

Supreme Court No. 89369-1

---

WASHINGTON STATE SUPREME COURT

---

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN TROY HAWKINS,

Petitioner.

RECEIVED  
STATE OF WASHINGTON  
SUPREME COURT  
MAY 19 10 A 0 23  
E

---

SUPPLEMENTAL BRIEF OF PETITIONER

---

CARL E. HUEBER, WSBA No. 12453  
COLLETTE C. LELAND, WSBA No. 40686  
WINSTON & CASHATT  
601 West Riverside Avenue  
1900 Bank of America Financial Center  
Spokane, Washington 99201  
Telephone: (509) 838-6131

Attorneys for Petitioner

## TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	6
A. The trial court did not abuse its discretion by ordering a new trial based upon Dale Martin's testimony that he had seen a truck moving a Kubota tractor onto the Hawkins' property during the relevant time period.	7
B. Time for trial recommenced upon the issuance of the mandate because no formal order granting a new trial was required and because CrR 3.3(c)(2)(iv) governs the time for trial.	12
1. The date the mandate issued is the commencement date because the decision granting a new trial was an effective order, which took effect upon restoration of jurisdiction to the trial court.	13
2. The date the mandate was issued is the commencement date, and CrR 3.3(c)(2)(iv) does not apply because the mandate was irrelevant to Mr. Hawkins' right to a new trial.	15
3. Time for trial commenced upon the issuance of the mandate because the State failed to exercise due diligence in bringing Mr. Hawkins before the trial court.	16
V. CONCLUSION	18
APPENDIX A	

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Barker v. Wingo</i> , 401 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2n 101 (1972)	17
<i>City of Seattle v. Hilton</i> , 62 Wn. App. 487, 815 P.2d 808 (1991)	17, 18
<i>Olpinski v. Clement</i> , 73 Wn.2d 944, 442 P.2d 260 (1968)	7
<i>People v. Ault</i> , 33 Cal. 4th 1250, 95 P.3d 523 (2004)	8
<i>Savage v. Three Rivers Med. Ctr.</i> , 390 S.W.3d 104 (Ky. 2012)	8
<i>State v. Chhom</i> , 162 Wn.2d 451, 173 P.3d 234 (2007)	12, 15
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013)	7, 11
<i>State v. Edwards</i> , 94 Wn.2d 208, 616 P.2d 620 (1980)	12
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	14
<i>State v. George</i> , 160 Wn.2d 727, 158 P.3d 1169 (2007)	12, 17
<i>State v. Marks</i> , 71 Wn.2d 295, 427 P.2d 1008 (1967)	6, 7
<i>State v. McCarty</i> 90 Wn.App. 195, 950 P.2d 992 (1998)	8

<i>State v. Raschka</i> , 124 Wn. App. 103, 100 P.3d 339 (2004)	6
<i>State v. Savaria</i> , 82 Wn. App. 832, 919 P.2d 1263 (1996), <i>disapproved on other grounds by</i> <i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003)	10
<i>State v. Slanaker</i> , 58 Wn. App. 161, 791 P.2d 575 (1990)	6, 10
<i>State v. Taylor</i> , 60 Wn.2d 32, 371 P.2d 617 (1962)	7
<i>State v. Watson</i> , 146 Wn.2d 947, 51 P.3d 66 (2002)	12
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981)	passim
<i>State v. York</i> , 41 Wn. App. 538, 704 P.2d 1252 (1985)	6
<i>Sylvester v. Olson</i> , 63 Wash. 285, 115 P. 175 (1911)	7
<i>Washburn v. City of Federal Way</i> , 169 Wn. App. 588, 283 P.3d 567 (2012)	7, 8
<i>Winburn v. Moore</i> , 143 Wn.2d 206, 18 P.3d 576 (2000)	10

**Court Rules**

CrR 3.3	passim
CrR 4.1	16, 17
CrR 7.5	14

## I. INTRODUCTION

This case concerns the correct standard for reviewing orders granting motions for new trials and the rules governing the commencement of the time for trial after a new trial is granted while the matter remains pending on appeal.

The trial court granted Edwin Troy Hawkins' motion for a new trial based upon newly discovered evidence. Although the trial court was in a better position to make the factual determinations required by *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981), the Court of Appeals substituted its own evaluation of the facts and the credibility of witnesses for that of the trial court. In addressing the due diligence factor of the *Williams* test, the Court of Appeals found the trial court abused its discretion by failing to require Mr. Hawkins to show he could not have discovered the evidence, period. The Court of Appeals' holding is a departure from longstanding Washington law requiring a heightened standard of abuse of discretion when reviewing orders for new trials. This court should reverse the Court of Appeals, affirm the trial court, and remand for a new trial.

Mr. Hawkins' first appeal was pending when the trial court granted Mr. Hawkins' motion for new trial. The Court of Appeals later affirmed Mr. Hawkins' convictions and issued its mandate on April 12, 2011. The

trial court set trial for September 13, 2011, 154 days after issuance of the mandate. Mr. Hawkins timely objected. The trial court concluded CrR 3.3(c)(2)(iii) governed, but time for trial could not commence until the trial court entered a separate formal order for new trial. The trial court filed a separate and additional order on August 30, 2011, some six weeks after it set a trial date and eleven months after it entered its Decision granting Mr. Hawkins a new trial. The Court of Appeals affirmed.

The trial court and Court of Appeals erred in ruling CrR 3.3(c)(2)(iii) requires a separate formal order to commence time for trial, particularly where the State has already set a trial date, and where the trial court delayed entry of a formal order until nearly 11 months after its original ruling. This court should therefore reverse the Court of Appeals and remand this matter for dismissal with prejudice.

## **II. ASSIGNMENTS OF ERROR**

The assignments of error and issues presented for review are identified in Respondent/Cross-Appellant's Opening Brief (Speedy Trial Issue) and Response to State's Appeal (New Trial), Case Nos. 30231-8-III and 30239-3-III, and the Petition for Review.

### III. STATEMENT OF THE CASE<sup>1</sup>

Mr. Hawkins was charged with two counts involving the possession of two Air-O-Fan sprayers and a Landini tractor, and two counts involving the possession and attempted possession of a Kubota tractor. (CP 14-16) Mr. Hawkins was acquitted of all but the counts relating to the Kubota tractor.

Mr. Hawkins timely appealed his conviction. Before the mandate was issued, Mr. Hawkins sought a new trial based upon newly discovered evidence relating to the movement of Kubota tractors onto Mr. Hawkins' property. Approximately sixteen months after Mr. Hawkins' conviction, Dale Martin described to Mr. Hawkins his observation of a truck unloading a Kubota tractor onto Mr. Hawkins' property and later departing with the same style Kubota tractor loaded onto the bed of the truck, during the relevant time period. (CP 1106, 1109-10, 1124, 1127-31) The defense theory at trial had been that Mr. Hawkins had been set up by persons who had planted the missing equipment onto his property.

In his declaration in support of Mr. Hawkins' motion for new trial, Mr. Martin explained he was not aware of all of the charges against Mr. Hawkins relating to the Kubota tractor, and so did not attach any

---

<sup>1</sup> The expanded version of the facts of this case are stated in greater detail in the Respondent/Cross-Appellant's Amended Opening Brief (Speedy Trial Issue) and Response to State's Appeal (New Trial) and the Petition for Review. (Pages 2 to 11 and 19 to 47 attached to this brief as Appendix A.)

significance to the movement of Kubota tractors he had seen on Mr. Hawkins' property in 2007 until much later. (CP 1106) Because Mr. Martin is field man who advises orchardists on control of disease and pests, his testimony at trial primarily concerned the missing sprayers. (CP 740, 111-13, 741-757) Mr. Martin was asked generally whether he had seen other equipment, but this was in the context of his visit to an orchard with Mr. Hawkins in 2006. (CP 745-46, 762-63) Mr. Martin was not asked whether he had seen someone moving tractors onto the Hawkins' property, nor did Mr. Martin's testimony suggest he may have seen suspicious movement of tractors. (See CP 739-767)

Before ruling, the trial court considered and applied the *Williams* factors and found Mr. Hawkins had met its requirements. (CP 1128-29, 1131, 1151) The trial court found Mr. Martin's testimony was "separate and distinct evidence which could support the position of the Defendant and be additional evidence to sway the opinion of the jury." (CP 1130) "The inference from the testimony is that someone, unknown to the Defendant or to Mr. Martin, came and switched the tractors." (CP 1129)

Although the trial court expressed its doubts about whether the Mr. Martin had only recently recalled and recognized the significance of what he had observed, the trial court found the delay in presenting the evidence was not the result of a lack of due diligence by the Defense.

