

63509-3

Court of appeals
63509-3

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2010 FEB 26 11:30:02

NO. 63509-3-I

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

CITY OF SEATTLE,

Respondent,

v.

RULAN CLEWIS,

Petitioner/Appellant.

APPELLANT'S BRIEF

Christine A. Jackson
WSBA No. 17192
Attorney for Petitioner/Appellant

The Defender Association
810 Third Avenue, Suite 800
Seattle, WA 98104
(206) 447-3900, ext. 786
jacksonc@defender.org

TABLE ON CONTENTS

I ASSIGNMENTS OF ERROR 1

II ISSUES RELATING TO ASSIGNMENTS OF ERROR 1

III STATEMENT OF THE CASE 2

IV. ARGUMENT & AUTHORITY 15

 A. The City was not entitled to a continuance for the unavailability of
 its witness where the City failed to comply with the court rule
 governing subpoenas and there was no valid reason for the
 witness’s failure to appear..... 15

 B. The municipal court abused its discretion for failing to dismiss the
 case for the City’s failure to prosecute and for mismanagement of
 the case under CrRLJ 8.3(b) 22

 C. The trial judge’s comments, rulings and behavior violated the
 appearance of fairness doctrine 29

V. CONCLUSION 33

TABLE OF AUTHORITIES

CASES

<u>City of Bellevue v. Vigil</u> , 66 Wn.App. 891, 833 P.2d 445 (1992)	15, 20
<u>Dimmel v. Campbell</u> , 68 Wn.2d 697, 414 P.2d 1022 (1966)	30
<u>State ex rel. Nugent v. Lewis</u> , 93 Wn.3d 80, 605 P.2d 1265 (1980)	20
<u>State v. Adamski</u> , 111 Wn.2d 574, 761 P.2d 621 (1988)	16-18
<u>State v. Bilal</u> , 77 Wn.App. 720, 893 P.2d 674 (1995)	30
<u>State v. Chichester</u> , 141 Wash.App. 446, 170 P.3d 583 (2007)	22-24, 26
<u>State v. Day</u> , 51 Wash.App. 544, 754 P.2d 1021 (1988)	15
<u>State v. Ford</u> , 110 Wn.2d 827, 755 P.2d 806 (1988)	21
<u>State v. Grilley</u> , 67 Wn.App. 795, 840 P.2d 903 (1992)	19
<u>State v. Hobbs</u> , 71 Wn.App. 419, 859 P.2d 73 (1993).....	22
<u>State v. Iniguez</u> , 143 Wash.App. 845, 180 P.3d 855 (2008)	15
<u>State v. Koerber</u> , 149 Wn.2d 373, 931 P.2d 904 (1997)	19
<u>State v. Madry</u> , 8 Wash.App. 61, 504 P.2d 1156 (1972).....	29
<u>State v. Palmer</u> , 38 Wash.App. 160, 684 P.2d 787 (1984)	27
<u>State v. Perdang</u> , 38 Wn.App. 141, 684 P.2d 781 (1984).....	25
<u>State v. Post</u> , 118 Wash.2d 596, 826 P.2d 172 (1992).....	29

State v. Runquist, 79 Wn.App. 786, 905 P.2d 922 (1995) 16

State v. Sherman, 59 Wash.App. 763, 801 P.2d 274 (1990)25

State v. Wake, 56 Wash.App. 472, 783 P.2d 1131 (1989)..... 16, 20

OTHER AUTHORITIES

CrRLJ 4.8(a)17

CrRLJ 8.3 22, 27

RALJ 9.121

CJC Cannon 2 29

I ASSIGNMENTS OF ERROR

- A. The trial court erred when it continued the jury trial on December 18 and 19 , 2007 and on February 12, 2008.
- B. The trial judge erred when he failed to grant the defense motion to dismiss for failure to prosecute or pursuant to CrRLJ 8.3(b).
- C. The pre-trial judge erred when he failed to recuse himself for violation of the appearance of fairness doctrine.

II ISSUES RELATING TO ASSIGNMENTS OF ERROR

- A. Did the trial court abuse its discretion when it continued a criminal trial multiple times and over defense objection due to the unavailability of a witness for whom a subpoena was not properly issued -- the subpoena was not filed in the court file as required by CrRLJ 4.8(a), was not signed by an attorney, and the proof of service was also not signed-- and there was no valid reason for the witness's failure to appear?
- B. Did the trial court abuse its discretion by denying the defense motion to dismiss for failure to prosecute and for government mismanagement under CrRLJ 8.3(b)?
- C. Did the pretrial judge's conduct violate the appearance of fairness doctrine?

