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NO. 53308-1-II

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

STATE OF WASHINGTON,

Appellant,

v.

DANIEL KEEN,

Respondent / Cross-Appellant

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

The Honorable Andrew Toynebee, Judge

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

On July 5, 2009, K.J.M. reported that she had been sexually assaulted in the early morning hours of July 4, after she left a local tavern with her roommate, Kimberly Woo, and two men she had just met. CP 24-25. Investigating officers with the Chehalis Police Department (CPD) quickly determined that these men were Kyle Teagle and Daniel Keen. CP 31-32. K.J.M., Ms. Woo, Mr. Teagle, and Mr. Keen all gave statements to law enforcement describing their activities on July 4. CP 24-37. While those statements conflicted in many significant respects, they also generally indicated that K.J.M. had had consensual sexual contact with Mr. Keen and non-consensual sexual contact with Mr. Teagle. As a result, the CPD regarded both men as suspects in the alleged sexual assault, but Mr. Teagle as the primary suspect. RP 29, 33.

In March of 2010, the results of K.J.M.'s sexual assault examination kit came back indicating the presence of semen and excluding K.J.M.'s boyfriend as the source. CP 39. Inexplicably, CPD investigators failed to pursue a warrant for either Mr. Teagle's or Mr. Keen's DNA samples, and the case went cold. RP 33-34; CP 52.

Seven years later, the CPD undertook a review of its cold sexual assault cases and became aware of the lapse. CP 52. Officers immediately obtained DNA samples from Mr. Teagle and Mr. Keen. CP

41. In late November 2017, Mr. Keen's sample was determined to match the male DNA from K.J.M.'s kit. CP 42. Prosecutors waited another year and then charged Mr. Keen with second degree rape. CP 1.

By this time, many witnesses to the events surrounding the alleged rape had disappeared, including Mr. Teagle and Ms. Woo, and Mr. Keen was consequently unable to prepare any meaningful defense. Defense counsel filed a motion to dismiss the case with prejudice under CrR 8.3(b), for government mismanagement that materially prejudiced Mr. Keen's right a fair trial. CP 11-19. After extensive briefing, testimony, and argument from both sides, the trial court granted the motion. CP 74-83.

The State appeals, assigning fourteen errors to various trial court findings, conclusions, and rulings.

Where the State does not argue the trial court misconstrued or misapplied any rule of law, where substantial evidence in the record supports every factual finding to which the State assigns error, where the State repeatedly mischaracterizes the trial court's findings, and where the State fails to support many of its arguments with citations to the record or legal authority, are the State's assignments of error all meritless and are many also frivolous?

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred by finding that the preaccusatorial delay lasted only five years.

2. The trial court erred by concluding that faded witness memory can never be grounds to find prejudice.

Issues Relating to Assignments of Error on Cross-Appeal

1. Where the State conceded a seven-year negligent lapse in the investigation of this case, lasting from 2010 until 2017, and where the only relevant evidence in the record supported that concession, did the trial court err by finding that the preaccusatorial delay lasted only five years?

2. Where controlling precedent holds that faded witness memory can support a finding of prejudice due to preaccusatorial delay, did the trial court err by refusing to consider the defendant's statement that his memory of the events surrounding the alleged rape in this case had faded over the course of a decade?

III. COUNTERSTATEMENT OF THE CASE

On July 5, 2009, Officer Neil Hoium of the Chehalis Police Department (CPD) responded to Providence Hospital, where a 33-year-old woman, K.J.M, had reported a sexual assault. CP 7, 24. K.J.M. told Officer Hoium that she and her friend, Kimberly Woo, had met two younger men at the Hub Tavern in the early morning hours of July 4, and taken them back to the house that Ms. Woo and K.J.M. shared. CP 24-25. These men were Daniel Keen and Kyle Teagle.¹ K.J.M. did not recall having sexual intercourse with anyone, but she told Officer Hoium that when she woke up later in the morning of July 4, "her 'butt hurt' . . . [and] she 'knew something had happened.'" CP 25. Officer Hoium obtained a statement and medical release from K.J.M. and collected her sexual

¹ The women did not know the men's names when they gave their statements to law enforcement, but they described Mr. Keen's clothing and distinct mohawk, and Mr. Teagle's clothing (a black hat and a white t-shirt). CP 25, 29, 30-34. Interviews with the men, as well as security video from a Chevron station the four visited after leaving the tavern, confirmed those descriptions. CP 30-31.

assault evidence kit (rape kit). CP 25-26. The case was then assigned to Sergeant Rick McNamara for further investigation. RP 24-25.

Sergeant McNamara and other investigating officers took multiple detailed statements from K.J.M., Ms. Woo, Mr. Keen, and Mr. Teagle. CP 27-37. In many significant respects these statements were inconsistent. CP 27-37. For example, K.J.M. told Officer Hoium that the two men approached her and Ms. Woo as they were leaving the tavern and persuaded the two women, against their initial resistance, to give the men a ride. CP 24-25. Ms. Woo, on the other hand, told investigators that K.J.M. “hit it off with one of the males [Mr. Keen] and wanted him to go home with her.” CP 28.² Mr. Teagle’s account tended to corroborate Ms. Woo’s: he said Mr. Keen met the women first and then, after deciding to go home with them, invited Mr. Teagle to join. CP 35.

