No. 90529-1
Court of Appeals No.71645-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HILL,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division One (transferred from Division Two),
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Robert Hill, appellant below, petitions this Court to grant review of the unpublished opinion of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Under RAP 13.4(b), Petitioner seeks review of the unpublished decision of the court of appeals, Division One, in State v. Hill, __ Wn. App. __, __ P.3d __ (2014 WL 2796715, filed June 16, 2014).[1]

C. ISSUES PRESENTED FOR REVIEW

1. In closing argument in this case where credibility was the crucial issue, the prosecutor compared the degree of certainty a juror would need to be convinced of guilt beyond a reasonable doubt with the degree of certainty they would need to be convinced of what city they were in if they looked out a window after seeing out a few panes after being blindfolded and driven somewhere.

   Should review be granted to address whether the court of appeals erred in holding that this comparison between the burden of proof and an everyday experience where review is pending on a similar issue in In re Curtiss, *motion for discretionary review pending under* No. 89012-9, involving the same prosecutor's office in this case and in this Court's recent decision in State v. Lindsay, __ Wn.2d __, __ P.3d ___ (2014 WL 1848454 (May 8, 2014)), which specifically condemned analogy to everyday experiences as improper minimizing of the burden of proof?

2. Should review be granted to address whether the trial court violated Mr. Hill's CrR 3.3 rights?

[1]A copy of the Opinion is filed herewith as Appendix A (hereinafter "App. A").

D. OTHER ISSUES SUPPORTING REVIEW

3. Should review be granted on the issues raised in Hill's Statement of Additional Grounds?

E. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Robert Hill was charged by amended information in Pierce County with and convicted after jury trial of malicious mischief in the third degree and three counts of fourth-degree assault. CP 11-12, 48-51; RCW 9A.36.04(1)(2), RCW 9A.48.090(1); RP 1, 70.[2] He was ordered to serve a standard range sentence and appealed to Division Two of the court of appeals. CP 75-91; RP 249-51. The case was transferred by Division Two to Division One due to caseload and, on June 16, 2014, Division One affirmed in an unpublished opinion. App. A.

2. Overview of facts relevant to issues on review[3]

The charges in this case arose as a result of an incident on November 8, 2011, at the Stonegate bar in Tacoma, where Robert Hill had come to celebrate on the night of the election in which he was a candidate. RP 102-125. Hill had scheduled an event with the owner but there were some issues with the bartender and customers thinking it had been

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

[3]A more detailed discussion of all of the facts regarding the incident is contained in the opening brief at 2-11.

cancelled and an altercation ensued. RP 52-197. Depending on whom you believed, Hill was either guilty of physically assaulting three people or was responding to those people physically assaulting him in trying to force him, mistakenly, to leave. RP 52-197. Also depending upon whom you believed, Hill had thrown and otherwise damaged property at the bar and broken it. RP 52-197.

F. ARGUMENT

1. REVIEW SHOULD BE GRANTED BECAUSE THE PROSECUTOR COMMITTED ILL-INTENTIONED AND PREJUDICIAL MISCONDUCT SIMILAR TO THAT RECENTLY CONDEMNED IN LINDSAY

Unlike all other attorneys in our criminal justice system, prosecutors, as "quasi-judicial" officers, enjoy a special status and, in turn, have special duties. See, Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). One of those duties is to act in ways which ensure fairness in a criminal proceeding even at the expense of "losing" a conviction. Id.; see State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Review should also be granted because the court of appeals erred in finding that there was no misconduct in this case.

In rebuttal closing argument, the prosecutor told the jury that he was going to use his "artistic abilities and **demonstrate reasonable**

doubt." RP 234 (emphasis added). He went on:

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

RP 235-36 (emphasis added).

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010), Division Two specifically declared that it was improper and misconduct for a prosecutor to compare

the standard of proof beyond a reasonable doubt to the degree of certainty people used when making everyday decisions. 153 Wn. App. at 431-32. The Court noted that, "[b]y comparing the certainty required to convict with the certainty people often require when they make everyday decisions - both important decisions and relatively minor ones - the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant]." 153 Wn. App. at 431; see also, State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), remanded on other grounds, 164 Wn.2d 724 (2012), affirmed on remand, 2013 WL 703974 (2/25/13) (prosecutor compared the decision jurors had to make in deciding guilt to decisions like having surgery and leaving children with a babysitter).

