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No. 63509-3-I

THE DEFENDER ASSOC

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

CITY OF SEATTLE,
Respondent,

v.

RULAN CLEWIS,
Petitioner.

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion by continuing the jury trial on December 18, 2007, December 19, 2007 or February 12, 2008.

2. The trial court did not abuse its discretion by denying defendant's motion to dismiss for failure to prosecute the case or pursuant to CrRLJ 8.3(b).

3. Defendant has not established that the trial court violated the appearance of fairness doctrine.

B. ISSUES PRESENTED FOR REVIEW

1. Where three subpoenas are issued by the prosecutor and received by the witness but are not filed with the court and the witness does not appear for the first scheduled trial date because she is sick, the assigned prosecutor is directed by a judge to begin a trial in another case on the second scheduled trial date and the witness is fearful of appearing on the third scheduled trial date, does the trial court abuse its discretion by continuing the trial date within the time for trial period? (Assignment of Error 1)

2. Where on the scheduled trial date the assigned prosecutor

is instructed by a judge to begin a trial in another case and on the next scheduled trial date a subpoenaed witness expresses her fear of appearing, but is later persuaded by the prosecutor to appear and the trial is held within the time for trial period, does the trial court abuse its discretion by denying defendant's motion to dismiss for failure to prosecute the case or based on governmental misconduct that materially affects defendant's right to a fair trial? (Assignment of Error 2)

3. Where the trial court mistakenly issues a material witness warrant on its own motion but vacates that order one hour later, continues defendant's trial from the morning to the afternoon to allow the prosecutor to attempt to persuade a fearful witness to appear and then continues the trial to the following day after properly recusing itself, has defendant demonstrated actual or potential bias violating the appearance of fairness doctrine? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Defendant was convicted of two counts of Assault and one count of Property Destruction. He appealed, contending that the trial

court abused its discretion by granting the City's motion to continue the trial date, the trial court abused its discretion by denying his motion to dismiss pursuant to CrRLJ 8.3(b) and the trial court violated the appearance of fairness doctrine. Defendant's convictions were affirmed on RALJ appeal, and this court granted discretionary review.

Defendant's original trial date was scheduled for December 18, 2007 in Courtroom 902. CP 9. As the prosecutor and a prosecution witness were sick, the case was set over one day. CP 9, 124, 125 & 129.

On December 19, the parties were ready for trial, but the prosecutor was also scheduled for another trial in Courtroom 1002. CP 71 & 128. Also, a trial was in progress in Courtroom 902. CP 71. The Courtroom 1002 judge had indicated that he expected the prosecutor to try its case. CP 71 & 72. The prosecutor went to Courtroom 1002, where she informed the court she was ready on its case, but that Courtroom 902 also was waiting for her. CP 289. The Courtroom 1002 judge began the trial on its case. CP 291.

The Courtroom 902 judge indicated that the prosecutor was in

trial in Courtroom 1002 on a case with a higher, *i.e.*, earlier, expiration date. CP 73. The expiration date for the Courtroom 1002 case was January 7, 2008. CP 279. The expiration date for defendant's case was January 9, 2008. CP 73-74. The prosecutor had suggested continuing the trial to January 2, 2008, to which defense counsel responded:

So we're fine with January 2nd. It's within speedy, and we do not object to that.

Though we are objecting that this is the third time that we've announced ready. And we're ready to go. And we'd like to get this trial over with. So I think I just need to make that objection and go ahead and make the motion to go ahead and, you know, dismiss even though – just because we're ready, we've been ready, our witnesses are ready. CP at 74.

The Courtroom 902 judge denied defendant's motion to dismiss because the prosecutor was in another trial that took priority over defendant's case and the new trial date was within the time for trial period. CP 74.

At the December 28, 2007 readiness hearing, defendant failed to appear and a warrant was issued. CP 10 & 135-36. The trial date was stricken, and the speedy trial period restarted when the defendant appeared on January 2, 2008 and was taken into custody.

CP 10-11.

At a pretrial hearing on January 10, 2008, the parties could not agree on a trial date, and the prosecutor reminded the court that she was normally assigned to another courtroom and indicated that February 19, 2008 would be the earliest date she could try the case without a courtroom conflict. CP 123. Defendant moved to dismiss under CrRLJ 8.3 for mismanagement on the ground that the prosecution witnesses who had not appeared for trial on December 18 had not actually been sick and had been told by the prosecutor not to appear and therefore had defied a court order to appear. CP 124-26. The prosecutor reiterated that she had been sick on that date and had been told by the victim advocate that the witness was sick. CP 125-26. The court reserved ruling on this ground, told the prosecutor to make the victim advocate available to defendant and indicated that he could raise his motion to dismiss on this ground again prior to trial. CP 126.