III STATEMENT OF THE CASE

Rulan Clewis was charged in Seattle Municipal Court No. 508996 with assaulting Tiffany Millner, a family friend, and Lena Carrasco, a passerby who witnessed the assault and called 911. He was also charged with property destruction and interfering with domestic violence reporting for breaking Carrasco's cell phone and attempting to prevent her from reporting the incident. CP 58-59. The case was set for trial. The parties answered ready and the case was called for trial several times between December 18, 2007 and February 13, 2008 when the trial finally commenced. CP 9-12 (Docket entries for 12/7/07 through 12/13/08).

When the trial was finally held, the City put on the following case. CP 327-598 (VI VRP 2/14/08, VII VRP 2/15/08). Carrasco testified that on July 16, 2007 she saw an African-American man and woman fighting with each other on the sidewalk across the street from where she stood waiting for her bus in the Capital Hill area of Seattle. CP 367-411 (VI VRP 41-85). The two were fighting and scuffling and swinging at each other. CP 369 (VI

VRP 43). "They were just whaling on each other, honestly." CP 370 (VI VRP 44). Carrasco yelled at them to stop and when they did not she called 911. CP 369 (VI VRP 43). As she was on the phone, the man came at Carrasco, yelled at her to mind her own business and hit her in the face. CP 371-73 (VI VRP 45-47). She dropped her phone. CP 372 (VI VRP 46). The man picked up her phone, tried to break it and then threw it onto the roof of a nearby building. CP 372-73 (VI VRP 46-47). The man and woman walked off just before the police arrived at Carrasco's location. CP 374-375 (VI VRP 48-50). She described the pair to the police. She told them that the man's mouth was bleeding. CP 376 (VI VRP 50). Soon after, another officer arrived and transported her to a one person show-up. CP 377-378 (VI VRP 51-52). She identified Clewis as her assailant. The woman he had been fighting was also there. CP 377 (VI VRP 51). On cross-examination, Carrasco testified that she saw a group of people standing near where the man and woman were fighting. CP 390-393, 410 (VI VRP 64-67, 84).

Tiffany Milner testified that she knew Clewis through her family; they

were not romantically involved. CP 413-415 (VI VRP 87-89). On the day in question, Milner explained that she and Clewis met up to get something to eat. CP 414-416 (VI VRP 88-90). On their way, they stopped at the corner store and visited with some friends. CP 417 (VI VRP 91). She and Clewis started “messaging with each other,” but it was all playful fun. CP 417-419 (VI VRP 91-93). As she and Clewis were leaving, she saw two “crackheads” – a man and a woman– arguing and fighting with each other. CP 421-416 (VI VRP 95-100). The man might have incurred a bloody lip after the woman slapped him. CP 422 (VI VRP 96). Milner and Clewis walked away, but were accosted by the police and accused of fighting with each other. CP 427, 445 (VI VRP 101, 119). Milner told the police that Clewis did not hit her. A woman pulled up in a police car and pointed to them. CP 429, 444 (VI VRP 103, 118). Milner said Clewis did not have a bloody lip or injuries that day. CP 426 (VI VRP 100). Milner explained that she and Clewis did not hit each other. CP 447 (VI VRP 121).

Seattle Police Officer Connors was one of the officers who responded

to the scene. He claimed that Clewis had a swollen lip when stopped, but failed to include that in his report. CP 482, 497 (VI VRP 156, 171). Another responding officer also said he observed an injury to Clewis' lip. CP 355 (VI VRP 29). Clewis was arrested and booked into jail. CP 354 (VI VRP 28)

Clewis testified in his own defense. CP 525-545 (VII VRP 14-34). Clewis explained that he met up with Milner for a meal. They left the area by the corner store because they heard a commotion. CP 526-527 (VII VRP 15-16). He described the two people hitting each other as older African-Americans, a man and woman. CP 533-535 (VII VRP 22-24). Clewis testified that his lip was not injured on the day in question. CP 537-538 (VII VRP 26-27). Clewis said that he slapped Milner's behind in fun. CP 539 (VII VRP 28).

The pertinent events leading up to trial are as follows.

December 7, 2007 Readiness hearing at which both defense and the prosecution answer ready. The defense anticipated interviewing Carrasco the following week. A second readiness date is set. CP 60-66 (I VRP 1-3).

