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Supreme Court No. 93035-0
(Court of Appeals No. 71912-2-1)

b/h

**THE SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

TRAVIS LILE, Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

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 **ORIGINAL**

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B. ISSUES PRESENTED

1. Whether a judge's granting of a continuance was a discretionary decision for purposes RCW 4.12.050 where the parties agreed to continue the trial date, but where the judge has discretion and an independent obligation to decide whether to grant a continuance and where the judge had denied agreed continuances in the past.
2. Whether the denial of the affidavit of prejudice was harmless error where the judge that was affidavited did not preside over the trial and the severance motion decided by that judge was waived because the defendant failed to renew his motion to sever at or before the end of trial as required by CrR 4.4.
3. Whether the trial court abused its discretion in denying defendant's attempt to impeach one assault victim with evidence of domestic harassment that didn't involve punching where the victim was a complete stranger to the defendant and where the victim testified he wasn't a fighter on cross-examination.

C. FACTS

Lile was convicted by a jury of second degree assault for assaulting Amanda Millman, third degree assault for assaulting Officer Woodward, fourth degree assault for assaulting Christopher Rowles and resisting arrest related to an incident that occurred on February 16, 2013. While on patrol around 11:30 p.m. Officer Woodward heard yelling and saw a commotion on a sidewalk outside some bars in downtown Bellingham, 2RP 92-96. After observing for about five seconds and from about 40 yards away, he saw a male, Lile, punch a guy, Rowles, in the face and then turn and punch another guy, Powell, a co-worker of Rowles. 2RP 96-102. He hadn't seen either Rowles or Powell do anything

aggressive towards Lile; it looked like Rowles was backing up when he got punched and Powell was just standing there. 2RP 101-02, 240.

Woodward got out of his patrol car and saw Lile turn around and punch a female, Millman. 2RP 100. Millman had taken one or two steps towards Lile from about 10 feet away with her hands raised in a non-threatening manner, stopped, and was yelling, "stop, stop fighting!" when Lile took two to three steps towards her and punched her in the face. 2RP 101-04, 239-41. Millman went down. 2RP 104. No one had been actively engaged with Lile at the time Lile hit Millman, and Woodward had been able to observe them for about five seconds before Lile hit Millman. 2RP 136. The punch knocked out one of Millman's teeth and fractured her jaw. 2RP 133, 260-63. She was knocked unconscious. 2RP 294-95.

Woodward ran towards Lile's location as Lile started to walk away fast. 2RP 105-06, 110. Another male was pulling Lile away from the incident. 2RP 238. When he was about 20 feet away, Woodward said, "Stop, police. You're under arrest." 2RP 106, 110. Lile turned around, and started walking backwards with his hands up. Officer Woodward said again, "You're under arrest," and as he went to grab Lile, Lile knocked his hand away and ran off. 2RP 106-07, 111. Woodward chased after Lile, continuing to yell, "Stop, police." 2RP 114-16. Officer Woodward caught up with Lile less than a minute after he saw Lile hit Millman. 2RP 174-75.

When Woodward tried to handcuff Lile, Lile continued to resist arrest, and it wasn't until another officer came to assist that Lile was able to be handcuffed. 2RP 118-20, 124- 27, 228, 353-54, 514-15, 1022-26. It was during this time that Lile assaulted Woodward. 2RP 119-20, 124.

Earlier that night Taylor and Alyssa Powell had met up with Rowles and Rowles' girlfriend of a couple months, Millman. 2RP 268, 490-91. Millman, a supervisor at a local bank, had never met the Powells before. 2RP 267-69. The Powells, Millman and Rowles went to a night-club in downtown Bellingham. Millman and Rowles had a couple of beers or drinks over the course of the evening, but the Powells had significantly more to drink. Alyssa was so intoxicated, she stumbled as she walked out of the club and Millman had to help her. 2RP 270-76, 496-500.

