NO. 45398-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN EDWARD WILSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's constitutional right to have a fair trial in which the jury was the sole judge of the facts when it allowed the prosecutor and a police officer over defense objection to refer to the complaining witness as the "victim" of the defendant's sexual assault.

2. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it granted his attorney's motion to continue the trial past the time for speedy trial without first obtaining the consent of the defendant.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, to have a fair trial in which the jury was the sole judge of the facts if it allows the prosecutor and two police officers over defense objection to repeatedly refer to the complaining witness as the "victim" of the defendant's sexual assault?

2. Does a trial court violate a defendant's right to speedy trial under CrR 3.3 if it grants the defense attorney's motion to continue the trial past the time for speedy trial without first obtaining the consent of the defendant?

STATEMENT OF THE CASE

Factual History

On March 16, 2013, Kitsap Transit bus driver Helen Henry was driving on her regular route in the afternoon when she pulled up to a stop by the Port Orchard foot ferry. RP 77-79[1]. As she did she saw a man pressed up from behind and with one arm over the shoulder of a young woman who looked distressed and afraid. *Id.* Based upon what she saw Ms Henry stopped her bus, got out and asked the young woman if she knew the man next to her. *Id.* When the young woman said "no" Ms Henry ordered the man to leave. *Id.* The man, whom Ms Henry could see was drunk, then stepped away from the young woman laughing and giggling. RP 79-80. When he didn't walk away Ms Henry told him that she would "call somebody to help you move if you'd like." *Id.* Ms Henry then turned around and saw that the young woman had got on her bus. *Id.* Ms Henry had never seen the man or the young woman before that day. RP 81

During this same time period, another young woman by the name of Laura Talkington walked up to the bus stop. RP 86-87. She also saw the

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[1]The record on appeal includes 11 volumes of verbatim reports, including six volumes of pretrial hearings, four volumes of trial proceedings, and one volume of the sentencing. The pretrial proceedings and the sentencing hearing are referred to herein as "RP [date of hearing] [page #]." The four volumes of trial reports are continuously numbered and are referred to herein as "RP [page #]."

drunken man, whom she later identified as the defendant, leaning up again a young woman with one of his arms across her shoulder. RP 88-89. The young woman looked afraid. *Id.* As Ms Talkington approached she recognized the young woman as an acquaintance by the name of HB. RP 87. When Ms Talkington approached HB looked at her and mouthed "help." *Id.* Ms Talkington responded to HB's plea by yelling "She's only 15 years old, you need to back off!" RP 89. The defendant, who appeared drunk, then staggered away while Ms Talkington turned to summons police officers. RP 89-91.

In fact two police officers had already responded to a call and drove up to see the defendant leaning against HB from behind with an arm draped across her shoulder. RP 116-118, 123-124. As they approached they say the defendant walk away. *Id.* One officer then went and arrested the defendant and put him in a patrol car. RP 123-124. The other officer went to help HB and take statements from witnesses. RP 116-119. He then took HB to the patrol car where she positively identified the defendant as the person who had been bothering her. RP *Id.* Both officers could see that the defendant was intoxicated. RP 119-120, 124.

HB later related that she had been waiting at the bus stop when the defendant approached her and started a conversation. RP 95-96, 98-102. He smelled of alcohol. *Id.* He then pressed up against her and tried to give her

a kiss. *Id.* She told him to back off but he didn't. RP 98-99. At that point she claimed he put one arm over her shoulder, reached inside her shirt and touched one of her breasts. RP 97. He then tried to kiss her again. RP 98-99. At about that time two people approached. RP 96, 101-102. The first was an acquaintance by the name of Laura Talkington. RP 96. The second was a male bus driver she knew by the name of Dan. RP 102-103, 104. He had driven up in his bus and got out. *Id.* In fact she had taken his bus on a number of prior occasions. *Id.*

HB reported that she looked at Laura Talkington as she approached and mouthed "help" to her. RP 95-96. Laura responded by yelling at the defendant to back off because she's "fifteen." RP 97. HB also remembered that her male bus driver acquaintance by the name of Dan also came over to help. RP 101, 104. When later relating what had happened HB was quite sure that the bus driver who stopped to help her was a male and was in fact "Dan," whose bus she had ridden on many occasions. RP 104. Although the bus driver Helen Henry, Laura Talkington, and the two police officers all observed the defendant standing behind HB with one arm over her shoulder, none of them claim to have seen the defendant put his hand inside HB's shirt or touch her breast. RP 82, 91-92, 119-120, 125-126.

