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Court of Appeals
Division I
State of Washington

No. 74026-1-I
King County Superior Court No. 13-1-09535-8

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

SOPHIA DELAFUENTE,
Defendant-Appellant.

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

The Honorable Timothy A. Bradshaw, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss the charges pursuant to CrR 8.3(b).

2. The trial court abused its discretion and violated Delafuente's right to a speedy trial when it continued her trial because no judicial officer was available.

3. The trial court violated Delafuente's right to be present and right to counsel when the two continuances were granted when neither she nor her counsel were present. As a result, Delafuente had no opportunity to timely object to the continuance of her trial.

4. The prosecutor committed misconduct when she argued that Delafuente could be convicted as an accomplice if a reasonable person would have known that Garcia-Mendez and Howard were going to assault the victim.

5. The prosecutor committed misconduct when she argued that Delafuente or her accomplices intended to "execute" the victim.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the King County Jail recorded Delafuente's call with her lawyer, Detective Stangeland listened to a portion of that call, the State destroyed evidence relating to the call and the State delayed telling

Delafuente about Stangeland's activity and her similar actions in other cases, should this prosecution be dismissed under CrR 8.3(b)?

2. Did the trial court abuse its discretion and violate Delafuente's right to a speedy trial when it continued her trial because no judicial officer was available, but made no findings to support that ruling?

3. Did the trial court violate Delafuente's right to be present and right to counsel when the two continuances were granted when neither she nor her counsel were present and where Delafuente had no opportunity to timely object to the continuance of her trial?

4. Did the prosecutor commit misconduct when she argued that Delafuente could be convicted as an accomplice if a reasonable person would have known that Garcia-Mendez and Howard were going to assault the victim?

5. Did the prosecutor commit misconduct when she argued that Delafuente or her accomplices intended to "execute" the victim?

III.
STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Juan Garcia-Mendez, Darreson Howard and Sophia Delafuente were charged with the first-degree assault of Richard Powell on April 1, 2013. Garcia-Mendez was the principal and the State alleged that Howard

and Delafuente were accomplices. CP 22-24. Delafuente was also charged with rendering criminal assistance for hindering or delaying the apprehension of Garcia-Mendez and Howard. *Id.*

Garcia-Mendez's charges were severed from those of Howard and Delafuente. He was convicted and his appeal is pending in *State v. Garcia-Mendez*, No. 74110-1-I.

Delafuente and Howard were joined for trial. The State offered Delafuente an opportunity to plead guilty to reduced charges but only if Howard also entered a plea. 8/10/15 RP 39. When Howard refused to enter a plea, Delafuente was forced into trial on the greater charges. *Id.*

A jury convicted both Delafuente and Howard as charged. This timely appeal followed. CP 74-76. Howard also appealed. *State v. Howard*, No. 74054-7-I.

B. MOTION TO DISMISS

On March 3, 2015, the parties appeared for a pretrial status conference. 3/3/15 RP 5. They agreed that they would all be ready for trial at the next omnibus hearing scheduled for March 23, 2015. Trial was scheduled for March 30, 2015.

Despite the fact that the State knew that investigating Detective Donna Stangeland listened to a recorded jail call between Delafuente and her lawyer, the State did not disclose that information until after the March

3, 2015 hearing. The State also neglected to disclose that Stangeland had previously read and the shredded attorney-client correspondence in *State v. Guantai*, No. 05-1-05673-4 SEA. The State later said that it had not done so because "the State does not believe that such information is *Brady* material or otherwise discoverable." CP 138. In the State's view, this information did not "call into question Detective Stangeland's credibility. *Id.*

Another status conference was held on March 31, 2015. By that time, the defense had learned of the call and had asked for discovery regarding Detective Stangeland's actions in this case and the *Guantai* case. As a result, the defense was forced to seek a continuance of the trial date. CP 125.

On May 1, 2015, another status conference was held. It became clear that Stangeland had also listened to attorney-client calls in *State v. Alan Duffy*, No. 15-1-00427-8. 5/1/15 RP 32. The State was still resisting Delafuente's motion to compel records of Stangeland's activities. *Id.* at 37-41, 43. The King County Jail also averred that it was not responsible for discovery regarding the recorded phone calls and told the court that the defense must contact the phone contractor, Securus. *Id.* at 46. The trial had to be continued June 1, 2015. CP 126.