And while all four individuals told investigators that they traveled in K.J.M.’s Jeep from the tavern to a Chevron station, CP 25-26, 28, 32, 34-35, their stories diverged after that. Ms. Woo told investigators that K.J.M. was asleep when the four arrived home that night and that she slept outside in the Jeep until about 5:00 a.m., at which point she came inside to sleep on a futon in the living room. CP 28. Mr. Keen told investigators

² Ms. Woo described this male as the one who later drove K.J.M.’s Jeep. CP 28. The Chevron station video confirmed this was Mr. Keen. CP 30-31.

that all four went inside when they arrived at the house, but that he and K.J.M. then came back out to the Jeep and made out in the front seat. CP 32. Mr. Teagle said that he and Ms. Woo went into the house together at first, but then came back outside to shoot off fireworks, whereas Ms. Woo said that she and Mr. Teagle listened to music in the house all night. CP 28, 35-36. K.J.M. told investigators that when they arrived home, Ms. Woo “went inside to do her drugs,” leaving K.J.M. outside in the Jeep with the two men for what felt like a long time. CP 34.

Where the four witness accounts were consistent, they implicated Mr. Teagle, not Mr. Keen, in unwanted sexual contact with K.J.M. Ms. Woo recalled that Mr. Teagle rode in the backseat of the Jeep with K.J.M. from the Chevron station to the women’s home, and that Ms. Woo observed Mr. Teagle repeatedly groping K.J.M. during the trip. CP 29. K.J.M. remembered leaning out of the backseat while the Jeep was parked in her driveway, seeing Mr. Keen standing outside the vehicle, and feeling Mr. Teagle penetrate her vagina with his hand. CP 34. She also recalled waking up inside, on the futon, to a male trying to put his penis in her mouth, and then looking up to see Mr. Teagle. CP 25, 34. Finally, Ms.

Woo said that K.J.M. told her the rape happened in the living room and was “definitely not the guy that drove her Jeep” (Keen). CP 29.³

The investigative notes from 2009 primarily document interviews with K.J.M., Ms. Woo, Mr. Teagle, and Mr. Keen, regarding the events of July 4, 2009, as well as Sergeant McNamara’s efforts to obtain evidence such as the security video. CP 24-38. But there are three entries, from July 5, 7, and 20, 2009, which reference an assault by K.J.M. against Ms. Woo. CP 26, 29-30. All three entries indicate that K.J.M. refused to give any statement about the alleged rape for almost all of July 2009, despite Sergeant McNamara’s repeated requests. CP 30. The July 7 entry indicates that Sergeant McNamara directed K.J.M. to call Detective Rick Silva and give him a statement about the rape. CP 30. Instead, K.J.M. called Detective Silva, yelled at him, and “was mainly interested in having Woo arrested for stealing her property.” CP 30.

In March of 2010, the lab results from K.J.M.’s rape kit came back showing the presence of semen and excluding K.J.M.’s boyfriend as the source. RP 28, CP 39. At that point, both Mr. Teagle and Mr. Keen were

³ Indeed, the State’s theory of Mr. Keen’s guilt remains entirely unclear to this day. Multiple statements in the record indicate that Mr. Keen left before K.J.M. experienced any sexual contact inside the house. CP 28 (Ms. Woo), 32 (Mr. Keen), 36 (Mr. Teagle). No evidence places Mr. Keen inside the house while K.J.M. was asleep on the futon. And yet the State argued to the trial court that “[t]he report is clear that . . . the rape happened inside the house while the victim was passed out on the couch.” CP 59.

suspects in the investigation, but Mr. Teagle was the primary suspect. RP 29, 33. The CPD dropped the investigation in April of 2010, when Sergeant McNamara failed to pursue a warrant for either Mr. Teagle's or Mr. Keen's DNA. CP 39-40, 52. Sergeant McNamara admitted he could and should have obtained a warrant for Mr. Keen's DNA at that point, but instead the case went cold. RP 33-34, CP 52.⁴ In its trial court briefing, the State refers to this lapse as "inexplicab[le]" and "[s]trange[]." CP 61.

More than seven years later, in late August 2017, the CPD undertook a review of its cold sexual assault cases, CP 52, and Detective Jason Roberts contacted Mr. Teagle, who was then living in Wyoming, CP 7, 40. Mr. Teagle immediately provided a DNA sample to cooperating detectives in that state. CP 41. When lab tests showed that sample did not match the male DNA from K.J.M.'s rape kit, Detective Roberts applied for a warrant to obtain DNA samples from Mr. Keen. CP 41. The results from those samples came back in late November 2017 and showed a match. CP 42.

⁴ The record is ambiguous as to why the CPD did not obtain a sample of Mr. Teagle's DNA. At the 2019 hearing on the motion to dismiss, Sergeant McNamara testified that he could not find Mr. Teagle in March or April 2010. RP 29. But his contemporaneous notes show that Sergeant McNamara knew Mr. Teagle was living in Hawaii at that time and had an address for him there. CP 40. Mr. Teagle had been cooperative and available throughout the investigation, including when he was living out of Washington. CP 35-37.

The State then waited another year before filing charges against Mr. Keen. CP 1-3.

