Supreme Court No. 94505-5
Court of Appeals No. 74026-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

SOPHIA DELAFUENTE,
Petitioner.

PETITION FOR REVIEW

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Sophia Delafuente, through her attorney, Suzanne Lee Elliott, seeks review designated in Part II.

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Delafuente seeks review of the unpublished decision by the Court of Appeals filed on April 21, 2017, in *State v. Delafuente*, No. 44026-1-I. See attached.

III.
ISSUE PRESENTED FOR REVIEW

1. Where the King County Jail recorded Delafuente's call to her lawyer, Detective Stangeland listened to a portion of that call, the State destroyed evidence relating to the call and delayed telling Delafuente about Stangeland's activity and her similar actions in other cases, should the case have been dismissed pursuant to CrR 8.3(b)?

2. Did the trial court violate Delafuente's state and federal constitutional right to be present at a critical stage when it twice continued the trial outside her presence?

IV.
STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Juan Garcia-Mendez, Darreson Howard and Sophia Delafuente were charged with the first-degree assault of Richard Powell on April 1, 2013. Garcia-Mendez was the principal and the State alleged that Howard and Delafuente were accomplices. CP 22-24. Delafuente was also charged with rendering criminal assistance for hindering or delaying the apprehension of Garcia-Mendez and Howard. *Id.*

Garcia-Mendez's charges were severed from those of Howard and Delafuente. He was convicted and his appeal is pending in *State v. Garcia-Mendez*, No. 74110-1-I.

Delafuente and Howard were joined for trial. The State offered Delafuente an opportunity to plead guilty to reduced charges but only if Howard also entered a plea. 8/10/15 RP 39. When Howard refused to enter a plea, Delafuente was forced into trial on the greater charges. *Id.*

A jury convicted both Delafuente and Howard as charged. This timely appeal followed. CP 74-76. Howard also appealed. *State v. Howard*, No. 74054-7-I.

B. MOTION TO DISMISS

On March 3, 2015, the parties appeared for a pretrial status conference. 3/3/15 RP 5. They agreed that they would all be ready for trial at the next omnibus hearing scheduled for March 23, 2015. Trial was scheduled for March 30, 2015.

Despite the fact that the State knew that investigating Detective Donna Stangeland listened to a recorded jail call between Delafuente and her lawyer, the State did not disclose that information to the defense until after the March 3, 2015 hearing. The State also neglected to disclose that Stangeland had previously read and then shredded attorney-client correspondence in *State v. Guantai*, No. 05-1-05673-4 SEA. The State later said that it had not done so because "the State does not believe that such information is *Brady* material or otherwise discoverable." CP 138. In the State's view, this information did not "call into question Detective Stangeland's credibility." *Id.*

Another status conference was held on March 31, 2015. By that time, the defense had learned of the call and had asked for discovery regarding Detective Stangeland's actions in this case and the *Guantai* case. As a result, the defense was forced to seek a continuance of the trial date. CP 125.

On May 1, 2015, another status conference was held. It became clear that Stangeland had also listened to attorney-client calls in *State v. Alan Duffy*, No. 15-1-00427-8. 5/1/15 RP 32. The State was still resisting Delafuente's motion to compel records of Stangeland's activities. *Id.* at 37-41, 43. The King County Jail also averred that it was not responsible for discovery regarding the recorded phone calls and told the court that the defense must contact the phone contractor, Securus. *Id.* at 46. The trial had to be continued June 1, 2015. CP 126.

After eventually receiving the entire discovery, Delafuente moved to dismiss under CrR 8.3, CrR 3.3, CrR 4.7, RCW 9.73.030, *State v. Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). CP 127-131.

On June 5, 2014, the trial court held a hearing on this motion. The evidence demonstrated that on April 1, 2014, the James Bible Law Group emailed the King County Jail and asked them to place his law firm on the "Do Not Record" list. CP 152. Anna Gigliotti of the James Bible Law Group appeared as Delafuente's counsel in November 2014. On February 9, 2015, Stangeland listened to the beginning of an attorney-client jail phone call from Delafuente to Gigliotti.

