NO. 68662-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL THREADGILL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Daniel Threadgill, the appellant below, asks this Court to review the Court of Appeals opinion referred to in section B.

B. COURT OF APPEALS DECISION

Threadgill requests review of the Court of Appeals decision in State v. Threadgill, COA No. 68662-3-I, filed July 11, 2016. A copy of the decision is attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate petitioner's right to speedy trial?

2. Did the State violate petitioner's constitutional rights when it used his refusal to consent to a warrantless search against him at trial?

3. Was defense counsel ineffective for failing to object to petitioner's refusal to consent to the warrantless search?

4 Is the pattern jury instruction on reasonable doubt unconstitutional?

5. Is review appropriate under RAP 13.4(b)(1) and (b)(3)?

D. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Daniel Threadgill and Araya McMillon-Cooper with Murder in the First Degree in connection with the August 2010 death of Jennifer Walstrand. The charge

included a deadly weapon sentencing enhancement and an aggravating circumstance of deliberate cruelty. CP 1-9, 537-538. Threadgill's case was later severed from McMillon-Cooper's. 3RP 17.

The Court of Appeals opinion summarizes the evidence at trial, relevant portions of which are discussed more thoroughly below.[1] Slip Op., at 1-6. A jury convicted Threadgill as charged. CP 661-663. The Honorable Cheryl Carey imposed an exceptional 480-month sentence, and Threadgill appealed. CP 756-758, 764-774; 30RP 35-38.

On appeal, Threadgill argued a violation of his speedy trial rights, argued the State violated his constitutional right to refuse to consent to a warrantless search when it used evidence of that refusal at trial, and argued the jury instruction on reasonable doubt, WPIC 4.01, was unconstitutional. See Brief of Appellant, at 15-44; Reply Brief of Appellant, at 1-21. The Court of Appeals rejected these arguments. Slip Op., at 7-16.

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[1] Threadgill's opening brief contains a comprehensive statement of the case. See Brief of Appellant, at 3-15.

E. ARGUMENT

REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) AND (b)(3).

1. The Trial Court Violated Threadgill's Right To Speedy Trial.

Threadgill was arrested on June 21, 2011. CP 246. On August 12, 2011, the State obtained an order authorizing collection of his DNA, and a sample was obtained on August 18, 2011. 1RP 12; CP 246. The DNA sample was important because Walstrand had been stabbed 65 times and suffered other significant trauma. 25RP 117, 131-132. The person or persons who killed her would have been covered in her blood. 17RP 165. Police believed that Walstrand's attacker likely applied significant force to her neck in an attempt to stabilize her while stabbing her. 23RP 143-144. And police were excited to learn that male DNA has been found on the left side of Walstrand's neck. 19RP 44-45; 23RP 45-48, 131-133, 140-141. One individual – labeled "male individual A" – was considered the primary contributor based on the amount of his DNA at that location. 24RP 46-48.

At the case setting hearing on September 14, 2011, Threadgill made it clear that he was exercising his right to a speedy trial and wanted a trial in November. 2RP 4. Speedy trial expired on November 12. Trial was set to begin November 7. 2RP 11.

The parties appeared in court again on September 23. 3RP 2. Prosecutors stated on the record they would be ready to begin trial November 7 assuming they received results from the crime lab on Threadgill's DNA, as expected, by October 17. 3RP 15. Threadgill again demanded a speedy trial. 3RP 3.

At a hearing on October 3, Threadgill reiterated that he wanted his trial to begin November 7. 4RP 13. On October 17, 2011, the parties learned that Threadgill was excluded as a possible contributor of the DNA found on Walstrand's body. CP 246. At a status hearing on October 20, defense counsel confirmed they would be ready for trial by November 7. 5RP 6. The court scheduled omnibus for November 1 and ordered all trial briefs to be filed by November 2. 5RP 11, 15.

At the omnibus hearing on Tuesday, November 1, prosecutors disclosed for the first time that, the previous day, they had submitted additional DNA samples to the crime lab, including a sample from Calvin Davis (Walstrand's pimp), to exclude him from evidence at the scene. Prosecutors acknowledged the results might not be ready in time for trial. 6RP 15-16. The defense was surprised by this revelation. 6RP 16-17. Prosecutors admitted they had not taken Davis' DNA sample until the prior Friday. 6RP 17. But they assured opposing counsel and the court

they were prepared to proceed to trial on November 7 without these results if not received by that date. 6RP 15-16. The defense again confirmed it was ready for trial November 7 and indicated a desire to finish pretrial hearings and start jury selection before November 12. 6RP 17-18.

Unexpectedly, on the afternoon of Friday, November 4, the State filed a Motion to Continue Trial until December 1 and indicated that it was now "unwilling to proceed to trial" without results from the crime lab comparing Davis' DNA to the male DNA found at the crime scene. Supp. CP 778, 786. The defense vigorously opposed the motion. CP 234-356.

The parties argued the State's motion on November 7 – the day trial was set to begin. 7RP 2. The State conceded prior knowledge that the defense planned to argue Davis was involved in the killing, but changed its mind about wanting his DNA evidence for trial once it received defense briefing focusing on Davis.[2] 7RP 4-5. The State also maintained it had not been possible to obtain Davis' DNA until he voluntarily agreed to provide a sample in October 2011 based on the following circumstances set out in its motion:

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[2] The defense filed a Trial Brief and Motion to Admit Other Suspect Evidence on November 2 and November 3, respectively, both of which addressed plans to convince jurors Davis was involved in Walstrand's murder. See CP 13-27, 82-221.

