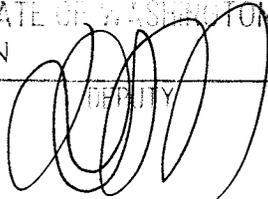


FILED
COURT OF APPEALS
DIVISION II

10 MAY -4 PM 12:54

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

NO. 40379-0-II

BY 
CERTEFF

[Consolidated with COA NO. 39849-4-II]

STATE OF WASHINGTON,

Appellant,

vs.

KENNETH EUGENE LAMB,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00143-9

BRIEF OF APPELLANT

BRIAN WENDT, WSBA #40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Appellant

SERVICE	<p>Mr. Loren D. Oakley 516 E. Front Street Port Angeles, WA 98362</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left.</p> <p>I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED: May 3, 2010 </p> <p>at Port Angeles, WA</p>
---------	---	---

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. ISSUE STATEMENT	2
IV. STATEMENT OF FACTS	2
V. ARGUMENT	5
A. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE UNLAWFUL POSSESSION OF A FIREARM CHARGES	5
1. <u>CrR 8.3(c) and <i>State v. Knapstad</i> do not support the dismissal order.</u>	6
2. <u>CrR 8.3(b) does not support the dismissal order.</u>	8
(a) <i>The filing of the contested charges does not constitute arbitrary action or government misconduct.</i>	9
(b) <i>The ten counts of unlawful possession of a firearm did not result in prejudice that materially affected the defendant's right to a fair trial.</i>	12

3. <u>CrR 4.2(f) does not give a trial court the authority to dismiss a prosecution.</u>	14
B. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED THE STATE'S MOTION TO AMEND THE CHARGES.	15
VI. CONCLUSION.....	17

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page(s)</u>
<u>U.S. Supreme Court Cases:</u>	
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)	9
<i>United States v. Goodwin</i> , 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).	9, 11
<u>Washington State Cases:</u>	
<i>In re Pers. Restraint of Stenson</i> , 153 Wn.2d 137, 102 P.3d 151 (2004)	14
<i>Smith v. State</i> , 118 Wn. App. 464, 76 P.3d 769 (2003)	11
<i>State v. Aguilar</i> , 153 Wn. App. 265, 223 P.3d 1158 (2009)	9
<i>State v. Beito</i> , 147 Wn. App. 504, 195 P.3d 1023 (2008)	5, 6
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993)	6
<i>State v. Bonisisio</i> , 92 Wn. App. 783, 964 P.2d 1222 (1998)	9
<i>State v. Brown</i> , 74 Wn.2d 799, 447 P.2d 82 (1968)	15
<i>State v. Cunningham</i> , 96 Wn.2d 31, 633 P.2d 886 (1981)	16
<i>State v. Fryer</i> , 36 Wn. App. 312, 673 P.2d 881 (1983)	10
<i>State v. Gosser</i> , 33 Wn. App. 428, 656 P.2d 514 (1982)	15
<i>State v. Hull</i> , 83 Wn. App. 786, 924 P.2d 375 (1996)	16
<i>State v. James</i> , 108 Wn.2d 483, 739 P.2d 699 (1987)	16
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986)	7
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006)	9

<i>State v. Lass</i> , 55 Wn. App. 300, 777 P.2d 539 (1989)	10
<i>State v. Lee</i> , 69 Wn. App. 31, 847 P.2d 25 (1993)	9
<i>State v. Lewis</i> , 115 Wn.2d 294, 797 P.2d 1141 (1990)	5
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	5
<i>State v. Ness</i> , 70 Wn. App. 817, 855 P.2d 1191 (1993)	11
<i>State v. Osman</i> , 147 Wn. App. 867, 197 P.3d 1198 (2008)	14
<i>State v. Pelkey</i> , 109 Wn.2d 484, 745 P.2d 854 (1987)	16
<i>State v. Penn</i> , 32 Wn. App. 911, 650 P.2d 1111 (1982)	10
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005)	14
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	5, 8, 9, 12
<i>State v. Rundquist</i> , 79 Wn. App. 786, 905 P.2d 922 (1995)	6
<i>State v. Schaffer</i> , 120 Wn.2d 616, 845 P.2d 281 (1993)	16
<i>State v. Schmidt</i> , 143 Wn.2d 658, 23 P.3d 462 (2001)	11
<i>State v. Serr</i> , 35 Wn. App. 5, 664 P.2d 1301 (1983)	10
<i>State v. Tracer</i> , --- Wn. App. ---, --- P.3d --- 2010 WL 927986 (2010)	8
<i>State v. Underwood</i> , 33 Wn. App. 833, 658 P.2d 50 (1983)	9
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	7
<i>State v. Watkins</i> , 76 Wn. App. 887 P.2d 492 (1995)	11
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	6