(CP 1129) “[T]his Court cannot see where the Defendant or his attorney had any reason to believe that Mr. Martin may have observed what he did.” (CP 1129) “If the defendant was not aware of this occurrence there would be no reason to ask anyone about it.” (CP 1152)

On October 7, 2010, the trial court entered its Decision on Motion for New Trial, ruling “Defendant’s motion for new trial is granted.” (CP 1127-31) Relying on this decision, the State set a trial setting hearing, which was subsequently struck, with the parties and the trial court agreeing the trial court could not set a new trial date until the mandate had issued. (CP 1248; Appendix C, RP 47-41)

The mandate issued on April 12, 2011, and the State set a hearing for trial setting for July 11, 2011, ninety (90) days later. (CPA 1132, 1252) This was the first time the State had sought Mr. Hawkins’ appearance following the issuance of the mandate. The trial court set trial for September 13, 2011, 154 days after the mandate had issued. (Appendix C, RP 46)

Mr. Hawkins timely objected to the trial setting as violative of his speedy trial rights. (CP 1254, 1282) The trial court denied Mr. Hawkins’ motion to dismiss, reasoning CrR 3.3(c)(2)(iv) did not apply because Mr. Hawkins’ right to a new trial did not arise out of the Court of Appeals’ decision. (CP 1277-78) Because the trial court still had not entered a

separate formal order for new trial, it concluded the time for trial had not yet recommenced. (CP 1277-78)

The trial court did not enter its "formal order" until August 30, 2011. (CP 1279) Just as it had in the October 7, 2010 Decision, the trial court ordered "defendant's motion for new trial is granted." (CP 1281)

#### **IV. ARGUMENT**

Rulings on motions for new trial are discretionary. *State v. Slanaker*, 58 Wn. App. 161, 163, 791 P.2d 575 (1990). A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than one denying a motion for a new trial. *Id.*; *State v. Marks*, 71 Wn.2d 295, 301-02, 427 P.2d 1008 (1967); *State v. York*, 41 Wn. App. 538, 543, 704 P.2d 1252 (1985). Because the trial court did not abuse its discretion, this matter should be remanded for a new trial.

Alternatively, this matter should be dismissed because the State and trial court failed to bring Mr. Hawkins to trial within ninety days of the mandate. The application of CrR 3.3 to a particular set of facts is a question of law reviewed de novo. *State v. Raschka*, 124 Wn. App. 103, 108, 100 P.3d 339 (2004). Rule 3.3 requires trial courts to bring defendants who are out of custody to trial within ninety days, unless time is excluded or extended under the rule. Failure to strictly comply with CrR 3.3 requires dismissal with prejudice. CrR 3.3(h).

**A. The trial court did not abuse its discretion by ordering a new trial based upon Dale Martin’s testimony that he had seen a truck moving a Kubota tractor onto the Hawkins’ property during the relevant time period.**

In reviewing an order granting a motion for new trial, “[t]he question is not whether this court would have decided otherwise in the first instance, but whether the trial court was justified in reaching his conclusion. In that respect, he has very wide discretion.” *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962). Trial courts are given wide latitude because they are in the best position to weigh the evidence and weigh the competing demands of justice and economy. *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013); *Olpinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968); *Marks*, 71 Wn.2d at 301-02.

The trial court is familiar with the evidence, witnesses, and proceedings, and is in the best position to determine the effect of the new evidence and make credibility determinations. *See Dye*, 178 Wn.2d at 547-48; *Sylvester v. Olson*, 63 Wash. 285, 287-88, 115 P. 175 (1911). Washington’s deferential standard of review also recognizes that an order granting a new trial merely affords the movant another opportunity to prove his case, and does not finally adjudicate a matter. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 617, 283 P.3d 567 (2012). Because a trial court has a strong incentive to avoid crowding its dockets, a decision

to retry a matter already brought to a verdict should not be reviewed lightly. *People v. Ault*, 33 Cal. 4th 1250, 95 P.3d 523, 528, 536 (2004); *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104, 112 (Ky. 2012). For these reasons, an order granting a new trial is not an abuse of discretion unless the trial court acted on untenable grounds or for untenable reasons. *State v. McCarty*, 90 Wn. App. 195, 200, 950 P.2d 992 (1998).

Washington's five-factor test ensures the trial court's decision is tenable, by requiring a movant relying upon newly discovered evidence to show: (1) the evidence is such that the results would probably change if a new trial is granted; (2) the evidence was discovered after trial; (3) the evidence could not have been discovered before trial through the exercise of due diligence; (4) the evidence is material and admissible; and (5) the evidence is not merely cumulative or impeaching. *Williams*, 96 Wn.2d at 223. Each factor requires the trial court to weigh the facts and circumstances of the motion against what occurred at trial, both on and off the record.

Here, the trial court correctly stated the required showing for a new trial based upon newly discovered evidence and determined Mr. Hawkins had met his burden. (CP 1128-31, 1151-52) In regard to the first, fourth, and fifth elements, the trial court discussed the defense theory of the case that someone had switched Mr. Hawkins' Kubota tractor with the stolen

RLF Kubota. (CP 1128-29) The trial court compared Mr. Martin's testimony favorably with similar testimony at trial which had resulted in acquittal on the charges arising out of the missing sprayers. (CP 1129) The trial court found Mr. Martin's testimony was "separate and distinct evidence [from testimony Mr. Hawkins believed the RLF Kubota to be his own] which could support the position of the Defendant and be additional evidence to sway the jury." (CP 1130)

The trial court also considered the significance of the Court of Appeals' holding that the exclusion of evidence showing the England family had a motive to frame Mr. Hawkins was error. (CP 1130; *see also* CP 1146) The Court of Appeals concluded, however, that the error was harmless because no evidence at trial linked the Englands to the missing Kubota. (CP 1148) Mr. Martin's newly discovered observations about the clandestine movement of the Kubota provided this link. In view of the jury's decision to acquit Mr. Hawkins of the other charges based upon similar testimony, it was not a manifest abuse of discretion for the trial court to conclude Mr. Martin's testimony was material, not merely cumulative or impeaching, and likely to alter the jury's verdict. (*See* CP 1128-31, 1151-52)

The trial court affirmatively found the defense could not have discovered Mr. Martin's observation of the Kubota tractors before trial

through the exercise of due diligence. (CP 1129) Like the other *Williams* factors, whether a movant has exercised due diligence is a factual determination best left to the trial court. *Winburn v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2000). Mere knowledge that a witness exists does not mean any testimony the witness is able to give is not newly discovered. *Slanaker*, 58 Wn. App. at 166-67. Where the defense does not have sufficient information to lead it to inquire into a possible source of evidence, its failure to do so is not a failure of due diligence. *See State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), *disapproved on other grounds by State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003). The Court of Appeals therefore erred in interpreting *Williams* as requiring movants to show discovery was impossible, regardless of diligence.

Here, the trial court stated it “could not see where the Defendant had any reason to believe that Mr. Martin may have observed what he did.” (CP 1129) While the trial court conceded that if the defense had asked Mr. Martin the right question, it could have learned of the movement of the Kubota tractors, it also reasoned “[i]f the Defendant was unaware of this occurrence, there would be no reason to ask anyone about it.” Because the defense had no reason to question Mr. Martin, regardless of whether Mr. Martin knew of all of the charges or not, the trial court found “the Defendant has shown the necessary due diligence.” (CP 1129)

The trial court's ruling that Mr. Hawkins had met his burden under *Williams* is supported by factual findings that should be given substantial deference. It was the trial court who heard Mr. Martin's testimony at trial, which was centered on the missing sprayers and only generally concerned the other missing equipment. The trial court was in a favored position to determine whether it was reasonable to expect the defense to question Mr. Martin about the movement of Kubota tractors. The trial court had seen the effect of similar testimony regarding the missing sprayers at Mr. Hawkins' first trial (not guilty verdicts), and was well-positioned to determine the nature and likely effect of Mr. Martin's testimony. The trial court had observed the jury's reaction to the defense theory, even without the excluded motive evidence, and had heard defense counsel's arguments regarding the content and significance of this evidence. The trial court was therefore in a favored position to determine the jury's likely reaction if it were to hear Mr. Martin's testimony in concert with the previously excluded motive evidence. The trial court's findings that Mr. Martin's testimony was material, non-cumulative, and would likely alter the outcome at trial were reasonable and supported by the record. Its order granting new trial was, therefore, not outside the realm of acceptable choices. *Dye*, 178 Wn.2d at 548.

**B. Time for trial recommenced upon the issuance of the mandate because no formal order granting a new trial was required and because CrR 3.3(c)(2)(iv) governs the time for trial.**

Washington courts apply rules of statutory interpretation to court rules, giving effect to the plain meaning of the rule as an expression of legislative intent as determined from a reading of the entire rule. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). Courts are to reject a literal reading that is inconsistent with a logical reading of the rule or with the rule’s intent. *State v. Chhom*, 162 Wn.2d 451, 458-59, 173 P.3d 234 (2007). Courts are likewise required to reject a literal reading that results in “unlikely, absurd, or strained consequences.” *Id.* at 464 (citing *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002)).

The purpose of the speedy trial rule is to “provide a *prompt* trial for the defendant once prosecution is initiated.” *Chhom*, 162 Wn.2d at 469 (quoting *State v. Edwards*, 94 Wn.2d 208, 216, 616 P.2d 620 (1980)). “[T]he fundamental principle that the State must exercise due diligence in bringing a defendant to trial continues in force” in the amendments to CrR 3.3. *George*, 160 Wn.2d at 738. Rule 3.3 should therefore be interpreted to promote speedy trials and the expectation that the State will use diligence to achieve that purpose.

Rule 3.3(c)(2) provides that, upon the occurrence of one or more of seven enumerated events, a new commencement date will be set for the latest of the dates specified under the rule. Because Mr. Hawkins was granted a new trial while review of his conviction was pending, the relationship between subsections (iii) and (iv) is at issue in this case:

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

CrR 3.3(c)(2)(iii), (iv). At issue is whether the trial court's decision was an order for purposes of CrR 3.3(c)(2)(iii), whether subsection (iv) applies where the Court of Appeals did not remand the matter for trial, and whether the trial court's and the State's conduct created a presumptive commencement date of April 12, 2011.

