NO. 46012-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICHOLAS THOMPSON,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The defendant's convictions should be reversed and the charges dismissed with prejudice because the trial court violated the defendant's statutory right to speedy trial.

2. The trial court erred when it denied the defendant's motion to dismiss under CrR 8.3 because the state's egregious misconduct in taking a letter from the defendant containing confidential communications to the defendant's attorney caused prejudice.

3. The trial court denied the defendant his right to be present at trial when it banished him from the courtroom for the final three days of trial without informing the defendant that he could return if he conducted himself appropriately.

Issues Pertaining to Assignment of Error

1. Should a defendant's convictions be reversed and the charges dismissed with prejudice if the trial court violated the defendant's statutory right to speedy trial and failed to ensure that the defendant's case was brought to trial within the time required under the rule?

2. Does a trial court err if it denies a motion to dismiss under CrR 8.3 if the defendant proves (1) egregious governmental misconduct that (2) caused prejudice to that defendant's case?

3. Does a trial court deny a defendant the right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, to be present at trial if it banishes him from the courtroom for the final three days of trial without informing that defendant that he may return if he conducts himself appropriately?

STATEMENT OF THE CASE

Factual History

On the evening of December 7, 2012, Arnold Hendrickson, Jr., known as "AJ," and five of his high school friends went to a high school basketball game. RP 61-66, 224-226, 264-266, 301-307, 364-370, 397-400.[1] His friends were Ryan Gault, Kaleb Keys, Joshua Wilson, Lauren Pinch and Xuanmai Vo. *Id.* At half-time they decided to leave the game and go to Costco for Pizza. *Id.* At that point they called their parents and told them that they were going to a movie. *Id.* However, after calling their parents they changed their minds as there were no movies they wanted to see and they didn't have enough money to buy everyone tickets. *Id.* At that point they decided to go to an apartment Xuanmai's sister shared with her boyfriend at a large apartment complex at 1309 Fern Street SW in Olympia. *Id.*

Once up in the apartment the six friends searched for a movie to watch, began drinking alcohol and then played a drinking game. RP 63-69, 233-236, 264-268, 301-307, 364-372, 397-419. By about 11:30 the six left the apartment to go home. *Id.* Once out in the parking lot, which was fairly dark, Lauren started her car to warm it up and Xuanmai got in the front

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[1]The record on appeal includes six volumes of continuously numbered verbatim reports of the jury trial, along with six other volumes of pretrial and post-trial hearings. The trial volumes are referred to herein as "RP [page #]." The other verbatim reports are referred to herein as "RP [date] [page #].

passenger seat to talk to Lauren. RP 73-74, 273-274. Ryan went to warm up the truck. RP 69, 239-240. AJ, Kaleb and Josh stood outside Lauren's car and talked with each other and the two girls through the open door as the car warmed up. *Id.* As they were talking a man they later identified as the defendant walked up out of the dark, pulled a 9mm pistol and ordered them to give him their possessions. RP 69-73, 273-275. AJ, Kaleb and Josh responded by handing over a backpack and other items on their persons. *Id.* At about this time Lauren and Xuanmai looked up, saw the defendant and the gun. RP 377-381, 420-422. In response they closed and locked their doors. RP 77-79; 381-385.

While AJ, Kaleb and Josh were handing over their possessions Ryan walked up and saw the defendant and the gun. RP 77-79, 239-242. The defendant then ordered Ryan to hand over his possessions, which he did. *Id.* At this point the defendant put the pistol back in his waistband, placed the items he had collected on the ground and started looking through them. RP 73-76. The defendant then stood up and told them repeatedly that he "needed" the car. RP 77-79. When he said this he pulled out the pistol and started knocking on the driver's side window with it. RP 428-430. Although AJ, Kaleb and Lauren do not remember whether or not the defendant used the gun to knock on the window, Xuanmai did remember the defendant using the gun to rap on the window. RP 77-79, 280-281, 428-430.

When Lauren and Xuanmai did not respond AJ began to worry that the defendant would shoot them. RP 79-80. As a result he placed himself between the defendant and the two girls and told him he couldn't take the car. RP 80-82. The defendant responded by hitting AJ in the face, knocking him back, and pulling the action back on the pistol. RP 80-84, 280-284. Seeing this AJ thought the defendant was putting a round in the chamber to shoot him. RP 80-84. AJ responded by jumping forward and grappling with the defendant trying to get the pistol from him. RP 83-84, 281-284. At about this time Lauren quickly backed her car up and drove out of the parking lot and down the street with Xuanmai. RP 289-392, 429-430. As they were driving away AJ, still grappling with the defendant, heard three shots in fairly short succession. *Id.* The third shot hit AJ in the abdomen, causing him to fall to the ground in a great deal of pain. RP 83-84, 89, 286-288.

