

NO. 37765-9-II

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

STATE OF WASHINGTON,

Appellant,

v.

KRISTY LEE WILLIAMS,

Respondent.

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COURT OF APPEALS DIV. II
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen M. Warnling, Judge

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

BRIEF OF RESPONDENT

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A. RESPONDENT'S STATEMENT OF THE ISSUES

The appellant claims the trial court abused its discretion by 1) continuing respondent's trial date for a week instead of a date preferred by the appellant and 2) by refusing to grant a subsequent continuance to accommodate the complaining witness' work schedule. Notably absent is any challenge by the appellant to the trial court's order dismissing with prejudice the charges against the respondent.

Should the appellant's claims be rejected and the appeal dismissed when 1) a trial court has broad discretion to reset trial dates, 2) the trial court correctly found the complaining witness' work schedule did not make him unavailable for the scheduled trial, and 3) when the issues raised by the appellant are moot in light of the correctly granted and unchallenged defense motion to dismiss?

B. STATEMENT OF THE CASE

On July 25, 2007, the appellant Cowlitz County Prosecutor charged respondent Kristy Lee Williams with third degree assault. The prosecutor alleged that on July 22, 2007, Williams "did intentionally assault Michael Ross, a nurse, who was performing his nursing or health care duties at the time of the assault[.]" CP 1. On August 8, 2007, Williams entered

a not-guilty plea and trial was set for October 24, 2007. CP 4; RP 3.¹ Williams was released on bond. Supp CP ___ (sub no. 4, Bail Bond, 7/26/07).

On October 18, 2007, the State filed a motion to continue, claiming it could not proceed with trial on October 24th because the assigned prosecutor's health problems necessitated a four to six week delay. CP 5-6. Given the circumstances, Williams' counsel did not object and Williams signed a speedy trial waiver, which set a new speedy trial expiration date of January 18, 2008. CP 7-8; RP 5. Finding good cause to continue the trial, both because of the prosecutor's health problems and court congestion, the court accepted Williams' waiver and set a new trial date of January 14, 2008. CP 9; RP 6-7.

On January 3, 2008, the defense notified the State it was endorsing as a witness the doctor who treated Williams on the date of the alleged assault, and that it planned to present the doctor's testimony at trial by "deposition testimony." Supp CP ___ (sub no. 22, Motion to Extend Time for Deposition, 1/8/08); RP 10. The State complained it could not

¹ There is one volume of verbatim report of proceedings for the following 17 hearing dates: July 23, 2007; August 7, 2007; October 18, 2007; January 8, 10, 28 & 31, 2008; February 7 & 12, 2008; March 13, 2008; April 9 & 23, 2008; and May 7, 19, 21, 23 & 28, 2008, and will be referenced as "RP."

participate in the deposition on the dates suggested by the defense without prior access to information regarding the doctor's credentials. Id.; RP 9. The court stated it was inclined to allow the defense to present the doctor's testimony by way of deposition testimony, but only if the defense was willing to postpone trial to allow the State time to obtain information about the doctor. RP 15. Defense counsel stated he could not agree to a continuance of trial and the speedy trial expiration date without first consulting Williams. RP 16. The court therefore set the matter to be heard on January 10, 2008. RP 16-17.

On January 10, 2008, defense counsel informed the court it would no longer seek to introduce the testimony of the doctor who treated Williams, and was therefore ready to proceed to trial as scheduled for January 14, 2008. RP 18. The prosecutor argued in response that, based on the defense's previously expressed intent to present the doctor's deposition testimony, it had assumed there would be a continuance and therefore it was no longer prepared to proceed to trial as scheduled. RP 18-20. The prosecutor also claimed court congestion would prevent Williams from beginning her trial as scheduled. RP 19.

Williams' counsel responded that the defense had never wanted to continue the case and withdrew the doctor as a witness to avoid that

potentiality. RP 19. Counsel also stated Williams was unwilling to further waive her right to a speedy trial. RP 20.

