

No. 49847-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT ANDREW MENDEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge  
The Honorable Carol Murphy, Judge  
Cause No. 16-1-00587-34

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defendant's right to a speedy trial under CrR 3.3 was violated when the court granted continuances based upon the temporary unavailability of the prosecutor and an essential witness for the State.

2. Whether the court granted continuances based upon courtroom or judicial unavailability, and if so, whether the trial court abused its discretion in doing so.

3. Whether the defendant's right to a fair and impartial hearing was violated because he was required to wear restraints in the courtroom during his bench trial.

## B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the case. Some additional facts will be discussed in the argument portion of this brief.

## C. ARGUMENT.

1. Each of the trial continuances challenged by Mendez were supported by sufficient justification. There was no violation of his speedy trial rights under CrR 3.3.

Mendez challenges two of the trial continuances requested by the State and granted by the court. He claims only that his court rule right was violated, but does not claim a constitutional violation. He does not challenge a continuance granted because his attorney was in trial in another county, 07/06/16 RP, or a one week continuance that resulted when his attorney failed to appear on

September 19, 2016, the date the trial was set to begin. 09/06/16  
RP.

A defendant being detained in jail must be brought to trial within 60 days of the “commencement date,” which is usually the date of arraignment. CrR 3.3(b)(1). Periods of time excluded from this 60-day limit include those required by the administration of justice so long as the continuance will not prejudice the defendant’s presentation of his case. CrR 3.3(e)(3), (f)(2). If a period is excluded, then “the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5). Thus, each excluded period brings with it a 30-day extension of the speedy trial deadline. See CrR 3.3(b)(5). CrR 3.3 is not constitutionally based. State v. Hall, 55 Wn. App. 834, 841, 780 P.2d 1337 (1989). Continuances granted within the speedy trial time are not violations of the rule; dismissal is required only when the speedy trial period has expired. Unless that is the case, the defendant must demonstrate “actual prejudice” before his case will be dismissed. Id.

The speedy trial right exists to protect specific interests.  
Those are:

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (footnote omitted).

Ruling on a motion to continue is discretionary with a judge because it involves “such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures.” State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). A reviewing court will not disturb an order granting a continuance “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 when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). 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. Id. A decision is “manifestly unreasonable” if the court, despite applying

the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” *Id.*

The defendant bears the burden of showing that the court abused its discretion and that he was prejudiced by the continuance. *State v. Torres*, 111 Wn. App. 323, 330, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005, 60 P.3d 1212 (2003).

Whether a court correctly applied CrR 3.3 is a question of law reviewed de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009).

a. Continuance for the prosecutor’s temporary unavailability.

Mendez’s original trial date was June 20, 2016. CP 66. On June 15, the deputy prosecutor handling the case sought a continuance because he was scheduled to be out of state on the trial date. 06/15/16 RP 4. The record does not indicate whether this was for a vacation, training, or some other purpose. Defense counsel did not object, although Mendez did, and it was defense counsel, not the State, who requested a new trial date of July 11. *Id.* at 3-4. Counsel also advised that negotiations were still in progress, *Id.* at 4, and informed the court that this continuance

would not prejudice Mendez in the presentation of his defense. *Id.* at 5. The court found that there was good cause for the continuance and that there was no prejudice to the defendant, and set a new trial date of July 11, 2016. *Id.* at 5; CP 11. Pursuant to CrR 3.3(b)(5), the time for trial would expire on August 10. CP 11.

Mendez argues that the trial court abused its discretion by granting a continuance because of the prosecutor's vacation. Appellant's Opening Brief at 12. He claims that the State had a "good faith obligation" to assign the case to another prosecutor. *Id.* Assuming *arguendo* that the prosecutor was going to be on vacation, scheduled vacations of counsel and investigating officers do justify a continuance. "This is necessary to preserve the dignity of officers who would otherwise never be able to plan a vacation." Torres, 111 Wn. App. at 331.