8. Mr. Davis was charged in March 2010 in an unrelated case with promoting prostitution, assault, intimidating a witness and tampering with a witness, King County Superior Court #10-1-01056-1 KNT. He was convicted of all charges in April 2011 but made a motion for a new trial based on ineffective assistance of counsel. That motion was pending when the State filed charges against Daniel Threadgill for the murder of Jennifer Walstrand.

9. The State approached Mr. Davis about assisting in the prosecution of Mr. Threadgill since Mr. Davis had information about possible motive for the murder that could assist the State. Due to the pending motion for a new trial, Mr. Davis's counsel, David Gehrke, advised Mr. Davis not to assist the State in the murder case because such assistance would expose Mr. Davis to potential additional criminal liability and potentially require him to admit to crimes that would affect his motion for new trial.

10. On October 13, 2011, Mr. Davis's motion for new trial was resolved when he and the State entered an agreement by which he would withdraw his motion for a new trial and his right to appeal in exchange for the State recommending a standard range sentence of 89.5 months.

11. Mr. Davis was sentenced on October 19, 2011. After his sentencing was completed, Mr. Gehrke, Davis's counsel, agreed to allow Mr. Davis to cooperate in the present case.

CP 776-777. The State obtained a DNA sample from Davis October 28 and sent it to the crime lab October 31. 7RP 5.

The State argued it would be unfair to start trial without the DNA results concerning Davis because, in their absence, the defense could argue that Davis' DNA might be on the victim and the State would be unable to rebut that argument. 7RP 5-6. The State also argued the results might show that Davis' DNA was on the victim, leading to a mistrial if discovered during trial or a defense motion for new trial should Threadgill be convicted without that evidence. 7RP 5-6.

The defense argued that, in light of the failure to even ask Davis for a sample of his DNA prior to October 28, the State could not establish it had acted with due diligence or good cause for a continuance. CP 235-237. Davis' own attorney – David Gehrke – disputed prosecutors' version of events. In a sworn declaration, Gehrke indicated that prosecutors never asked Davis for a DNA sample prior to October 28, 2011, and he never advised Davis to withhold a sample. CP 295. Gehrke continued:

> 5. Had the State asked for Mr. Davis' DNA, I would have advised my client that, in light of his multiple previous felony convictions, there would be no reason for him to withhold giving a sample of his DNA as the State would already have a DNA sample from those convictions.
>
> 6. Nothing that I did as Mr. Davis' attorney would have prevented the State from seeking to obtain a sample of his DNA prior to October 28, 2011. Any assertion by the State that Mr. Davis would not provide a DNA sample prior to October 28, 2011 based on my

counsel is not a correct statement.

CP 296.

Faced with Gehrke's declaration, prosecutors expressed regret they did not ask sooner "because we would have had it sooner, but we didn't." 7RP 8. Prosecutors also indicated that, according to the crime lab, "they are not allowed to pull a sample from CODUS to compare to DNA at the scene" and had no choice but to obtain a new sample from Davis. 7RP 9.

The defense pointed out that the prosecution had long known the defense would be painting Davis as a suspect in this case. 7RP 13 ("that was something the state was well aware of from the beginning"). Indeed, a majority of defense interviews with witnesses had involved connecting Davis to Walstrand and, even in law enforcement's mind, Davis had been a person of interest following the murder. 7RP 11-16; CP 243-245. The defense also argued that, as a convicted felon, Davis' DNA should already have been available to prosecutors and, if not, they could have collected it at any time. 7RP 12; CP 245-246. Yet, they did nothing until just before trial. 7RP 14-15.

In granting the State's motion to continue, the court indicated it was taking prosecutors at their word that any prior sample of Davis' DNA would not have sufficed and found that a new sample could not reasonably have

been obtained earlier. The court also justified the continuance with prosecutors' recent realization (after the omnibus hearing) that it was very important to compare Davis' profile against DNA found at the scene. 7RP 20-21. Trial was continued to December 1. 7RP 21; CP 787. On that date, prosecutors informed the court that the crime lab had excluded Davis as the source of male DNA found at the scene. 11RP 2.

By continuing trial beyond the speedy trial deadline, over Threadgill's objection, and without justification, the trial court erred.

CrR 3.3(b)(1)(i) requires trial within 60 days for a jailed defendant. The rule is designed to protect the constitutional right to speedy trial. State v. Mack, 89 Wn.2d 788, 791-792, 576 P.2d 44 (1978). "[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). A violation of the rule requires dismissal of the charge with prejudice. CrR 3.3(h); State v. Saunders, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009).

Delays for continuances are excluded from the 60-day period and may be granted on motion where "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(e)(3), (f)(2). If a continuance is properly granted and

results in an excluded period, "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5).

This Court reviews an alleged violation of the speedy trial rule de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). The decision to grant a continuance is reviewed for abuse of discretion and will be overturned where clearly unreasonable or exercised on untenable grounds or for untenable reasons. Kenyon, 167 Wn.2d at 135; Saunders, 153 Wn. App. at 216. A trial court abuses its discretion when it grants a continuance without "convincing and valid reasons." Saunders, 153 Wn. App. at 221. Moreover, where the State fails to exercise due diligence in obtaining evidence, it cannot rely on the absence of that evidence as valid grounds for a continuance. See State v. Adamski, 111 Wn.2d 574, 578-579, 761 P.2d 621 (1988); State v. Ross, 98 Wn. App. 1, 4, 981 P.2d 888 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000); State v. Gowens, 27 Wn. App. 921, 925, 621 P.2d 198 (1980).