- 1. The date the mandate issued is the commencement date because the decision granting a new trial was an effective order, which took effect upon restoration of jurisdiction to the trial court.**

In interpreting CrR 3.3(2)(iii), "order" should not be read in isolation, but should be interpreted in a manner that best harmonizes the

word with its context. *See State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008). According to CrR 7.5, an “order” for new trial must include a statement of whether the granting of a new trial is based upon the record or upon facts and circumstances outside the record, and provide the factual and legal basis for the new trial. CrR 7.5(d). Rule 7.5 does not require a separate formal order or require formal findings of fact and conclusions of law.

The Decision entered October 7, 2010 satisfies CrR 7.5. *See* CP 1127-31. Both the Order and the Decision state that the motion for new trial is granted and provide the factual and legal basis for that order. (CP 1131, 1152) The trial court’s Order entered nearly eleven months later is therefore superfluous. And, indeed, the State and the trial court proceeded as if the Decision were a fully effective order for purposes of setting a new trial. (CP 1245, 1247, 1252)

The State and trial court proceeded to set the matter for trial soon after the entry of the Decision. (CP 1244-47) This is exactly what CrR 3.3(d)(2) requires when it calls for the trial court to set a new date for trial “[w]hen the trial court determines that the trial date should be reset for any reason.” The State’s delay in setting a trial date was due to the trial court’s loss of jurisdiction pending appellate review and its own lack of

diligence, and not the absence of a formal order authorizing a new trial. (See 1248-1253, 1269, 1279; Appendix C, RP 37-41)

The State's after-the-fact interpretation of CrR 3.3(c)(2)(iii) as requiring entry of a separate formal order in addition to the trial court's Decision creates the absurd result of prosecution recommencing without recommencing the time for trial. The State essentially claims it can set a matter for trial without any restriction on the time within which this trial must take place. This interpretation of "order" is inconsistent with the purpose of CrR 3.3(c)(2) and creates an "unlikely, absurd, or strained consequence." *Chhom*, 162 Wn.2d at 464. Because the August 30, 2011 Order had no effect on the State's and the trial court's authority to set a new trial, it cannot reset Mr. Hawkins' time for trial. Mr. Hawkins' new trial was therefore untimely.

**2. The date the mandate was issued is the commencement date, and CrR 3.3(c)(2)(iv) does not apply because the mandate was irrelevant to Mr. Hawkins' right to a new trial.**

An interpretation of CrR 3.3(c)(2)(iv) as limited to mandates which result in a new trial is consistent with the purpose of CrR 3.3 to ensure defendants receive a prompt trial. See *Chhom*, 162 Wn.2d at 469. Rule 3.3(c)(iii) defines "appearance" as "the defendant's physical presence in the adult division of the superior court where the pending

charge was filed.” A “pending charge” is “the charge for which the allowable time for trial is being computed.” CrR 3.3(a)(3)(i). If the mandate of the reviewing court does not result in the need to compute time for a new trial, then the “appearance” following remand cannot be an appearance which commences time for trial.

Here, the mandate had no effect on Mr. Hawkins’ right to a new trial. Had there not been a Decision granting Mr. Hawkins a new trial, his next appearance would not have recommenced prosecution or time for trial. Therefore, only CrR 3.3(c)(2)(iii) governs the commencement date in this case. Because the Decision was effective to recommence prosecution, it was also effective to commence time for trial, and did so upon the restoration of the trial court’s jurisdiction on April 12, 2011.

**3. Time for trial commenced upon the issuance of the mandate because the State failed to exercise due diligence in bringing Mr. Hawkins before the trial court.**

Even if this court should determine a separate formal order is required by CrR 3.3(c)(2)(iii) or that CrR 3.3(c)(2)(iv) applies, this court should deem April 12, 2011 to be the commencement date because the State and trial court failed to exercise the diligence required of them by CrR 3.3 and 4.1.

“A defendant has no duty to bring himself to trial; the state has that duty.” *Barker v. Wingo*, 401 U.S. 514, 527, 92 S. Ct. 2182, 33 L. Ed. 2n 101 (1972). Rule 3.3 vests the trial court with responsibility to ensure its requirements are followed. CrR 3.3(a)(1). Rule 3.3 contemplates that the accused will be brought promptly before the court and that trial will commence while the underlying facts are still fresh. *City of Seattle v. Hilton*, 62 Wn. App. 487, 490-91, 815 P.2d 808 (1991). This expectation is embodied in the provisions of CrR 3.3 and 4.1, which minimize the discretion of the State and the courts in determining when to set first appearances and trial dates and in mandating trial courts reset trial dates “[w]hen the court determines that the trial date should be reset for any reason.” *See, e.g.*, CrR 3.3(d)(1), (d), 3.3(f), 4.1(a)(1).

The expectation of good faith and due diligence is embodied in the time for trial rules, even where the language of the rule does not explicitly require the State to demonstrate good faith and due diligence. *George*, 160 Wn.2d at 738. Therefore, if CrR 3.3(c)(2)(iii) does indeed require a formal order, it should be interpreted to carry with it the expectation that the trial court will ensure this order is timely entered. If CrR 3.3(c)(2)(iv) does apply to the facts of this case, it should be interpreted as assuming the State will bring the defendant before the trial court within the presumptively reasonable time set forth in CrR 4.1(a).

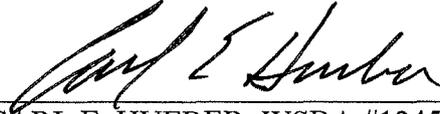
Here, the trial court and State failed to satisfy the foundational expectations of CrR 3.3. The trial court waited eleven months to enter a formal order granting a new trial. No formal order was entered until four and one-half months after the issuance of the mandate, and six weeks after the trial court set a new trial date. The State did not secure Mr. Hawkins' appearance until 90 days after the issuance of the mandate. Either basis justifies a calculation of time for trial from receipt of the mandate. This court should deem Mr. Hawkins' commencement date to be April 12, 2011, reverse the Court of Appeals, and dismiss this case with prejudice. *See Hilton*, 62 Wn. App. at 494.

## **V. CONCLUSION**

The Court of Appeals erred in giving insufficient deference to the trial court's factual determinations and in interpreting *Williams* to require a showing that discovery of new evidence before trial was impossible. The Court of Appeals also erred in holding CrR 3.3(c)(2)(iii) requires entry of a separate formal order to commence time for trial, even where the trial court has entered a Decision granting a new trial, and where the State has reinitiated prosecution on the basis of that Decision. This court should

therefore reverse the Court of Appeals and order this case dismissed with prejudice.

DATED this 7th day of February, 2014.



---

CARL E. HUEBER, WSBA #12453  
COLLETTE C. LELAND, WSBA #40686  
Attorneys for Petitioner,  
E. Troy Hawkins

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on February 7, 2014, I served the foregoing document by causing a true and correct copy of said document to be delivered to counsel and the party named below at the addresses shown below in the manner(s) indicated:

Eric C. Biggar	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Douglas County Prosecutor's	VIA EMAIL	<input type="checkbox"/>
Office	HAND DELIVERED	<input type="checkbox"/>
P.O. Box 360	BY FACSIMILE	<input type="checkbox"/>
Waterville, WA 98858	VIA FEDERAL EXPRESS	<input type="checkbox"/>

E. Troy Hawkins	VIA REGULAR MAIL	<input type="checkbox"/>
P.O. Box 66	VIA EMAIL	<input checked="" type="checkbox"/>
Manson, WA 98831	HAND DELIVERED	<input type="checkbox"/>
	BY FACSIMILE	<input type="checkbox"/>
Served by email per agreement with	VIA FEDERAL EXPRESS	<input type="checkbox"/>
E. Troy Hawkins		

DATED at Spokane, Washington, on February 7, 2014.

Cheryl Hansen

494497

# Appendix A

No. 30231-8-III and  
No. 30239-3-III

**FILED**

MAY 24 2012

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

---

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

---

STATE OF WASHINGTON,  
Appellant / Cross-Respondent,

vs.

E. TROY HAWKINS,  
Respondent / Cross-Appellant.

---

RESPONDENT/CROSS-APPELLANT'S AMENDED OPENING BRIEF  
(Speedy Trial Issue) AND RESPONSE TO STATE'S APPEAL  
(New Trial)

---

CARL E. HUEBER  
WSBA No. 12453  
WINSTON & CASHATT, LAWYERS  
601 West Riverside Avenue  
1900 Bank of America Financial Center  
Spokane, Washington 99201  
Telephone: (509) 838-6131

Attorneys for E. Troy Hawkins

COPY

2. Whether the trial court's written ruling granting a motion for a new trial is an order for speedy trial purposes.

3. Whether the State is estopped from arguing that the issuance of the Mandate did not operate as the commencement date for speedy trial purposes.

4. Whether Mr. Hawkins' right to a speedy trial was violated when his new trial was set 154 days after the issuance of the Mandate.

