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Court of Appeals  
Division II  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ARTHUR AMBLE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00104-9

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT .....6

A. THE COURT’S FINDING OF GOOD CAUSE TO CONTINUE THE TRIAL WAS REASONABLE BECAUSE THE TRIAL DATE WAS STRICKEN WHEN THE DEFENSE ERRONEOUSLY CLAIMED A RESOLUTION HAD BEEN REACHED.....6

1. The court’s finding of good cause was reasonable and supported by the record and case law.....7

2. The court, forced to reset a trial date, properly considered scheduling conflicts and other factors when it set a trial date beyond July 13. ....9

IV. CONCLUSION .....12

CERTIFICATE OF DELIVERY .....14

## TABLE OF AUTHORITIES

### Cases

<i>State v. Brown</i> , 40 Wn. App. 91, 94–95, 697 P.2d 583 (1985).....	9
<i>State v. Chichester</i> , 141 Wn. App. 446, 454, 170 P.3d 583 (2007).....	11
<i>State v. Downing</i> , 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) .....	7
<i>State v. Eaves</i> , 39 Wn. App. 16, 20–21, 691 P.2d 245 (1984).....	10
<i>State v. Flinn</i> , 154 Wn.2d 193, 110 P.3d 748 (2005) .....	7, 9, 10
<i>State v. Heredia-Juarez</i> , 119 Wn. App. 150, 79 P.3d 987 (2003) .....	10, 11
<i>State v. Kenyon</i> , 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).....	6
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 623, 290 P.3d 942 (2012).....	6
<i>State v. Swenson</i> , 150 Wn.2d 181, 190 n.4, 75 P.3d 513 (2003) .....	8

### Rules

CrR 3.3(f)(2) .....	7
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the court's finding of good cause to continue the trial was reasonable because the previous trial date had been stricken in reliance upon the defense's erroneous representation that a resolution had been reached and the matter should be set for a change of plea?

## **II. STATEMENT OF THE CASE**

On Mar. 17, 2017, the State filed an information charging Amble with the crimes of Assault of a Child in the Third Degree. CP 29. The Clallam County Superior Court issued a summons for Amble to appear for his first appearance on the charge on Apr. 7, 2017. CP 54. On Apr. 7, Amble appeared in court and was ordered to remain on his own personal recognizance pending trial. CP 53. The trial court set Amble's arraignment date for Apr. 14, 2017. CP 52. On Apr. 14, Amble entered a plea of not guilty and the court set the trial date for June 26, 2017, and the expiration of time for trial on July 13, 2017. CP 51.

On June 1, 2017, the State filed and sent out subpoenas for a CrR 3.5 hearing set for June 20, 2017, and subpoenas for trial set for June 26, 2017. CP 49, 50, RP 7.

On June 1, the parties discussed a possible diversion resolution but Amble represented that he could not afford diversion supervision fees due to his limited income. RP 4-5. The State, recognizing the financial hardship,

pointed out that there was a treatment component to the diversion agreement and that the State would be ok with the court monitoring the completion of the diversion agreement. RP 5–6. The court pointed out that the special report calendar could be used to monitor the completion of treatment at no cost to the defendant. RP 6–7. The court also pointed out that Amble would still have to pay for the actual treatment component of the diversion agreement. RP 7. The next hearing date was set over to June 8 to allow defense counsel more time to discuss the options with Amble. RP 8.

On June 8, Amble’s defense counsel pointed out that it was the treatment component of the State’s offer, in particular anger management evaluation and treatment, that was the sticking point preventing a resolution of the case. RP 9, 11, 14. The State pointed out that Amble would have to pay for the anger management treatment if convicted at trial. RP 10. Defense counsel stated that the condition to complete anger management treatment would not be enforceable if his client is indigent. RP 11.