After eventually receiving the entire discovery, Delafuente moved to dismiss under CrR 8.3, CrR 3.3, CrR 4.7, RCW 9.73.030, *State v. Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). CP 127-131.

On June 5, 2014, the trial court held a hearing on this motion. The evidence demonstrated that on April 1, 2014, the James Bible Law Group emailed the King County Jail and asked them to place his law firm on the "Do Not Record" list. CP 152. Anna Gigliotti of the James Bible Law Group appeared as Delafuente's counsel in November 2014. On February 9, 2015, Stangeland listened to the beginning of an attorney-client jail phone call from Delafuente to Gigliotti.

Although Stangeland had no training on jail phone call interception, she can listen to jail telephone calls from her desktop computer. 6/5/15 RP 14-16. Beginning in 2014, the vendor for the telephone system added that feature. Prior to that, police officers had to ask the jail for all of the CDs of jail calls to listen to them. According to Stangeland, she had been listening to Delafuente's jail phone calls sporadically, beginning in April 2013. She said that the prosecutors prosecuting this case knew of her activities. 6/5/15 RP 21-23.

Stangeland said that she did not listen to all calls made by Delafuente. She picks and chooses when to listen. She said:

> It's somewhat random. I try to listen to the most recent ones if there's been a delay where I haven't listened to any in a while. I'll try to do the ones that are most recent. Sometimes I'll try to do the ones right before a court hearing or right after a court hearing. I've tried to, or I will target sometimes phone numbers to which I think they'll be more likely to have a conversation about the case itself.

6/5/15 RP 23. Stangeland said that after listening to a defendant's jail calls for a while, you know who they are contacting and who they might discuss the case with. *Id.*

Stangeland admitted this was not her first problem with intercepting attorney-client privileged communications. She admitted she had done so the week before in *Duffy*. 6/5/15 RP 16. In 2005, she had intercepted emails between an attorney and a client, read them, and then shredded them in *Guantai*.

Finally, Detective Stangeland testified that although she could listen to the preamble on the phone calls, which would indicate what warning was being given to the caller, she ordinarily fast-forwarded through that information. 6/5/15 RP 11.

There was no way to confirm Detective Stangeland's testimony that she hung up quickly because the State destroyed the call. The State's excuse was that they did not want to have anyone else inadvertently listen to the call. 6/5/15 RP 28.

Delafuente argued that Stangeland's actions, the State's delay in telling the defense and the State's failure to provide the information that Stangeland had done this before, required dismissal. Delafuente argued that she was prejudiced because she had to choose between having a speedy trial and the need to have all of the information to impeach Stangeland. 6/5/15 RP 26-28.

The trial court found that, while the jail's original decision to record telephone calls was for security, it was "clear that that is no longer the reason." *Id.* at 49.

> Having decided that the police have access via an officer's department-provided computer to these calls simply by clicking on a desktop icon, it's clear to the court that this is an investigative tool ancillary to any security purpose.

Id.

The Court found, however, that Stangeland was credible when she said that she did not listen to any privileged conversation. He denied the motion with the caveat that he was open to additional argument on the "*Brady*-type issue" – that is, whether the destruction of the jail call should cause dismissal of the charges. *Id.*

C. THE TRIAL CONTINUANCES

The trial had to be continued because of the State's failure to timely disclose Stangeland's actions. Stangeland notified the prosecutor

of her actions on February 9, 1015. Pretrial Exhibits 1-3. But, the prosecutor did not notify Delafuente' s counsel until roughly six weeks later. 3/31/15 RP 10. The case was then continued at least 10 more times because the prosecutor was in trial in another case.

On August 3, 2015, the trial court continued the trial to August 5, 2015. Supp. CP ____ (Order Continuing Trial filed 8/3/15). On August 5, 2015, the trial was continued to August 6, 2015. A judge checked a box on a form that stated "no judicial availability." Supp. CP _____ (Order Continuing Trial filed 8/5/15). This order appears to have been entered without a hearing. The defendant and counsel did not sign the Order. On August 6, 2015, the trial was again continued to August 10, 2015. A judged checked a box on a form that stated "no judicial availability." Supp. CP ____ (Order Continuing Trial filed 8/6/15). Again, this order appears to have been entered without a hearing. And again, the defendant and counsel did not sign the Order.