More recently, in May of 2013, in Lindsay, supra, this Court agreed with this line of cases, holding that a prosecutor's comparison of the certainty a juror would have in deciding to cross the street with the certainty they would need to have to be convinced beyond a reasonable doubt improperly trivialized the state's burden of proof and is misconduct. __ Wn.2d at ___ (2014 WL 1848454) (May 8, 2014) (slip op. at 7). And a similar issue is pending a decision on a motion for discretionary review in In re Curtiss, supra, another case involving the same prosecutor's office committing similar misconduct.

Further, other courts have similar noted that a person that acting

even in "an important business or family matter would certainly gravely weigh that decision but still would not "necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). The duty a juror has to determine a defendant's guilt is "awesome," a Massachusetts court declared, so that comparing that duty to making even important decisions "understated and tended to trivialize" it. Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1272 (Mass. 1977).

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

> **We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so.** Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

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

Here, the prosecutor's closing argument walked jurors through imagining themselves in the situation where he had blindfolded them and driven them in a car for 40 minutes, then taken them to a room and shown them one window after another to see if they could figure out, "beyond a reasonable doubt," where they were. RP 235-36. Further, he quantified the amount of evidence needed, saying he did not have to show them more than three things and they could be convinced beyond a reasonable doubt where they were, just as he did not have to provide more evidence to prove his case. RP 235-36.

The court of appeals erred in finding that this argument was not improper, especially here, where the question of credibility was crucial. See, e.g., State v. Emery/Olson, 161 Wn. App. 172, 195, 253 P.3d 314, affirmed 174 Wn.2d 741 (2012). Here, Mr. Hill's version of events was starkly different than the version given by the prosecution's witnesses. The misconduct in this case was flagrant, prejudicial and ill-intentioned. Further, it invited the jurors to convict based upon far less than the constitutionally mandated burden of proof. This Court should grant review.

2. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER HILL'S CRIMINAL RULE 3.3 RIGHTS WERE VIOLATED

Under CrR 3.3, the "speedy trial" rule, a trial must be held within

60 days of arraignment, if the defendant is in custody. See State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). The trial court is responsible for ensuring compliance with the rule and, when a defendants rights under the rule are violated, the court must dismiss the charges with prejudice. Id. In this case, review should be granted, because the court of appeals erred in finding that Hill's speedy trial rights were not violated.

a. Relevant facts

Mr. Hill was initially charged on November 14, 2011, when the first information was filed. CP 1-2. On January 3, 2012, the parties appeared before Judge Stolz to discuss whether bail should be reduced. RP 1-8. The judge also granted a continuance, with the written order indicating the reason as follows: "[d]efense needs additional time for investigation." CP 5. The order continued the trial date to February 1, 2012, calculating the new expiration date as March 2, 2012. CP 5.

No hearing was held on January 23, 2012, but a notation was made in the court file that the matter had been scheduled but "due to inclement weather conditions was cancelled." On February 1, 2012, an order of continuance was entered, giving the reason of "additional time needed for interviews/negotiations" and indicating the extension was by agreement of the parties. CP 6. The order continued the trial from February 1 to February 15, stating the expiration date was now March 16. CP 6. Another order continuing trial was entered on February 15, 2012,

indicating that the "plea fell through parties need to interview witnesses and prepare for trial" and that extension was by agreement of the parties. CP 7. The trial date was extended to March 20, with the new expiration date noted as April 19. CP 7.

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

On April 16, 2012, the parties again appeared before Judge Stolz. RP 8. The judge stated her understanding that there was a request to continue the trial because one of the assault victims was "out of the country with the military" and two law enforcement officers were "not available." RP 8. The court noted the case was 154 days old and there had been four prior continuances. RP 8.

The prosecutor told the court that Hill would not be "prejudiced" by a continuance because he was "currently serving a prison sentence" for another offense. RP 8. Counsel for Hill told the court, "[w]e're opposed to any continuance of this matter." RP 9. He said Hill wanted to go to trial and that it seemed "these scheduling issues" with witnesses "could have been known when the trial was last set." RP 9. The court held that there was "good cause under State vs. Campbell to continue this matter."