Mendez cites to State v. Heredia-Juarez, 119 Wn. App. 150, 17 P.3d 648 (2001), for his position that the State had an obligation to assign the case to another prosecutor when the currently assigned prosecutor was unavailable. That is not the holding of Heredia-Juarez. "[W]e take this opportunity to clarify *Kelley*<sup>1</sup> and hold that there is not a per se requirement of reassignment when a

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<sup>1</sup> State v. Kelley, 64 Wn. App. 755, 828 P.2d 1106 (1992).

prosecutor becomes unavailable.” Id. at 155. There are several factors that the court is to consider, and one of them is whether or not the defendant will be prejudiced by the delay. Id. at 156. Here there was none. Further, the State was not requesting a delay until July 11.<sup>2</sup> The defense counsel was. For a short continuance, reassigning the case to another prosecutor who would have to become familiar with the case would cause a longer delay than merely accommodating the current prosecutor’s vacation.

Mendez also complains that the prosecutor did not promptly notify the court of his planned vacation, where he was aware of the trial date as early as the arraignment on April 26. Appellant’s Opening Brief at 14. He does not point to any authority that the justification for a continuance depends on the timing of the motion for continuance. In this instance, it would not be unreasonable for a prosecutor to wait until shortly before trial to ask for a continuance. It is no secret that most criminal cases resolve short of a trial, and there were ongoing negotiations in this case. 06/15/16 RP at 3. There would be no reason to take court time to seek a new trial date when there existed the possibility, if not the probability, that there would not be a trial at all.

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<sup>2</sup> Defense counsel told the court, “. . . understanding [the prosecutor]’s not going to be available for the next week . . .” 06/15/16 RP 3.

Finally, when the court granted this continuance, there was no indication that there would be more, and lengthier, continuances in the future. It cannot be said that the court abused its discretion in granting this continuance of 21 days.

b. The court did not abuse its discretion in granting a continuance to accommodate the temporary unavailability of the State's investigating officer.

As noted above, on June 15, 2016, the trial court continued the trial from June 20 to July 11. The last date for trial was then August 10, 2016. CP 11. On July 6, defense counsel requested a continuance until July 25. He was starting a first degree murder trial in Pierce County that was scheduled to last all of the month of July. 07/06/16 RP 3. Even though the Pierce County trial was unlikely to be finished by then, counsel requested a new trial date of July 25, only because Mendez objected to any continuance. Id. The State did not object to the continuance, but asked for a trial date of August 1 or 8, to allow time to issue and serve new subpoenas. Id. at 4. The trial court set the date for August 1, but defense counsel immediately asked for August 8, since he planned to be out of town on the first of August. Id. The court then set trial for August 8, which resulted in September 7 being the last day for trial. Id.; CP 12.

On August 3, 2016, the State again asked for a continuance based upon the fact that the investigating officer was going to be out of state until September 10. 08/03/16 RP 3. The record does not reflect whether this was for vacation, training, personal or family emergency, or some other reason. Defense counsel was not present because he was still in a murder trial that was expected to conclude by the following Wednesday. *Id.* at 4-5. August 3, 2016, was a Wednesday, and the following Wednesday would be August 10, two days past the date the trial was set for at the time. An attorney standing in for defense counsel relayed his request that the matter be set for a status hearing on August 10. *Id.*

Because the witness would be available on September 10, which was a Saturday, the State requested a trial date of Monday, September 12. 08/03/16 RP 4. The court responded that “the 12<sup>th</sup> is a nonjury trial week.” *Id.* The State then asked for the next trial date, which was Monday, September 19. *Id.* The court found that the officer was a material witness for the State and there was no information that the defendant would be prejudiced. The trial was continued to September 19. *Id.* at 6; CP 14. The last date for trial was October 19, 2016. CP 14.

The unavailability of a material witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.

State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993). The fact that there has already been several continuances does not change the nature of this continuance. A temporarily unavailable material witness is a valid reason for granting a continuance, and the State requested a trial date as soon after the witness became available as possible.