The court found court congestion would prevent Williams' trial from beginning on January 14, 2008. RP 20. After consulting with the defense counsel and prosecutor, the court set a new trial date of February 13, 2008, and Williams signed a speedy trial waiver, which, according to the prosecutor, served to reset the speedy trial expiration date from January 18, 2008 to April 8, 2008. CP 10-11, 25; RP 22-23, 41.

On January 28, 2008, defense counsel notified the court that the State had obtained an ex parte subpoena duces tecum to obtain access to Williams' medical records after learning Williams had sought a protection order to prevent the State from gaining access to the records. RP 25-26. The court quashed the subpoena and set the matter for a hearing on January 31, 2008 regarding Williams' request for a protection order. RP 27.

On January 31, 2008, defense counsel requested the hearing be continued for one week because he had only just received the prosecutor's written response to his motion for a protection order. RP 29. The court granted the request and set the hearing for February 7, 2008. RP 29-30.

On February 7, 2008, defense counsel conceded the prosecution was entitled to Williams' medical records for the date of the alleged assault and

stated Williams would sign a release allowing the prosecution access to those records. RP 35. Defense counsel declined, however, to agree to a continuance of the trial date. RP 36. The prosecution claimed it needed a continuance in order to get the medical records and, more pressingly, because the assigned prosecutor was already scheduled to try another case on the same date as Williams' trial was currently scheduled. RP 38. The trial court declined to immediately grant the State's continuance request, preferring instead to reconvene on February 12, 2008, the day before the scheduled trial, to determine whether a continuance would be needed. RP 38-40.

On February 12, 2008, defense counsel informed the court Williams was ready to proceed to trial on February 13, 2008, as scheduled. RP 41. The prosecutor, however, filed another motion to continue trial, claiming the State needed more time because it would not receive Williams' medical records in time to subpoena the doctor for trial and because the prosecutor was advised by her doctor that she should not try any cases until late June 2008. CP 24-26. The prosecutor also claimed her medical condition required assigning the case to another prosecutor and that court congestion prevented Williams' trial from proceeding as scheduled. RP 41-42. Defense counsel objected, noting Williams is an emergency medical

technician and is unable to work at that vocation until she is cleared of the charge. RP 42. Despite defense counsel's objection, the court reset Williams' trial to begin on March 19, 2008. CP 27; RP 44. The prosecutor assured the court that "We can make March 19th work, Your Honor." RP 44.

On March 13, 2008, the newly assigned prosecutor requested another trial continuance, noting he would already be in trial in another matter on March 19th and that one of the State's witnesses against Williams was unavailable from March 18-27, 2008.² RP 46-47. Finding good cause to continue the trial based on the new prosecutor's unavailability, the court reset trial for April 17, 2008. CP 28; RP 50. Defense counsel did not object to the trial date being set beyond the speedy trial expiration date of April 8, 2008.

On April 2, 2008, defense counsel filed a motion to continue trial due to witness unavailability. CP 29. The motion was heard on April 9, 2008. The prosecutor did not object, so the court reset trial to begin on May 19, 2008, and, at least according to the resulting "Notice of Trial Date," reset the speedy trial expiration date to July 8, 2008. CP 31; RP 54; but see RP 80-81 (at a May 23rd hearing the prosecutor implied the

² The Brief of Appellant (BOA) erroneously asserts this request was made on "March 18, 2008." BOA at 7.

speedy trial period had already expired and defense counsel specifically asserted "we are outside the speedy [trial period] now.") and BOA at 1 (Assignment of Error 1 appears to concede Williams' speedy trial date was sometime before May 27, 2008).

On April 23, 2008, the prosecutor notified the court that one of the State's witnesses, "Dr. Libertore," was unavailable May 19-20, 2008, but the prosecutor did not know why. RP 55. The court responded, "Well, given our circumstances without anything further I can't find that's a good cause for continuance at this point." RP 55.

On May 7, 2008, the prosecutor notified the court that several of the State's witnesses were unavailable for trial on May 19, 2008, including Dr. Libertore.³ RP 58. Defense counsel proposed presenting the doctor's testimony by deposition. RP 60-61. The prosecutor also alerted the court that he might be in trial on another matter on May 19th. RP 62. The court refused to grant another continuance and instead suggested the doctor's testimony be presented at trial by way of perpetuation deposition. RP 63-64.