- December 14, 2007 Second readiness hearing held and parties answer ready. The court grants the defense's motion to have City's witness present and available for an interview on the morning of trial, December 18. CP 10 (Docket entry for 12/14/07).
- December 18, 2007 Trial continued as prosecution reports that both the prosecutor and Carrasco are sick. CP 10 (Docket entry for 12/18/07).
- December 19, 2007 Defense and prosecution are present and answer ready. The judge excuses the prosecutor to address a trial in another courtroom. When the prosecutor fails to reappear, court releases defense counsel, finding that "this case is going to continue." Court notes the prosecutor's other case has a "higher expiration date."
- The defense moved to dismiss as this is the third time the defense has been ready to proceed to trial and prepared to call witnesses. The court denied the motion. Readiness is set for December 28, 2007. CP 70-75 (II VRP 5-10).
- December 28, 2007 Clewis fails to appear at mandatory readiness hearing. Court issues a bench warrant. CP 10 (Docket entry for 12/28/07).
- January 10, 2008 Defense counsel moves to dismiss under CrRLJ 8.3 for misrepresentations that Carrasco was ill on December 18, 2007. The court finds no intentional misrepresentation but reserves the motion to trial. CP 124-126 (III VRP 2-4).

Defense counsel also moved to dismiss pursuant to *State v. Chichester* because prosecuting attorney failed to reappear for trial on December 19, 2007 as ordered by the court, despite both parties indicating they were ready to proceed at that time. The court denies the motion. CP 126-134 (III VRP 4-12). Defense counsel moved for Clewis' release based on the circumstances of his failure to appear; that motion was also denied. CP 135-136 (III VRP 13-14).

February 12, 2008. Trial should have commenced on this day. The case was called for trial at 9:24 a.m. CP 11 (Docket entry for 2/12/08). Carrasco did not appear for trial, despite being under subpoena. The prosecutor claimed Carrasco did not wish to appear because she was fearful. The prosecutor insinuated that defense counsel somehow influenced her decision not to appear. The prosecutor did not want a material witness warrant issued. CP 146-153 (IV VRP 1-8).

When finally permitted to speak, defense counsel explained that Carrasco told her that she was on call for December 18 and did not mention being ill. CP 153 (IV VRP 8). Defense counsel also described her interview and conversations with Carrasco as being a "good long conversation" about

the events and that Carrasco did not state any concern about appearing in court. CP 152-154 (IV VRP 7-9). Defense counsel also put on the record that Carrasco had failed to appear at the readiness hearing, as directed by the court, to provide testimony about her failure to appear on December 18. CP 154-155 (IV VRP 9-10).

The City's victim advocate, Rhonda Harris, then testified regarding her conversation with Carrasco. CP 155-157 (IV VRP 10-12). Harris explained that the City had placed Carrasco "on call" for the Tuesday trial date, December 18. She called Carrasco, apparently after the readiness hearing when the court ordered that Carrasco appear morning of trial to be interviewed. Carrasco said she had to first report to work at 8:30 because she had already explained to her employer that she would be "on call" and could not change that. So the advocate told her to go to work and she would call her that morning. On December 18, however, Carrasco called to say she was ill. Carrasco told the advocate that when asked by defense counsel why she did not appear on December 18, she said she was "on call" and just

omitted that she was ill. CP 156 (IV VRP 11). With regard to Carrasco's failure to appear that day, the advocate merely offered, "We talked yesterday. She just said she didn't want to see him or face him in court. She, you know, it was just- it had gone on too long and she was she was afraid, that she didn't want to see him, and she didn't know what was going to happen." CP 157 (IV VRP 12).

Without any input from counsel, the trial judge immediately announced that "the victim is in fear of retaliation" and *sua sponte* issued a \$10,000 material witness warrant for Carrasco's arrest. The court held this case "in abeyance" and ordered the police department to go and arrest Carrasco. CP 157-158 (IV VRP 12-13). The court also denied the defense motion to dismiss. CP 157 (IV VRP 12).

The case was recalled at 10:39 a.m. to address defense counsel's motion to reconsider the court's earlier rulings. CP 12 (Docket entry for 2/12/08); CP 158 (IV VRP 13). The court vacates the material witness warrant, recognizing that the court has no authority issue such a warrant on

its own motion under CrRLJ 4.10(a). The City asked to have the case set over to 1:30 so that she can “talk to Ms. Carasco one last time. If I’m unable to convince her to come to court, um, then at that time, the City’s wouldn’t object to a Defense motion [to dismiss].” CP 159, 161 (IV VRP 14, 16). The trial judge clarified the City’s intent, “if the Prosecutor convinces the alleged victim to come in and give testimony then there won’t be a motion to dismiss?” The prosecutor confirmed. CP 159-160 (IV VRP 14-15). Defense counsel objected and moved to dismiss because the City is unable or unwilling to proceed without this witness and the witness failed to appear for trial at 9:00 a.m. when she was to be in court. CP 160 (IV VRP 15). The judge confirmed that the City would not go forward without this witness. CP 160 (IV VRP 15). Defense counsel also objected under the appearance of fairness doctrine. CP 161 (IV VRP 16). The court granted the City’s motion to continue to 1:30 p.m. over defense objection ruling “under these unique and limited circumstances. . . . [to] allow . . . one more opportunity to try and contact the witness.” CP 161-162 (IV VRP 16-17). Defense

counsel pointed out that the prosecutor had already made such efforts this morning and nothing appeared to have changed to warrant another continuance. CP 162-163 (IV VRP 17-18).