Procedural History

By information filed April 1, 2013, the Kitsap County Prosecutor

charged the defendant Brian Edward Wilson with one count of Child Molestation in the Third Degree. CP 1-2. Two days later on April 3rd the defendant appeared for arraignment, and pled not guilty. RP 4/3/13 1-6. Given that the defendant was in custody the court set a pretrial for May 1st and a trial for May 28th. *Id.* The court calculated that the time for speedy trial would run on June 3rd. *Id.* On the May 1st pretrial the defense asked and the court agreed to put the matter over one week so counsel could review additional reports that the state had just produced. RP 5/1/13 1-3. One week later on May 9th, the defense stated that its interview with the complaining witness was that day. RP 5/9/13 3. The court then set a trial review date for May 16th. *Id.*

On May 16th the parties appeared for a trial review at which time defense counsel asked to change the trial date from May 20th to June 10th as the defense was trying to "locate some witnesses." RP 5/16/13 2. The state objected and the court did not enquire of the defendant whether or not he was willing to sign a speedy trial waiver. *Id.* In fact, when the court granted the defense attorney's motion and set a new trial date for June 10th the defendant objected stating "Why can't it be sooner." RP 5/16/13 3-4.

On June 10th the court called the case for trial. RP 6/10/13 2. At that time the court informed the defendant that his case would be continued because there was another case with "less speedy" trial time remaining. *Id.*

The court then reset the defendant's trial date to July 8th upon the state's claim that one of its witnesses, Officer David Walker, would be unavailable until that date. RP 6/10/13 3-5. At that time the defendant gave a written letter to the court objecting to any continuances. CP 22-25. When the case was called for trial on July 8th the prosecutor asked for and the court granted another week's extension upon the prosecutor's statement that Officer Walker would actually not be back until July 15th. *Id.*

The case was later called for trial on July 15th, at which time defense counsel handed the court a second letter from the defendant. RP 3; CP 29-32. Counsel also noted that defendant had requested that counsel move to dismiss the charges based upon a speedy trial violation and that she had refused upon her belief that the motion was without merit. RP 3. The case then proceeded to trial with the parties spending the first day on motions *in limine* and the second day starting *voir dire*. RP 3-44. As one of its motion *in limine* the defense moved that the court preclude the state or any witness from referring to HB as the "victim" of the defendant's crime. RP 8-12. The court denied the motion. *Id.*

During the trial the state called five witnesses: Helen Henry, Laura Talkington, HB and the two police officers Patrick Pronovost and David Walker. RP 77, 86, 94, 114, 122. During the state's direct examination of the two police officers the prosecutor referred to HB as the "victim" of the

defendant's crimes and both of those police officers referred to HB as the "victim." The prosecutor's first two uses of this term occurred during the following question to the first officer:

> Q. You briefly described the ***victim's*** demeanor while she was still sitting at the bus station. Did you have additional contact with the ***victim***?
>
> A. Yes.

RP 118 (emphasis added).

The third time the prosecutor used the term "victim" in front of the jury occurred directly after the second police officer used this term to refer to HB. RP 123-124. This exchange went as follows:

> Q. So when you got there, what was your role in it?
>
> A. We arrived, the suspect was pointed out, and I immediately recognized him. So I sort of gravitated to the suspect, since I was the lead car and I was closer to him. So I went that way while Officer Pronovost spoke to ***the victim***.
>
> Q. Okay. Did you ever have a chance to talk to ***the victim***?
>
> A. I think briefly. Basically, she pointed to the direction where the suspect was. I didn't get a blow-for-blow detail of what happened, but it was sort of pointed out, that's him. Other people in the area pointed. And I went directly to them – to him, I should say.

RP 123-124 (emphasis added).

This same police officer again referred to HB as the "victim" of the defendant's crime during the following exchange on cross-examination.

> Q. Okay. Do you remember the transit employee?

A. It was a male, mid 40s, early 50s. I didn't recall his name. I didn't get his name. I dealt with Mr. Wilson primarily.

Q. Okay.

A. As well as ***the victim***, so ...

Q. Okay.

RP 126 (emphasis added).

Finally, the prosecutor again referred to HB as the "victim" of the defendant's crimes during the following statement made as part of closing arguments:

> In light of what the others saw and reported to you, the proximity of the defendant to ***the victim***, his arm around her shoulder, his chin on her shoulder; in light of that testimony, is it a stretch to believe that he also tried to kiss her and touch her breast? Is that a stretch? Absolutely not.

RP 151.