On May 19, 2008, defense counsel learned Williams' case would not go to trial because there were already two other cases set for trial and

³ The appellant's brief erroneously asserts this request was made on "May 17, 2008." BOA at 8.

there was no judge available to preside over Williams' trial. RP 65-67. Counsel asked the court to dismiss the charges with prejudice "[i]n the interest of justice." RP 67. The court informed counsel it could not rule on the motion and that it would have to be raised, in writing, before a different judge. RP 67. The matter was set over until May 21, 2008. RP 71.

On May 20, 2008, defense counsel filed a motion and supporting declarations asking the court to dismiss the charge with prejudice under CrR 8.3, or, in the alternative, under State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007). CP 32-42. The motion was heard on May 21, 2008. The court denied the motion based on a finding that court congestion prevented Williams' trial on May 19th and concluded "we are in the five day court congestion bump." RP 77. The court set Williams' trial to begin on Tuesday, May 27, 2008. CP 43; RP 78. The prosecutor did not object, stating only, "Tuesday it will be." RP 78.

On May 23, 2008, the prosecutor notified the court that the complaining witness, Michael Ross, would not be available to testify until after June 8, 2008, and asked the court to reset trial for either June 9 or 11, 2008. RP 80, 83. Defense counsel objected, claiming the speedy trial period had already expired, accused the prosecution of mismanaging the

case, renewed the defense motion to dismiss the charge with prejudice, and argued that at the very least the prosecution should be required to proceed to trial with whatever witnesses it could muster. RP 81-82. The court ruled:

I want to know -- Well, I'm going to strike the trial for Tuesday [May 27, 2008]. I would like to know exactly when this witness was actually unavailable from and to. When we were last in court the only suggestion from anybody was that we were asking on a five-day bump. If we have got a new theory, I would like to see that in writing and know why it wasn't presented last time. I am putting it on Wednesday [May 28, 2008] at 1 o'clock to consider the motion to dismiss. Either side, if they wish to present any supporting affidavits or memoranda need to file those and serve the other side no later than 3 o'clock on Tuesday and I would like a copy of them by 3 o'clock.

RP 83-84.⁴

On May 27, 2008, the prosecutor filed a motion to continue trial and supporting memoranda and affidavits. CP 44-52. Although not entirely clear from the submitted materials, it appears the prosecutor claimed a trial continuance was warranted and appropriate because the speedy trial period had not yet expired and CrR 3.3 gave the court

⁴ The appellant's brief erroneously asserts the court "struck the trial date of May 27, 2008, and set a review date of May 28, 2008, to consider the State's motion to continue the trial date. Transcript, p. 80-84." BOA at 10 (emphasis added). The only reason provided by the court for the May 28th hearing was to "consider the [defense] motion to dismiss." RP 83.

discretion to reset the trial date to accommodate the prosecution's witnesses.

Id.

On May 28, 2008, the prosecutor asserted trial could be reset for anytime within 30 days. RP 85-86. Defense counsel argued the charges should be dismissed with prejudice based on State v. Chichester, *supra*, as previously argued in the defense motion to dismiss pursuant to CrR 8.3. CP 32-42; RP 86.

The court granted the defense motion to dismiss, concluding there was no good cause not to try Williams on May 27th. RP 88. The court found the complaining witness was not sufficiently unavailable for trial on May 27th because his excuse for not attending -- that he was working in Astoria, Oregon -- only put him about an hour drive to the courthouse and that was not a sufficient hardship to excuse his availability for Williams' trial. RP 87-88. The court entered a written order denying the continuance and granting Williams' motion to dismiss. CP 53. The State appeals. CP 54.

C. ARGUMENT

1. THE STATE'S APPEAL SHOULD BE DISMISSED.

The appellant does not challenge the trial court's decision to grant the defense motion to dismiss with prejudice. Having waived any challenge to this ruling, the State's appeal should be dismissed.