RP 9. The written order indicated that the current trial date of April 16 was continued to May 22, with the expiration date thus changing to June 23. CP 9.

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

b. The court of appeals should have found that Hill's speedy trial rights were violated

Review should be granted and Hill's convictions should be reversed and dismissed with prejudice, because the trial court erred in granting the April 16 continuance over Hill's objection and the result was a violation of Hill's CrR 3.3 speedy trial rights. While in general, a trial court's decision to grant or deny a motion for a continuance is reviewed for abuse of discretion, that is not the standard used when the speedy trial rule applies. See State v. Saunders, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009). Instead, when the question is whether there was a violation of the speedy trial rule, that issue is reviewed de novo. Kenyon, 167 Wn.2d at 135.

Under CrR 3.3, a defendant who is in custody must be brought to

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

Here, the first continuance, on January 3, was apparently at defense request, continuing the trial date to February 1 and thus extending speedy trial to March 2, 2012. CP 5. The February 1, 2012, continuance to February 15 for "additional time needed for interviews/negotiations" then extended speedy trial to March 16. CP 6. The February 15 continuance due to the plea negotiations falling through extended the trial date to March 20, with the new expiration date of April 19. CP 7. The March 20 continuance, based on the filing of the amended information, reset the trial date to April 16, thus extending speedy trial to May 16 under the rule, i.e., 30 days later. CP 8.

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

have had that effect under CrR 3.3(b)(5).

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

This was simply insufficient to support a continuance in this case. In general, the unavailability of a material state's witness may be a valid ground for granting a continuance beyond speedy trial if 1) there is a valid reason the witness is not available, 2) the witness will become available within a reasonable time and 3) the continuance will not cause substantial prejudice to the defendant. See State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988). To satisfy these requirements, the prosecution must make a sufficient showing that the witnesses are, in fact, unavailable. See, e.g., State v. Yuen, 23 Wn. App. 377, 597 P.2d 401 (1979) (where the prosecutor gave details about physical illness of an absent witness, a death in the family and expected return of another and the efforts made to try to locate another, sufficient showing made); compare, State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989) (reversal and dismissal was required where the prosecution moved for a continuance based on the unavailability of its expert witness from the

crime lab, without giving any written or oral reason for that absence).

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

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

could have heard the case, nor was there anything in the record noting what other courtrooms or judges might have been available. Id.

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

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

The Torres Court then declared that the record before it was "insufficient to support a continuance past the speedy trial period," that the trial court "simply accepted at face value" the prosecutor's "assertion that officer training was good cause for delay." Id. And the Court noted that

the trial court had made "no factual inquiry and no findings," never asking things like whether the testimony was crucial to the state's case, whether the training was different, special or just routine, or whether it could be rescheduled. Id. The Court affirmed on other grounds, however, because the parties agreed to have the case consolidated with another which was sufficient reason for the delay. Id.

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

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

etc., to prove that the witnesses were, in fact, "unavailable" as a matter of law and that they would become available within a reasonable time or even within the nearly six week continuance that the prosecutor was asking the court to grant. A witness is not "unavailable" for the purposes of CrR 3.3 simply because they are not physically present in court. Torres, 111 Wn. App. at 331. Instead, as the Torres Court noted, "[f]or the purposes of CrR 3.3, an 'unavailable' witness is one whose testimony cannot be contrived by any means," and "[t]he word 'unavailable' is not used in the social sense of having a previous engagement." Torres, 111 Wn. App. at 330-31.

Further, the trial court's decision appears to have also relied on caselaw which did not apply. In ruling, orally, the trial court also declared that there was "good cause under State vs. Campbell to continue this matter." RP 9. But State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied sub nom Campbell v. Washington, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985), involved defense counsel asking for a continuance over the defendant's objection because of the magnitude and complexity of the case. 103 Wn.2d at 13-14. Here, however, it was not *counsel* who requested the continuance - it was the state. RP 8. The question was not between the two evils of violating a defendant's rights to speedy trial or violating his rights to have adequate assistance of counsel as in Campbell; it was whether to grant a continuance over defense

objection based on "unavailability" of crucial state's witnesses.

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

G. OTHER REASONS SUPPORTING REVIEW

3. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES HILL RAISED PRO SE

Hill filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG"), raising a number of issues, all of which the Court of Appeals rejected. See App. A. Counsel was not appointed to assist or to research the issues contained in Hill's SAG. See RAP 10.10(f). In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S.