Although Stangeland had no training on jail phone call interception, she can listen to jail telephone calls from her desktop

computer. 6/5/15 RP 14-16. Beginning in 2014, the vendor for the telephone system added that feature. Prior to that, police officers had to ask the jail for all of the CDs of jail calls to listen to them. According to Stangeland, she had been listening to Delafuente's jail phone calls sporadically, beginning in April 2013. She said that the prosecutors prosecuting this case knew of her activities. 6/5/15 RP 21-23.

Stangeland said that she did not listen to all calls made by Delafuente. She picks and chooses when to listen. She said:

> It's somewhat random. I try to listen to the most recent ones if there's been a delay where I haven't listened to any in a while. I'll try to do the ones that are most recent. Sometimes I'll try to do the ones right before a court hearing or right after a court hearing. I've tried to, or I will target sometimes phone numbers to which I think they'll be more likely to have a conversation about the case itself.

6/5/15 RP 23. Stangeland said that after listening to a defendant's jail calls for a while, you know who they are contacting and who they might discuss the case with. *Id.*

Stangeland admitted this was not her first problem with intercepting attorney-client privileged communications. She admitted she had done so the week before in *Duffy*. 6/5/15 RP 16. In 2005, she had intercepted emails between an attorney and a client, read them, and then shredded them in *Guantai*.

Finally, Detective Stangeland testified that although she could listen to the preamble on the phone calls, which would indicate what warning was being given to the caller, she ordinarily fast-forwarded through that information. 6/5/15 RP 11.

There was no way to confirm Detective Stangeland's testimony that she hung up quickly because the State destroyed the call. The State's excuse was that they did not want to have anyone else inadvertently listen to the call. 6/5/15 RP 28.

Delafuente argued that Stangeland's actions, the State's delay in telling the defense and the State's failure to provide the information that Stangeland had done this before, required dismissal. Delafuente argued that she was prejudiced because she had to choose between having a speedy trial and the need to have all of the information to impeach Stangeland. 6/5/15 RP 26-28.

The trial court found that, while the jail's original decision to record telephone calls was for security, it was "clear that that is no longer the reason." *Id.* at 49.

> Having decided that the police have access via an officer's department-provided computer to these calls simply by clicking on a desktop icon, it's clear to the court that this is an investigative tool ancillary to any security purpose.

Id.

The Court found, however, that Stangeland was credible when she said that she did not listen to any privileged conversation. He denied the motion with the caveat that he was open to additional argument on the "*Brady*-type issue" – that is, whether the destruction of the jail call should cause dismissal of the charges. *Id.*

C. THE TRIAL CONTINUANCES

The trial had to be continued because of the State's failure to timely disclose Stangeland's actions. Stangeland notified the prosecutor of her actions on February 9, 1015. Pretrial Exhibits 1-3. But, the prosecutor did not notify Delafuente's counsel until roughly six weeks later. 3/31/15 RP 10. The case was then continued at least 10 more times because the prosecutor was in trial in another case.

On August 3, 2015, the trial court continued the trial to August 5, 2015. On August 5, 2015, the trial was continued to August 6, 2015. A judge checked a box on a form that stated "no judicial availability." This order appears to have been entered without a hearing. The defendant and counsel did not sign the Order. On August 6, 2015, the trial was again continued to August 10, 2015. A judged checked a box on a form that stated "no judicial availability." Again, this order appears to have been entered without a hearing. And again, the defendant and counsel did not sign the Order.

Trial commenced on August 10, 2015.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. IN THIS CASE, THE KING COUNTY JAIL RECORDED DELAFUENTE'S CALL TO HER LAWYER, DETECTIVE STANGELAND LISTENED TO A PORTION OF THAT CALL, THE STATE DESTROYED EVIDENCE RELATING TO THE CALL AND DELAYED TELLING DELAFUENTE ABOUT STANGELAND'S ACTIVITY AND HER SIMILAR ACTIONS IN OTHER CASES. THE TRIAL COURT'S FAILURE TO DISMISS THE CHARGES FOR THIS MISMANAGEMENT IS A QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(B)(4).

In its opinion, the Court of Appeals acknowledged that any government eavesdropping on an attorney-client communication is presumptively prejudicial. Slip Opinion at 3. However, the Court of Appeals held that the government had overcome the presumption because the trial court found that Detective Stangeland was credible when she said she did not hear anything related of substance. *Id.* at 4.