The appellate rules require the appellant to include a separate section for assignments of error in its brief. RAP 1.2(b); 10.3(a)(4). That section must include "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). In a criminal case, an order dismissing the charges with prejudice is the final order. For that reason, where the State contends on appeal that the court made an erroneous ruling, the state must assign error to the court's final order.

Two Supreme Court cases illustrate the application of this rule, State v. Perry, 120 Wn.2d 200, 840 P.2d 171 (1992), and State v. Fortun, 94 Wn.2d 754, 626 P.2d 504 (1980). In Perry, the State filed a notice of appeal, which appealed the trial court's order granting a suppression motion and the order dismissing the charge. The State's brief, however, did not assign error to the order of dismissal. The Perry Court, relying on Fortun, dismissed the State's appeal. 120 Wn.2d at 202.

In Fortun, the Court similarly dismissed a State's appeal, where it failed to assign error to the trial court's dismissal order. The opinion reasoned "[w]e have held consistently that we will not consider matters to which no error has been assigned." 94 Wn.2d at 756. "Although in this case the two orders may have stemmed from similar circumstances, the consequences of each are different." 94 Wn.2d at 757.

The rules stated in Fortun and Perry necessarily lead to dismissal of the State's appeal here. The orders of suppression in those cases correspond to the court's order denying the State's motion to continue here. The final dismissal orders in those cases correspond to the court's dismissal order here. Although the two orders are related, they clearly have different consequences. Here it was the court's dismissal order that resulted in dismissal of the charge with prejudice, not the court's refusal to grant the State's motions to continue. Because the State failed to assign error to the order of dismissal, the appeal should be dismissed.

The fact that the State's notice of appeal included its intent to appeal both orders does not change the result. CP 54. In Perry, the State argued "that its notice of appeal is from the order of suppression and dismissal." The Supreme Court succinctly rejected the argument that the notice of appeal cured the failure to assign error, finding that it "fails to recognize

the difference between a notice of appeal and an assignment of error. See RAP 10.3(a)(3)." 120 Wn.2d at 202.

As in Perry and Fortun, the State's appeal here should be dismissed.

2. THE TRIAL COURT CORRECTLY DISMISSED THE CHARGE WITH PREJUDICE.

As argued above, the appellant's failure to challenge the trial court's dismissal order warrants dismissal of the appeal. But even if dismissal of the appeal is not warranted for failure to challenge the dismissal order, the State's appeal should still be rejected because the trial court's decision to dismiss was correct.

CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the furtherance of justice, and to ensure that an accused person is treated fairly. The rule reads, in part, as follows:

The Court, in the furtherance of justice after motion and hearing, may dismiss any criminal prosecution due to arbitrary action or government misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

Thus, a court may require dismissal under CrR 8.3 when the defendant shows: (1) governmental misconduct; and (2) prejudice affecting the defendant's rights to a fair trial. State v. Rohrich, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003); State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997); State

v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210, 1214 (2004).

The trial court's decision on the motion to dismiss is reviewed for an abuse of discretion. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Under the first element, simple case mismanagement falls within the standard of government misconduct subject to CrR 8.3(b) dismissal. Blackwell, 120 Wn.2d at 831; State v. Sulgrove, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). Moreover, Washington courts have held the misconduct need not be intentional, evil, or dishonest; simple mismanagement is indeed sufficient. State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990). The underlying purpose of CrR 8.3(b) is fairness to the defendant. State v. Stephans, 47 Wn. App. 600, 603, 726 P.2d 302 (1987). This is the reason CrR 8.3 exists; to provide a trial court with authority to dismiss any criminal prosecution in the furtherance of justice and to ensure an accused person is treated fairly. State v. Wilke, 28 Wn. App. 590, 624 P.2d 1176 (1981).

witness was unavailable, the prosecutor could not provide any. RP 80. Unwilling to grant the prosecutor's motion to continue without more information, the court set the matter for a hearing on the defense motion to dismiss for May 28, 2008, and directed the parties to provide whatever information they thought supported their respective positions. RP 83-84.

