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Court of Appeals
Division II
State of Washington
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No. 52063-0-II

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

State of Washington,

Respondent,

v.

Fernando A. Celaya,

Appellant

REPLY BRIEF OF FERNANDO A. CELAYA

Appeal from Pierce County Superior Court, 17-1-0278-9

Harry Williams IV, WSBA
#41020
Law Office of Harry Williams
707 East Harrison
Seattle, Washington 98102
harry@harrywilliamsllaw.com
206.451.7195

Table of Contents

Table of Authorities	iii
Introduction	1
A. Timeline	1
B. The State’s misconduct forced Celaya to choose between his right to a speedy trial and his right to present a defense	4
C. The trial court abused its discretion by continuing the case based on a mistake of law	7
D. The court’s earlier continuances, caused by the State’s mismanagement, do not excuse the late amendment	8
E. The claim was preserved at the trial court.....	11
F. Celaya’s right to a speedy trial was violated when the State sought to add serious charges on the day of trial	13
G. The State fails to address the cases that govern this case	15
H. Celaya was prejudiced	18
I. Celaya’s argument in his Statement of Additional Grounds that he received ineffective assistance also merits reversal.....	19
Conclusion	22
Declaration of Service	24

Table of Authorities

Cases

<i>State v. Berg</i> , 147 Wn. App. 923, 198 P.3d 529 (2008).....	21
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993).....	7, 13
<i>State v. Brooks</i> , 149 Wn. App. 373, 203 P.3d 397 (2009).....	8
<i>State v. Carlyle</i> , 84 Wn. App. 33, 925 P.2d 635 (1996).....	7
<i>State v. Earl</i> , 97 Wn.App. 408, 984 P.2d 427 (1999).....	17
<i>State v. Estes</i> , 193 Wn. App. 479, 372 P.3d 163 (2016).....	20
<i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017).....	20
<i>State v. Haggin</i> , 195 Wn. App. 315, 381 P.3d 137 (2016).....	19
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	21
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	<i>Passim</i>
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756, 760 (2009).....	12
<i>State v. Purdom</i> , 106 Wn.2d 745, 725 P.2d 622 (1986).....	16-17
<i>State v. Ralph Vernon G.</i> , 90 Wn. App. 16, 950 P.2d 971 (1998).....	17-18
<i>State v. Rohrich</i> , 149 Wash. 2d 647, 71 P.3d 638 (2003).....	7
<i>State v. Stephans</i> , 47 Wn. App. 600, 736 P.2d 302 (1987).....	9
<i>State v. Van Auken</i> , 77 Wn.2d 136, 460 P.2d 277 (1969)	13

Other Authority

Criminal Rule 2.1.....	16
Criminal Rule 8.3	19-22

RAP 2.5 12

RCW 9A.72.120 20

WPIC 115.81 Tampering with a Witness, Elements 19

23 C.J.S. Criminal Procedure and Rights of Accused § 801 9

Introduction

Celaya's right to a speedy trial was violated. The State does not dispute that prosecutors misled the trial court about why the State waited to amend charges until the day of trial. The State does not dispute that the trial court relied on this misrepresentation in granting the amendment. Where, as here, the State has all the information it needs to file amended charges for months and months but waits to amend until the day of trial, and that amendment forces the defendant to choose between his speedy trial rights and his right to prepare a defense, the convictions must be reversed with instructions to dismiss all charges.

A. Timeline

June 2017: Celaya arrested and charged with Felony Harassment and Assault 2. CP 3.

July 18: Joint motion to continue trial. Trial set for October. CP 7.

August 11: State prepares exhibit that is the sole evidence for charge of Tampering with a Witness. RP 4/24 at 132.

August 18: State's list of witnesses includes Brien Pace. CP 8.

August 21: State serves Pace with trial subpoena for a jury trial on October 2. Supp. CP (attached to opening brief).

September 19: Case continued on a joint motion, trial date was set for November 14 and speedy trial to expire December 14. CP 12.

November 13: The defense is forced to ask to continue the trial date because the State failed to make witnesses available for interviews. CP 24. Trial was set for December 12, and speedy trial set to expire on January 11, 2018. CP 24. The charges were the same as they had been in June. CP 24. The State did not raise the possibility of amending the charges.