At about the time the defendant was telling AJ, Kaleb and Josh that he needed the car Ryan was able to back into the dark, return to the truck and call 911. RP 244-245. He then heard the shots and ran over to find AJ on the ground. RP 245-249, 336-339. A short distance away the defendant was on the ground with Kaleb and Josh on top of him. *Id.* In fact, prior to jumping on the defendant Kaleb saw the gun on the ground and threw it away from them. RP 286-288. When Ryan ran up he helped detain the defendant until the police arrived. RP 245-249, 336-339. Josh also broke away long enough

to also call 911. RP 338-339. Before the police arrived a man without a shirt ran up, found the pistol, unloaded it, put the round from the chamber and the clip in his pocket and set the pistol down where he found it. RP 436-448. That man then also helped restrain the defendant. RP 448

After five or ten minutes the police and aide crews arrived. RP 469-474, 481-487, 523-528, 596. The police took the defendant into custody, retrieved the pistol, started a crime scene investigation and eventually took statements from everyone present except AJ. *Id.* In fact the aide crew had taken AJ by ambulance to a local hospital where he underwent emergency surgery to remove a 9 mm bullet from his abdomen. RP 506-517, 759-764. Although the shot had caused a significant amount of tissue damage it did not go through any internal organs. RP 513-517. AJ was in the hospital for two days and took five or six months to recover completely. RP 89-92.

Procedural History

By information filed December 12, 2012, and later twice amended, the Thurston County Prosecutor charged the defendant Nicholas Bostrom Thompson with seven felonies as follows:

> Count I: first degree robbery against Ryan Gault while armed with a firearm;
>
> Count II: first degree robbery against Arnold Hendrickson while armed with a firearm;
>
> Count III: first degree robbery against Kaleb Keys while armed

with a firearm;

Count IV: first degree robbery against Joshua Wilson while armed with a firearm;

Count V: first degree unlawful possession of a firearm;

Count VI: first degree assault against Arnold Hendrickson while armed with a firearm; and

Count VII: possession of a stolen firearm.

CP 6-8, 230-232, 238-240.

On December 26, 2012, the defendant appeared with his court-appointed attorney for arraignment, at which time the court set a trial date for the week of February 19, 2013. CP 10-11. The defendant remained in custody for the entirety of these proceedings. CP 11, 255. On January 28, 2013, the court granted a motion from the defendant's attorney to continue the trial date to March 11, 2013. RP 1/28/13 1-8. The defendant was present at that time, refused to sign a speedy trial waiver and objected to any continuance of the trial date. *Id.*

On February 11, 2013, the court reset the trial date to May 27, 2013, again with the defendant objecting. CP 16-17. On April 23, 2013, the court again reset the trial date over the defendant's objection, this time to August 5, 2013. CP 19-20. One month later on May 29, 2013, the defendant filed a *pro se* "Motion Requesting Court of Compel Defense to Comply with Defendant's Requests." CP 23-46. Specifically, the defendant objected to

the violation of his right to speedy trial, as well as his attorney's refusal to take steps in the preparation of the case that the defendant wanted. *Id.* On June 10, 2013, the defendant filed a *pro se* Motion for a Bill of Particulars and a *pro se* Motion to Dismiss for Speedy Trial Violations under CrR 3.3 and a Motion to Dismiss for Governmental Misconduct under CrR 8.3. CP 52-55, 56-72.

One month later on June 28, 2013, the defendant filed two additional *pro se* motions: (1) "Motion Supplemental Information for Motion to Dismiss under 3.3, 3.3(h) Speedy Trial Rights Violation & Under 8.3(g) Governmental Misconduct; and (2) "Motion - Denial of Access to the Courts, Denial of Effective Assistance of Counsel, Violations of Due Process, and Governmental Misconduct." CP 76-80, 81-82, 83-87, and 88-99. The defendant thereafter filed (1) a *pro se* "Notice Demanding for Additional Discovery," (2) a lengthy letter to the court complaining about ineffective assistance of counsel, and (3) a "Motion Regarding Prosecutorial/Governmental Misconduct, Re-Denial of Access to the Courts and Due Process." CP 102-105, 108- 112, 118-127.

