

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PRESENTED	
1. Does a defendant’s right to present witnesses on her behalf outweigh the court’s concern for commencing the trial in a timely manner?.....	1
2. Should a trial judge recuse herself when she attends the same church as the defendant and previously represented the defendant in a lawsuit?	1
3. Does a defendant’s Constitutional right to present a defense include the right to present witnesses on her behalf?	1
4. Does a defendant’s right to present a defense include the right to present witnesses to rebut the testimony of witnesses for the State such that it is an error commensurate to a mistrial where the defendant is unable to present rebuttal testimony due to the court’s denial of the defendant’s motion to continue trial to secure the testimony of witnesses?.....	1-2
5. Does a defendant’s right to a fair trial include the right to a fair and unbiased jury?	2
6. Was there sufficient evidence to establish the corpus delicti of theft where there was no evidence independent from Ms. McCoy’s confessions to establish that a theft occurred?	2
C. STATEMENT OF THE CASE	2
D. ARGUMENT	

1.	Ms. McCoy was denied her Constitutional right to a fair trial	7
	i. Judge Grant abused her discretion in declining to recuse herself	7
	ii. The trial court's denial of the motion to continue trial in order to secure the presence of witnesses for the defense violated Ms. McCoy's right to present witnesses in her defense	8
	iii. The trial court's refusal to continue the trial in order to allow Ms. McCoy to call witnesses in her defense denied Ms. McCoy her right to cross-examine the State's witnesses	10
	iv. Ms. McCoy was denied a fair trial due to juror misconduct	11
2.	There was insufficient evidence to establish the corpus delicti of any crime	13
E.	CONCLUSION	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	8, 9
<u>Alford v. United States</u> , 282 U.S. 687, 51 S.Ct. 218, 219, 75 L.Ed.624 (1931).....	10

Washington Cases

<u>Gardner v. Malone</u> , 60 Wn.2d 836, 376 P.2d 651, 379 P.2d 918 (1962).....	11
<u>In re Marriage of Farr</u> , 87 Wn.App. 177, 940 P.2d 679 (1997), <u>review denied</u> , 134 Wn.2d 1014 (1998).....	7
<u>State v. Bilal</u> , 77 Wn.App. 720, 893 P.2d 674, <u>review denied</u> , 127 Wn.2d 1013 (1995).....	7
<u>State v. Blackwell</u> , 120 Wn.2d 822, 845 P.2d 1017 (1993).....	7
<u>State v. Boling</u> , WL 181372, (2006).....	11
<u>State v. Briggs</u> , 55 Wn.App. 44, 776 P.2d 1347 (1989).....	11, 12
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976).....	9
<u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	12
<u>State v. Dominguez</u> , 81 Wn.App. 325, 914 P.2d 141 (1996).....	7
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	7
<u>State v. Jackman</u> , 113 Wn.2d 772, 783 P.2d 580 (1989).....	11

<u>State v. Lung</u> , 70 Wn.2d 365, 423 P.2d 72, 76 (1967)	13
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).	9
<u>State v. Smith</u> , 101 Wn.2d 36, 677 P.2d 100 (1984).....	9
<u>State v. Smith</u> , 130 Wn.2d 215, 922 P.2d 811 (1996).	10
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	13

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. McCoy's motion to continue trial in order to obtain witnesses.
2. The trial court abused its discretion in failing to recuse itself.
3. Ms. McCoy was denied her Constitutional right to present a defense by the trial court's failure to allow Ms. McCoy to present witnesses
4. The trial court erred in denying Ms. McCoy's motion for mistrial based on a witness lying on the stand and Ms. McCoy being unable to rebut his testimony.
5. Ms. McCoy was denied a fair trial due to juror misconduct.
6. There was insufficient evidence to establish the corpus delicti of the crimes Ms. McCoy was charged with committing.