On May 27, 2008, the prosecutor filed a written motion to continue with supporting affidavits outlining why the complaining witness could not attend the May 27th trial. CP 44-52. According to these materials, the complaining witness was not available from May 27, 2008 through June 6, 2008 because he would be working in Astoria, Oregon from May 27-28, 2008, and in Vancouver, Washington from May 29, 2008 through June 6, 2008. CP 49, 51-52.

The trial court properly rejected the prosecutor's motion by finding that the complaining witness' work obligation did not make him unavailable for the May 27th trial. RP 87. The court correctly observed that if having to go to work were sufficient to make a person unavailable for trial such that a continuance was required, cases would never get tried. RP 88. Thus, as in Sulgrove and Stephans, the State's failure to marshal its evidence for the day of trial constitutes mismanagement subject to dismissal under CrR 8.3(b).

Under the second element, the defendant must show prejudice that affects the defendant's rights to a fair trial. State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970); Blackwell, 120 Wn.2d at 831 (1993). Here, Williams would have been prejudiced at trial due to the State's mismanagement because it would have deprived her of her constitutional right to confront her accuser, Michael Ross, the complaining witness. Sixth Amendment; Wash. Const. Art. I § 22; Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988); California v. Green, 399 U.S. 149, 157-58, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970); State v. Guloy, 104 Wn.2d 412, 424, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Moreover, it is reasonable to assume Williams' claim of self defense may have been less effective without the ability to cross examine Ross because the jury would have no opportunity to judge the credibility of Williams' version of events against the credibility of Ross and his presumptively conflicting version of events. See RP 3.⁵

⁵ At arraignment, Williams pleaded not guilty and asserted she acted in self defense. RP 3.

But even if dismissal were not warranted under CrR 8.3(b), it was under Chichester.⁶ In Chichester, several continuances had already been granted before a firm trial date in district court was established. 141 Wn. App. at 449. On the day trial was to begin, the prosecutor's office requested another continuance because the prosecutor assigned to the case had another trial, office policy precluded assigning a different prosecutor, and a continuance would not violate the speedy trial rules. Id. at 450-52. Chichester objected, noting he was missing work to attend trial, and argued that if trial did not proceed as scheduled, the charges should be dismissed due to governmental mismanagement. Id. at 452. The trial court denied the prosecutor's request for a continuance and dismissed the charge with prejudice, finding the prosecutor's office had mismanaged its case load and that this had prejudiced Chichester "because of trial preparation, travel, and further delay." Id. at 452-53.

This Court rejected the State's appeal, holding the trial court did not abuse its discretion in denying the prosecutor's request for a continuance or in dismissing the charge. Id. at 454-59. With regard to the State's

⁶ The trial court did not clearly indicate whether it was dismissing the charge under CrR 8.3, Chichester, or both. CP 53; RP 87-88. Williams argued dismissal was warranted under both. CP 32-42.

claim that Chichester was not sufficiently prejudiced by the prosecution's failures to warrant dismissal under CrRLJ 8.3(b),⁷ this Court held:

We think it plain from a review of the record in Chichester's case that the district court dismissed the case because the State was not ready, not on the basis that Chichester had been prejudiced by arbitrary action or governmental misconduct. . . . We do not believe CrRLJ 8.3(b) is the controlling rule where the State comes to court on the date of trial unready to proceed after being unable to show good cause for a continuance. To hold that the court in such a situation cannot dismiss the case, but must instead grant another continuance, would mean that control of the court's criminal trial settings would be transferred to the State. The mere filing by the State of a last-minute motion to continue would routinely serve to dislodge a confirmed trial date, so long as there was time left in the speedy trial period. Surely this was not intended by the drafters of the rule.

When Chichester moved to dismiss, the State still had the opportunity to begin the trial with [another prosecutor] or to propose some other deployment of resources consistent with the trial date. Instead of objecting to a dismissal, the State declared itself unready to proceed and virtually invited the court to grant the defense motion.