Taylor and Rowles were about 10-15 feet behind Millman and Alyssa as they walked down the hill on the sidewalk. 2RP 276, 500. Millman passed Lile and his friends, who all appeared to have been drinking and were swaying back and forth. 2RP 502. Millman accidentally bumped Lile with her purse or elbow as they passed. 2RP 502-04. Lile yelled some profanities at Millman and Alyssa. 2RP 278-82. Alyssa said "fuck you," and Millman turned around and saw Lile staggering backwards up the hill. 2RP 283-84, 502-05. Lile's friends were further up the hill. 2RP 502. Lile turned around and ran into Rowles, bumping

shoulders, as Rowles walked down the hill. 2RP 284-85, 505-06. Lile said some more profanities. Rowles continued down the hill away from Lile when Lile yelled, "Hey!" 2RP 506-07, 535, 563-64. When Rowles turned around, Lile punched Rowles in the jaw and then punched him a couple more times. 2RP 285-87, 507-08. Rowles shoved Lile and then got punched some more and shoved to the ground. Rowles got up and pushed Lile who fell down, but got back up. 2RP 286-88, 508-09. Rowles didn't throw any punches at Lile. 2RP 289. Taylor was scuffling with one of Lile's friends while this was going on. 2RP 288-89. Rowles went to assist Taylor and heard Millman yelling, "Stop, stop!" 2RP 509.

Millman was about 20 feet away when she saw the altercation and started walking briskly back up the hill, yelling at them to stop fighting. 2RP 290. She stopped when she was about five to seven feet away because she was scared she might get hit. 2RP 290-91, 510. At this point Rowles was off to the side and Taylor was scuffling with the other guy. 2RP 291. Lile stepped towards her and punched her even though no one was doing anything aggressive towards Lile at the time. 2RP 292-93.

Lile testified that he and his friends had been drinking at a party earlier in the evening and then walked downtown to go to a bar. 2RP 864-88. He admitted he exchanged some words with Millman and Alyssa. 2RP 867. He testified he got struck in the shoulder and then one guy was

in his face and another to his right. 2RP 867-68. Lile took a step back and hit the guy, although the guy's hands were at his waist, because Lile was very frightened and the guys were approaching him aggressively. Then the fight broke out. 2RP 868-70. He didn't remember hitting anyone else or hitting Millman. 2RP 871. He testified he ran away because he wanted out of the situation and he didn't know the police were there. 2RP 872. Lile testified he didn't know why he had lost his memory of the incident and agreed his judgment had been impaired a little bit. 2RP 912, 918.

Lile's friends Duff and Owen testified that Rowles "shoulder-checked" Lile. Owens heard Lile respond, "So, it's like that, is it?" Duff saw one of the guys move towards Lile and Lile punch the guy, and then the fight broke out. 2RP 17, 668-73, Ex. 34. Owens testified he was pretty sure Lile was the one who threw the first punch and that he hadn't seen anyone shove Lile. Ex. 34, 2RP 46. Duff admitted Lile's punch landed and he hadn't seen anyone throw punches at Lile. 2RP 674, 719-20.

D. ARGUMENT

The joint motion for a continuance of the trial date called upon the judge to make a discretionary decision because the trial court has an independent obligation to decide whether to grant or deny such a motion, taking into consideration a defendant's speedy trial rights and the effect on its own calendar. Even if the judge's decision was not discretionary for

purposes of RCW 4.12.050, the error was harmless because the judge did not preside over the trial. Finally, the judge who did preside did not abuse her discretion in denying Lile's request to impeach the victim with evidence of domestic harassment because it was not sufficiently similar conduct to rebut the victim's statement he was not a fighter.

1. A judge's decision on a joint motion to continue a criminal case is a discretionary decision for purposes of RCW 4.12.050 because the judge has discretion, and an independent obligation, to decide whether to grant the motion under CrR 3.3.

The issue before this Court is whether a joint, or agreed motion, to continue a trial date in a criminal case is a "ruling involving discretion" under RCW 4.12.050 or only a matter related to "arrangement of the calendar." Continuances of trial dates affect the administration of the courts and a defendant's speedy trial rights, and the court has an independent obligation to decide whether to grant or deny the motion, even if the motion is agreed. The continuance of a trial date in a criminal action is a discretionary act for purposes of RCW 4.12.050.