Undoubtedly, there are circumstances where the prosecution's desire to obtain crime lab results is required in the administration of justice and warrants a continuance over the defendant's assertion of his right to speedy trial. In State v. Osborne, 18 Wn. App. 318, 320, 569 P.2d 1176 (1977), review denied, 89 Wn.2d 1016 (1978), substantial physical evidence –

including items in the defendant's possession soaked in what was believed to be the victim's blood – were timely sent to the crime lab for testing, but could not be completed by the scheduled trial date. In affirming the trial court's decision to continue trial at the prosecution's request, this Court noted:

> substantial efforts had been made to analyze the physical evidence, which had been sent to the laboratory a few days after the victim was discovered, but because of the large number of items to analyze, the sophisticated analysis required, and the heavy workload from other cases, the analysis was incomplete. The criminalist indicated the analysis could be finished by January 5, 1976. The trial court granted the prosecution's motion, continuing the trial to January 5, 1976.
>
> . . . . The expert analysis of raw physical exhibits is an important, often crucial, form of the prosecution's evidence. The criminalist's affidavit established that expert analysis of the physical evidence was unavailable, that the State had exercised due diligence, and that there were reasonable grounds to believe that the analysis would be available in a reasonable time. Therefore the delay resulting from the continuance is excluded from the speedy trial period . . . .

Osborne, 18 Wn. App. at 320-321.

Among the relevant considerations in assessing a motion to continue are notions of surprise and diligence. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). In Osborne, the continuance was proper because prosecutors had acted with timeliness and diligence and could

hardly be faulted because the case involved a surprisingly large number of evidence items requiring sophisticated analysis.

In contrast, prosecutors handling Threadgill's case failed to exercise diligence and could hardly claim surprise that Davis' DNA profile might be important at trial. Although prosecutor's claimed that, because Davis was represented by counsel, they could not obtain a reference sample from him until after they made a deal with him in October 2011, they were forced to concede that they never even bothered to ask for a sample earlier. See 7RP 8. Davis' attorney, David Gehrke, submitted a sworn declaration signed under penalty of perjury stating that, had prosecutors asked about Davis' willingness to provide a DNA sample any time during his representation (April to October 2011), he would have advised Davis there was no reason to refuse. Gehrke rejected any notion that he would have advised Davis to decline a request. CP 295-296.

Prosecutors also failed to demonstrate that notions of surprise justified a continuance. While prosecutors emphasized the defense briefing of November 2 and 3 focusing on Davis as a possible suspect, they conceded they had prior knowledge of this focus. See RP 7RP 4-5. In fact, prosecutors had already obtained Davis' DNA sample (October 28) and sent it off to the lab (October 31) prior to the filing of these defense

briefs. See 7RP 5. Indeed, as defense counsel demonstrated, prosecutors knew they were seeking to portray Davis as a suspect "from the beginning" based on numerous defense interviews. 7RP 11-16.

Ultimately, the record belies the trial court's findings that prosecutors could not reasonably have obtained a sample from Davis any earlier and that the defense focus on Davis in its trial briefs necessitated a continuance in the administration of justice. See 7RP 20-21. The State did not act with due diligence when it failed to timely request a DNA sample from Davis at any time between August 2010 and October 2011 and failed to submit it for testing. And while the defense briefing may have highlighted the impact of these strategic failures, neither that briefing nor anything else warranted a continuance denying Threadgill his right to a speedy trial under CrR 3.3.

In rejecting this claim, the Court of Appeals cited this Court's opinions in State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993), and State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005) for the proposition that a continuance is justified to obtain evidence necessary for trial. Slip op., at 8-9. In Cauthron, however, this Court merely noted that the continuances requested by the State had been necessary without any discussion of the underlying circumstances. Cauthron, 120 Wn.2d at 910. Whatever the

circumstances in Cauthron, however, the circumstances in Threadgill's case are that the State could have obtained Davis' DNA and sent it off for testing six months earlier than it did. All it had to do was ask.

In Flinn, the defense obtained two trial continuances designed – at least in part – to provide sufficient time to evaluate a potential diminished capacity defense. Flinn, 154 Wn.2d at 196. The same day the defense requested and obtained a third continuance, this time for 19 days, the defense notified the prosecution of its intent to present a mental defense and provided a report from the defense-retained expert. Id. Nineteen days later, the State obtained a continuance necessary to review materials on which the defense expert had relied, interview the expert, and arrange for its own expert to evaluate Flinn. Id. at 197. On appeal, this Court found this continuance justified. Id. at 200-201.

Flinn is correctly decided under its facts. There is no indication the prosecution in that case knew of Flinn's intent to pursue a mental defense until 19 days before trial, when the defense gave notice of the defense and identified its expert witness. Continuing trial at the State's request was reasonable in light of the relatively late defense notice and all tasks necessary to meet the defense evidence, including an additional evaluation by a prosecution expert. These circumstances bear little resemblance to

Threadgill's case, where the State knew early in the case the defense would argue Davis was involved in Walstrand's murder. To begin the process of responding to that argument, prosecutors merely had to ask Davis for a DNA sample and have it tested, tasks that could have been completed long before the November 2011 trial date. Unlike Flinn, there was no justifiable reason to ask for a continuance on the eve of trial.