5. Whether the trial court abused its discretion in granting a new trial.

#### **IV. STATEMENT OF THE CASE**

Mr. Hawkins was convicted of Possession of Stolen Property and Attempted Possession of Stolen Property in Douglas County Superior Court. Mr. Hawkins appealed that conviction to this Court. (Court of Appeals No. 28118-3-III)

On August 25, 2010, while his appeal was pending, Mr. Hawkins filed a Motion for New Trial in the Superior Court based on newly discovered evidence. (CP 1096) Oral argument was set on the Motion for New Trial for September 27, 2010. (CP 1096)

On September 9, 2010, the Court of Appeals affirmed Mr. Hawkins' conviction. 157 Wn.App. 739, 238 P.3d 1226 (2010)

(CP 1133) Mr. Hawkins timely filed a Motion for Reconsideration of that ruling at the Court of Appeals. (Cover Page appended as Appendix "A")

The Superior Court heard argument on Mr. Hawkins' Motion for New Trial on September 27, 2010, took the Motion under advisement and advised the parties that it would get them a written decision. (CP 1329) The State then asked the trial court to set a date for Mr. Hawkins' resentencing. (CP 1331) In response to that request, Mr. Hawkins' trial counsel, Allen Ressler, stated:

Mr. Ressler: Well, there was a, there was a motion for reconsideration filed in the, in the, in the Court of Appeals on this decision so the mandate hasn't issued yet, so we don't have to have a report date, I don't think, until the mandate issues.

(CP 1331)

The following colloquy took place concerning the impact of the Motion for Reconsideration and the issuance of the Mandate:

Mr. Ressler: Right. So does the Court intend to do that prior to the issuance of a mandate?

The Court: Probably not if the Court of Appeals has got something under reconsideration, so...

Mr. Ressler: Well, they have a petition-a motion for reconsideration, so I'm not sure why we're setting a date prior to the issuance of the mandate. Normally we would set a, set a surrender date after the issuance of the mandate. So if the Court doesn't need our

presence here for purposes of issuing a written opinion, I don't see why we need a date until the mandate is issued.

The Court: I would think we do, Mr. Edgar [deputy prosecutor], would you?

Mr. Edgar: I'll defer to Chief Deputy-

The Court: Alright.

Mr. Edgar: - prosecutor, Mr. Biggar.

The Court: Alright.

Mr. Biggar: I didn't know they had-I didn't know they had filed for reconsideration.

The Court: No, no, once a mandate-Once they do the motion for reconsideration, they'll issue a mandate and the appeals period's in there and I don't have any idea whether anybody's going to appeal it from there, but once that occurs, then **once the mandate issues, then we'll impose a sentence.**

Mr. Ressler: Thank you, Your Honor.

(CP 1332-1334; emphasis added)

On October 7, 2010, the Superior Court ruled that Mr. Hawkins was entitled to a new trial. The trial court issued a written "Decision on Motion for New Trial" that stated in its conclusion that "Defendant's motion for a new trial is granted." (CP 1127)

On November 2, 2010, the State asked the Superior Court to set Mr. Hawkins' case on the Court's November 15th calendar "for entry of order for new trial, and trial setting." (CP 1244)

On November 8, 2010, the Superior Court noted a hearing for November 15, 2010 for an "order for new trial/trial setting." (CP 1245) On November 15, 2010, the Superior Court continued that hearing to December 2, 2010 because "DPA Biggar requests continuance-State initially didn't provide notice to defense counsel; prosecutor's office will send out notice of new hearing." (CP 1247)

On November 22, 2010, Mr. Hawkins moved to strike the December 2, 2010 hearing to set a trial date because his Motion for Reconsideration was still pending at the Court of Appeals. (CP 1248) A hearing on the motion to strike was held on November 29, 2010. Mr. Hawkins personally appeared at that hearing. (Appendix "B" - Previously filed as Ex. "M" to Motion for Discretionary Review) At that hearing, counsel for Mr. Hawkins argued that the trial court was without authority to schedule a new trial until a mandate was issued. (Appendix "C" - Previously filed as Ex. "F" to Motion for Discretionary Review, 11/29/10 Transcript, RP 37-41) The following colloquy took place:

Mr. Ressler: As I read the rule--I mean I understand Mr. Biggar's concern because the rule says that the--says the time for speedy trial begins running from the entry of the order for--for the entry of the Court's order granting a new trial, that's the new commencement date. But I--Be that as it may, that probably does not take into account the--those situations in which, in which the matter's still pending in the Court of Appeals, and so, so the, the granting of an order of new trial doesn't take into account situations where the case is still in the Court of Appeals. And because this case is still in the Court of Appeals, I don't believe that your granting the motion for new trial actually triggers the speedy trial running because I would, I would, I would--**I can't imagine being able to argue with a straight face that, that the commencement date is anything but the date that the mandate issues by the Court of Appeals.** But, you know, that, that doesn't--it doesn't seem to me to make sense that if you--that the Trial Court doesn't have the discretion to schedule a new trial, and then at the same time argue that the commencement date is, is the, is the Court granting the order--the Court granting the defense motion for a new trial.

So, despite the fact that you granted a motion for a new trial, the commencement date hasn't begun. The commencement date is not the--not that order, but rather it is that, that the Court of Appeals decides to get around to dealing with the, the, I mean, the, the, the defense motion for reconsideration, and hopefully that'll be in the summer time...

The Court: Mr. Biggar? ...

Mr. Biggar: Well, with that concession, Your Honor, I think Counsel's argument does make some sense. **I would take the position that speedy trial, that commencement date of speedy trial does not occur until, I guess, one of two things: One, the mandate is received or until this Court actually formally enters an order granting new trial.** This Court has entered a memorandum of opinion (sic). I think under the rules that's not technically an order for a new trial; I think one would need to be rendered in writing with findings and conclusions.

Mr. Ressler: I'm not going to argue that, that, that whatever it is that--I mean, I don't necessarily agree with that last thing, you know, but I will not, I will not, I will not argue that, that the, that--and I've talked to my client about this and I've told him that this was the position I was taking with the Court. So--and I think it's legally the right decision. I've tried to research this to see if I can find anything that--I think we're in a peculiar situation. I can't find anything that, that tells me the answer to this question, but, but the most sensible answer, I think, is that until the case comes back to the Trial Court from the Court of Appeals, we can't schedule a new trial, and I, and I certainly won't argue that, that the commencement date is the, the date that the Court granted the motion for new trial, whether that be in a formal order, or whether it be in a memorandum decision that the Court issued. But, in any, in any event, it would seem--it

would not be, it would not be appropriate for me to, to talk out of both sides of my mouth.

The Court: Well, the Court agrees that the speedy trial can't begin to run until such time as the Court has the ability to set it for trial, and **the Court doesn't, pursuant to the rules, have the ability to set it for trial at this particular time until it's mandated back.** So, under those circumstances, we won't set it for trial until that occurs. **Speedy trial will not begin to run until such time as the mandate has come back.**

Mr. Ressler: Okay. Thank you, Your Honor.

Mr. Biggar: Thank you.

(Appendix "C," RP 37-41; emphasis added)

On December 6, 2010, the Court of Appeals sent a letter to the State that provided:

It has come to our attention that a Decision on Motion for New Trial was filed in Douglas County on October 7, 2010. Pursuant to RAP 7.2(e), a motion for permission to file a trial court determination which will change a decision being reviewed by the appellate court must be obtained prior to the formal entry of the trial court decision. A Motion for Reconsideration is pending in the appellate court. Please file such motion within five days, by December 13, 2010.

(Appendix "D") The State did not follow the Court of Appeals' directive to file a motion pursuant to RAP 7.2 for permission to file a formal order.

The State took no action in response to this letter.

On April 12, 2011, the Court of Appeals issued the Mandate on this case. (CP 1132) The issuance of the Mandate operated as the commencement date for Mr. Hawkins' speedy trial clock.

On June 21, 2011, the State filed a Notice of Hearing for July 11, 2011 for a trial setting. (CP 1252) This trial setting hearing (not the trial) was set for the 90th day following the issuance of the Mandate. The State's filing of this notice to set a trial date based on the new trial ruling is most curious in light of the State's present position that the court was without authority to do anything pertaining to a new trial until such time as a formal order on the new trial ruling was entered.

On July 11, 2011, counsel and Mr. Hawkins appeared for the trial setting hearing. The following colloquy took place:

Mr. Biggar: A bit of a backdrop: Mr. Hawkins was previously convicted, appealed to the Court of Appeals, that was affirmed, sought discretionary review with the Supreme Court, that request was denied. In the interim period, defense had brought a motion for a new trial, which the Court, at least from the State's perspective, orally granted, but no written order has been entered. And, again, in the State's perspective, although Judge Hotchkiss did enter a oral-or, excuse me, a written ruling by letter opinion-

The Court: Okay.

Mr. Biggar: In any event, we'd like to go ahead and set a trial date...

I also understand, and I'll let defense Counsel articulate, but that they're maybe challenging speedy trial, based on the issuance of the mandate from the Court of Appeals.

(Appendix "C"; RP 42-43) At the hearing, defense counsel specifically objected to the setting of a trial date and stated that no right to speedy trial was being waived. (Appendix "C"; RP 44) The Superior Court set September 13, 2011 as the new trial date. (Appendix "C"; RP 46) This trial setting was 154 days after the issuance of the Mandate. The Superior Court also ruled that the conditions of release that had been previously set would remain in effect while the case was ongoing. (Appendix "C"; RP 48)

On July 18, 2011, the defense formally objected to the new trial date as being in violation of Mr. Hawkins' speedy trial rights. (CP 1254)

The trial court heard argument on the speedy trial motion on August 8, 2011. At that hearing, the State argued erroneously that the trial court did not have the authority to enter its ruling on the motion for a new trial. (Appendix "C"; RP 56)

On August 11, 2011, the Superior Court filed a written decision on defendant's motion objecting to trial setting pursuant to CrR 3.3(d)(3).