Trial commenced on August 10, 2015.

D. THE ASSAULT

On April 1, 2013, Richard Powell was shot 3 times near 2353 S.W. Charlestown Street in West Seattle. Powell had been standing outside his town car at about 11:00 to 11:15 p.m. 8/19/15 RP 509. According to him, a car pulled up and two men jumped out and one pulled a gun. *Id.* at 518.

The only other thing he remembered was that the man with the gun told him to empty his pockets. 8/19/15 RP 519.

Powell had his own gun and shot back. It was later determined that the gunman was Garcia-Mendez.

Earlier that evening, Leon Gordon had been walking along Alki. 8/31/15 RP 1180. A car passed him, and then turned off its lights and slowed down. *Id.* at 1185. Two people got out of the car, completely covered. *Id.* at 1186-87. Later, he identified one person from a photo montage. *Id.* at 1194.

One of the two asked Gordon if he was "gang banging." *Id.* at 1190. Gordon said: "No" and walked away. *Id.* One of the two was male; he could not tell if the other one was male or female. *Id.* at 1198. Neither person displayed a gun. *Id.* at 1198.

Sophia Delafuente admitted to the police that she was driving when "Juan was shot." 8/27/15 RP 1038. There was no direct evidence to establish that she was driving when Gordon was approached by Howard and Garcia-Mendez.

The State submitted grainy surveillance video from the area where Powell and Garcia-Mendez exchanged fire. The State argued that the video shows Delafuente passing the street where Powell was standing,

making a U-turn, coming back and pulling into an alley nearby. The State's theory was that the three had a plan to "attack and rob someone."

On April 1, 2013, the police were dispatched to SW Charlestown Street and Avalon Way in Seattle. 8/18/15 RP 459. The police found Rick Powell lying in the street injured. *Id.* at 466. There was a .9 millimeter semi-automatic handgun a couple of feet just to the west of him. *Id.* Emergency personnel arrived and took Powell to the hospital. There were video cameras at the intersection. 8/18/15 RP 474. On re-direct, the prosecutor asked, "Does this incident stand out in your memory?" *Id.* at 477. The officer testified that it did because

> It's not very often that you have a situation like this where you're able to do CPR on somebody that everything kind of lines up as far as the time frame and stopping, you're able to bring somebody else back. So it's something that you remember. I'll probably remember it for the rest of my life.

Id. at 477-78.

Powell testified that he was a limousine driver. 8/19/15 RP 500-18. He carried a Glock 19 .9 mm pistol. *Id.* at 519. He dropped off a fare on April 1, 2013, just prior to 11:15 p.m. *Id.* at 522. He pulled over on Avalon and Charlestown to have a smoke. A car drove past and two individuals approached him. *Id.* at 524. One of them flashed a gun at him saying, "empty your pockets," so he reached for his gun. *Id.* at 524. Then, he felt a shot entering his body. He does not remember shooting his own

gun. 8/19/15 RP 525. The last thing he remembered was calling 911. *Id.* at 528. He was shot in the chest three times. *Id.* at 528. He still has a bullet in his spine that was too difficult to remove. *Id.* at 529.

Clinton Cody Hurd lived on Avalon and Charlestown. *Id.* at 568. On the evening of April 1, 2013, he heard three popping sounds and looked out his living room window. He saw a silver car parked outside the house. Then he saw two people run up to the car, get in the back and the car sped off down the alley. *Id.* at 571. Hurd testified that the silver car was running the entire time it was parked in front of his house. *Id.* at 583.

Another neighbor, Ashley Bissell, also heard gunshots at about 11:00 p.m. *Id.* at 593. She went to the window and heard somebody say "Let's go, let's go, we gotta go." *Id.* at 595. She indicated that it was a male voice. *Id.* at 595.

Delafuente's fingerprints were found in the vehicle that left the scene. 8/20/15 RP 725.

E. CLOSING ARGUMENT

The State began its closing argument as follows:

> Thank you, Your Honor. Counsel, ladies and gentlemen of the jury, it should be very clear to you now that on April 1st, 2013, Richard Powell was the victim of horrific violence. Unprovoked, senseless stranger violence, the type of violence that we may hope to only ever see on TV....

