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Court of Appeals  
Division II  
State of Washington  
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NO. 50679-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

RUSSEL ARNOLD FORD,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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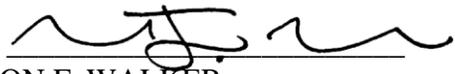
THE HONORABLE F. MARK McCAULEY, JUDGE

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BRIEF OF RESPONDENT

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KATHERINE L. SVOBODA  
Prosecuting Attorney  
for Grays Harbor County

BY:   
JASON F. WALKER  
Chief Criminal Deputy  
WSBA # 44358

OFFICE AND POST OFFICE ADDRESS  
Grays Harbor County Prosecuting Attorney  
102 West Broadway Room 102  
Montesano, WA 98563  
(360) 249-3951

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## RESPONSE TO ASSIGNMENTS OF ERROR

1. **The court did not error in denying a recess to allow the defense to attempt to contact a witness because it is within the court's discretion. The Defendant was still able to present his defense.**
2. **Trial counsel was not ineffective by not requesting a material witness warrant because the testimony was available through another witness, was of questionable value, and the motion would likely not have been granted.**

## RESPONDENT'S COUNTER STATEMENT OF THE CASE

On February 16, 2017, Officer Nicholas Byron observed a Ford Aerostar van fail to stop at a stop sign entering Cosmopolis from the Blue Slough road. RP 5/4/17 at 37. Upon this observation, Officer Byron turned on both his lights and siren and began to pursue the van. RP 5/4/17 at 38. The van slowed to approximately 5-10 miles per hour, at which point Officer Byron was able to identify the driver as a white male with facial hair and a baseball cap. RP 5/4/17 at 39-40. Officer Byron stated that he did not recognize the driver as anyone he knew at the time, but at trial identified the Defendant as the driver. RP 5/4/17 at 40.

Before coming to a full stop, the vehicle drove off at a high rate of speed. RP 5/4/17 at 44. Officer Byron pursued, reaching a speed of approximately 95 miles per hour when he determined that the pursuit should be terminated in the interest of public safety. RP 5/4/17 at 44-45.

As Officer Byron was terminating the pursuit, the vehicle turned onto a dead end road. RP 5/4/17 at 45. Officer Byron followed the van, and observed the van go over the curb at the end of the road, landing approximately 70 feet from the roadway. RP 5/4/17 AT 48-50.

Kenneth Singleton stays with his girlfriend in Cosmopolis. RP 5/4/2017 at 22. On the day in question, he saw the minivan crash and Officer Byron in pursuit. RP 5/4/17 at 23. Mr. Singleton testified that he saw only one person flee from the vehicle. RP 5/4/17 at 27-28. Mr. Sningleton could not, however, identify the person, and did not recognize the Defendant at trial. RP 5/4/17 at 26. But he did believe the person fleeing from the van was a male. RP 5/4/2017 at 33.

Officer Byron observed the Defendant running from the vehicle. RP 5/4/17 at 55. Upon the arrival of other officers, they searched the woods, and arrested the Defendant and administered the *Miranda* warning. RP 5/4/17 at 59. Upon being asked whom the vehicle belonged to, the Defendant stated that he had “borrowed the vehicle from a friend.” RP 5/4/17 at 59.

On February 17, 2017 the Defendant was charged by Information with attempting to elude a pursuing police vehicle. CP 1-2.

On April 24, 2017 the State moved to amend the charges to include Possession of Heroin with Intent to Deliver with a firearm enhancement and Unlawful Possession of a Firearm in the Second Degree. RP 4/24/2017 at 29. This was based upon a search of the van the Defendant was accused of driving, which had revealed a large quantity of heroin and a loaded firearm in the back. *Id.* The motion to amend was denied. RP 4/24/2017 at 39.

Trial commenced May 4, 2017. *See* RP 5/4/17 at. The State presented the evidence as cited above.

The Defense presented the testimony of David Rupert and Chelsie Landgraf. Mr. Rupert testified that the Defendant had gotten into the *passenger* side of the van in Montesano. 5/4/17 at 127. He testified that he followed the van down the Blue Slough road, and “the guy” who was driving the van (impliedly not the Defendant) ran the stop sign. RP 5/4/17 at 128. Mr. Rupert testified that the van had never stopped between Montesano and Cosmopolis, and the driver and passenger did not switch positions. RP 5/4/17 at 129.