(CP 1273) The Superior Court ruled that it did not have jurisdiction to order a new trial while the appeal was pending and that the new speedy trial commencement date would begin when such an order for new trial was entered.

On August 29, 2011, the trial court entered Findings of Fact, Conclusions of Law and Order Denying Motion to Dismiss. (CP 1276)

On August 30, 2011, the trial court also entered Findings of Fact, Conclusions of Law and Order Granting New Trial. (CP 1279)

On September 15, 2011, Mr. Hawkins timely filed a Notice for Discretionary Review which was granted on November 1, 2011. (CP 1282)

## V. ARGUMENT

- 1. When the Superior Court grants a new trial while an appeal is pending, the filing of the mandate operates as the commencement date for speedy trial purposes.**

Mr. Hawkins' appeal was pending when the Superior Court ordered a new trial. The issuance of the Mandate must be treated as the new commencement date.

The right to a speedy trial is a fundamental right. State v. White, 23 Wn.App. 438, 440, 597 P.2d 420 (1979). Strict compliance with the speedy trial rule is required. State v. Teems, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997). When the rule is not strictly followed, the case

did not need permission from the Court of Appeals. See, Leen v. Demopolis, 62 Wn.App. 473, 484-85, 815 P.2d 269 (1991).

As a practical matter, the State ignored this directive and the order for a new trial became effective by operation of law when the Mandate was issued. Assuming the State had timely complied with the directive, the "formal order" for a new trial would still have only become effective upon issuance of the Mandate.

**5. The trial court properly exercised its discretion when it granted a new trial. (Response to State's appeal)**

In its appeal, the State asserts that the trial court abused its discretion in granting Mr. Hawkins' motion for a new trial based on newly discovered evidence. (Amended Brief of Appellant) None of the State's theories are sufficient to meet the high showing needed to reverse an order granting a new trial.

The granting of a motion for a new trial based on newly discovered evidence is within the sound discretion of the trial court, and the ruling on such a motion will not be overturned unless it can be shown that the trial court abused its discretion. State v. Young, 76 Wn.2d 551, 555, 458 P.2d 8 (1969). The test for abuse of discretion in this context is whether it can realistically be said that "no reasonable person would take the position adopted by the trial court." State v. Dawkins, 71 Wn.App. 902, 907, 863

P.2d 124 (1993) (quoting State v. Huelett, 92 Wn.2d 967, 603 P.2d 1258 (1979)).

Appellate courts will rarely control the exercise of discretion of a trial court in granting a new trial on the ground of newly discovered evidence. State v. O'Brien, 66 Wash. 219, 224, 119 P. 609 (1911).

Here, the trial court sat through a lengthy trial and later heard and considered the motion for a new trial. The trial court was familiar with the appropriate legal standards for such a motion and properly exercised its discretion and granted Mr. Hawkins a new trial.

**a. Factual background.**

The jury heard evidence concerning allegedly stolen sprayers, a Landini tractor, and an RLF Kubota 7030 tractor. This evidence was presented to support the State's theory that Mr. Hawkins unlawfully possessed stolen property. The jury heard evidence that the sprayers and the Landini tractor could have been planted on the Sundance Slope property. The jury acquitted Mr. Hawkins on these counts. The jury did not hear any evidence as to how the RLF Kubota 7030 tractor wound up on the Sundance Slope property, which would have resulted in Mr. Hawkins unknowingly delivering a tractor that was not his to Valley Tractor for repair. The newly discovered evidence provided the missing

link that would have allowed the jury to also acquit Mr. Hawkins of the two counts involving the RLF Kubota 7030 tractor.

In ruling on the motion for a new trial, the trial court had the benefit of presiding over a lengthy trial in this case. The trial court was familiar with the underlying facts, the arguments and defenses raised during trial, and the issues raised in post-trial motions and the appeal that was pending at that time.

Unfortunately, this Court does not have the same benefit. Accordingly, the following factual background from the trial is set forth to place the present motion in proper context.

This case arises from the disappearance and switching of Sundance Slope's farm equipment. Mr. Hawkins works for Sundance Slope which operates an orchard business and maintains a fleet of tractors. Two of its tractors were taken and replaced with tractors that had been taken from a former competitor.

At the time of trial, Troy and Britt Hawkins had been married for 19 years. (CP 592) They had five daughters. (CP 594) Upon graduation from college, they moved to Texas where Mr. Hawkins worked in the financial industry and Mrs. Hawkins worked as a school teacher. (CP 799)

Mrs. Hawkins' family has been involved in the orchard business for generations. (CP 800) While living in Texas, Mrs. Hawkins desired to return to Washington to raise her children and to get involved in orcharding. (CP 595) In 2002, Mrs. Hawkins purchased a piece of Washington orchard property. (CP 596) Because the Hawkinses were still in Texas, arrangements were made to have Mrs. Hawkins' father, Doug England, and her uncle, Len England, operate the orchard. Her father, Doug England, also managed a local apple packing cooperative by the name of Manson Growers. (CP 597)

The Hawkinses left Texas and moved to Manson in 2004. (CP 598) Mr. Hawkins had no prior involvement in the orchard industry. (CP 804) In 2004, the Hawkinses worked their own orchard and three other orchards they were leasing and marketed their apples that season through Manson Growers. (CP 598) The Hawkinses stopped marketing their apples through Manson Growers during the 2006 season because of conflicts with the Englands. (CP 598)

The trial court excluded evidence of the conflict between the Hawkinses and the Englands. (CP 599-605) Had this evidence been admitted, the jury would have heard that the Hawkinses sold their apples and purchased their chemicals through Manson Growers, the local apple packing cooperative run by Mrs. Hawkins' father, Doug England.

(RP 592) During the 2006 growing season, Mr. Hawkins discovered that Manson Growers was overcharging its members for chemicals. Mr. Hawkins confronted the Englands on this overcharging in front of the Manson Growers Board of Directors. (Supp. CP \_\_\_\_, Memorandum in Support of New Trial) Shortly thereafter, Sundance Slope (the Hawkinses' business) terminated its relationship with Manson Growers, causing the cooperative to suffer a substantial loss of business. (Supp. CP \_\_\_\_, Memorandum in Support of New Trial) Because of these events, the relationship between the Hawkinses and Englands became mutually hostile. (Supp. CP \_\_\_\_, Memorandum in Support of New Trial) This hostility between the families was widely known in the community, including among the State's witnesses in this case.

By 2006, the Hawkinses were working a total of seven orchards in Chelan and Douglas Counties. (CP 811, 812) At harvest time, they had over 80 people working in their orchards. (CP 806)

**Sundance Slope Equipment.**

The operation of multiple orchards required considerable equipment, including a fleet of tractors. When the Hawkinses bought their first orchard, there was some equipment that came with the purchase. (CP 808) When they subsequently purchased the property that included

their home, there was additional equipment acquired as part of that sale.  
(CP 808)

The Hawkinses acquired additional used equipment, which was generally acquired at auctions. (CP 609) They stored their equipment at two shops on their home property. (CP 609)

**RLF Columbia Land Holdings.**

Two orchards, the Beebe Ranch Orchard and the Twin W Orchard, played roles in this case. These orchards were purchased by RLF Columbia Land Holdings<sup>2</sup> in 2001. (CP 265) RLF leased the orchards to the Zirkle Fruit Company until 2006. (CP 267) Zirkle Fruit employed Robert Morrison as its orchard manager. (CP 195) Mr. Morrison's wife was employed at Manson Growers. (CP 194) At the end of the 2005 season, the lease between Zirkle Fruit and RLF was terminated. (CP 196) Mr. Morrison was unemployed for several months, but was subsequently hired by RLF to keep an eye on the orchards. (CP 157)

**Hawkins Inspection of the RLF Equipment.**

When the lease between RLF and Zirkle Fruit for the Beebe Ranch and Twin W property was terminated in late 2005, RLF offered the lease

---

<sup>2</sup> Throughout the course of trial, this company was variously referred to as RLF, RLH and RLF Columbia Landholdings. It will be collectively referred to as RLF in this brief.

for the 2006 season to other orchardists. (CP 174) Sundance Slope was potentially interested in leasing one or both of these properties. (CP 174) Sundance Slope eventually leased a portion of the Twin W Orchard. (CP 177)

Mr. Hawkins was also in discussions with RLF to lease the Beebe Ranch Orchard for the 2006 season. (CP 234) During those discussions, Mr. Hawkins and Alvin Anderson, an experienced orchard manager and mechanic who assisted Mr. Hawkins with orchard decisions (CP 616), inspected the Beebe Ranch equipment that would be included with the lease. (CP 235) This included a Kubota 7030 tractor and a Landini tractor. (CP 235) Mr. Hawkins and Mr. Anderson inspected the Kubota 7030 tractor and determined it did not function at all in four-wheel drive. (CP 238, 828) The problems with the four-wheel drive operation of the Kubota 7030 tractor were also documented in emails between Mr. Hawkins and RLF. (CP 311) Ultimately, the Hawkinses did not lease the Beebe Ranch Orchard. (CP 825)