1121 (1996), this Court indicated it would not address arguments incorporated by reference from other *cases*, but did not state anything about incorporation by reference of arguments or issues in the *current* case. Thus, to comply with RAP 13.7(b) and raise all issues in this Petition without making any representations about their relative merit, incorporated herein by reference are Hill's pro se arguments, contained in his RAP 10.10 SAG. This Court should grant review on those issues.

H. CONCLUSION

For the foregoing reasons, this Court should accept review of the published decision of Division Two of the court of appeals in this case

DATED this 16th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Robert Hill, bkg 3834, Kitsap Jail, MS033, 614 Division Street, Port Orchard, WA. 98366, and to opposing counsel at Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402.

DATED this 16th day of July, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. ROBERT JESSE HILL, Appellant.	)	No. 71645-0-I UNPUBLISHED OPINION FILED: June 16, 2014

VERELLEN, A.C.J. — Robert Hill contends that the trial court erred by granting a continuance after the State informed the court that a victim witness was unavailable due to military service. But Hill's failure to object on the basis of CrR 3.3 speedy trial rights waived any challenge under CrR 3.3. The trial court also properly exercised its discretion by granting a continuance based on the unavailability of witnesses.

Hill also argues that the prosecutor committed misconduct in closing argument by offering a general analogy regarding the beyond a reasonable doubt standard. A prosecutor does not commit misconduct in closing argument by analogizing the beyond a reasonable doubt jury instruction where the analogy does not contradict the instruction, imply a standard that is at odds with the correct standard, or attempt to quantify that standard in numerical or statistical terms. Other arguments raised by Hill lack merit. We affirm.

FACTS

Witnesses alleged that on November 8, 2011, Hill entered a bar, screamed at employees and patrons, slammed a coffee thermos into electronic equipment, grabbed and shook a server, blew a whistle loudly, aggressively grabbed one customer who told him to stop, and grabbed and hit a second customer who told him he needed to leave. Hill bumped into several of the same individuals as he was herded out the door.

Hill was later arrested and charged with assault in the second degree, assault in the fourth degree and two counts of malicious mischief in the third degree. Following a jury trial, he was convicted as charged.

Hill appeals.

DISCUSSION

Speedy Trial

Hill first argues that the trial court violated his right to a speedy trial by granting the State's motion for a continuance due to the unavailability of witnesses. We disagree.

Under CrR 3.3, a defendant who is in custody must be brought to trial within 60 days of arraignment. Under CrR 3.3(e), certain time periods are excluded from the 60-day calculation, such as continuances granted by the court upon written agreement of the parties or a motion of a party arguing the extension is required in the administration of justice.[1] Time excluded under CrR 3.3(e) extends the time for trial, so that the

[1] CrR 3.3(e), (f).

allowable time for trial then expires 30 days after the end of that excluded period.[2] Under CrR 3.3(f)(2), 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. An appellate court reviews a trial court's decision to grant a continuance under CrR 3.3 for an abuse of discretion.[3]

Hill was charged on November 14, 2011.

On January 3, 2012, the court granted Hill's motion for a continuance (continuing trial date to February 1, 2012, expiration date of March 2, 2012).

On January 23, 2012, a scheduled hearing was cancelled due to inclement weather.

On February 1, 2012, the trial court granted an agreed motion for continuance (continuing trial date until February 15, 2012, expiration date of March 16, 2012).

On February 15, 2012, the trial court granted an agreed motion for continuance (continuing trial date to March 20, 2012, expiration date of April 19, 2012).

On March 20, 2012, the trial court granted the State's motion for continuance to allow the State to file an amended information and conduct further investigation (continuing trial date to April 16, 2012, expiration date of May 16, 2012).

On April 16, 2012, the trial granted the State's motion for continuance over Hill's objection, finding good cause due to the unavailability of three witnesses (continuing trial date to May 22, 2012, expiration date of June 23, 2012).

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[2] CrR 3.3(b)(5).

[3] State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

On May 22, 2012, the court continued the case at Hill's request (continuing trial date to July 12, 2012, expiration date of August 22, 2012).

On July 12, 2012, the trial began.