The Court of Appeals interprets Cauthron and Flinn to authorize a continuance even where, as here, the State had significant prior notice of a defense claim, could have obtained evidence necessary to meet that claim well before trial, but failed to obtain that evidence until the eve of trial.

The Court of Appeals' interpretation weakens significantly the protections afforded by CrR 3.3, presents significant questions of Washington law, and warrants review under RAP 13.4(b)(3). In addition, permitting a continuance of trial where the State failed to exercise due diligence conflicts with prior appellate decisions requiring diligence. See Adamski, 111 Wn.2d at 578-579; Ross, 98 Wn. App. at 4; Gowens, 27 Wn. App. at 925.[3] Thus, review also is warranted under RAP 13.4(b)(1).

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[3] Citing State v. Bible, 77 Wn. App. 470, 473, 892 P.2d 116 (1995), the State argued it was not required to be diligent, although diligence is properly considered. Brief of Respondent, at 26.

2. The State Violated Threadgill's Constitutional Rights When It Presented Evidence That he Refused To Consent To A Search Of His Cell Phone And Records Of His Calls.

In State v. Gauthier, 174 Wn. App. 257, 263-267, 298 P.3d 126 (2013), this Court held that the State's use of evidence that the defendant refused consent to a search, thereby requiring law enforcement to obtain a court order authorizing the search, violates due process and the protections of the Fourth Amendment and article 1, section 7 by improperly penalizing the lawful exercise of a constitutional right.

Gauthier was suspected of rape and, when asked to provide a DNA sample to compare with evidence found on the victim, declined. A detective then obtained a court order authorizing a DNA cheek swab. Gauthier, 174 Wn. App. at 261. At trial, the prosecution elicited evidence of Gauthier's refusal and contrasted that refusal with the cooperation of another suspect, who had volunteered a DNA sample. Id. at 260-262. This Court found that "the prosecutor's use of Gauthier's invocation of his right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal." Id. at 267.

The same violation occurred at Threadgill's trial. During the State's examination of Chuck Pardee – the King County Prosecutor's

forensic investigator – the following exchange occurred regarding Pardee's examination of phone records for McMillon-Cooper, Davis, and Threadgill:

> Q: Specifically, how many phones did you review with respect to Ms. Araya McMillon-Cooper?
>
> A: Two, an LG and a Samsung.
>
> Q: And did you review a phone that purported to belong to Daniel Threadgill?
>
> A: Yes, a Sanyo.
>
> Q: All right. And one purporting to belong to Calvin Davis?
>
> A: Yes, Blackberry.
>
> Q: Now in reviewing the phone records or the phones for Ms. McMillon-Cooper and Mr. Threadgill, was that pursuant to a court order?
>
> A: Yes.
>
> Q: What about the records or the phone for Mr. Davis?
>
> A: It was consent.
>
> Q: Mr. Davis' consent?
>
> A: Correct.

25RP 29-30; see also 22RP 37, 26RP 59-61 (detectives contrast Davis with Threadgill and McMillon-Cooper).

Citizens have a recognized privacy interest in the information on their phones. See State v. Hinton, 179 Wn.2d 862, 867-878, 319 P.3d 9 (2014). As in Gauthier, at Threadgill's trial the prosecutor elicited his lack of cooperation (the necessity of a court order to obtain his phone records) and contrasted that exercise of his constitutional right to refuse a warrantless search with the cooperation of another individual once suspected of involvement in the crime (Davis' consent). Making matters worse, Threadgill was lumped in with McMillon-Cooper as another for whom a court order had been required. And she confessed to being criminally liable in connection with Walstrand's murder. 24RP 78.

The Court of Appeals concluded that Threadgill had failed to demonstrate a manifest constitutional error, preventing him from raising the issue for the first time on appeal, because "[i]n contrast to Gauthier, the prosecutor did not use Threadgill's invocation of his constitutional right to refuse consent . . . as substantive evidence of guilt. Nor did the prosecution question Threadgill about his lack of consent or argue that Threadgill's actions were consistent with a guilty person." Slip op., at 13-14.

But the testimony comparing the cooperative Davis with the uncooperative Threadgill and McMillon-Cooper is the functional equivalent

of the prosecutor's closing argument in Gauthier contrasting the defendant's lack of cooperation with the cooperation of another suspect. Even without an explicit use of the comparison during closing argument or during examination of Threadgill, jurors would have understood the distinction. As in Gauthier, the message to jurors was that the true culprits had something to hide. And, as in Gauthier, the State's error was both constitutional and sufficiently prejudicial to be manifest.

Alternatively, this Court should find that defense counsel was ineffective for failing to object to the testimony at trial. See Brief of Appellant, at 31-34 (citing the Sixth Amendment and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The Court of Appeals rejected this argument, finding the absence of objection to be a legitimate tactic and finding no prejudice. Slip. op, at 15. But permitting a violation of a client's constitutional rights is not a legitimate tactic and the prejudice is obvious and significant.

These issues present significant questions of constitutional law and review is appropriate under RAP 13.4(b)(3).

3. The Jury Instruction On Reasonable Doubt Is Unconstitutional.

Threadgill hereby adopts the comprehensive arguments challenging WPIC 4.01 made in the Court of Appeals. See Brief of Appellant, at 34-

44; Reply Brief of Appellant, at 8-21. These challenges to the pattern instruction also warrant review under RAP 13.4(b)(3).