On August 15, 2013, the parties appeared before the court, at which time the defendant said that he did not want to proceed *pro se.* RP 8/15/13 1-11. Rather, the defendant stated that he wanted the court to hear and rule on his motions. *Id.* On September 5, 2013, the parties again appeared before

the court, at which time the defendant orally moved to dismiss. RP 9/5/13 22-25. The court then granted a motion to withdraw by defendant's attorney and assigned a new attorney to represent the defendant. RP 9/5/12, 27-56.

Defendant's new attorney later filed a Motion to Dismiss under both CrR 3.3 and CrR 3.8. CP 199-211. These motions came on for hearing on January 13, 2014, at which time the defendant called three witnesses: Larry Corbin, Jesse Lee Harkcom and the defendant Nicholas Thompson. RP 1/13/14, 5-28, 28-45, 45-56. The substance of this testimony was that on March 9, 2013, personnel from the Thurston County Jail performed a routine search of the defendant's cell, found a letter the defendant had written and addressed to his attorney setting out confidential information about the defendant's case, and setting out detailed trial strategy. *Id.* The jailers who found this document then took two pages from the letter and kept them. *Id.* According to the defendant he thereafter refrained from any written communication with his attorney based upon his belief that Thurston County Jail Personnel would again take his confidential legal communications with his attorney. RP 1/13/14 45-56.

After the defendant called his witnesses the state called two jail guards to the stand. RP 1/13/14 56-85, 85-95. The substance of their testimony was that (1) there had been a routine search of the defendant's cell on March 9th, along with all other cells in the pod, and (2) they were unaware

of any guard taking any legal papers from the defendant. *Id.* Following this testimony and argument by counsel the court denied the motion, ruling that even assuming misconduct, which the court did not find, there was no evidence of prejudice and no argument that dismissal would be the only appropriate remedy. RP 1/13/14, 107-110.

On January 29, 2014, over 13 months after arraignment and about two weeks after denying the motions to dismiss, the court called this case for trial before a jury. RP 1. At the beginning of trial the court allowed the jail personnel to outfit the defendant with a single leg brace worn under his pants. RP 16-22. The defense did not object. *Id.* The parties then proceeded with *voir dire*, opening statements and the state's first witness. RP 1-103.

On the morning of the second day of trial jail personnel informed the trial judge that the defendant was refusing to come to court because they had denied his request to shave. RP 109-111. The court then held a hearing over a video feed, after which the jail personnel brought the defendant to court in a restraint chair. RP 153-157. During that hearing the court repeatedly asked the defendant (1) whether or not the defendant wanted to attend the trial and (2) whether or not the defendant would behave himself in court. 153-157. The defendant refused to answer any questions and the court had him returned to the jail. *Id.* The defendant's attorney then met with him and informed the trial judge that the defendant wanted to attend court for the

remainder of the day in a restraint chair. RP 130, 162.

At this point in the trial the court heard testimony from two jail guards. RP 164-176, 176-177. They indicated that the defendant had told them that the only way he would attend the trial was in a restraint chair. RP 174-175, 176-177. The court refused to allow the defendant to attend court in that manner. RP 178-180. The court then called the jury in and the state called four more witnesses and started on its fifth witness before adjourning for the day without the presence of the defendant. RP 180- 315.

On the morning of the fourth day of trial the court instructed the jail personnel to inform the court that he was free to attend the trial but not in a restraint chair. RP 315. The defendant thereafter appeared in court and the state proceeded with its case-in-chief. RP 322-600. On the morning of the fourth day of trial jail personnel informed the court that there had been an incident the preceding night during which the defendant armed himself with a broken broom handle and had to be taken out of his cell by an extraction team using a taser. RP 650-666. Based upon this evidence the jail personnel requested authorization to place a stun device under the defendant's clothing. *Id.* The court granted the request. *Id.* The state then called its first witnesses for the day, who was an Emergency Room Physician who had helped treat Mr. Hendrickson. RP 677. However, when the state asked its first question, the defendant yelled out "This is all a bunch of fucking lies! This is bullshit!

This is fucking crazy, man!" RP 677-678. Jail personnel then subdued the defendant and the jury was escorted out of the courtroom. *Id.*

Following the defendant's outburst the court had the defendant removed to the jail and later returned in belly chains. RP 687. The court then discussed the matter with the parties and ultimately decided that the defendant would be taken to another courtroom where he could attend the trial over a video feed. RP 715-744. The defendant attended the last three days of trial via video. RP 744, 795, 818, 931, 1020, 1079, 1086.