RCW 4.12.050 provides a time limitation on the filing of affidavits of prejudice. The affidavit must be filed and called to the attention of the judge before any discretionary order or ruling in the case. RCW 4.12.050(1). The "arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of

the accused in a criminal action or the fixing of bail,” however, are not rulings involving discretion within the meaning of the statute. RCW 4.12.050(1). The statute as originally enacted did not provide such a time limitation, but the courts read one into the statute in order to prevent manipulation of the court system. *See, State v. Clifford*, 65 Wash. 313, 316, 118 P.40 (1911) (party could not wait to see what rulings the judge would make and if they would be favorable before deciding to file affidavit). The legislature amended the statute to include the current time limitation, which “permit[s] little, if any, exercise of discretion by the trial judge.” *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 463, 687 P.2d 202 (1984). The courts have consistently held that a motion to continue a hearing or trial is a discretionary ruling under the statute, *See, In re Recall of Lindquist*, 172 Wn.2d 120, 129, 258 P.3d 9 (2011); *State v. Maxfield*, 46 Wn.2d 822, 829, 285 P.2d 887 (1955) (affidavit of prejudice was untimely because “motion for continuance invoked discretion of court”); *Clifford*, 65 Wash. at 316 (request for a continuance invoked “jurisdiction” of the court and therefore the affidavit of prejudice filed afterwards was untimely); *State v. Guajardo*, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987).

The Court of Appeals determined the judge did not need to exercise any discretion here because the motion to continue was agreed

and akin to a stipulation. However, with any request, even a joint motion, for a continuance of a trial date in a criminal matter, the judge has an independent obligation to decide whether to grant or deny the continuance. CrR 3.3(f). Even if the parties enter into a *written* agreement to continue a trial date, which did not occur here¹, the judge has the discretion not to continue the trial date. CrR 3.3(f)(1). “Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial.” In re Lindquist, 172 Wn.2d at 130 (quoting State v. Guajardo, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987)). It is the responsibility of the trial court to ensure that time for trial rules are complied with and that a defendant receives a speedy trial. State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009). In addition to considering a defendant’s desire for a speedy trial, the judge may also need to consider the desires and availability of witnesses and victims².

The Court of Appeals acknowledged a decision to grant a continuance is usually discretionary but determined it was not in cases

¹ The joint motion was orally made and granted on January 22, 2014. The written order continuing it was entered later on Feb. 3rd, 2014.

² In cases involving child sex abuse victims, a judge may not continue a trial date absent a finding that there are substantial and compelling reasons to do so and that the benefit of postponement outweighs the detriment to the victim. RCW 10.46.085.

where the parties jointly request the continuance, based on State ex rel. Floe v. Studebaker, 17 Wn.2d 8, 134 P.2d 718 (1943) and State v. Parra, 122 Wn.2d 590, 859 P.2d 1231 (1993). Floe was a civil case in a one judge county involving a written stipulation that two causes could be consolidated for trial and the trial date in the one set over so that consolidation could occur. Floe, 17 Wn.2d at 15. The judge granted the continuance as well as the consolidation. Id at 15-16. The court found the subsequently filed affidavit of prejudice timely because the judge had not been called upon to exercise any discretion in ruling as the orders involved preliminary matters and the parties had stipulated to their entry. Id. at 17.

The Floe opinion was decided before State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). The court in Dennison, a criminal case, noted that *although both parties stipulated to the continuance*, the trial court had still exercised discretion in ruling on the motion, citing former CrR 3.3(h)(1). Dennison, 115 Wn.2d at 620 n.10 (emphasis added). Former CrR 3.3(h)(1) used language very similar to current CrR 3.3(f)(1)³.

In Parra, the judge signed an omnibus order granting motions requested by both parties within the omnibus application before the affidavit of prejudice was filed. Parra, 122 Wn.2d at 597-98. Although

³ Continuances; Continuances or other delays may be granted as follows:
(1) Upon written agreement of the parties which must be signed by the defendant or all defendants. The agreement shall be effective when approved by the court on the record or in writing. CrR 3.3(h)(1)(1998).

neither side objected to the requests of the other, some of the requests fell within the discretionary provisions of the discovery rules. *Id.* at 598-99. While Parra approved the rationale in Floe, it held the unobjected-to discovery requests did not create a stipulation since those were matters on which the court had to rule. *Id.* at 602. Examples of agreed orders Parra listed that wouldn't invoke a judge's discretion included "admissibility of evidence, discovery, identity of witnesses and anticipated defenses," *not* continuances. *Id.* at 600. The court noted that generally "matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, *affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court*, may be the subject of a stipulation." *Id.* at 603 (emphasis added).

