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JANUARY 19, 2017
Court of Appeals
Division III
State of Washington

No. 34176-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

Kittitas County Superior Court Cause No. 15-1-00277-4

STATE OF WASHINGTON,

Respondent

vs.

RICHARD GARCIA,

Appellant

(AMENDED) RESPONSE TO APPELLANT'S BRIEF

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I. IDENTITY OF RESPONDENT:

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

II. STATEMENT OF RELIEF SOUGHT:

The State is asking this Court to affirm the decisions of the Superior Court and uphold the Appellant's Conviction and Sentence, except to the extent that any concessions acknowledge the potential propriety of correcting certain portions of the judgment and sentence.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW:

A. Defense counsel did not improperly fail to object to a continuance, and Appellant was not denied effective assistance of counsel.

B. The trial court did not err in finding that the State acted with due diligence in its efforts directed at having the named victim and two of her children appear for trial.

C. The information on which Appellant was actually tried was not constitutionally deficient as to either the Felony Harassment

count or the Unlawful Possession of a Firearm (in the second degree) count.

D. The State will concede that the conditions of Community Custody alleged to be flawed in Appellant's Assignments of Error numbers 5 – 7 (Br. of Appellant at 1 – 2) are probably flawed in the manner described and the matter must be remanded to remove or correct these conditions.

E. The State will also concede that the trial court appears to have failed to enter the Findings of Fact and Conclusions of Law required to support the exceptional sentence as alleged in Assignment of Error number 8 (Br. of Appellant at 2), and that the matter must be remanded to correct this error.

F. The State will further concede that the scrivener's error alleged in Assignment of Error number 9 (Br. of Appellant at 2) is present, and requires that the matter must be remanded to correct this error.

G. Assignment of Error number 10 (Br. of Appellant at 2) does not appear to be an error, but a preemptive response to a potential request pursuant to RAP 18.1(a) and (b) which has not been made and is unlikely to be made. At a minimum, this is an

issue that is not ripe for consideration and should be ignored on that basis.

IV. STATEMENT OF THE CASE:

Appellant's summary describing the facts of the case (Br. of Appellant, at 5 – 16) is generally sufficient for the purpose of Respondent's response, and will be accepted as it is, except as otherwise supplemented or disputed below.

V. ARGUMENT:

A. Defense counsel did not fail to object to a continuance; there was no continuance to which counsel could object, and thus counsel was not ineffective.

Appellant's careful analysis and discussion of CrR 3.3 and associated case law is not applicable, and this Court can and should give it no consideration at all. There was only one continuance in this case. On November 13, 2015, trial was reset to December 1, 2015. CP, 34; Br. of Appellant at 6. A continuance is "(t)he adjournment or postponement of an action pending in a court, to a subsequent day of the same or another term." http://thelawdictionary.org/continuance/, last accessed on December 30, 2016. CrR 3.3 does not have a definition of "continuance", but 3.3(f) is consistent with that definition. Both

subsections thereof use the phrase "continue the trial date to a specified date". As with the rest of CrR 3.3, this language is consistent with the intent of the drafters to address the commencement day of a trial. The rule itself is referred to as "Time for Trial" in its header. Although both counsel and the Court regularly used the word "continuance", this was an incorrect use.

Trial did in fact commence with motions and other preliminary matters on December 1, 2015. RP, 33; 158.[1] *State v. Andrews*, 66 Wn. App. 804, 832 P. 2d 1373 (1992). The Court reversed its decision with regard to the admissibility of testimony by Officer Rogers about the victim's statements after a long and careful discussion and analysis December 2. RP, 107; 128 – 133.[2] This left the State faced with an immediate problem in proving its case. Although there were references to a "continuance", the Court correctly noted that the trial had already started. RP, 158 – 159. As such, there could not have been a continuance.

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[1] The Verbatim report of proceedings is organized as four volumes, consecutively paginated, and the State will simply use those page numbers. A brief review indicates that the numbers appear the same as those cited by Appellant.

[2] The entire exchange between the Court and attorneys is substantially longer, running between pp. 107 – 160 and addresses multiple aspects of the analysis of the hearsay issue and related changes in the logistics of trying the case.

