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COA No. 71911-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RUVIM KHOMYAK,

Appellant.

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STATE OF WASHINGTON

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ON APPEAL FROM THE SUPERIOR COURT  
OF SNOHOMISH COUNTY

The Honorable Bruce I. Weiss

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. In Ruvim Khomyak's jury trial for residential burglary, the trial court abused its discretion when it allowed the prosecutor to introduce evidence that Mr. Khomyak sought to plead guilty to the burglary.

2. The evidence was insufficient to prove residential burglary by accomplice liability.

3. The trial court violated the time for trial rules of CrR 3.3.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court allowed the prosecutor to introduce evidence that Mr. Khomyak sought to plead guilty to the burglary that Detective Rabelos had Mirandized<sup>1</sup> and was interrogating him about, following discovery of his DNA on a cigarette outside the door of the house. Under ER 410, may a defendant's offer to plead guilty to a crime in which he was a suspect, in order to swiftly resolve the matter for purposes of his pending deportation action, be used against him at his trial to persuade the jury that he is guilty of that offense?

2. Was the evidence insufficient to prove that Mr. Khomyak was an accomplice to robbery where the proof merely indicated that he was present at the scene?

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. Was CrR 3.3 violated by the court's orders of continuances, granted on the ground that the complaining civilian witness was a "snowbird" living her winters at her California residence, for whom travel to Washington for trial before April would be merely inconvenient?

### **C. STATEMENT OF THE CASE**

The Everett police responded to a 911 call from a neighbor across the street from the house of Patricia Spromberg. CP 112-16; 4/16/14RP at 48-50. Officers found the rear door of the house kicked in, with a shoeprint that could never be identified. Jewelry and other items had been taken from the home. 4/16/14RP at 54-62. Police found a cigarette butt outside the door, on the ground. 4/16/14RP at 59-61. It was tested for DNA, and the State's forensic scientist matched it to Ruvim Khomyak, whose DNA was in the CODIS crime/DNA database.<sup>2</sup> 4/16/14RP at 158-63.

Carol Williams, the Sprombergs' neighbor, took photographs of some unknown, unidentifiable men who were seen arriving at then leaving the area of the house, and called 911. 4/16/14RP at 41-45. Nothing indicated that Ruvim Khomyak might be guilty of burglary, including by accomplice liability, the prosecution's theory at trial. See 4/16/14RP at

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<sup>2</sup> Mr. Khomyak's DNA was obtained via a CrR 4.7-ordered buccal swab; the jury was told simply that the DNA on the cigarette matched a reference sample provided by him. CP 107-08; 2/7/14RP at 2-3; 4/16/14RP at 114, 161.

183-91, 197-202.

However, Detective Daniel Rabelos had Mirandized and interrogated Mr. Khomyak when he became a suspect some months after the burglary. 4/16/14RP at 104-15. Mr. Khomyak told the detective that he had been abusing drugs around the time of the incident Rabelos was asking about, and did not remember anything from those months. 4/16/14RP at 115-17. At one point he told the detective that he was not denying he could be a burglar, he simply had no memory of that time in his life, nor did he remember who might be involved. 4/16/14RP at 116-18. In closing argument, the prosecutor made clear the State's theory of proof, contending that Mr. Khomyak was present, and guilty as an accomplice:

He voluntarily agreed to speak to Detective Rabelos and Detective Rabelos did talk to him in a very cordial way. You heard that from Detective Rabelos. And that Mr. Khomyak well understood the English language. He said hurry up and charge me, I want to plead guilty. Mr. Khomyak knew what he did was wrong back on June 24th. Otherwise, why would he say that to Detective Rabelos? Knowing full well what the job of Detective Rabelos was, which was to investigate this burglary. But he nevertheless cooperatively shared with Detective Rabelos that he wanted to plead guilty.

4/16/14RP at 187-88. The trial court had allowed the detective to testify as follows:

Q: [by MR. CORNELL] Okay. And did Mr. Khomyak make

any other statements to you that were significant in your investigation?

A: Yeah. He had – when we were finishing up the investigation he asked me if I could hurry up and charge him so that he could plead guilty.

MR. CORNELL: Your Honor, I think this is a good time to stop, if we could.