By this time—nearly ten years after K.J.M. gave her initial statement—neither the State nor the defense could locate Mr. Teagle or Ms. Woo. RP 9-10. Nor could they locate any employees or patrons at the Hub Tavern who might have observed K.J.M. interacting with Mr. Keen and Mr. Teagle on July 4, 2009; the gas station attendant shown on surveillance video interacting at length with K.J.M., Ms. Woo, and Mr. Keen when the group stopped at the Chevron together that morning; any neighbors who might have observed the four arriving home; or the nurse who conducted K.J.M.’s sexual assault examination and collected swabs for the rape kit. RP 10-12, 14-16. Finally, no one could contact Detective Silva, who spoke with K.J.M. after she was arrested for assaulting Ms. Woo around the time of the alleged rape, because Detective Silva had passed away. RP 13.

After determining it would not be able to locate any of these critical witnesses, the defense moved to dismiss the charges with prejudice under CrR 8.3(b), for “arbitrary action or governmental misconduct.” CP 11-19. Counsel argued that the unjustified preaccusatorial delay had deprived Mr. Keen of any ability to prepare a meaningful defense, and that forcing him to stand trial under these circumstances would deprive him of

due process. CP 11. A hearing on that motion was held on February 22, 2019, where the court heard testimony by the defense investigator and Sergeant McNamara, as well as extensive argument by counsel. RP 1-60.

The trial court granted the motion to dismiss in lengthy oral and written rulings, agreeing with most, though not all, of the defense's arguments. RP 60-77; CP 74-83. The trial court's findings and conclusions are addressed in detail in the "Argument" section below, but their overall import is captured in the following oral ruling, regarding Mr. Teagle and Ms. Woo:

[T]o put it bluntly, none of the four main players in this case told the same story. There are contradictions throughout. None of them told a consistent story.

And to have those two unavailable to the defense sort of cleanses this case for the state, to use my own term. It basically takes out two witnesses that would be very, very useful to the defense and useful to show the improbability of the allegation or the accusation here, and without those two witnesses, then the state has basically an accuser and DNA evidence to back that up without the defense having the benefit of the rest of the story so to speak. So I find that that's prejudicial.

RP 61.

The court further ruled that this prejudice was compounded by the loss of witnesses who observed K.J.M.'s demeanor and interactions with Mr. Keen at the Chevron station, and by the loss of the nurse who performed the sexual assault exam. RP 62-63. The court did not find any

prejudice from the loss of witnesses at the tavern, the neighbors, or Detective Silva. RP 62. Finally, in light of the total lack of justification for the delay, the court concluded that forcing Mr. Keen to face trial under these circumstances would violate fundamental concepts of justice. RP 64.

The State appealed, assigning 14 errors to the trial court's findings and conclusions. Appellant/Cross-Respondent's Opening Brief (App. Op. Br.) at 1-3; CP 84. The State's arguments are all meritless, many are also frivolous. Mr. Keen cross-appeals, raising two minor errors, one factual and one legal. CP 96.

IV. ARGUMENT

To determine whether preaccusatorial delay requires dismissal under CrR 8.3(b),⁵ Washington courts apply a three-part “due process balancing analysis”:

(1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.

State v. Oppelt, 172 Wn.2d 285, 295, 297-98, 257 P.3d 653 (2011).

In this case, the trial court determined that (1) Keen suffered “actual and significant prejudice” as a result of the preaccusatorial delay; (2) the only reason for the delay was governmental mismanagement and negligence; and (3) forcing Keen to face trial would violate fundamental concepts of justice, given the enormity of the charge, the severity of the prejudice, and the lack of any reason for the State’s failure to timely pursue the case. CP 82-83.

⁵ Criminal Rule 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its reasons in a written order.

The State does not dispute the second element: it concedes that the preaccusatorial delay was purely negligent. See CP 62 (“Certainly, the lack of any follow up between 2010 and 2017 was a negligent investigative delay but not a tactical intentional prosecutorial delay.”) But it argues that Keen suffered no actual prejudice as a result of this negligence. Accordingly, it contends the first and third elements for dismissal are not met.

Standard of Review

A trial court’s dismissal under CrR 8.3(b) can be reversed only for abuse of discretion. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).⁶ A trial court abuses its discretion only if it makes a decision that is manifestly unreasonable or based on untenable grounds. Id. A decision is untenable if it was reached by applying the wrong legal standard or rests on facts unsupported by the record. State v. Sassen Van Elsloo, 191 Wn.2d 798, 807, 425 P.3d 807 (2018). Facts are supported by the record where the record contains sufficient evidence to persuade a fair-minded, rational person that the declared premise is true. See State v. Martinez,

⁶ The State first asserts that the standard of review is de novo, App. Op. Br. at 12, and later concedes it is abuse of discretion, id. at 27. That concession is correct. Because “[p]reaccusatorial delay can be understood as a subcategory of government misconduct under CrR 8.3(b),” a defendant may address delay through a CrR 8.3(b) motion to dismiss. Oppelt, 172 Wn.2d at 297. Where that occurs, the trial court’s ruling is reviewed for abuse of discretion. Id.

121 Wn. App. 21, 31, 86 P.3d 1210 (2004); In re Davis, 152 Wn.2d 647, 679-80, 101 P.3d 1 (2004).

A. Each of the State’s Fourteen Assignments of Error is Entirely Meritless

The parties to this case agree on every relevant point of law. They agree that a defendant seeking dismissal under CrR 8.3(b) bears the initial burden to show prejudice,⁷ that dismissal is an “extraordinary remedy,”⁸ that a defendant must show greater prejudice to obtain a dismissal where preaccusatorial delay is merely negligent as opposed to tactical,⁹ and that purely speculative prejudice is not sufficient to weigh in the analysis.¹⁰ See App. Op. Br. at 17. The trial court was also well aware of these legal principles.¹¹

Indeed, the State does not contend otherwise. Instead, the State argues that the trial court made several factual errors, which led it to

⁷ Oppelt, 172 Wn.2d at 295, 297.