Other Case Authorities:

<i>Flaut & Mann v. Counsel of City of Memphis</i> , 285 S.W.3d 856 (Tennessee 2008)	6
--	---

Statutes: Page(s)

Revised Code of Washington [hereinafter RCW]

RCW 9.41.040	passim
• Laws of Washington 1992, ch. 205 § 118	10
• Laws of Washington 1994, ch. 7 § 402 (1st Sp. Sess).	10
RCW 9.94A.030(23) (1986)	10
RCW 9A.44.100 (1986)	10

Court Rules: Page(s)

CrR 2.1(d)	15
CrR 4.2(f)	14
CrR 8.3(b)	8, 9, 12
CrR 8.3(c)	7

Publications: Page(s)

Washington Practice: Rules Practice CrR 8.3 (7th ed.)	9
---	---

I. INTRODUCTION

When the Superior Court vacated Mr. Lamb's 1991 juvenile disposition for second-degree burglary and allowed him to withdraw the corresponding guilty plea (cause number 91-8-00025-0), the State moved to amend the charges against Mr. Lamb in cause number 09-1-00143-9. The State informed the Superior Court that Mr. Lamb's 1987 juvenile adjudication for indecent liberties (cause number 1920) would serve as the predicate felony for five counts of unlawful possession of a firearm (UPF). The Superior Court denied, with prejudice, the State's motion. The Superior Court then dismissed, with prejudice, the UPF charges, adopting the same reasoning it followed when it allowed Mr. Lamb to withdraw, pursuant to CrR 4.2(f), his guilty plea under 91-8-00025-0. The State appealed the Superior Court's order. This Court consolidated the appeal with the State's pending appeal under cause number 39849-4-II.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it denied, with prejudice, the State's motion to amend the charges of unlawful possession of a firearm in order to list the 1987 adjudication for indecent liberties to serve as a predicate felony.
2. The Superior Court erred when it dismissed, with prejudice, the ten counts of unlawful possession of a firearm in cause number 09-1-00143-9.

3. The Superior Court erred when it concluded that it would be “manifestly unjust” if it allowed the State to prosecute any unlawful possession of a firearm charge.

III. ISSUE STATEMENT

1. Did the Superior Court abuse its discretion when it denied the State’s motion to amend the charges in 09-1-00143-9, which sought to identify a 1987 juvenile adjudication for indecent liberties as the predicate felony for five counts of unlawful possession of a firearm, when the State’s motion was made prior to trial?
2. Did the Superior Court abuse its discretion when it dismissed the ten counts of unlawful possession of a firearm under cause number 09-1-00143-9 when (1) there was no showing that the State’s charging decision was arbitrary, vindictive, or constituted misconduct; and (2) there was no showing that the defendant’s right to a fair trial was compromised?

IV. STATEMENT OF FACTS

On November 19, 2009, the Superior Court informed the parties that it denied the State’s motion to reconsider a previous ruling that vacated Mr. Lamb’s juvenile disposition for second-degree burglary and allowed him to withdraw an eighteen year-old guilty plea under cause number 91-8-00025-0. RP (11/19/2010) at 4.