In deciding a motion to continue a criminal case, the judge needs to consider the impact on the court, as well as a defendant's constitutional speedy trial rights and impact on any victims or witnesses. Continuances are not the proper subject of a binding stipulation on the court because they do not affect just the rights or conveniences of the parties.⁴

Moreover, just because parties have agreed that a certain order should be entered does not necessarily change the nature of a judge's authority to grant or deny the order. *See, In re Williams' Estate*, 48 Wn.2d 313, 293

⁴ In fact a defendant's speedy trial rights may be at odds with his counsel's request and/or agreement to continue a trial date.

P.2d 392 (1956) (affidavit was untimely because judge had granted an application to associate for out-of-state attorney; even though such applications generally were granted “as a matter of comity and courtesy,” the fundamental discretionary nature of the judicial action didn’t change.)

Lile asserts the continuance in this case falls within the statutory provision regarding calendaring of hearings. RCW 4.12.050 specifically excludes “the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial” from those discretionary decisions contemplated by the statute. *See, e.g., Tye v. Tye*, 121 Wn. App. 817, 90 P.3d 1145 (2004) (judge’s issuance of computer generated scheduling order did not involve judge’s discretion); Hanno v. Neptune Orient Lines, Ltd., 67 Wn. App. 681, 838 P.2d 1144 (1992) (pretrial orders setting dates for mediation and pretrial conferences were not discretionary rulings); In re Dependency of Hiebert, 28 Wn. App. 905, 627 P.2d 551 (1981) (routine appointments of counsel and “setting a case for hearing” do not invoke trial court’s discretion). The court in Rhinehart, however, held that while the “setting or renoting and resetting a cause or motion for hearing” was a calendaring action that fell outside the “discretionary classification,” the granting of a continuance did involve the exercise of discretion. Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 578, 754 P.2d 1243, *rev. den.* 111 Wn.2d 1025 (1988). It explained:

“The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather the court’s discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party’s request.” *Id.* The time for trial rules make a distinction between the initial setting of the trial date and a continuance. *Cf.* CrR 3.3(d) (trial settings) and CrR 3.3(f) (continuances).

As noted in Rhinehart, the granting of a continuance does require the trial court to exercise discretion. Here, at the time of the joint motion to continue there had previously been a number of continuances and the case had been pending for over 8 months. While Judge Uhrig granted the continuance, he denied the affidavit, finding that his granting of the continuance was discretionary and noting that he had in fact denied agreed continuances in the past, although infrequently. 1RP 13-14. The continuance here, although an agreed or joint motion, did not remove the judge’s independent obligation and discretion to decide whether the continuance should be granted.

2. Lile is not entitled to a new trial because the trial was heard by a different judge and Lile failed to preserve his motion to sever.

Lile contends he’s entitled to a new trial, although Judge Uhrig did not preside at the trial, because Judge Uhrig heard and denied his motion to sever the counts regarding the assault on the officer and resisting arrest

from the assault counts regarding Rowles and Millman. Lile, however, failed to preserve his motion to sever as required by CrR 4.4. If Judge Uhrig had no authority to rule on Lile's motion to sever, a new trial is not warranted because had the error not occurred, within reasonable probabilities, the outcome of the trial, heard by a different judge, would not have been materially affected as his severance issue was waived⁵.

In general, reversal of a conviction or trial is not warranted unless the alleged error was prejudicial. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *see*, Chapman v. California, 386 U.S. 18, 22, 87 S.Ct.824, 17 L.Ed.2d 705 (1967) (reversal is not warranted where the error or defect does not affect substantial rights of the parties); *see also*, State v. Martin, 137 Wn.2d 149, 159, 969 P.2d 450 (1999) (juvenile not entitled to dismissal where he could not demonstrate prejudice from the delay in sentencing beyond the statutorily mandated time period).

Violations of statutes are normally subject to a nonconstitutional harmless error analysis, i.e., "the error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Cunningham, 93 Wn.2d at 831. Even as to violations of critical constitutional rights, the remedy must fit the

⁵ The Court of Appeals used a different standard and concluded that Judge Uhrig's ruling on the motion to sever "had no effect on the trial beyond a reasonable doubt" and therefore did not constitute reversible error.

violation. *See*, Waller v. Georgia, 467 U.S. 39, 49-50, 404 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *cf.*, In re Personal Restraint of Eagle, 195 Wn. App. 51, ¶67, ___ P.3d ___ (2016) (defendant not entitled to new trial where he couldn't show prejudice from appellate counsel's failure to raise a right to public trial violation regarding defendant's arraignment on an amended information in chambers because the arraignment proceeding was separate from the trial and did not taint the trial).