F. CONCLUSION

Threadgill respectfully asks for review and a new trial.

DATED this 10th day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

#45397

DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL ALEXANDER THREADGILL, Appellant, and SYNAE ARAYA MCMILLON-COOPER AKA ARAYA MCMILLON, Defendant.	No. 68662-3-I DIVISION ONE UNPUBLISHED OPINION FILED: July 11, 2016

TRICKEY, J. — Daniel Threadgill appeals his judgment and sentence for his conviction of first-degree murder. He contends that the trial court violated his right to a speedy trial, the State violated his constitutional rights by presenting evidence that he did not consent to a search of his cell phone, he received ineffective assistance of counsel, WPIC 4.01[1] is constitutionally defective, and the sentencing court failed to file the mandatory written findings of fact and conclusions of law in support of his exceptional sentence. We reject all arguments and affirm.

FACTS

On August 31, 2010, police officers conducted a welfare check at a triplex apartment building in Des Moines, Washington. Neighbors had called 911 after becoming concerned about sounds coming from the center apartment. Upon

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC).

arrival, the officers discovered the body of Jennifer Walstrand in a large pool of blood just inside the door to her apartment.

Walstrand had been stabbed 65 times. She had scrapes on her face, bruises on her arms and legs, a fractured jaw, and wounds on her head consistent with blunt force trauma. Blood spatter evidence established that there had been "a lot of violence and movement" and that Walstrand was upright and fighting for a portion of the attack.[2] None of Walstrand's wounds caused immediate death.

At the time of her death, Walstrand was working as a prostitute for a pimp named Calvin Davis. Walstrand had known Davis for over 10 years. Davis considered himself closer to Walstrand than any of the other women that worked for him. As his longest serving prostitute, Walstrand had many responsibilities.

Walstrand's next door neighbor, Araya McMillon-Cooper, also worked as a prostitute for Davis. Davis had arranged McMillon-Cooper's move into the triplex. Walstrand had a key to McMillon-Cooper's apartment and occasionally collected money from her on Davis's behalf. Walstrand also reported McMillon-Cooper's activities to Davis.

McMillon-Cooper had been living in the triplex since around June 2010. Shortly after she moved in, McMillon-Cooper met Threadgill, who worked in club promotions. McMillon-Cooper began working as a club promoter for Threadgill in addition to prostituting for Davis. During the next few months, McMillon-Cooper and Threadgill developed a close friendship and started socializing outside of work. Threadgill frequently spent time at the triplex. On occasion, he stayed overnight.

[2] Report of Proceedings (RP) (Jan. 10, 2012) at 175.

In late August 2010, Threadgill and McMillon-Cooper's relationship became sexual.

During that same period of time, McMillon-Cooper had a falling out with Davis. In late July 2010, McMillon-Cooper stopped turning money over to Davis because she needed it for her grandmother's funeral. In mid-August, Davis confronted McMillon-Cooper at the triplex. After she refused to give him money, Davis punched her in the mouth and kicked her. After this incident, and shortly before Walstrand's murder, McMillon-Cooper told Threadgill that she was a prostitute and that Davis had assaulted her. She also told him that she could not go back to the triplex because Walstrand would tell Davis and she would get beat up again. Threadgill assured her that no one would hurt her.

As part of their investigation into Walstrand's murder, detectives spoke with Davis, McMillon-Cooper, and Threadgill. Threadgill was not a suspect at the time. Detectives also submitted evidence to the Washington State Patrol Crime Laboratory for testing. The crime laboratory conducted extensive DNA (deoxyribonucleic acid) testing. Some of the evidence, including swabs from Walstrand's neck, revealed partial male DNA profiles. Walstrand's homicide went unsolved for approximately nine months.

In May 2011, Crime Stoppers of Puget Sound got a break in the case when they received an anonymous tip. The tip led police to Marian Kerow and Fardosa Mohamed. Kerow worked as a club promoter for Threadgill. She introduced Mohamed to Threadgill, and the three of them socialized together, often with McMillon-Cooper.

Detectives questioned Mohamed and Kerow individually in June 2011. Mohamed initially denied any knowledge of the murder but later admitted that she was present when Walstrand died. Kerow also admitted that she was present and had witnessed Walstrand's murder. Following these interviews, police began to focus their investigation on McMillon-Cooper and Threadgill. Kerow and Mohamed participated in the investigation by wearing wires and recording conversations with McMillon-Cooper and Threadgill.

On June 24, 2011, the State charged McMillon-Cooper and Threadgill with first-degree murder for the death of Walstrand. The charge included a deadly weapon sentencing enhancement.

On August 2, 2011, the State obtained an order authorizing law enforcement to collect a sample of Threadgill's DNA. The State collected Threadgill's DNA on August 18, 2011.

At the case setting hearing on September 14, 2011, Threadgill indicated that he wished to exercise his right to a speedy trial, which expired on November 12, 2011. The court scheduled the trial to begin on November 7, 2011.

The parties appeared in court again on September 23, 2011, when Threadgill moved to sever his case from McMillon-Cooper's. The State did not oppose this motion, which the trial court granted. McMillon-Cooper ultimately pleaded guilty to conspiracy to commit second-degree murder. During this hearing, Threadgill reiterated that he wanted to exercise his right to a speedy trial and try the case on November 7.