⁸ State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003) (internal quotations omitted).

⁹ Oppelt, 172 Wn.2d at 292.

¹⁰ Rohrich, 149 Wn.2d at 657-58.

¹¹ RP 61 (“[m]y first step is that I do find that there is prejudice based on the delay”); RP 62 (“the mere possibility of prejudice is not enough”); RP 63 (“I found actual prejudice, so now I have to look to see what the reason for the delay was”); RP 64 (“the balance clearly falls in favor of finding that to allow the state to continue under these circumstances would be offensive to the fundamental conceptions of justice”).

overestimate the prejudice to the defense. The State is wrong. The court’s detailed findings reflect its careful approach and are amply supported by the record. The only errors in the trial court’s ruling (discussed in section IV. B. below) were minor and redounded entirely to the State’s benefit.

1. Finding 1.6: there is no error regarding K.J.M.’s “contact with then Detective Rick Silva”

Finding of fact 1.6 reads: “The [CPD] interviewed [K.J.M.] multiple times, including her primary initial interview and a later contact with then Detective Rick Silva who died years later but years before this case was charged.” CP 76. The State objects to this finding “insofar as it represents that K.J.M.’s primary initial interview and a later contact were conducted by Detective Silva.” App. Op. Br. at 13. The State’s objection is meritless for three reasons.

First, the trial court’s actual finding does not state that Detective Silva conducted K.J.M.’s initial interview—the State is simply misreading it.¹²

Second, in the trial court, the State affirmatively *approved* the language about the initial interview, asking only that the court change the subsequent clause from “in a later interview conducted by Detective

¹² The State’s brief contains the following misleading paraphrase of finding 1.6: “that K.J.M. was interviewed multiple times by, including her initial interview and a later contact with then Detective Rick Silva who died years later but years before this case was charged.” App. Op. Br. at 1.

Silva” to “maybe a conversation, that he had a conversation.” RP 68-69. The court proposed, and the parties then agreed, to “insert ‘later contact with’” instead. RP 69. Thus, the State invited the “error” it now complains of. State v. McLoyd, 87 Wn. App. 66, 69, 939 P.2d 1255 (1997) (invited error doctrine prohibits party from creating error in trial court and complaining of it on appeal).

Finally, the trial court did not find that Detective Silva’s absence caused any prejudice to Mr. Keen’s defense. RP 62 (“I also don’t find that Detective Silva’s lack of ability to testify or availability it - - that’s potential impeachment, and, again, it’s the mere possibility. We don’t know what that would be.”). Therefore, the mere mention of Detective Silva in finding 1.6 is completely irrelevant to any ruling adverse to the State—that is, the ruling challenged by the State does not “rest” on any finding related to Detective Silva. Cf. Sassen Van Elsloo, 191 Wn.2d at 807 (ruling is abuse of discretion if it *rests* on facts unsupported by the record).

In sum, there is no error in the court’s reference to Detective Silva and, even if there were, the error would be both invited and inconsequential.

2. Finding 1.13: any error regarding Mr. Teagle’s whereabouts during his initial interview with law enforcement is completely irrelevant to the dismissal

Finding of fact 1.13 states that the CPD was unsuccessful in obtaining a DNA sample from Kyle Teagle “as he had left the state after being interviewed due to reasons unrelated to the investigation.” CP 77. The State objects to this finding only because Mr. Teagle was “never in Washington State when contacted by the police in regards to this investigation.” App. Op. Br. at 14.

To the extent the court’s finding implies that Teagle was in Washington when he was interviewed for the very first time, the State’s objection is well taken. The record indicates that Mr. Teagle was in Utah when Sergeant McNamara initially interviewed him over the phone, then returned to Washington in mid-August 2009, and then left again before providing any DNA sample. CP 35, 37. Regardless, any error in Finding 1.13 is completely irrelevant to the dismissal, since Mr. Teagle was readily available and cooperative, despite being in Utah, when he was initially contacted by law enforcement in this case. CP 35. Thus, the trial court’s misstatement has no bearing on any legal conclusion and is not grounds for reversal. Cf. Sassen Van Elsloo, 191 Wn.2d at 807.

3. *Finding 1.23: the “error” the State identifies is neither an error nor relevant to the dismissal*

Finding of fact 1.23 states that the prosecutor and CPD communicated between November 27 and December 29, 2017 about whether K.J.M. still wanted the case prosecuted, that they determined she did, and that the case sent for charging at the end of 2017. CP 78.

The State objects to this finding on the ground that, after the CPD and the prosecutor agreed, on December 29, 2017, that K.J.M. still wanted the case prosecuted, it then took the CPD another week to print out a “supplemental report” documenting these communications. App. Op. Br. at 14-15. It is not clear why the State believes this indicates any error in the trial court’s finding. Nor is it clear how any error affected the trial court’s rulings. The State’s assignment of error to finding 1.23 is frivolous.