The Superior Court explained (1) that in all probability, Mr. Lamb would have moved to restore his right to bear arms had he been aware of

the firearm prohibition, (2) that even if the court omitted the finding that Mr. Lamb was eligible to restore his rights, a manifest injustice would result if the State prosecuted the unlawful possession of a firearm (UPF) based upon a burglary charge that occurred eighteen years earlier and without any notice that the adjudication terminated his right to bear arms, and (3) that despite prevailing case law interpreting a firearm disability as a collateral consequence of a guilty plea, the law has an unlawful *ex post facto* effect. RP (11/19/2010) at 5-6. While the Superior Court recognized that Mr. Lamb's had also committed a sex offense as a juvenile, it refused to consider whether that offense could serve as a predicate felony for UPF. RP (11/19/2010) at 7.

Because the State had previously listed the 1991 adjudication for second-degree burglary as the predicate felony for UPF, the State moved to amend the charges against Mr. Lamb. RP (11/19/2010) at 8. The deputy prosecuting attorney explained that he intended to use Mr. Lamb's 1987 adjudication for indecent liberties as the predicate for five of the UPF charges.¹ RP (11/19/2010) at 8. Mr. Lamb opposed the motion and moved to dismiss the ten contested UPF counts.² RP (11/19/2010) at 10, 12.

¹ The deputy prosecutor assigned to the case argued that the 1991 adjudication for second-degree burglary could remain a predicate felony for the UPF charges because the Superior Court never found the conviction to be constitutionally infirm. As such, the State moved to amend charges nine through thirteen, specifying that the underlying predicate felony would be the 1987 adjudication for indecent liberties. The State intended

On December 28, 2010, the Superior Court issued an opinion, which granted Mr. Lamb's motion to dismiss the UPF charges in cause 09-1-00143-9. CP 11. The Superior Court explained that its dismissal was supported by the "same considerations" that supported its previous ruling that vacated the disposition and allowed withdrawal of the guilty plea in 91-8-00025-0: (1) Mr. Lamb was a juvenile when he pleaded guilty to indecent liberties; (2) Mr. Lamb never received notice that his adjudication would result in a firearm disability; and (3) a manifest injustice would result if the adjudication for indecent liberties served as a predicate felony for the UPF charges. CP 11-12. However, the Superior Court did not vacate the disposition for indecent liberties, nor allowed Mr. Lamb to withdraw the corresponding guilty plea.³

On February 12, 2010, the Superior Court entered a written order dismissing, with prejudice, the ten counts of UPF. CP 08-09. The State appealed that order. CP 04.

to list the 1991 adjudication for second-degree burglary as the predicate felony for counts four through eight. *See* RP (11/19/2010) at 8-10.

² On October 2, 2009, Mr. Lamb filed his motion to dismiss the ten counts of UPF. Mr. Lamb filed his motion pursuant to "the due process clauses of the United States and State Constitutions, CrR 8.3, and the records and pleadings herein." Mr. Lamb argued: because the Superior Court had previously granted his motion to vacate the 1991 disposition and withdraw the corresponding plea that the adjudication for second-degree burglary, the State could not establish the essential elements for unlawful possession of a firearm. *See* CP Supp (Motion to Dismiss).

³ The State notes that Mr. Lamb did not move to vacate the 1987 indecent liberties disposition or withdraw the corresponding plea.

This Court initially assigned the present appeal the following cause number: 40379-0-II. Pursuant to the State's motion, this Court consolidated the appeal with COA No. 39849-4-II (State's appeal challenging the order vacating the disposition and allowing withdrawal of the guilty plea under 91-8-00025-0). This Court instructed the State to file its brief no later than May 03, 2010.

V. ARGUMENT

A. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE UNLAWFUL POSSESSION OF A FIREARM CHARGES.