But like the trial judge, the Court of Appeals refused to consider the totality of the State's actions in this case when evaluating the motion to dismiss. The Court of Appeals erred because it found that Delafuente "argued four additional instances of misconduct for the first time on review." That is simply not the case. These instances were fully briefed for the trial court, addressed at the hearing and argued by trial counsel. Counsel has provided the record cites above and will do so again below so

that there are no further questions about preservation of the record in this case.[1]

CrR 8.3(b) states:

> 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.

There were multiple levels of governmental misconduct, all of which required Delafuente to choose between her right to counsel and her right to a speedy trial. First, despite the State's assurances to Delafuente and her counsel that their conversations were not being recorded, they were. Securus was recording these calls in violation of her right to counsel. The evidence demonstrated that on April 1, 2014, the James Bible Law Group emailed the King County Jail and asked them to place his law firm on the "Do Not Record" list. CP 152. Anna Gigliotti of the James Bible Law Group appeared as Delafuente's counsel in November 2014. On February 9, 2015, Stangeland listened to the beginning of an attorney-client jail phone call from Delafuente to Gigliotti.

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[1] In its reply brief the State never argued that these instances were not preserved. In fact State acknowledged that Delafuente argued that it was error to purge the call and that delayed disclosure of Stangeland's eavesdropping prejudiced her. See, e.g., State's Response 7, 8, 9 and 10.

Second, Securus provided access to all of Delafuente's calls to Detective Stangeland. Stangeland was not given any training about how to avoid intercepting attorney-client calls. Although Stangeland had no training on jail phone call interception, she can listen to jail telephone calls from her desktop computer. 6/5/15 RP 14-16. Beginning in 2014, the vendor for the telephone system added that feature. Prior to that, police officers had to ask the jail for all of the CDs of jail calls to listen to them. According to Stangeland, she had been listening to Delafuente's jail phone calls sporadically, beginning in April 2013. She said that the prosecutors prosecuting this case knew of her activities. 6/5/15 RP 21-23.

Third, Stangeland should have been exceedingly vigilant regarding the calls because she had previously engaged in at least one egregious violation of the attorney-client relationship. Instead, she admitted that she skipped the preamble of the call and went directly to the substance. And, she did not use the part of the program that would have showed her the records relating to the number called, and she admitted that she deliberately focused on calls before and after court hearings because "I think they'll be more likely to have a conversation about the case itself." 6/5/15 RP 23.

Fourth, the State deleted the electronic evidence of Stangeland's access to Delafuente's calls making it impossible to corroborate

Stangeland's testimony that she did not listen to the call long enough to hear privileged conversations.

Fifth, the State delayed roughly six weeks before disclosing this intrusion to Delafuente and her counsel. Delafuente argued that Stangeland's actions, the State's delay in telling the defense and the State's failure to provide the information that Stangeland had done this before required dismissal. Delafuente argued that she was prejudiced because she had to choose between having a speedy trial and the need to have all of the information to impeach Stangeland. 6/5/15 RP 26-28.

Sixth, the State failed to immediately inform Delafuente's counsel that Stangeland had previously violated a defendant's right to confidential communication with his lawyer. That was material and exculpatory evidence. Stangeland's act of reading the privileged communication and covering up her misconduct by shredding the evidence is probative of her truthfulness. Stangeland admitted this was not her first problem with intercepting attorney-client privileged communications. She admitted she had done so the week before in *Duffy*. 6/5/15 RP 16. In 2005, she had intercepted emails between an attorney and a client, read them, and then shredded them in *Guantai*.

These are "truly egregious [instances] of mismanagement or misconduct by the prosecutor." *State v. Duggins*, 68 Wn. App. 396, 401,

844 P.2d 441, *affirmed*, 121 Wn.2d 524, 852 P.2d 294 (1993); *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868, *review denied*, 141 Wn.2d 1014, 10 P.3d 1072 (2000) (citing *City of Seattle v. Orwick*, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)).