While prejudice of the *judge* is presumed under the statute once an affidavit of prejudice is filed⁶, that does not mean that prejudice is or should be presumed regarding the effect of the denial of the affidavit. Generally, if an affidavit of prejudice is properly and timely filed, then the judge against whom the affidavit is filed is without authority to hear the case, and a subsequent judgment entered by that judge is void. Harbor Enterprises v. Gunnar Gudjonsson, 116 Wn.2d 283, 291, 293, 803 P.2d 798 (1991). However, as the Court of Appeals found here, "not every ruling made after timely filing of an affidavit of prejudice constitutes reversible error." Slip Opinion, at 17, *citing*, State ex rel. LaMon v. Town of Westport, 73 Wn.2d 255, 438 P.2d 200 (1968), *overruled on other grounds by* Cole v. Webster, 103 Wn.2d 280, (1984).

⁶ A party who files an affidavit of prejudice does not have to prove prejudice or bias of a judge as the party would if s/he moved for recusal and asserted that the judge was in fact biased. State v. Dominguez, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

In LaMon, a party who had been named in a lawsuit, but not served, filed an affidavit of prejudice against the judge. *Id.* at 260. The affidavit issue was raised at a hearing, but both “proper” parties agreed the “non-proper” party should be dismissed from the action, and the judge dismissed the non-proper party from the lawsuit. On appeal, brought by one of the proper parties, the court held that the judge should not have entered the dismissal order because of the affidavit. *Id.* at 260-61. The court, however, did not reverse because although the judge should not have ruled on the motion to dismiss the party, the court did not lose jurisdiction to hear the case and the parties had acquiesced in the error.

Similarly, in an appearance of fairness case, City of Seattle v. Clewis, 159 Wn. App. 842, 247 P.3d 449 (2011), a judge’s erroneous hearing of a motion did not result in reversal of the trial. On the day of trial the judge issued a material witness warrant, despite the prosecutor not wanting one, which prompted the defense to ask the judge to recuse himself based on the appearance of fairness doctrine. *Id.* at 846. The judge vacated the material witness warrant, but granted the prosecutor’s request for a brief continuance. *Id.* at 847. Later that day, the judge denied a defense motion to dismiss, but recused himself and set the case over one day so that another judge could hear it. On review, the court indicated that reversal of the defendant’s conviction was not warranted because his

remedy would have been a trial in front of another judge, which is what had occurred. *Id.* at 851. The court found the issue moot because the judge did recuse himself, noting that the defendant could have renewed his motion to dismiss or requested that other, previous rulings be revisited at trial after reassignment of the judge. *Id.*

Under the unusual facts of this case, this Court can engage in a harmless error analysis as to Judge Uhrig's lack of authority to decide Lile's severance motion. Lile waived, i.e., failed to preserve, his motion by failing to renew it at trial. A defendant must move for severance before trial and renew the motion at or before the close of all evidence. CrR 4.4(a). Severance is waived if a defendant fails to do so. CrR 4.4(a)(1), (2); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, *rev. den.*, 169 Wn.2d 1027 (2010). Lile failed to renew his motion to sever at trial, before Judge Garrett, and thus failed to preserve his severance issue.

Lile asserts that Judge Uhrig should not have heard his motion, that another judge should have. But that result is in effect what was available to him, and in fact was required of him, under CrR 4.4. Even if it was error for Judge Uhrig to hear the motion to sever, Lile still had an obligation to re-raise the motion at trial, no matter who the judge was, or severance would be waived. If Judge Uhrig did not have the authority to hear the motion to sever, his ruling would be void. However, given that

Judge Uhrig did not hear the trial, the void decision had no effect on the trial because he waived the severance issue. Moreover, it is highly unlikely any other judge would have granted his motion to sever, and it clearly was not an abuse of discretion for Judge Uhrig to have denied it⁷. The assault on the police officer occurred within a couple minutes of Lile's assaults on Rowles and Millman, the resisting arrest charge was based on the officer's attempt to arrest Lile for those assaults, and the officer would have been called to testify regarding all counts. Virtually all the evidence would have come in at both trials as res gestae evidence. Judge Uhrig's denial of the affidavit of prejudice did not materially affect the outcome of the trial in this case.