> Without the heroic efforts of the first responding officers, the first responding medics, and Harborview Medical Center, you would be sitting here on a homicide trial. But for medical intervention, the defendants would have successfully executed Mr. Powell.

9/1/15 RP 1352-53.

Later in argument, the State said:

> Less than five minutes later, she pulls past Charlestown, pulls her car off the road, turns her car back around, and pulls up next to Mr. Powell and delivers the two people that nearly ended Mr. Powell's life, and she wants to say to you, I had no idea what was going on.
>
> It defies common sense. We ask you as jurors and we interrogate you about any biases, any prejudice, any preconceived notions and we ask you to judge this case on the facts, the evidence, and the law as given to you by the Court. But no one ever has or ever will ask you to check your common sense at the door.
>
> Your instructions are replete with the use of the word "reasonable," and a reasonable person standard. And is it at all reasonable that these two individuals didn't know exactly what was going to go down? That Juan Garcia-Mendez and Darreson Howard were going to try and rob and assault Mr. Powell? That Juan Garcia-Mendez was armed and that someone might get shot?

Id. at 1373.

IV.
ARGUMENT

A. WHERE THE KING COUNTY JAIL RECORDED DELAFUENTE'S CALL TO HER LAWYER, DETECTIVE STANGELAND LISTENED TO A PORTION OF THAT CALL, THE STATE DESTROYED EVIDENCE RELATING TO THE CALL AND DELAYED TELLING DELAFUENTE ABOUT STANGELAND'S ACTIVITY AND HER SIMILAR ACTIONS IN OTHER CASES, SHOULD THIS PROSECUTION BE DISMISSED UNDER CRR 8.3(B)?

This Court reviews a trial court's decision to dismiss criminal charges for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, which includes the right to confer privately with that counsel. State intrusion into those private conversations blatantly violates a foundational right. The Washington State Supreme Court has strongly condemned "the odious practice of eavesdropping on privileged communication between attorney and client." *Fuentes*, 179 Wn.2d at 811, citing to *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963). The courts must presume that such eavesdropping results in prejudice to the defendant and must vacate criminal convictions when there was no way to isolate the prejudice to the defendant from such "shocking and

unpardonable conduct." *Id.* And, the State must show beyond a reasonable doubt that the defendant was not prejudiced. *Id.* at 819-20.

When trial counsel belatedly learned of Stangeland's intrusion into the attorney-client relationship and her history of doing so in other cases, trial counsel was forced to choose between going to trial on the date scheduled in March 2015, or moving to continue to investigate Stangeland's actions.

When Delafuente brought her motion, the trial judge refused to dismiss because he found that Stangeland was credible when she said that she heard no privileged conversations. It appears that he concluded there was no Sixth Amendment violation. But the trial judge did not determine whether the State's actions in this case should have resulted in dismissal pursuant to CrR 8.3(b). That rule provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

There were multiple levels of governmental misconduct, all of which required Delafuente to choose between her right to counsel and her right to a speedy trial. First, despite the State's assurances to Delafuente and her counsel that their conversations were not being recorded, they

were. Securus was recording these calls in violation of her right to counsel.

Second, Securus provided access to all of Delafuente's calls to Detective Stangeland. Stangeland was not given any training about how to avoid intercepting attorney-client calls.

Third, Stangeland should have been exceedingly vigilant regarding the calls because she had previously engaged in at least one egregious violation of the attorney-client relationship. Instead, she admitted that she skipped the preamble of the call and went directly to the substance. And, she did not use the part of the program that would have showed her the records relating to the number called, and she admitted that she deliberately focused on calls before and after court hearings because "I think they'll be more likely to have a conversation about the case itself." 6/5/15 RP 23.

Fourth, the State deleted the electronic evidence of Stangeland's access to Delafuente's calls making it impossible to corroborate Stangeland's testimony that she did not listen to the call long enough to hear privileged conversations.

Fifth, the State delayed roughly six weeks before disclosing this intrusion to Delafuente and her counsel.