Defendant also moved to dismiss under CrRLJ 8.3 on the ground that the parties were ready for trial on December 19 and the prosecutor should not have begun trial in another case. CP 126-130.

The prosecutor pointed out that on December 19 Courtroom 902 had another trial in progress and, before that case had concluded, the Courtroom 1002 judge had begun trial on its case. CP 128 & 130-31. She also noted that she had told the Courtroom 1002 judge that she was ready for trial on defendant's case. CP 133. The trial court denied defendant's motion to dismiss as follows:

Well, in any event, this Court finds there's really no fault with the prosecutor, even though she answered ready. Another judge had usurped this Court and assigned counsel out. The Court will take judicial notice that given the – both defense counsels and assigned prosecutors are each assigned their own matters for trial themselves. So it would be very difficult, in fact, I've never seen it done on both sides that another attorney can fill in that same day and try the case. I've never seen it done. CP 133-34.

Although the prosecutor had requested a trial date of February 19, the trial court set the trial for February 12, as all parties would be available and not in another trial. CP 137. The time for trial period would expire on March 5, 2008. CP 123, 140 & 163. Because he would remain in custody pending trial, defendant requested the Courtroom 902 judge to recuse himself, which motion was denied. CP 138-39.

On February 12, the prosecutor told the trial court that the prosecution witness, after speaking with defense counsel, was now fearful of coming to court. CP 146-147 & 152. The prosecutor pointedly said she was not alleging that defense counsel had done or said anything improper. CP 152. The prosecutor stated that this witness had been served with a subpoena, which defense counsel seemed to acknowledge. CP 147 & 154. The witness had in fact been subpoenaed for all the trial dates. CP 316-17. Notwithstanding the prosecutor's reluctance to request a material witness warrant, the trial court indicated the possibility of such a warrant. CP 147-48. Defense counsel stated that the witness told her that she did not appear in court on December 18 not because she was sick, but because she had been told that she was "on call." CP 153.

The victim advocate stated that, prior to December 18, when she told the witness that she needed to be in court on December 18, the witness said she had already told her boss that she was "on call" and had to report to work that morning. CP 156. The victim advocate then told the witness that the advocate would call her on the morning of December 18 to come to court. CP 156. Then, on the

morning of December 18, the witness called the victim advocate to say she was sick at home. CP 156. The victim advocate relayed this information to a prosecutor in Courtroom 902. CP 156. After defense counsel had spoken with the witness, she told the victim advocate that she had been interviewed, that defense counsel had asked her why she did not appear on December 18 and she had replied that she had been “on call. CP 156. The witness further told the victim advocate that, although she was ill on December 18, she did not mention this to defense counsel as it was not on her mind during the interview. CP 156.

The trial court reiterated its concern about a witness’s reluctance or refusal to appear in court based on fear of retaliation and ordered a material witness warrant. CP 157-58. The trial court also ordered that the case be the next case to go to trial. CP 158.

Approximately one hour later, the trial court reconsidered its decision to issue a material witness warrant. CP 159. The prosecutor asked the court instead to hold the case until 1:30 p.m. for her to try to persuade the witness to appear voluntarily. CP 159. The prosecutor said that if her efforts were unsuccessful, she would not

object to defendant's motion to dismiss. CP 159-60.

Defendant objected because the prosecutor previously had stated that the witness did not want to appear. CP 160. Defendant also moved to dismiss based on a violation of the appearance of fairness. CP 161. After defense counsel noted that CrRLJ 4.10 authorizes a material witness warrant "on motion of the prosecuting authority," the trial court acknowledged its mistake and vacated its order issuing the warrant. CP 161, 169 & 172. But, after considering the representations of the parties, the trial court determined that "these very unique and limited circumstances" justified setting over the case until the afternoon to allow the prosecutor one more opportunity to try to contact the witness. CP 161-62. Defendant reiterated his appearance of fairness objection, to which the trial court responded that it may assign the case to another judge for trial. CP 162-63.

At 1:30 p.m., the prosecutor reported to the trial court that the witness had agreed to appear, but could not do so until the following afternoon because of her work schedule. CP 164. The prosecutor also asked for sanctions against the public defense agency

representing defendant because a defense investigator had left a message for the witness that a warrant had been issued for her arrest and the police might be knocking on her door. CP 164-65. This investigator previously worked as bailiff for the trial court. CP 166. The prosecutor asked the court to send the case to another judge for the request for sanctions, and the trial court agreed. CP 167-68.