What occurred was a recess, "a stoppage in court proceedings for a short period of time but the court is not adjourned." http://thelawdictionary.org/recess/, last accessed on December 30, 2016. A trial court's grant of a recess is reviewed for abuse of discretion. In a case in which there was a two month recess in the course of trial, the Court of Appeals dealt with the issue in a cursory fashion and upheld the trial court's actions. *State v. Bluehorse*, 159 Wn. App. 410, 248 P. 3d 527 (2011)(citation omitted). (No reason for the recess appears in the opinion.) This is consistent with a line of cases going back to *State v. Mays*, 65 Wn. 2d 58, 395 P. 2d 758 (1964). The discussion in *Mays* appears to conflate the consideration of "continuance" and "recess", and itself relies on cases based upon *State v. Connor*, 107 Wash. 571, 182 P. 602 (1918). After *Mays*, there is recognition that the analysis based on speedy trial/time for trail considerations is not applicable to consideration of the court's discretion with regard to a recess. Cases subsequent to *Mays* thus make a more precise distinction between a continuance and a recess.

As far as can be determined, the law in this area seems to be well settled, as the vast majority of the cases are unpublished. As in *Bluehorse*, the review of the decision to grant a recess is very

deferential. Further, the State has not been able to find a case in which the defense's objection to a recess under such circumstances, if any, was effective. Given that the trial court is to "... exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence ...," this is predictable. ER 611. As with the attention to and reliance upon the provisions of CrR 3.3, Appellant's analysis of the case law with regard to ineffective assistance of counsel is not relevant, as it starts from essentially the same fundamental misunderstanding. The State acknowledges that there is language in *State v. Becerra*, 66 Wn. App. 202, at 206, 831 P. 2d 781 (1992) that might support Appellant's assertion. However, the language not only appears to be *dicta*, but CrR 3.3 has been amended four times since then and the version in place now limits its effect to the trial date as discussed above. There is thus still no support for Appellant's position.

B. The trial court did not err in finding that the State had acted with due diligence in its efforts to have April Garcia and her daughters appear to testify.

Appellant misunderstands the State's planning for the trial. Even as close as ten days before the trial date, the State did in fact

expect to call April[3] and her children. RP, 26. It is true that not all of the names of potential witnesses appeared on the witness list referred to by Appellant. However, there can be no claim of surprise; as shown above, the State made that intent clear. It is probable that the failure to list them on an amended witness list is a mere oversight; a consequence of the evolution of the trial DPA's perception of the case and the tactical reality. Such an evolution is a familiar experience to trial attorneys, especially when dealing with victims whose emotional response to the matter may impact their will to testify. Some victims may be explicitly non-compliant; some may be disingenuous; some may vacillate. For example, the State did not know that the victim's mother would be available and willing to testify until "Monday morning", apparently a reference to November 30, 2015, the day before trial commenced. RP, 103. However the situation arose, it was well within the Court's discretion to allow those witnesses to be called, as long as defense counsel had sufficient time to address the addition. *State v. Hoggatt*, 38 Wn. 2d 932, 234 P. 2d 495 (1951).

[3] Due to the fact that the Appellant, the victim, and both child witnesses all share the same last name, other than the Appellant, first names will be used as needed to differentiate them. No disrespect is intended.

On the first day of the trial, the State informed the Court of the changed circumstances with regard to the victim and her children as witnesses. RP, 34. The Court was then informed in detail of the State's plans to make use of the victim's excited utterances to Officer Rogers and the basis for doing so. RP, 36 – 44. After hearing argument, the Court determines that the excited utterances about the event would be admissible. RP, 49. The victim's statements about the history of domestic violence perpetrated by Appellant would not be. RP, 50.

The Court determined that the hearsay decision should be revisited on the second day of trial. RP, 107. One of the considerations about which the Court desired more information was the efforts to secure the presence of the victim, April. Among other factors impeding the State's ability to bring her to court was her rapid move out of State. To the best of the State's knowledge, she had gone to Oregon. RP, 109. As of two to three weeks prior to trial, the State expected April and her daughters to be present. RP, 111. Despite Appellant's assertions to the contrary, not until the Friday before trial, November 27, did it become clear that April was non-compliant, not merely non-committal. RP, 115. Defense counsel had similar experiences, and although he suspected the

reality, did not know until the last minute that April would not be located. RP, 125.