In *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980), our Supreme Court observed that:

> if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

Here, the State failed to act with diligence by failing to be immediately forthcoming about Detective Stangeland's past and present invasions of the attorney-client relationship. This forced Delafuente to choose between fully prepared and competent counsel and her right to a speedy trial under CrR 3.3. The charges against her should have been dismissed.

As the trial judge in this case stated, the police and prosecutor no longer pretend that recording jail calls is for security. Instead, they listen to jail calls as an investigative tool. Thus, this Court should reaffirm that

any misconduct related to eavesdropping should be subject to strict scrutiny by the trial court under CrR 8.3(b).

B. DID THE TRIAL COURT VIOLATE DELAFUENTE'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BE PRESENT AND HER RIGHT TO COUNSEL AT A CRITICAL STAGE WHEN IT TWICE CONTINUED THE TRIAL OUTSIDE HER PRESENCE? RAP 13.4(B)(3).

In this case, no one disputed that the trial court twice continued the case without the presence of Delafuente or her lawyer. See Brief of Respondent at 17, n.6. An accused has a constitutional right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, even where the defendant is not confronting witnesses or evidence against him. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). An accused is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *Id.*

An accused is also guaranteed the right to counsel at all critical stages of the proceedings even if the defendant is not present. Consideration of the time for setting the trial is a critical stage. See, e.g., *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210, 215 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934, *reh'g denied*,

487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988) (Defendant had the right to have counsel present when the resentencing trial date was set).

Relying on *In Re Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998), the Court of Appeals rejected both arguments stating that the continuance of the trial date is not a "critical stage." This reliance was misplaced. In *Benn*, this Court held that a motion to continue was not a critical stage because Benn's absence during that hearing did not affect his opportunity to defend the charge. The Court also noted that the trial court was aware of the defendant's opposition to any continuance. The trial was delayed at defense counsels' request to enable counsel to provide the defendant with a competent defense. *Id.*

None of those things are true in this case. Here, the order granting the continuances was undertaken by the trial court on its own motion. Counsel was not present and there is no record of the defense's position on the continuances. The entire proceeding apparently consisted of the presiding judge signing orders and sending them out via email.

Moreover, since *Benn* CrR 3.3 has been amended and the case law has evolved. The rule places the burden of objecting to the trial date squarely on the defendant. CrR 3.3(d)(3). But if neither the defendant nor her lawyers are present, there is no opportunity to object.

This is particularly true when the stated reason for the continuance is court congestion. This Court has strongly affirmed that routine court congestion is not a basis to continue a trial. Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Specifically, "[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

In *Kenyon*, on the eve of the confined defendant's speedy trial deadline, the trial court granted a continuance due to the unavailability of a judge – the presiding judge was presiding over another criminal case and the other county superior court judge was on vacation. *Kenyon*, 167 Wn.2d at 134. The court made no other findings, but extended the speedy trial date during the continuance period. Kenyon's motion to dismiss on speedy trial grounds was denied. Relying on the above-cited precedent, the Court noted that court congestion and courtroom unavailability are not valid bases for a continuance. *Id.* at 137. The Court held "simply because

the rule now allows 'unavoidable or unforeseen circumstances' to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms." *Id.* at 139. Because the record contained no information on the number or availability of unoccupied courtrooms or the availability of visiting or pro tempore judges to hear criminal cases, the defendant's speedy trial right was violated. *Id.* at 137, 139.

This case is on all fours with *Kenyon.* The record contains no information regarding the number or availability of unoccupied courtrooms nor the availability of visiting judges or pro tempores to hear criminal cases in the unoccupied courtrooms. The trial court made no note of other available courtrooms or judges.

But when neither counsel nor the defendant are present and the continuance is accomplished in chambers by the judge on his or her own motion, the defendant has been deprived of the opportunity to object and make sure the that trial court either makes the appropriate findings or sends the case out to trial.

This Court should accept review and examine the King County Superior Court practice of continuing cases outside the presence of the defendants and their lawyers.

VI.
CONCLUSION

This Court should grant review.

