

**JAN 30 2017**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
No. 34498-3-119

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

MANUEL ABRAHAMSON,  
Appellant.

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AMENDED BRIEF OF APPELLANT

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## **ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in granting the State's motion to continue, by order of March 17, 2016.
2. The trial court erred in entering judgment, on May 19, 2016, on a verdict that did not necessarily find every element of the crime.

### **B. Issues Pertaining to Assignments of Error**

1. Did the trial court err by granting the State's motion to continue past expiration to accommodate the prosecutor's vacation, where the prosecutor was assigned even though the State already knew he would not be available on the trial date and made no effort to assign the trial to a prosecutor who would be available? (Assignment of Error 1)
2. Did the continuance constitute reversible error? (Assignment of Error 1)
3. Did the "to convict" instruction omit an essential element of the crime, in that it did not instruct the jury that a theft must be "from another"? (Assignment of Error 2)
4. Is the deficiency in the "to convict" instruction structural and therefore not subject to harmless error analysis? (Assignment of Error 2)

## **STATEMENT OF THE CASE**

On January 18, 2016, Debra Purvis was at the home of her daughter and daughter-in-law, in Spokane. 2VRP 134.<sup>1</sup> After visiting for

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<sup>1</sup> The transcript is in three volumes. "1VRP" refers to the transcript of the State's motion to continue on March 17. "2VRP" refers to the transcript of all other proceedings. 2VRP is in two volumes, but it is numbered continuously across the volumes.

a while, she realized that she didn't know where her car keys were, so all three went out to the parking lot to look for them. 2VRP 109-110, 118-119, 134-36, 139. Two of the women interacted briefly with Abrahamson, who was standing nearby. 2VRP 110, 119, 135. They did not know him, and he appeared to be drunk. 2VRP 115, 119, 127, 139. A short time later, one of the women saw the car driving away. 2VRP 111. They called the police and attracted the attention of neighbors. 2VRP 121-23. Within 10 minutes, the car returned to a different place in the parking lot. 2VRP 123, 140, 151-52. One of the women, then neighbors, and then police detained the driver, who was Abrahamson. 2VRP 112-13, 122-23, 145. The car was not damaged and nothing was taken from it. 2VRP 140. Abrahamson was injured, so he was taken to the hospital, where he was found to have methamphetamine in his system and a BAC of .27. 2VRP 146, 149.

On February 2, Abrahamson was arraigned on Theft of a Motor Vehicle. CP 1, 70. He remained in custody throughout all of the following proceedings. CP 66-68; 1VRP at 5. At arraignment, trial was set for March 28. CP 70.

On March 17, the State moved to continue past the expiration date, which was April 1, to accommodate the assigned prosecutor's vacation. CP 5-8; 1VRP at 3. More details about this motion are in the

Argument section *infra*. The court continued the trial to April 11. CP 72. Trial began on April 26 and concluded on April 27. CP 73-75. The reason for the additional 15-day delay is not reflected in the record.

At trial, Abrahamson asserted that his voluntary intoxication prevented him from forming intent, and he testified that he had no memory of the incident. 2VRP 159-65. The jury returned a verdict of guilty, and sentencing followed on May 19. CP 31, 36. Abrahamson had an offender score of 9, and the court sentenced him within the standard range to 45 months in prison. CP 39, 41.

This appeal timely followed. CP 50-65.

## **ARGUMENT**

### **A. The trial court violated Abrahamson's right to a speedy trial.**

#### **1. The issue is preserved for appeal.**

On March 17, the State moved to continue in order to accommodate the assigned prosecutor's vacation, from March 28 through March 30. CP 5-8; 1VRP 3-4. At that time, trial was set for March 28. CP 70. Abrahamson had been arraigned on February 2, and he was in custody on this matter. CP 66-68, 1, 70; 1VRP at 5. Therefore, the expiration date was April 1. CrR 3.3(b)(1). Trial counsel's coverage attorney told the court that trial counsel was "amenable" to a continuance,

1 VRP 4, but Abrahamson himself objected, 1 VRP 4-5. The court did not entertain his objection “because he is represented by counsel,” but the court did acknowledge being aware of the objection. 1 VRP 5. Additionally, the continuance order does not bear Abrahamson’s signature, as CrR 3.3(f)(1) requires for agreed continuances, but instead says “present—objected.” CP 78. Therefore, this continuance was not agreed and is preserved for appeal.

Even if defense counsel’s amenability amounted to an agreement to continue, rather than a gently expressed objection to the State’s motion, Abrahamson’s objection is sufficient to avoid deeming this an agreed continuance. In *State v. Saunders*, 153 Wn. App. 209, 217-19, 220 P.3d 1238, 1243-44 (2009), a similar situation arose, in which the State moved to continue several times. Each time, the defense attorney either agreed or had coverage attorneys appear to contest the continuances without knowing the substantive status of the case. *Saunders*, 153 Wn. App. at 220-21. However, the defendant himself “consistently resisted” the continuances. *Saunders*, 153 Wn. App. at 220. The court reached the merits of the speedy trial argument—and then ruled in Saunders’ favor. *Saunders*, 153 Wn. App. at 220-21. Similarly here, if the Court finds that the continuance was agreed, it should reach the merits of the argument because of Abrahamson’s objection.

2. **The trial court violated Abrahamson's right to a speedy trial by continuing the trial to accommodate the prosecutor's vacation, where the prosecutor's office assigned the trial to him knowing that he would be unavailable on the trial date.**

For a detained defendant, CrR 3.3(b)(1) mandates trial within 60 days of the commencement date, unless an exclusion applies. This Court reviews violations of CrR 3.3 *de novo*:

We review an alleged violation of the speedy trial rule *de novo*. [T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court, and we will not disturb the trial court's decision unless there is a clear showing it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

*State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024, 1027 (2009)

(internal citations and quotation marks omitted).

Here, the commencement date was February 2, when Abrahamson was arraigned. CrR 3.3(c)(1). Therefore, the expiration date was April 1. Trial was originally set for March 28. CP 70. But the continuance to April 11, and the further delay to April 26, violated CrR 3.3, notwithstanding the prosecutor's vacation or trial schedule.

Neither the State's written motion or oral argument for continuance mentions any caselaw that supports a continuance to accommodate the prosecutor's vacation. CP 5-8; 1VRP 3-4. Defense counsel and the court did not mention any specific cases either.

The rule itself excludes time for an “[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), and for a continuance that is either agreed in writing or when it “is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense,” CrR 3.3(f)(2). But this continuance met none of these requirements: It was not the result of unavoidable or unforeseen circumstances, it was not agreed in writing, it was not required in the administration of justice, and it prejudiced the defendant.

The administration of justice does allow for a participant to go on vacation. For example, in *State v. Kelley*, 64 Wn. App. 755, 758, 828 P.2d 1106, 1107 (1992), trial was scheduled for December 12. By the time it was actually called for trial, on December 23, the assigned deputy had left on a previously scheduled vacation. The case was reassigned to the only deputy who not on vacation during the Christmas holidays, although he was already in trial on a different case. The appellate court found: “That the trial was not had before [the prosecutor’s] vacation and the December 26 expiration date was both unforeseen and unavoidable,” because the parties had expected the trial to begin well before the vacation and the expiration date. *Kelley*, 64 Wn. App. at 764. The trial

and appellate courts both found that the State had managed its calendar responsibly, and the appellate court affirmed the conviction.

No one disputes that lawyers need vacations. But those vacations must be managed responsibly in order to meet the requirements of CrR 3.3. “We emphasize that the State has an obligation to accommodate both responsibly scheduled vacations for its deputy prosecutors and a defendant's CrR 3.3 rights.” *Kelley*, 64 Wn. App. at 767. The court explained:

Fairness in administration and effective justice requires that responsibly scheduled vacations of deputy prosecutors be honored by the State. To construe CrR 3.3 otherwise would be to deprive deputy prosecutors of the dignity they deserve, and would result eventually in less effective justice as well as in unfairness in the administration of justice.

This is not to say that the State has no responsibility to reassign a vacationing deputy's cases to the next most available deputy, and to control the schedule of vacations in such a manner as to minimize the need to reassign cases. *Such clearly is required and such clearly was done here.*

*Kelley*, 64 Wn. App. at 767 (emphasis added).

But such clearly was not done here. Here, the prosecutor's vacation was scheduled even before arraignment. 1VRP 4. His office assigned the case to him knowing that he would not be available on the trial date. This was not a matter of a trial being continued into a vacation,

as in *Kelley*, but rather an outright assignment of a trial to a prosecutor who would surely be unavailable.

A more telling case is *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009), in which a judge was on vacation. There, the county had only two judges. After several continuances, the trial was scheduled when one of the judges would be on vacation and the other judge would be presiding over a different case. Therefore, the court continued the trial, on the grounds that no judge was available. But the Supreme Court reversed, because the trial court had not made a sufficient record of the availability of vacant courtrooms and *pro tempore* judges. Rather than remanding for these findings, the court reversed outright. *Kenyon*, 167 Wn.2d at 139. A concurring justice was sympathetic to, but unpersuaded by, judges' needs for vacations, because those vacations are "rarely a surprise." *Kenyon*, 167 Wn.2d at 140 (Chambers, J., concurring).

Similarly here, the conflict between the trial date and the prosecutor's vacation was not a surprise. The vacation may have been necessary, but the conflict was not. The record contains no information as to whether other prosecutors were available or why the trial was assigned to an unavailable prosecutor in the first place. There is no indication that the prosecutor or his office responsibly managed their schedule so as to protect not only the vacation, but also Abrahamson's speedy trial right.

Instead, the record shows no urgency whatsoever in getting Abrahamson to trial. Indeed, the prosecutor noted several reasons why the trial would likely be delayed even past April 11, which is what happened. 1VRP 4. Trial began on April 26, four weeks after the original trial date and 25 days after expiration.

3. **The continuance prejudiced Abrahamson.**

Abrahamson was prejudiced by the continuance, in several ways. First, he was placed at risk of losing his lawyer. The prosecutor was set to return on March 31, which would have allowed two days before expiration to begin the trial. But by the time the prosecutor returned, Abrahamson's own lawyer would be on vacation, leaving on March 30 and returning on April 6. So the continuance past March 28 caused Abrahamson to lose either his speedy trial right or his attorney. It is hard to imagine how a defendant could be more "prejudiced in the presentation of his or her defense" than by not having his lawyer at his side. CrR 3.3(f)(2).

Second, the continuance was lengthy. The prosecutor moved not only to delay trial until he returned, but also until defense counsel returned from his own vacation. The prosecutor also noted that he had 10 matters preassigned for April 4 and that "we're having a meeting on that

tomorrow morning,” indicating perhaps that he and his office recognized that he was overloaded. 1VRP 4. He asked for a two week continuance, but he acknowledged that the trial might not begin for several weeks after that. 1VRP 4.

Additionally, this trial would have been relatively easy to reassign. It was not complicated or time-consuming. The trial involved four State witnesses, none of whom were experts, and it needed very little legal analysis or briefing. In the end, the trial took just over one day, from pretrial motions through closing arguments. CP 73-75. The State’s case in chief took all of 62 minutes. CP 73-75. Perhaps a more complicated case would be difficult to reassign, but not this one, which makes the State’s failure to reassign even less understandable.

And finally, the passage of time itself is prejudicial. For the defendant, the stress of being in jail, anxious about his future, is a disadvantage:

[A] defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety.

*Barker v. Wingo*, 407 U.S. 514, 527, 92 S. Ct. 2182, 2190, 33 L.Ed.2d 101, 114-15 (1972). And society itself has an interest in seeing cases tried sooner rather than later, which the State ought to protect:

[S]ociety has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

*Barker*, 407 U.S. at 527. The court considered the fact that Abrahamson was in jail, calling it an “onerous burden” and noting that Abrahamson’s objection to the continuance was “perfectly understandable.” 1VRP 5. But the court then referred to unnamed cases and CrR 3.3 to find that a continuance was justified for good cause and that it did not prejudice Abrahamson. 1VRP 5-6.

But Abrahamson was prejudiced. The case never should have been assigned to a prosecutor who was going to be on vacation on the trial date. Then the continuance snowballed from the three days it would have taken for the prosecutor to return to 28 days in all. When the prosecutor returned, the defense attorney was gone. And the prosecutor had ten matters already pre-assigned for the following week. He anticipated, apparently correctly, that some of those matters might “spill over” into the week after that. Then the judicial conference the following week would limit the court’s availability. Then the prosecutor would be on vacation again. On the originally scheduled trial date, everyone would have been ready if the State had assigned an available prosecutor. The case could have been not only started but concluded before expiration and before the prosecutor’s logjam on April 4. But because of the

continuance, Abrahamson had to wait in jail an extra 28 days, constantly under the stress and uncertainty of awaiting trial in jail.

Because the continuance was not agreed in writing, was not the result of unavoidable or unforeseen circumstances, was not required in the administration of justice, and prejudiced the defendant, it violated CrR 3.3. The proper remedy is to reverse. *Kenyon*, 167 Wn.2d at 139.

**B. The “to convict” instruction was defective.**

1. **The “to convict” instruction omitted an element, in violation of Abrahamson’s right to a jury trial and to due process of law.**

The “to convict” instruction omitted the element that the car belonged “to another.” CP 27; RCW 9A.56.065. That property belongs to another is surely an essential element of theft. RCW 9A.56.020(1); *see also, State v. Ralph*, 85 Wn. App. 82, 86, 930 P.2d 1235, 1237 (1997) (construing as insufficient an Information that omitted ownership). A “to convict” instruction that does not “plainly, explicitly, and correctly” state all the elements required for a conviction is “constitutionally defective.” *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). It is manifest error affecting a constitutional right, so it may be raised for the first time on

appeal. RAP 2.5(a); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415, 418 (2005) . This Court reviews jury instructions *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

A jury verdict in Washington is defined by the “to convict” instruction. *DeRyke*, 149 Wn.2d at 911. This instruction purports to list the essential elements of the charged crime and thereby serves as the yardstick, directing the jury to the essential elements of the charge. *DeRyke*, 149 Wn.2d at 910; *Smith*, 131 Wn.2d at 263; *McClaine*, 1 Wash. at 352. Specifically, an incomplete “to convict” instruction violates the constitutional rights to a jury trial and to due process:

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state statute.

*Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355, 147 L.Ed.2d 435, 446 (2000) (*quoting, Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)).

2. **The defect is structural and therefore cannot be harmless error.**

Although some constitutional errors can be harmless, omitting an element from the “to convict” instruction is structural and cannot be harmless.

Structural errors are “defects in the trial mechanism.” *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1265, 113 L.Ed.2d 302, 331 (1991). Other errors, even constitutional ones, are those that “occur during the presentation of the case to the jury.” *Fulminante*, 499 U.S. at 307-08. A structural error is more rare, but also more problematic, in that it renders the trial fundamentally unfair or unreliable:

Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."

*Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 2551, 165 L.Ed.2d 466, 474 (2006) (quoting, *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999)).

A deprivation of the jury-trial guarantee is “certainly” a structural error:

Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former [structural] sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but

without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

*Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 2082-83, 124 L.Ed.2d 182, 190-91 (1993) (internal citations omitted). And a structural error requires reversal without regard for whether the error was harmless. *Sullivan*, 508 U.S. at 281.

Here, the failure to instruct the jury on an element of the crime—in fact, a core element of this particular crime—in the “to convict” instruction relieved the State of proving that element to the jury. The error violates both the right to a jury trial and due process, and it affects the mechanism of the trial itself. Therefore, it is structural and cannot be harmless. The proper remedy is reversal. *State v. Byrd*, 125 Wn.2d 707, 716, 887 P.2d 396, 401 (1995).

**C. If Abrahamson does not substantially prevail, this Court should order that no costs on appeal be awarded.**

Following the instruction of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), *review denied*, 185 Wn.2d 1034, 377 P.3d 733

(2016), if Abrahamson does not substantially prevail on appeal, he asks this Court to deny a future request, if any, for appellate costs.

“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1). “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, if Abrahamson does not substantially prevail on appeal, this Court has discretion to deny the State’s request, if any, for appellate costs.

Abrahamson asks this Court to exercise its discretion in his favor. Before imposing costs, this Court should consider whether Abrahamson can pay them. *See, State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The trial court did not make any individualized findings on this issue. Therefore, this Court does not have a basis to determine whether Abrahamson has a present or future ability to pay, and it should not assess appellate costs against him.

If instead this Court reviews the record to determine whether to award appellate costs, Abrahamson asks it to consider the following. He is 47 years old. CP 36. At the time of sentencing, he was homeless and on food stamps. CP 50-65. He has an offender score of 9 and a lengthy misdemeanor history. CP 39. He is now serving 45 months in prison. CP 40. The trial court noted that “it looks like you have a substantial problem

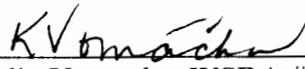
with either alcohol or drugs” and doubted his commitment to recovery. 2VRP 212. For all of these reasons, Abrahamson will very likely have substantial difficulty finding employment after he is released. Also, he was represented at trial and on appeal by appointed counsel, having been found indigent under GR 34. CP 50-65; *see, City of Richland v. Wakefield*, \_\_\_\_ Wn.2d \_\_\_\_ (slip op. at 13, filed 9-22-2016, 92594-1). He was unable to post bail pretrial. He likely owes LFOs on previous cases, although this is unknown. The trial court waived most non-mandatory fees, but it did impose \$800 in LFOs. Those LFOs are accumulating interest at 12% a year even while he is in prison and unable to pay down the principal. RCW 10.82.090(1). For all of these reasons, Abrahamson asks this Court to deny a future request, if any, for appellate costs because Abrahamson cannot pay them.

### **CONCLUSION**

The trial court erred by continuing the trial past the expiration date in order to accommodate the prosecutor’s vacation, even though the prosecutor’s office assigned the trial knowing that the prosecutor would be unavailable on the trial date. The continuance resulted in a four week delay and prejudiced Abrahamson. Therefore, it violated Abrahamson’s speedy trial right and requires reversal.

Additionally, the trial court erred by omitting from the “to convict” instruction an essential element of theft—that the property be “of another.” The omission allowed the jury to return a guilty verdict without finding Abrahamson guilty of all elements of the crime, violating his constitutional guarantees to a jury trial and to due process. The error is structural and cannot be harmless. Therefore, this error also requires reversal.

Respectfully submitted this 27 day of Jan, 2017,

  
\_\_\_\_\_  
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IN THE COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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Respondent,

v.

MANUEL ABRAHAMSON,

Appellant.

No. 34498-3-III

CERTIFICATE OF SERVICE

I certify that on January 27, 2017, I emailed a copy of the following documents:

1. Appellant's Motion to File an Amended Brief of Appellant
2. Amended Opening Brief
3. Certificate of Service

to:

Brian Clayton O'Brien  
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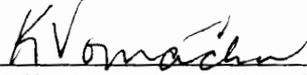
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