The court discussed whether Amble or defense counsel had found out about the actual cost of treatment and where it could be done and suggested that the issue be looked into to see if arrangements could be made based on Amble’s financial circumstances. RP 15. Then the court stated, “[I]f you don’t want to accept the state’s offer then the matter’s set for trial, so the trial would be Monday, June 26th.” RP 15–16. Before concluding the hearing, the

court suggested to Amble that he contact Trillium to see if any arrangements could be made and to see if diversion was a possibility and, if not, then to be prepared for the CrR 3.5 hearing on Tues., June 20. RP 16.

On Tues., June 20, 2017, defense counsel announced, “We’ve reached a resolution with this case.” RP 19. The CrR 3.5 hearing did not take place and the trial date was stricken as defense counsel stated, “We need to set it for a change of plea and sentencing. I’d recommend Monday.” RP 19, CP 48.

The court to set the matter over to the following Mon., June 26, 2017, for a change of plea and sentencing as requested and struck the trial date which was also set for Mon., June 26 as the case was to be resolved that day. RP 21, CP 48.

On June 26, 2017, the deputy prosecuting attorney (DPA), pointed out that the defendant’s statement of plea of guilty outlining what the State’s recommendation would be did not accurately convey what the State’s plea offer was. RP 22–23.

The DPA admitted that at the end of business on Thurs., June 22, 2017, the defense sent a statement of plea of guilty by email to the DPA which included an erroneous version the State’s offered recommendation on sentencing. RP 22–23. The DPA was out of town on a conference that Wed., June 21 through Fri., June 24 and did not have an opportunity to review the statement of plea of guilty until the day of the anticipated change of plea and

sentencing on June 26, 2017. RP 22–23.

The DPA stated that, as part of the plea offer, the State was recommending certain legal financial obligations and completion of anger management treatment. RP 24. The State had expected that the recommended sentencing terms in the plea offer were agreed upon based upon the language of the plea offer which specifically required that the sentence be agreed. RP 23–24. The plea offer hinged upon Amble’s agreement that he would get anger management treatment. RP 24. Based upon the defense’s representation on June 20, 2017, that a resolution was reached, the DPA believed that a plea agreement had been reached. RP 24.

The court heard from both parties and pointed out that because Amble wanted to argue against certain terms of the plea offer, and the plea offer forbid argument against its terms, the plea offer was no longer on the table and a new trial date needed to be set. RP 37, 42. In particular, the court pointed out that Amble wanted to argue against being required to get anger management treatment and therefore there was no meeting of the minds. RP 44.

The DPA believed that a new trial would need to be set and moved the court to reset the trial after the expiration of the time for trial on July 13, 2017, based upon good cause. RP 23, 24. The DPA pointed out that in addition to a new trial date, a new date needed to be set for a CrR 3.5 hearing

prior to the trial date. RP 45. The DPA pointed out the State's witnesses had been called off for the June 26, 2017 trial date because he was told on June 20, 2017, that there was a resolution of the case. RP 45, 47. The DPA also had two other trials set for Mon., July 10, 2017. RP 45. The DPA was also scheduled to be in training out of town on Mon., July 17 through Thurs., July 20. RP 48. The DPA stated that the earliest date that he could be ready to go to trial on the case was Mon., July 24, 2017. The defense objected to any finding of good cause to set the trial date after July 13, 2017. RP 48.

The trial court found good cause and pointed out that there was previously an agreement that the case had resolved in a plea agreement and a plea was supposed to be entered that day (June 26, 2017). RP 48. The trial date was stricken because of the representation that there was a plea agreement. RP 51. The State would have called off its witnesses for a trial that would have been heard that day (June 24, 2017) but which now had to be reset. RP 48. The court explained that the new trial date of July 24 is only 10 days after the July 13 expiration date. RP 48.

Amble waived his right to a jury trial and opted for a stipulated bench trial. RP 57. The trial court heard the case and found Amble guilty of Assault of a Child in the Third Degree. RP 80, 83.

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### III. ARGUMENT

#### A. THE COURT'S FINDING OF GOOD CAUSE TO CONTINUE THE TRIAL WAS REASONABLE BECAUSE THE TRIAL DATE WAS STRICKEN WHEN THE DEFENSE ERRONEOUSLY CLAIMED A RESOLUTION HAD BEEN REACHED.