DATED this 16 day of May, 2017.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Sophia Delafuente

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served email where indicated and by United States Mail one copy of this brief on:

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Date

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74026-1-I
Respondent,	)	DIVISION ONE
v.	)	
SOPHIA ALEEN DELAFUENTE,	)	UNPUBLISHED
Appellant.	)	FILED: April 17, 2017

Cox, J. – Sophia Delafuente appeals her judgment and sentence for first degree assault and first degree felony rendering of criminal assistance. The trial court did not abuse its discretion in denying Delafuente's motion to dismiss and by continuing her trial within the speedy trial expiration deadline. The trial court did not violate her right to be present and her right to counsel by granting the continuances outside her and her counsel's presence. Delafuente fails in her burden to show comments to which she did not object at trial were flagrant and ill-intentioned prosecutorial misconduct. We affirm.

On April 1, 2013, Richard Powell, a town car driver, dropped off a customer in West Seattle. A car passed by him and two people exited the vehicle and approached him. One of the individuals pulled out a gun and told Powell to empty his pockets. Powell reached for his gun but was shot multiple times. Powell managed to call 911.

Before Delafuente's arrest, she admitted to a detective that she drove the car after the shooting. The State charged her with one count of first degree assault and one count of felony first degree rendering of criminal assistance. It alleged that Delafuente drove the car to and from the scene.

Delafuente's speedy trial "[e]xpiration date" was set for September 4, 2015. On August 5th and 6th of 2015, the court entered two orders continuing trial. On the orders, the trial court marked boxes indicating "No judicial availability" as the reasons for the continuances. Delafuente's trial began on August 10th, 2015.

The jury found Delafuente guilty as charged, and the trial court entered its judgment and sentence in accordance with the jury verdicts.

Delafuente appeals.

MOTION TO DISMISS

Delafuente argues that the trial court abused its discretion in failing to dismiss the charges under CrR 8.3(b). We disagree.

CrR 8.3(b) provides:

> 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. . . .

We review for abuse of discretion a trial court's decision on a motion to dismiss.[1] A court abuses its discretion when it makes a decision for untenable reasons or on untenable grounds.[2]

Also relevant here is the Sixth Amendment guarantee to criminal defendants of the right to confer privately with counsel.[3]

The supreme court has held that government eavesdropping on such privileged communication violates this right and "is presumed to cause prejudice to the defendant."[4] The State can rebut that presumption if it "proves beyond a reasonable doubt that the eavesdropping did not result in any such prejudice."[5]

Pretrial in this case, Delafuente moved to dismiss all charges on account of government misconduct. Although the record on appeal does not contain the motion, the record contains the memorandum supporting the motion. In relevant part, Delafuente argued that Detective Donna Stangeland violated Delafuente's attorney-client privilege by improperly listening to a jail phone call between her and her attorney Anna Gigliotti.

At the motion hearing, Detective Stangeland testified about the call at issue. She explained that she started listening to a recording of Delafuente's

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[1] State v. Williams, 193 Wn. App. 906, 909, 373 P.3d 353, review denied, 186 Wn.2d 1015 (2016).

[2] Wade's Eastside Gun Shop, Inc. v. Dep't of Labor and Indus., 185 Wn.2d 270, 277, 372 P.3d 97 (2016).

[3] State v. Fuentes, 179 Wn.2d 808, 811, 318 P.3d 257 (2014).

[4] Id. at 812.

[5] Id. at 811-12 (emphasis omitted).

outgoing call and heard the person answering say the word "law." She then realized that the call was probably to an attorney and proceeded to stop the recording when she heard Delafuente ask for Gigliotti. A female voice responded that Gigliotti was on the other line. Detective Stangeland then stopped listening to the recording.

Detective Stangeland testified that the above discussion was all that she heard. She also reported this incident to her sergeant and the prosecutor's office. Detective Stangeland testified that she did not learn anything relevant to the investigation and did not "do anything investigative . . . in response to that call in [her] investigative duties."[6] She further testified that she did not hear anything that affected her investigation in any way, other than writing the reports. The recording could not be played for the court because it had been deleted.

The trial court found Detective Stangeland to be credible and denied Delafuente's motion.

This court defers to the trier of fact on credibility determinations.[7] Here, the trial court was in the best position to determine the facts and it was persuaded that the State rebutted the prejudice presumption. Because the facts support this conclusion, the trial court did not deny the dismissal motion for untenable reasons. Thus, it did not abuse its discretion.