B. ISSUES PRESENTED

1. Does a defendant's right to present witnesses on her behalf outweigh the court's concern for commencing the trial in a timely manner? (Assignment of Error No. 1)
2. Should a trial judge recuse herself when she attends the same church as the defendant and previously represented the defendant in a lawsuit? (Assignment of Error No. 2)
3. Does a defendant's Constitutional right to present a defense include the right to present witnesses on her behalf? (Assignment of Error No. 3)
4. Does a defendant's right to present a defense include the right to present witnesses to rebut the testimony of witnesses for the State such that it is an error commensurate to a mistrial where the defendant is unable to present rebuttal testimony due to the court's denial of the

defendant's motion to continue trial to secure the testimony of witnesses? (Assignment of Error No. 4)

5. Does a defendant's right to a fair trial include the right to a fair and unbiased jury? (Assignment of Error No. 5)
6. Was there sufficient evidence to establish the corpus delicti of theft where there was no evidence independent from Ms. McCoy's confessions to establish that a theft occurred? (Assignment of Error No. 6)

C. STATEMENT OF THE CASE

Factual and Procedural Background

For three or four months in late 2003, Ms. Celine McCoy was employed as an office assistant at Smiley's car dealership. RP 64-65. In October of 2003, Linda Petty was employed as the office manager at Smiley's. RP 52-53. Part of Ms. Petty's duties included performing all of the accounting functions. RP 52. During October of 2003, Ms. McCoy was making bank deposits for Ms. Petty because Ms. Petty was out of town. RP 59. Later that month, Ms. Petty was reconciling the bank statements and noticed that the deposits in the bank didn't match her copy of the deposit slips. RP 53-54. Ms. Petty investigated and learned that two deposit slips dated October 20, 2003 and October 22, 2003, were for cash deposits which had never been deposited in the bank (RP 53-56), and that a deposit slip dated October 23, 2003 had been altered to show a

deposit in the bank of a lesser amount than Ms. Petty's copy of the deposit slip. RP 55-57.

Ms. Petty immediately informed the owners of the dealership and confronted Ms. McCoy about the missing bank deposit slips. RP 57-58. Ms. McCoy told Ms. Petty that she had given the deposit slips to Ms. Petty (RP 58), but Ms. Petty was unable to locate the deposit slips and there was no record on the bank statement that the deposits had ever been made. RP 58.

Ms. Petty had a second conversation with Ms. McCoy where Ms. McCoy told Ms. Petty that Ryan Erker, the co-owner and manager of the car lot, had told Ms. McCoy that he was going to loan Ms. McCoy some money and that that was why money was missing. RP 58, 60, 65. Prior to the money going missing, Ms. McCoy had approached Mr. Erker about getting a loan from the dealership in the amount of \$3000, but the dealership did not have the money to loan her. RP 67.

On October 28, 2003, Mr. Erker and the owners of the dealership called the police and the confronted Ms. McCoy about the discrepancies in the accounting. RP 32, 66. Ms. McCoy told Mr. Erker that she had taken the money and Ms. McCoy was then arrested. RP 66.

Deputy Scott Mock was the officer who arrested Ms. McCoy. RP 31-34. A deputy had arrived at the dealership and took the initial report

before Deputy Mock arrived. RP 32. Based on his conversation with this other Deputy, Deputy Mock believed he had probable cause to arrest Ms. McCoy at that time. RP 42. Deputy Mock contacted Ms. McCoy and asked her to step outside, then escorted her to his patrol car. RP 33-34. Deputy Mock advised Ms. McCoy of her Miranda rights and Ms. McCoy agreed to speak with Deputy Mock. RP 34.

Deputy Mock asked Ms. McCoy about the theft of the money and Ms. McCoy told Deputy Mock that she had come back to the dealership in order to pay back some money. RP 34-35. Ms. McCoy told Deputy Mock that she had been altering deposit slips and taking the money. RP 36.

Deputy Mock asked Ms. McCoy if she would be willing to write a statement and Ms. McCoy agreed. RP 36. Deputy Mock then re-Mirandized Ms. McCoy and gave her the paperwork to fill out a statement. RP 36-37. In the statement, Ms. McCoy admitted to taking approximately \$4900. RP 38-39.

On October 29, 2003, Ms. McCoy was charged with two counts of theft in the first degree and two counts of theft in the second degree. CP 1-5.

Between October 2003, and March 16, 2005, numerous continuances were requested in the trial and Ms. McCoy was represented

by three different attorneys, the final attorney being Mr. Scott Messinger, the attorney who represented Ms. McCoy at trial. CP 6-18.

On May 11, 2005, Mr. Messinger filed a Motion to Continue trial on grounds that two witnesses who were necessary to Ms. McCoy's defense were out of State and would not return to Washington until the end of June, 2005. CP 19-21. On May 17, 2005, Judge Beverly Grant denied the motion. RP 8.

Also on May 17, 2005, the charges against Ms. McCoy were amended to two counts of theft in the first degree and one count of theft in the second degree. CP 27-28.