Somewhat similar circumstances were presented in State v. Sulgrove, 19 Wn. App 860, 578 P.2d 74 (1978). . . . The trial court dismissed the case because of the State's lack of preparation. This court affirmed. Sulgrove, 19 Wn. App. at 863. Of significance to the present case, we noted parenthetically that "had the trial court not dismissed the prosecution under CrR 8.3(b), but simply allowed the trial to proceed and denied any request for a continuance (as would have been well within its discretion, having already granted one continuance), the State would have failed for a lack of evidence." Sulgrove, 19 Wn. App. at 863. The

⁷ CrRLJ 8.3(b) contains identical language to that found in CrR 8.3(b).

same is true here. The trial court was within its discretion to deny the request for a continuance. Because the State was not ready to proceed, the case would have necessarily failed for lack of evidence if the court had called it for trial. Granting the defense motion to dismiss simply recognized that reality.

Control of a trial calendar ultimately rests with the court, not the litigants. The court's decisions were reasonable. We find no abuse of discretion.

141 Wn. App. at 457-59.

Here, as in Chichester, the State was not ready to proceed on the date of trial and failed to establish good cause for a continuance. And had trial proceeded as scheduled, the prosecution would likely have failed for lack of evidence. The trial court's decision to dismiss the prosecution "simply recognized this reality." 141 Wn. App. at 459. It also provided a clear and necessary signal from the court that "[c]ontrol of the trial calendar . . . rests with the [trial] court" and not the prosecutor. *Id.* As such, the trial court did not abuse its discretion in dismissing the charge against Williams and therefore should be affirmed.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT RESET THE TRIAL DATE FROM MAY 19, 2008 TO MAY 27, 2008.

The appellant claims the trial court abused its discretion by resetting Williams' trial from May 19, 2008 to May 27, 2008, arguing the State was entitled, apparently as a matter of law, to have an additional 30 days after

May 19th to bring Williams to trial because the prosecutor was not available to try the case on May 19th. BOA at 11-14. The appellant reaches this conclusion only after misconstruing CrR 3.3 as not allowing the trial court to set a trial date that is less than 30 days from the previously set date. To the extent this Court need even reach this claim, it should be rejected because the court has discretion to reset trial anytime within the speedy trial period and therefore the court did not abuse its discretion by resetting trial from May 19th to May 27th.

A defendant not detained in jail must be brought to trial within 90 days of arraignment. CrR 3.3(b)(2), (c)(1). The rule authorizes the court to grant a motion to continue the trial date when it "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). A delay due to a continuance is excluded in computing the time for trial. CrR 3.3(e)(3).

A trial court's decision to grant a continuance is generally discretionary and will not be disturbed on appeal absent "'a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A court's

decision is manifestly unreasonable only if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Here, the last firmly established speedy trial expiration date was April 9, 2008, 90 days after the trial court's January 10th ruling postponing trial to February 13, 2008. CP 10-12; RP 22-23. Two more continuances were granted thereafter at the request of the prosecution, but no new speedy trial expiration date resulted. CP 27-28; RP 44, 50.

On April 9, 2008, the date of speedy trial expiration, the court granted defense counsel's request for a continuance, setting the trial date for May 19, 2008. CP 31. By requesting a continuance, Williams waived objection to any delay of trial beyond the speedy trial expiration date resulting from the request and the resulting delay is excluded from calculating the subsequent speedy trial expiration date. CrR 3.3(e)(3), (f)(2). Moreover, the speedy trial expiration date is never less than 30 days past the end of the excluded period. CrR 3.3(b)(5). Therefore, because the defense motion to continue was granted, the speedy trial expiration date for Williams was June 18, 2008, 30 days after the May 19th trial date.

Following grant of Williams' motion to continue trial to May 19th, the trial court had discretion to reset trial anytime between May 20, 2008

and June 18, 2008, once it was established trial could not proceed on May 19th. CrR 3.3(d)(2).⁸ On May 19th, contrary to the appellant's claim that the court set the matter over until May 21st because the prosecutor was engaged in another trial, the court actually set the matter over because there was no judge available to hear Williams' case. RP 65-67; see BOA at 13.⁹ On May 21st the prosecutor noted Williams' trial could not be heard on May 19th because the only available judge had previously been disqualified from presiding over Williams' trial and, in any event, was presiding over another case that day. RP 74. The court agreed that regardless of the prosecutor's availability, Williams' trial could not occur on May 19th because there was no available judge, and therefore reset trial for May 27, 2008. RP 77-78. This was well within the court's sound discretion under

⁸ CrR 3.3(d)(2) provides:
Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, . . . the court shall set a new date for trial within the time limits prescribed and notify each counsel or party of the date set.