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[6] Report of Proceedings (June 5, 2015) at 12-13.

[7] State v. Hart, 195 Wn. App. 449, 457, 381 P.3d 142 (2016), review denied, 187 Wn.2d 1011 (2017).

The State correctly argues that Delafuente argues four additional instances of government misconduct for the first time on appeal. First, Delafuente argues that Securus, the jail's call system provider, gave Detective Stangeland access to Delafuente's calls without providing any training on "how to avoid intercepting attorney-client calls." Second, Delafuente argues that "the State deleted the electronic evidence of Detective Stangeland's access" to the call, making it impossible to corroborate her testimony. Third, Delafuente argues that Securus violated her right to counsel by recording the call. And lastly, she argues that the State delayed in disclosing Detective Stangeland's actions in this case and a prior case involving a similar incident. Overall, Delafuente argues that these acts of government misconduct "forced" her to choose between being fully prepared for trial and her speedy trial right.

Notably, Delafuente fails to cite the record to support these new arguments in accordance with RAP 10.3(a)(6). More importantly, she fails to argue that these alleged incidents of government misconduct constitute manifest constitutional errors as required by RAP 2.5(a). Thus, we do not consider these arguments.

SPEEDY TRIAL RIGHT

Delafuente argues that the trial court violated her speedy trial right. We disagree.

CrR 3.3 protects a defendant's constitutional right to a speedy trial.[8] CrR 3.3(b)(1)(i) provides that a defendant detained in jail shall be brought to trial

[8] State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

within 60 days of arraignment.[9] But certain time periods are excluded from the computation of time, including trial court continuances.[10]

CrR 3.3(f)(2) provides:

> 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 application of the speedy trial rule to a specific set of facts is a question of law we review de novo.[11] But we review for abuse of discretion a trial court's decision to grant a continuance.[12]

Court congestion, perhaps due to lack of courtroom availability, is not a valid reason for a continuance beyond the time period for trial.[13] A court may continue trial due to court congestion "when it carefully makes a record of the unavailability of judges and courtrooms and of the availability of judges pro tempore."

Here, Delafuente's argument focuses on the two trial court orders continuing her trial. It is undisputed that Delafuente's speedy trial "[e]xpiration date" was set for September 4, 2015. The two continuance orders were entered

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[9] State v. Ollivier, 178 Wn.2d 813, 823, 312 P.3d 1 (2013).

[10] Id.; CrR 3.3(e).

[11] State v. Hawkins, 181 Wn.2d 170, 183, 332 P.3d 408 (2014).

[12] Ollivier, 178 Wn.2d at 822-23.

[13] Kenyon, 167 Wn.2d at 137.

on August 5th and 6th of 2015. Delafuente's trial began on August 10th, 2015. There was no continuance beyond the speedy trial expiration date of September 4, 2015. Because the trial court did not continue Delafuente's trial beyond the speedy trial expiration date, we conclude that the trial court did not abuse its discretion in granting the continuances.

Delafuente relies on State v. Kenyon[14] to argue that the trial court violated her speedy trial right. She specifically argues that the trial court failed to provide the required details regarding the lack of judicial availability. But that case is distinguishable because the trial court there continued the trial past the speedy trial deadline.[15] Thus, it was required to document the availability of pro tempore judges and unoccupied courtrooms but failed to do so. That is not the case here.

RIGHT TO BE PRESENT

Delafuente argues that the trial court violated her right to be present at trial. We disagree.

As a matter of due process, criminal defendants have a fundamental right to be present at all critical stages of the trial.[16] "A 'critical stage' is one at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'"[17]

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[14] 167 Wn.2d 130, 216 P.3d 1024 (2009).

[15] Id. at 135.

[16] State v. Zylon Houston-Sconiers, No. 92605-1, slip op. at 31 (Wash. Mar. 2, 2017), http://www.courts.wa.gov/opinions/pdf/926051.pdf.

[17] Id. (internal quotation marks omitted) (quoting State v. Irby, 170 Wn.2d 874, 881, 246 P.3d 796 (2011)).