The detailed record of the State's efforts to obtain her presence and the related problems are provided at RP 108 – 122. Under the circumstances as presented to and found by the trial court, there was a basis for obtaining a material witness warrant under the provisions of CrR 4.10(a)(3). The State had not found a valid address for April and her daughters and until shortly before trial, had no reason to expect that she would be uncooperative and that formal process as provided for in RCW 10.55 and CrR 4.10 would be needed. When forced to, the State also had made an analysis of the possibility of going forward without those witnesses. As the trial court initially ruled consistent with the State's argument on December 1, it is clear that the State's analysis was valid and not done in bad faith. There was a more than ample basis upon which the trial court could conclude that the State had acted with due diligence under the circumstances as they evolved. *State v. Eller*, 84 Wn. 2d 90, 524 P. 2d 242 (1974). Appellant asserts that April and her children were found with "ease", but provides no authority for that statement. Br. of Appellant, at 21. The only information in the record does not detail the "ease" or

lack thereof with which the State located the witnesses. The record only reflects that it was one week between the issuance of the material witness warrants and the certification by the trial judge. CP, 133, 138, 143; 144 – 150.

Appellant's misunderstanding of the process by which the trial was started and then stopped for a period introduces error into the analysis of this issue. The State will concede that the distinction has been missed by all involved at some point; there seems to be an on-going confusion of what actually happened, a "recess", with what it was often labeled, a "continuance". The undersigned has not been immune to that. However, the distinction is critical. The entire critique of the State's efforts, and subsequently, defense counsel's performance, reflects an analysis based upon case law about continuances. Assuming without conceding that Appellant's analysis would be correct if this were in fact a "continuance", it is not relevant. That case law is simply not applicable here. The Court's discretion with regard to recessing for a period of time to allow the State to locate and serve the witnesses once trial has started is substantial, and the review deferential.

More correctly, the State's efforts had to be "reasonable" in order to be a "good faith effort" to ensure that the witnesses were

present. *State v. Hurtado*, 173 Wn. App. 592, 294 P. 3d 838 (2013). Reasonableness by its nature requires an objective analysis; "reason" is "… a rational ground or motive …", or "… a sufficient ground of explanation or of logical defense …". https://www.merriam-webster.com/dictionary/reason, last accessed December 30, 2016. Comparing the state's efforts here to the complete lack of any explanation for the circumstances in *Hurtado* shows that in fact the State was reasonable and that the trial court was correct. This is a decision reviewed for an abuse of discretion, and the trial court properly exercised its discretion when it obtained sufficient information upon which to base its decision and then made that decision. *State v. Hope*, 2016 Wash. App. LEXIS 2039 (unpublished, 8/22/2016, noted at 195 Wn. App. 1049)[4]. The first two assignments of error are without merit and should be summarily disregarded.

C. The purported deficiencies in the Information upon which Appellant was actually tried are not shown and thus cannot be the basis for a claim of error.

Any error in the original Information, assuming without conceding that there was error and that it was "manifest error

[4] This opinion is cited to pursuant to GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate.

affecting a constitutional right" cannot be relevant. During the first day of trial, there was argument about the legal effect of Appellant's 3rd Degree Robbery conviction in Oregon upon the charge in Count III (Unlawful Possession of Firearm, then charged in the First Degree). The argument was in the nature of what is commonly referred to among criminal practitioners as a "comparability analysis", usually arising in the context of offender scoring for sentencing purposes. Defense counsel was able to persuade the trial court that the offense was not an adequate basis for the First Degree version of the charged offense.

This argument was interwoven with other issues (hearsay admissibility and the appropriateness of an "*Old Chief*" stipulation in particular) due to the complexity of the circumstances facing the parties. RP, 61 – 78. Near the beginning of that argument, the State explicitly acknowledges that "knowledge" of the possession is an element of the offense. The actual filing of the first amended information does not appear, but Appellant was arraigned on it during other procedural matters related to the recess on December 2. RP, 299. As stated by Appellant, this (First) Amended Information is not in the court file and has not been located. (Br. of

Appellant at 12.) No objection was made to this amendment, nor did the Court refer to any flaws in the document.

On December 16, the State then filed a (Second) Amended Information. This amendment was primarily directed at correcting the reference to the crime charged in Count III, but did include some other changes. Although the record reflects that the Information had been placed on the bench, and that defense counsel had been provided a copy, this (Second) Amended Information also is not in the file and has not been located. RP, 537 – 540, Br. of Appellant at 12.[5] There is no question that Appellant was not tried on the original Information, but on the (Second) Amended Information. Again, no objection was made to this amendment, nor did the Court refer to any flaws in the document, and thus there is no basis upon which this Court can conclude that there was any error in the (Second) Amended Information.

