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Court of Appeals
Division I
State of Washington

NO. 73814-3-I

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

STATE OF WASHINGTON

Appellant

v.

STEPHEN J. HOPE,

Respondent

BRIEF OF APPELLANT/CROSS-RESPONDENT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 1

II. ISSUE 1

III. STATEMENT OF THE CASE..... 1

 A. THE STATE’S EVIDENCE OF THE DEFENDANT’S CRIME. 1

 B. PRETRIAL PROCEDURE. 3

 C. THE TRIAL. 6

 1. Day 1 – Monday, July 27, 2015..... 6

 2. Day 2 – Tuesday, July 28, 2015..... 8

IV. ARGUMENT 11

 A. STANDARD OF REVIEW..... 11

 B. THE COURT APPLIED THE INCORRECT LEGAL STANDARD.
 12

 C. THE DEFENDANT WOULD NOT HAVE SUFFERED
 PREJUDICE FROM THE PROPOSED RECESS, BUT THE
 COURT DID NOT EVEN EVALUATE PREJUDICE OR CONSIDER
 INTERMEDIATE REMEDIES BEFORE DISMISSING THE CASE.
 19

 D. RETRIAL DOES NOT OFFEND DOBULE JEOPARDY
 PRINCIPLES BECAUSE THE FIRST JURY NEVER REACHED A
 VERDICT AND THE PROSECUTOR DID NOT ACT IN BAD
 FAITH..... 23

V. CONCLUSION 25

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>City of Seattle v. Clewis</u> , 159 Wn. App. 842, 247 P.3d 449 (2011)	12
<u>State v. Adamski</u> , 111 Wn.2d 574, 761 P.2d 621 (1988)	12, 14
<u>State v. Cannon</u> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	11
<u>State v. Dye</u> , 178 Wn.2d 541, 309 P.3d 1192 (2013)	11
<u>State v. Edwards</u> , 68 Wn.2d 246, 412 P.2d 747 (1966)	12
<u>State v. Eldridge</u> , 17 Wn. App. 270, 562 P.2d 276 (1977)	24
<u>State v. Koerber</u> , 85 Wn. App. 1, 931 P.2d 904 (1996)	19, 20, 23
<u>State v. McPherson</u> , 64 Wn. App. 705, 829 P.2d 179 (1992)	17
<u>State v. Nguyen</u> , 68 Wn. App. 906, 847 P.2d 936 (1993)	12, 15, 16, 18
<u>State v. Whisler</u> , 61 Wn. App. 126, 810 P.2d 540 (1991)	16
<u>State v. Wright</u> , 165 Wn.2d 783, 203 P.3d 1027, (2009)	24

FEDERAL CASES

<u>Arizona v. Washington</u> , 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)	24
<u>Downum v. United States</u> , 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)	24

WASHINGTON STATUTES

RCW 5.60.050	14
RCW 9.94A.510	3
RCW 9.94A.525(20)	3

COURT RULES

CrR 3.3	3, 4, 11, 21
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I. ASSIGNMENT OF ERROR

The State assigns error to the trial court's July 28, 2015, order granting the defendant's motion to dismiss the case.

II. ISSUE

Did the trial court abuse its discretion by dismissing the case due to the unforeseen medical unavailability of the State's most important witness, instead of allowing the trial to proceed while the State collected information from the injured deputy's post-operative appointment scheduled just 2.5 hours later?

III. STATEMENT OF THE CASE

A. THE STATE'S EVIDENCE OF THE DEFENDANT'S CRIME.

The State of Washington charged the defendant by Information with Possession of Stolen Vehicle. The Information was filed December 22, 2014, in Snohomish County Superior Court. 1 CP 24-25. According to the Affidavit of Probable Cause filed contemporaneously with the Information, the State's evidence related to a yellow Chevrolet pickup truck that was stolen from a Mount Vernon crane company at approximately 5:32 AM on May 16, 2014. The vehicle was equipped with a GPS tracking device, so by 7:21 AM Deputy Poole of the Snohomish County Sheriff's Office was attempting to locate the stolen vehicle in Lake Stevens,

Washington, based on information provided by the GPS tracking device. Deputy Poole observed the stolen yellow pickup truck pass him going the opposite direction, and noted the lone white male driver was wearing sunglasses, a blue hardhat, and a flagger vest. The driver accelerated rapidly out of sight upon seeing Deputy Poole's patrol vehicle. 1 CP 20.