Hill only objected to the State's April 16, 2012 motion for continuance. Hill's only asserted basis for his objection was that he wanted to go to trial. His attorney's argument, in its entirety, was:

> Your Honor, we're opposed to any continuance of this matter. It seems to us that these scheduling issues were probably--or certainly could have been known when the trial was last set and could have been taken into consideration and a trial set where everybody could be available if it goes, and Mr. Hill is opposing any continuance and prefers to go to trial.[4]

Hill did not contest the State's proffered reasons for the continuance, but argued that these were "scheduling issues" that should have been dealt with at the prior hearing.[5] The trial court explained the reasons for the motion to continue as:

> One of the assault victims is out of the country with the military, and two law enforcement officers are not available. It is proposed to continue this, at this time, from 04/16/12 to 05/22/12. The case is 154 days old, and there have been four prior continuances.[6]

The trial court granted the motion, stating that "the court finds good cause under State v. Campbell to continue this matter, so I've signed the order of continuance."[7]

For the first time on appeal, Hill asserts that the charges should have been dismissed based on a violation of the speedy trial rule. This court will not consider an

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[4] Report of Proceedings (RP) (Apr. 16, 2012) at 9.

[5] Id.

[6] Id. at 8.

[7] Id. at 9 (citing State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984)).

issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right.[8] While there is a constitutional right to a speedy trial, the CrR 3.3 right to trial within 60 days is not constitutional in nature.[9]

Additionally, Hill did not file a motion to dismiss the charges, he did not argue that the proposed trial date was outside the CrR 3.3 speedy trial limits, and the parties' attorneys selected the date for the new trial as their schedules allowed. Under CrR 3.3, a timely objection must be made to a trial date set outside of the CrR 3.3 expiration date so that the trial court has the opportunity to fix the error and comply with the CrR 3.3 requirements.[10] Because no timely motion was presented to the trial court and the alleged 60-day speedy trial violation is not a constitutional issue, we decline to reach the speedy trial argument.

Hill also argues for the first time on appeal that the trial court erroneously relied on State v. Campbell.[11] In that case, the defendant requested a continuance based on concerns that counsel was not prepared for trial.[12] Although the facts of Campbell are distinguishable, Campbell holds that the trial court's ruling on a motion for continuance "will not be disturbed absent a showing of manifest abuse of discretion," and that the trial court may properly grant a continuance over defense objection where the ruling is

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[8] RAP 2.5(a); State v. Brewer, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

[9] State v. Torres, 111 Wn. App. 323, 330, 44 P.3d 903 (2002).

[10] State v. Chavez-Romero, 170 Wn. App, 568, 581, 285 P.3d 195 (2012).

[11] 103 Wn.2d 1, 691 P.2d 929 (1984).

[12] Id. at 14.

based on valid reasons, including a concern to ensure a fair trial.[13] The unavailability of a key witness is recognized as a valid reason for a court to grant a motion for continuance.[14] Hill fails to demonstrate that the trial court abused its discretion in granting the motion for a continuance under these circumstances.

Hill's speedy trial argument fails, both for lack of an adequate objection in the trial court and because the trial court did not abuse its discretion in granting the State's April 16, 2012 motion for continuance.

Prosecutorial Misconduct

Hill argues that prosecutorial misconduct requires reversal of his convictions. We disagree.

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, he or she must seek convictions based only on probative evidence and sound reason.[15] "'The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.'"[16]

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that the prosecutor's conduct was both improper and prejudicial.[17] The prejudice prong requires that the defendant show a substantial likelihood that the

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[13] Id. at 14-15.

[14] State v. Iniguez, 167 Wn.2d 273, 279, 217 P.3d 768 (2009) (State's witness left the country and was unavailable); State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988).

[15] In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

[16] Id. (quoting ABA, STANDARDS FOR CRIMINAL JUSTICE std. 3-5.8(c) (2d ed. 1980)).

[17] Id.

misconduct affected the jury verdict.[18] We consider the prosecutor's alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[19]

Hill claims the prosecutor misstated and trivialized the beyond a reasonable doubt standard of proof. We disagree that there was misconduct.