This Court reviews a trial court's decision to dismiss criminal charges for an abuse of discretion. *State v. Beito*, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008) (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). A trial court abuses its discretion when the "decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *Id.* A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is "manifestly unreasonable" if the court adopts a view "that no reasonable person would take," *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and

arrives at a decision “outside the range of acceptable choices.” *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

The dismissal of charges is an “extraordinary remedy,” available only when the rights of the defendant have been prejudiced, materially affecting his or her rights to a fair trial. *Beito*, 147 Wn. App. at 508. *See also State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

Here, it is unclear what legal authority, if any, the Superior Court relied upon to support its dismissal order. Neither the facts, nor the law supports the dismissal of 10 counts of unlawful possession of a firearm. Furthermore, there is no evidence that the UPF charges prejudice Mr. Lamb such that his right to a fair trial was materially affected. This Court should hold that the Superior Court abused its discretion when it issued a dismissal order that was clearly result-oriented.⁴

1. CrR 8.3(c) and *State v. Kapstad* do not support the dismissal order.

Prior to trial, a defendant may move to dismiss a criminal charge claiming there is insufficient evidence to establish a prima facie case for

⁴ Appellate deference to a trial court’s “discretionary” decisions should not promote result-oriented opinions or seemingly irreconcilable precedent. The law’s need for consistency, predictability, and reliability requires the elimination of apparently whimsical authority on both the trial and appellate levels.” *Flaut & Mann v. Counsel of City of Memphis*, 285 S.W.3d 856, 872-73 (2008).

the alleged crime. CrR 8.3(c); *State v. Knapstad*, 107 Wn.2d 346, 350, 729 P.2d 48 (1986). Whether pursuant to court rule or *Knapstad*, a trial court “shall” grant a motion to dismiss only if there are “no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” CrR 8.3(c)(2). *See Knapstad*, 107 Wn.2d at 352-53.

Here, Mr. Lamb made passing reference to CrR 8.3 in his motion to dismiss. *See CP Supp.* After the Superior Court vacated Mr. Lamb’s disposition for second-degree burglary, Mr. Lamb erroneously assumed the State could not identify a second felony to serve as a predicate for unlawful possession of a firearm. *See CP Supp.* However, the State moved to amend the charges, arguing that Mr. Lamb’s adjudication for indecent liberties would serve as the requisite predicate for the UPF counts. RP (11/19/2010) at 8. Thus, a material fact remained in dispute (*i.e.* the existence of a predicate felony to support the UPF charges). Neither CrR 8.3(c), nor *State v. Knapstad* permitted the Superior Court to dismiss the ten counts of unlawful possession of a firearm.

Furthermore, the Superior Court erred when it dismissed the charges with prejudice. A dismissal pursuant to CrR 8.3(c) or *Knapstad* requires the trial court to dismiss the prosecution without prejudice. *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995); *Knapstad*, 107 Wn.2d at 357. Here, the Superior Court dismissed the ten counts with

prejudice. CP 08-09. Thus, the Superior Court afforded Mr. Lamb a remedy that the law does not allow.

To the extent the Superior Court may have dismissed the ten UPF counts pursuant to CrR 8.3(c) or *State v. Knapstad*, the order constitutes an abuse of discretion: material facts remain in dispute and the proffered remedy is not allowed by law. On this basis, the dismissal of the State's charges was manifestly unreasonable.

2. CrR 8.3(b) does not support the dismissal order.

CrR 8.3(b) gives the trial court authority to dismiss, with prejudice,⁵ charges pursuant to its own motion:

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

However, the authority to dismiss is not unfettered and it is severely restricted. *See State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 648 (2003). The trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence (1) "arbitrary action or governmental misconduct," and (2) prejudice that materially affects the

⁵ This Court recently noted that a trial court may dismiss a prosecution with prejudice under CrR 8.3(b). *State v. Tracer*, _____ Wn. App. ___, ___ P.3d ___ 2010 WL 927986 (2010) at 4.

accused's right to a fair trial. CrR 8.3(b); *Rohrich*, 149 Wn.2d at 654; 4A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CrR 8.3 (7th ed). If the defendant meets this burden, the rule expressly requires the trial court to set forth its reason dismissing the charge in a written order. CrR 8.3(b).