3. The court did not abuse its discretion in disallowing evidence of the victim's harassment of an ex-girlfriend because it was not sufficiently similar for impeachment.

Lile asserts he should have been able to impeach Rowles' testimony on cross-examination that Rowles was not a "fighter" with evidence of an incidence of domestic violence harassment.⁸ The trial court did not abuse its discretion in finding that the proffered domestic harassment evidence was not sufficiently similar to be probative of either Rowles' truthfulness or whether Rowles was a "fighter."

⁷ The merits of the severance decision were briefed below.

⁸ On appeal Lile asserted the domestic harassment was similar to the assault here because it was prompted by "impulse of possession" and romantic jealousy, the same motive he alleges Rowles had to start the fight with Lile, but he never asserted this at trial.

A trial court may refuse to allow cross-examination that only remotely tends to show bias or prejudice, or where the evidence is merely argumentative. State v. Roberts, 25 Wn. App 830, 834, 611 P.2d 1297 (1980). The court's decision is reviewed for manifest abuse of discretion. State v. O'Connor, 155 Wn.2d 335, 351, 119 P.3d 806 (2005). The proponent of impeachment evidence must show that the evidence is relevant to the witness's veracity and to the facts at issue at trial. O'Connor, 155 Wn.2d at 350-52. If relevant, the court must then balance the defendant's right to introduce the evidence "against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), *rev. den.*, 131 Wn.2d 1011 (1997).

Specific instances of conduct of a witness cannot be proved through extrinsic evidence in order to attack the witness's credibility. ER 608(b). A witness cannot be impeached on matters that are collateral to the issues at trial. State v. Oswald, 62 Wn.2d 118, 120-21, 381 P. 2d 617 (1963); State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988). Not every instance of misconduct is probative of a witness's truthfulness or untruthfulness. O'Connor, 155 Wn.2d at 350.

The harassment evidence was not relevant to Rowles' veracity. Ex. 21, the *only* evidence proffered for impeachment, was a petition for an

order of protection. Lile wanted to impeach Rowles with evidence in the petition that Rowles had pushed his ex-girlfriend down on a bed in order to get control over her because Rowles had twice stated on cross he wasn't a fighter, thereby implying he was a peaceful person. 2RP 543-46. Rowles never testified that he was a peaceful person, however, only that he wasn't a fighter. The trial judge determined the harassment evidence pertained mainly to Rowles interfering with his ex-girlfriend's text messages and email account and wasn't similar enough to impeach Rowles. The judge specifically noted she did not interpret the allegations as accusing Rowles of fighting. The judge did not abuse her discretion because Rowles' harassment of his ex-girlfriend was not relevant to rebut Rowles' testimony he wasn't a fighter in an incident involving total strangers.

In Alexander, the defendant, who asserted self defense to an assault charge, sought to admit evidence of specific acts of violence committed by the victim in order to rebut the victim's claims that he was a peaceful man. Alexander, 52 Wn. App. at 901. The trial court properly excluded the evidence because it would not have been admissible for any other purpose aside from contradiction, and therefore was collateral. *Id.* at 901-02. Similarly, here, the evidence of Rowles' harassment of his ex-girlfriend would not have been admissible for any purpose other than to contradict Rowles' testimony that he was not a fighter.

Moreover, any error in disallowing the evidence of Rowles's harassment towards his ex-girlfriend was harmless. "A non-constitutional error is harmless if, within reasonable probabilities, the error did not affect the result." Alexander, 52 Wn. App. at 902. Lile admitted he threw the first punch, 2RP 868-70. There was more than one witness to the fight: both Millman and the officer observed the fight. Lile's own witnesses testified he was probably the one who threw the first punch. The minimal impeachment value of the harassment evidence was harmless as to the assault on Rowles where Rowles was impeached with other evidence, and certainly was harmless as to the assault on Millman, who approached the fracas in order to stop it. 2RP 521-24, 554-61.

E. CONCLUSION

The State of Washington, respectfully requests that this Court overrule the Court of Appeals' decision that a judge's decision on a joint motion for a continuance is not a discretionary act under RCW 4.12.050, and otherwise affirm the decision.

Respectfully submitted this 7th day of November, 2016.


HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

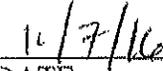
CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, William Johnston, addressed as follows:

William Johnston
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LEGAL ASSISTANT



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Attached is Respondent's Supplemental Brief.

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