4. *Finding 1.29: the trial court did not err by finding that the defense investigator attempted to locate critical witnesses*

Finding of fact 1.29 states “that the defense investigator began investigation in an effort to locate critical witnesses and evidence in the case necessary to the defense.” CP 79. The State asserts this is a “finding that all the witnesses Mr. Aust was attempting to locate were critical,” and

objects because the trial court ultimately found that some of the witnesses Mr. Aust sought were not critical. App. Op. Br. at 15.

Again, the State mischaracterizes that court's findings. Finding of fact 1.29 reads, in its entirety:

On January 9, 2019, defense investigator Steve Aust began his investigation in an effort to locate critical witnesses and evidence in the case necessary to the defense, and, if he could not find such witnesses or evidence, to produce a report regarding his conclusions and explanation as a former law enforcement officer of 20 years as to why the defense would be prejudiced.

CP 79.

This is a finding about the defense investigator's efforts, not the quality of any individual witness. Obviously, the defense could not know which witnesses would be "critical" until it conducted some investigation. Ultimately, the trial court found that several of the witnesses pursued by Mr. Aust would have offered "relevant" or "highly relevant" information to the defense. CP 81-82. The State's appeal of this finding is frivolous.

5. Finding 1.30: the trial court correctly found that the State could not locate Ms. Woo in time for trial

Finding of fact 1.30 states that, "[t]he State, through law enforcement, served Kimberly Woo with a subpoena, but could never physically locate her or contact her by phone." CP 79. The State objects to this finding on the ground that, even though it never knew

“definitively” where Ms. Woo was living during the pendency of the case, it must have known her physical whereabouts at some point because it served her with a subpoena. App. Op. Br. at 15-16.

The State’s argument is neither logical¹³ nor indicative of any error in the trial court’s ruling. The hearing on the motion to dismiss occurred ten days before trial was set to begin, and the State acknowledged at this hearing that it still had not located or spoken with Ms. Woo. RP 51, 54. That acknowledgment constitutes substantial support for the trial court’s finding that the State could not “physically locate [Ms. Woo] or contact her by phone.” CP 79. Thus, the trial court did not abuse its discretion. See Martinez, 121 Wn. App. at 31.

6. Conclusion 1.2(a): the trial court correctly concluded that the preaccusatorial delay caused Ms. Woo and Mr. Teagle to become unavailable

Conclusion of law 1.2(a) states:

Kimberly Woo and Kyle Teagle were not located by the State prior to filing this case in court almost a decade after the initial investigation began and their ability to be located and questioned by the defense was significantly compromised by the delay. Also, their testimony is highly relevant because all four relevant parties provided very different accounts of important details of the evening.

CP 81.

¹³ A subpoena for testimony need not be served on the subject personally. CrR 4.8(a)(3).

The State objects to this conclusion on the grounds that (1) Ms. Woo had been served with her subpoena, so she must be around somewhere; (2) Mr. Aust should have tried harder to find Ms. Woo and Mr. Teagle (even though the State had not been able to contact them); and (3) any difficulty in contacting Mr. Teagle could not be attributed to preaccusatorial delay because he was already out of the state when the investigation began in 2009. App. Op. Br. at 20-22.

As noted above, the fact that Ms. Woo was served with her subpoena for testimony did not render her available for timely defense preparation. The court found both that she had been served and that she could not, as of February 22, 2019, be located *by either party* in time to facilitate a speedy trial. CP 79-81. The latter finding is amply supported by the record. RP 51 (defense counsel stating that even if the State were to produce Mr. Teagle and Ms. Woo, there would not be enough time remaining to adequately prepare for trial), 54 (prosecutor stating that State is “still trying to be able to get her to contact our office”).

Indeed, in its opening brief the State concedes that Ms. Woo “was not being cooperative with the State.” App. Op. Br. at 22. But it nevertheless contends that she was “available for trial” because the State could seek a material witness warrant if she did not appear. *Id.* at 22. The State did not make this argument in the trial court, nor did it seek any

material witness warrant for Ms. Woo. Thus, the argument is unpreserved and should not be entertained for the first time on appeal. See State v. Carter, 138 Wn. App. 350, 367, 157 P.3d 420 (2007) (declining to address argument State failed to raise at hearing on defendant's Knapstad¹⁴ motion).

Moreover, the State fails to explain, even now, how the availability of the warrant procedure mitigates the prejudice to Mr. Keen's due process and speedy trial rights. When the CPD began the investigation in 2009, Ms. Woo was a cooperative witness, giving law enforcement multiple detailed statements and the names of other potential witnesses. CP 26-29. A decade later, when defense counsel needed to investigate the case, Ms. Woo was no longer making herself available. No material witness warrant could solve that problem. See State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (prejudice warranting dismissal under CrR 8.3(b) "includes [prejudice to] the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense'"). This is no doubt why the State did not bother making any material witness warrant argument in the trial court.

¹⁴ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

The State's arguments regarding Mr. Teagle are similarly meritless. The record establishes that both parties attempted to contact Mr. Teagle and neither succeeded. RP 18 (investigator Aust testifying that he left two unreturned voice messages for Mr. Teagle at the number listed in the initial police report), 54 (prosecutor conceding that the State could not contact Mr. Teagle). And, contrary to the State's argument now, the record supports the conclusion that the delay compromised Mr. Teagle's availability. The State contends Mr. Teagle was always "elusive" because he was never in Washington State. App. Op. Br. at 22. This is false. Despite living out of state, Mr. Teagle was readily available and cooperative with law enforcement when the investigation began in 2009, and again when asked to provide a DNA sample in 2017. CP 35-37, 40-41.