Defendant renewed his motion to dismiss because the witness was not present at that moment as ordered by the trial court. CP 168-69. The trial court noted that it had not ordered the witness to appear at 1:30 p.m., but had allowed the prosecutor until that time to talk to the witness. CP 169. The trial court admitted its error in ordering a material witness warrant and indicated that the appropriate remedy would be to send the case to another courtroom for trial. CP 172. On its own motion, the trial court continued the case to the following day before a different judge. CP 172 & 174.

When the trial began on February 13, the judge pro tem determined that the City's motion for sanctions would be decided after the trial. CP 192-93-95. Defendant moved to exclude the witness's testimony and dismiss because of the witness's failure to

appear on December 18. CP 212-13. These motions were denied because they were untimely, exclusion of evidence would not be appropriate and the judge pro tem was disinclined to readdress the issues. CP 220-21.

D. ARGUMENT

1. The trial court did not abuse its discretion by continuing the case within the time for trial period.

Defendant claims that the trial court abused its discretion by continuing the case because the subpoena issued to the witness did not comply with the court rule and because the witness did not have a valid reason for not appearing on December 18.

CrRLJ 3.3(f) provides:

Continuances. Continuances or other delays may be granted as follows:

...

(2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be filed before time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The period of a continuance granted under this rule is excluded from the time for trial period. CrRLJ 3.3(e)(3).

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.¹ The trial court's decision will not be disturbed on appeal unless the appellant makes a clear showing that the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.² In exercising its discretion, a trial court may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.³ When the trial court continues the trial date pursuant to the court rule and gives reasons for doing so, the appellate court should give those reasons credence.⁴

Defendant's claim that the subpoena issued to the witness was invalid because it was not filed with the court, as required by CrRLJ 4.8(a), was not raised at trial. An alleged violation of a procedural or

¹ *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

² *Flinn*, 154 Wn.2d at 199; *Downing*, 151 Wn.2d at 272.

³ *Downing*, 151 Wn.2d at 273.

⁴ *State v. Henderson*, 26 Wn. App. 187, 191, 611 P.2d 136, review denied, 94 Wn.2d 1008 (1980).

court rule cannot be raised for the first time on appeal.⁵ In reviewing a RALJ decision, the Court of Appeals is reviewing the decision of the court of limited jurisdiction, not the decision of the superior court.⁶ Whether the superior court erred by not considering this argument is immaterial to this court's review. Defendant's assertion that "this issue was thoroughly litigated in the trial court"⁷ is not supported by the record – not a single word was said about the form of the subpoena.

Even if this claim can be raised now, it does not establish that the trial court abused its discretion. Continuing a case to secure the presence of a subpoenaed witness when the prosecution exercises due diligence, the witness is likely to be available within a reasonable period of time and there is no substantial prejudice to the

⁵ *State v. Gentry*, 125 Wn.2d 570, 615-16, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995) (alleged violation of CrR 6.5); *State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988); (same); *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (alleged violation of CrR 3.3); *State v. Boot*, 40 Wn. App. 215, 218-20, 697 P.2d 1034 (1985) (alleged violation of CrR 4.7)

⁶ *State v. Kronich*, 131 Wn. App. 537, 542, 128 P.3d 119 (2006), *affirmed*, 160 Wn.2d 893, 161 P.3d 982 (2007).

⁷ Appellant's Brief, at 21.

defendant is not an abuse of discretion.⁸ The witness did receive the subpoena for trial, as shown by the prosecutor's assertion to the trial court,⁹ defense counsel's acknowledgement,¹⁰ and the copies of the subpoenas and affidavit provided by the City.¹¹ A subpoena remains in effect beyond the specific trial date for which it is issued and imposes a continuous duty to appear until discharged.¹²

Although the subpoena was not filed with the court, it did command the witness to appear to testify, it correctly indicated the date, time, courtroom, case number and defendant's name and it was received by the witness. The purpose of a subpoena was satisfied.¹³ The witness did eventually testify at trial,¹⁴ which showed her willingness to appear in this case.

⁸ *State v. Day*, 51 Wn. App. 544, 548-49, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988); *Henderson*, 26 Wn. App. at 192.

⁹ CP 147.

¹⁰ CP 154.

¹¹ CP 316-25.

¹² *State v. Tatum*, 74 Wn. App. 81, 85, 871 P.2d 1123, review denied, 125 Wn.2d 1002 (1994).