Continuing to follow the stolen truck's GPS signal, by 7:52 AM deputies located the stolen truck, now abandoned on the driveway leading to 8125 108th St NE, Arlington, Washington. This is the defendant's known residential address. 1 CP 20-21. Deputy Poole accessed a jail booking photo of the defendant and confirmed that it closely resembled the driver of the stolen vehicle. 1 CP 8. Deputy Gibson used his K9 partner to track a scent directly from the stolen vehicle to the detached garage area of the defendant's residence. Police obtained a search warrant for the residence and announced their presence, prompting the defendant to come out of his house. He waived his rights and voluntarily spoke with police, offering an alibi that he was having sex all night and laughing when commenting that he was looking at 56 months

in prison if he was caught in another stolen vehicle.¹ 1 CP 20-21. Police located a construction flagger vest inside the defendant's residence, which Deputy Poole concluded was the same vest worn by the defendant when driving the stolen vehicle. Police did not locate a blue hardhat or sunglasses. 1 CP 20-21.

B. PRETRIAL PROCEDURE.

The defendant was arraigned on December 23, 2014, with the court allowing the defendant to remain out of custody on his own recognizance without further conditions. __ CP ____ (sub #7, Order on Release/Detention of Defendant). Trial was set for February 27, 2015, and the court determined the last allowable date for trial pursuant to CrR 3.3 was March 23, 2015. 1 CP 18-19.

The defendant failed to appear for his first omnibus hearing, but the State did not seek a warrant due to the fact that the defendant had supplied proof of his participation in in-patient drug treatment. __ CP ____ (sub #13, Clerk's Minute Entry for 2/5/15 omnibus hearing). On February 26, 2015, the parties sought an agreed trial continuance. The court approved the parties' request to

¹ Based on the defendant's four prior felonies (three of which were for possessing stolen vehicles), the defendant was correct about his potential exposure upon a new conviction. 1 CP 22-23; See RCW 9.94A.525(20) (three points for every prior stolen vehicle conviction); RCW 9.94A.515 (level II offense); RCW 9.94A.510 (standard sentencing range is 43 to 57 months).

set a new trial date of May 1, 2015, and accordingly extended the CrR 3.3 last allowable date for trial to June 1, 2015. 1 CP 16-17.

On April 2, 2015, the court approved the parties' second joint request for a continuance of the trial date. The new trial date was set to June 19, 2015, with a CrR 3.3 last allowable date for trial of July 17, 2015. 1 CP 14-15. The court also ordered the defendant to meet with his attorney prior to the next court hearing. Id.

On May 21, 2015, the State moved for another continuance of the trial date. The motion was supported by a deputy prosecutor's affidavit stating that her colleague, the deputy prosecutor assigned to this case, began a 4 to 6 week medical leave on May 11, 2015. The affidavit indicated that defense counsel was amenable to the continuance but the defendant, who remained out of custody on his own recognizance, would not agree. 1 CP 12-13. The State requested a new trial date of July 24, 2015, to accommodate the assigned prosecutor's medical leave. 1 CP 8. The court determined that there was good cause for the continuance but did not continue the case as long as the State requested, instead setting the trial date to July 2, 2015. The last allowable date for trial was reset accordingly to August 1, 2015. 1 CP 10-11.