December 1: The trial courts grants a continuance because “officer Bradley (3.5) is unavailable for training 12-11-12-15 and officer Robillard is on vacation [until December 24]” and the prosecutor planned a vacation until January 6. CP 27. The defendant objected to the continuance. CP 27. In all caps on the bottom of the order, the trial court stamped “NO MORE CONTINUANCES.” CP 27. On December 1, the case was 163 days old and had been continued three times. CP 27. The new trial date was January 17, 2018, and speedy trial was set to expire February 16, 2018, again over Celaya’s objection. CP 27. The State did not raise the possibility of amending the charges.

January 5, 2018: The State indicated that it would amend to add one count of Assault 4, a misdemeanor, and the defense did not object. CP

28. The State was still insisting it needed a 3.5 hearing. CP 28. Trial was scheduled for January 24. CP 30. The State told the Court all subpoenas had been served. CP 29. The speedy trial deadline was pushed out to February 23, over Celaya's objection. CP33. The State and defense both estimated a trial length of 3-4 days. CP 31. The Court stamped NO MORE CONTINUANCES on the bottom of the order. CP 33. Celaya objected to the continuance. CP 33.

January 12: The State adds Officer Robillard to its witness list for the first time, although it had stated in December that it had to continue trial in part because of Officer Robillard's availability. CP 34.

January 24: The State moved to continue the trial, stating that counsel was "out on another trial." CP 35. A new trial date of February 8 was assigned. Celaya objected to the continuance. CP 35.

February 8: The State presented an amended information, adding a Tampering with a Witness charge. The basis for that charge was the call that had been burned to CD on August 11, 2017, six months earlier. RP 4/24 at 132.

The State claimed that it had to wait to amend because it needed to talk to Pace. RP 2/8 at 24-25.

Celaya was forced to ask for a continuance to prepare a defense against the new charges. RP 2/8 at 39 (trial court finding that a continuance was needed to defend against amended charges).

April 17: Trial commences.

April 24: The State called Torvald Pearson. CP 353. He testified that on August 11, 2017, he made a CD of the phone call containing the alleged witness tampering. RP 4/24 at 132. Pace was never mentioned when determining if the call was admissible. RP 4/24 132-142. The trial court admitted the call because it came from Celaya's pin and Celaya identified himself on the recording. RP 4/24 at 142.

April 25: The State told the jury in closing: "I'll point out that we don't even have to show that Mr. Pace relayed that message [to prove witness tampering]." RP 4/25 at 248.

The trial took seven days, about twice as long as anticipated prior to the State's February amendment of charges. Opening br. at 16.

B. The State's misconduct forced Celaya to choose between his right to a speedy trial and his right to present a defense

The government had all the information it needed for the amended charges in August, when it made its trial exhibits and served subpoenas. It took the State six months, until February, to add the charges—on the day

of trial. The only reason the State gave for the late amendment was that it needed to talk to a witness, Pace, before amending the charges, because Pace would testify that Celaya's alleged threat was received. RP 2/8 at 24-7. But the State misstated the law, because showing that the threat was communicated was not necessary to obtain a conviction, and, at trial, the State told the jury it could and should convict regardless of whether the threat was communicated. RP 4/25 at 248.

The late amendment forced Celaya to choose between going to trial unprepared or waiving his speedy trial rights. RP 2/8 at 39 (trial court finding that a continuance was needed to defend against amended charges). When the State's late amendment forces a defendant to make that choice, the remedy is dismissal. *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997).

In justifying its late amendment, the State told the trial court that it needed to contact a witness, Pace, and that it had been unsuccessful in finding him until after the last scheduled trial date. RP 2/8 at 11. The State told the trial court that without Pace's testimony, it would "not [] be able to prove that witness tampering . . . because he is the one that conveys the message from that call to the alleged victim." RP 2/8 at 23.

The trial court relied on the State's misrepresentation in allowing the late amendment. The trial court stated that while it "may well have been better had a detective contacted Mr. Pace in September or October," the State did not mismanage the case because the State "didn't have a good-faith basis to proceed on the witness tampering charge" without Pace. RP 2/8 at 29-30. The Court emphasized that the State needed to contact Pace because Pace's information "I guess, matters." RP 2/8 at 30.