Mendez argues that the officer was not really unavailable, and that defense counsel had obtained records showing he had worked shifts during some of the time period included in the continuance. CP 25-19; Appellant's Opening Brief at 16. However, immediately after the bench trial, defense counsel said this to the court:

The court may notice in its review of the file that I filed a motion to dismiss based on what we felt was an improperly granted continuance. I simply want to say that after further discussions with the State and received (sic) some further information, we are withdrawing that motion. So I don't want to leave that dangling.

09/27/16 RP 85.

While the specifics were not made part of the record, it is clear that defense counsel became convinced that the officer was in fact unavailable during the time period of the continuance. There are no grounds to suggest that the continuance was improperly granted, and therefore there was no abuse of discretion by the trial court. Nor did Mendez suffer any prejudice in his ability to present his defense.

2. The court did not grant a continuance on the basis of courtroom or judicial unavailability.

Mendez argues that on two occasions the court continued the trial of his case outside the speedy trial time because of the unavailability of courtrooms and/or judges. Appellant's Opening Brief at 16-18. In neither case, however, was the unavailability of either a courtroom or a judge the reason for the continuance, and in neither case did the court exceed the speedy trial time.

Court congestion may be a valid reason for a continuance, but the court must make a thorough record of the details, "such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Without such a detailed record, it may

be an abuse of discretion to continue a trial on the basis of court congestion. State v. Kokot, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986), *review denied*, May 6, 1986. A reviewing court cannot determine, without such a record, whether the continuance was reasonably granted or not. In this case, there was virtually no record made, but the court was not continuing the trial because of courtroom unavailability.

On August 3, 2016, when the State requested a continuance because of the unavailability of the witness, it asked for a trial date of September 12. The court advised that there were no jury trials that week. 08/03/16 RP 4-5. The continuance may have been a week longer than it otherwise would have been, but it was still granted for the reason that a material State witness was unavailable. Even had it been set for September 12, the last allowable day for trial would have been October 12. The trial began on September 26, well within that time limit.

Defense counsel filed a declaration on September 16 indicating he would be in trial in Pierce County on the 19<sup>th</sup> and asked for Mendez's trial to begin on Wednesday, September 21. CP22-24. On September 19, when the case was called for trial, defense counsel was not present. The court indicated that there

would not be a judge available on Wednesday. 09/19/16 RP 5-6. Other than noting that it “was simply not possible,” the court did not make a record of any specific reasons. *Id.* at 6.

The fact remains, however, that this continuance of the trial was because defense counsel was not present, not because of court congestion or judicial unavailability. The prosecutor, the witnesses, the defendant, and the judge were all present and ready to proceed. *Id.* at 3-5. Again, the continuance may have been longer than it would otherwise have been, but it was for a valid reason—defense counsel was not present.

It cannot be said that this continuance was manifestly unreasonable. There was no abuse of discretion. And again, Mendez has not pointed to any prejudice to his defense that resulted from it.

3. Even though the court failed to make a record of the reasons for Mendez’s restraints, any error was harmless.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), *review denied*, 145 Wn.2d 1016, 41

P.3d 482 (2002). “It is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public.” State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). The trial court’s decision to restrain a defendant is reviewed for abuse of discretion. State v. Turner, 143 Wn.2d 715, 724, 23 P.3d 499 (2001); State v. Walker, 185 Wn. App. 790, 803, 344 P.3d 227, *review denied*, 183 Wn.2d 1025 (2015). Shackles and handcuffs are not per se unconstitutional. In re Pers. Restraint of Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004).

Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one’s own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in

the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to Hartzog, 96 Wn.2d at 400). A lesser showing of necessity is required when there is no jury present. Walker, 185 Wn. App. at 80, *citing to* People v. Fierro, 1 Cal. 4th 173, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991).