4/16/14RP at 118. Mr. Khomyak appeals. CP 2-14.<sup>3</sup>

#### D. ARGUMENT

**1. THE TRIAL COURT VIOLATED ER 410, WHICH PREVENTS THE PROSECUTOR FROM INTRODUCING EVIDENCE “OF AN OFFER TO PLEAD GUILTY . . . TO THE CRIME CHARGED OR ANY OTHER CRIME, OR OF STATEMENTS MADE IN CONNECTION WITH, AND RELEVANT TO, ANY OF THE FOREGOING PLEAS OR OFFERS.”**

(a). **Evidentiary ruling.** The prosecutor was able to make the above argument because the trial court had denied Mr. Khomyak’s motion *in limine* to suppress the evidence that Mr. Khomyak had asked that he be charged so he could plead guilty quickly for purposes of his pending deportation proceeding.<sup>4</sup>

During the CrR 3.5 hearing, there was testimony that when Detective Rabelos approached Mr. Khomyak in jail as the suspect in the

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<sup>3</sup> Mr. Khomyak was sentenced to a standard range term following conviction. CP 15-25; 4/29/14RP at 1-16.

<sup>4</sup> The jury was not told that the detective spoke with the defendant in jail, or that Mr. Khomyak’s discussion of a guilty plea was out of concern for how it would affect the resolution of his deportation proceeding. 2/7/14RP at 14-15; CP 103-04; 4/15/14RP at 13; 4/16/14RP at 118.

burglary, and read him his Miranda rights, which Mr. Khomyak waived.

After some discussion that he was the suspect in the Everett robbery and the evidence claimed to be against him, Mr. Khomyak

requested, because he has some deportation issues that he is facing, that if I was going to file charges against him, that I do it as quickly as possible so that he could do like a global resolution type of thing. I informed him that I had not yet completed my investigation at this time, but I provided him with all my information to give to his attorney to contact me, and then I told him I would also speak to the prosecutor about – he said he had other cases, so I said I would find out who that prosecutor was and speak to them about it so that his attorney and that prosecutor could get on the same page.

2/7/14RP at 14-15.

Subsequently, defense counsel moved *in limine* that this statement be excluded from the State's case, arguing that ER 410 applied and that the statement satisfied both the objective and subjective components of the Rule. CP 103-04; 4/15/14RP at 12-15. The prosecutor argued that this was a "classic statement against interest."<sup>5</sup> 2/7/14RP at 14.

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<sup>5</sup> ER 804(b) applies to "unavailable" declarants, and provides a statement against a person's interest is admissible as an exception to the hearsay rule if "a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." ER 804(b)(3) (also stating that "[i]n a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."). The prosecutor may have been intending to refer to ER 801(d)(2), regarding admissions of a party opponent. But in any event, the question was not whether a hearsay exception or a categorical classification as 'non-hearsay' applied to allow the evidence, but whether ER 410

The trial court stated that ER 410 applied to statements during the “proceedings,” not to the police. 4/15/14RP at 14. The court ruled that the evidence would be admissible for the jury trial, absent Mr. Khomyak’s references to deportation concerns and other charges. 2/7/14RP at 13-15.<sup>6</sup>

(b). **ER 410 error.** The trial court committed legal error based on the record before it and a misapplication of the Rule. State v. Hatch, 165 Wn. App. 212, 267 P.3d 473 (2011) (standard of review for a conclusion regarding the applicability of ER 410 is *de novo*); cf. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). ER 410 prohibits the prosecutor from introducing evidence of a defendant’s statements made in connection with the *contemplation* of entering a guilty plea, as well of course as the defendant’s offer to plead guilty, as here. ER 410 provides:

**INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS**

(a) General. Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made

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barred the evidence. ER 410.

<sup>6</sup> Mr. Khomyak’s statement that he desired to plead guilty was also the State’s primary argument against the defense’s unsuccessful ‘half-time’ motion to dismiss the burglary charge under State v. Green, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980). CP 78-86; 4/16/14RP at 176-81.

in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath and in the presence of counsel. This rule does not govern the admissibility of evidence of a deferred sentence imposed under RCW 3.66.067 or RCW 9.95.200-.240.