Pace did not matter. The State's purported need for Pace was based on an incorrect statement of the law, as was the court's ruling. In closing, the State correctly argued to the jury that "we don't even have to show that Mr. Pace relayed that message . . ." RP 4/25 at 248.

This case is governed by *Michielli* and similar cases.

In *Michielli*, the State "had all the information and evidence necessary to file all the charges in July 1993." 132 Wn.2d at 246. But the State moved to amend the information three business days before trial, on October 27, 1993. 132 Wn.2d at 223. Because "the defense attorney was unprepared to go to trial on the four new charges, Defendant was forced to waive his speedy trial rights and request a continuance." *Id.* *Michielli* holds that where the State delays amendment without justification and forces a defendant to waive his speedy trial right in order to mount an adequate

defense, that “can reasonably be considered mismanagement and prejudice” sufficient to dismiss the charges. *Id.* at 245.

C. The trial court abused its discretion by continuing the case based on a mistake of law

While this Court reviews de novo whether Celaya’s speedy trial rights were violated, *State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996), the State argues that the grant of continuances and allowance of amendment should be reviewed for abuse of discretion. State br. at 21. Even under an abuse of discretion standard, the State loses.

The trial court erred by granting a continuance based on the State’s misstatement of the law regarding tampering with a witness. The reviewing court will find an abuse of discretion “when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). 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 Wash. 2d 647, 654, 71 P.3d 638 (2003). There are no facts in the record requiring Pace’s testimony, and the wrong legal standard—the wrong understanding of the elements of the charge of witness tampering—

resulted in the trial court wrongly allowing an amendment on the day of trial, more than six months after the State had all the information it needed to amend the charges.

D. The court’s earlier continuances, caused by the State’s mismanagement, do not excuse the late amendment

The State argues that the trial court had discretion to continue the case in November and December 2017. State br. at 11-13. While a trial court generally does have discretion to continue cases, that general rule does not apply here, for two reasons. First, the State is overlooking its misconduct in obtaining the continuances. Second, the continuances do not excuse the late amendment to add charges the State knew of no later than August.

Celaya wanted a trial in November, but the State failed to make witnesses available in a timely manner. CP 24. Without the State’s failure to allow the defense to prepare for trial, trial would have occurred in November and Celaya would not have faced the amended charges.

Government mismanagement includes failure to timely provide discovery. *State v. Brooks*, 149 Wn. App. 373, 390, 203 P.3d 397 (2009) (upholding dismissal for failure to timely provide discovery where the “delayed and

missing discovery prevented defense counsel from preparing for trial in a timely fashion”). And the

Government’s failure to make witnesses available to the defense upon the defense’s request constitutes bureaucratic indifference that weighs against the State for purposes of determining what weight to give to a delay in bringing a defendant to trial for constitutional speedy trial purposes.

23 C.J.S. Criminal Procedure and Rights of Accused § 801 (collecting cases from around the county and federal courts).

The State does not dispute that it misrepresented to the trial court that it needed a 3.5 hearing in December. The State told trial court it needed to continue the trial date because it needed officer Bradley for a 3.5 hearing. CP 27. The State also claimed that it needed Officer Robillard for trial, but he was not added to the witness list until January 12. CP 34; *State v. Stephans*, 47 Wn. App. 600, 604, 736 P.2d 302 (1987) (the “State’s failure to supply a formal witness list was symptomatic of the State’s poor management of this case”). The State eventually admitted there was no need for a 3.5 hearing. RP 2/8 at 9-10. This again shows mismanagement: the State did not know what evidence existed, over six months after charges were filed. The State had not updated its witness list. The State had not talked to Pace and had not sent anyone to talk to Pace, although he was allegedly a key witness.

The State was not ready for trial in December because it was mismanaging the case. The State was not ready for trial in January because it had not contacted Pace, whom it argued—erroneously—was central to its witness tampering charge. Celaya, in contrast, was not allowed to be ready for trial. He could not be ready for trial in November because the State had mismanaged the case and failed to make witnesses available. He was ready in December, but the State obtained a continuance over Celaya’s objection. Given this, this Court should reject the State’s contention that the November and December continuances were typical continuances. Those continuances were made because of the State’s mismanagement.

The State should not benefit from its mismanagement of the case.