¹³ Moreover, even if its improper form made the subpoena invalid, CrRLJ 3.3(f)(2), does not expressly require a "lawfully issued subpoena" as a prerequisite for a continuance, unlike CrRLJ 4.10(a)(2), which requires a "lawfully issued subpoena" before the court can issue a material witness warrant.

¹⁴ See CP 367-411.

Defendant also challenges the reasons for the continuances. Regarding the continuance on December 18, the trial court was entitled to believe the representations of the prosecutor and the victim advocate that the witness was sick. The illness of a witness is grounds for continuing a trial.¹⁵ In addition, the prosecutor was ill. Counsel's illness is also grounds for continuing a trial.¹⁶

On December 19, the prosecutor was involved in another trial that had an earlier expiration date than did defendant's case. A prosecutor's involvement in another trial is grounds for continuing a trial.¹⁷

On February 12, the witness was fearful of coming to court. A witness's refusal to testify because of fear of retaliation is a proper grounds to continue a trial.¹⁸ Even if a prosecutor could have acted with more diligence in securing a witness's attendance at trial, the

¹⁵ *State v. Baker*, 4 Wn. App. 121, 123-24, 480 P.2d 778 (1971)

¹⁶ *State v. Greene*, 49 Wn. App. 49, 55-56, 742 P.2d 152 (1987)

¹⁷ *State v. Carson*, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996); *State v. Jones*, 117 Wn. App. 721, 730, 72 P.3d 1110 (2003), *review denied*, 151 Wn.2d 1006 (2004); *State v. Palmer*, 38 Wn. App. 160, 161-6, 684 P.2d 787 (1984)

¹⁸ *State v. Lee*, 13 Wn. App. 900, 903-04, 538 P.2d 538, *review denied*, 85 Wn.2d 1019 (1975).

unavailability of a key witness is a valid reason for a continuance.¹⁹

The reasons for each of the continuances were valid. Each continuance also was within the time for trial period.

The prosecution did exercise due diligence in attempting to persuade the witness voluntarily to come to court. The witness was sent three separate subpoenas.²⁰ The prosecutor and the victim advocate both had spoken with the witness several times before February 12,²¹ and the prosecutor spoke with her again the morning of February 12, when she agreed to come to court the following afternoon.²²

Although defendant claims he was prejudiced by the continuances, that these continuances allowed the City to present the witness's testimony, which contributed to his conviction, does not establish that he was "prejudiced in the presentation of his or her defense" under CrRLJ 3.3(f)(2).²³

We are not persuaded that in adopting the [time

¹⁹ *Iniguez*, 167 Wn.2d at 294.

²⁰ CP 316.

²¹ CP 146-47, 151 & 156.

²² CP 164.

²³ *Day*, 51 Wn. App. at 549.

for trial] rule the Supreme Court meant to abolish the trial court's traditional discretion to grant continuances within the speedy trial time limits so long as the defendant is not unduly prejudiced thereby. In this context, undue prejudice to a defendant means there is some interference with his ability to present his case, for example, the unavailability of a witness or some substantial additional time in custody awaiting trial. It does not mean merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness.²⁴

Indeed, defendant does not assign error to anything that occurred during trial.

The trial court carefully analyzed the reasons for the witness's unavailability and weighed the appropriate factors and equities. The trial court's reasoning was not based on an erroneous understanding of the facts or the law. Defendant has not made a clear showing that the trial court's decision was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

The situation in this case is somewhat similar to that in *State v. Edwards*,²⁵ in which the witnesses were served with subpoenas, but the subpoenas were improper in that they were not signed by a

²⁴ *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, affirmed, 121 Wn.2d 524, 853 P.2d 294 (1993).

judge, which was required by the court rule, or filed with the court.

When the witnesses failed to appear for trial, the trial court denied a motion to continue the trial, but the Supreme Court held that this was an abuse of discretion.²⁶ Under *Edwards*, the trial court here would have abused its discretion had it refused to grant a continuance to secure the presence of the witness.

The Supreme Court recently reiterated that, in interpreting court rules, it would not exalt form over substance, but would examine the actual conduct involved in determining if the purpose of the rule was satisfied.²⁷ The disinclination to allow form to prevail over substance applies as well in criminal cases.²⁸

A comparison of *State v. Adamski*²⁹ with *State v.*

*McPherson*³⁰ illustrates this principle. In *Adamski*,³¹ the trial court

²⁵ 68 Wn.2d 246, 252 & 254 n. 1, 412 P.2d 747 (1966)

²⁶ *Edwards*, 68 Wn.2d at 258.