ER 410. Thus in the case of State v. Hatch, *supra*, 165 Wn. App. 212, 267 P.3d 473 (2011), this Court of Appeals held that the statements the defendant made in a psychological examination -- of the sort used to negotiate a post-trial alternative sentence -- were protected because they were made in connection with a contemplated, negotiated plea of guilty. State v. Hatch, 165 Wn. App. at 217-18.

Further, the defendant need not yet be charged with the crime for ER 410 to apply, as in the present case. In State v. Nowinski, 124 Wn. App. 617, 621, 102 P.3d 840 (2004), the Court noted that the purpose underlying the rule is to encourage the disposition of criminal cases through plea bargaining, without the defendant fearing that plea-related statements will be used against him if the case proceeds to trial. State v. Nowinski, 124 Wn. App. at 628 (citing State v. Jollo, 38 Wn. App. 469, 472, 685 P.2d 669 (1984)).

To determine whether a defendant's statements are related to plea negotiations such that ER 410 applies, the court must determine, first,

whether the accused in question exhibited that he had an actual subjective expectation to try to negotiate a plea at the time the statements were made and, second, “whether the accused’s expectation was reasonable given the totality of the objective circumstances.” State v. Nowinski, 124 Wn. App. at 622 (quoting United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir.1978)).

Here, both aspects of this analysis squarely apply. Although the jury was not ultimately told of it, Mr. Khomyak had pending federal deportation proceedings, and plainly and reasonably believed that quick resolution of the criminal charge of burglary by plea would allow proper “global” assessment of the deportation matter and any and all pending state criminal case issues affecting it, and its timing. Mr. Khomyak’s desire to be charged, if that was law enforcement’s intention, and to plead guilty in pursuit of that objective, was subjectively genuine. Thus in Nowinski, the defendant was merely a suspect in a murder, and he told a police interviewer and a prosecutor that he wanted to plead guilty. Even though he had not yet been charged, and even though the prosecutor responded to him by saying he could not make any promises of a deal, the defendant’s statements were deemed protected by ER 410. Nowinski, 124 Wn. App. at 629. The Court rejected the State’s argument that plea negotiations must be formal for ER 410 to apply. Nowinski, 124 Wn.

App. at 626-27.

The trial court in the present case erred as a matter of law because the record that the court had before it, and that this Court has before it, shows that ER 410 applied. State v. Hatch, *supra*; State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

**(c). Reversal is required.** The improper admission of evidence is reversible error if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial, and in assessing whether the error was harmless, the courts measure the admissible evidence of guilt against the prejudice caused by the improperly admitted evidence. State v. Nelson, 108 Wn. App. 918, 926, 33 P.3d 419 (2001), review denied, 145 Wn.2d 1026, 51 P.3d 87 (2002).

Here, the only evidence that Mr. Khomyak was even present near the Spromberg home was the discarded cigarette butt – found outside the residence. Carol Williams, the Sprombergs' neighbor, was in her front yard and snapped photographs of several men who had pulled up to the Spromberg home and then went on foot down a side path that could access the back of the property. The men shortly re-appeared; one of the men was carrying a bag over his shoulder. 4/16/14RP at 35-41. It was mid-day and Mrs. Williams could clearly see what was happening. 4/16/14RP at

34-37. But none of the men could be identified by sight or in the pictures by anyone, including Ms. Williams or the police, as the defendant.

4/16/14RP at 41-45; Supp. CP \_\_\_, Sub # 33 (Exhibit list) (Exhibits 1, 2, 3, 4 and 5).

Further, for the jury, which deliberated into the next court day and requested in two separate jury note to see the report of Detective Rabelos, and the witness statement of Carol Williams, the DNA on the cigarette hardly persuaded the jurors convincingly that Mr. Khomyak was somehow an accomplice to the felonious entry of the house. 4/16/14RP at 202 (deliberations, day 1); 4/17/14RP at 208-19 (deliberations, day 2; and jury requests (denied)); CP 43, CP 44 (jury requests); Supp. CP \_\_\_, Sub # 33 (Exhibit list) (Exhibit 35 (Rabelos report), Exhibit 33 (Carol Williams statement)). The ER 410 error was prejudicial because the case was weak, and, within reasonable probabilities, the outcome would have differed but for the error. State v. Bourgeois, 133 Wn.2d at 403.