The case was called for trial again at 1:30 p.m. CP 163 (IV VRP 18). Carrasco again did not appear for trial. The prosecution explained that Carrasco “has agreed to come to court. However she is unavailable til tomorrow afternoon at 3:00. That’s when she has arranged her work schedule to be here.” CP 164 (IV VRP 19).

The City moved for sanctions against defense counsel because her investigator called and informed Carrasco that the court had issued a material witness warrant. The prosecutor believed this conduct was tantamount to witness tampering, based on the notion that defense counsel should have first asked the prosecutor “*whether or not* [she] was going to inform her of the warrant or how that message would be relayed to her.” CP 166 (IV VRP 21). The prosecutor accused the defense of trying to scare her witness into *not* coming to court by informing her the judge had ordered her to appear. CP

166 (IV VRP 21). The City then asked the court to send the motion for sanctions to another judge because the defense investigator involved was the judge's former bailiff. CP 166-167 (IV VRP 21-22). Without permitting defense counsel to be heard, the judge recused himself sent the case to another judge. CP 167-169 (IV VRP 21-23).

When finally permitted to speak, defense counsel moved to dismiss as the City was unwilling or unable to go forward with the trial that morning or in the afternoon as its material witness was not present. CP 168-169 (IV VRP 23-24). The judge denied the motion explaining that he did not order the City's witness to be present for trial, "all I wanted to hear or needed to hear whether because [sic] the case is still going to trial." CP 169 (IV VRP 24). Defense counsel explained that her investigator called Carrasco in an effort to get her to court so that the case could move forward and Clewis, who was in custody, could have his day in court. CP 170 (IV VRP 25).

Ultimately, the judge continued the trial on the court's motion because "he messed up" by erroneously issuing the material witness warrant.

CP 172 (IV VRP 27). Clewis told that judge that he was willing to waive “the issue defense counsel has raised” in order to go to trial right then before the current judge. The judge refused the request. CP 173 (IV VRP 28). The case was set over until the next day. While having already recused himself, the judge granted the City’s motion to prevent defense counsel from having any contact with “the City attorney’s witness” without the prosecutor present. CP 174-175 (IV VRP 29-30).

Defense counsel asked the court to find another judge, like a *pro tem*, who could hear the case today. “No. Too late today. We’ll start tomorrow at 9:00,” was the court’s only response. CP 175 (IV 30). He had previously ruled that the case would go to Judge Kondo because, “[s]he’s the only DV judge that’s left.” CP 167 (IV VRP 22).¹

The trial finally commenced the next day at 10:47 a.m., before Commissioner Eisenberg, not Judge Kondo. CP 7, 12; CP 181 (V VRP 1); CP 12. The court first took up the issue of sanctions against defense counsel,

²Seattle Municipal Court has eight elected judges, one commissioner and three magistrates. See www.pan.ci.seattle.wa.us/courts/docs/guide.

who was eager to “set the record straight.” CP 181-82 (V VRP 1-2). After hearing from both parties, the commissioner set the matter over until after the trial and to set a briefing schedule. CP 182-195 (V VRP 2-15). The parties then proceeded with pretrial motions. CP 195 (V VRP 15). Defense counsel moved to exclude Carrasco based on her failure to appear for trial on December 18. CP 212 (V VRP 32). Both counsel reviewed the information previously presented to the court regarding Carrasco’s failure to appear on December 18. The court denied the motion to exclude as untimely, despite the fact that the previous judge reserved the motion. CP 212-221 (V VRP 32-41). Carrasco finally appeared to testify on the second day of trial, February 14, 2008. CP 366 (VI VRP 40).

Clewis was convicted of the two counts of assault and property destruction, but acquitted on the interfering charge. CP 27-30. He appealed to the King County Superior Court, which affirmed. This court then granted review.

IV. ARGUMENT & AUTHORITY

A. The City was not entitled to a continuance for the unavailability of its witness where the City failed to comply with the court rule governing subpoenas and there was no valid reason for the witness's failure to appear.

Generally, witness unavailability may be grounds to continue a trial.