#### **The Air-O-Fan Sprayers.**

Two Air-O-Fan sprayers were used by Zirkle Fruit in 2004 when it worked the Twin W Orchard. (CP 741) The sprayers were unique as they had been modified to add multiple spray nozzles from the original factory settings. (CP 743) Zirkle Fruit determined these sprayers were not

adequate for what they were doing as they did not get sufficient penetration into the trees. (CP 743) Zirkle Fruit replaced these sprayers with new sprayers. (CP 744) Zirkle Fruit never used the Air-O-Fan sprayers again. (CP 744)

When Sundance Slope was considering whether to lease any of the RLF orchards, Mr. Hawkins had the opportunity to inspect one of the old Air-O-Fan sprayers with Dale Martin, a field man for GS Long Company in Yakima. (CP 819)<sup>3</sup> As a field man, Mr. Martin's job was to walk the orchards and make recommendations to the owners, including Mr. Hawkins, as to chemicals that should be used. (CP 741) When Mr. Hawkins and Mr. Martin inspected the old Air-O-Fan sprayers, they concluded that they were obsolete and would never be used in Mr. Hawkins' orchard. (CP 822)

#### **The Theft of RLF's Equipment.**

At the end of the 2005 season, RLF stored its equipment at both the Beebe Ranch and the Twin W Orchard. (CP 159) This equipment included the Kubota 7030 tractor ("RLF Kubota 7030 tractor"), the

---

<sup>3</sup> Mr. Martin later provided the Declaration that resulted in the trial court granting a new trial.

Landini tractor ("RLF Landini tractor"), and the two Air-O-Fan sprayers, which Mr. Hawkins had previously inspected. (CP 159)

Mr. Morrison testified that on April 2, 2006, this equipment was missing. (CP 162) Mr. Morrison reported the theft to RLF. (CP 164) Several weeks later, Mr. Morrison reported the thefts to the Douglas County Sheriff's Office and provided an appraisal list that had been previously prepared by Valley Tractor which included the make and model of the equipment. (CP 166) Mr. Morrison added serial numbers to the appraisal list. (CP 167) This list contained the RLF Kubota 7030 tractor, the RLF Landini tractor, and the RLF Air-O-Fan sprayers. (CP 167)

**The Hawkins 7030 Kubota Tractor.**

Sundance Slope's fleet of tractors also included a Kubota 7030 tractor ("Hawkins Kubota 7030 tractor") and a Landini tractor ("Hawkins Landini tractor"). (CP 809)

The Hawkins Kubota 7030 tractor was purchased by Mr. Hawkins during the summer of 2005. (CP 613, 699) This tractor had been for sale in Mattawa and was checked out by Mr. Hawkins and Alvin Anderson. Mr. Hawkins, with Mr. Anderson's assistance, purchased the used Hawkins Kubota 7030 tractor for \$3,000 or \$3,300. (CP 613, 695) At the

time of the purchase, Mr. Hawkins did not record or check the serial number. (CP 933)

The Hawkins Kubota 7030 tractor was brought to the Hawkinses' property and used during the 2005 growing season. (CP 617, 699) During the 2005 growing season, the Hawkins Kubota 7030 experienced mechanical problems and would stick in gear. (CP 617) Mr. Anderson was able to make the necessary repairs. The Hawkins Kubota 7030 tractor was stored in the Hawkins' shop at the conclusion of the 2005 growing season. (CP 701)

A year later, at the close of the 2006 growing season, all of the Sundance Slope equipment was winterized and stored in the Hawkins' shop. (CP 775) Julio Juraz testified that he was the mechanic that winterized the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor at the end of the 2006 season. (CP 775) Mr. Juraz testified that during the 2006 season, there was an incident when the key to the Hawkins Kubota 7030 went missing. (CP 777) Two or three days later, the Hawkins Kubota 7030 tractor was found in the middle of the road, far away from where it had been parked. It had run out of diesel fuel. (CP 778) A fair inference from this is that someone had taken the key and attempted to drive away the tractor, but ran out of fuel.

**The Hawkins Landini Tractor.**

In the summer of 2005, Mrs. Hawkins became aware of a used Landini tractor that was for sale. (CP 633) Mrs. Hawkins asked the seller to contact her mechanic, Mr. Anderson. (CP 634) The seller brought the Landini tractor to Mr. Anderson's shop for inspection. (CP 702) Mr. Anderson identified repair work that was needed. (CP 703) The seller made some of the repairs and brought the tractor back to Mr. Anderson's shop a second time. (CP 703) It was again rejected due to mechanical problems. (CP 703) The seller made additional repairs which finally satisfied Mr. Anderson. (CP 705) The Hawkinses purchased the Landini 6550 tractor for \$3,600. (CP 705-708)

Mr. Anderson testified that he saw **both** the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor used in the field during the 2005 and 2006 seasons and at the Hawkins shop at the start of the 2007 season. (CP 708)

**The Investigation into the Missing RLF Equipment.**

Mr. Morrison reported the theft of the RLF equipment, including the RLF Kubota 7030 tractor, the RLF Landini tractor, and the two sprayers in April of 2006.

Mr. Morrison testified that in August of 2006, he received a phone call from Len England, Mrs. Hawkins' uncle, advising him that he knew

where the RLF sprayers were and that he had pictures of them. (CP 179, 245) Len England gave Mr. Morrison several photos of the sprayers that had been taken at night. (CP 179, 367) Mr. Morrison testified that Len England did not tell him who took the pictures. (CP 245) In fact, Mr. Morrison testified that he did not discuss with Len England who took the pictures. (CP 245) Len England told Mr. Morrison not to tell the police that he learned of the missing sprayers from him. (CP 247) Mr. Morrison testified that Len England told him that the sprayers could be found on some orchard property that was being leased by Sundance Slope. (CP 245)

Mr. Morrison contacted the Douglas County Sheriff's Office and reported the information that he had been given by Len England. (CP 365) He made his report to Deputy Scott Allen. (CP 366) At first, Mr. Morrison refused to give Deputy Allen the name of the person who took the photos. (CP 366) He eventually identified Len England as the source of the photos and the information concerning the location of the sprayers. (CP 366)

When Mr. Morrison told Deputy Allen that the photos and sprayer information had come from Len England, Deputy Allen knew that Mrs. Hawkins was a member of the England family. (CP 365) He was also aware that one of the Englands, Dale England, was a Chelan County

Detective. (CP 365) Deputy Allen testified there was a dispute in the England family and that he did not want Detective England involved in this investigation as it was a conflict of interest. (CP 365) At this point, the court sustained an objection by the State that precluded further testimony concerning the dispute between the Hawkins and England families. (CP 365)

Deputy Allen used the information that came from Len England to obtain a search warrant for the sprayers that was executed on September 5, 2006. (CP 329-331) Despite the fact that the photos and information provided by Len England were set forth in the search warrant affidavit, law enforcement never interviewed Len England concerning how he knew the location of the sprayers, how he knew they belonged to RLF, or why the photos were taken at night. (CP 367)

The sprayers were found near a burned out trailer in a remote area on property that Sundance Slope had leased at the time. (CP 679) Deputy Allen called Mr. Hawkins when he seized the sprayers. (CP 332) Mr. Hawkins arrived at the search location and advised Deputy Allen that he did not know who owned the sprayers and that he did not know they were on his leased property. (CP 333-334) No charges were filed at that time.

During the investigation and execution of the sprayer search warrant, Deputy Allen was advised that Don and Gloria Bailey had information pertinent to the investigation. (CP 362) The Baileys lived adjacent to where the sprayers were recovered. In fact, when the search warrant was executed, law enforcement needed to get permission from the Baileys to cross their property. (CP 675)

Gloria Bailey testified at trial that sometime between a week to ten days prior to the execution of the sprayer search warrant, at approximately 12:30 am or 1:30 am, she saw a small blue pickup truck, a Ford Ranger, with a loaded trailer travel down her road to the area where the sprayers were later found. (CP 675) After the truck was out of sight for 20-30 minutes, Mrs. Bailey became nervous and walked out of her house to investigate. (CP 677, 682) When she saw the truck coming back up her road, she turned on her outside lights. (CP 678) When her lights came on, the driver accelerated rapidly and the now-empty trailer was bouncing all over the place. (CP 678) Mrs. Bailey had been to the location where the sprayers were found a week or two earlier and there was nothing there other than a burned out trailer. (CP 679) No equipment was there at that time. (CP 679) Neither Deputy Allen nor any law enforcement officer contacted the Baileys or investigated this related suspicious activity.