Following the close of the state's case the court had the defendant returned to the courtroom outside the presence of the jury, at which time the defendant stated that he did not want to testify. RP 945. The court then had the defendant returned to the room with the video feed. RP 1020. The court also dismissed Count VII (theft of a firearm) upon the state's motion. RP 933. The defense then closed its case without calling any witnesses and the court instructed the jury without objection from the parties. RP 949-981. Following closing argument the jury retired for deliberation and returned the following verdicts:

> Count I: not guilty of first degree robbery against Ryan Gault but guilty of the lesser included offense of attempted first degree robbery against Ryan Gault;
>
> Count II: guilty of first degree robbery against Arnold Hendrickson;

Count III: guilty of first degree robbery against Kaleb Keys;

Count IV: guilty of first degree robbery against Joshua Wilson;

Count V: guilty of first degree unlawful possession of a firarm;

Count VI: guilty of first degree assault against Arnold Hendrickson.

RP 1086-1089; CP 351-320.

The jury also returned special verdicts that the defendant had committed each of these offenses (1) while armed with a firearm (except Count V), and (2) shortly after being released from incarceration. CP 321-331. Based upon the later aggravator the court imposed 489 months on the first degree assault charge on a range of 240 to 318 months. CP 378-379. The court then ran this sentence concurrent with standard range sentences on the other charges. *Id.* With the firearms enhancements added (four 60 month and one 36 month) this yielded a total sentence of 765 months in prison. CP 181. The defendant thereafter filed timely notice of appeal. CP 388.

ARGUMENT

I. THE DEFENDANT'S CONVICTIONS 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 December 26, 2012. The defendant thereafter insisted upon

a trial within 60 days and repeatedly objected over the next 13 months each time the court continued the trial dates, usually at the request of the defendant's attorney. Although the defendant's attorney repeatedly claimed that he needed more time because this was a "complex" case, the court's own statements, the evidence presented at trial, and the defense's failure to even cross-examine the majority of the state's witnesses belies this claim. Indeed, as the prosecution admitted at the first motion for a continuance, the only thing complex about the case was the fact that there were multiple witnesses. RP 1/28/13 6. Thus, in this case the trial court abused its discretion under CrR 3.3 when it continued this case for over 13 months over the defendant's repeated objections. As a result, this court should vacate the defendant's convictions and remand for dismissal of all charges under CrR 3.3(h).

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS UNDER CrR 8.3 BECAUSE THE STATE'S EGREGIOUS MISCONDUCT IN TAKING A LETTER FROM THE DEFENDANT CONTAINING CONFIDENTIAL COMMUNICATIONS TO THE DEFENDANT' S ATTORNEY CAUSED PREJUDICE.

Under CrR 8.3(b), the trial court has authority to dismiss a criminal prosecution upon a showing of arbitrary action or governmental misconduct. *State v. Brooks*, 149 Wn.App. 373, 203 P.3d 397 (2009). In order to qualify for relief under this measure, the governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. *State v. Dailey*,

93 Wn.2d 454, 457, 610 P.2d 357 (1980). However, the defendant must show that such action prejudiced his right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). As the court notes in *Michielli*, "[s]uch prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). Dismissal under CrR 8.3 is an extraordinary remedy which the trial court should use only as a last resort. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

For example, in *State v. Michielli*, *supra*, the defendant was charged with two counts of second degree theft under a probable cause statement that alleged that he had stolen a rifle, a fish-finder, and a scanner out of a house in which he was staying. According to the probable cause statement, the defendant later pawned all three items, two at one pawn shop and the third at another. Three days before trial and without prior notice to the defense, the court allowed the state to amend the information to charge a third count of theft (for the third item), and three counts of trafficking in stolen property (for pawning the three items).

The defense later moved to dismiss the added charges, arguing in part that it was unprepared to respond to them, thus putting the defendant in the unfair position of either having to give up his right to speedy trial or give up

his right to effective assistance of counsel. The trial court granted the motion, and the state appealed the dismissal of the amended charges. Following argument, the Court of Appeals reinstated the third theft charge, but affirmed the dismissal of the three trafficking charges on a separate legal theory. The state then obtained review before the Supreme Court.