On October 17, 2011, the parties learned that Threadgill was excluded as

a contributor to the DNA found on Walstrand's body.

At the omnibus hearing on November 1, 2011, the State informed the court that it had submitted additional DNA samples to the crime laboratory for testing. In particular, it had submitted samples from Davis, McMillon-Cooper, and one of Walstrand's customers. The State indicated that it did not know whether the results would be available before the trial date of November 7. Nonetheless, the State indicated that it was prepared to go forward without the results. Threadgill again indicated that he was prepared to go to trial on November 7.

On November 2, 2011, Threadgill filed his trial brief. The next day, he filed a motion to admit other suspect evidence, where he sought to admit evidence of Davis's prior violent acts. In these materials, Threadgill indicated that he planned to argue that Davis killed Walstrand.

On November 4, 2011, the State moved to continue the trial. It stated that it was "unwilling to proceed to trial" without the results from the crime laboratory comparing Davis's DNA to the unknown male DNA from the crime scene.[3] Because the comparison would not be complete until the end of November, the State asked for a continuance until December 1, 2011. Threadgill opposed the continuance. He argued that the State's failure to obtain available evidence showed a lack of due diligence and was not a good cause for a continuance.

The court held a hearing on the State's continuance motion on November 7, 2011. Over Threadgill's objection, the trial court granted the motion and continued the trial until December 1, 2011. Prior to trial, the State amended the

[3] Clerk's Papers (CP) at 778.

charge against Threadgill to add an aggravating factor of deliberate cruelty.

At trial, the State relied primarily on eyewitness testimony. McMillon-Cooper, Mohamed, and Kerow all testified that they were present on the night of the murder. They described in great detail how Threadgill killed Walstrand. They testified that they watched Threadgill stab Walstrand repeatedly and stomp on her head as she begged for her life. McMillon-Cooper testified that Threadgill told her that he killed Walstrand because "[i]t was either [you] or her."[4]

The State also presented testimony from a forensic examiner who searched cell phones belonging to Threadgill, McMillon-Cooper, and Davis. During his testimony, the forensic examiner stated that he searched Threadgill's and McMillon-Cooper's cell phones pursuant to a court order and that he searched Davis's cell phone pursuant to his consent.

In general, the State argued that jurors should approach the case as an eyewitness case rather than a DNA case. It argued that Threadgill stabbed and stomped on Walstrand because he was "fed up" with the way McMillon-Cooper was being treated by Walstrand and Davis.[5]

Threadgill maintained his innocence. He argued that McMillon-Cooper, Mohamed, and Kerow were all lying. He focused on the fact that his DNA was absent from the crime scene and that unidentified male DNA was found on Walstrand's body.

A jury convicted Threadgill as charged. The trial court imposed an exceptional sentence based on the jury's finding of deliberate cruelty.

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[4] RP (Feb. 1, 2012) at 16.
[5] RP (Feb. 2, 2012) at 3-4.

Threadgill appeals.

ANALYSIS

Criminal Rule (CrR) 3.3

Threadgill argues that the trial court violated his right to a speedy trial under CrR 3.3. Specifically, he contends that the trial court abused its discretion "[b]y continuing trial beyond the speedy trial deadline, over Threadgill's objection, and without sufficient justification."[6] We disagree.

"CrR 3.3 provides time limitations that must be observed for ensuring that criminal defendants are brought to trial in a timely manner." State v. Greenwood, 120 Wn.2d 585, 588-89, 845 P.2d 971 (1993). The purpose of this rule is "to protect the defendant's constitutional right to a speedy trial, and to prevent undue and oppressive incarceration prior to trial." State v. Kingen, 39 Wn. App. 124, 127, 692 P.2d 215 (1984). A criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice. CrR 3.3(h); Greenwood, 120 Wn.2d at 591.

CrR 3.3(b)(1)(i) provides that an individual held in custody pending trial must be tried within 60 days of arraignment. Certain time periods are excluded from the computation of time, including continuances granted by the trial court. CrR 3.3(e)(3). CrR 3.3(f)(2) provides a basis by which a trial court may validly continue the start of trial:

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the

[6] Br. of Appellant at 22.

record or in writing the reasons for the continuance.

If a continuance is properly granted, the time for trial will not expire until 30 days after the new trial date. CrR 3.3(b)(5).

"'[I]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.'" State v. Flinn, 154 Wn.2d 193, 199-200, 110 P.3d 748 (2005) (quoting State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003)). These factors include "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004).

A trial court may properly grant a continuance to permit the State time to obtain evidence. State v. Cauthron, 120 Wn.2d 879, 910, 846 P.2d 502 (1993). For example, in Cauthron, the Supreme Court held that Cauthron's right to a speedy trial was not violated where "the continuances were necessary to obtain the required evidence" and where Cauthron was not prejudiced by the delay in starting trial. 120 Wn.2d at 910.

A trial court may also properly grant a continuance to allow counsel time to prepare for trial. Flinn, 154 Wn.2d at 200-01. For example, in Flinn, the Supreme Court concluded that the trial court did not abuse its discretion in granting a continuance to allow the State to prepare for Flinn's diminished capacity defense. 154 Wn.2d at 196.

This court reviews an alleged violation of the speedy trial rule de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). But the decision to grant a continuance rests in the sound discretion of the trial court. Kenyon, 167

Wn.2d at 135. This court will not disturb the trial court's decision unless there is a clear showing that it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Kenyon, 167 Wn.2d at 135.