The facts show the State:

- did not make witnesses available;
- did not know what evidence would be introduced at trial (thus, the request for a continuance to hold a 3.5 hearing when there were no statements subject to 3.5);
- did not know which witnesses it would present at trial (and thus added witness to the witness list in January, after claiming it was ready in November and December);

- failed to amend, or even give notice of a possible amendment regarding witness tampering, although it had knowledge of facts underlying the amended charges six months prior to amendment.

E. The claim was preserved at the trial court

The State argues that Celaya “has not assigned error to the trial court’s oral ruling that that State waited to proceed on the additional charges until it had a good-faith basis to do so.” State br. at 29. In fact, that is the basis of this appeal, and Celaya argued repeatedly in his opening brief that the ruling was error. See Opening br. at 1, Assignment of Error 2 (“The trial court erred in allowing amendment of the charges on the day of trial”).

Celaya has focused his argument on the State’s mismanagement which led to the late amendment. Rather than waiting for a “good-faith basis” to amend, the State misunderstood the elements of the witness tampering charge. Opening br. 21-28. The State did not need to contact Pace to bring the amended charges, and, at trial, it both admitted it did not need his testimony and sought to discredit Pace. Opening br. at 19-20, 26-27.

In the trial court, the defense objected to amending information on day of trial. RP 2/8 at 4. Defense counsel argued that “the State [was] trying to substantially change the course of the facts of this case based upon the amendment of the Information.” RP 2/8 at 4. Defense counsel “strenuously object[ed] to the amending of the Information” because the allegations “substantially change[d]” the case and would “bring great difficulty in the defense that we had anticipated putting forth.” RP 2/8 at 8. Based on these objections, the claim is reviewable.

Even if Celaya had failed to preserve the claim, this Court has the power to review all of Celaya’s claims because they are a “manifest error affecting a constitutional right.” RAP 2.5(a). To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, the Constitutional rights—the right to a speedy trial and the right to know the charges against him—are identifiable and were raised below by trial counsel.

After determining the error is of constitutional magnitude, this court must determine whether the error was manifest. “‘Manifest’ in RAP

2.5(a)(3) requires a showing of actual prejudice.” *O’Hara*, 167 Wn.2d at 99. To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* Here, since the State’s misrepresentations are clear, this claim is reviewable, and the prejudice is plain from cases such as *Michielli*, *Vernon G.*, and *Earl*.

In addition, any motion to dismiss would have been futile. *State v. Van Auken*, 77 Wn.2d 136, 143, 460 P.2d 277 (1969) (recognizing futility exception to need present issue to trial court). The trial court heard extensive argument on amendment and decided to allow the amendment, and it would have been futile to ask the court to revisit the issue.

F. Celaya’s right to a speedy trial was violated when the State sought to add serious charges on the day of trial

Celaya’s right to a speedy trial was violated as a result of governmental misconduct. The government’s misconduct need not be evil or dishonest. Simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

There is no valid explanation for the delay in amending the charges. Speedy trial expired on January 11 from the continuance in November, the last continuance that was made without Celaya's objection and the last made without a misrepresentation by the State as to the reasons needed to continue the trial date. CP 24. In December, the parties anticipated trial on January 17, CP 27, but the State failed to send anyone to talk to Pace until January 29. RP 2/8 at 11. The State claimed repeatedly it was ready for trial, and now claims that Celaya did not suffer prejudice from the delay it sought. But the record is plain that the State dallied based on a misunderstanding of the law, and, even if had not been mistaken about the law, it failed to make a serious effort to talk to Pace until after the firm trial date of January 24. CP 33 (setting January 24 trial date over Celaya's objection); CP 30 (State claiming on January 5 that it was ready for a 3-4 day trial without mentioning the Witness Tampering charge); CP 35 (continuing trial date over Celaya's objection not because Pace was unavailable or to allow amendment, but because counsel was not available).

The reasons the State proffered to obtain the delays—the 3.5 hearing and the need to have Pace testify that he communicated Celaya's message—did not justify the continuances in December and January and

do not justify the failure to amend the complaint far earlier than the day of trial.

G. The State fails to address the cases that govern the outcome here.

In his opening brief, Celaya discussed extensively *Michielli*, *Vernon G.*, and *Earl*, which govern the issues here. Opening br. at 28-33.