On July 2, 2015, the State moved to continue the trial date again. The newly-assigned deputy prosecutor supported his motion with an affidavit which established the materiality of Deputy Poole's testimony; Deputy Poole was the only person who could identify the defendant as the driver of the stolen vehicle. The affidavit also explained that Deputy Poole had a pre-scheduled family vacation scheduled from July 2nd through July 16th, 2015, an event he could not reschedule because Deputy Poole and his family intended to spread his deceased father's ashes during the vacation. 1 CP 8. The State asked for a finding of good cause, but in the alternative proposed a continuance within the August 1, 2015 last allowable date for trial. 1 CP 8-9.

The court found good cause to continue the trial date based on Deputy Poole's unavailability. __ CP ____ (sub #39, Clerk's Minute Entry for 7/2/15 Motion to Continue/Motion to Compel). 1 CP 5-6. The trial date was reset to July 24, 2015, with the last allowable date for trial reset to August 24, 2015. The State subpoenaed Deputy Poole to attend the new trial date. 1 RP 40.

C. THE TRIAL.

1. Day 1 – Monday, July 27, 2015.

Trial officially began with a trial call hearing on Friday, July 24, 2015, at 1:00 PM. The court granted the defendant's request to issue a \$10,000 material witness warrant for his alibi witness Kelsie Carlson. __ CP ____ (sub #46, Clerk's Minute Entry for 7/24/2015 trial call hearing). However, just an hour later the defendant asked for permission to destroy the just-issued material witness warrant because Ms. Carlson had now appeared in court. The court granted this request and instructed Ms. Carlson to appear outside of the trial courtroom on July 28, 2015 at 1:00 PM. __ CP ____ (sub #50, Clerk's Minute Entry for 7/24/2015 2:00 PM hearing).

Trial began in earnest on Monday, July 27, 2015, at 9:22 AM before the Honorable Joseph P. Wilson. 1 RP 1-3. As expected for a one count trial with a relatively straightforward set of facts, the State anticipated calling just six witnesses and estimated a maximum trial length of three days. __ CP ____ (sub #53, State's Trial Memorandum). Defense counsel concurred in this estimate. 1 RP 19. The court completed its rulings on motions in limine by 9:47 AM. 1 RP 22. By 11:40 AM a twelve person jury plus one alternate

had been selected and sworn in. 1 RP 26. __ CP ____ (sub #52 Clerk's Trial Minutes).

The court recessed for lunch and resumed promptly at 1:29 PM. __ CP ____ (sub 52). Prior to opening statements the prosecutor informed the court about his unexpected difficulty getting in contact with Deputy Poole and forecasted a potential request for a recess after the State presented its first witness. The prosecutor confirmed that Deputy Poole had been subpoenaed to be present, but due to the inability of both the prosecutor and Deputy Poole's supervisor to reach him, the prosecutor had no explanation for why Deputy Poole did not appear as directed by his subpoena. 1 RP 39-40. Defense counsel indicated it was fine if Deputy Poole appeared at 9:00 AM the next day, July 28, 2015. 1 RP 40-41.

The opening statements by each party were less than 10 minutes long. __ CP ____ (sub #52). The State then called Ronald Bahr, the only civilian on the State's witness list. The parties needed only 32 minutes combined to conduct the entire examination of this witness. See 1 RP 51-79. __ CP ____ (sub #52).

At the conclusion of Mr. Bahr's testimony the prosecutor informed the court that the State's next witness, Deputy Gibson, "was under the mistaken impression that he was supposed to be here tomorrow and not today." 1 RP 80. Without any witnesses available to fill the remainder of the court day,² the State requested a recess until the next morning. The defendant did not object. 1 RP 81. The court granted the recess and sent the jury home for the remainder of the day, explaining that unforeseen events required the delay and comparing the unpredictability of trials to a box of chocolates – "You never know what you're going to get." 1 RP 82.