Sixth, the State failed to immediately inform Delafuente's counsel that Stangeland had previously violated a defendant's right to confidential communication with his lawyer. That was material and exculpatory evidence. Stangeland's act of reading the privileged communication and covering up her misconduct by shredding the evidence is probative of her truthfulness.

These are "truly egregious [instances] of mismanagement or misconduct by the prosecutor." *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *affirmed*, 121 Wn.2d 524, 852 P.2d 294 (1993); *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868, *review denied*, 141 Wn.2d 1014, 10 P.3d 1072 (2000) (citing *City of Seattle v. Orwick*, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)).

In *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980), our Supreme Court observed that:

> if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

Here, the State failed to act with diligence by failing to be immediately forthcoming about Detective Stangeland's past and present

invasions of the attorney-client relationship. This forced Delafuente to choose between fully prepared and competent counsel and her right to a speedy trial under CrR 3.3. The charges against her should have been dismissed.

B. DID THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE DELAFUENTE'S RIGHT TO A SPEEDY TRIAL WHEN IT CONTINUED HER TRIAL BECAUSE NO JUDICIAL OFFICER WAS AVAILABLE, BUT MADE NO FINDINGS TO SUPPORT THAT RULING?

"[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).

An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right "'is as fundamental as any of the rights secured by the Sixth Amendment.'" *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting *Barker*, 407 U.S. at 515 n.2).

The right to a speedy trial is also a fundamental right under Washington's speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88, *opinion amended*, 990 P.2d 962 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (2000). CrR 3.3 sets a definite timeline in which a trial

must occur; it requires that a defendant in custody be brought to trial within 60 days, or the trial court must dismiss the charge. The trial court must ensure a defendant receives a timely trial under CrR 3.3. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). Certain periods may be excluded in computing the time for trial, including valid continuances granted by the court under CrR 3.3(f) and unavoidable or unforeseen circumstances. CrR 3.3(e)(3), (8). "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). The court must state the reasons for the delay on the record. CrR 3.3(f)(2); *Kenyon*, 167 Wn.2d at 139.

Although the rule is "not a constitutional mandate," its purpose is to protect the constitutional right to a speedy trial. *Id.* at 136. Under CrR 3.3(a)(1), "it is the trial court which bears the ultimate responsibility to ensure a trial is held within the speedy trial period." *State v. Jenkins,* 76 Wn. App. 378, 382-83, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995). This responsibility "underscore[s]...the importance" of the speedy trial rule. *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). The State also bears responsibility for seeing

that the defendant is timely tried and must uphold its duty in good faith and act with due diligence. *Ross*, 98 Wn. App. at 4.

Applying the speedy trial rule to the facts of a particular case is reviewed de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009), *review denied*, 168 Wn.2d 1034, 230 P.3d 1061 (2010); see, e.g., *Kenyon*, 167 Wn.2d 130 (speedy trial violation found through de novo review of the court's compliance with the rules regarding the continuance decision, not the discretionary decision itself). Although applying CrR 3.3 is reviewed de novo, a trial court's factual determination to grant a continuance is reviewed for abuse of discretion. *Kenyon*, 167 Wn.2d at 135.

Routine court congestion is not a permissible reason for a continuance. *State v. Mack*, 89 Wn.2d 788, 576 P.2d 44 (1978). Delay based upon court congestion is "contrary to the public interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion." *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *Kenyon*, 167 Wn.2d at

134 (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the "trial court should have documented the availability of pro tempore judges and unoccupied courtrooms" because, under CrR 3.3(f), it is "required to 'state on the record or in writing the reasons for the continuance' when made in a motion by the court or by a party"); *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance); *State v. Smith*, 104 Wn. App. 244, 251-52, 15 P.3d 711 (2001) (routine court congestion not good cause for continuance); *State v. Warren*, 96 Wn. App. 306, 309, 979 P.2d 915, *opinion amended*, 989 P.2d 587 (1999) (courtroom unavailability is synonymous with court congestion) (citing *State v. Kokot*, 42 Wn. App. 733, 737, 713 P.2d 1121, *review denied*, 105 Wn.2d 1023 (1986)). Specifically, "[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." *Flinn*, 154 Wn.2d at 200.