[5] These circumstances have been very frustrating. In the interest of candor to this Court: as stated in Appellant's Third Motion for Extension of Time for Filing, the undersigned was out of the office (by over 1800 miles) on personal and family matters. I worked with Appellant's counsel throughout the following week in the effort to find the missing documents, including many emails and phone calls to counsel and others during that period, and at least one call to the Case Manager to ensure that there was an adequate record that counsel was not being dilatory or otherwise inappropriate and that the State could not object. As counsel stated, attorneys and legal secretaries in both the criminal and civil divisions of this office made significant efforts, searching every location of which we could think, including seeking the Court Administrator's assistance in contacting the visiting judge and obtaining access to the trial DPA's electronic work space and contacting him directly. None of the efforts bore fruit. Only an unfiled draft of the (Second) Amended Information was located in the former DPA's electronic storage some weeks later.

"Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on appeal, we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) truly of constitutional magnitude." *State v. WWJ Corp.*, 138 Wn. 2d 595, 602, 980 P. 2d 1257 (1999)(internal quotation marks and citations omitted).

"(W)here (the) record is insufficient to evaluate a claim of error on its merits, the error is not "manifest" under RAP 2.5(a)(3))." *City of Lakewood v. Willis*, 186 Wn. 2d 210, 218, 375 P. 3d 1056 (2016). Something is "manifest" when it is "easily understood or recognized by the mind." https://www.merriam-webster.com/dictionary/manifest, last accessed 12/30/2016.

> The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest" allowing appellate review. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.

State v. McFarland, 127 Wn. 2d 322, 333, 899 P. 2d 1251 (1995). There is no evidence at all that any error that might have existed in the original Information would have carried over into the (Second) Amended Information, and even if it did, it would not have had any "... practical and

identifiable consequences in the trial of the case." *State v. Lynn*, 67 Wn. App. 339, 345, 836 P. 2d 251 (1992).

If the errors alleged by Appellant had been carried over through the amended versions, while the analysis would be changed, the result would not. When an information is challenged for the first time on appeal, the analysis is pursuant to the "liberal construction rule". *State v. Kosewicz*, 174 Wn. 2d 683, 278 P. 3d 184 (2012). This rule is a two pronged test, described in this manner:

> When a defendant challenges the information for the first time on appeal, we determine if the elements appear in any form, or by fair construction can they be found, in the charging document. We read the information as a whole, according to common sense and including facts that are implied, to see if it "reasonably apprise[s] an accused of the elements of the crime charged. If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him.

Id., at 694 (Internal quotations and citations omitted). This consideration is not limited to only the count or counts that have been challenged, but looks at the whole document to determine all of the words used would inform and accused of the crime(s) charged. *State v. Nonog*, 169 Wn. 2d 220, 237 P. 3d 250 (2010).

In this case, Count I (Assault in the first degree) and its associated allegations, including the use of a firearm, has not been challenged.

As such, its wording may be considered when considering whether the information as filed would have been sufficient. Count I required the intentional use of the firearm, and "intent" is a higher level of mental state than "knowledge". RCW 9A.08.010(2). One cannot assault another with a firearm without possessing it, so a fair reading of all of the wording of the information supplies the "missing" mental state element as to Count III. Likewise, the same actions would by their nature would create the reasonable fear that the threat would be carried out, and the wording of the information, while imperfect, would have been sufficient to provide notice of the "missing" essential element.

VI. CONCLUSION:

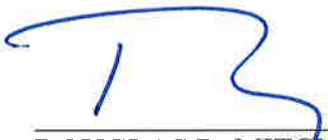
Appellant cannot and did not sustain his burden of proof on any issue related to his trial and conviction. This Court should uphold the trial court's decisions and the jury's verdict. The Court should, however, accept those concessions made by the State and remand the matter to address those aspects of the sentence in need of correction.

The trial may not have been perfect, as there are no perfect trials, but the State denies that there were any errors. It was by any

analysis a fair trial, and that is what the Appellant was entitled to receive – a fair trial. "A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one." *State v. Barry*, 183 Wn. 2d 297, 316 – 317, 352 P. 3d 161 (2015)(citation omitted).

DATED this 19th day of January, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 19th day of January, 2017.

Rebecca Schoos, Legal Secretary