**2. THE EVIDENCE WAS INSUFFICIENT TO PROVE BURGLARY.**

**(a). The prosecutor sought a guilty verdict based on complicity.**

In every criminal prosecution, the State must prove all elements of the charged crimes beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct.

1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Pursuant to RCW 9A.52.025, residential burglary is committed when a “A person . . . with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1).

Accordingly, as the prosecutor argued in closing, the jury in Mr. Khomyak’s trial was required to find that he was an accomplice to burglary, by virtue of knowingly acting to facilitate that crime by aid or encouragement. See CP 69 (Instruction no. 8); CP 70 (Instruction no. 9); RCW 9A.08.020; 4/16/14RP at 183-91, 197-202.

**(b). The evidence was insufficient.** A cigarette allegedly smoked by Mr. Khomyak was located outside the Spromberg dwelling. However, “more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” CP 70 (Instruction no. 9).

Thus in In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979), a conviction was overturned where “Wilson’s presence, knowledge of the theft, and personal acquaintance with active participants” was not legally “sufficient to support a finding of abetting.” In re Welfare of Wilson, 91 Wn.2d at 491–92. Presence and possibly knowledge is all that the State proved in Mr. Khomyak’s case. Notably,

Mr. Khomyak was not seen in the area, much less entering, or leaving, the home as one of the men, or with the man, who was seen carrying a bag. The shoeprint on the door was not his. 4/16/14RP at 143-44. Police did a Leads Online search and an investigation to see if Mr. Khomyak had ever pawned any of the stolen items, but this investigation showed he had not done so. 4/16/14RP at 142-43. Mr. Khomyak was never found to have pawned any of the items that were ultimately located and returned to Mrs. Spromberg. 4/16/14RP at 143-44. The prosecutor attempted to show that perhaps the defendant, or someone, had pawned the items under a 'fake ID,' but Detective Rabelos clarified that the police can, and also did in this case search the stolen items under their description and serial numbers. 4/16/14RP at 144-45. Some of the items were later recovered at a church, apparently with no connection to Mr. Khomyak whatsoever. 4/16/14RP at 28-29, 94, 183.

Mere presence is insufficient to prove complicity in a crime, State v. Roberts, 80 Wn. App. 342, 355–56, 908 P.2d 892 (1996), even when that presence is coupled with knowledge of what is occurring or what others later do. In re Welfare of Wilson, supra; State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

Guilt on the burglary allegation was not proved and the entry of judgment violated Due Process. U.S. Const. amend. 14; Wash. Const. art.

1, § 3. Mr. Khomyak asks the Court to reverse his conviction. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

**3. THE DEFENDANT'S RIGHT TO A TIMELY TRIAL UNDER THE COURT RULES WAS VIOLATED.**

**a. The time for trial rules require prompt disposition of a defendant's case.** The right to a speedy trial under Washington's Criminal Rules is fundamental. State v. Ross, 98 Wn. App. 1, 981 P.2d 888 (1999). In promulgating the original timely trial rules found in CrR 3.3, the Supreme Court exercised its rule-making power in aid of the constitutional imperative that there be prompt disposition of criminal cases. State v. Cornwall, 21 Wn. App. 309, 584 P.2d 988 (1978). The policy underlying CrR 3.3 is "that it is in the best interest of all concerned that criminal matters be tried while they are fresh." State v. Greenwood, 120 Wn.2d 585, 595, 845 P.2d 971 (1993).

Even following revisions to the time for trial rules, the trial court bears the ultimate responsibility of insuring an accused be tried in a timely fashion. State v. Raschka, 124 Wn. App. 103, 111, 100 P.3d 339 (2004).

CrR 3.3(b)(1)(i) requires trial within 60 days when the defendant is in custody. State v. Saunders, 153 Wn. App. 209, 216–17, 220 P.3d 1238 (2009). Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial, but CrR 3.3(e)

excludes the time allowed for valid continuances from the speedy trial period. Saunders, 153 Wn. App. at 217. When a period of time is excluded under CrR 3.3(e), the speedy trial period extends to at least 30 days after the end of the excluded period. CrR 3.3(b)(5).