“We review an alleged violation of the speedy trial rule de novo.” *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009) (citing *State v. Carlyle*, 84 Wn. App. 33, 35–36, 925 P.2d 635 (1996)). “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court,’ and we will not disturb the trial court's decision unless there is a clear showing it is ‘manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons.’” *Id.* (quoting *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005)); *see also State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)) (“Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong legal standard and is thus made ‘for untenable reasons.’”).

**1. The court's finding of good cause was reasonable and supported by the record and case law.**

“On motion of the court or a party, the court may continue the trial date to a specified date when such continuance 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).

“Common law has clarified that “[i]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.” *State v. Flinn*, 154 Wn.2d 193, 199–200, 110 P.3d 748 (2005) (citing *State v. Heredia–Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003)). “Scheduling conflicts may be considered in granting continuances.” *Id.* at 200 (citing *Heredia–Juarez*, 119 Wn. App. at 153–55). “Allowing counsel time to prepare for trial is a valid basis for continuance.” *Id.* (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001)).

“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.” *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)).

“The time for trial violation is also excused if the delay was caused by any fault or connivance on the part of the defendant.” *State v. Swenson*, 150 Wn.2d 181, 190 n.4, 75 P.3d 513 (2003) (citing *Greenwood*, 120 Wn.2d at 600 (citing *State v. Striker*, 87 Wn.2d 870, 872, 557 P.2d 847 (1976))).

Here, the record shows that the court struck the June 26 trial date in reliance upon the defense representation that the parties had a resolution when such was not the case. RP 19, 21. There was no resolution because the defendant wanted to argue the terms of sentencing when the plea offer required agreement on all recommendations. Thus, the court had no choice but to reset a new trial date.

Amble announced a resolution to the case on June 20, 2017. The trial was stricken upon the representation that Amble would be entering a plea of guilty on June 24, 2017. The defense made the representation that they accepted the plea offer after the parties had discussed the requirement of anger management in the plea offer on multiple occasions on June 1 and June 8. The terms of the State’s plea offer required agreement to all sentencing recommendations and hinged upon requirement that Amble get an evaluation for anger management and complete recommended treatment. RP 23–24. Yet, when June 24, 2017, came around it became clear that the defense wanted to argue for different terms for sentencing. RP 37.

The defense did not inform the State that it intended to argue certain terms of the agreement before announcing it had reached a resolution with the State. RP 24. The defense did not reveal this intention until it sent an email to the DPA on Thurs., June 22, with a copy of the change of plea statement after the trial had already been stricken. Further, the DPA did not have the opportunity to review it until June 26.

Therefore, the court had no choice but to reset a new trial date due to the defense's incorrect representation that there was a resolution which caused the court to strike the June 26 trial date. This defense created circumstance and surprise provided good cause to reset a new trial date or in other words, to continue it.

**2. The court, forced to reset a trial date, properly considered scheduling conflicts and other factors when it set a trial date beyond July 13.**

“When scheduling a hearing after finding good cause for a continuance, the trial judge can consider known competing conflicts on the calendar.” *Flinn*, 154 Wn.2d at (holding that a 5 week continuance was not an abuse of discretion).

“A counsel's unavailability for trial may be an unforeseen and unavoidable circumstance beyond the court's control which justifies a continuance.” *State v. Brown*, 40 Wn. App. 91, 94–95, 697 P.2d 583 (1985) (citing *State v. Palmer*, 38 Wn. App. 160, 162, 684 P.2d 787 (1984) (trial

deputy's scheduling difficulties a proper basis for an extension); *State v. Eaves*, 39 Wn. App. 16, 20–21, 691 P.2d 245 (1984) (defense counsel's participation in another trial may justify an extension of the trial date beyond the speedy trial period)); *see also State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003) (citing *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996) (holding that the unavailability of counsel due to trial schedules justifies an extension)).