Whether a defendant's constitutional right to be present has been violated is a question of law we review de novo.[18]

A defendant's right to be present is not absolute.[19] In In re Personal Restraint of Benn, the supreme court held that Gary Benn did not have a right to be present at a continuance hearing.[20] This is because his absence during the hearing "did not affect his opportunity to defend the charge. The motion for continuance involved no presentation of evidence, nor was the purpose of the hearing . . . to determine the admissibility of evidence or the availability of a defense . . . ."[21] In short, it was not a "critical stage."

Here, outside Delafuente's presence, the trial court entered the two orders continuing trial. Neither proceeding was a critical stage. Delafuente did not have a right to be present when the court entered these orders.

RIGHT TO COUNSEL

Delafuente argues that the trial court violated her right to counsel. We disagree.

Both the federal and state constitutions provide the right to counsel.[22] "The focus of the Sixth Amendment right to counsel inquiry is whether the event

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[18] Irby, 170 Wn.2d at 880.

[19] State v. Thompson, 190 Wn. App. 838, 843, 360 P.3d 988 (2015), review denied, 185 Wn.2d 1012 (2016).

[20] 134 Wn.2d 868, 920, 952 P.2d 116 (1998).

[21] Id.

[22] U.S. CONST. amend. VI; CONST. art. I, § 22.

for which the defendant argues counsel is necessary is a 'critical stage' of the criminal prosecution."[23]

As explained above, a continuance hearing is not a critical stage of trial. Thus, the trial court did not violate Delafuente's right to counsel when it entered the orders continuing her trial outside her counsel's presence.

Delafuente relies on State v. Rupe[24] to argue that a trial court's "[c]onsideration of the time for setting the trial is a critical stage." But Rupe is distinguishable because the issue in that case was whether the defendant was entitled to counsel when the trial court set his resentencing trial date.[25]

PROSECUTORIAL MISCONDUCT

Delafuente argues that the prosecutor committed two acts of misconduct during closing argument. Because she failed to object at trial and cannot show either comment was flagrant and ill-intentioned, we disagree.

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial.[26] A defendant waives the misconduct issue by failing to object or request a curative instruction at trial, "unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[27] This heightened

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[23] Grisby v. Herzog, 190 Wn. App. 786, 796, 362 P.3d 763 (2015).

[24] 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

[25] See id. at 741-42.

[26] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

[27] State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

standard requires that a defendant "show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"[28]

When the defendant fails to object, it "'***strongly suggests*** to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'"[29]

"Reasonable" Argument

Delafuente argues that the prosecutor improperly argued to the jury that Delafuente should have known that the assault would happen. She fails to show this was flagrant and ill-intentioned misconduct.

At trial in this case, the State had the burden to prove that Delafuente rendered criminal assistance. This means the State had to prove that Delafuente provided transportation "or other means of avoiding the discovery" to another person, who she knew had committed a crime, with the "intent to prevent, hinder, or delay the apprehension or prosecution" of that person.

The trial court gave the following "knowledge" instruction, which provided:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. . . .
> If a person has information that would lead ***a reasonable person*** in the same situation to believe that a fact exists, the

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[28] Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[29] State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

> jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.[30]

During closing argument, the prosecutor referred to Delafuente's actions and the knowledge instruction. Delafuente did not object after the prosecutor argued as follows:

> [S]he wants to say to you, I had no idea what was going on.
>
> . . . .
>
> Your instructions are replete with . . . the word "reasonable," and a reasonable person standard. And ***Is it at all reasonable*** that [Delafuente] didn't know exactly what was going to go down?[31]

The question before us is whether this argument is flagrant and ill-intentioned misconduct that overcomes her failure to object below. We hold that it is not.

On appeal, Delafuente contends that the prosecutor improperly argued to the jury that Delafuente should have known that the assault would happen and that she assisted. To support this argument, she cites State v. Allen.[32]

In that case, Dewayne Allen drove Maurice Clemmons to and from a crime scene.[33] The State had to prove that Allen actually knew he was promoting or

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[30] Clerk's Papers at 92 (emphasis added).

[31] Report of Proceedings Vol. 13 (September 1, 2015) at 1373 (emphasis added).

[32] 182 Wn.2d 364, 375, 341 P.3d 268 (2015).