"Due process requires the State to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged."[20] Misstating or trivializing the State's burden to prove the defendant's guilt beyond a reasonable doubt is misconduct.[21]

Here, the prosecutor paraphrased the jury instruction describing reasonable doubt:

> If I were to take you from the building and drive you around in the back seat of a limousine with a blindfold on for 40 minutes—you can go 40 minutes this way, that way, or you can go around in a big circle; you don't know where you're going. And I bring you up to a building that has ten flights of stairs, and I put you in a room, and I take your blindfold off, and you see three windows and a chair in the middle, and I have you sit in the middle, and then I say, let's do a little experiment here; go look out that first window and see what you see, and you do; you go out, and you look out the first window, and you see a mountain, and then I tell you -- you know, I say, can you tell me beyond a reasonable doubt where you are? You know you're in Washington because you didn't go that far in the car. You went 40 minutes; but you say to me, I can still be in Tacoma because I can see that beautiful mountain from right out there on the highway, and I show you a body of water. I ask you to look out the next window, and you do; and of course, you see this large body of water and you say, wait a minute, you know. I say, can you tell me beyond a reasonable doubt

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[18] Id.

[19] State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

[20] Glasmann, 175 Wn.2d at 713.

[21] Id.

> where you are? And you say, of course not. I can see the water from Tacoma. I can see it from Seattle. I don't know where I am beyond a reasonable doubt. But then I say, look out the third window, and you do, and you see this thing that you recognize right there, and it's the Space Needle, and it's as big as day, and you see it. You know beyond a reasonable doubt you're in Seattle, and I don't have to show you the EMP. I don't have to show you the Seattle Art Museum. I don't have to show you--I don't have to show you a hundred things. I don't have to show you a thousand things. I've showed you three things, and you were convinced beyond a reasonable doubt; so the argument where there's evidence or lack thereof, there's not a lack of evidence here, folks. There's enough evidence for you to find the defendant guilty beyond a reasonable doubt.[22]

In State v. Lindsay, the Supreme Court recently examined whether a prosecutor's use of a similar analogy amounted to a misstatement of the burden of proof. It concluded that analogies where the prosecutor quantifies the amount of the puzzle that may be complete in order to know beyond a reasonable doubt what the puzzle is are improper.[23] But analogies where the prosecutor gives only a general reference to being able to discern the subject of a puzzle with some pieces missing were not improper.[24]

Similar to the argument under consideration in Lindsay, here, the process of elimination analogy that the prosecutor used to illustrate reasonable doubt was a general reference and did not improperly quantify the burden of proof. And the

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[22] RP (July 19, 2012) at 235-36.

[23] No. 88437-4, 2014 WL 1848454, at *6-7 (Wash. May 8, 2014) (quoting State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010) (statement that "even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.")).

[24] Id. (quoting State v. Curtiss, 161 Wn. App. 673, 700, 250 P.3d 496 (2011) (statement that "There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.")).

prosecutor concluded his challenged remark by expressly referring to the correct burden of proof: "[T]here's not a lack of evidence here, folks. There's enough evidence for you to find the defendant guilty beyond a reasonable doubt."[25]

Hill fails to demonstrate that the prosecutor's closing argument was misconduct.

Statement of Additional Grounds for Review

Hill argues in his statement of additional grounds for review that the trial court erred by not recusing after Hill filed an affidavit of prejudice. He also contends that the assault convictions were improper because he lacked the "intent to make contact" with the victims and the victims consented to being touched.[26] Neither argument has merit.

Hill's affidavit of prejudice was not timely filed. Under RCW 4.12.050, an affidavit is timely if filed before a discretionary ruling is made. The trial court made numerous discretionary rulings prior to Hill filing the affidavit on August 12, 2012, including rulings on several motions for continuance—which are recognized as discretionary rulings.[27] The trial court did not err by refusing to recuse.

Hill's arguments concerning his intent and the victims' alleged consent are conclusory factual arguments concerning issues the jury necessarily resolved against Hill. The record provides ample evidence to allow the jury to find all the elements of the assault charges were proved beyond a reasonable doubt. This court defers to the trier

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[25] RP (July 19, 2012) at 236.

[26] Statement of Additional Grounds at 1.

[27] State v. Dennison, 115 Wn.2d 609, 620, 801 P.2d 193 (1990).

of fact to resolve conflicting testimony, evaluate the credibility of witnesses, and generally weigh the persuasiveness of the evidence.[28]

Affirmed.

WE CONCUR:

[28] State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).