Here, the DPA pointed out that he had called off the State's witnesses, so new subpoenas and service would be required. Additionally, the DPA had two other trials scheduled for July 10. The DPA was also scheduled to go to training on the following week on July 17 through July 20.

July 24 was therefore the earliest date the DPA could confirm availability to proceed to trial without needing yet another continuance. *Flinn*, 154 Wn.2d at 201 (finding it relevant that the trial judge wanted to give the State ample preparation time to avoid yet another continuance). Based on this information, the court acted reasonably in setting the new trial date four weeks later and only about 11 days after the expiration of speedy trial. Therefore, the court did not abuse its discretion as its decision was not manifestly unreasonable.

Amble argues that the State was required to have another deputy prosecutor take over the case and go to trial because the assigned DPA was

not available on a date earlier than the expiration of the time for trial on July 13. Amble argues further that the trial court abused its discretion in failing to determine whether the DPA would actually be unavailable during the remainder of the speedy trial period. *See* Br. of Appellant at 10–11.

Amble fails to support this argument with any authority to support such a proposition that a court abuses its discretion in granting a continuance if it fails to investigate the DPA’s representations. Further, Amble fails to cite to any facts from the record which would give the trial court reason to disbelieve the DPA’s representations. Rather, Amble cites to *State v. Heredia-Juarez*, which does not help Amble as that case holds, after discussing reassignment cases, “that there is not a per se requirement of reassignment when a prosecutor becomes unavailable. In exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.” 119 Wn. App. 150, 155, 79 P.3d 987 (2003); *see* Br. of Appellant at 11.

Amble’s argument also fails because subpoenas still needed to be reissued and served after June 26 and a newly assigned DPA would need time to prepare, which is in itself good cause to continue the trial.

Moreover, a new trial deputy only need be assigned if the defendant would suffer substantial prejudice. *See State v. Chichester*, 141 Wn. App. 446, 454, 170 P.3d 583 (2007) (“When a prosecutor is unavailable due to

involvement in another trial, a trial court generally has discretion to grant the State a continuance unless there is substantial prejudice to the defendant in the presentation of his defense.”) (citing *State v. Raper*, 47 Wn. App. 530, 535, 736 P.2d 680 (1987); *State v. Jones*, 117 Wn. App. 721, 728–29, 72 P.3d 1110 (2003)).

Here, Amble was not awaiting trial while being held in custody and there is nothing in the record demonstrating that the four week continuance caused any prejudice to Amble’s ability to present a defense.

Therefore, the trial court’s decision to continue the trial to July 24 was reasonable and the conviction should be affirmed.

#### IV. CONCLUSION

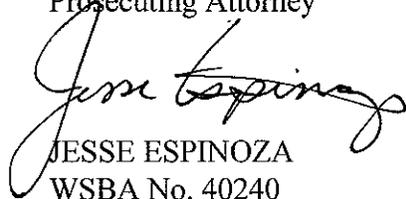
In this case, there was no time for trial violation because there was good cause to continue the trial as the court had no choice but to reset a new trial date. The delay was triggered by the defense representation that the parties had come to a resolution when that was not the case. In reliance upon that representation, the court struck the trial date and the State called off witnesses. Moreover, when resetting the trial, the court properly considered the DPA’s scheduling conflicts and the length of the delay. Finally, there was no showing of any prejudice to Amble’s ability to present a defense.

For the foregoing reasons, this Court should find no abuse of discretion and should affirm the conviction.

Respectfully submitted this 5th day of March, 2018.

Respectfully submitted,

MARK B. NICHOLS  
Prosecuting Attorney

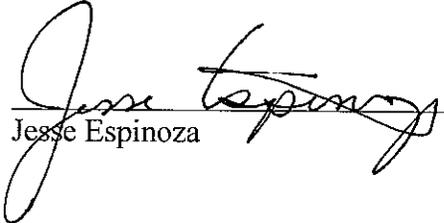
A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

JESSE ESPINOZA  
WSBA No. 40240  
Deputy Prosecuting Attorney

**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Travis Stearns on March 5, 2018.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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