Importantly, the trial court must find that a continuance “is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense” in order to grant a party’s motion for a continuance. CrR 3.3(f)(2); State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003); State v. Jack, 87 Wn.2d 467, 469, 553 P.2d 1347 (1976).

**b. The trial court violated CrR 3.3.**

*(i) The time for trial.* In the present case, Mr. Khomyak was arraigned on November 27, 2013, and was in custody at that time, resulting in a speedy trial expiration date 60 days thereafter, with a trial start date set for January 11, 2014. Supp. CP \_\_\_, Sub # 7 (minutes of November 27, 2013); Supp. CP \_\_\_, Sub # 19 (State’s Motion Continuing Trial, Feb. 25, 2014); CrR 3.3(b)(1)(i).

By agreement, the matter was continued to February 28, 2014, with trial to commence on Monday, March 3, 2014, and a resulting time for trial expiration date of March 30, 2014. Supp. CP \_\_\_, Sub # 19 (State’s

Motion Continuing Trial, Feb. 25, 2014); Supp. CP \_\_\_, Sub # 10 (minutes of January 3, 2014).

However, on February 28, the prosecutor sought to continue the trial date to April 4, 2014. 2/28/14RP at 2. Supp. CP \_\_\_, Sub # 19 (State's Motion Continuing Trial, Feb. 25, 2014). The request was opposed by Mr. Khomyak. 2/28/14RP at 4.

The reasons for the continuance request to April 4, and the trial court's basis for its order which was to continue the trial date to March 14 with the intervening two weeks as an excluded period, were inadequate. The prosecutor's basis for the request was that the alleged burglary victim, Mrs. Patricia Spromberg, was a "snowbird" who spends approximately half the year at her residence in Southern California, and half the year at her residence in Washington. 2/28/14RP at 3. She planned to return to Washington State on April 2, and had told the prosecutor that it would be "an inconvenience for her" to return earlier. 2/28/14RP at 3; see also Supp. CP \_\_\_, Sub # 19 (State's Motion Continuing Trial, Feb. 25, 2014) (Declaration) (stating that "Ms. Spromberg will be residing in the State of California until April 2, 2014, and is unwilling to interrupt her sojourn until that time.").

Despite the prosecutor's attempted "analogy" to a continuance for a police officer's prescheduled vacation, Ms. Spromberg was not on a

vacation. She was an out-of-state resident during the relevant time, who merely claimed that coming to Washington for trial was inconvenient. As the trial court stated when the prosecutor analogized the circumstances to a vacation:

Is this the same thing as a vacation really, though? I mean, you used the term snowbird. Is that a vacation, or is it somebody who has two homes in two locations and then maybe it's not equivalent to a vacation.

2/28/14RP at 7-8.

The prosecutor suggested that in the alternative, since trial expiration was not until the end of March, the court could “carry the matter.” 2/28/14RP at 8-9. The prosecutor then stated, however,

but I'm scheduled to be sent out to trial this coming week in a trial with [another lawyer] Ms. Mann, so I wouldn't be available just for my own schedule to try the case next week. That doesn't mean that I wouldn't be able to try it the week after that, but I think I would be entitled to at least a week continuance based on certainly my unavailability for being in trial next week[.]

2/18/14RP at 9. The trial court stated that it would continue the trial “for two weeks until March 14” for good cause “at least at this point because of Mr. Cornell's trial schedule.” 2/18/14RP at 10. The court stated that this would be an excluded period, and said that the “primary reason” for the

continuance was the prosecutor's schedule "plus the witness is not here today." 2/28/14RP at 10-11.

***(ii) Mr. Khomyak alleges multiple violations of the time for trial.***

However, the prosecutor's scheduling for a trial the coming week was not a basis in the record to continue Mr. Khomyak's trial. The record shows that the schedule had always been that Mr. Khomyak's trial was to be held in the early part of the week, and that the prosecutor's second trial with Ms. Mann would then begin. Mr. Khomyak's short trial was never expected to take substantively more than the approximately one to two days that it did. See Reports Proceedings of April 16, 2014, at 27-207 (witnesses, closing argument, and commencement of deliberations); and April 17, 2014, at 208-18 (jury questions and verdict).