Chelsie Landgraf testified that she was the other passenger in the van in question, and that her boyfriend, Tyler Parker, was the driver. RP 5/4/17 at 148. Ms. Landgraf testified that, after the pursuit, she and Tyler

Parker fled from the van out of the driver's side door into the woods. RP 5/4/17 at 150-51. She claimed the Defendant went out the passenger side door. RP 5/4/17 at 159. Under cross examination, however, she testified that Tyler Parker did not have a beard, and could not grow a beard. RP 5/4/17 at 158.

The defense also called Officer Byron back to the stand. RP 5/5/17 at 179. During Officer Byron's testimony, while the jury had been taken out of the room, defense counsel requested a recess to make a call to a Mr. Beebe, a witness that had appeared in response to the State's subpoena the previous day. RP 5/5/17 at 185. Mr. Beebe had told the prosecutor that he had only received a subpoena from the State. *Id.* Defense council suggested that the State call Mr. Beebe during her proposed recess. *Id.* The court did not grant a recess at that time. *Id.*

The defense then called Tyler Parker to the stand. RP 5/5/17 at 189. Parker testified that he had not seen the Defendant in years outside of jail, and had not seen him on the date of the incident. RP 5/5/17 at 191. He also testified that Ms. Landgraf was not his girlfriend. RP 5/5/17 at 190.

The Defendant was found guilty by the jury and the court imposed a residential drug offender sentencing alternative (DOSA) pursuant to RCW 9.94A.660 and RCW 9.94A.662. CP 25-35.

### **ARGUMENT**

**1. The trial court did not abuse its discretion in denying a recess when defense trial council requested it.**

The Defendant argues that the court denial of the requested recess amounted to a denial of his right to present a defense. However, a trial court does not abuse its discretion to deny such a request where it the witness' testimony is of questionable value, or can be obtained from another source, as is the case here.

**The court did not abuse its discretion by denying the request for a recess.**

“[T]he decision to grant or deny a motion for a continuance<sup>1</sup> rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169, 1172 (2004) (citing *State v. Miles*, 77 Wash.2d 593, 597, 464 P.2d 723 (1970).) Appellate courts review that decision under an abuse of discretion standard, leaving the decision undisturbed unless there is a clear showing that the trial court's decision

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<sup>1</sup> Although the defense asked for a *recess*, not a continuance in the instant case, there would appear to be no reason not to apply the same standard.

“is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (citing *State v. Hurd*, 127 Wash.2d 592, 594, 902 P.2d 651 (1995), *Skagit Ry. & Lumber Co. v. Cole*, 2 Wash. 57, 62, 65, 25 P. 1077 (1891) and *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).)

“In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” *Downing* at 272 (citing *State v. Eller*, 84 Wash.2d 90, 95, 524 P.2d 242 (1974).

In *State v. Eller* the defendant was charged with aiding and abetting the delivery of a controlled substance. *Eller*, 84 Wn.2d 90, 91, 524 P.2d 242, 243 (1974). A woman named Pat Thorson had requested to purchase some narcotics, had declined to complete the transaction when she saw them, but apparently remained at the scene to witness the State’s undercover informant arrange to buy the drugs. *Id.* at 92. The defense wanted to subpoena Ms. Thorson, but she refused to come to court and evaded service of process. *Id.* at 93-94.

On the morning of trial defense counsel moved for a continuance to attempt to serve Ms. Thorson, but the motion was denied. *Id.* at 94.

The court noted that it was unclear what Ms. Thorson would testify to. *Id.* The Washington Supreme Court upheld the decision to not allow the continuance, noting that Thorson's testimony, "would have had no qualitative impact or significant effect upon the ultimate result." *Id.* at 98.

In the instant case, the Defendant's trial counsel requested a recess in the middle of another witness' testimony to call Mr. Beebe, apparently for the purpose of establishing that Mr. Beebe had sold the van to Tyler Parker at some point in the past. However, ownership of the van was not at issue. Mr. Beebe's testimony would have only been circumstantial evidence. Another witness had already testified that the Defendant was not driving and that Parker was. Additionally, Parker was available as a witness to testify that he had bought the van. The defense chose not to ask Parker about ownership of the van. *See* RP 5/5/18 at 189-91.

**The court did not violate the Defendant's right to present a defense.**

The right to present a defense is guaranteed by the Sixth Amendment. *State v Jones*, 168 Wn.2d 716, 719, 230 P.3d 576 (2010). Denial of Sixth Amendment rights are reviewed *de novo*. *Id.* "However, there is a significant difference between the compulsory process clause and most rights protected by the Sixth Amendment." *State v. Lizarraga*,

191 Wn. App. 530, 552, 364 P.3d 810, 822 (2015), *as amended* (Dec. 9, 2015).

“The right to compulsory process is not absolute.” *Id.* The right is dependent on the defendant’s initiative, and more than the mere absence of testimony is required to establish a violation of the right. *Id.* Further, “[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions” and “bow to accommodate other legitimate interests in the criminal trial process.” *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987).)