²⁷ *Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956 (2007) (defendant has “appeared” for purposes of CR 55 if his conduct was designed to and did apprise plaintiff of his intent to litigate the case).

²⁸ See *Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785-86, 831 P.2d 149, review denied, 119 Wn.2d 1022 (1992); *State v. Larson*, 56 Wn. App. 323, 331, 783 P.2d 1093 (1989), review denied, 114 Wn.2d 1015 (1990).

²⁹ 111 Wn.2d 574, 761 P.2d 621 (1988).

³⁰ 64 Wn. App. 705, 829 P.2d 179, review denied, 119 Wn.2d

abused its discretion by continuing a trial for an unavailable civilian witness where the subpoena was not properly served and not received by the witness. In *McPherson*,³² the trial court did not abuse its discretion by continuing a trial for an unavailable police witness where the subpoena was not properly served, but was received by the witness. The actual receipt of a served subpoena cured the improper form of service.

Likewise, the witness's actual receipt of the subpoena cured the improper form of issuance in defendant's case. There is no credible evidence that the witness did not actually receive a subpoena or know she was under order to appear. She had been subpoenaed several times, was in communication with the prosecutor and victim advocate, and knew she had to come to trial. Again, she did, in fact, testify at trial.

Defendant's reliance on *State ex rel. Nugent v. Lewis*³³ is misplaced as that case holds that "[t]he *unexcused* absence of a

1014 (1992).

³¹ 111 Wn.2d at 578-79.

³² 64 Wn. App. at 708-709.

³³ 93 Wn.2d 80, 84, 605 P.2d 1265 (1980) (emphasis supplied).

subpoenaed witness at the time of trial is not good cause for a continuance.” The reason for the witness’s absence was explained at great length. This was not a situation involving “the absence of any evidence of a justifiable reason for such absence” of the witness.³⁴

2. The trial court did not abuse its discretion by denying defendant’s motion to dismiss for failure to prosecute the case or pursuant to CrRLJ 8.3(b).

Defendant contends that the trial court erred by denying his several motions to dismiss for failure to prosecute the case or under CrRLJ 8.3(b) for prosecutorial mismanagement.

Two things must be shown before a court can order dismissal of charges under CrR 8.3(b) [identical to CrRLJ 8.3(b)]. First, a defendant must show arbitrary action or governmental misconduct. Second, a defendant must show prejudice affecting the defendant’s right to a fair trial. A trial court’s decision to dismiss charges is reviewable under the manifest abuse of discretion standard.³⁵

Dismissal under this rule is an extraordinary remedy and is improper unless the due process rights of the defendant are

³⁴ *Lewis*, 93 Wn.2d at 83.

³⁵ *State v. Puapuaga*, 164 Wn.2d 515, 520-21, 192 P.3d 360 (2008) (footnote and citation omitted).

materially prejudiced.³⁶ Dismissal of a criminal case is a remedy of last resort, and a trial court abuses its discretion by ignoring intermediate remedial steps.³⁷ Absent evidence of arbitrary prosecutorial action or governmental misconduct and a showing of prejudice to the defendant's right to a fair trial, dismissal of a charge is an abuse of discretion.³⁸ The requirement of material prejudice is not met by a showing of inconvenience to the defendant.³⁹

Defendant first claims that the trial court should have granted his motion to dismiss on December 19, 2007 when the prosecutor began a trial in another courtroom. Instead, the trial court continued the case to January 2, 2008, which was, as defense counsel acknowledged, within the time for trial rule period. As the trial court noted, the prosecutor was not at fault for arriving in another courtroom and being forced by that judge to begin the trial in that courtroom.

³⁶ *State v. Korum*, 157 Wn.2d 614, 638, 141 P.3d 13 (2006).

³⁷ *State v. Koerber*, 85 Wn. App. 1, 9, 931 P.2d 904 (1996); *see also Duggins*, 68 Wn. App. at 401 (the trial court's authority to grant a dismissal under this rule has been limited to truly egregious cases of mismanagement or misconduct by the prosecutor).

³⁸ *State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993).

³⁹ *Koerber*, 85 Wn. App. at 5.