(CP 362) Deputy Allen testified that it was a mistake to not follow up on the Bailey report. (CP 383)

Mr. Morrison owns a blue Ford Ranger. (CP 249) During this time, Mr. Morrison's wife was employed at Manson Growers. (CP 194) Doug England was the manager of Manson Growers and Mr. Hawkins' father-in-law. (CP 194)

Due to the recovery of the missing sprayers, the criminal investigation continued. (CP 326) On October 24, 2006, two Chelan County officers arrived at the Hawkins home and asked for permission to inspect their orchard equipment. (CP 376, 632) Mrs. Hawkins granted permission and opened up her shop to allow access for the officers. (CP 632) When the police arrived, they had a copy of the appraisal list with serial numbers of the missing RLF equipment that had been provided by Mr. Morrison. (CP 840) On that day, the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor were both in the Hawkins shop. (CP 632) Officer Randy Lake spent between sixty and ninety minutes inspecting all of the Hawkins equipment. (CP 632) This inspection included the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor. (CP 632) Law enforcement checked every piece of equipment, lifting every hood of every tractor. (CP 842) Deputy Lake wrote down serial numbers. (CP 842)

After inspecting all of the Hawkins equipment, the officers reported that there was nothing to suggest that any of the missing RLF equipment was at Sundance Slope. (CP 376) There were no tractors with missing or ground-off serial numbers. (CP 463) They did not write a report or save the serial numbers that were recorded. (CP 459)

It is undisputed that as of October 24, 2006, the Hawkins Kubota 7030 tractor and the Hawkins Landini tractor were at the Hawkins shop. There were no problems with serial numbers nor was any RLF equipment at the Hawkins' shop.

#### **The Shop Burglary.**

On October 25, 2006, the day following law enforcement's search, the Hawkins shop was burglarized. (CP 629, 838) During the burglary, a large tool box and an expandable file that contained equipment records, bills of sale, and tractor part numbers were taken. (CP 838, 663) This break-in and theft were reported to Chelan County. (CP 629) The Hawkinses filed an insurance claim for the shop burglary. (CP 700)

#### **The Start of the 2007 Growing Season.**

In the Spring of 2007, Mr. Hawkins pulled the Kubota 7030 and Landini tractors out of Sundance Slope storage and began getting the equipment ready for the upcoming season. The tractors were parked outside of the shop. The tractors started up and appeared to have no

operational problems. (CP 848) Unbeknownst to Mr. Hawkins, someone switched the Hawkins Kubota and Landini tractors with the RLF Kubota and Landini tractors.

Not realizing the switch, Mr. Hawkins tried to move the Kubota 7030 tractor, but it would not start. (CP 846) He called Mr. Anderson to perform repairs. (CP 846) Mr. Anderson recalled that he had replaced the battery and battery cables on the Hawkins Kubota 7030 tractor at the end of the 2006 season. (CP 710) The Kubota tractor that would not start at the beginning of the 2007 season had an old battery and old battery cables. (CP 710, 847) Mr. Anderson wondered if someone had changed the batteries. (CP 710) Mr. Anderson further noticed that the Kubota tractor he was working on did not have the attachments for a bin trailer that had been on the Hawkins Kubota 7030 tractor at the end of the 2006 growing season. (CP 710) When later shown photos from the investigation, Mr. Anderson also noticed that the Kubota tractor he was working on had lights. (CP 722) The Hawkins Kubota 7030 tractor did not have lights. (CP 722) At trial, Mr. Anderson testified that the tractor he worked on at the start of the 2007 season was not the same tractor that he and Mr. Hawkins had purchased in Mattawa and that he had attempted to repair at the end of the 2006 season. (CP 724)

Mr. Anderson continued to work on this tractor and concluded it had significant problems with its four-wheel drive system. (CP 711) This seemed odd to Mr. Anderson as the Hawkins Kubota 7030 tractor had never had four-wheel drive problems. (CP 711) Mr. Anderson did not have time to make the four-wheel drive repairs and told Mr. Hawkins that the tractor should be taken to the dealer, Valley Tractor, to be repaired. (CP 712, 848)

Because the Kubota tractor would not start and the four-wheel drive was not working, Mr. Hawkins followed Mr. Anderson's advice and took the tractor to Valley Tractor on April 3, 2007. (CP 620, 395, 418) These problems were puzzling as the Hawkins Kubota 7030 tractor did not have any starting or four-wheel drive problems when it was winterized, placed into storage at the end of the 2006 season, and brought out of the shop and parked in the loading area at the start of the 2007 season. (CP 848) However, Mr. Hawkins did not have any notion that the tractor he delivered to Valley Tractor was not his. (CP 848)

Mr. Hawkins had previously taken equipment to Valley Tractor for repairs. (CP 849) He knew that his receipts always contained the serial number of the equipment he brought in. (CP 849) Valley Tractor employees testified that anyone who brings in a tractor knows that they

will always receive a receipt containing the equipment's serial number.  
(CP 426)

The Valley Tractor mechanics determined that the cause of the four-wheel drive problem on the Kubota 7030 tractor was a blown clutch pack. (CP 398) In performing this diagnosis, the mechanics noticed that the serial number of the tractor had been ground off and the ID plate was missing. (CP 400, 421)<sup>4</sup> The mechanics also determined that the Kubota tractor that Mr. Hawkins brought in belonged to Twin W Orchard based upon work they had previously done on the tractor. (CP 407, 413) Valley Tractor told Mr. Hawkins that it would need to order parts. (CP 399) Meanwhile, Valley Tractor contacted the Douglas County Sheriff's Office and reported that it had a tractor with ground off and missing serial numbers. (CP 340) Deputy Bill Black responded and took a number of photos showing grind marks where the serial numbers had been. (CP 343) Deputy Black asked Valley Tractor to notify him when Mr. Hawkins returned to pick up the tractor. (CP 345)

---

<sup>4</sup> In October of 2006, Chelan County officers had inspected the Hawkins' 7030 tractor and the Hawkins' Landini tractor. (CP 632) Neither of these tractors had ground off or missing serial numbers. (CP 463)

On June 7, 2007, Valley Tractor advised Mrs. Hawkins that the Kubota tractor was ready to be picked up. (CP 625) Mr. Hawkins drove his truck and trailer to pick up the tractor the next day. (CP 852) Upon his arrival, a Valley Tractor employee attempted to start the tractor, but it would not start. (CP 852) After the Valley Tractor employee could not start the tractor, Mr. Hawkins started to drive away. (CP 853) As he started to leave, a law enforcement officer knocked on his window and arrested him. (CP 854) Mr. Hawkins' truck and trailer remained at Valley Tractor. Mr. Hawkins was not told why he was being arrested. (CP 854) He was taken to jail and held for three to four hours before his wife posted bail. (CP 627, 855) He was not given any paperwork by the arresting officer or the jail regarding the charge that was the basis for his arrest. (CP 855) Mr. Hawkins had no idea why he had been arrested.<sup>5</sup>

After his release from jail and having not been advised of the basis for his arrest, Mr. Hawkins returned the following morning to Valley Tractor to pick up his truck and trailer and the Kubota tractor he believed

---

<sup>5</sup> Mr. Hawkins was arrested by Deputy Brandon Long who had been sent by dispatch to Valley Tractor to make a probable cause arrest of Mr. Hawkins. (CP 491) Deputy Long prepared a report that stated he arrested Mr. Hawkins for possession of stolen property but said nothing about the basis of the charge being a tractor. (CP 493) Despite what was in his report, he testified at trial that he told Mr. Hawkins he was under arrest for possession of a tractor. (CP 491) Mr. Hawkins testified consistent with Deputy Long's report that he had not been told his arrest involved a tractor. (CP 857)

he owned. (CP 856) Mr. Hawkins put the pickup he drove and the tractor on his trailer and headed back to his shop in Manson. (CP 861) On his way home, he was stopped by a Chelan County Sheriff in downtown Chelan. (CP 861) Mr. Hawkins learned during that stop that the tractor he was hauling might have been the subject of a dispute and the reason he was arrested the day before. (CP 862) Mr. Hawkins was not detained from this stop. (CP 862)

After he returned home and was unloading the tractor, he was again contacted by Officer Lake, one of the officers who had previously inspected the Hawkins equipment on October 24, 2006 and determined there was no stolen machinery, nor any machinery with ground off or missing serial numbers, in the Hawkins' shops. Officer Lake assisted Mr. Hawkins in unloading the tractor and departed the scene. (CP 842, 863)

On June 11, 2007, a search warrant for the Kubota tractor was executed and the tractor was recovered from the Sundance Slope shop. (CP 349) To obtain information for the warrant covering the Hawkins residence, Deputy Allen testified that he spoke with Detective Dale England from Chelan County. (CP 379) The tractor was located where Officer Lake and Mr. Hawkins had left it. Mr. Hawkins was arrested again that day. (CP 865)

**Illegal Search and Seizure of Kubota 2550 Tractor.<sup>6</sup>**

On October 23, 2006, Robert Morrison contacted Chelan County Deputy Jeremy Mathena and reported seeing an allegedly stolen RLF Kubota 2550 tractor in Manson. (Supp. CP \_\_\_\_, Motion to Suppress)

While Deputy Mathena was in route to the location to investigate, he received a call from Chelan County Detective Dale England. (Supp. CP \_\_\_\_, Motion to Suppress) Detective England had called Deputy Mathena to offer his unsolicited assistance in locating the allegedly stolen tractor. (Supp. CP \_\_\_\_, Motion to Suppress)

The allegedly stolen tractor, a Kubota 2550, was on property leased by Sundance Slope. (Supp. CP \_\_\_\_, Motion to Suppress) Mr. Morrison had advised Deputy Mathena that he had entered onto the Sundance Slope property to confirm the serial number of the tractor. (Supp. CP \_\_\_\_, Motion to Suppress)

Deputy Mathena arrived at the Sundance Slope property and entered without a warrant. (Supp. CP \_\_\_\_, Motion to Suppress) He drove between a house and a shop on a private driveway and passed a "No Trespassing" sign. (Supp. CP \_\_\_\_, Motion to Suppress) Deputy

---

<sup>6</sup> This discussion concerns evidence presented at trial concerning a Kubota 2550 tractor which is separate and different from the Hawkins Kubota 7030.