2. Day 2 – Tuesday, July 28, 2015.

When court started promptly at 9:03 AM on July 28, 2015, the prosecutor announced that he had three officers present and ready to testify but unfortunately the State's primary material witness, Deputy Poole, was not among them. 1 RP 84. The prosecutor explained:

Deputy Poole was subpoenaed to testify in this case. He is the only officer who can in fact identify the defendant as driving the stolen vehicle. Apparently the reason his sergeant and his lieutenant were unable to get ahold of him as well and did not know his whereabouts was because he

² The State's first motion for a recess came at 2:46 PM on July 27, 2015. 1 RP 80. The court's general schedule for jury trials includes the evening recess at approximately 4:30 PM. 1 RP 35. Therefore the State's first request for a recess was asking for a delay of less than two hours.

had an unforeseen injury which required a surgery. The surgery was performed last week, sometime last week, the exact date I don't know off the top of my head, Your Honor. It is an injury to his head³ where he required a steel plate to be put in. He's currently on a high dosage of Percocet for that injury. He has a post-op appointment for that injury today at 11:30. I spoke with him myself this morning. He indicates he takes about a Percocet an hour due to the injury. I asked him when is the doctor going to wean him off of the Percocet, when is he going to stop taking them so he can testify. As he indicated, it makes him fuzzy, it makes him sleepy, it's a high prescription narcotic.

He informed me after his post-op appointment today he would know more information regarding I guess the pain medication he's on and when he will be tapered off or taken off of that. I would imagine, although I don't have any personal experience, since Percocet is such a strong narcotic that the doctors wouldn't want him to be on it for a prolonged period of time. At this point the State is unable to proceed without Deputy Poole, however, the State would be requesting that we proceed with the trial, finish the three witnesses that the State does have today, recess for the lunch hour as normal, and have more information to present to this court about Officer Poole's availability. He informed me that he thinks that he will be able to testify next week, so the State at that time may ask this court to recess this trial until next week due to this unforeseen injury and surgery that the State was unaware of. 1 RP 84-86.

Defense counsel agreed that the State was unable to prove its case without Deputy Poole and indicated "we *will be* making a motion to dismiss." 1 RP 86 (*emphasis added*). But defense counsel also requested, twice, additional time to conduct legal

³ The reference to Deputy Poole's injured head was either a misstatement by the prosecutor or an error in transcription. The deputy prosecutor later filed an affidavit explaining that the injury was to Deputy Poole's hand. __ CP ____ (sub #60, Affidavit Regarding Deputy Poole's Unexpected Injury).

research on the issue. 1 RP 87, 88. The prosecutor agreed and asked that “both parties have an opportunity to potentially brief this issue if and when it comes to that.” 1 RP 89.

The court did not allow either party time to conduct legal research. Instead the court interpreted the defendant’s anticipated motion to dismiss as a motion currently before the court. The case was dismissed at 9:14 AM, when Deputy Poole’s post-operative appointment was less than 2.5 hours away. See 1 RP 85, 91.

Regarding Deputy Poole, the court stated:

He’s under an obligation to notify the State and the State is under an obligation to know where their witnesses are. I don’t find any plausible excuse for the failure of him to keep the State and the defense and the Court informed of his whereabouts. This case was continued twice, once by Judge Kurtz to the 17th and another one by Judge Appel over the defendant’s objection to accommodate Deputy Poole. Even with that accommodation he seems unwilling to keep us informed of his whereabouts. The defendant is objecting to another continuance. Speedy trial runs August 1.⁴ I’m not continuing this matter. Based upon the unavailability of the State’s chief material witness, I would grant the defense motion to dismiss this action. 1 RP 91.

The defendant filed a written motion to dismiss at 3:20 PM on July 28, 2015, nearly six hours after the case had already been

⁴ This statement was incorrect. The prosecutor pointed out the error and correctly stated that the last allowable date for trial was August 24, but the court said that information did not change the decision. 1 RP 91-92.

dismissed. ___ CP ___ (sub #57, Defense Objection to Recess and Motion to Dismiss).