Defendant certainly did not suggest at the time that his case be assigned to another prosecutor for trial. The trial court had never seen a case that could be reassigned to another prosecutor for trial on the same day. There is no requirement that, whenever the assigned prosecutor becomes unavailable, a case be assigned to another prosecutor, even if the continuance is beyond the time for trial period.⁴⁰ In *State v. Jones*,⁴¹ *State v. Stock*,⁴² *State v. Raper*,⁴³ *State v. Palmer*,⁴⁴ and *State v. Williams*,⁴⁵ the court upheld continuances *beyond* the time for trial period because of the prosecutor's involvement in another trial. Also, the trial court had not yet finished with its current trial.⁴⁶ The prosecutor's compliance with a directive of a judge to begin a trial is not governmental misconduct.

Moreover, defendant does not seem to contend that not trying the case on December 19 prejudiced him in any way – he does not

⁴⁰ *State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003).

⁴¹ 117 Wn. App. 721, 730, 72 P.3d 1110 (2003), *review denied*, 151 Wn.2d 1006 (2004).

⁴² 44 Wn. App. 467, 472-73, 722 P.2d 1330 (1986).

⁴³ 47 Wn. App. 530, 539, 736 P.2d 680, *review denied*, 108 Wn.2d 1023 (1987).

⁴⁴ 38 Wn. App. at 162-63.

⁴⁵ 104 Wn. App. 516, 17 P.3d 648 (2001).

claim that a defense witness thereby became unavailable and defendant was not, at that time, in custody.

The trial court was well aware of the circumstances of the trial occurring in its own courtroom, another court beginning a trial involving the same prosecutor, the unfeasibility of reassigning the case to another prosecutor for trial that day, the proposed continuance being within the time for trial period and the defendant being out of custody. The trial court did not misunderstand the facts or misapply the law; it did not abuse its discretion by denying defendant's December 19 motion to dismiss.

Defendant also contends that the trial court should have dismissed the case on February 12 when the witness did not appear. The witness's reluctance to appear certainly was not the result of governmental misconduct – indeed, the explanation provided to the court was that she became fearful and unwilling to appear only after being interviewed by defense counsel.⁴⁷ The prosecutor had been in contact with the witness and both the prosecutor and the victim

⁴⁶ CP 70-73.

⁴⁷ CP 146-47.

advocate had attempted to persuade her to appear.⁴⁸ The prosecutor acted reasonably in encouraging her to appear voluntarily without resorting to the drastic remedy of a material witness warrant.

A witness does not, of course, belong to either party.⁴⁹ The prosecutor had no control over the witness and could not physically force her to appear. In *State v. Wilson*,⁵⁰ the court concluded that the prosecutor's inability to produce a witness for an interview with defense counsel, even after being ordered to do so by the trial court, was not governmental misconduct justifying dismissal under CrR 8.3(b). Similarly, the prosecutor's inability to persuade the witness to appear on February 12, even though she had received a subpoena so commanding, was not governmental misconduct justifying dismissal. The *Wilson* court rejected the suggestion that the prosecutor should have sought a court-ordered deposition or a material witness warrant to force the uncooperative witness to

⁴⁸ CP 147.

⁴⁹ *State v. Hofstetter*, 75 Wn. App. 390, 395-98, 878 P.2d 474, review denied, 125 Wn.2d 1012 (1994).

⁵⁰ 149 Wn.2d 1, 11-12, 65 P.3d 657 (2003).

appear.⁵¹ Similarly, the prosecutor was not required to seek a material witness warrant to obtain the witness's presence at court. The *Wilson* court also stated that dismissal would not be appropriate until the defendant's speedy trial expiration became an issue.⁵² The time for trial period in defendant's case did not expire until March 5.⁵³

Defendant's reliance on *State v. Chichester*⁵⁴ is misplaced for several reasons. That case involved significantly different facts. The original trial date in the case had been continued for ten months.⁵⁵ When a trial date was set, the prosecution indicated that it would not have a prosecutor available to try the case.⁵⁶ On the day of trial, the assigned prosecutor was unavailable as she would be assigned to another case, a supervising prosecutor declined to try the case and another prosecutor, who was not engaged in trial, was not prepared to try the case.⁵⁷ The trial court believed the prosecution

⁵¹ *Wilson*, 149 Wn.2d at 11.

⁵² *Wilson*, 149 Wn.2d at 12.

⁵³ CP 123, 140 & 163.

⁵⁴ 141 Wn. App. 446, 170 P.3d 583 (2007).

⁵⁵ *Chichester*, 141 Wn. App. at 449.

⁵⁶ *Chichester*, 141 Wn. App. at 449.