Ultimately, the Supreme Court affirmed the decision of the Court of Appeals that the trial court properly dismissed the three trafficking charges. However, it did so on the basis that the dismissal was proper under CrR 8.3(b), which allows the trial court to dismiss a charge "on its own motion in the furtherance of justice." In its analysis, the court noted that for a dismissal to be proper under CrR 8.3(b), the defense must prove (1) government misconduct that (2) causes prejudice to the defendant's case. As to the second criteria, the court held:

> The state, by adding four new charges just before the scheduled trial date, without any justification for the delay in amending the information, forced Mr. Michielli either to go to trial unprepared, or give up his speedy trial right. *See also State v. Sulgrove*, 19 Wn.App. 860, 578 P.2d 74 (1978) (charge dismissed under CrR 8.3(b) after the State charged the wrong crime, amended to correct it the day before trial after defense motioned for dismissal, and then failed to produce necessary evidence to support the correct charge on the day of trial).

State v. Michielli, 132 Wn.2d at 245.

In the case at bar the defendant presented evidence that jail personnal has stolen confidential information he had written to his attorney about the

facts of his case, witnesses and trial strategy. The defendant further claimed that prejudice resulted from (1) the fact that the state now had confidential information about the trial, and (2) that the state's actions had the effect of ending written communication between the defendant and his attorney because he could no longer trust in the confidentiality of such communications. The defendant presented two witnesses besides himself to prove that the written communication had been in his cell just prior to the jail search and that it had been missing after the search. Thus, the defense argued that jail personnel had taken the letter. Although the state called two witnesses at the hearing they did not state that nothing was taken from the defendant's cell. Rather, they simply verified the fact of the search on the day in question and the fact that they had not personally seized anything from the defendant.

In its ruling the trial court did not enter a finding that jail guards had not seized the papers as the defendant and his witness claimed. Rather, the court noted that the only evidence before it was that the papers had been taken. However the court did not rule on this factual issue because it found that the defendant had not proven prejudice. In so ruling the trial court ignored the defendant's claim and argument that the majority of the prejudice that occurred from the fact that his inability to trust in the confidentiality of written communication with his attorney had the effect of cutting off

confidential written access to his counsel. Thus, the state's improper action in this case did cause prejudice to the defendant's case. As a result, the trial court erred when it denied the defendant's motion to dismiss under CrR 8.3. As a result this court should vacate the defendant's convictions and remand with instructions to dismiss with prejudice.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO BE PRESENT AT TRIAL WHEN IT BANISHED HIM FROM THE COURTROOM FOR THE FINAL THREE DAYS OF TRIAL WITHOUT INFORMING THE DEFENDANT THAT HE COULD RETURN IF HE CONDUCTED HIMSELF APPROPRIATELY.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a criminal defendant has the right to be present in the courtroom at all critical stages of trial. This right is also guaranteed under CrR 3.4(a). However, this right is not absolute and a defendant's persistent, disruptive conduct can be held to constitute a voluntary waiver of the right. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991). In the *Allen* case, the United States Supreme Court reviewed the constitutionality of ejecting a criminal defendant from the courtroom for repeated disruptive behavior. In that case the court held as follows:

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that

> his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Illinois v. Allen, 397 U.S. at 343 (footnote omitted).

The court in *Allen* went on to explain that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* Although the court held that no single rule applied in all situations," the court none the less recognized three constitutionally permissible methods for handling a disruptive defendant: (1) the defendant could be bound and gagged in the courtroom, (2) the court could cite the defendant for contempt, or (3) the court could remove the defendant until he or she promised to act appropriately. *Illinois v. Allen*, 397 U.S. at 343-44.

In *Allen* the court carefully reviewed the facts of the case and then ruled that the trial court's decision to remove the defendant from the courtroom and continue in his absence until he promised to behave was constitutionally permissible. As the court noted, the defendant's behavior had been "extreme and aggravated" and the trial court had repeatedly warned him that he would be ejected from the courtroom for such conduct. In addition, once the defendant was removed, the court "constantly informed [the defendant] that he could return to the trial when he would agree to

conduct himself in an orderly manner." *Illinois v. Allen*, 397 U.S. at 346.

In *State v. Deweese*, *supra*, the Washington Supreme court adopted the *Allen* standard when reviewing a claim that a trial court had violated a defendant's constitutional right under Washington Constitution, Article 1, § 22, to be present at trial by ejecting him from the courtroom. In that case the defendant had proceeded *pro se* during trial without problem until the third day when his behavior degenerated and he repeatedly disrupted the state's presentation of its case-in-chief. Specifically, the defendant had persisted in calling the complaining witnesses "prostitutes" over the court's order to cease such references. After a last warning went unheaded, the court removed the defendant to another room where he could watch the trial via video. The court then repeatedly invited the defendant to return but he refused.

