

NO. 45755-5-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

GARY COLE,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## **STATE'S COUNTERSTATEMENT OF THE CASE**

The State is satisfied with the statement of the factual and procedural history in appellant's brief.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

#### **1. The grant of a continuance was within the trial court's discretion.**

Defendant claims that the trial court's decision was unreasonable based on speculation about prosecutorial mismanagement, but the record reflects only that the court exercised its discretion. Additionally, Defendant cannot claim prejudice by a continuance because he was under sentence of another conviction throughout the pendency of the instant case.

#### **Standard of review.**

"In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169, 1172 (2004) (citing *State v. Miles*, 77 Wash.2d 593, 597, 464 P.2d 723 (1970).) "Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard." *Id.* (citing *State v. Hurd*, 127 Wash.2d 592, 902 P.2d 651 (1995).) "We will

not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* at 272-73 (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (1971) (alterations in original.)

**An officer's vacation is good cause for a continuance.**

"The unavailability of a material State witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant." *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936, 940 (1993) (citing *State v. Day*, 51 Wash.App. 544, 754 P.2d 1021, *review denied*, 111 Wash.2d 1016 (1988).) The prescheduled vacation of an arresting police officer is good cause for a continuance. *See State v. Grilley*, 67 Wn. App. 795, 840 P.2d 903 (1992) *accord State ex rel. Rushmore v. Bellevue Dist. Justice Court*, 15 Wn. App. 675, 552 P.2d 693 (1976).

In the instant case the trial court found that Deputy Wilson's vacation was good cause for a continuance, and granted the request. This is clearly within the discretion of the trial court. Additionally, when asked if Defendant would be prejudiced, defense council stated that "beyond

going beyond speedy trial, there really isn't" any prejudice. VRP at 6. As was noted on the record, Defendant had been sentenced on another case prior to this conviction, and was in custody anyways.

**There is no evidence of mismanagement by the State.**

Defendant asserts that, because the prosecutor characterized Deputy Wilson's vacation as "long-scheduled" that this was clearly a case of mismanagement. This is pure speculation. There is nothing in the record to indicate what "long-scheduled" means, or that the prosecutor's office was aware of Deputy Wilson's vacation when Defendant's trial was set. The trial court's decision should be left undisturbed and the conviction affirmed.

**2. It was not error to deny an "unwitting possession" instruction because Defendant was not entitled to the instruction.**

Defendant now asserts that he was denied his right to present a defense because the trial judge found there was no evidence to support his "unwitting possession" instruction. In fact, not only was there no evidence to support this instruction, it was actually contrary to his defense.

**Standard of review.**

This court will "review a challenge to a trial court's refusal to give a jury instruction for abuse of discretion." *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437, 441 (2011) (citing *Stiley v. Block*, 130 Wash.2d

486, 925 P.2d 194 (1996).) “A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions *when substantial evidence in the record supports that theory*. *Id.* (citing *State v. Harvill*, 169 Wash.2d 254, 259, 234 P.3d 1166 (2010) (emphasis added).) “When determining whether the evidence was sufficient to support giving an instruction, we view the evidence in the light most favorable to the party requesting the instruction.” *State v. Jarvis*, 160 Wn. App. 111, 120, 246 P.3d 1280, 1285 (2011) (citing *State v. Fernandez–Medina*, 141 Wash.2d 448, 6 P.3d 1150 (2000).)

**Defendant was not entitled to the instruction.**

Deputy Wilson testified he found the pills on Defendant. VRP at 32. Defendant testified that Deputy Wilson produced the pills. VRP at 44. Even in a light most favorable to Defendant, on the facts presented there is insufficient evidence to support an unwitting possession instruction.

Defendant’s speculation that the jury might have, on its own and without any evidence, decided that Deputy Wilson was able to find drugs on Defendant’s person that Defendant did not know he possessed, is wild speculation. No evidence, substantial or otherwise, supported this

instruction and the trial court properly refused to give it. This court should affirm this decision and Defendant's conviction.

**CONCLUSION**

Defendant's assignments of error are without merit. The trial court was within its discretion to grant a continuance because the arresting officer was on vacation, and there was no basis to give Defendant's proffered instruction. He was afforded a fair trial and was convicted. This court should reject the assignments of error and affirm the decisions of the trial court.

DATED this 8 day of September, 2014.

Respectfully Submitted,

By: s/ Jason F. Walker  
JASON F. WALKER  
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WSBA # 44358

# GRAYS HARBOR COUNTY PROSECUTOR

**September 08, 2014 - 5:40 PM**

## Transmittal Letter

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