Conclusion of Law 1.2(a) rests on facts substantially supported by the record. Sassen Van Elsloo, 191 Wn.2d at 807. The State's appeal of this conclusion is meritless.

7. Conclusion 1.2(b): the trial court correctly concluded that the Chevron station witnesses could have offered relevant testimony about the parties' interactions and apparent levels of intoxication

Conclusion of law 1.2(b) states that "[t]he employees and/or other witnesses at the Chevron that evening were also compromised by the

delay and would offer relevant evidence in that they observed the interactions of the relevant parties as well as their respective levels of intoxication.” CP 81. The State objects to this conclusion for two reasons: first, because “[i]t is unclear what relevant evidence Keen believes could be offered from witnesses at the Chevron” and, second, because no one disputes that K.J.M. was intoxicated on the night in question. App. Op. Br. at 23-24. These objections are meritless.

As the trial court stated in conclusion 1.2(b), the Chevron station witnesses “observed the interactions of the relevant parties as well as their respective levels of intoxication.” CP 81. These potential witnesses included the clerk shown on surveillance video speaking at length with K.J.M., and then entering the station store with K.J.M., Ms. Woo, and Mr. Keen. CP 31. This clerk observed K.J.M.’s interactions with Mr. Keen, the man Ms. Woo told investigators K.J.M. had just “hit it off with” at the tavern and invited home, CP 28. There is nothing unclear or speculative about the trial court’s conclusion on this point.

And contrary to the State’s assertion, evidence that K.J.M. was intoxicated on July 4, 2009 does not obviate the need for the Chevron witnesses. The State charged Keen with second degree rape, alleging that he “engaged in sexual intercourse with . . . K.J.M. . . . when K.J.M. . . . was incapable of consent by reason of being physically helpless or

mentally incapacitated.” CP 1; see RCW 9A.44.050(b). Even if it were “undisputed” that K.J.M. was intoxicated on the night in question, this would not establish that she was so intoxicated as to be physically or mentally incapable of consent. Testimony from neutral, third party, and presumably sober witnesses at the Chevron, who observed her demeanor and interactions with Mr. Keen, would be highly relevant to that question.

The State’s appeal of conclusion 1.2(b) is meritless.

8. *Conclusion 1.2(c): the trial court correctly concluded that Wendy Johnson’s absence prejudiced the defense*

Conclusion of law 1.2(c) states:

Wendy Johnson’s location and availability were also compromised irreparably due to the pre-accusatorial delay, and information she would provide in advance of trial and at trial would be relevant beyond merely foundational issues in that she was the only person who interviewed the alleged victim during the rape kit process, she used certain protocols to obtain critical evidence in the case, and she obtained and retained critical evidence in the case.

CP 82.

Wendy Johnson was the nurse who conducted K.J.M.’s sexual assault exam. RP 14. As noted above, by the time the State brought charges in this case, no one could locate Ms. Johnson. RP 15. The State argues that Ms. Johnson’s absence prejudices the prosecution—not the defense—because it will prevent the State from introducing the rape kit

DNA evidence Ms. Johnson collected. App. Op. Br. at 25. This argument is incorrect for two reasons.

First, Ms. Johnson’s absence would not render the DNA evidence inadmissible in a trial—the State acknowledged as much at the CrR 8.3(b) hearing, where it argued that the absence “would *weaken* our way of introducing the evidence, and it would go the *weight* of that evidence.” RP 59 (emphases added). With or without Ms. Johnson, the DNA evidence was the State’s entire case, and it certainly planned to offer that evidence in Mr. Keen’s prosecution. See RP 61 (trial court reasoning that, without critical eyewitnesses, “the state has basically an accuser and DNA evidence to back that up without the defense having the benefit of the rest of the story so to speak”).

Second, although the trial court agreed that Ms. Johnson’s absence might prejudice the State as to “foundational issues,” it found that her absence caused greater prejudice to Mr. Keen. RP 62, CP 82. This was because that absence prevented the defense from investigating the evidence-collection methods used during K.J.M.’s exam—particularly problematic because the record indicated a departure from standard protocol¹⁵—and because Ms. Johnson was one of the only witnesses who

¹⁵ Officer Hoium’s contemporaneous notes indicate that K.J.M. sought the sexual assault exam at Providence Hospital in Centralia, where she was told

saw K.J.M. immediately after the alleged assault and interviewed her about it. RP 82. The State does not address these trial court findings.

The record substantially supports the trial court's conclusion that Ms. Johnson's absence prejudiced the defense. The State's appeal of conclusion 1.2(b) is meritless.

9. Conclusion 1.4: the trial court correctly concluded that the cumulative effect of all the loss of evidence caused actual and significant prejudice

Conclusion of law 1.4 states that "the cumulative effect of all the loss of evidence in conclusion of law 1.2 above constitutes actual and significant prejudice." CP 82. The State contends that, since conclusions 1.2(a), (b), and (c) are all wrong—and that no prejudice in fact resulted from any loss of evidence described in those conclusions—the trial court was also wrong to conclude that the cumulative effect of these losses caused prejudice. App. Op. Br. at 25. As detailed above, each of the State's challenges, to findings 1.6, 1.13, 1.23, 1.29, 1.30 and conclusions 1.2(a), (b), and (c), is meritless. Therefore, the State's argument on cumulative error is also meritless.