IV. ARGUMENT

A. STANDARD OF REVIEW.

A trial court's grant or denial of a motion for a continuance or trial recess will not be disturbed absent a showing of a manifest abuse of discretion. State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). An abuse of discretion occurs if any of the following is true:

(1) The decision is manifestly unreasonable, that is, it falls outside the range of acceptable choices, given the facts and the applicable legal standard;

(2) The decision is based on untenable grounds, that is, the factual findings are unsupported by the record; or

(3) The decision is based on untenable reasons, that is, it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Under CrR 3.3(f)(2), a trial court may grant a continuance where a material State's witness is unavailable if (1) there is a valid reason for the unavailability, (2) the witness will be available within

a reasonable time frame, and (3) the defendant incurs no substantial prejudice from the continuance. State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). In addition, the State must show that it exercised due diligence in securing the attendance of the witness. See State v. Adamski, 111 Wn.2d 574, 577–78, 761 P.2d 621 (1988). Due diligence requires the proper issuance of subpoenas to essential witnesses. Id. at 578. City of Seattle v. Clewis, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). Courts also require that the party seeking a delay act in good faith, and can justifiably deny a continuance if it is designed to delay, hARRY, or obstruct the orderly process of the trial, or to surprise the opposing party. State v. Edwards, 68 Wn.2d 246, 258, 412 P.2d 747 (1966).

B. THE COURT APPLIED THE INCORRECT LEGAL STANDARD.

The court stated that the basis for dismissing the case was the “unavailability of the State’s chief material witness.” 1 RP 91. The order dismissing the case cited only “Deputy Poole’s unavailability,” and that the court was unwilling to recess the matter, but without any reasons in support of that position. 1 CP 1. But the propriety of a continuance due to a material witnesses’

unavailability requires further inquiry into the reasons for the predicament and the ramifications if a continuance is granted. The court's analysis was deficient because it did not include any meaningful effort to apply the facts to the correct legal standard. From the outset it appeared that the trial court had little patience for delay. 1 RP 17 (to the deputy prosecutor, "Are you going to stand there or respond?"). The court's failure to give due attention to the applicable legal standard was a similar display of impatience.

The State informed the court that its primary witness, Deputy Poole, was incapable of testifying due to the effects of strong pain medication prescribed to him following an unexpected injury requiring surgery. 1 RP 85. The State's request was to make efficient use of the court's time by proceeding with three witnesses who were available to testify on the morning of July 28, 2015, in order to learn when Deputy Poole's doctor could sufficiently reduce his medication regimen to allow him to testify. 1 RP 85-86. Deputy Poole's doctor appointment was scheduled for 11:30AM on July 28, 2015. 1 RP 85.

Neither the trial court nor the defendant questioned Deputy Poole's contention that his prescribed medication had significant impact on his mental faculties. In Washington, a prospective

witness is incompetent to testify if they are intoxicated at the time of their production for examination. RCW 5.60.050. The prosecutor told the court that Deputy Poole was "fuzzy" and "sleepy" as a result of his pain medications, both typical observations for those intoxicated by an ingested substance.

The court did not address, as required, whether Deputy Poole's medical condition was a valid reason for his unavailability. Instead the court declared that Deputy Poole had an "obligation to notify the State" of his whereabouts, and that the State had a corresponding duty to "know where their witnesses are." 1 RP 91. These comments imply a breach of duty independently held by both the prosecutor and the witness, and although brief they are best interpreted as the court's perceived lack of diligence or good faith on the part of both of those people.

But the legal standard for continuances based on witness unavailability does not impose specific notice obligations upon a witness, and does not require that the State track each witnesses' location before they testify. The prosecutor's duty of diligence is generally satisfied by the prosecutor issuing a subpoena to the witness. State v. Adamski, 111 Wn.2d 574, 578, 761 P.2d 621 (1988). There was no legal authority for the trial court's assertion

that the State has a duty beyond issuance of a subpoena to know the physical location of its witnesses when they are not present in court. The court's error was to concentrate on a non-existent obligation of the State to know the location of its witnesses at all times, while ignoring the fact that such knowledge would have done nothing to alleviate Deputy Poole's medical situation or his inability to testify. The court therefore based its decision on the incorrect legal standard, which constitutes an abuse of discretion.