Here, the trial court did not abuse its discretion when it granted the State's request for a continuance. The trial court concluded that the continuance was required in the administration of justice. In reaching this conclusion, the trial court relied on the fact that the taking of [Davis's] DNA sample "could not have reasonably occurred earlier."[7] It also relied on the fact that the test results would not be complete until the end of November and that it was "necessary for the [S]tate to have the results" to respond to Threadgill's defense that Davis committed the murder.[8]

The trial court properly relied on these factors. As stated earlier, a trial court may grant a continuance to permit the State time to obtain evidence. Cauthron, 120 Wn.2d at 910. It may also grant a continuance to allow counsel time to prepare for trial. Flinn, 154 Wn.2d at 200. Both of those considerations are present here.

Threadgill filed his trial brief on November 2, 2011, and he moved to admit other suspect evidence on November 3, 2011. These materials made it clear that Threadgill planned to argue that Davis was another suspect in the murder. The need for the DNA results greatly increased at that time, as the results were crucial to rebut this theory. Because the results of Davis's DNA comparison would not be complete until the end of November, a continuance was proper to allow the State to obtain that evidence and to prepare for Threadgill's defense.

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[7] RP (Nov. 7, 2011) at 20.
[8] RP (Nov. 7, 2011) at 21; CP at 787.

Moreover, Threadgill did not argue to the trial court that he would be prejudiced if the court granted the State's motion to continue. And he makes no argument on appeal that the continuance of a few weeks caused him any prejudice to the presentation of his defense. In short, under these circumstances, Threadgill has failed to show that the trial court's decision was based on untenable grounds or was for untenable reasons.

Threadgill asserts that "the State did not act with due diligence when it failed to timely request a DNA sample from Davis at any time between August 2010 and October 2011 and failed to submit it for comparison to evidence at the scene."[9] He relies on a declaration from Davis's attorney that states that prosecutors never asked Davis for a DNA sample prior to October 28, 2011, and that he would have advised Davis to provide a sample. Threadgill further asserts that "where the State fails to exercise due diligence in obtaining evidence, it cannot rely on the absence of that evidence as valid grounds for a continuance."[10]

But the trial court found that the State acted diligently in this case. Specifically, it found that "the taking of [Davis's] DNA sample could not have reasonably occurred earlier."[11] And this finding is supported by substantial evidence in the record.

In a declaration, the prosecutor explained that in March 2010, Davis was charged in an unrelated case. In April 2011, Davis was convicted of all charges. Davis subsequently moved for a new trial and that motion was pending when the

[9] Br. of Appellant at 26.
[10] Br. of Appellant at 23.
[11] RP (Nov. 7, 2011) at 20.

State filed charges against Threadgill. The State approached Davis about assisting in the prosecution of Threadgill but, due to his pending motion for a new trial, Davis's counsel advised Davis not to assist the State. Davis withdrew his motion for a new trial on October 13, 2011, pursuant to an agreement with the State, and the court sentenced Davis on October 19, 2011. After sentencing was completed, Davis's counsel agreed to allow Davis to cooperate in Threadgill's case. The State interviewed Davis on October 28, 2011, and obtained a DNA sample at that time.

These facts support the trial court's determination that the taking of Davis's DNA sample could not have reasonably occurred earlier. Based on Davis's earlier representation that he would not assist in the prosecution of Threadgill, it is reasonable to believe that a request for a DNA sample would not have been fruitful. Under these circumstances, the fact that the State did not explicitly ask Davis for a DNA sample prior to October 28, 2011, does not show a lack of diligence.

Forensic Examiner's Testimony

Threadgill next argues that the State violated his constitutional rights under the Fourth Amendment and article I, section 7 of the Washington Constitution by presenting evidence that he did not consent to a search of his cell phone. Threadgill contends that the use of this evidence improperly penalized the lawful exercise of a constitutional right. Because Threadgill fails to show manifest constitutional error, he is precluded from raising this claim for the first time on appeal.

To raise an error for the first time on appeal, an appellant must demonstrate

(1) the error is "truly of a constitutional magnitude" and (2) the error is manifest. State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). "[M]anifest" requires a showing of actual prejudice. Kalebaugh, 183 Wn.2d at 584. "'To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Kalebaugh, 183 Wn.2d at 584 (alteration in original) (internal quotation marks omitted) (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)).

In State v. Gauthier, this court held that the prosecutor's use of Gauthier's invocation of his constitutional right to refuse consent to a warrantless search as substantive evidence of guilt was manifest constitutional error. 174 Wn. App. 257, 267, 298 P.3d 126 (2013), review denied, 185 Wn.2d 1010, 368 P.3d 171 (2016). There, Gauthier was suspected of rape and declined to provide a DNA sample to compare with evidence found on the victim. 174 Wn. App. at 261. At trial, the prosecutor repeatedly questioned Gauthier during cross-examination about his refusal to provide a DNA sample, elicited the testimony "for the primary purpose of encouraging the jury to infer guilt based on Gauthier's refusal to provide a DNA sample," and argued that Gauthier's refusal was consistent with the actions of a guilty person. 174 Wn. App. at 262, 270.

Threadgill relies on Gauthier to argue that the "same violation occurred at [his] trial"[12] when the State elicited the following testimony from a forensic examiner:

> [Prosecutor]: Specifically, how many phones did you review with respect to Ms. Araya McMillon-Cooper?

