

FILED  
COURT OF APPEALS  
DIVISION II

2017 DEC 22 AM 11:42

STATE OF WASHINGTON

BY Clid  
DEPUTY

NO. 50566-5-II

COURT OF APPEALS

IN THE STATE OF WASHINGTON

DIVISION II

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ALFREDO SUAREZ, *APPELLANT*

v.

TOPBUILD, et al, *RESPONDENT*.

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REPLY BRIEF OF APPELLANT

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## ARGUMENT

One salient point to consider in the statement of the case is that the jury returned its verdict at 5:08 p.m. on April 24, 2017. When the jury announced its verdict by knocking on the jury room door and informing the bailiff that they had reached a verdict is not recorded. But all reason would conclude that since counsel had to be called and returned to the courtroom, and the court clerk called and brought in, that it must have been close to 5:00 p.m., if not before the hour, when the jury announced its verdict. And with the jury having been advised by this trial judge the previous day, “We generally don’t stay past 5:00 o’clock . . . We try to be out promptly at 5:00 o’clock.” All indications are that the jury was complying with the trial court’s directions.

Counsel for the employer argued against the motion for a continuance to the following day outside the presence of the jury that they could take more time if they wanted. But the jury was never advised by the trial court that they could have more time if needed, or could come back the next day to deliberate on the case. Employer’s counsel makes a good analogy by comparing this case to the denial of a motion for continuance on a motion for summary judgement, citing *Coggle v. Snow*, 56 Wn, App. 499, 748 P. 2d 554 (1990). There the appellate court stated at page 504 that the standard by which to determine whether a trial court has properly exercised its discretion is in disarray in this state. The proper standard is whether discretion is exercised on untenable grounds, or for untenable reasons, considering the purpose of the trial courts discretion. *Coggle v. Snow*, 56

Wn App. at page 507. The court went on to hold at page 508 that they could not discern a tenable ground or reason for the trial court's decision to deny the continuance, and the trial court improperly exercised its discretion.

Mr. Suarez is arguing that the trial court abused its discretion in denying his motion for a continuance of the trial to the following day, not that time management itself was abused. Though the trial court had advised the jury to be back in the jury room at 8:45 a.m. and that trial would commence promptly at 9:00 a.m. the following morning, it is not an abuse of discretion in and of itself for the trial court to have scheduled other matters at 9:00 a.m. so that the trial did not commence until 10:15 a.m. that day. What is an abuse of discretion is for the trial court to deny Mr. Suarez's motion for a continuance at 3:30 p.m. that afternoon when the jury had yet to be instructed on the law and counsel had not presented their closing arguments. The one hour and fifteen minute delay in the morning, and the fifteen minute delay in commencing in the afternoon session, only compounded the problem and necessitated the motion for continuance.

In denying the motion for continuance, the trial court stated, "I am in favor of good time management." The trial court went on to state, "So let's see how far they get today, and they can certainly be informed that if they need to come back tomorrow morning, they will have the time to do that." RP, page 7, lines 12 and 16. The jury was never advised that they could come back tomorrow, after previously being advised that they do not stay past 5:00 o'clock. "The reason is there's some staffing and overtime

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issues for the courthouse here so in order to avoid running up extra expense . . .” RP, page 2, line 25). Considering that earlier delay that day in the commencement of the trial, there is no tenable ground or reason for the trial court’s decision to deny the continuance. *Coggle V. Snow*, 56 Wn. App. at page 508.

In enunciating the reason why they don’t stay past 5:00 o’clock, the trial court was not timely providing an overview of a typical daily schedule. The statements of the trial court taken together can reasonably be constructed as a directive, don’t go past 5:00 p.m., and when the jury announce their verdict promptly at 5:00 p.m. indicates that the jury took that as a directive. Mr. Suarez is not alleging that the jury or any number of jurors committed misconduct. There is no evidence that the jury committed misconduct in doing what the trial court asked them to do, return a verdict by 5:00 p.m. As well as an abuse of discretion in denying the motion for a continuance for irregularities occurring during the course of the trial, Mr. Suarez was denied a full opportunity to be heard pursuant to RCW 51.52.115, and his due process right to a fair trial was violated pursuant to the 14<sup>th</sup> Amendment to the United States Constitution and Article 1, Section 3, of the Washington State Constitution.

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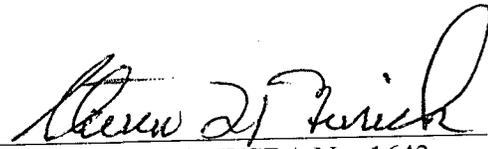
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~~CONCLUSION~~

The appellate court should award Alfredo Suarez a new trial.

Dated: December 20, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven L. Busick", written over a horizontal line.

Steven L. Busick, WSBA No. 1643  
Attorney for Alfredo Suarez  
Respondent

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STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS

BY CLD  
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DIVISION II

ALFREDO SUAREZ,	)	No. 50566-5-II
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Appellant,	)	PROOF OF SERVICE
	)	
v.	)	
	)	
TOPBUILD, et al,	)	
	)	
Respondent.	)	

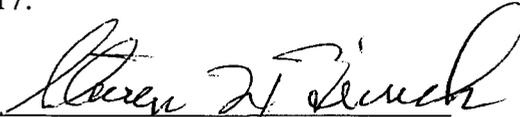
The undersigned states that on Wednesday, December 20, 2017, I served via US mail, as indicated below, Reply Brief of Appellant, as attached, addressed as follows:

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

Dated: December 20, 2017.

  
 Steven L. Busick, WSBA #1643  
 Attorney for Alfredo Suarez, Appellant