After the close of the state's case the defense rested without calling any witnesses. RP 127. Neither did the defense voice any objections to the court's instructions to the jury. RP 133-141. Following argument by counsel and deliberation the jury eventually returned a "guilty" verdict. RP 144-156, 164-168; CP 109. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 135-144, 146-147.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO HAVE A FAIR TRIAL IN WHICH THE JURY WAS THE SOLE JUDGE OF THE FACTS WHEN IT ALLOWED THE PROSECUTOR AND A POLICE OFFICER OVER DEFENSE OBJECTION TO REFER TO THE COMPLAINING WITNESS AS THE "VICTIM" OF THE DEFENDANT'S SEXUAL ASSAULT.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the

defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

> A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:
>
> > Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.
>
> This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).
>
> To the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic

stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

In the case at bar, the court violated the defendant's right to have a fair trial free from opinions of guilt when, over defense objection though a motion *in limine*, it allowed the prosecutor and police officers to repeatedly refer to the complaining witness as the "victim" of a sexual assault by the defendant, thereby giving their opinions that the defendant was guilty of the crime charged. This occurred six times during the trial. The first two uses of this term came in the following single question by the prosecutor:

> Q. You briefly described the ***victim's*** demeanor while she was still sitting at the bus station. Did you have additional contact with the ***victim***?
>
> A. Yes.

RP 118 (emphasis added).

The third and fourth time the jury heard the prosecutor and a police officer describe HB as the "victim" occurred in the following exchange:

> Q. So when you got there, what was your role in it?
>
> A. We arrived, the suspect was pointed out, and I immediately recognized him. So I sort of gravitated to the suspect, since I was the lead car and I was closer to him. So I went that way while Officer Pronovost spoke to ***the victim***.
>
> Q. Okay. Did you ever have a chance to talk to ***the victim***?
>
> A. I think briefly. Basically, she pointed to the direction where the suspect was. I didn't get a blow-for-blow detail of what happened,

but it was sort of pointed out, that's him. Other people in the area pointed. And I went directly to them – to him, I should say.

RP 123-124 (emphasis added).

The fifth use of the term "victim" to describe HB came from the same police officer during the following exchange on cross-examination.

Q. Okay. Do you remember the transit employee?

A. It was a male, mid 40s, early 50s. I didn't recall his name. I didn't get his name. I dealt with Mr. Wilson primarily.

Q. Okay.

A. As well as ***the victim***, so ...

Q. Okay.

RP 126 (emphasis added).

Finally, the sixth use of this term occurred when the prosecutor again referred to HB as the "victim" of the defendant's crimes during the following statement made as part of closing arguments:

In light of what the others saw and reported to you, the proximity of the defendant to ***the victim***, his arm around her shoulder, his chin on her shoulder; in light of that testimony, is it a stretch to believe that he also tried to kiss her and touch her breast? Is that a stretch? Absolutely not.

RP 151.

The fact is that words have meaning and some words have come to carry special meaning in our society. One of these words is "victim." By using it the prosecutor and the police unequivocally communicated two facts

to the jury: (1) that the defendant was guilty of sexually assaulting HB, and (2) that the prosecutor and the police believed HB's claims. One might well ask whether or not the trial court would have countenanced for one second an attempt by the defense to repeatedly refer to the defendant as the "falsely accused" in front of the jury. The first attempt would undoubtedly have resulted in the court threatening counsel with contempt if not actually finding counsel in contempt. Would this court on appeal then have seriously considered reversing such a contempt citation upon an argument that the term "falsely accused" didn't really convey an improper opinion by defense counsel or constitute an attempt to impermissibly convey a personal opinion to the jury? The purpose of this rhetorical question is to illustrate the fact that words like "falsely accused" and "victim" are loaded words that convey specific meaning to a jury. Their use is improper.

In this case the defense specifically moved *in limine* at the beginning of the trial to preclude the use of the word "victim" by the state and the state's witnesses. By denying this motion the court allowed the prosecutor and the police officers to render their personal opinions to the jury that HB was telling the truth and that the defendant was guilty of the crime charged. This was error and as the following explains, this error denied the defendant a fair trial.

In this case there is little doubt from the state's five witnesses that on

the night in question the defendant acted as a drunken lout. His conduct toward HB was obnoxious and reprehensible. No person, young woman or old should have to put up with the experience of a drunken "jerk" walking up, leaning against them, resting one arm across their shoulder and then repeatedly trying to kiss them. Helen Henry saw the defendant do this; Laura Talkington saw the defendant do this; Officer Patrick Pronovost saw the defendant do this; Officer David Walker saw the defendant do this; and HB had the misfortune of having experienced it. The defendant undoubtedly deserved to be punished for this conduct.