The case of State v. Nguyen, 68 Wn. App. 906, demonstrates that Washington courts do not hold police witnesses to any greater standard than honoring their subpoena if they are able to do so. In Nguyen, the prosecutor received a call from the lead detective (a "crucial witness") on the first day of trial that he was being called up for immediate service in the Washington National Guard. Id. at 914-915. The court declined to impose any additional duty upon the witness:

The witness could have more promptly notified the parties and the court of his unavailability. However, we are not prepared to hold that a witness is required to assess the legal implications of an order federalizing the Air National Guard or to challenge the authority of his commanding officer to order him to report for duty because he is under subpoena. The detective's unavailability was not a personal or voluntary absence, and it was unforeseeable that a call to

duty would come just as Nguyen's case was due to go to trial. State v. Nguyen, 68 Wn. App. at 916.

The holding in Nguyen illustrates that truly unforeseen reasons for a material witnesses' unavailability should not deprive the State of that witnesses' testimony.

The Nguyen holding applies with equal force to cases involving unforeseen witness unavailability for medical reasons. Just as the court in Nguyen was not inclined to require a police witness to challenge the authority of his commanding military officer due to a subpoena, the same rationale dissuades courts from requiring a witness to challenge the medical advice of his physicians. This Court has previously rejected assertions that a witnesses' obligation to testify, or the State's obligation to diligently attempt to secure their testimony, outweighs the contrary advice of doctors. See State v. Whisler, 61 Wn. App. 126, 138-39, 810 P.2d 540 (1991) ("The State's duty to make a good faith effort does not require it to urge or attempt to compel a witness to testify at trial over the advice of the witness' doctors."). In contrast to Nguyen and Whisler, this court did not directly address whether Deputy Poole's medical situation was a valid reason to delay the trial, but instead created an obligation for Deputy Poole to notify the State about his

circumstances in a more timely manner. Again, the court abused its discretion by applying an incorrect legal standard.

Courts have refused to hold the State responsible for delays made necessary by valid reasons, even if the unavailable witness could have done more to notify the parties. In State v. McPherson, a police officer responded to his subpoena by calling the prosecutor three weeks prior to trial to say that he was unavailable to testify because he was leaving for an extended vacation on the day of his phone call. State v. McPherson, 64 Wn. App. 705, 706-707, 829 P.2d 179 (1992). The court held, "Where, as here, the subpoena was received and the officer did respond to it, we cannot conclude that there was a lack of due diligence on the part of the State in attempting to procure the attendance of a witness at trial." Id. at 708. Even though the officer's choice to inform the State about his vacation on the day he left for vacation inhibited the State's ability to preserve his testimony via deposition, this unfortunate timing was not tantamount to a lack of diligence on the State's part. To the contrary, the court held that there was "nothing more the State could have done." Id. at 709. In this case the trial court's insistence that Deputy Poole or the prosecutor could have more promptly notified the court about his medical problem constitutes a clear

departure from the correct legal standard of review. It was reversible error for the court not to analyze the validity of the delay, how soon Deputy Poole might become available, and whether the defendant suffered any prejudice as a result.

In this case the State satisfied the three-part test for a continuance due to unavailability of a material witness, but the court's decision to dismiss the case included no analysis of those three parts. The prosecutor's statements made clear that Deputy Poole had received his subpoena and was aware of his obligation to testify. 1 RP 40, 86. The prosecutor presented a valid medical reason for Deputy Poole's unavailability, and neither the court nor the defendant disputed that medical basis. 1 RP 84-86.