10. Conclusion 1.6: the trial court correctly concluded that, where actual and significant prejudice to the defense is

that she would need to go to St. Peter's Hospital in Olympia for evidence collection. CP 25. After K.J.M. became "very upset over this," staff at Providence "decided to take care of it." CP 25-26. Officer Hoium noted he was "surprised" by this. CP 25.

weighed against a completely unjustified preaccusatorial delay, the due process balancing analysis tips definitively in favor of dismissal

Conclusion of law 1.6 states:

In weighing the reason for the delay, that there was none, and the prejudice, the Court determines that this balancing test falls squarely in favor of the Defendant in the fundamental concepts of justice would not be met if the case was allowed to proceed.

CP 82.

The State does not brief this assignment of error. Presumably, it intends to rest on its previous arguments regarding individual and cumulative error. Since none of those arguments has merit, its appeal of conclusion 1.6 also fails.

11. Conclusion 1.7: the trial court correctly concluded that the State committed government mismanagement; this court should not address the State's completely unsupported argument to the contrary

Conclusion of law 1.7 states that the State “committed governmental mismanagement of its case . . . and offered no reasonable explanation for the delay.” CP 82. The State assigns error to this conclusion but does not brief the issue at all. It does not attempt to define “governmental mismanagement,” nor does it offer any purportedly “reasonable explanation” for what its trial court briefing called a “negligent investigative delay” and “lack of any follow up between 2010

and 2017,” CP 62. The court should not address this frivolous assignment of error. Det. of Mitchell, 160 Wn. App. 669, 675 n.6, 249 P.3d 662 (2011) (citing RAP 10.3(a)(6)) (appellate court will not consider arguments unsupported by citations to authority).

12. Conclusion 1.8: the trial court correctly determined that the State’s unjustified delay put Mr. Keen to a “Hobson’s Choice” between a speedy trial and a fair one; the State’s argument to the contrary is unsupported by any citations to the record or case law

Conclusion of law 1.8 states that government mismanagement prejudiced Mr. Keen’s right to a fair trial, in that it presents him with a “*Hobson’s choice* between his right to properly defend himself and his right to a speedy trial.” CP 82-83. The State objects to this conclusion, on the ground that Mr. Keen “still had 24 days of speedy trial remaining” when the trial court dismissed the case. App. Op. Br. at 29. This argument is meritless.

When the trial court heard arguments on Mr. Keen’s motion to dismiss, trial was set to begin March 4, 2019, and the speedy trial date was March 18, 2019. CP 108-09. The defense had been trying to locate Ms. Woo for over two weeks. CP 15. The State had known about these attempts since at least February 8, 2019, when the defense filed its motion to dismiss, CP 15, yet the State made no attempts to locate Ms. Woo until February 15, CP 67. These attempts were also unsuccessful. RP 54.

In its written and oral arguments on the motion to dismiss, the State predicted that Ms. Woo *would probably be located* in time for trial, but it offered no evidence to support that prediction—just vague speculation about how and where she might be reached. CP 58 (“another officer may be able to contact her through social media”); RP 54 (“We found out that she might be living with her dad . . . We are still trying to be able to get her to contact our office . . .”).

In the trial court, the State never argued that it needed more time to locate witnesses, nor did it move for a continuance to mitigate the effects of the preaccusatorial delay. Instead, it argued only that Ms. Woo would probably turn up before trial on March 4, and that none of the other witnesses mattered to the dismissal analysis, either because they were unimportant or because their absence was equally prejudicial to the prosecution. RP 54-59. The State makes a similar argument on appeal, except with respect to Mr. Teagle, about whom it now advances the entirely new and demonstrably false theory that he was never available in the first place. App. Op. Br. at 28-29.

Despite never having sought to continue trial past March 4, 2019, the State now argues that “the trial court improperly based its ruling on Keen’s counsel’s representation that he could not be ready to proceed in 10 days, the current trial date . . . [when in fact] Keen still had 24 days of

speedy trial remaining, as his speedy trial expiration was March 18, 2019. Id. at 29.

The implication of the State's argument is that the trial court should have *sua sponte* continued trial until March 18, 2019, instead of conducting the prejudice inquiry on the basis of the actual trial date. The State cites no authority supporting this argument, nor does it explain whether a continuance to March 18 would have been feasible (something we can't now know, at any rate, because the issue was not raised below). Nor does the State explain how, assuming it were feasible, a two week delay would render Ms. Woo available or why, even if investigators located Ms. Woo during those two weeks, her presence would offset the prejudice Mr. Keen suffered because Mr. Teagle, Ms. Johnson, and the Chevron station witnesses were all absent.

In short, the State cites no factual or legal authority for its argument that the court erred by basing this conclusion on the actual trial date. An entirely unsupported argument does not merit review. State v. Reeder, 181 Wn. App. 897, 910 n.15, 330 P.3d 897 (2014) (citing RAP 10.3(a)(6) and Cowiche Canyon Conservancy v. Bosely, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)) (appellate court will not address argument unsupported by citations to record or authority). This court should not address the State's frivolous challenge to conclusion 1.8.

13. The trial court properly granted the dismissal with prejudice for unjustified delay that caused actual and significant prejudice

Without briefing the issue, the State assigns error to the dismissal with prejudice for an unjustified delay that caused actual and significant prejudice. App. Op. Br. at 2-3. Presumably, the State intends to rest on the arguments raised in assignments of error 1-12. Because all these arguments are meritless, the State's challenge to the dismissal necessarily fails.