(a) *The filing of the contested charges does not constitute arbitrary action or government misconduct.*

The dismissal of charges constitutes an abuse of discretion if there is no evidence of arbitrary prosecutorial action, governmental misconduct, or case mismanagement. *State v. Underwood*, 33 Wn. App. 833, 837, 658 P.2d 50 (1983).

In *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), the Supreme Court noted that “[t]he imposition of punishment is the very purpose of virtually all criminal proceedings.” Thus, the prosecuting authority’s decision to file charges, by itself, does not support a dismissal. *See e.g. United States v. Goodwin*, 457 U.S. 368, 377-85, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *State v. Korum*, 157 Wn.2d 614, 625-36, 141 P.3d 13 (2006); *State v. Aguilar*, 153 Wn. App. 265, 280-81, 223 P.3d 1158 (2009); *State v. Bonisisio*, 92 Wn. App. 783, 790-92, 964 P.2d 1222 (1998); *State v. Lee*, 69 Wn. App. 31.

35-38, 847 P.2d 25 (1993); *State v. Lass*, 55 Wn. App. 300, 306, 777 P.2d 539 (1989); *State v. Fryer*, 36 Wn. App. 312, 316-17, 673 P.2d 881 (1983); *State v. Serr*, 35 Wn. App. 5, 10-11, 664 P.2d 1301 (1983); *State v. Penn*, 32 Wn. App. 911, 913-14, 650 P.2d 1111 (1982).

Here, there is no evidence that the deputy prosecuting attorney was vindictive, arbitrary, or committed misconduct when he moved to amend five UPF charges to identify indecent liberties as the predicate felony.

In 1986, Mr. Lamb committed indecent liberties. *See* CP 87-90.⁶ At the time of the offense, indecent liberties served as a Class B felony and a sex offense. RCW 9A.44.100 (1986); RCW 9.94A.030(23) (1986). Subsequent amendment to RCW 9.41.040⁷⁻⁸ (the unlawful possession of a

⁶ This particular cite to the record references the Appellant's Supplemental Clerk's Papers filed in Super Court Cause No. 91-8-00025-0 and COA No. 39849-4-II.

⁷ RCW 9.41.040 (1992) provides:

- (1) A person is guilty of the crime of unlawful possession of a short firearm or pistol, if, having previously been convicted *or, as a juvenile, adjudicated* in this state or elsewhere of a crime of violence or of a felony in which a firearm was used or displayed, the person owns or has in his possession any short firearm or pistol.

Laws of Washington 1992, ch. 205 § 118 (emphasis added).

⁸ RCW 9.41.040 (1994) provides:

- (1) A person, *whether an adult or juvenile*, is guilty of the crime of unlawful possession of a firearm if the person owns, has in his or her possession, or has in his or her control any firearm:
 - (a) After having previously been convicted in this state or elsewhere of a *serious offense*....

Laws of Washington 1994, 1st Sp. Sess. ch. 7 § 402 (emphasis added).

firearm statute) imposed a “collateral consequence” on Mr. Lamb’s adjudication for indecent liberties and deprived him of the right to possess a firearm. *See State v. Schmidt*, 143 Wn.2d 658, 675-77, 23 P.3d 462 (2001); *State v. Watkins*, 76 Wn. App. 726, 731-32, 887 P.2d 492 (1995); *State v. Ness*, 70 Wn. App. 817, 820-24, 855 P.2d 1191 (1993). Additionally, RCW 9.41.040(4) expressly excludes sex offenders from ever owning or possessing a firearm. *See Smith v. State*, 118 Wn. App. 464, 470, 76 P.3d 769 (2003). Finally, Mr. Lamb was in possession of 10 different firearms at the time of his arrest. *See* CP 118-121.⁹

In light of these facts, the deputy prosecutor’s efforts to amend the charges were “fully justified as a legitimate response to perceived criminal conduct.” *Goodwin*, 457 U.S. at 373. The State’s continued effort to prosecute Mr. Lamb for UPF does not give rise to the presumption of prosecutorial vindictiveness, arbitrary action, or government misconduct. Thus, Mr. Lamb failed to satisfy the first prong of the analysis required by CrR 8.3(b) and a dismissal pursuant to this court rule is unjustified.