On appeal, the defendant argued that the trial court's actions denied him his rights under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, to be present at every stage of the trial. The Washington State Supreme Court disagreed, holding that (1) the trial court had taken the least severe remedy necessary to assure courtroom decorum, (2) that the court had offered the defendant the opportunity to change his conduct and return to the courtroom, and (3) the defendant had voluntarily refused to return. Thus, the court found no violation of the defendant's constitutional right to be present for the trial.

In *State v. Chapple*, 145 Wn.2d 310, 36 P.3d 1025 (2001), the Washington Supreme Court noted that while the decisions in *Allen* and *DeWeese* leave the appropriate method for dealing with a disruptive defendant to the sound discretion of the trial court, both cases do establish four basic guidelines for dealing with disruptive defendants. They are:

> First, the defendant should be warned that his conduct could lead to removal. Second, the defendant's conduct must be severe enough to justify removal. Third, this court has expressed a preference for the least severe alternative that will prevent the defendant from disrupting the trial. Finally, the defendant must be allowed to reclaim his right to be present upon assurances that the defendant's conduct will improve.

State v. Chapple, 145 Wn. 2d at 320 (citations omitted).

In the case at bar the trial court followed the first three criteria when it removed the defendant on the beginning of the fourth day of trial after his profanity laced outburst as the state began questioning its first witnesses of the day. First, the defendant had previously been warned by the court that he could not disrupt the proceedings. Second, the outburst was enough to require action by the court and allow removal. Third, as in *Deweese* the court did take the same least restrictive alternative of placing the defendant in a room where he could observe the proceedings via video. However, the error in the case at bar is that the trial court did not follow the fourth criteria. At no point for the entire fourth day of trial, the fifth day or the sixth and final day of trial did the court even attempt to inform the defendant that he could

return to the proceedings if he would comport himself appropriately. Neither did the defendant give any indication that he would refuse such an opportunity.

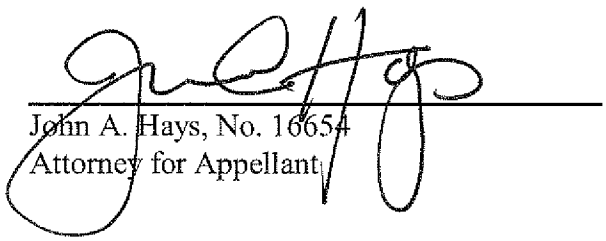
In fact, following the close of the state's case the trial judge had the defendant returned to the courtroom so the defendant could indicate whether or not he wanted to testify. The defendant, absent any type of contemptuous conduct, indicated that he was going to continue in his right to silence and not testify. In spite of the defendant's appropriate comportment, the court had the defendant removed from the courtroom for the remainder of the proceedings. Thus, in the case at bar the trial court's failure to give the defendant the opportunity to return to the courtroom for the last three days of trial, particularly after the close of the state's case, violated the defendant's rights under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

The trial court erred when it denied the defendant's motions to dismiss because (1) the trial court failed to bring the defendant to trial within the time required under CrR 3.3, and (2) the state committed egregious, prejudicial conduct when it seized two pages of a letter the defendant had written to his attorney setting out facts and trial strategy. As a result this court should vacate the defendant's convictions and remand with instructions to dismiss with prejudice.

DATED this 1st day of December, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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 wherein 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
Time for Trial

(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.

CrR 8.3
Dismissal

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

(c) On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.

(1) The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties. The stipulation, affidavit or declaration may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding the motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(2) The prosecuting attorney may submit affidavits or declarations in opposition to defendant's supporting affidavits or declarations. The affidavits or declarations may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding defendant's motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. The court shall not dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section. A decision denying a motion to

dismiss under this rule is not subject to appeal under RAP 2.2. A defendant may renew the motion to dismiss if the trial court subsequently rules that some or all of the prosecuting attorney's evidence is inadmissible.

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **Nicholas Thompson,** **Appellant.**	**NO. 46012-2-II** **AFFIRMATION 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. Ms Carol Laverne
   Thurston County Prosecutor's Office
   2000 Lakeridge Dr. S.W., Building 2
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   lavernc@co.thurston.wa.us

2. Nicholas Thompson, No.302547
   Washington State Penitentiary
   1313 North 13th Avenue
   Walla Walla, WA 99362

Dated this 1st day of December, 2014, at Longview, WA.

Donna Baker

HAYS LAW OFFICE

December 01, 2014 - 2:54 PM

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Court of Appeals Case Number: 46012-2

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