The court's discretion, however, is limited to instances in which "there is a valid reason for the witness's unavailability, the witness will become available within a reasonable time, and the continuance will not substantially prejudice the defendant." State v. Iniguez, 143 Wash.App. 845, 860, 180 P.3d 855 (2008) (citing State v. Day, 51 Wash.App. 544, 549, 754 P.2d 1021 (1988)).² Prior to continuing a case for witness-unavailability, the party requesting the continuance must establish that it exercised due diligence in securing the witnesses attendance:

These requirements are not satisfied, however, unless the party whose witness is absent proves it acted with due diligence in seeking to

³The decision to grant or deny a continuance is reviewed for an abuse of discretion. City of Bellevue v. Vigil, 66 Wn.App. 891, 892, 833 P.2d 445 (1992). A court abuses its discretion if it acts on untenable grounds; such grounds include factual findings unsupported by the record, the use of an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Runquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)

secure that witness's presence at trial. *Id.*, *State v. Nguyen*, 68 Wash.App. 906, 915-16, 847 P.2d 936 (1993). '[A] party's failure to make "timely use of the legal mechanisms available to compel the witness' presence in court' preclude[s] granting a continuance for the purpose of securing the witness' presence at a subsequent date.

State v. Adamski, 111 Wn.2d 574, 579, 761 P.2d 621 (1988) (quoting State v. Toliver, 6 Wash.App. 531, 533, 494 P.2d 514 (1972)). Thus, "the issuance of a subpoena is a critical factor in granting a continuance." State v. Wake, 56 Wash.App. 472, 783 P.2d 1131 (1989) (emphasis added).

Moreover, the subpoena must comply with the law. "The failure to serve a subpoena in conformity with the rules 'renders such service a nullity.'"

Adamski, 111 Wn.2d at 578, 761 P.2d 621 (quoting Harrison v. Prather, 404 F.2d 267, 273 (5th Cir.1968)). As stated in *Adamski*,

[t]his court has long held the position that due diligence requires the proper issuance of subpoenas to essential witnesses. In *State v. Smith*, 56 Wash.2d 368, 370, 353 P.2d 155 (1960), this court expressly declared that [t]he failure to cause a subpoena to issue clearly constitutes such a lack of diligence as to justify the denial of a motion for a continuance.

Adamski, 111 Wn.2d at 578, 761 P.2d 621. *See also* State v. Iniguez, 143 Wn.App. 845, 853-54, 180 P.3d 855 (2008) (not an abuse of discretion to

continue case within the time for trial period where witness was still under subpoena but had failed to report before leaving the area).

The rule for subpoenas issued in criminal matters in courts of limited jurisdiction is unique. *Compare* CrRLJ 4.8(a) *with* CrR 4.8 *and* CRLJ 45(a).

The rule requires subpoenas issued by lawyers to be filed with the court.

The defendant and the prosecuting authority may subpoena witnesses necessary to testify at a scheduled hearing or trial. The subpoena may only be issued by a judge, court commissioner, clerk of the court, or by a party's lawyer. *If a party's lawyer issues a subpoena, a copy shall be filed with the court.*

CrRLJ 4.8(a). (Emphasis added).

The City failed to comply with the court rule; its subpoenas were not filed with the court. The court file does not contain a copy of any subpoena issued to Carrasco before or at trial.³ The City failed to properly complete even the most basic step to ensure the central witness's testimony. Given the

⁴In response to Clewis' appeal in the superior court, the City submitted an affidavit, attaching the subpoenas issued in this case. CP 316-325. These are not signed by the issuing lawyer and the proof of service is also unsigned. There is no indication that these were ever filed with the court at or before the time the case was called for trial.

absence of a valid subpoena, the court was not justified in continuing the trial on December 18th and 19th or February 12th. The subpoenas that were presented to the superior court on appeal also did not comply with the rule. They were not signed either by the attorney or the person who provided the service by mail. There is simply no record that the City ever properly placed its material witness under subpoena.

The inability of the prosecution to command the presence of its key witness forced the court and defense to repeatedly schedule the trial around the witness's desire to appear and her work schedule. The court allowed this to continue regardless of the fact that both parties had repeatedly appeared and indicated they were ready to proceed to trial. The continuances prejudiced Clewis as, without Carrasco, the City would not have been able to proceed and the case would have been dismissed.