Our Supreme Court has continued to apply this requirement. In *Kenyon*, on the eve of the confined defendant's speedy trial deadline, the trial court granted a continuance due to the unavailability of a judge – the

presiding judge was presiding over another criminal case and the other county superior court judge was on vacation. *Kenyon*, 167 Wn.2d at 134. The court made no other findings, but extended the speedy trial date during the continuance period. Kenyon's motion to dismiss on speedy trial grounds was denied. Relying on the above-cited precedent, the Court noted court congestion and courtroom unavailability are not valid bases for a continuance. *Id.* at 137. The Court held "simply because the rule now allows 'unavoidable or unforeseen circumstances' to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms." *Id.* at 139. Because the record contained no information on the number or availability of unoccupied courtrooms or the availability of visiting or pro tempore judges to hear criminal cases, the defendant's speedy trial right was violated. *Id.* at 137, 139.

This case is on all fours with *Kenyon.* The record contains no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tempores to hear criminal cases in the unoccupied courtrooms. The trial court made no note of other available courtrooms or judges.

And the record here is arguably worse because the continuances were entered outside the presence of Delafuente and her counsel. She had

no opportunity to object or insist upon compliance with CrR 3.3 and the dictates of *Keynon*. There are no clerk's minutes so the orders appear to have been entered in chambers and not in open court. There is no showing that the orders were served on either Delafuente or her counsel. The record is silent as to how she learned that trial would finally commence on August 10, 2015.

C. DID THE TRIAL COURT VIOLATE DELAFUENTE'S RIGHT TO BE PRESENT AND RIGHT TO COUNSEL WHEN THE TWO CONTINUANCES WERE GRANTED WHEN NEITHER SHE NOR HER COUNSEL WERE PRESENT AND WHERE DELAFUENTE HAD NO OPPORTUNITY TO TIMELY OBJECT TO THE CONTINUANCE OF HER TRIAL?

An accused has a constitutional right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, even where the defendant is not confronting witnesses or evidence against him. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)). An accused is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *Id.*

An accused is also guaranteed the right to counsel at all critical stages of the proceedings even if the defendant is not present. Consideration of the time for setting the trial is a critical stage. See, e.g.,

State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210, 215 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934, *reh'g denied*, 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988) (Defendant had the right to have counsel present when the resentencing trial date was set).

And Delafuente had a right to be present when the trial court, apparently on its own motion, twice continued the case because there were no judges available. Her presence would have contributed to the fairness of the proceedings because she could have objected and reminded the court that it had to make detailed findings tied to specific, articulable facts, rather than generalized assertions. Her absence deprived her of the opportunity to object in a timely fashion as required by CrR 3.3.

By the time she and her counsel next appeared in court, the five days had passed and she had no remedy for the delay. It is unclear if she or her lawyer even knew of the reason the case was continued twice more. There was no way to remedy the fact the trial had been continued outside her presence.

The State cannot demonstrate that the errors here were harmless beyond a reasonable doubt.

D. DID THE PROSECUTOR COMMIT MISCONDUCT WHEN SHE ARGUED THAT DELAFUENTE COULD BE CONVICTED AS AN ACCOMPLICE IF A REASONABLE PERSON WOULD HAVE KNOWN THAT GARCIA-MENDEZ AND HOWARD WERE GOING TO ASSAULT THE VICTIM?

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 678. Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed flagrant and ill-intentioned. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). However, if the misconduct is flagrant, the petitioner has not waived his right to review of the conduct. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In such cases, reversal is required if the misconduct caused an enduring and resulting prejudice. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676.

A criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v.*

Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

To prove Delafuente was an accomplice to first-degree assault, the State had to prove she knew she was facilitating, promoting or aiding in the commission an assault. RCW 9A.08.010(1); RCW 9A.36.011. It is not enough that the State's evidence may have established she knew Mr. Garcia-Mendez and Mr. Howard might commit some crime, or even that she should have known they intended to commit an assault.

RCW 9A.08.010(1) defines "knowledge" as:

> (b) ...A person knows or acts knowingly or with knowledge when:
>
> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
>
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts

> exist which facts are described by a statute defining an offense.

The Supreme Court has clarified that the language in RCW 9A.08.010(1)(ii) regarding a "reasonable person" is not an alternative definition of knowledge. *State v. Shipp*, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980).