14. The trial court properly granted the dismissal with prejudice for governmental mismanagement that prejudiced Mr. Keen's right to a fair trial

Without briefing the issue, the State assigns error to the dismissal with prejudice for governmental mismanagement that prejudiced Mr. Keen's right to a fair trial. *Id.* at 3. Presumably, the State intends to rest on the arguments raised in assignments of error 1-12. Because all these arguments are meritless, the State's challenge to the dismissal necessarily fails.

B. Issues on Cross-Appeal: the Trial Court Erred in Conclusions of Law 1.1 and 1.3

As discussed above, the trial court's findings and conclusions were detailed, thoughtful, and well-founded in the record and case law. The

trial court did make two minor errors, however—one legal and one factual—which led it to underestimate the State’s negligence and the prejudice to the defense. This court should correct those errors.

1. Conclusion of law 1.1: the trial court erred by finding that the preaccusatorial delay lasted only five years

Conclusion of law 1.1 states that “[t]here was a five-year pre-accusatorial delay in the case, for no reason.” CP 81. In the trial court, defense counsel objected to this finding, arguing that there was actually a seven-year delay, from the time Sergeant McNamara should have obtained Mr. Keen’s DNA in 2010 to the time the CPD actually did obtain his DNA in 2017. RP 73. The trial court explained that it was dating the delay (the CPD’s negligence) from the time that Sergeant McNamara was transferred away from the investigation and back to patrol, RP 73-74—something the record indicates happened on January 1, 2012, CP 52.

The trial court erred by dating the delay from 2012. The only relevant evidence in the record shows that Sergeant McNamara could and should have obtained Mr. Keen’s DNA by at least 2010, at which time Mr. Keen was one of two suspects. RP 34; CP 52. The State has consistently conceded that point. E.g., CP 61 (explaining that when the CPD received the DNA results from K.J.M.’s rape kit on March 8, 2010, “[s]trangely, Daniel Keen’s DNA Buccal Swab is not discussed . . . [and]

[i]nexplicably, the case then remains inactive until February 2017”). For purposes of the CrR 8.3(b) analysis, the State’s negligence began in 2010 when Sergeant McNamara failed to investigate Mr. Keen. It is irrelevant when or whether the case was later assigned to someone else.

The trial court found that the “five-year pre-accusatorial delay” supported dismissal, because it actually and significantly prejudiced the defense and constituted government mismanagement. CP 81-82. Thus, the trial court’s relatively minor factual error regarding the length of the delay did not affect the outcome. Nevertheless, this factual error should be corrected. The State’s negligence spanned seven years, not five.¹⁶

2. *Conclusion of Law 1.3: the trial court erred by concluding that fading witness memory can never be grounds to find prejudice*

Conclusion of law 1.3 states that “[t]he potential loss of witnesses at the tavern, the loss of Detective Silva, the potential loss of witnesses in the neighborhood, and the loss of memory of witnesses generally including the Defendant do not constitute prejudice.” Mr. Keen cross-

¹⁶ Indeed, that conclusion necessarily follows from finding of fact 1.17, which states: “In the Spring of 2010, without any DNA comparison having occurred, and without any additional investigation occurring, Sergeant McNamara rotated into another role in the CPD and the case was left alone. Nothing was done with the case between 2010 and 2017.” CP 77. To the extent this finding indicates Sergeant McNamara was taken off the case in 2010, it is not supported by the record. See CP 52. But to the extent it describes seven years of negligence, it is correct.

appeals this conclusion only to the extent it rejects memory loss as a basis for finding prejudice.

The trial court appears to have believed that witnesses' memory loss could never be grounds to find prejudice in a due process balancing analysis. Specifically, it ruled that "[t]he memories of people, and in particular the defendant's lack of memory, I don't consider that whatsoever." RP 62. This was an error of law.

Fading memories, including the defendant's, can indeed be a basis to find prejudice supporting a CrR 8.3(b) motion to dismiss, provided there is actual and not merely speculative memory loss. See Rohrich, 149 Wn.2d at 657; Oppelt, 172 Wn.2d at 296. Mr. Keen did attest that his memories of the night he met K.J.M., ten years ago, had faded. RP 16; CP 18. That fact contributed to the cumulative prejudice, and the trial court erred by refusing to consider it.

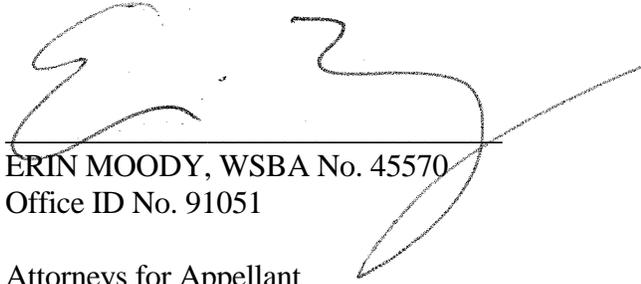
V. CONCLUSION

The trial court's well-reasoned decision is legally correct and amply supported by the record. The two minor errors in its findings and conclusions redounded entirely to the State's benefit. This court should reject all the State's assignments of error, correct the two errors Mr. Keen identifies, and affirm the dismissal with prejudice.

DATED this 30th day of September, 2019

Respectfully submitted,

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