Even if this court finds that Carrasco had been properly subpoenaed, she was not absent for a valid reason. Carrasco did not come to court because of some generalized fear of being involved the case and the date and

time was not convenient to her work schedule. There is no case which permits a witness or party to unilaterally decide when she will appear; the witness is not the arbiter of when they will obey a subpoena. The cases recognize a number of excused absences that will justify a continuance of the trial date. *See e.g.*, State v. Koerber, 149 Wn.2d 373, 1, 2-3, 931 P.2d 904 (1997) (when State's witness was sick with the flu, trial judge should have considered a short continuance); State v. Grilley, 67 Wn.App. 795, 798-99, 840 P.2d 903 (1992) (pre-planned vacations of law enforcement and prosecutors); State v. Day, 51 Wn.App. 544, 549, 754 P.2d 1021 (1988) (continuance permitted for victim's divorce to become final and permit her to testify against him). Carrasco's proffered excuse is not one of them. *Compare* State v. Wake, 56 Wn.App. 472, 475, 783 P.2d 1131 (court abused its discretion by granting a continuance where the State's expert witness from the state crime lab had not been subpoenaed and was unavailable because of the congestion and backlog in the lab).

Moreover, "[t]he unexcused absence of a subpoenaed witness at the

time of trial is not good cause for continuance.” State ex rel. Nugent v. Lewis, 93 Wn.3d 80, 84, 605 P.2d 1265 (1980), *as quoted in* City of Bellevue v. Vigil, 66 Wn.App. 891, 894, 833 P.2d 445 (1992). Under these circumstances, the trial court abused its discretion by granting a day of trial continuance where the investigating officer in a DUI prosecution, who had been subpoenaed, failed to appear for trial. Lewis, 93 Wn.2d at 82, 83-84. While the holding in *Lewis* has been questioned and distinguished by Washington courts, the case has not been overruled and is consistent with the modern standard for continuances. The prosecution is not entitled to string an accused person along for days while the prosecution’s key witness decides whether and when she will appear for trial.

The Superior Court refused to review this issue because “the issue was not raised below.” CP 327. But the superior court, in its appellate capacity, is required to review the lower court’s decision and determine whether the findings are supported by substantial evidence and whether the

decisions contain errors of law. RALJ 9.1.⁴ More importantly, this issue was thoroughly litigated in the trial court. It is clearly the moving party's burden to demonstrate its due diligence in compelling witness attendance. Clewis' vigorously objected to all continuances caused by Carrasco's failure to appear; the City's ability to procure her presence for trial was matter subject to litigation in the trial court. The City had every opportunity and motivation to make a record of its attempts to compel Carrasco to come to court. The court had plenty of opportunity to cure any error related to the City's subpoenas. In fact, the court attempted to do so by erroneously issuing a material witness warrant under CrRLJ 4.10, when the court could simply have issued its own subpoena for the witness pursuant to CrRLJ 4.8(a). The defense did not attempt to "sand bag" the prosecution; rather, it was the defense that notified Carrasco of the material witness warrant in an attempt to obtain her presence so the trial could start. Nonetheless, defense counsel

⁴This court reviews the municipal court in the same manner as the superior court under RALJ 9.1. State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988).

is an “advocate for her client, the a law clerk for the prosecutor.” State v. Hobbs, 71 Wn.App. 419, 424, 859 P.2d 73 (1993). It was not her obligation to make the City’s record regarding the efforts taken to subpoena its witnesses. This Court should address the claim on its merits and confirm that good cause to continue a case due to witness unavailability does not exist where the moving party failed to issue a valid subpoena.

B. The municipal court abused its discretion for failing to dismiss the case for the City’s failure to prosecute and for mismanagement of the case under CrRLJ 8.3(b).

Control of a trial calendar ultimately rests with the court, not the litigants. State v. Chichester, 141 Wash.App. 446, 459, 170 P.3d 583 (2007). In *Chichester*, the court held that dismissal was the appropriate action when the State failed to prosecute a case on the day of trial. The State refused to deploy its two prosecutors to try to the two cases called for trial that day.

When Chichester moved to dismiss, the State still had the opportunity to begin the trial with Ms. Wendt as prosecutor or to propose some other deployment of resources consistent with the trial date. Instead of objecting to a dismissal, the State declared itself unready to

proceed and virtually invited the court to grant the defense motion.

Chichester, 141 Wn.App. at 458.

Similarly, in this case, the prosecutor answered ready for the December 18th date, knowing that she had another case with a shorter expiration date scheduled as well. The City made no mention of any attempts to reassign either case. Then the prosecutor answered ready again for the February 12th trial date. But on the day of trial, she was unwilling or unable to proceed because the City's key witness was reluctant to come to court, not because she was the target of any specific threats but because of some generalized fear and her work schedule. Instead of taking steps to enforce the subpoena (if a valid one had indeed been issued) and compel the witness's attendance, the prosecutor instead sought a continuance so she could cajole the witness into attendance. Under these circumstances, trial judges have authority to dismiss the case for want of prosecution.