Mathena circled around the shop and exited his vehicle to inspect the tractor. (Supp. CP \_\_\_\_, Motion to Suppress) He located the tractor's serial number and confirmed it was the same serial number that Mr. Morrison had reported as stolen. (Supp. CP \_\_\_\_, Motion to Suppress) Deputy Mathena photographed the tractor and released it to Mr. Morrison who drove it away. (Supp. CP \_\_\_\_, Motion to Suppress)

Deputy Mathena surmised that the tractor was driven by Mr. Morrison to property owned by Manson Growers, a company run by Mr. Hawkins' father-in-law, Doug England. (Supp. CP \_\_\_\_, Motion to Suppress)

#### **Illegal Stop and Search of Landini Tractor.**

On September 11, 2007, Douglas County Deputy Dean Schlaman received a call from Detective Dale England that he had seen the allegedly stolen RLF Landini tractor being towed by one of the Hawkins distinctive Dodge flatbed pickups. (Supp. CP \_\_\_\_, Motion to Suppress) Detective Dale England is one of Mrs. Hawkins' uncles. Detective England told Deputy Schlaman that the truck was headed to Douglas County. (Supp. CP \_\_\_\_, Motion to Suppress; CP 546) Detective England asked Detective Schlaman to stop the pickup that was transporting the Landini tractor. (CP 547) Detective England had the list of stolen equipment from RLF. (CP 548)

Deputy Schlaman, at Detective England's request, stopped the vehicle and conducted a "Terry stop". Deputy Schlaman, by his own admission, acknowledged that the driver had not committed a driving infraction. (Supp. CP \_\_\_\_, Motion to Suppress) Deputy Schlaman was unable to communicate with the driver due to a language barrier and thus was unable to obtain the driver's consent to search. (Supp. CP \_\_\_\_, Motion to Suppress; CP 548) Deputy Schlaman, nevertheless, physically got up on the trailer and inspected the tractor for identifying numbers. (Supp. CP \_\_\_\_, Motion to Suppress; CP 548) Detective England arrived shortly thereafter and assisted in looking for serial numbers on the tractor. (Supp. CP \_\_\_\_, Motion to Suppress) There were no missing serial numbers on the Landini tractor. (CP 550)

At a different time, Detective Schlaman received another call from Detective England that he had information about a serial number being ground off a tractor. (CP 552) Detective England gave Detective Schlaman the name of the person who allegedly ground off the serial number. (CP 552) Detective Schlaman contacted the person, who denied any knowledge of the allegations. (CP 553)

In October of 2007, Detective Schlaman learned that Mr. Morrison had found a stolen tractor on orchard property leased by Sundance Slope. This was the same orchard where the sprayers had been found. (CP 535)

On October 8, 2007, another search warrant was executed for the recovery of the Landini tractor from an orchard being leased by Sundance Slope. (CP 867) The Landini tractor described in the search warrant had special hydraulic equipment. (CP 868) The Landini that was seized that day had no special hydraulic equipment. (CP 868) Following the seizure of the Landini 6550 tractor, Mr. Hawkins did not have a Landini 6550 in his fleet. (CP 869)

**Motion to Suppress Illegal Searches and Seizures.**

Prior to trial, the defense filed a motion to suppress the warrantless search and seizure of the Kubota 2550 tractor and the illegal stop and search of the Landini tractor. (Supp. CP \_\_\_\_\_, Motion to Suppress)

In response to the suppression motion, the State filed a Response that stated:

**III. STIPULATIONS BY THE STATE**

3.1 Kubota 2550. The State stipulates that it will not introduce evidence at trial relating to the alleged possession by defendant of the Kubota 2550 on October 23, 2006, and the search and seizure of the Kubota 2550 by Deputy Jeremy Mathena on that date.

3.2 Landini 6550. The State stipulates that it will not introduce evidence relating to the "Terry stop" by Detective Dean Schlaman of an employee of defendant on September 11, 2007, and his subsequent search of the Landini 6550 during the stop.

On February 27, 2009, the trial court granted the motion to suppress. (CP 1153)

**The Charges Against Mr. Hawkins.**

Mr. Hawkins was charged by Second Amended Information with four counts. (CP 14) Count One was Possession of Stolen Property in the First Degree for the two Air-O-Fan sprayers. Count Two was Attempted Possession of Stolen Property in the First Degree based upon Mr. Hawkins' actions on June 8, 2007, at Valley Tractor of showing up to pick up the Kubota tractor. (CP 15) Count Three was Possession of Stolen Property in the First Degree for Mr. Hawkins' actions on June 9, 2007, when he actually picked up the Kubota tractor at Valley Tractor. (CP 16) Count Four was Possession of Stolen Property in the First Degree on October 8, 2007, arising from the seizure of the Landini tractor. (CP 16)

Prior to trial, the State filed a motion in limine seeking to preclude the defense from presenting evidence concerning the Englands' involvement in this case. (CP 1203-1240) As aptly stated by Mr. Hawkins' counsel:

**Mr. Ressler:** ... the England's have their fingerprints on almost every aspect of this; every single item of property that was found has England fingerprints on it. ... The question would be: ... why is it that the England's are involved in every aspect of this case? They find the

sprayers. They hand pictures of the sprayers to Morrison, Morrison then calls the police. Dale England calls the police to tell them that he knows who - - there was a serial number on the 7030 that apparently was obliterated. Dale England calls the Douglas County police to tell them that he knows who did that, and gives the information to one of the detectives, and the detective goes and talks to this person, and the person knows nothing of it, and Dale England is involved in that aspect.

Dale England knows why it is, when it is and where it is that one tractor's being moved from one place to another, that one of Mr. Hawkins' employees is driving a tractor, so their fingerprints are on every single aspect of this case and I think the jury is entitled to know that they are involved in every aspect of this case. We don't know who took this property, and we don't know why a 7030 that doesn't belong to Mr. Hawkins ends up on his property, and we don't know who took his 7030, but what we do know is that Dale England knows something about where the sprayers are and how they were located and where they moved, and Len England - - excuse me, Dale England knows a whole lot about that particular part of the case, as well. Who took the serial number off the tractor and when and where the tractor was and how it is it was being moved.

The evidence will show that the England's are related to Mr. Hawkins. Doug England is his wife's father, Dale England is her uncle, Len England is her uncle. That there has been a dispute within this family for some period of time. Dale England is a police officer or was a police officer. He's since been removed from the force because of dishonesty, which is odd information that we have. And though I'm not going to claim or say or even present any evidence that they were involved, that they stole this equipment, I think the jury's entitled to know that when Len England finds the sprayers and takes pictures of them, and there's no one else who's ever seen them there up until the time that he does, and there's people that are down there everyday and he's the first person to see them there, the jury's entitled to know that he has a motive to implicate

Mr. Hawkins in this crime. He has a motive to implicate him, and that it's not a simple act of an honest person discovering lost property and reporting it to the person who lost the property. There's something more to it than that. And I think that I should be able to present those circumstances to the jury so in order to explain that Len England has got some motive, besides being an honest citizen, to involve himself in all of this and to be reporting it, and the jury can conclude that maybe he had some additional involvement beyond simply finding it and taking a picture.

(Supp. CP 1232-1234)

The trial court initially reserved ruling on the State's motion in limine. (CP 1214) The court later ruled "...if you're going to blame it on someone else, you have to have evidence someone else did it." (CP 133-134) In response, defense counsel argued:

**Mr. Ressler:** I think I'm allowed to introduce evidence that there's this financial strife between their family and his family and that they are the people who are making all these calls about the missing sprayers, the missing Landini's and the missing whatever, and that's it. I'm not going to say that they hate me or they hate him or anything of the sort. I'm going to say that they suffered a financial loss as a result of him pulling out of Manson Growers and that, I mean, the fact is is that they took the picture or got the picture. The fact is is that Dale England calls about the Landini, and the fact is is that, I mean, Len - - Dale England calls about the 7030 and who scraped off the number. So they are involved and there is a financial problem between the two.

(CP 135)

The trial court ultimately ruled that the evidence concerning the Englands and Robert Morrison was not admissible. (CP 136)

Following trial, the jury returned verdicts of not guilty as to Count One (Air-O-Fan sprayers); guilty as to Count Two (attempt to pick up the Kubota tractor); guilty as to Count Three (picking up the Kubota tractor); and not guilty as to Count Four (possession of the Landini tractor). (CP 18-21)

It is difficult to reconcile the State's theory that all four pieces of the RLF equipment were stolen during the weekend of March 31, 2006 from the Twin W Ranch, and that all four pieces of equipment were found on Sundance Slope property, yet the jury could find Mr. Hawkins guilty of the charges arising from the Kubota tractor and not guilty of the charges arising from the sprayers and the Landini tractor.

On May 5, 2009, Mr. Hawkins was sentenced. (CP 22) A timely Notice of Appeal was filed on May 20, 2009. (CP 32)

**b. Motion for a new trial based on newly discovered evidence.**

The basis for the motion for a new trial was newly discovered evidence. Mr. Dale Martin was a "field man" for GS Lawn Company, a vendor of agricultural chemicals. At trial, he testified that in 2006 and 2007, he provided field services for 40-50 orchard businesses, including