The prosecutor also represented that Deputy Poole *thought* he could testify within a reasonable time, as soon as the next week, but would not know for sure until his post-operative appointment scheduled in just a few hours' time. 1 RP 85-86. The estimated one week delay was a reasonable time frame, and one which did not come close to implicating the August 24, 2015, last allowable date for trial which was nearly a month away. See State v. Nguyen, 68 Wn. App. at 916 (delay attributable to continuance was seven days, and did not prejudice the defendant). But Deputy Poole's one week

estimate was just an estimate, and the State was only asking to fill the morning of July 28, 2015 with the testimony of three other witnesses until Deputy Poole's post-operative appointment could take place. By waiting for the appointment to occur and Deputy Poole's doctor to weigh in on the conflict between his patient's pain medications and his obligation to testify, the court would have received an accurate assessment of when the Deputy could testify. Because the prosecutor predicted that the testimony of his other three witnesses would take the whole morning of July 28th, there was no real delay being proposed by waiting until after the lunch recess to learn more from Deputy Poole's doctor. The court's decision to dismiss the case at 9:14 AM instead of allowing the State to call three witnesses and return after lunch with information from Deputy Poole's 11:30 AM medical appointment was a manifestly unreasonable choice.

C. THE DEFENDANT WOULD NOT HAVE SUFFERED PREJUDICE FROM THE PROPOSED RECESS, BUT THE COURT DID NOT EVEN EVALUATE PREJUDICE OR CONSIDER INTERMEDIATE REMEDIES BEFORE DISMISSING THE CASE.

A court cannot impose the extraordinary remedy of dismissal without a finding of material prejudice to the defendant. State v. Koerber, 85 Wn. App. 1, 3-4, 931 P.2d 904 (1996), as amended

(Feb. 21, 1997). Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. Id. at 4. In State v. Koerber, the prosecutor learned the night before trial that a material witness was ill and could not offer an estimate of when the witness might be able to testify. Id. at 3. The court dismissed the case for “want of prosecution,” but on appeal this Court found that the dismissal was a reversible abuse of discretion. Id. at 3-4 (“Criminal convictions should not be dismissed for minor acts of negligence by third parties that are beyond the State’s direct control when there is no material prejudice to the defendant.”).

The failure of the Koerber court to consider intermediate remedies or to make any findings relating to prejudice suffered by the defendant was unfortunately repeated by the trial court in this case. The court conducted no meaningful inquiry into prejudice, and the State had presented a reasonable intermediate remedy of simply taking other witnesses’ testimony for a few hours to collect a medical opinion from Deputy Poole’s doctor.

The defendant in this case did attempt to create a record of the prejudice he perceived if a recess was granted. The defendant referenced his own witnesses who were “very difficult to get into

court." 1 RP 87. Another attempt to show prejudice was that other in-custody witnesses were being housed in the local jail instead of their usual residences in the Department of Corrections, thereby "costing the taxpayers money." 1 RP 87-88. The defendant did not assert, however, that his status as a taxpayer required a finding of prejudice if taxpayer money was "wasted" as a result of any delay.

The court's oral remarks prior to dismissing the case contained no reference to any prejudice to the defendant other than noting his objection to the delay and incorrectly stating that "speedy trial" expired on August 1, 2015. 1 RP 91. The written order of dismissal is completely silent on the issue of prejudice. 1 CP 1. Nonetheless, the prosecutor corrected the court about the amount of time for trial remaining; instead of just 4 days remaining to commence trial under CrR 3.3, there was actually 26 days remaining. 1 RP 91-92; 1 CP 5. The court claimed this correction had no impact on the court's decision to dismiss the case. 1 RP 92. Therefore, the court's decision omitted any analysis of prejudice to the defendant and was based on an incorrect legal standard.