In its response, the State barely discusses the cases. The State merely cites *Vernon G.*, State br. at 29, and does not even cite *Earl*.

The State makes a half-hearted attempt to argue that *Michielli* does not apply because speedy trial expired on March 10. State br. at 26, citing CP 35. But March 10 only became the speedy trial expiration after the State mismanaged the case and obtained unwarranted continuances. The extension of speedy trial on January 24, over Celaya's objection, CP 35, was made without reference to filing new charges and was unnecessary. Trial was scheduled for January 24 (already over Celaya's objection) and the purported need to move the **trial date** to accommodate the prosecutor's schedule did not justify extending **speedy trial**. And the State did not even contact the witness it would eventually use to justify its late amendment on until January 29. RP 2/8 at 11. As discussed above, Celaya objected to the December and January continuances, and those

continuances were the result of the State's mismanagement, such has not having witnesses available for interviews. CP 24.

Just as in *Michielli*, the "State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice" sufficient to dismiss the charges. 132 Wn.2d at 145.

Under the State's theory, the State can obtain continuances despite mismanagement and then claim no speedy trial violation because the trial court was tricked into granting the continuances. State br. at 29. That would be a terrible rule, of course, because it would encourage the State to play games, withhold evidence and charges, and encourage trial by ambush.

Fortunately, the State is wrong, as shown by *Michielli*, *Vernon G.*, and *Earl*.

A defendant being "forced to waive his speedy trial right is not a trivial event." *Michielli*, 132 Wn.2d at 245. The court may only allow an amendment of the information if the court finds that "substantial rights of the defendant are not prejudiced." CrR 2.1(d). "An amendment to an information at trial may prejudice a defendant by leaving him without

adequate time to prepare a defense to a new charge.” *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986), quoting *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980).

The “State may not, without excuse, compel defendants to choose between their right to assistance by an attorney who has had an opportunity to adequately prepare for trial, and their right to a speedy trial.” *State v. Ralph Vernon G.*, 90 Wn. App. 16, 21, 950 P.2d 971 (1998). It is unfair for the State to wait until days before trial to file an amended information based on information long-known by the State. *Michielli*, 132 Wn.2d at 246.

In *Vernon G.*, the record showed that the “State was aware of the factual basis for the charges for nearly a month,” and the court held that delaying in bringing the charges until shortly before trial violated the defendants speedy trial rights and reversed. 90 Wn. App. at 18.

In *Earl*, the State waited nine months to amend, which it did on the day of trial. *State v. Earl*, 97 Wn. App. 408, 410, 984 P.2d 427 (1999). The *Earl* court reversed on all charges, both the original count and the amended count. *Id.* at 415-17.

Here, there can be no doubt that the State was aware of the information it needed to amend the complaint well before February 8.

Pace’s testimony was unnecessary to bring or prove the Witness Tampering charge, because the phone call showing Celaya’s attempt would be sufficient to convict—which is precisely what the State argued to the jury. RP 4/25 at 248.

As the *Vernon G.* court explained, when a defendant is forced to request a continuance to prepare to address an untimely amended information, the court looks at the time for trial without any exception for the time of the continuance, and if the time for trial has expired, the remedy is dismissal. *Ralph Vernon G.*, 90 Wn. App. 22. Here, the speedy trial time expired well before the trial started on April 17. Again, Celaya’s speedy trial time was continued in December and January over his objection, CP 27, 33, and based on government mismanagement.

H. **Celaya was prejudiced**

The State argues that Celaya was not prejudiced by the late amendment because “the continuance [] allowed his counsel to prepare to defend the new charges.” State br. at 29. The case law explains that Celaya “was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days [here, on the day of] the scheduled trial.” *Michielli*, 132 Wn.2d at 244.

The State's sole justification for amending on the day of trial evidenced mismanagement. Pace's testimony was not necessary because it is not necessary for a threat to actually be communicated to the victim. Comment to WPIC 115.81 Tampering with a Witness, Elements (11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 115.81 (4th Ed)); *State v. Haggin*, 195 Wn. App. 315, 324, 381 P.3d 137 (2016).