⁹ The appellant asserts "Judge Stonier found good cause to continue the trial date on May 19, 2008, because the assigned deputy prosecutor was in another trial and not available to try the respondent's case." BOA at 13 (emphasis added). But Judge Stonier never found a continuance was necessary due to prosecutor unavailability. Rather, the only sure finding Judge Stonier made was that there was no judge to hear Williams' trial on that date. RP 67.

CrR 3.3(d)(2). Nothing precluded the court from setting a May 27th trial date. The appellant's contrary claims should be rejected.

4. THE TRIAL COURT CORRECTLY DENIED THE STATE'S REQUEST TO CONTINUE THE MAY 27, 2008 TRIAL DATE.

The appellant claims the trial court erred by refusing to grant a continuance of the May 27th trial date based on unavailability of the complaining witness. BOA at 14-16. The appellant fails, however, to show how the trial court's determination that the complaining witness was available for trial was wrong. The record supports the court's determination and therefore the appellant's claim should be rejected.

On May 23, 2008, the prosecutor sought a continuance of the May 27th trial based on a claim the complaining witness was unavailable to testify until June 9, 2008. When the court asked for details on why the witness was unavailable, the prosecutor could not provide any. RP 80. Unwilling to grant the prosecutor's motion to continue without more information, the court set the matter for a hearing on the defense motion to dismiss for May 28, 2008, and gave the parties the opportunity to provide whatever information they thought supported their respective positions. RP 83-84.

On May 27, 2008, the prosecutor filed a written motion to continue with supporting affidavits outlining why the complaining witness could not attend trial beginning on May 27th. CP 44-52. According to these materials, the complaining witness was not available from May 27, 2008 through June 6, 2008 because he would be working in Astoria, Oregon from May 27-28, 2008, and in Vancouver, Washington from May 29, 2008 through June 6, 2008. CP 49, 51-52. Curiously, however, the prosecutor's motion does not argue a continuance of the May 27th trial date was mandated because of witness unavailability, but instead claims a trial date later than May 27th was required due to the prosecutor's unavailability on May 19th. CP 45-47. But as previously discussed, the trial court had discretion to set the matter for trial on any available court date before June 18, 2008. CrR 3.3(d)(2). Therefore, the court correctly denied the State's motion to continue the May 27th trial because the State failed to present a valid claim that setting trial for May 27th was in error.

To the extent the State is now claiming that on May 28th the court should have, *sua sponte*, retroactively continued the May 27th trial date to accommodate the complaining witness' work schedule, that claim should be rejected. On May 28th, the trial court determined the complaining witness was available for trial on May 27th despite his work schedule

because Astoria, Oregon is only an hour drive from the Cowlitz County Courthouse. RP 87. The court correctly observed that if having to go to work were sufficient to make a person unavailable for trial such that a continuance was required, cases would never get tried. RP 88. The court's finding and observation supported by the facts and law constitute a proper exercise of discretion. Littlefield, 133 Wn.2d at 47. This Court should reject any claim the trial court abused its discretion by refusing to retroactively continue the start of Williams' trial.

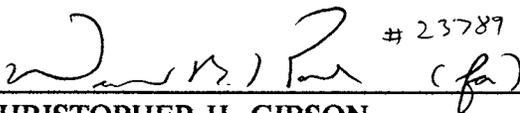
D. CONCLUSION

For the reasons stated, this Court should affirm the trial court and dismiss the State's appeal.

DATED this 16th day of January, 2009.

Respectfully submitted,

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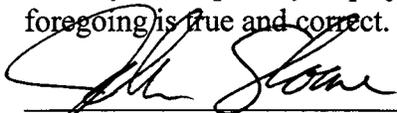
On January 16, 2009, I deposited in the mails of the United States of America
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Containing the brief of respondent, re Kristy Williams
Cause No. 37765-9-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
forgoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

1-16-09
Date

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