[33] Id. at 369.

facilitating Clemmons's crime.[34] During closing argument, the State repeatedly used the phrase "should have known" when describing the knowledge definition.[35] For example, the prosecutor argued "even if [Allen] doesn't actually know, if a reasonable person would have known, he should have known . . . ."[36]

On appeal, the supreme court concluded that these statements misstated the law and were improper.[37] It determined that "what Allen knew and did not know was critically important."[38] Thus, it concluded that "the 'should have known' standard is incorrect" and that a jury must find that Allen had actual knowledge.[39] But the jury may make this finding from circumstantial evidence.[40]

Here, although Delafuente correctly cites the Allen principles, the prosecutor in this case did not make the "should have known" argument during closing argument. The prosecutor did not argue that Delafuente should have known if a reasonable person would have known. Rather, the context of this argument demonstrates that the prosecutor argued to the jury whether

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[34] Id. at 371.

[35] Id.

[36] Id. at 376.

[37] Id. at 375.

[38] Id.

[39] Id. at 374-75.

[40] Id. at 374.

Delafuente's lack of knowledge claim was reasonable. Thus, the prosecutor's conduct was not "flagrant and ill intentioned."[41]

"Successfully Executed" Argument

Delafuente also argues that the prosecutor committed misconduct by using the phrase "successfully executed." She fails to overcome her failure to object below.

In State v. Davis, the supreme court approved of a prosecutor's comment during closing argument that the defendant was the victim's "'judge, jury[,] and executioner.'"[42] The supreme court specifically concluded that nothing in the record "indicate[d] the comment was intended to inflame the jury."[43]

Here, during trial, a police officer testified that Powell "had passed on" when the officer arrived and that he tried to bring Powell "back to life." An emergency physician also testified that Powell "would have definitely died" without medical intervention.

During closing argument, the prosecutor stated:

> Without the heroic efforts of the first responding officers, the first responding medics, and Harborview Medical Center, you would be sitting here on a homicide trial. But for medical intervention, the defendants would have ***successfully executed*** Mr. Powell.[44]

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[41] Lindsay, 180 Wn.2d at 430.

[42] 175 Wn.2d 287, 337, 290 P.3d 43 (2012) (internal quotation marks omitted) (quoting State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000)).

[43] Davis, 141 Wn.2d at 873.

[44] Report of Proceedings Vol. 13 (September 1, 2015) at 1353 (emphasis added).

Delafuente did not object but she now challenges the above emphasized language.

As in Davis, nothing in this record indicates that the prosecutor made this comment to inflame the jury's passions or prejudices. Although this statement may have been a strong characterization of the evidence presented, we conclude that the prosecutor's comment was not "flagrant and ill intentioned."[45]

Delafuente contends that the prosecutor argued to the jury that Delafuente was actually guilty of the uncharged crime of murder to inflame the jury. But the prosecutor did not refer to the uncharged crime of murder by stating "the defendants would have successfully executed Mr. Powell." Rather, this statement reflects the State's characterization of the evidence presented to the jury.

In sum, Delafuente fails to establish that the comments to which she did not object below were flagrant and ill-intentioned that overcome her failure to object. They were not. We need not reach her substantive claims of prosecutorial misconduct.

COSTS

Neither Delafuente nor the State raises the issue of the award of appellate costs in their appellate briefs. We do so sua sponte.

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[45] Lindsay, 180 Wn.2d at 430.

Under our recent opinion in State v. Sinclair, the issue of appellate costs is to be decided by the panel that renders the decision.[46] We do so here.

Shortly after the trial court entered the judgment and sentence, Delafuente moved for review at public expense and appointment of an attorney. The trial court granted the motion.

Under Sinclair, there is a presumption that indigency continues unless the record shows otherwise.[47] We have reviewed this record and see nothing to overcome this presumption. Accordingly, an award to the State for appellate costs is inappropriate under these circumstances.

We affirm the judgment and sentence and decline to award costs on appeal to the State.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

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[46] 192 Wn. App. 380, 385, 367 P.3d 612 (2016), review denied, 185 Wn.2d 1034 (2016).

[47] Id. at 393.

LAW OFFICE OF SUZANNE LEE ELLIOTT

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