

No. 34498-3-III

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

**FILED**

**FEB 08 2017**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON,  
Respondent,

v.

MANUEL ABRAHAMSON,  
Appellant.

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REPLY BRIEF

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Kelly Vomacka  
Attorney for Appellant

Law Office of Kelly Vomacka  
600 First Avenue, Suite 304  
Seattle, WA 98104  
kelly@vomackalaw.com  
(206) 856-2500  
WSBA #20090

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## ARGUMENT

**A. The prosecutor's scheduling conflict was both avoidable and foreseen, so it could not justify a continuance past expiration.**

The initial trial date was set during arraignment on February 2, 2016, for March 28. CP 70. By then, the trial prosecutor, Reese Sterett, had already been assigned. Brief of Respondent, at 5-6.<sup>1</sup> By then, he had also scheduled his vacation for March 28 to March 31. 1VRP 4. However, when he stood in court at arraignment and heard the judge schedule this trial during his upcoming vacation, Sterett said nothing. 3VRP 3-4.<sup>2</sup> He simply let it happen. In fact, he said nothing for six weeks, when he finally filed his motion to continue. CP 5-8. By then, the options for avoiding a continuance past expiration had narrowed.

If Sterett had spoken up at arraignment or even soon after, the court could have easily rescheduled the trial to March 27 or to any other day when the State was available. This was a simple, one-day trial, and the State's case-in-chief took only 62 minutes. CP 73-75. In the alternative, if Sterett had spoken up, the case could have been reassigned

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<sup>1</sup> The record does not reflect this, but Abrahamson accepts the State's assertion that the fact that Sterett appeared for the State at arraignment indicates that he had already been assigned to the case. Brief of Respondent, at 5-6. Even if Sterett had been assigned later, it would not change Abrahamson's argument.

<sup>2</sup> 3VRP refers to the transcript of the arraignment hearing on February 2, 2016.

to a different prosecutor or even to a different defense attorney, who would be available on the couple of days between Sterett's return and the expiration date. By remaining silent, Sterett made a continuance—and a speedy-trial violation—much more likely. Even after Sterett did speak up, in March, the case could have been reassigned to different prosecutor.

The speedy-trial rule allows for a continuance past expiration for “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties.” CrR 3.3(e)(8). A prosecutor's vacation can qualify as an unavoidable or unforeseen circumstance, but “the State has an obligation to accommodate both responsibly scheduled vacations for its deputy prosecutors and a defendant's CrR 3.3 rights.” *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). Here, the conflict with Sterett's vacation was entirely avoidable and foreseen even at arraignment. Therefore the State did not accommodate Abrahamson's speedy-trial right and failed in its obligation to do so. Instead, it violated Abrahamson's right with a casual indifference.

**B. The “to convict” instruction is defective and requires reversal.**

**1. The issue is constitutional and not waived.**

The State argues that Abrahamson has waived his right to appeal the defective “to convict” instruction because he did not object to it below. Brief of Respondent, at 14. However, the defect is of constitutional magnitude, because the instruction omits an element of the crime. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Strasburg*, 60 Wash. 106, 116-17, 110 P.2d 1020 (1910); *McClaine v. Territory*, 1 Wash. 345, 355, 25 P. 453 (1890). And a “manifest error affecting a constitutional right” may be raised for the first time on appeal. RAP 2.5(a). The issue is not waived.

**2. The error is not invited.**

The State also argues that the error is not reviewable because Abrahamson invited it. Brief of Respondent, at 14. But Abrahamson did not invite this error. His failure to object did not cause the error. He did not propose the defective instruction in the first place. He did not argue in favor of the defect. Instead, he simply did not object to a defective instruction that the State had proposed.

Abrahamson has no responsibility to correct the State’s errors. He is not the State’s editor, coming behind the State to make sure it got its

instructions right. If the State seeks to convict Abrahamson, the least they can do is submit a proper “to convict” instruction. Abrahamson’s failure to point out the defect is not an invitation to error nor an invitation to relieve the State of its burden of proof.

3. **The “to convict” instruction is defective.**

The State argues that the “to convict” instruction correctly states the law. It questions how a person could exert “unauthorized control” over his own car. Brief of Respondent, at 15-17. But a person could do exactly this if, for example, his license was suspended and he was not “authorized” to “control” the car. The same would be true if he were intoxicated, if he were operating his car without a required ignition interlock device, if he had no insurance, etc. Control of a car is highly regulated by the State, and a person can exert “unauthorized control” in any number of ways short of stealing it from another person. Because the “to convict” allows for these other possibilities and expands the statutory *actus reus* of the crime, it is defective.

4. **This Court should find that harmless-error analysis does not apply.**

The State argues that harmless-error analysis applies and that the error here is not harmless. It relies on *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Washington Supreme Court determined in 2002 that harmless-error analysis can be applied to a defective “to convict” instruction. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). But Abrahamson urges this Court to find that *Brown* does not survive *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and that an instruction that relieves the State of its burden of proving an element of the crime can never be harmless.

The United States Supreme Court ruled on the interaction of *Neder* and *Blakely* in *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006). The *Recuenco* cases<sup>3</sup> are summarized in *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913, 919 (2010). In *Recuenco II*, the United Supreme Court found that the federal constitution does not require automatic reversal of a defective “to convict” instruction. But in *Recuenco III*, the Washington Supreme Court

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<sup>3</sup> There are three *Recuenco* cases: *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (Recuenco I); *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II); and *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III).

found that the state constitution did, at least with respect to the sentencing enhancement at issue there. *Williams-Walker* noted, “[W]e did not decide [in *Recuenco III*] whether a *Blakely* error may ever be harmless under a state constitutional analysis.” *Williams-Walker* 167 Wn.2d, at 900. It remains an open question.

Division One took up this question in *State v. Clark-El*, 196 Wn. App. 614, 623-24, 384 P.3d 627, 632 (2016). It found persuasive the dissent by Justice Fairhurst in *Williams-Walker*, in which she wrote:

Based on our constitutional history, our subsequent case law, and the very nature of the error, I would hold the failure to submit a sentencing factor to the jury for a factual determination based upon the reasonable doubt standard is subject to a harmless error analysis under state law.

*Williams-Walker*, 167 Wn.2d at 919. Division One relied on this dissent to allow for a harmless-error analysis of an element of the crime. *Clark-El*, 196 Wn. App. at 624. Abrahamson urges this Court to find to the contrary of Division One and to instead hold that our state constitution will allow an omission of an element from a “to convict” instruction to be harmless.

### **CONCLUSION**

Because the trial was continued past expiration for a scheduling conflict that was both foreseen and avoidable, and also because the “to

convict” instruction is reviewable, defective, and not subject to harmless-error analysis, this Court should reverse.

Respectfully submitted this 6 day of Feb, 2017,

  
\_\_\_\_\_  
Kelly Vomacka, WSBA #20090  
Attorney for Appellant

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CERTIFICATE OF SERVICE

I certify that on February 6, 2017, I emailed a copy of the following documents:

1. Appellant's Reply Brief
2. Certificate of Service

to:

Brian Clayton O'Brien  
Spokane County Prosecuting Attorney  
[scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org)

Certificate of Service

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**LAW OFFICE OF KELLY VOMACKA**  
600 First Avenue, Suite 304  
Seattle, WA 98104  
(206) 856-2500  
[kelly@vomackalaw.com](mailto:kelly@vomackalaw.com)

DATED: February 6, 2017

Respectfully submitted,



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Kelly Vomacka, WSBA #20090  
Attorney for Appellant