In this case the Defendant was able to present his defense: that he was not driving. He presented two witnesses that testified to that effect. If Mr. Beebe was to testify that someone who looked like Tyler Parker had bought the van at some point in the past, this was much less valuable than the two eyewitnesses. Further, this testimony could have been elicited from Parker himself. The Defendant did call Tyler Parker to the stand immediately following the denied request for a continuance. RP 5/5/2017 at 189. Trial council could have elicited Parker’s purchase of the vehicle from Parker himself, but chose not to do so. Apparently, the defense did

not feel that the matter should be pursued further. Because hindsight can be distorting, reviewing courts are highly deferential to trial council's decisions. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 2055, 80 L. Ed. 2d 674 (1984). This court should not second guess trial council's decision to focus the defense on the two eyewitnesses who said the Defendant was not driving.

The Defendant claims that Mr. Beebe's evidence would have been more critical because the Defendant's other witnesses, Ruport and Landgra, were impeachable, and Mr. Beebe would have no motive to lie. This is speculative. The record is silent on these matters.

The court did not deny the Defendant's right to present a defense. It simply denied a recess to try to obtain the testimony of a witness whose testimony was of questionable value, and whose evidence could be obtained elsewhere. For that reason, this court should affirm the conviction.

**2. Defense council was not ineffective.**

The Defendant's trial council was not ineffective for not requesting a material witness warrant for Mr. Beebe because the warrant would probably not have been granted, it is not clear that Mr. Beebe was under subpoena, and his testimony was of limited value.

**Standard of review for ineffective assistance.**

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). *Strickland* explains that the defendant must first show that his counsel's performance was deficient. *Strickland* at 687. Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *State v. Carson*, 184 Wash.2d 207, 216, 357 P.3d 1064 (2015) (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

**Performance was not deficient.**

First, it is doubtful that the court would have issued a material witness warrant for Mr. Beebe. Material witness warrants are drastic measures that require a showing that other means of securing the witness’ appearance are futile. *City of Bellevue v. Vigil*, 66 Wn.App. 891, 896, 833 P.2d 445 (1992). In this case, Mr. Beebe had willingly responded to the State’s subpoena the previous day, but represented that he had not received the defense’s subpoena. There was no evidence Mr. Beebe was evading process or would not have come to court. It is extremely unlikely that the court would issue a warrant for a man who had willingly appeared just the day before.

Further, material witness warrants are issued only when a defendant can show that the testimony of a witness is in fact material and

could affect the outcome of the trial. CrR 4.10(a); *State v. Hartley*, 51 Wn.App. 442, 446, 754 P.2d 131 (1988); *City of Bellevue v. Vigil*, 66 Wn.App. 891, 833 P.2d 445 (1992). As discussed above, Mr. Beebe's testimony was of limited value as ownership of the van was not at issue, and the testimony could have been obtained from Tyler Parker, if he had purchased the van at some point in the past. The only other reason to call Mr. Beebe would be to establish that Mr. Beebe was the registered owner of the van. This information was not material to the issue of who was driving, and would not have affected the outcome of the trial.

For this same reason, the Defendant cannot show prejudice. The Defendant had two eyewitnesses who claimed the Defendant was not driving. This was much more probative than ownership.

Because Mr. Beebe's evidence was of questionable value, would not have likely affected the outcome of the trial, and the request would not have been granted, defense council was not ineffective. This court should leave the verdict undisturbed and affirm the conviction.

### **CONCLUSION**

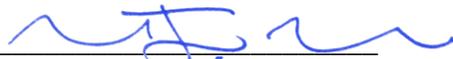
The trial court did not abuse its discretion in denying a recess for the Defendant's trial council to ask the prosecutor to call Mr. Beebe

because Mr. Beebe's evidence was only that he was the registered owner of the vehicle. This was not relevant to the issue of whether the Defendant was driving. For the same reason, trial council was not ineffective for failing to request a material witness warrant.

For the reasons stated above, the State respectfully asks that the appeal be denied on all grounds and the Court affirm the decision of the Jury and the sentence imposed by the trial court.

Dated this 7<sup>th</sup> day of September, 2018.

Respectfully Submitted,

BY:   
\_\_\_\_\_  
JASON F. WALKER  
Chief Criminal Deputy  
WSBA # 44358

JFW / jfw

**GRAYS HARBOR PROSECUTING ATTORNEY**

**September 07, 2018 - 2:39 PM**

**Transmittal Information**

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