Pretrial, Mr. Messinger made a motion for Judge Grant to recuse herself from the trial because Judge Grant attended the same church as Ms. McCoy and had represented Ms. McCoy in a personal injury lawsuit in 1998. RP 18-19. Judge Grant declined to recuse herself. RP 19.

Also pretrial, Ms. McCoy informed the court that she wished to fire Mr. Messinger and hire new counsel. RP 19. Judge Grant denied this motion as well. RP 19-20.

Trial commenced on May 17, 2005. RP 22. At the close of the State's case, Mr. Messinger moved for a mistrial on grounds that Mr. Erker had lied on the witness stand, but that Ms. McCoy was unable to present any testimony to rebut Mr. Erker's testimony because Ms.

McCoy's witnesses were unavailable for trial due to being out of state. RP 71. Judge Grant denied this motion as well. RP 71.

After the defense rested, it was discovered that one of the juror's had a book in the jury room titled, "The Hidden Jury and Other Secret Tactics that Lawyers Use to Win." RP 78-79, CP 52-54.

The juror was questioned by the court and counsel (RP 84-94), and Mr. Messinger moved to strike the juror and moved for a mistrial on grounds of juror misconduct. RP 95. Judge Grant dismissed the juror but deferred ruling on the motion for mistrial until the jury panel had been questioned. RP 100.

Upon questioning the rest of the jury panel, it was discovered that seven other jurors had also seen the book. RP 104. Mr. Messinger renewed the motion for mistrial (RP 107) but Judge Grant denied it. RP 108.

The jury returned a verdict of guilty on one charge of first degree theft and on the charge of second degree theft. CP 57-59. Ms. McCoy was sentenced on July 22, 2005. CP 69-81. Notice of appeal was timely filed on August 19, 2005. CP 84-97.

D. ARGUMENT

1. **Ms. McCoy was denied her Constitutional right to a fair trial**

- i. Judge Grant abused her discretion in declining to recuse herself

The appearance of fairness doctrine, which applies to judicial and quasi-judicial officers, seeks to prevent the evil of a biased decision maker. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). Not only must a judge be impartial, but he or she must appear to be impartial. Id.

Canon 3(D)(1) of the Code of Judicial Conduct requires a judge to recuse herself if she is biased against a party or if her impartiality may reasonably be questioned. State v. Dominguez, 81 Wn.App. 325, 328, 914 P.2d 141 (1996). The party claiming bias must present evidence of the judge's actual or potential bias. State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995). A decision on recusal is reviewed for an abuse of discretion. In re Marriage of Farr, 87 Wn.App. 177, 188, 940 P.2d 679 (1997), review denied, 134 Wn.2d 1014 (1998).

A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Here, Judge Grant attended the same church as Ms. McCoy and had actually represented Ms. McCoy previously. Judge Grant's personal and professional relationship with Ms. McCoy violated the appearance of fairness doctrine due to her potential bias. The reasons Judge Grant gave for denying Mr. Messinger's request that Judge Grant recuse herself was that Judge Grant didn't recognize the defendant (RP 19), that Judge Grant didn't recall Ms. McCoy (RP 21), and that "[it was] time to move this case forward." RP 21. These grounds were unreasonable in light of the requirements of the appearance of fairness doctrine. Judge Grant abused her discretion declining to recuse herself.

- ii. The trial court's denial of the motion to continue trial in order to secure the presence of witnesses for the defense violated Ms. McCoy's right to present witnesses in her defense

A criminal defendant has a constitutional right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The Washington Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to

present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19, 87 S.Ct. at 1923, cited with approval by State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Washington defines the right to present witnesses as a right to present material and relevant testimony. *See* State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless. State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Here, Ms. McCoy had identified two witnesses who would testify on her behalf. However, the witnesses were living out of state and could not appear in court until the end of June, 2005. Mr. Messinger properly brought a motion to continue based on the unavailability of defense witnesses, but Judge Grant denied the motion stating, "You know, and we're ready to proceed. This is the day of trial." RP 6.

Judge Grant's denial of the motion to continue resulted in a denial of Ms. McCoy's constitutional right to present witnesses and is therefore assumed to be prejudicial. Judge Grant's denial of the motion to continue denied Ms. McCoy a fair trial.