> This provision instead permits but does not require the jury to infer actual, subjective knowledge if the defendant has information that would lead a reasonable person in the same situation to believe that facts exist that are described by law as being a crime.

State v. Vanoli, 86 Wn. App. 643, 648, 937 P.2d 1166, *review denied*, 133 Wn.2d 1022, 950 P.2d 478 (1997); *Shipp*, 93 Wn.2d at 516.

Shipp recognized there were three potential readings of RCW 9A.08.010(1)(ii). First, an instruction mirroring the language of the statute could permit a juror to conclude that if a reasonable person might have known of a fact, the juror had to find the defendant had knowledge. *Shipp*, 93 Wn.2d at 514. Second, a juror could conclude the statute redefined "knowledge" to include "negligent ignorance." *Id.* Finally, a juror instructed in the language of the statute could conclude the statute requires he find the defendant had actual knowledge, "and that he is permitted, but not required, to find such knowledge if he finds that the defendant had 'information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.'" *Id.*

Addressing each of these alternatives, *Shipp* found the first "clearly unconstitutional" as it creates a mandatory presumption. *Id.* at 515. The Court deemed the second alternative unconstitutional as well, as defining knowledge in a manner so contrary to its ordinary meaning deprived people of notice of which conduct was criminalized. *Id.* at 515-16.

In resting upon the third interpretation as the only constitutionally permissible reading, the Supreme Court said "[t]he jury must still be allowed to conclude that he was less attentive or intelligent than the ordinary person. *Id.* at 516. Thus, the "jury must still find subjective knowledge." *Id.* at 517.

Therefore, when the State asked the jury to conclude that is was not "reasonable" that Delafuente did not know that Garcia-Mendez and Howard would commit an assault, she was arguing the Delafuente "should have known" that the assault would happen and that she was assisting it. This was flagrant and ill-intentioned. Before the trial, our Supreme Court decided *State v. Allen*, 182 Wn.2d 364, 341 P.2d 268 (2015). There the Court clarified that the argument that a "reasonable" person would have known is an impermissible "theory of constructive knowledge." Rather, "the jury must find actual knowledge but may make such a finding with circumstantial evidence." *Id.* at 374.

The argument was prejudicial here because the State's theory of guilt was based solely on circumstantial evidence. And that circumstantial evidence demonstrating actual knowledge was weak.

E. DID THE PROSECUTOR COMMIT MISCONDUCT WHEN SHE ARGUED THAT DELAFUENTE OR HER ACCOMPLICES INTENDED TO "EXECUTE" THE VICTIM?

A prosecutor must "seek convictions based only on probative evidence and sound reason." *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). "[T]he scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct." *In re Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). Hence, a prosecutor may not refer to charges not brought against the defendant. *State v. Boehning*, 127 Wn. App. 511, 522, 111 P.3d 899, 905 (2005); *State v. Torres*, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976); ABA Standards for Criminal Justice 3-6.9.

Here, the prosecutor told the jury that Delafuente was actually guilty of attempted murder or "execution." She was only spared because of the actions of the first responders. This argument was flagrant and ill-intentioned. If the prosecutor thought Delafuente or her co-defendants

intended a murder, she could have brought that charge. But she did not. Instead, she argued that was their intention but somehow they were spared indictment on that charge.

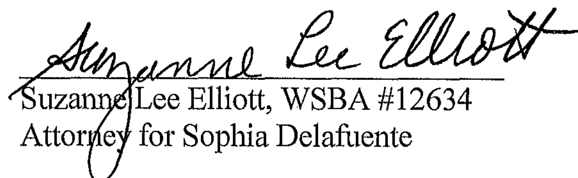
This argument was simply a tactic to prejudicially inflame the jury and suggest that convicting Delafuente was the least they could do. The argument was prejudicial because the circumstantial evidence supported Delafuente's claim that she was unaware that her co-defendants assaulted or were intending to assault the victim.

V.
CONCLUSION

This Court should reverse and dismiss the charges because of pervasive governmental misconduct and mismanagement, and because the State violated Delafuente's right to a speedy trial, right to be present and right to counsel. Failing that, this Court should reverse for prosecutorial misconduct.

DATED this 14th day of July, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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