[12] Br. of Appellant at 28.

[Forensic Examiner]: Two, an LG and a Samsung.

[Prosecutor]: And did you review a phone that purported to belong to Daniel Threadgill?

[Forensic Examiner]: Yes, a Sanyo.

[Prosecutor]: All right. And one purporting to belong to Calvin Davis?

[Forensic Examiner]: Yes, Blackberry.

[Prosecutor]: Now, in reviewing the phone records or the phones for Ms. McMillon-Cooper and Mr. Threadgill, was that pursuant to a court order?

[Forensic Examiner]: Yes.

[Prosecutor]: What about the records or the phone for Mr. Davis?

[Forensic Examiner]: It was on consent.

[Prosecutor]: On Mr. Davis' consent?

[Forensic Examiner]: Correct.[13]

Threadgill asserts, "As in Gauthier, at Threadgill's trial the prosecutor elicited his lack of cooperation (the necessity of a court order to obtain his phone records) and contrasted that exercise of his constitutional right to refuse a warrantless search with the cooperation of another individual once suspected of involvement in the crime (Davis'[s] consent)."[14]

But Threadgill fails to show that this testimony amounts to a manifest constitutional error under RAP 2.5(a). In contrast to Gauthier, the prosecutor did not use Threadgill's invocation of his constitutional right to refuse consent to a search of his cell phone as substantive evidence of guilt. Nor did the prosecution

[13] RP (Jan. 31, 2012) at 29-30.
[14] Br. of Appellant at 29.

question Threadgill about his lack of consent or argue that Threadgill's actions were consistent with a guilty person. Simply put, the forensic examiner's testimony was a fleeting reference to Threadgill's exercise of a constitutional right. It does not rise to the level of manifest constitutional error.

Ineffective Assistance of Counsel

Threadgill argues in the alternative that his trial counsel's failure to object to the forensic examiner's testimony deprived him of his constitutional right to effective assistance of counsel. We disagree.

To establish an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant cannot demonstrate either prong, the ineffective assistance of counsel claim fails. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Counsel's performance is deficient if it falls "below an objective standard of reasonableness." McFarland, 127 Wn.2d at 334. To establish deficient performance, the defendant must show the absence of any "conceivable legitimate tactic" supporting counsel's action. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

"The decision of when or whether to object is a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Madison, 53 Wn. App. at 763.

To establish prejudice, the defendant must show there is a reasonable probability that, but for the deficient performance, the outcome would have been different. McFarland, 127 Wn.2d at 335. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, Threadgill fails to show that he received ineffective assistance of counsel. First, he fails to show that the decision not to object was not a legitimate trial tactic. Second, even if the failure to object constituted deficient performance, Threadgill fails to show prejudice. This testimony was not central to the State's case. It was merely a fleeting reference to Threadgill's assertion of a constitutional right. Moreover, the evidence of guilt was overwhelming. In short, there is not a reasonable probability that the outcome of the trial would have been different.

Reasonable Doubt Instruction

Threadgill argues that the reasonable doubt jury instruction that was used at his trial is constitutionally defective. He contends that the instruction improperly adds an articulation requirement and impermissibly undermines the presumption of innocence. He further contends that the use of this instruction requires reversal. We reject this claim.

The trial court gave a reasonable doubt jury instruction that was identical to WPIC 4.01—the standard reasonable doubt instruction. In relevant part, that instruction states: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."[15]

[15] CP at 670.

In State v. Bennett, our Supreme Court directed trial courts to use WPIC 4.01 in all criminal cases. 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). More recently, in Kalebaugh, the Supreme Court reaffirmed that WPIC 4.01 was the "proper" instruction and "the correct legal instruction on reasonable doubt." 183 Wn.2d at 585-86. This court recently noted the Supreme Court's directive and upheld the use of WPIC 4.01 in State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022, 369 P.3d 501 (2016). Because controlling case authority directs the use of this standard instruction, we reject Threadgill's claim.

Sentencing

Finally, Threadgill argues the sentencing court erred when it failed to enter written findings of fact and conclusions of law supporting his exceptional sentence. He asserts that a remand is necessary. We disagree.

"Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Here, the judgment and sentence contains the necessary written findings of fact and conclusions of law. Section 2.5 of the judgment and sentence contains preprinted findings of fact and conclusions of law, which the trial court completed. Section 2.5 states:

> Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) I .
>
> Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the

standard range for Count(s) I .[16]

In section 2.1(j) of the judgment and sentence, the trial court identified the relevant aggravating circumstance as deliberate cruelty.

Threadgill does not argue that these written findings of fact and conclusions of law are insufficient. Instead, he appears to argue that the findings of fact and conclusions of law must be contained in a separate document and that the trial court may not rely on the preprinted language in the judgment and sentence to meet its statutory requirement. But Threadgill cites no authority to support this position. In the absence of such authority, we may presume that counsel found none. Roberts v. Atlantic Richfield Co., 88 Wn.2d 887, 895, 568 P.2d 764 (1977). Accordingly, we reject this claim.

We affirm the judgment and sentence.

Trickey, ACJ

WE CONCUR:

Cox, J.

[16] CP at 756.

NIELSEN, BROMAN & KOCH, PLLC

August 10, 2016 - 2:04 PM

Transmittal Letter

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Copy sent to : Daniel Threadgill, 357673 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
amy.meckling@kingcounty.gov
kochd@nwattorney.net