We think it plain from a review of the record in Chichester's case that the district court dismissed the case because the State was not ready, not on the basis that Chichester had been prejudiced by arbitrary action or governmental misconduct.

Illustrative of fact patterns where a dismissal is governed by CrRLJ 8.3(b) are *State v. Stephans*, 47 Wash.App. 600, 736 P.2d 302 (1987) (dismissal proper where State encouraged two witnesses to disobey the court's discovery order); *State v. Sherman*, 59 Wash.App. 763, 801 P.2d 274 (1990) (dismissal proper where State, among other acts of mismanagement, failed to provide significant documents requested in discovery despite having agreed to do so); and *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993) (dismissal improper where State reasonably attempted to obtain personnel records in response to defendant's discovery request, but was unable to do so and in any event the documents were not shown to be material).

We do not believe CrRLJ 8.3(b) is the controlling rule where the State comes to court on the date of trial *unready to proceed* after being *unable to show good cause for a continuance*. To hold that the court in such a situation cannot dismiss the case, but must instead grant another continuance, would mean that control of the court's criminal trial settings would be transferred to the State.

Id. (Emphasis Added).

Here, the trial judge abused his discretion in denying Clewis' motions to dismiss based on the authority in *Chichester*. Despite having this case brought to his attention by defense counsel, the initial trial judge did not believe that dismissal was a remedy in this circumstance. CP 163, 172 (IV VRP 18, 27). Yet, the judge did have that authority, that discretion. The failure to exercise discretion is an abuse of discretion. State v. Perdang, 38

Wn.App. 141, 684 P.2d 781 (1984).

In *Chichester*, the prosecuting attorney refused to try the case and dismissal was proper without relying on CrRLJ 8.3(b). However, in this case, dismissal under CrRLJ 8.3(b) was also appropriate. Mismanagement of the case can justify dismissal of the charges. State v. Sherman, 59 Wash.App. 763, 801 P.2d 274 (1990) (dismissal proper where State, among other acts of mismanagement, failed to provide significant documents requested in discovery despite having agreed to do so).

Even if the City Attorney or the pretrial judge exercised due diligence in solving the initial scheduling problem, the City's key witness was not present on December 19th and the prosecutor would have been unable to go forward. On February 12th, the City's key witness again failed to appear for trial. Again, the prosecutor had no intention of proceeding to trial on that date because the prosecutor had already spoken to the witness and already knew that she was not going to appear. The City mismanaged this case by not issuing a subpoena and ensuring its complaining witness's presence for

trial. This court should find that the repeated continuances caused prejudice to Mr. Clewis because of trial preparation, continued incarceration, and further delay. *See Chichester*, 141 Wn.App. at 453. While a continuance where a prosecutor is unavailable because she is in another trial is at times appropriate, such continuances cannot be granted where they are self-created, the direct result of case mismanagement. Where mismanagement occurs, a court should deny the motion for a continuance and, where the case cannot go forward, dismiss with prejudice.

Not only did the City Attorney mismanage the case, but the pretrial judge repeatedly excused the behavior. On December 19th, the prosecutor indicated that she was ready, but that she had another case scheduled for the same day. The court excused the prosecution to finalize her schedule while the court, defense counsel and Clewis waited to determine whether the trial would go forward as planned. When the prosecutor failed to return to the court room, the trial court continued the case on the basis that the prosecutor was in trial in another courtroom on a case with a sooner expiration date.

Defense counsel moved to dismiss, arguing it was the third readiness and that defense had witnesses ready. The prosecutor made no efforts to try and reassign either case. As in *Chichester*, she never notified defense counsel about the conflict, but rather she indicated she was ready to proceed to trial prior to acknowledging the scheduling conflict. Under such circumstances, dismissal pursuant to CrRLJ 8.3(b) was warranted. *Compare State v. Palmer*, 38 Wash.App. 160, 161-62, 684 P.2d 787 (1984) (continuance warranted where defendant's case assigned late and prosecutor already in trial with unexpected complications as "problems were specific, unpredictable, and certainly not self-created.").

This mismanagement continued on February 12th. The prosecutor answered ready for trial, even though she was aware that the complaining witness was not going to appear. The prosecution asserted that the witnesses didn't want to come to court because she was afraid. When the court asked whether the City would like a material witness warrant, the prosecution declined. Instead, the prosecution asked for a continuance until the afternoon

session to try and coax the witness into obeying the subpoena. The court overruled defense counsel's motion to dismiss and granted the continuance. Upon reconvening, the prosecution notified the court that the complaining witness would be available to appear at 3:00p.m. the following day, as "[t]hat's when she arranged her work schedule to be here." Defense counsel again moved to dismiss as the witness was not present and the City would not proceed without her, but the court denied the motion. Given enough continuances and leeway by the court, the prosecutor finally managed to go forward and obtain a conviction. But the court should not have let the matter proceed that far. The City Attorney's conduct, sanctioned by the trial court justified dismissal of the charges.