However, HB further claimed that the defendant intentionally touched one of her breasts. Not a single one of the four eye witnesses claimed to have seen any such conduct occur. This lack of evidence where one would have expected it to exist calls HB's claim of sexual assault into question. Certainly it is possible that this conduct preceded the arrival of the four witnesses, but HB's claims of sexual assault are also called into question by another unexplained anomaly in the case. That anomaly is HB's absolute insistence that the bus driver who approached to help her was a male transit driver by the name of "Dan" whom she knew and whose bus she had repeatedly ridden in the past. In fact, the only bus driver on the scene was Helen Henry, a woman who had never seen HB prior to that evening.

One is left to ask the obvious question: If HB could be so obviously

wrong about the identity of the bus driver who arrived on the scene, could she not also have been mistaken about the defendant intentionally touching her breast? Given that all of the witnesses stated that the defendant had one of his arms draped over HB's shoulder the answer to this question is that she might well have been wrong. The lack of any witness seeing the alleged sexual touching, as well as HB's obvious inability to accurately relate what happened regarding the identity of one of the witnesses both support an argument that as far as the sexual touching was concerned the evidence presented at trial was equivocal at best and probably best described as weak. Thus, there is a significant possibility that the state's six improper references to HB as the "victim" was sufficient to change what would have been a verdict of acquittal into a verdict of guilt in this case. In other words, the error caused prejudice. Consequently, the trial court's refusal to grant the defendant's motion *in limine* and the state's repeated reference to HB as the "victim" of the defendant's crimes denied the defendant the right to have a fair and impartial jury decide the facts of this case under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

II. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CHARGES DISMISSED WITH PREJUDICE BECAUSE THE TRIAL COURT VIOLATED THE DEFENDANT'S STATUTORY RIGHT TO SPEEDY TRIAL.

Under CrR 3.3(b), the time for trial for a person held in jail is "60 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." CrR 3.3(b)(1)(i)&(ii)."initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

> (f) 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 made before the time for trial has

> expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra,* a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first

acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

> The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the defendant was in custody the entire time of this trial. As a result, the 60 day rule applies as opposed to the 90 day rule. He was arraigned on April 3, 2013, making June 3, 2013, the last day upon which he could be tried under the rule. On May 16, 2013, the court granted

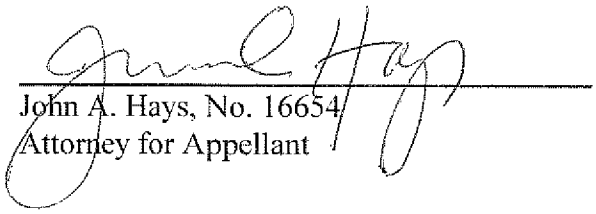
a defense request to continue the case beyond the June 3rd trial date without a waiver from the defendant and in spite of his objection to a continuance. The court did this without any explanation from the defense as to why the case could not be reset within the available time for speedy trial.. Thus, in the case at bar the trial court violated the defendant's right to speedy trial and the defendant is entitled to dismissal with prejudice under CrR 3.3(h).

CONCLUSION

This court should reverse the defendant's conviction and remand for dismissal given the trial court's failure to bring the defendant to trial in the time required under CrR 3.3. In the alternative, the state's repeated reference to the complaining witness as the "victim" of the defendant's sexual assault denied the defendant a fair trial. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 21st day of February, 2014.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district whercin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CrR 3.3

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) 'Pending charge' means the charge for which the allowable time for trial is being computed.

(ii) 'Related charge' means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) 'Appearance' means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) 'Arraignment' means the date determined under CrR 4.1(b).

(v) 'Detained in jail' means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense

attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice--Objections--Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on

the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to Foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(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 made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **BRIAN EDWARD WILSON,** **Appellant.**	**NO. 45398-3-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Russell D. Hauge
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2. Brian Wilson
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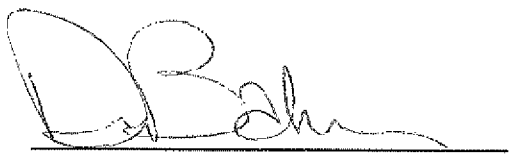
Dated this 19th day of February, 2014, at Longview, Washington.



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February 21, 2014 - 10:14 AM

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Court of Appeals Case Number: 45398-3

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