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No. 66228-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAY ABBETT,

Appellant.

FILED
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STATE OF WASHINGTON
2011 SEP - 14 PM 4:39

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

The Honorable Kenneth L Cowser

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE VIOLATION OF THE RIGHT TO BE PRESENT IS A MANIFEST ERROR WHICH CAN BE RAISED FOR THE FIRST TIME ON APPEAL

The State concedes Mr. Abbett was not present during the trial court's discussion of the jury inquiry, but responds that the since Mr. Abbett did not object before the trial court, the argument cannot be raised for the first time on appeal. Brief of Respondent at 14-15. The State is incorrect and the issue can indeed be raised for the first time on appeal.

Appellate courts review issues raised for the first time on appeal when such errors are manifest errors affecting a constitutional right. RAP 2.5(a); *State v. Woo Won Choi*, 55 Wn.App. 895, 900-01, 781 P.2d 505 (1989). The error in this case affected Mr. Abbett's constitutional right to be present at trial, which is a fundamental right. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). The violation of that right occurred during a critical stage of the proceedings. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). Thus, the error is manifest and may be raised for the first time on appeal. See *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (claim of involuntary

guilty plea could be raised for the first time on appeal “given the fundamental constitutional rights” at stake); *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (claim of governmental misconduct could be raised for the first time on appeal because it affected fundamental aspects of due process).

As noted, the discussion of a jury inquiry is a critical stage of trial at which the defendant has a right to be present. *Rogers*, 422 U.S. at 39. Communication between the court and the jury without defendant’s presence is error, and the State must prove the error harmless beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

The hearing regarding the jury inquiry was a critical stage of the proceeding and Mr. Abbett’s absence violated his right to be present. As argued in the opening brief, his absence was not harmless and he is entitled to reversal of his convictions.

2. MR. ABBETT OBJECTED TO THE COURT'S CONTINUANCE OF THE TRIAL THUS THE ISSUE WAS PROPERLY PRESERVED FOR APPEAL

Mr. Abbett contended the trial court improperly granted the State a continuance of the trial date over his objection. The State has responded by claiming that since he did not move for dismissal in the trial court, he cannot raise his speedy trial issue for the first time on appeal. Brief of Respondent at 7-8.

Appellate courts will review issues which the record shows have been argued and decided by the trial court. RAP 2.5(a); *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979); *State v. Barton*, 28 Wn.App. 690, 693, 626 P.2d 509, *review denied*, 95 Wn.2d 1027(1981). Here, Mr. Abbett objected to the trial court's June 17, 2010, granting of the State's motion to continue the trial date to August 20, 2010. RP 6-7. Mr. Abbett was not required to subsequently move for dismissal; he was only required to object, which he did. The issue is properly before this Court.

As argued in the opening brief, the trial court was solely concerned with the financial burden on the county in obtaining Mr. Foye's presence from Alaska. This emphasis on the financial burden on the county as opposed to Mr. Abbett's right to a speedy

trial mirrors the myopic focus of the courts in *State v. Wake*, 56 Wn.App. 472, 476, 783 P.2d 1131 (1989), with congestion in the State crime lab. In addition, the court not only improperly focused on the county's costs but in doing so improperly shifted the burden of proof to Mr. Abbett to prove he would be prejudiced as opposed to the properly placed burden on the State to justify its actions and prove due diligence and good cause for a continuance.

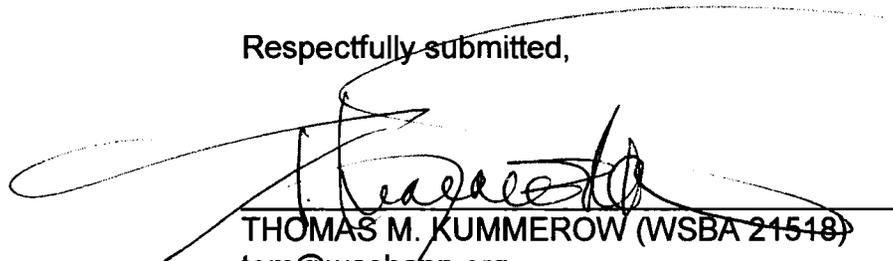
Since the State failed to establish "good cause" for the continuance, the trial court erred in granting the State's motion for a continuance. Mr. Abbett is entitled to reversal of his convictions. CrR 3.3(h).

B. CONCLUSION

For the reasons stated, Mr. Abbett requests this Court reverse his convictions and either remand for a new trial or dismiss the matter for a violation of speedy trial.

DATED this 1st day of September 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 66228-7-I
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ROBERT ABBETT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 1ST DAY OF SEPTEMBER, 2011.

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