- iii. The trial court's refusal to continue the trial in order to allow Ms. McCoy to call witnesses in her defense denied Ms. McCoy her right to cross-examine the State's witnesses

"Cross-examination of a witness is a matter of right...Its permissible purposes, among others, are...that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." Alford v. United States, 282 U.S. 687, 691-692, 51 S.Ct. 218, 219, 75 L.Ed.624 (1931). (Citations omitted).

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996).

As discussed above, the trial court's denial of the motion to continue trial in order to secure the testimony of two witnesses for the defense was a prejudicial error. Further, as indicated by counsel at trial in his motion for mistrial, the inability of Ms. McCoy to call witnesses on her behalf prejudiced her both in that she could not present a defense, but also

in that she couldn't rebut the testimony of Ryan Erker. Judge Grant's refusal to continue the trial in order to allow Ms. McCoy to call witnesses in her defense denied Ms. McCoy her right to cross-examine the State's witnesses.

- iv. Ms. McCoy was denied a fair trial due to juror misconduct.

Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced. State v. Briggs, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989). The court's inquiry is an objective one. State v. Boling, WL 181372, *2 (2006). The question is whether the extrinsic evidence could have affected the jury's determinations. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). The court need not delve into the actual effect of the evidence. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). But any doubts must be resolved against the verdict. Briggs, 55 Wn.App. at 55, 776 P.2d 1347. The subjective thought process of the jurors inheres in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

Once juror misconduct is established, prejudice is presumed. State v. Boling, WL 181372, *2 (2006). To overcome this presumption, the State must satisfy the trial court that, viewed objectively, it is

unreasonable to believe the misconduct could have affected the verdict. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). And so the court properly looks at the purpose for which the extraneous evidence was injected into the deliberations. Briggs, 55 Wn.App. at 55-56, 776 P.2d 1347. The court must grant a new trial unless it is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. Id. at 56, 776 P.2d 1347.

Here, one juror was dismissed for misconduct in reading and bringing into the jury deliberation room a copy of the book titled, "The Hidden Jury and Other Secret Tactics that Lawyers Use to Win." RP 78-79, 84-100, CP 52-54. The remainder of the jury panel was questioned and it was revealed that seven other jurors had also seen the book. The highly suggestive and prejudicial title of the book prejudiced the jury against the defendant in that the jury would doubt the validity of the proceedings and the veracity of the witnesses and attorneys.

Juror misconduct was established in this case and the state failed to present any evidence to rebut it. Ms. McCoy was denied her Constitutional right to a fair trial.

2. There was insufficient evidence to establish the corpus delicti of any crime

An accused's confession has a limited role in establishing the corpus delicti of a crime. A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). If, however, independent proof is presented, then the defendant's statements may be considered "in connection therewith and the Corpus delicti established by a combination of the independent proof and the confession." State v. Lung, 70 Wn.2d 365, 372, 423 P.2d 72, 76 (1967), State v. Goranson, 67 Wn.2d 456, 408 P.2d 7 (1965); State v. Hamrick, 19 Wn.App. 417, 576 P.2d 912 (1978).

Here, the only evidence against Ms. McCoy was her confessions to Ms. Petty, Mr. Erker, and Deputy Mock. No physical evidence was presented to establish that Ms. McCoy either personally failed to deposit the money or personally altered the deposit slip and kept the difference in money. No evidence was offered to establish that the handwriting on the altered deposit slips was that of Ms. McCoy, nor was any fingerprint evidence presented to establish that Ms. McCoy ever had possession of the deposit slips. Aside from Ms. McCoy's confessions, the only evidence presented by the state that any theft occurred was the testimony of Ms.

Petty, the accountant in charge of managing the finances of the auto dealership.

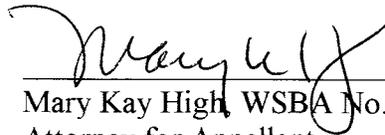
There was insufficient evidence independent of Ms. McCoy's confessions to establish that Ms. McCoy committed any crime.

E. CONCLUSION

For the reasons stated above, this court should vacate Ms. McCoy's conviction and either dismiss the case or remand for a new trial.

DATED this 14 day of April, 2006.

Respectfully submitted,



Mary Kay High, WSBA No. 20123
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Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14 day of April, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Ms. Celine K. McCoy/Reeves, DOC# 708286
Pine Lodge Corrections Center
P.O. Box 300
Medical Lake, WA. 98022-0300

Signed at Tacoma, Washington this 14th day of April, 2006.



Reed Speir, WSBA No. 36270

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