I. Celaya's argument in his Statement of Additional Grounds that he received ineffective assistance also merits reversal

Celaya argued in his SAG that he received ineffective assistance, SAG 1-8. The State makes the same argument, without using the words "ineffective assistance," arguing that Celaya's counsel needed not only to object to the amendment and to the various continuances, but also had to file a formal CrR 8.3 motion. State br. at 24. If the Court agrees with the State on the CrR 8.3 issue, it should find counsel was ineffective and rule for Celaya on that basis.

Celaya's counsel did not raise with the court that the State was requesting a continuance based on interviews with an unnecessary witness. RP 2/8 (transcript shows objection but no motion to dismiss and no argument that the witness tampering charge did not require Pace's testimony); State br. at 24.

Here, the plain words of the Tampering statute show that an attempt is sufficient. RCW 9A.72.120 (“A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . .”).

Those plain words are part of the Pattern Jury Instruction, which was given here (Instruction 31): “That . . . defendant attempted to induce a person to testify falsely, withhold any testimony . . .” CP 325.

“The duty to provide effective assistance includes the duty to research relevant statutes.” *State v. Estes*, 188 Wn.2d 450, 460, 395 P.3d 1045 (2017) “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland* . . . Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case.” *State v. Estes*, 193 Wn. App. 479, 489, 372 P.3d 163 (2016), *aff’d*, 188 Wn.2d 450, 395 P.3d 1045 (2017) (internal citations and punctuation omitted).

Here, the plain language of the statute, the comment to the WPIC, and readily discoverable case law all should have alerted counsel that the

State's request for leave to make a late amendment was based on testimony that was unnecessary to the charges. While Celaya's counsel did object to the late amendment and did point out the State's mismanagement and the prejudice Celaya suffered, if the Court finds he also needed to move separately to dismiss, then counsel provided ineffective assistance.

When reviewing a claim of ineffective assistance of counsel on direct appeal, the court of appeals is limited to the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that trial counsel's representation was effective. *Id.* To show ineffective assistance, Celaya must show: (1) defense counsel's representation fell below an objective standard of reasonableness under the circumstances, and (2) the deficient representation prejudiced him, i.e., a reasonable probability exists the outcome would have been different without the deficient representation. *Id.* at 334-35. Failure to meet either prong of this test is dispositive of an ineffective assistance claim. *State v. Berg*, 147 Wn. App. 923, 937, 198 P.3d 529 (2008).

Failure to understand the law as applied to the charges is plainly deficient performance. The failure to move to dismiss on the basis of the plain language of the statute, resulted in additional time in prison for

Celaya, which is plainly prejudice. Put another way, there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different because he would not have faced the witness tampering charge. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

CONCLUSION

The State engaged in misconduct that requires dismissal based on a violation of Celaya's speedy trial rights. Where, as here, the State seeks an exception from the speedy trial rule based on evidence it eventually admits does not exist (the 3.5 issue), or asks for a late amendment based the need to contact a witness whose testimony it properly tells the jury is unnecessary (Pace), that is misconduct. The misconduct need not be ill-intentioned; it is misconduct if the State was simply so unsure of its evidence and the elements of the charges that it failed to manage the case properly.

Where, as here, government misconduct leads to a violation of a defendant's speedy trial rights, the charges must be dismissed. This case should be remanded with instructions to dismiss with prejudice all charges against Celaya.

RESPECTFULLY SUBMITTED May 23, 2019.

LAW OFFICE OF HARRY WILLIAMS

By s/ Harry Williams IV
Harry Williams IV, WSBA #41020
harry@harrywilliamslaw.com.
707 East Harrison
Seattle, WA 98102
206.451.7195
Attorney for Fernando Celaya

DECLARATION OF SERVICE

I declare that on May 23, 2019, I filed Appellant's open brief with the Court of Appeals for Division II via Electronic Filing for the Court of Appeals (Division II), which served counsel for Clark County.

I further declare that on May 23, 2019, I served by U.S. mail a copy of the brief on Fernando Celaya at:

Fernando Celaya DOC # 325580
SCCC
191 Constantine Way
Aberdeen, WA 98520

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

Dated May 23, 2019, in Seattle, Washington

s/ Harry Williams IV

Harry Williams IV, WSBA # 41020

LAW OFFICE OF HARRY WILLIAMS LLC

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