While failing to consider the correct legal standard, the court committed the reciprocal error of considering irrelevant equitable arguments as a basis to dismiss the State's case. The court

remarked that the case had already been continued twice over the defendant's objection, and seemed particularly offended that one of those continuances was also related to Deputy Poole. 1 RP 91 ("Even with that accommodation [Deputy Poole] seems to unwilling to keep us informed of his whereabouts."). But the two prior continuances referenced in the court's pre-dismissal comments were each supported by good cause and the court had already found the same. 1 CP 10-11; ___ CP ___ (sub #39, Clerk's Minute Entry for 7/2/15 Motion to Continue/Motion to Compel). The prior continuances were required for reasons completely independent of Deputy Poole's unforeseen medical situation, yet the court placed significant weight on the prior valid continuances as evidence that the current request was without merit. This was error because the correct legal analysis of this proposed trial delay should have been limited to the validity of the continuance, the reasonableness of the timeframe within which Deputy Poole could have testified, and any prejudice suffered by the defendant. The standard does not incorporate a comparative analysis of whether the good cause findings on prior continuances should cast the current request in a different light.

The defendant would not have suffered any prejudice even if Deputy Poole's estimate of a one week delay was accurate. His material witness responded to her subpoena on the first day of trial, July 24, 2015, and was ordered by the court to return at 1:00 on July 28, 2015. __ CP ____ (sub #50). There was no reason to assume the witness would not follow that directive in order to receive instructions about a new date and time to appear. If in fact the witness did not follow the directive, it would have been good cause for a defense motion to further delay the trial. The court had also planned for potential jury scheduling difficulties by seating an alternate 13th juror. 1 RP 90. There was no legitimate reason for the court to dismiss the case rather than wait to hear what Deputy Poole's doctor had to say about his ability to testify in the coming days. The court's error was an abuse of discretion in line with the established precedent from State v. Koerber, and should be reversed.

D. RETRIAL DOES NOT OFFEND DOBULE JEOPARDY PRINCIPLES BECAUSE THE FIRST JURY NEVER REACHED A VERDICT AND THE PROSECUTOR DID NOT ACT IN BAD FAITH.

The State anticipates argument regarding whether, assuming the trial court did abuse its discretion in dismissing the

case, double jeopardy principles would nonetheless bar a retrial. In this case the jury had already been sworn in when the court dismissed the case. 1 RP 26. Once a jury has been empanelled and sworn, jeopardy attaches. State v. Eldridge, 17 Wn. App. 270, 276, 562 P.2d 276 (1977). The reason for barring retrial when a trial ends without a verdict is to protect the defendant's valued right to have the trial completed by a particular tribunal, and to prevent the State from manipulating the trial process by terminating the proceedings when it appears its case is weak or the jury is unlikely to convict. State v. Wright, 165 Wn.2d 783, 805, 203 P.3d 1027, (2009)(citations omitted). There is no bright line rule preventing retrial unless the first trial resulted in a verdict acquitting the defendant of the charged offense; in all other circumstances, the law is "flexible and case-specific." Id.

While some cases have barred retrial on double jeopardy grounds if the case involved the prosecutor's "lack of preparedness" or a prosecutor's effort to use the first trial as a "trial run" of his case, those circumstances are not present here. See Id. at 805-806 (citing Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); Arizona v. Washington, 434 U.S. 497, 508, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). The prosecutor in this

case did not learn of Deputy Poole's medical condition until after the jury was sworn in. All parties agreed that Deputy Poole was a material witness of paramount importance, and his medical condition would have presented the same dilemma for any prosecutor regardless of their level of preparation.

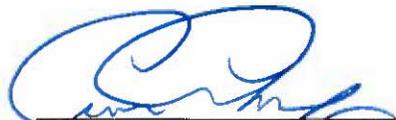
V. CONCLUSION

The State respectfully requests that the court reverse the trial court's July 28, 2015 order dismissing the case, and remand to the Superior Court for further proceedings including a retrial on the merits.

Respectfully submitted on November 16, 2015.

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By:



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

THE STATE OF WASHINGTON,

Appellant,

v.

STEPHEN J. HOPE,

Respondent.

No. 73814-3-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 16th day of November, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF APPELLANT/CROSS RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and John Sloane, Nielsen, Broman & Koch, Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of November, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office