///

///

///

///

⁹ This particular cite to the record references the Appellant’s Supplemental Clerk’s Papers filed in Super Court Cause No. 91-8-00025-0 and COA No. 39849-4-II.

(b) The ten counts of unlawful possession of a firearm did not result in prejudice that materially affected the defendant's right to a fair trial.

The dismissal of charges under CrR 8.3(b) is permissible only when “there has been prejudice to the rights of the accused which materially affect[s] the accused’s right to a fair trial.” CrR 8.3(b); *Rohrich*, 149 Wn.2d at 655.

Here, Mr. Lamb never argued that the ten UPI counts prejudiced him to the extent that it denied him a fair trial. Mr. Lamb’s sole argument was that a predicate felony did not exist to support the contested charges once the Superior Court vacated his second-degree burglary disposition in cause 91-8-00025-0. CP Supp; RP (11/19/09) at 10. Because Mr. Lamb failed to show how the State’s charges actually prejudiced and materially affected his right to a fair trial, this Court should hold that record does not support a dismissal pursuant to CrR 8.3(b).

Furthermore, the Superior Court’s written order, which failed to reference CrR 8.3(b), never explained the reasons for the dismissal. *See* CP 08-09. Even the memorandum opinion is devoid of any discussion of prejudice and whether the charges materially and adversely affected Mr. Lamb’s right to a fair trial. *See* CP 11-12. While the opinion did adopt the “same considerations” that the Superior Court claimed justified the decision to vacate the disposition and withdraw the guilty plea under 91-

00025-0, that analysis was an attempt to adhere to the standard articulated in CrR 4.2(f), not CrR 8.3(b). *See* CP 11-12. Because the Superior Court never vacated Mr. Lamb’s disposition for indecent liberties and allowed him to withdraw his corresponding plea, the Superior Court employed an incorrect legal standard when it dismissed the ten UPF charges.

CrR 8.3(b) does not support the Superior Court’s dismissal order. Mr. Lamb failed to present any facts that preponderate in favor of a finding that the State’s decision to charge UPF constitutes “arbitrary action or governmental misconduct,” resulting in “prejudice” that “materially affects” his right to a fair trial. Thus, it appears that the Superior Court was guided by its own, subjective interpretation of fairness. *See* CP 68-69; 1RP 49-52; 2RP at 11-13.¹⁰ However, this is not the standard required by CrR 8.3. The Superior Court’s dismissal order constitutes an abuse of discretion: it is not supported by facts, fails to conduct the appropriate legal analysis, and is result-oriented. This Court should so hold.

///

///

///

¹⁰ This particular cite to the record references the verbatim Record of Proceedings and the Appellant’s Supplemental Clerk’s Papers filed in Super Court Cause No. 91-8-00025-0 and COA No. 39849-4-II.

3. CrR 4.2(f) does not give a trial court the authority to dismiss a prosecution.

The interpretation of a court rule is a question of law that is reviewed *de novo*. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). When a court rule is plain and unambiguous, the courts must give effect to the plain meaning of its language. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 147, 102 P.3d 151 (2004). CrR 4.2(f) provides:

The Court shall allow a defendant to *withdraw the defendant's plea of guilty* whenever it appears that the withdrawal is necessary to correct a manifest injustice.

(Emphasis added). The rule does not bestow upon the trial court the authority to dismiss a prosecution against a criminal defendant.

Here, the Superior Court believed that it was “manifestly unjust” to allow the State to use Mr. Lamb’s juvenile adjudication for indecent liberties as a predicate felony for the UPF charges, and it employed the “same considerations” that it used to vacate the eighteen year-old disposition under 91-8-00025-0. *See* CP 11-12. Thus, it appears that the Superior Court relied on CrR 4.2(f) to support its order.