Therefore the basis for the continuance was an out-of-state victim/witness who was unwilling to suffer the inconvenience of traveling to the State for trial, because of the season. This is inadequate. Prescheduled attorney or police officer vacations generally justify a continuance. See State v. Selam, 97 Wn. App. 140, 143, 982 P.2d 679 (1999) (citing cases), review denied, 140 Wn.2d 1013, 5 P.3d 9 (2000); see, e.g., State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005); State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), review denied, 148 Wn.2d 1005 (2003). Further, the unavailability of a material State witness

may provide a valid basis for a continuance. State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). But Mrs. Spromberg was not unavailable, the record establishes she was merely unwilling to travel at a time that inconvenienced her. This is inadequate.

Further, the party whose witness is absent must prove it acted with due diligence in seeking to secure that witness's presence at trial. State v. Nguyen, 68 Wn. 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 Wn. 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 Wn. App. 472, 476, 783 P.2d 1131 (1989).

Here, the original agreement for trial continuance to a trial date of February 28, 2014 was reached on January 3 of 2014. Supp. CP \_\_\_\_, Sub 10 (minutes of Jan. 3, 2014). The prosecutor only sent out a subpoena on February 11, 2014, and the State appeared to represent that it consequently only learned of Mrs. Spromberg's California residence shortly after that time. 2/28/14RP at 5. The prosecutor admitted that the State could have

contacted Mrs. Spromberg earlier, but did not. 2/28/14RP at 5 (“I certainly could have called her in advance. I didn't do it.”).

In addition, on March 13, 2014, the prosecutor sought another continuance of the trial date on March 13, 2014, based on the same “snowbird” justification, to the last then-allowable date for trial, expressed variously by the prosecutor as April 14 (correctly), or April 15 by the court. Supp. CP \_\_\_, Sub # 23 (State’s Motion to Continue trial, March 11, 2014); Supp. CP \_\_\_, Sub # 26 (minutes of March 13, 2014). This new request was also opposed. Supp. CP \_\_\_, Sub # 25 (Defense Response to State’s Motion to Continue, March 11, 2014).

The trial court stated that it *understood* that Mrs. Spromberg was unwilling, and that it would be inconvenient for her to come to trial, and asked the State to show what made her unavailable. 3/13/14RP at 5. The prosecutor stated that Ms. Spromberg was “winding things down” as she got closer to her planned departure from her warm weather winter residence to her residence in Washington. 3/13/14RP at 5. The court noted, “Everything to do with court is inconvenient.” 3/13/14RP at 8. The court stated it could not find good cause to continue the matter based on unavailability, but would carry the matter until April 4, with trial to begin on April 7. 3/13/14RP at 9-10. Trial ultimately began on April 15, 2014, following an April 4, 2014 grant for “good cause” of a one-week

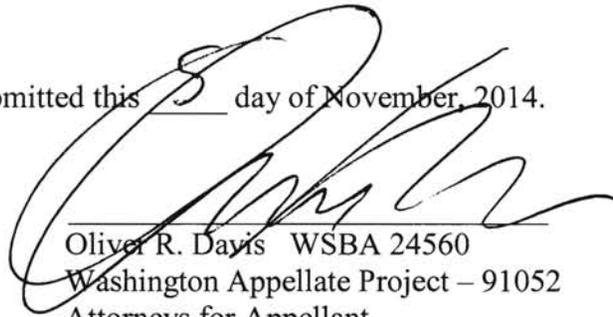
continuance following the State's opposed motion to continue based on the unavailability of the State's DNA/forensic witness, Ms. Himick. 4/4/14RP at 2-5; Supp. CP \_\_\_, Sub # 30 (minutes of April 4, 2014).

Mr. Khomyak alleges multiple violations of the time for trial rules of CrR 3.3 and asks that his conviction be reversed and the charge dismissed.

**E. CONCLUSION**

Based on all of the foregoing, Ruvim Khomyak respectfully argues that this Court should reverse his burglary conviction, and dismiss the charge against him.

Respectfully submitted this \_\_\_ day of November, 2014.



Oliver R. Davis WSBA 24560  
Washington Appellate Project – 91052  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71911-4-I
	)	
RUVIM KHOMYAK,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING 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<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201    | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | RUVIM KHOMYAK<br>344133<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2014.

X \_\_\_\_\_ 

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NOV 11 2014  
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