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NO. 36180-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ROBBINS,

Appellant.

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

The Honorable Christopher Culp, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying a brief continuance<sup>1</sup> to secure the appearance of a defense witness.
2. The court violated appellant's constitutional right to present his defense.
3. The court erred in denying appellant's motion for a new trial.
4. Prosecutorial misconduct during cross-examination and closing argument denied appellant a fair trial.
5. The prosecutor's misconduct violated appellant's constitutional right to confront witnesses.
6. Cumulative error denied appellant a fair trial.
7. The court erred in imposing 12 months of community custody extending beyond the maximum term of sentence.

Issues Pertaining to Assignments of Error

1. Did the court violate appellant's constitutional right to present his defense and abuse its discretion when it refused to delay the trial to secure the appearance of a witness who would have testified that the complaining witness told him she attacked, robbed, and falsely accused appellant?

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<sup>1</sup> The legal issues are the same regardless of whether the postponement is referred to as a recess or a continuance. State v. Edwards, 68 Wn.2d 246, 258, 412 P.2d 747 (1966). This brief refers to a continuance, following the nomenclature of the parties at trial.

2. Did the court violate appellant's constitutional right to present his defense and abuse its discretion when it denied appellant's motion for a new trial?

3. Did the prosecutor commit prosecutorial misconduct that violated appellant's constitutional right to confront witnesses and deny him a fair trial when the prosecutor cross examined him about alleged statements inconsistent with his testimony; he denied making the statements; the prosecutor presented no other evidence the statements were made; and the prosecutor relied on the alleged inconsistent statements to argue in closing that appellant was not to be believed?

4. Did cumulative error deny appellant a fair trial?

5. Did the court err in imposing terms of confinement and community custody that, taken together, exceed the statutory maximum for the offense?

B. STATEMENT OF THE CASE

1. Procedural Summary

The Okanogan County prosecutor charged appellant Christopher Robbins with one count of second-degree kidnapping and one count of driving with a suspended license in the third degree. CP 6-7, 8-9. During trial, the court refused to delay when a defense witness failed to appear. RP 313. The jury found Robbins guilty of driving with a suspended license but

could not reach a verdict on the kidnapping charge. CP 16-17. Robbins was convicted of the lesser included offense of unlawful imprisonment. CP 16-17. The court denied Robbins' motion for a new trial based on the denial of the continuance. RP 405. The court imposed 55.5 months confinement plus 12 months of community custody on the felony charge and concurrent 90 days on the misdemeanor. CP 60-62. Notice of appeal was timely filed. CP 75.

2. Substantive Facts

a. Robbins was accused after spending time with a woman at the Barter Fair.

Robbins began hanging out with Brenda Perez about a week and a half before the "Barter Fair" in Tonasket, Washington. RP 285. The two spent time at a house where numerous people were partying. RP 285. For about three days, the pair went on outings together in Robbins' car. RP 286-87. Then, late Thursday night, they decided to head to the Barter Fair. RP 287-88. They parked on the fairgrounds and spent the night in the car. RP 289.

At some point during the night, things came to a head, and Robbins clarified with Perez whether she would ever be interested in a sexual relationship with him. RP 289. When she said no, he asked her to get out of the car. RP 289. She refused, demanding \$10 that she claimed he owed her.

RP 290. This argument continued until the early morning. RP 290-91. Finally, Robbins decided to leave. RP 291. As he wove his way through the campground, he rolled up a small hill. RP 291-92. As they drove, she kept demanding her \$10 and refusing to leave until she got it. RP 293.

Suddenly, Robbins did not even see or feel how it happened, but his hand was cut. RP 294. He looked over and saw Perez with a knife in her hand, looking as though she was going to stab him again. RP 294. Then, the door fell open, and she fell out onto her back, accusing Robbins of trying to abduct her. RP 294. He responded, “Are you serious?” RP 295. He then continued up the hill, quickly now that he had finally gotten her out of his car. RP 295. He was hoping to find a way out of the campground. RP 295. At the top, he realized it was not a way out, and turned around. RP 295. Then he realized she had taken his bag of “H” when she left the car. RP 296. At first, he tried to find her to get his product back. RP 297. When that was unsuccessful, he went to the medical tent because of the stab wound on his hand and to report the incident to the police. RP 297.

Perez’ account of the incident was notably different. She admitted she had often been in the same room with Robbins but claimed she hadn’t really met him until the day before they left for the Barter Fair. RP 235. She had been hanging out and using drugs – specifically heroin and methamphetamine. RP 236. She claimed it was nearly morning when they

left the party house, and they arrived at the Barter Fair just as they were setting up for the day. RP 238-39.

As they waited for the fair to open, she claimed he touched her breast, and got angry when she told him not to touch her. RP 240-41. She claimed that, when it got cold, he offered to share a sleeping bag with her, but she declined. RP 241. At some point, she smoked some marijuana, and her head was a bit foggy. RP 242. She testified he never asked her to get out of the car. RP 250. She denied ever asking him for money and claimed he headed up a hill away from the populated part of the campground. RP 243. She testified she said that was not the way out and began screaming for him to stop and let her out, but he kept driving, slowly at first and then more quickly as the wheels spun on the gravel. RP 243. She began to kick him, and he grabbed her legs. RP 244. At that point, the car stopped, but she could not get the door open. RP 244. She grabbed her knife and stabbed Robbins. RP 244-45.

After she stabbed him, he let go and “somehow” the door opened. RP 245. She stabbed him, she said, because she had become frightened. RP 244-46. She denied taking anything with her when she left the car except her small duffel bag or purse that was over her shoulder. RP 247. She ran up to a group of campers, jumped in their car, and pulled a blanket over her head.

RP 248. After waiting a while, they went with her to Barter Fair security and the police were called. RP 249.

At trial, Perez was “hazy” on much of what had happened. RP 252. She had been up for a couple of days and had been smoking marijuana. RP 252. She was not sure if it was Thursday or Friday. RP 254. She was not sure what time of day it was. RP 254. Even though she had felt “gross and disgusted” when he touched her breast, she never asked to get out of the car. RP 269, 272.

Others at the campground heard Perez scream several times to let her out as the car passed their campsite. RP 137, 150, 166. Then, they saw her running down the hill towards them, hysterically crying. RP 137, 151, 167-68. They could not see when the car came to a stop or how she got out of the car. RP 141, 158, 167. Deputy Gregory Lee responded to the scene. RP 219. Robbins told Lee Perez was demanding money and drugs and ended up stabbing him. RP 221.

- b. The Court denied additional time when Robbins’ witness failed to appear.

The defense theory of the case was that Perez attacked and robbed Robbins, and then falsely accused him to deflect suspicion from herself. In support of that theory, counsel planned to present the testimony of Michael Sackman, who had a conversation with Perez in which she admitted as

much. According to the defense offer of proof, Sackman would testify Perez told him that she attacked, robbed, and falsely accused Robbins. RP 306. Sackman was in the county jail until the day trial began. RP 9-10. He was under subpoena and was expected to testify the second day of trial. RP 109. However, the morning of the second day of trial, he could not be found. RP 211. Defense counsel had tried to reach Sackman via all his known phone numbers and his address. RP 211. Counsel had the address for Sackman's girlfriend, where Deputy Lee reported he could probably be found. RP 212. Counsel asked for a material witness warrant. RP 211.

The prosecutor noted there were probably no officers available to serve a warrant; all available officers were currently involved in a pursuit in Tonasket, where Sackman also lived. RP 212, 215-16.

The court gave defense counsel only 10 minutes in which to enlist someone else to draft the material witness warrant for him. RP 213-14. Fortunately, counsel was able to contact someone. RP 215. Then the trial resumed with the testimony of Deputy Lee and Brenda Perez. RP 216-77.

At the end of Perez' testimony, the court asked if defense counsel had the warrant, stating, "I was hoping you'd hand it up sooner." RP 277. Counsel apologized, noting he was distracted by cross examination. RP 277. As Sackman had still not appeared, the court signed the material witness warrant. RP 278. When the time arrived for the lunch recess, the court asked

what should happen if Sackman had still not arrived by the time Robbins finished his testimony. RP 301. Counsel responded, “Well, it would be, I guess, my request to – for time – I don’t know if the – if we have time. I would imagine that another jury would be starting up tomorrow.” RP 301. The court instructed the parties to research over the lunch hour. RP 301-02.

After lunch, counsel responded that he had been unable to complete much research but noted Robbins has a constitutional right to compulsory process to present his witness. RP 303. The State argued against giving the defense any more time, claiming Sackman was not the owner of the party house, and so his testimony was mere impeachment. RP 304-05. The prosecutor also argued Sackman’s account of his conversation with Perez contained inconsistencies that the State would exploit to undermine Robbins’ credibility on cross-examination. RP 305.

The court concluded Robbins had a right to rebut Perez’ testimony by presenting Sackman’s. RP 308. However, the court declared, “If he’s not here at the conclusion of Mr. Robbins’ testimony, we’re not going to wait any longer.” RP 313. The court cited several reasons for this decision. First, the court claimed there had been sufficient time for the police to apprehend Sackman and bring him to court because the material witness warrant was signed at 11:30, it was currently 1:22; and Tonasket is about a 30 minute drive from the courthouse. RP 310-11. Second, the court noted it had told the

jury trial would resume at 1:20. RP 310. Third, the court decided it had done everything in its power to get the witness to court. RP 312. The court also noted the question of whether Sackman and the owner of the house were different people. RP 312. Finally, the court reasoned that, under the missing witness rule, Sackman's failure to appear was a sign he had nothing beneficial to say for the defense. RP 312. After Robbins' testimony, Sackman had still not arrived, and the defense rested. CP 44; RP 320.

- c. The court denied Robbins' new trial motion after his witness was apprehended that same evening.

After the verdict late that afternoon, the court quashed the material witness warrant. RP 383. Later that night, police apprehended Sackman. CP 51.

Defense counsel moved for a new trial under CrR 7.5 on the basis of "Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial." CP 42. Robbins argued it was unreasonable to allow police only three hours to execute the material witness warrant during a busy period with a hot pursuit going on. CP 47. He argued the court's decision denied Robbins a fair trial by preventing him from presenting his witness. CP 45, 48. At the hearing, counsel explained Sackman's testimony would have given him an argument that was otherwise unavailable. RP 389.

The State opposed the motion, arguing counsel had not properly subpoenaed the witness, counsel had not formally asked for more time, no one knew at the time where Sackman was or when he could be apprehended, Sackman was only an impeachment witness, and Sackman would have been impeached with inconsistencies in his account. RP 390-93.

The court denied the new trial motion. RP 405. The court took no position on the subpoena, but faulted counsel for not filing a formal motion to continue, not immediately presenting the material witness warrant during Perez' testimony, thereby losing "at least a half hour," and not explaining to the court in the new trial motion why Sackman had failed to appear. RP 400, 403. The court also reasoned Sackman would have been impeached and his failure to appear cast additional doubt on his credibility. RP 402-03. The court noted the jury heard both sides, Perez and Robbins, as well as three additional witnesses, and found Robbins guilty of the lesser-included offense. RP 403-04. The court reasoned Sackman's testimony was not really material and, although it was favorable to the defense, there was no way to know what weight the jury would have attributed to it. RP 404-05.

C. ARGUMENT

1. THE COURT'S DENIAL OF A CONTINUANCE VIOLATED ROBBINS' RIGHT TO PRESENT A DEFENSE.

Michael Sackman would have testified that Perez told him she attacked and robbed Robbins and then falsely accused him to cover up her own crimes. RP 306. A short recess of less than a day would have sufficed to permit Robbins to present this critical defense witness. CP 51. The court's refusal to entertain the possibility of delay violated Robbins' right to present his defense and requires reversal of his conviction.

Both the United States Constitution and the Washington State Constitution guarantee an accused the right to compulsory process to compel the attendance of witnesses and the right to present a defense. U.S. Const. amend. V, VI, XIV; Const. art. I, § 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The right to call witnesses and have them testify for the defense is a fundamental element of due process protection. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-96, 359 P.3d 919 (2015). In general, the right is violated when the government's conduct impermissibly interferes with the presentation of the defense. State v. McCabe, 161 Wn. App. 781, 787, 251 P.3d 264 (2011). Denying a continuance violates this right when it prevents the defendant from

presenting a witness material to his defense. State v. Downing, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004).

To determine whether there has been a constitutional violation, courts look to the totality of the circumstances and engage in a case-by-case inquiry. Downing, 151 Wn.2d at 275. “[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result . . . the answer must be found in the circumstances present in the particular case. State v. Eller, 84 Wn.2d 90, 96, 524 P.2d 242 (1974). The court’s discretion is grounded in consideration of “such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures.” Id. at 95-96.

Here, the court violated Sackman’s constitutional right to present his defense and abused its discretion because Sackman’s testimony was critical, counsel acted diligently, the court’s decision was grounded in an arbitrary insistence on speed and a misapprehension of the missing witness doctrine, and the error was not harmless.

- a. Sackman’s testimony was essential to Robbins’ defense.

Sackman’s testimony was material and critically important to the defense. Aside from Robbins himself, Sackman was the only defense

witness. RP 9-10. The offer of proof was clear. Sackman would testify that Perez told him she attacked and robbed Robbins and then falsely accused him. RP 306. The court agreed this was in direct contradiction to her testimony. RP 307-08. Washington law recognizes that “there are rare circumstances in which impeaching testimony will be so important as to require a continuance.” State v. Simonson, 82 Wn. App. 226, 234 n. 17, 917 P.2d 599 (1996). This is one of those circumstances.

In Simonson, the defense sought a continuance to call a police officer who had spoken with the complaining witness in a rape and child molestation case. Id. at 230-31. At trial, the witness testified she had penile vaginal intercourse with the defendant once when she was 14. Id. at 229. By contrast, the offer of proof was that she told the officer the defendant was having intercourse with her two to three times a day. Id. at 231. The State argued the evidence was merely impeaching, but the court rejected this argument. Id. at 234 n. 17. Although impeachment testimony is not usually central to a trial, the court explained, “We think, however, that there are rare circumstances in which impeaching testimony will be so important as to require a continuance, and that such circumstances were present here.” Id.

Sackman’s testimony here was even more critical than the missing police witness in Simonson. There, the absent witness would merely have contradicted details of conduct that was clearly criminal. Simonson, 82 Wn.

App. at 229-31. Here, however, Perez' prior inconsistent statement negates the existence of a crime entirely. RP 306. Sackman's testimony would not merely have undermined Perez' credibility. It would have corroborated Robbins' testimony that he was the victim and was being framed.

It is also important to note that the court did not deny the continuance on grounds that the evidence was not material. On the contrary, the court would not have signed a material witness warrant if it did not agree that the witness was, in fact, material. See RCW 10.52.040 (before issuing warrant for witness, court "shall determine that the testimony of the witness would be material"). Although technically impeaching, Sackman's testimony contradicted the state's complaining witness on the gravamen of the offense. This testimony was critical to the defense and required a continuance.

b. Defense counsel acted with reasonable diligence in the face of Sackman's surprising failure to appear.

The issues of surprise and diligence also indicate the continuance was necessary. Eller, 84 Wn.2d at 95-96. Realizing the critical nature of the witness, counsel acted with reasonable diligence to secure Sackman's attendance. At the beginning of the first day of trial, counsel noted his plan to call Sackman the next day. RP 9-10, 109. Counsel expected Sackman would obey the subpoena and appear. RP 109. The next morning, however, counsel noted Sackman had not reported in. RP 211. Counsel was obviously

surprised by this turn of events, and his efforts were reasonably diligent, particularly in light of the time pressure created by the court.

Counsel informed the court he had tried all Sackman's numbers and his address. RP 211. He then requested a material witness warrant. RP 211. Although he did not immediately present the warrant to the court, this delay was unlikely to affect the ultimate timing because all the officers in the area were all engaged in a pursuit that morning. RP 212, 215-16. It was extremely unlikely anyone would be available to serve the warrant right away.

Moreover, the court undermined counsel's diligence by refusing to permit a recess to draft the material witness warrant, insisting instead that counsel have someone else at his office draft it while the trial continued. RP 213-14. As counsel explained, the reason he did not present the warrant immediately was that he got caught up in cross examination. RP 277-28. This was reasonable, since Perez was testifying. RP 235-76. Counsel could hardly be expected to divert his attention from cross-examining the State's most important witness.

A similar scenario arose in Lee v. Kemna, 534 U.S. 362, 366, 122 S. Ct. 877, 880, 151 L. Ed. 2d 820 (2002). In that case, the court excused defense counsel's failure to file a written motion to continue (as required by state court rule) because "in the midst of a murder trial . . . defense counsel could hardly be expected to divert his attention from the proceedings rapidly

unfolding in the courtroom and train, instead, on preparation of a written motion.” Id.

Although counsel did not formally move for a continuance, he did clearly communicate a request for time to locate the witness. RP 301. When the court asked what should occur if Sackman did not appear by the time Robbins’ testimony finished, counsel answered, “Well, it would be, I guess, my request to – for time – I don’t know if the -- if we have time. I would imagine that another jury would be starting up tomorrow.” RP 301. This was a request for time, accompanied by an acknowledgment that the court may not grant it due to the impending next trial. After lunch, acknowledging he had lacked time to really research, counsel bolstered his request by asserting his client’s constitutional right to present his witness. RP 303.

It was clearly understood as a request for a continuance because the State proceeded to argue that no continuance should ensue. RP 305. The court also understood it to be a request for a continuance because, at the conclusion of the parties’ arguments, the court declared that no additional time would be granted, declaring, “If he’s not here by the conclusion of Mr. Robbins’ testimony, we’re not going to wait any longer.” RP 313.

In short, counsel subpoenaed the witness, sought a material witness warrant, and sought additional time so the warrant could be executed. This

was reasonable diligence in light of the witness' unexpected failure to appear and the court's insistence on finishing the trial in two days.

- c. The Court's insistence on speeding through the trial was manifestly unreasonable.

“[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.” Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964). A continuance should be granted to obtain a defense witness when the defense shows “the witness probably can be found if the continuance is granted.” State v. Lane, 56 Wn. App. 286, 296–97, 786 P.2d 277 (1989). The grant or denial of a continuance is generally reviewed for abuse of discretion. Simonson, 82 Wn. App. at 231-32. This record indicates not a reasoned exercise of discretion, but a “myopic insistence upon expeditiousness” even though it was likely that the witness could be brought to court within a reasonable time.

This insistence on speed was evident from the very beginning of trial. The court began by telling potential jurors their duty would be limited to “today and tomorrow. In other words, after this, you’re done with jury duty.” RP 32. Moments later the court again emphasized the trial would be over the next day. RP 49.

When Robbins sought a material witness warrant to secure Sackman's attendance, the court declined to permit a reasonable recess. Instead, the court gave counsel only 10 minutes in which to enlist the aid of another attorney to draft the warrant for him. RP 213-14.

Once the warrant was issued, the court refused to allow a reasonable amount of time for it to be executed. The warrant was signed at 11:30 a.m., and at 1:22 p.m., the court declared that it would not wait any longer. RP 309-10. If Sackman did not appear by the end of Robbins' testimony, the court would not wait. RP 313. This posture was manifestly unreasonable in light of the realities of local law enforcement that day. The prosecutor twice informed the court that all available officers were involved in a pursuit that morning. RP 212, 215-16.

A continuance was the most reasonable course of action because, once the officers had concluded their pressing business, it was probable they could quickly apprehend Sackman and bring him to court. Under Lane, it is not required that the defendant prove beyond all doubt that the witness can be obtained in a reasonable time. 56 Wn. App. at 296. The standard is "probably." Id.

By contrast, the record here shows Robbins' witness could probably be brought to court in a reasonable time. He had information from a police officer that Sackman was likely to be found at his girlfriend's residence. RP

212. He had the address. RP 212. The address was approximately a 30-minute drive from the courthouse. RP 311. Police were sent after him, armed with a material witness warrant. RP 310. The police were involved in a pursuit, but that pursuit was in Tonasket, where Sackman was likely located. RP 212. There was no reason to believe police would be unable to procure his presence in a reasonable amount of time. This case is utterly unlike Lane, where the witness was unable to be found after five days. Id. at 297. The court's insistence on finishing trial that same day rather than wait a reasonable amount of time for police to execute the material witness warrant was manifestly unreasonable under the circumstances.

d. The court's refusal to wait was based on a misapprehension of the relevant facts and law.

The court also abused its discretion because the refusal to wait was manifestly unreasonable, was based on untenable factual grounds, and was made in reliance on a misapprehension of the relevant law. State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018) (court's exercise of discretion is unreasonable when premised on untenable grounds or legal error).

First, the court decided not to wait based on two incorrect fact-based reasons. First, the court believed that there had been enough time since 11:30 for the police to bring Sackman to court by 1:22 p.m. RP 309-10. This was

an untenable conclusion in light of the police pursuit involving all available officers. RP 212, 215-16.

Second, the court reasoned there was some question as to Sackman's identity. RP 312. This conclusion was also untenable. It was apparently based on the prosecutor's representation that Sackman was not the owner of the house where Robbins and Perez had stayed the night before the Barter Fair. RP 304. But the prosecutor was merely arguing Sackman was an impeachment witness, that his testimony was based on a conversation with Perez, not personal, first-hand knowledge of events. RP 304-05. This was not an assertion that Sackman's identity or location were in doubt.

Finally, the court reasoned that the missing witness doctrine allowed an inference that Sackman would have nothing helpful to say for the defense. RP 312. The court's reasoning constitutes a blatant misunderstanding of the missing witness doctrine and is an untenable basis for denying a continuance. Application of the missing witness doctrine is a question of law reviewed de novo. See State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008) (de novo review applies to whether missing witness instruction was appropriately given to the jury).

The missing witness rule applies when a party knowingly fails to present the testimony of a witness who is peculiarly available to that party. State v. Baker, 56 Wn.2d 846, 859, 355 P.2d 806 (1960). Under very

specific circumstances, the fact-finder is then permitted to infer that the witness' testimony would be adverse to that party. Id. For the rule to apply, the circumstances must warrant the inference that the party would not knowingly fail to call the witness unless the testimony were damaging to that party. State v. Blair, 117 Wn.2d 479, 488, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)). Application of the rule is limited to very specific circumstances. Two limits are particularly relevant here. First, there must be a natural inference that the party would not have failed to present the witness unless the facts known by him were unfavorable. Id. Second, if the witness' absence is satisfactorily explained, no negative inference arises. Blair, 117 Wn.2d at 489.

The missing witness rule has no application here. Robbins did not knowingly or intentionally fail to present Sackman's testimony. He tried, multiple times, and unsuccessfully, to obtain that testimony. The witness' absence from the trial was due to two factors, neither of which were attributable to Robbins: first, Sackman was released from jail and was not at home or answering his phone. RP 9-10, 211. Second, the court refused to wait a reasonable time for him to be brought in on the missing witness warrant. RP 313. These circumstances sufficiently explain Sackman's absence. Because Robbins was obviously trying to secure Sackman's attendance, it is not natural to infer that the testimony would have been

unfavorable. On the contrary, Robbins made a clear record as to what Sackman's testimony would have been. RP 306. The prosecutor, who interviewed Sackman as well, did not dispute this summary. RP 304-05.

Given the police pursuit, there had not been sufficient time to serve the material witness warrant. Sackman's identity was not in doubt. And the missing witness doctrine does not apply. The court's decision to deny a continuance was an abuse of discretion because it was based on facts unsupported by the record and a misapprehension of law. Ramirez, 191 Wn.2d at 741.

- e. Denial of the continuance violated Robbins' constitutional right to present his defense.

The right to call witnesses for one's own defense has long been recognized as essential to due process. Chambers, 410 U.S. at 294. In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained a defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense." This right to present witnesses to establish a defense is "a fundamental element of due process of law." Id.

Further, a criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." Taylor v. Illinois, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)**Error! Bookmark**

**not defined.** Thus, courts must jealously guard a criminal defendant's right to present witnesses in his defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). Courts review de novo whether exclusion of defense evidence violated the right to present a defense. Jones, 168 Wn.2d at 719-20.

To protect the right of accused persons to defend themselves, relevant defense evidence must be admitted unless the State can show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). A restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Once it is shown that the evidence is even minimally relevant, the jury must be allowed to hear it unless the State can show it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622; see also Cayetano-Jaimes, 190 Wn. App. at 289 ("Because this unavailable witness's testimony was relevant and highly probative and the State did not show its admission would disrupt the fairness of the fact-finding process, the trial court abused its discretion by excluding it.")

As discussed above, the primary reason for not allowing Robbins to present his witness was the court's insistence that trial would conclude that

day. A brief delay would have impacted the trial court's schedule, but there was no indication it would "disrupt the fairness of the fact-finding process." Darden, 145 Wn.2d at 622.

Courts must safeguard the right to present a defense "'with meticulous care.'" State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). The trial court failed to apply the requisite meticulous care, and Robbins' right to present his defense was violated. Error in excluding relevant defense evidence is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). That is not the case here. The only evidence of guilt was the testimony of one woman who admitted she had been using drugs and who admitted stabbing Robbins. RP 236, 240, 245. Robbins' conviction should be reversed.

f. Even if Robbins is required to show prejudice, he has done so.

Even if this Court should decline to address this as a constitutional violation subject to the constitutional harmless error standard discussed above, reversal is nonetheless required. Denial of a continuance to present a critical defense witness requires reversal when the defendant is denied a fair trial because if the witness had testified, the outcome of the trial would have

been different. Lane, 56 Wn. App. at 296. The denial of the continuance was an abuse of discretion, and without the error, it is probable the outcome of the trial would have been different.

If Sackman had testified, it is likely Robbins would not have been convicted. The only testimony that condemned him was from Perez. The other witnesses observed behavior that would have been equally consistent with a person trying to falsely incriminate Robbins, as he claimed. Sackman would have corroborated Robbins' assertion that what the other witnesses observed was actually Perez trying to cover up her own wrongdoing by falsely accusing Robbins. RP 306. It is immaterial that Sackman would, in his turn, have his credibility impeached with inconsistencies on cross examination. Perez' credibility was already in doubt, given her drug use and her failure to try to leave the car at any time prior to the incident. Having Sackman there to undermine her testimony with her prior inconsistent statement would likely have created reasonable doubt in the minds of jurors. If Sackman had testified, it is unlikely Robbins would have been convicted. The denial of the continuance was an abuse of discretion that prejudiced him and violated his constitutional right to present his defense. The conviction for unlawful imprisonment should be reversed.

2. THE COURT ERRED IN DENYING ROBBINS' NEW TRIAL MOTION.

CrR 7.5 mandates that a new trial may be granted when there has been "Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial." As discussed above, the fundamentals of a fair trial include the constitutional right to compulsory process so the accused can present a meaningful defense. Cayetano-Jaimes, 190 Wn. App. at 295-96. Robbins was prevented from having a fair trial because the court's insistence on finishing the trial that day was an abuse of discretion that violated his right to present a defense. The court erred in denying his motion for new trial on this basis.

A trial court's decision on a motion for new trial is reversible on appeal when the court bases its decision on an erroneous interpretation of the law or acted based on untenable grounds. State v. Robinson, 79 Wn. App. 386, 396, 902 P.2d 652 (1995). A much stronger showing of an untenable basis is required to set aside an order granting a new trial than one denying a new trial. State v. Reynoldson, 168 Wn. App. 543, 547, 277 P.3d 700 (2012). Here, the court relied on numerous rationales, none of which amounts to a tenable basis for denying Robbins' constitutional right to present his defense.

First, the court reasoned defense counsel was equivocal about whether he wanted a continuance and made no formal motion. RP 400. This basis is untenable. As discussed above, it was clear counsel was asking for more time. RP 301. Acknowledging the court's time pressure does not make that request equivocal. The request was also sufficiently clear that the prosecutor argued against a continuance and the court declared one would not be granted. RP 305-06, 313. When a continuance has been argued against and ruled on, it is disingenuous to say it was not requested by a formal motion.

Second, the court reasoned that defense counsel wasted time by not presenting the material witness warrant, which was apparently ready at 10:30, until at least a half hour later. RP 400. As discussed above, the delay was reasonable given that counsel was in the middle of cross examining the State's most important witness. RP 277. Additionally, the brief delay made no difference since no officers were likely available right away given the pursuit going on in Tonasket. RP 212, 215-16.

Third, the court reasoned there was no way to know when Sackman would be picked up by police. RP 401. This is also disingenuous. While it may be technically correct that the timing could not be predicted with absolute certainty, it was nearly certain he could *not* be secured in the brief time allowed by the court. After the police finished their pursuit, however,

there was no reason to assume they would not be quickly able to arrest Sackman, since he was believed to be in the same town. RP 212. Robbins met his burden to show the witness could probably be brought to court within a reasonable amount of time.

Fourth, the court reasoned Sackman would, himself, be cross examined and doubts would be raised as to his credibility. RP 401-02. This rationale appears based on the prosecutor's assertion that Sackman had given inconsistent statements about the circumstances of his conversation with Perez. RP 305. The court also found Sackman's failure to appear at trial when subpoenaed reflected poorly on his credibility. RP 401-02. This basis is untenable because gauging witness credibility is the role of the jury, not the judge. See, e.g., Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156 (2007) ("The credibility of the witnesses and the weight of the evidence was a question for the jury alone."); Browning v. Ward, 70 Wn.2d 45, 51, 422 P.2d 12, 16 (1966) ("The credibility and the weight of the testimony are questions for the jury, notwithstanding there are contradictions or inconsistencies in the testimony of a particular witness.").

Fifth, the court reasoned that, although defense counsel had interviewed Sackman, he had not explained to the court why Sackman had been absent from trial. RP 403. This is a misapprehension of the "failure to explain" aspect of the missing witness rule discussed above. At the time it

mattered (when counsel requested additional time), counsel had no idea why Sackman had failed to appear and was doing everything in his power to secure his testimony.

Sixth, the court apparently believed the testimony would not have made a difference because the jury heard the State's three witnesses in addition to Perez and Robbins and found Robbins guilty only of the lesser included offense of unlawful imprisonment. RP 404-05. This rationale is manifestly unreasonable in light of the critical nature of Sackman's testimony to the defense. Without any corroboration, the jury was unlikely to believe Perez was making the whole thing up. Sackman's testimony was crucial to establishing reasonable doubt. The court is likely correct that there is no way to know what weight the jury would have given Sackman's testimony. RP 404-05. But that only weighs in favor of a reasonable delay to allow the defense to put on its case so the jury could decide. Herriman, 142 Wn. App. at 234. It was reasonably probable the jury would see Sackman as corroborating the defense and casting doubt on Perez' testimony, which was the only evidence of guilt. Any reason to doubt Perez' testimony would require an outright acquittal.

Finally, the court declared the loss of testimony was not attributable to the sovereign. RP 404-05. While the prosecutor committed no misconduct, it was the court's insistence on finishing the trial that day the

cost Robbins his only witness. The reason Sackman was not called to testify was that the court refused to allow a reasonable amount of time for the police to execute the material witness warrant. RP 313.

After violating Robbins' right to present a defense by denying his reasonable request for a continuance, the court continued on its erroneous course of action when it denied his new trial motion on similarly untenable grounds. Robbins' conviction for unlawful imprisonment should be reversed.

3. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPUGNING ROBBINS' CREDIBILITY WITH FACTS NOT IN EVIDENCE.

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Robbins' conviction should be reversed because the prosecutor suggested during cross examination that Robbins had made prior statements to police that contradicted his testimony. RP 314-17. She then argued during closing that Robbins' testimony was, for this reason, not to be believed. RP 353. This improper examination and argument, insinuating and directly asserting the existence of "facts" of which the State presented no evidence, denied Robbins a fair trial. State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993); Yoakum, 37 Wn.2d at 144.

Prosecutorial misconduct during closing argument has the potential to violate the accused person's right to a fair trial. In re Pers. Restraint of

Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). A prosecutor is a quasi-judicial officer with an independent duty to ensure that accused persons receive a fair trial. State v. Thierry, 190 Wn. App. 680, 689, 360 P.3d 940 (2015), rev. denied, 185 Wn.2d 1015 (2016).

Reversible error results when the prosecutor makes improper arguments that are substantially likely to have affected the outcome of the trial. Id. Even without contemporaneous objection, prosecutorial misconduct requires reversal when it is so flagrant and ill-intentioned as to cause prejudice to the defendant that cannot be cured merely by instructing the jury. State v. Pinson, 183 Wn. App. 411, 416, 333 P.3d 528 (2014). The prosecutor's conduct must be viewed in light of the total argument, the evidence, and the jury instructions. Thierry, 190 Wn. App. at 689.

The prosecutor's cross examination and closing argument was misconduct because it insinuated the existence of facts the State had no evidence to support and then invited the jury to convict based on those insinuated facts. A prosecutor commits reversible misconduct by inviting the jury to decide a case based on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). "Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the

record.” State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citing State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006)).

Similarly, a prosecutor may not use impeachment as a guise for submitting otherwise unavailable evidence to the jury. Babich, 68 Wn. App. at 444 (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984)). “[A] prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact.” Id.

This case directly parallels Babich, and this Court should reverse, as it did in that case. In Babich, the prosecutor cross examined two witnesses about whether they had made prior statements that the defendant was dealing drugs. 68 Wn. App. at 441-42. Both witnesses denied making any such statement and denied that the defendant was dealing drugs. Id. The State never presented any evidence, aside from the prosecutor’s questions, that the witnesses had made the out-of-court statements. Id. at 442. Nevertheless, in closing argument, the prosecutor argued in closing that the defendant was a drug dealer and specifically relied on the alleged out-of-court statements by the two witnesses. Id. at 442-43.

This Court reversed Babich’s conviction. Id. at 446. When the State insinuates a prior inconsistent statement in cross-examination, and the witness denies making the statement, the State has a duty to present evidence showing the statement was, in fact, made. Id. at 443. “If the rule were

otherwise, cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be misled into thinking that the statements allegedly attributable to the witness were evidence.” Id. at 443-44 (quoting 5A K. Tegland, Wash. Prac., Evidence § 254(1), at 298 (1989)). The court held the error was not waived by mere failure to object because the error did not occur during the cross-examination; the error was the failure to subsequently prove up the statements. Id. at 446. At the time of the cross-examination, there was nothing to object to. Id. By the time it became clear that proof was not forthcoming, it was too late to undo the prejudice. Id. The court also rejected the State’s harmless error argument. Id. With two witnesses apparently portraying her as a seasoned, established drug dealer, the jury was unlikely to accept Babich’s defense of entrapment. Id.

This case cannot be meaningfully distinguished from Babich. On cross examination, Robbins denied making statements to police that were inconsistent with his testimony. RP 314. The prosecutor asked “Isn’t it true that when Off. Lee contacted you, you stated that you had just met the female the day before at a friend’s house in Tonasket?” RP 314. Robbins answered, “No, that’s not what I said.” RP 314. Next, the prosecutor asked, “And didn’t you tell the officer that you had arrived at the barter fair approximately 8:00 or 8:30?” RP 314. Robbins replied, “No, I didn’t. I was

there all night long.” RP 314. The prosecutor then asked about exhibit 4, but Robbins answered that it was neither his signature nor his handwriting. RP 314-15. He told the jury he had no idea where that document came from. RP 315-16. When the prosecutor quoted bits of language, Robbins denied having written it. RP 316. Exhibit 4 was never admitted into evidence. CP 96.<sup>2</sup> The statements Robbins allegedly made to the officer were also not presented during the officer’s testimony. RP 216-31. No evidence of any contradictory statements were ever elicited from any witness or admitted into evidence. Like Babich, Robbins was tried by innuendo, rather than evidence.

This error cannot be deemed harmless. The State’s reliance on unadmitted evidence violates the Sixth Amendment right to confront witnesses. Babich, 68 Wn. App. at 446. This is constitutional error that may not be deemed harmless unless it can be said beyond a reasonable doubt that it did not contribute to the verdict. Id. Robbins’ defense hinged on his credibility versus that of Perez. She was an admitted drug user. RP 236. Thus, evidence that he gave statements to police that contradicted his testimony was likely to affect the jury’s decision. The prosecutor’s misconduct violated appellant’s right to confront witnesses and denied him a fair trial. Babich, 68 Wn. App. at 446. His conviction should be reversed. Id.

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<sup>2</sup> A supplemental designation of clerk’s papers was filed on January 23, 2019. This citation is to the anticipated index page number for the exhibit list, document number 123, filed on June 6, 2018.

4. CUMULATIVE ERROR DENIED ROBBINS A FAIR TRIAL.

Alternatively, the accumulated effects of 1) the court denying Robbins additional time to secure his witness' attendance and 2) the prosecutor creating a trial by innuendo violated Robbins' right to a fair trial. Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when the errors at trial, even if individually harmless, accumulate to deny the accused a fair trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing Weber, 159 Wn.2d at 279).

The accumulation of Robbins' inability to present his defense witness and the State's reliance on insinuation, rather than evidence, to impeach Robbin's credibility denied him a fair trial. In Venegas, the court noted that the case hinged on witness credibility and, rather than trusting the jury to make its determination based on the evidence, the prosecutor resorted to unfair tactics. Venegas, 155 Wn. App. at 526. The court reversed based on cumulative error. Id. at 527.

Like Venegas, this case also hinged on credibility. Both errors were likely to influence the jury's perception of Robbins' credibility vis-à-vis that

of Perez, each compounding the prejudicial effect of the other. First, Robbins was denied the ability to present a witness who would have undermined Perez' credibility and corroborated his account of what happened. Then, the State was allowed to impugn Robbins' own credibility with alleged inconsistent statements that were never admitted into evidence. If this Court should determine that these issues do not individually require reversal, reversal is nonetheless required because, when taken cumulatively, the errors deprived Robbins of a fair trial.

5. THE COURT ERRED IN IMPOSING CONFINEMENT AND COMMUNITY CUSTODY THAT EXCEED THE STATUTORY MAXIMUM FOR THE OFFENSE.

Robbins' judgment and sentence must be vacated because his sentence unlawfully exceeds the statutory maximum for his offense. State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The sentencing court must reduce the term of community custody whenever the community custody, when added to the sentence, would exceed the statutory maximum for the offense. RCW 9.94A.701 (9); Boyd, 174 Wn.2d at 472.

Merely specifying on the judgment and sentence that the total combined length may not exceed the statutory maximum is insufficient. Boyd, 174 Wn.2d at 472 (citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011)). The community custody term must be determinate, rather than contingent upon the amount of early release time earned.

Franklin, 172 Wn.2d at 836. The court must specify the precise length of community custody at the time of sentencing. Id.; RCW 9.94A.701. For anyone sentenced after the effective date of RCW 9.94.701(9) on July 26, 2009, the responsibility for reducing the length of the community custody lies solely with the sentencing court. Boyd, 174 Wn.2d at 473.

Boyd was sentenced to 54 months confinement and 12 months of community custody. Id. at 472. The sentencing court noted on the judgment and sentence that the combined sentence and community custody could not exceed the statutory maximum of 60 months. Id. The court held that the trial court erred in imposing the sentence and remanded for resentencing consistent with RCW 9.94A.701 (9). Boyd, 174 Wn.2d at 473.

Boyd dictates the outcome of this case. Robbins was convicted of a class C felony with a statutory maximum sentence of five years. CP 16-17; RCW 9A.40.040; RCW 9A.20.021. The court imposed 55.5 months confinement. CP 61. Although the sentence is only 4.5 months lower than the statutory maximum, the court also ordered 12 months of community custody. When added together, the confinement and community custody exceed the statutory maximum by 7.5 months. The judgment and sentence notes, “combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum.” CP 62.

This notation is insufficient under Boyd, 174 Wn.2d at 472-73. As in Boyd, the trial court erred in failing to set a determinate term of community custody within the statutory maximum. Id. Even if this Court does not reverse Robbins' conviction, it should remand to reduce the community custody term to 4.5 months to avoid exceeding the statutory maximum. Id.

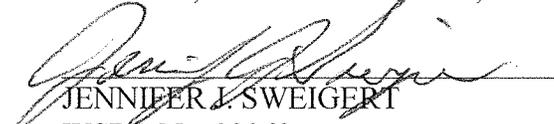
D. CONCLUSION

For the foregoing reasons, Robbins' conviction for unlawful imprisonment should be reversed. Additionally, the term of community custody must be reduced because it exceeds the statutory maximum for the offense.

DATED this 30<sup>th</sup> day of January, 2019.

Respectfully submitted,

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