However, the Superior Court never vacated Mr. Lamb’s juvenile disposition for indecent liberties, nor did it allow him to withdraw the underlying guilty plea. *See* CP 08-09, 11-12. Instead, the Superior Court dismissed the UPF charges. *See* CP 08-09, 11-12. Because CrR 4.2(f) does

not grant trial courts the authority to dismiss a prosecution, to the extent that the Superior Court's dismissal relied on CrR 4.2(f), the order is not supported by law.

In sum, this Court should hold that the Superior Court abused its discretion when it dismissed the ten counts of unlawful possession of a firearm. The dismissal order is not supported by, nor did it here to the requisite standards of CrR 4.2(f), CrR 8.3(b), CrR 8.3(c), or *State v. Knapstad*. Thus, the order is manifestly unreasonable and was exercised on untenable grounds.

B. THE TRIAL COURT ABUSED ITS DISCRETION
WHEN IT DENIED THE STATE'S MOTION TO
AMEND THE CHARGES.

CrR 2.1(d) allows the State to amend an information at any time before a verdict if substantial rights of the defendant are not prejudiced. The defendant has the burden of showing prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968); *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). This is a difficult burden to satisfy because Washington law permits liberal amendment to an information before trial. *See State v. Pelkey*, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987); *State v. Hull*, 83 Wn. App. 786, 800, 924 P.2d 375 (1996).

A trial court's ruling on a motion to amend an information is reviewed for abuse of discretion. *State v. Schaffer*, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993); *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). Abuse of discretion occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

Here, the State's proposed amendments did not prejudice Mr. Lamb's right to a fair trial. First, the timing of the State's proposed amendment did not compromise Mr. Lamb's ability to prepare for trial. The State moved to amend the information on November 19, 2009, well in advance of the scheduled trial date.¹¹ RP (11/19/2010) at 8. If the Superior Court had granted the State's motion, Mr. Lamb still would have had sufficient time to prepare a defense prior to trial. Second, Mr. Lamb's able counsel knew of the indecent liberties adjudication because it was identified in disposition that he successfully moved the Superior Court to vacate under cause number 91-8-00025-0. CP 88.¹² Thus, Mr. Lamb's attorney cannot claim to be surprised by the amendment. Finally, the proposed amendment did not increase the charges against Mr. Lamb. The

¹¹ At the time of this filing, trial is scheduled for May 24, 2010.

¹² This particular cite to the record references the Appellant's Supplemental Clerk's Papers filed in Superior Court Cause No. 91-8-00025-0 and COA No 39849-4-II.

State's motion sought only to identify a new predicate for five of the original ten UPF charges. RP (11/19/2010) at 8. In light of the Superior Court's prior ruling that vacated the disposition and allowed withdrawal of the guilty plea under 91-8-00025-0, the State's proposed amendment effectively reduced the number of charges against Mr. Lamb. This Court should find that the State's proposed amendment did not prejudice Mr. Lamb's right to a fair trial. As such, this Court should hold that the Superior Court abused its discretion when it denied the State's motion to amend the charges prior to trial.

VI. CONCLUSION

The Superior Court abused its discretion when it (1) denied, with prejudice, the State's motion to amend the charges against Mr. Lamb; and (2) dismissed, with prejudice, the charges of unlawful possession of a firearm. The Superior Court's decision is not supported by facts or by law. Furthermore, the Superior Court never conducted the analysis that the law requires in order to deny a proffered amendment to the information or dismiss particular charges. Thus, the Superior Court's order is manifestly unreasonable and constitutes an abuse of discretion.

Based upon the arguments presented above, the State respectfully requests that this Court reverse the Superior Court's order (filed

02/12/2010) that (1) denied the State's motion to amend the information against Mr. Lamb, and (2) dismissed the ten UPF charges against Mr. Lamb. Upon remand, this Court should instruct the Superior Court to allow the State to prosecute Mr. Lamb for unlawful possession of a firearm if it is so inclined.

DATED May 3, 2010.

DEBORAH S. KELLY, Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'B. Wendt', written over the typed name of the Deputy Prosecuting Attorney.

Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney