the denial of the continuance from a unique perspective after the fact. It shows how unlikely it would have been that the battered woman syndrome defense would have been allowed as an arguable defense in the case even if the continuance was granted. As a result, defendant can in no way show the result of the trial would likely have been different had the continuance been granted given defendant's own version of events and how wholly incompatible the battered woman syndrome defense was with that.

The trial court did not abuse its discretion in denying defendant's continuance given how long the case had been pending, how much time

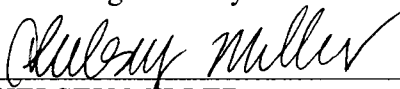
the attorneys had to prepare the case, and how speculative the battered woman syndrome defense was at the time. Because defendant is unable to show she was prejudiced by the denial of the continuance or that the result of the trial would likely have been different had the continuance been granted, this Court should affirm defendant's convictions.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: May 7, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
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WSB # 42892

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-7-14 Heavenstar
Date Signature

PIERCE COUNTY PROSECUTOR

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