⁵⁷ *Chichester*, 141 Wn. App. at 450-51.

could have assigned the case to another prosecutor, was critical of the prosecution for failing to alert the court that a prosecutor would not be available to try the case and accepted defense counsel's argument that the defendant had been prejudiced by the delay.⁵⁸

In defendant's case, on the other hand, December 18 was the first trial date set,⁵⁹ defendant failed to appear for the next trial date and February 12 was the first trial date set thereafter. Defendant's case did not involve the prosecution refusing to reassign the case to another prosecutor, which the trial court did not believe was feasible. Defendant did not articulate any specific prejudice from continuing the case on December 19 or February 12. Defendant's case is factually distinguishable from *Chichester*.

In addition, the appellate court in *Chichester* upheld the trial court's discretionary decisions denying the prosecution's motion to continue and dismissing the case.⁶⁰ Defendant, on the other hand, is asking this court to reverse the trial court's discretionary decisions

⁵⁸ *Chichester*, 141 Wn. App. at 452.

⁵⁹ This trial date had been set after the pretrial hearing was continued three times at defendant's request. CP 8-9.

⁶⁰ *Chichester*, 141 Wn. App. at 455 & 459.

continuing the case and denying his motion to dismiss.

Defendant has not established governmental misconduct either in the prosecutor assigned to his case being told to begin a trial in another courtroom or in a subpoenaed witness being reluctant to appear in court. As the continuances did not extend defendant's time for trial period, he has not established prejudice to his right to a fair trial. The trial court did not abuse its discretion by denying defendant's motion to dismiss.

3. Defendant has not established that the trial court violated the appearance of fairness doctrine.

Defendant contends that the trial court's action in issuing a material witness warrant on its own motion, continuing the case first for the prosecutor to attempt to persuade the witness to appear and then to the following day and denying his motion that the judge recuse himself violated the appearance of fairness doctrine. A trial court is presumed to perform its functions regularly and properly without bias or prejudice.⁶¹ Evidence of a judge's actual or potential

⁶¹ *State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006); *State v. Harris*, 123 Wn. App. 906, 914, 99 P.3d 902 (2004), *reversed on other grounds in State v. Hughes*, 154

bias must be shown before an appearance of fairness claim will succeed.⁶² An appearance of fairness claim requires *proof* of actual or potential bias; mere speculation is not enough.⁶³ Allegedly improper or biased comments are considered in context.⁶⁴ A trial court advising a party as to the legal consequences of the party's position does not demonstrate judicial bias.⁶⁵ Judicial rulings alone almost never constitute a valid showing of bias.⁶⁶

The trial court raised the issue of a material witness warrant as follows:

Judge: Is the City Attorney seeking any material witness bench warrant, arrest warrant?

Prosecutor: Your honor, given the nature of her injuries and her

Wn.2d 118, 110 P.3d 192 (2005) (no violation where sentencing judge read inadmissible sexual deviancy evaluation).

⁶² *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007) (no potential bias shown where judge who issued search warrant also ruled on suppression motion challenging issuance of that warrant). This threshold requirement of evidence of a judge's actual or potential bias was reformulated in *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992), which postdates *State v. Madry*, 8 Wn. App. 61, 504 P.2d 1156 (1972), relied on by defendant. *See State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230, *review denied*, 126 Wn.2d 1026 (1995).

⁶³ *Harris*, 123 Wn. App. at 914 (emphasis supplied).

⁶⁴ *In re Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003).

⁶⁵ *Marriage of Wallace*, 111 Wn. App. at 706.

⁶⁶ *In re Personal Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

position, your honor, this is not, her charge is not a domestic violence charge, your honor. So, we view these incidents a little bit different than we would had she been a domestic violence victim. So, it's, I doubt that that would work, your honor, in getting her here. And, I don't want to put her in custody.

Judge: Well, it would work because the police would arrest her, put her into custody, bring her to trial. And should the City decide to prosecute this case and if there are – I'm not suggesting that that 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 statement, under the rules of evidence such could be used. And I don't know whether that could happen or not, but I'm sure you already have taken that into consideration.⁶⁷

In discussing the effect of a material witness warrant, the court was simply informing the parties of the legal consequences of a possible action. Viewed in context, the trial court's comments do not demonstrate bias.

After hearing further from the prosecutor, defense counsel and the victim advocate, the trial court ordered the prosecutor to issue a material witness warrant.⁶⁸ Approximately one hour later, the trial court acknowledged its mistake in issuing the material witness

⁶⁷ CP 147-48.

warrant on its own motion and vacated it.⁶⁹

The trial court certainly erred by ordering a material witness warrant, but, once the applicable court rule was quoted, quickly and repeatedly admitted its error. The trial court's belief that a subpoenaed witness refusing to appear because of intimidation is "a classic example of a miscarriage of justice"⁷⁰ finds support in the statutes concerning crimes against witnesses⁷¹ and the Judicial Canon regarding the integrity of the judiciary.⁷² A witness who does not have a right or privilege to refrain from testifying in a criminal case has a legal obligation to do so truthfully and fully.⁷³ The trial court did not demonstrate bias by expressing its concern for the integrity of the court system and condemning any interference with a subpoenaed witness's duty to testify.