C. The trial judge's comments, rulings and behavior violated the appearance of fairness doctrine.

While due process requires the absence of actual bias, "our system of law has always endeavored to prevent even the probability of unfairness." State v. Madry, 8 Wash.App. 61, 68, 504 P.2d 1156 (1972), *quoting In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). "[E]very

procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the later due process of law." Id. While the appearance of fairness is fundamental, courts have required that there be some "evidence of a judge's or decisionmaker's actual or potential bias[.]" prior to application of the doctrine. State v. Post, 118 Wash.2d 596, 619 n. 8, 826 P.2d 172 (1992). The Washington State Code of Judicial Conduct emphasizes this requirement by additionally mandating that judges avoid "impropriety and the appearance of impropriety in all their activities." CJC Cannon 2. This rule requires that judges act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Id. Nonetheless, the appearance of fairness doctrine can be violated without any question as to the judge's integrity or violation of judicial ethics. See Dimmel v. Campbell, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966). Ultimately, the test of whether the appearance of fairness doctrine was violated is whether "a reasonably prudent and disinterested observer would conclude that [the defendant] obtained a fair,

impartial, and neutral [hearing]." State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013, 902 P.2d 163 (1995).

In this case, the pretrial judge's personal intervention in Clewis's case, as evidenced by his statements throughout the proceedings, is evidence of his actual or potential bias. Despite the prosecution's explicit statements that she was not asking the court for relief granted –a material witness warrant and a continuance of the trial date-- the court evidenced actual or potential bias against Clewis by taking such action on his own initiative. The defense attorney made a motion for the pretrial judge to recuse himself for failing to appear neutral which the court denied on the basis that he had already made discretionary rulings. The defense was not submitting an affidavit of prejudice based upon the court's anticipated rulings, but rather asked the pretrial judge to recuse himself because he did not appear to be impartial and fair.

The events of February 12th alone evidence the apparent bias. At that time - the third trial date - the City Attorney represented to the court that her

witness would not attend out of fear of coming to court. Despite the City's explicit statement that it did not want a material witness warrant, the pretrial judge exceeded the scope of his authority and actively pursued the City's case by "ordering the prosecution to issue a material witness arrest warrant." The court also walked the City through how a warrant would help them prosecute their case:

Well, it would work because the police would arrest her, put her in custody, bring her to trial. And should the City decide to prosecute this case and if there are - I'm not suggesting that the City do this, I'm just outlining for the purposes of this record what the options are, and it's going to be ultimately the prosecutor's decision. But if there are - is evidence that the City attorney can use to declare that witness a hostile witness and if there's a prior inconsistent statements, under the rules of evidence, such could be used.

CP 148 (IV VRP 3). Only when the defense attorney informed the court that he did not have the authority to issue the warrant did the judge change his mind. With neither a subpoena nor a warrant, the pretrial judge set the trial over for the City Attorney to convince the complaining witness to come to court one last time. The City Attorney claimed that if she was not able to convince the witness to come to court she would not object to a defense

motion to dismiss.

When the court reconvened at 1:30p.m., the prosecutor informed the court that the witness was not available but had scheduled her work to allow appearance the *following day* at 3:00p.m. Defense again moved to dismiss the case. The pretrial judge denied the motion, stating, "[n]ow, [City Attorney], as an officer of the court, has made a representation that, yes, she now wishes to go forward to - and that's all I wanted to hear or needed to hear [] because the case is still going to trial." CP 169 (IV VRP 24). Further, the court clearly made itself a party to the case by ordering it continued till the following afternoon even after the prosecution emphasized that "I'm not requesting a continuance...." CP 171 (IV VRP 26). With the prosecution's explicit statement that the witness was not available on the day of trial and that it was not requesting a continuance, the pretrial judge should have dismissed the case. Instead, the trial court continued the case *sua sponte* to ensure the witness's presence. But for the pretrial judge's overzealous advocacy on behalf of the City to prosecute Clewis, the case would likely

have been dismissed due to lack of prosecution or insufficient evidence.

Under these circumstances, the judge stepped outside his role as a neutral magistrate and violated the appearance of fairness doctrine.

V CONCLUSION

For the reasons articulated above, this Court should reverse Clewis' conviction and remand for dismissal or a new trial.

Respectfully submitted this 26th day of February, 2010,

Christine Jackson
Christine A. Jackson, #17192 *by K. Murray*
Attorney for Petitioner/Appellant