Mendez maintains that even in a bench trial the defendant runs the same risk of prejudice if he appears in restraints as he would in a jury trial. He cites to cases from New York and Illinois to support his argument. Appellant's Opening Brief at 22. Washington courts, however, have said differently. "This was a proceeding without a jury, which greatly reduces the likelihood of prejudice." State v. E.J.Y., 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

Mendez did not ask to have all of his shackles removed. His request was to free one hand so he could take notes during the trial. 09/26/16 RP 8. The trial court made a meticulous record as to the nature and extent of Mendez's restraints, and ordered that his right hand be released from the handcuff. 09/26/16 RP 8-10. The court inquired whether, other than hindering his ability to write, the restraints interfered in any way with his ability to participate fully in the trial, and defense counsel responded that he did not believe so. *Id.* at 9. After ordering that Mendez's hand be freed and that

he be provided paper and a pen, the court further instructed defense counsel to alert the court if any security measures inhibited his ability to participate in the trial. *Id.* at 11.

It is true that the court did not make the required findings as to the necessity for the restraints that Mendez wore at trial. Mendez did not ask to be completely unshackled and his attorney apparently had no concern that the presence of those shackles would prejudice the court. Although Mendez argues that judges will unconsciously be affected by the fact that the defendant is in restraints, Appellant's Opening Brief at 22-23, it seems unlikely that even without them, the judge who has just ordered shackles to be removed is going to forget that the defendant is in custody. It is likely that the court will simply not take that circumstance into account. Trial court judges routinely disregard evidence or information that a trier of fact is not permitted to consider. "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002), (quoting Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981)).

Even though it was error for the court to fail to make a record of the factors requiring that Mendez be restrained, "[a] claim of

unconstitutional shackling is subject to harmless error analysis.” State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). An error is harmless if the reviewing court is convinced, beyond a reasonable doubt, that the fact finder would have reached the same result had the error not occurred. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). “But this error does not require reversal unless it is shown that the use of restraints substantially affected the trial court’s finding.” E.J.Y., 113 Wn. App. at 952 (citing Hutchinson, 135 Wn.2d at 888). The trial court in this case was careful to ensure that Mendez was able to participate in his trial and communicate freely with his attorney. As noted above, it is unlikely that the court would be prejudiced against him because he wore shackles, which were, as the court said, consistent with the way defendants who were in custody appeared in the courtroom. 09/26/16 RP 10.

Mendez argues that the evidence that he violated the no contact order “was far from overwhelming,” Appellant’s Opening Brief at 25, implying that the court must have been prejudiced against him because it found him guilty. While the evidence may not have been overwhelming, it was substantial. The police responded to a report that Mendez was heading for an apartment

occupied by a person who had a restraining order against him. 09/26/16 RP 20. As the officers rounded the corner of the building toward that apartment, they heard the sound of a door closing. *Id.* at 21. Mendez was within five to ten feet of the apartment door, walking away from it. *Id.* at 23. When asked, he said he was visiting someone else, but he refused to say who that was. *Id.* at 25. Later he said he was there because he sometimes parks his bicycle there, but never said whether his bike was there that day. *Id.* at 25-26. The manager of the apartment complex testified that the nearest door to any other apartment was 48 to 50 feet away from the door of the party protected by the restraining order. *Id.* at 39-40. The restraining order included a restriction of 500 feet around the protected party's residence. *Id.* at 29. The State presented a solid case that Mendez violated the no-contact order as charged.

The court's error in failing to make findings regarding the reason for requiring Mendez to wear restraints other than on his writing hand was harmless. The result of the trial would have been the same even if all his restraints had been removed. Similarly, the trial court would not have been prejudiced because Mendez was wearing jail clothes. It was well aware that he was in custody and it

was certainly not a novel experience for the court. Mendez's clothing made no difference in the outcome.

D. CONCLUSION.

There was no violation of CrR 3.3. Any error regarding shackling of the defendant at trial was harmless. The State respectfully asks this court to affirm Mendez's conviction.

Respectfully submitted this 5<sup>th</sup> day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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Dated this 5<sup>th</sup> day of July, 2017, at Olympia, Washington.

  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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