After the trial court vacated the material witness warrant, the prosecutor moved to continue the case to the afternoon for her to try

⁶⁸ CP 157-58.

⁶⁹ CP 161; *see also* CP 169 & 172.

⁷⁰ CP 147.

⁷¹ *See* RCW 9A.72.110 (Intimidating a Witness) & RCW 9A.72.120 (Tampering With a Witness).

⁷² *See* CJC Canon 1 & CJC Canon 2.

⁷³ *State v. Victoria*, 150 Wn. App. 63, 67, 206 P.3d 694, *review*

to persuade the witness to come to court.⁷⁴ In granting this motion to continue, the trial court noted that it may assign the case to another judge for trial.⁷⁵

When the prosecutor later reported to the court that the witness would appear the following day and raised an issue concerning a defense investigator's contact with the witness, the court recused itself.⁷⁶

A trial court has discretion to recuse itself.⁷⁷ Because the prosecutor was asking for sanctions against the defense agency based on conduct by the trial court's former bailiff,⁷⁸ the trial court would have had to evaluate her veracity and the propriety of her actions. The trial court properly believed that it could not fairly and

denied, 167 Wn.2d 1004 (2009).

⁷⁴ CP 159.

⁷⁵ CP 163.

⁷⁶ CP 167.

⁷⁷ *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 653-56, 20 P.3d 946, *review denied*, 144 Wn.2d 1007 (2001), *cert. denied*, 534 U.S. 1090 (2002) (no abuse of discretion where court personnel were witnesses in case); *State v. Leon*, 133 Wn. App. 810, 812-13, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007) (decision denying motion for recusal reviewed on appeal for abuse of discretion); *Perala*, 132 Wn. App. at 111 (judge's decision denying a motion for recusal will not be disturbed on appeal without a clear showing of an abuse of discretion); *State v. Graham*, 91 Wn. App. 663, 669, 960 P.2d 457 (1998).

impartially judge the credibility of its former bailiff because of the “close relationship between judge, bailiff and clerk”⁷⁹ and “for many, many years I have no question about her credibility.”⁸⁰

Recusal was not an abuse of discretion.

But, prior to the City’s motion for sanctions involving the trial court’s former bailiff, the trial court had not taken any action or made any statements showing that it had prejudged defendant’s case or could not be fair and impartial. The case had been delayed by numerous continuances during the pretrial stage and the trial had been postponed because of the prosecutor’s unavailability, defendant’s failure to appear at a readiness hearing and now a reluctant witness. The trial court was understandably frustrated with these delays⁸¹ and earnestly sought to discharge its obligation to timely resolve the case.⁸² The trial court’s denial of defendant’s

⁷⁸ CP 166-67.

⁷⁹ CP 168.

⁸⁰ CP 168.

⁸¹ A judge’s expressions of displeasure with trial delays do not violate the appearance of fairness doctrine. *State v. Newbern*, 95 Wn. App. 277, 297, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

⁸² *See* CrRLJ 3.3(a)(1) (it shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime).

motion for recusal was not an abuse of discretion.

Although the prosecutor wanted to begin the trial that day,⁸³ the trial court stated that it was too late in the day to get a judge pro tem,⁸⁴ but the court would get a judge pro tem for the following day.⁸⁵ Inasmuch as the trial court had properly recused itself, it could not try the case and apparently no other judge was available that day to try the case. Continuing the case to the following day, which was within the time for trial period, was the only option available. This action did not demonstrate bias.

Defendant has not overcome the presumption that the trial court properly discharged its duties. The trial court's rulings, actions and statements do not show that the judge was prejudiced against defendant. Having not shown proof of actual or potential bias, defendant has not demonstrated that the trial court violated the appearance of fairness doctrine.

⁸³ See CP 171.

⁸⁴ CP 175.

⁸⁵ CP 174

E. CONCLUSION

Based on the foregoing argument, the superior court's decision affirming defendant's convictions for Assault and Property Destruction should be affirmed and the case remanded to Seattle Municipal Court for reimposition of sentence.

Respectfully submitted this 2nd day of July, 2010.

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