No. 94949-2
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Kittitas County Superior Court Cause No. 15-1-00277-4
Court of Appeals No. 34176-3-III

STATE OF WASHINGTON,

Respondent

vs.

RICHARD GARCIA,

Petitioner

ANSWER TO PETITION FOR REVIEW

DOUGLAS R. MITCHELL
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I. IDENTITY OF RESPONDENT:

The State of Washington was the Plaintiff in the Superior Court, Respondent in the Court of Appeals, and is Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

II. STATEMENT OF RELIEF SOUGHT:

The State is asking this Court to affirm the decision of the Court of Appeals and uphold the Petitioner's Convictions for Assault in the Second Degree and Unlawful Possession of a Firearm in the Second Degree.

III. RESPONSE TO ISSUE PRESENTED FOR REVIEW:

Defense counsel did not improperly fail to object to a continuance. There was a recess, not a continuance, and the analysis is not at all the same. Petitioner was thus not denied effective assistance of counsel. The State acted with due diligence in its efforts directed at having the named victim and two of her children appear for trial.

IV. STATEMENT OF THE CASE:

Petitioner's summary describing the facts of the case

(Petition, at 2-5) is generally sufficient for the purpose of Respondent's response, and will be accepted as it is except as otherwise supplemented or disputed below.

V. ARGUMENT:

A. Defense counsel did not fail to object to a continuance; there was no continuance to which counsel could object, and thus counsel was not ineffective.

Petitioner's careful analysis and discussion of CrR 3.3 and associated case law is not applicable, and this Court, like the Court of Appeals, should reject it. There was only one continuance of the trial. On November 13, 2015, trial was reset to December 1, 2015. CP, 34; Petition, at 2. A continuance is "(t)he adjournment or postponement of an action pending in a court, to a subsequent day of the same or another term." http://thelawdictionary.org/continuance/, last accessed on September 25, 2017. CrR 3.3 does not have a definition of "continuance", but 3.3(f) is consistent with that definition. Both subsections thereof use the phrase "continue the trial date to a specified date". As with the rest of CrR 3.3, this language is consistent with the intent of the drafters to address the commencement day of a trial. The rule itself is referred to as

"Time for Trial" in its header. Although both counsel and the Court regularly used the word "continuance", this was an incorrect use.

Trial did in fact commence with motions and other preliminary matters on December 1, 2015. RP, 33; 158.[1] *State v. Andrews*, 66 Wn. App. 804, 832 P. 2d 1373 (1992). The Court reversed its decision with regard to the admissibility of testimony by Officer Rogers about the victim's statements after a long and careful discussion and analysis December 2. RP, 107; 128 – 133.[2] This left the State faced with an immediate problem in proving its case. Although there were references to a "continuance", the Court correctly noted that the trial had already started. RP, 158 – 159. As such, there could not have been a continuance.

What occurred was a recess, "a stoppage in court proceedings for a short period of time but the court is not adjourned." http://thelawdictionary.org/recess/, last accessed on September 25, 2017. A trial court's grant of a recess is reviewed for abuse of discretion. In a case in which there was a two month

[1] The Verbatim report of proceedings is organized as four volumes, consecutively paginated, and the State will simply use those page numbers. A brief review indicates that the numbers appear the same as those cited by Petitioner.

[2] The entire exchange between the Court and attorneys is substantially longer, running between pp. 107 – 160 and addresses multiple aspects of the analysis of the hearsay issue and related changes in the logistics of trying the case.

recess in the course of trial, the Court of Appeals dealt with the issue in a cursory fashion and upheld the trial court's actions. *State v. Bluehorse*, 159 Wn. App. 410, 248 P. 3d 527 (2011)(citation omitted). (No reason for the recess appears in the opinion.) This is consistent with a line of cases going back to *State v. Mays*, 65 Wn. 2d 58, 395 P. 2d 758 (1964). The discussion in *Mays* appears to conflate the consideration of "continuance" and "recess", and itself relies on cases based upon *State v. Connor*, 107 Wash. 571, 182 P. 602 (1918). After *Mays*, there is recognition that the analysis based on speedy trial/time for trail considerations is not applicable to consideration of the court's discretion with regard to a recess. Cases subsequent to *Mays* thus make a more precise distinction between a continuance and a recess.

As far as can be determined, the law in this area seems to be well settled, as the vast majority of the cases are unpublished. As in *Bluehorse*, the review of the decision to grant a recess is very deferential. Further, the State has not been able to find a case in which the defense's objection to a recess under such circumstances, if any, was effective. It is probable that any such objection would have been pointless. Given that the trial court is to "… exercise reasonable control over the mode and order of

interrogating witnesses and presenting evidence …," this is predictable. ER 611.

As with the attention to and reliance upon the provisions of CrR 3.3, Petitioner's careful and detailed analysis of the case law with regard to ineffective assistance of counsel is not relevant, as it starts from essentially the same fundamental misunderstanding. The State acknowledges that there is language in *State v. Becerra*, 66 Wn. App. 202, at 206, 831 P. 2d 781 (1992) that might support Petitioner's assertion. However, the language not only appears to be *dicta*, but CrR 3.3 has been amended four times since then and the version in place now limits its effect to the trial date as discussed above. There is thus still no support for Petitioner's position.

B. The trial court did not err in finding that the State had acted with due diligence in its efforts to have April Garcia and her daughters appear to testify.

Petitioner misunderstands the State's planning for the trial. Even as close as ten days before the trial date, the State did in fact expect to call April[3] and her children. RP, 26. It is true that not all

[3] Due to the fact that the Petitioner, the victim, and both child witnesses all share the same last name, other than the Petitioner, first names will be used as needed to differentiate them. No disrespect is intended.

of the names of potential witnesses appeared on the witness list referred to by Petitioner. However, there can be no claim of surprise; as shown above, the State made that intent clear. It is probable that the failure to list them on an amended witness list is a mere oversight; a consequence of the evolution of the trial DPA's perception of the case and the tactical reality. Such an evolution is a familiar experience to trial attorneys, especially when dealing with victims whose emotional response to the matter may impact their will to testify. Some victims may be explicitly non-compliant; some may be disingenuous; some may vacillate. For example, the State did not know that the victim's mother would be available and willing to testify until "Monday morning", apparently a reference to November 30, 2015, the day before trial commenced. RP, 103. However the situation arose, it was well within the Court's discretion to allow those witnesses to be called, as long as defense counsel had sufficient time to address the addition. *State v. Hoggatt*, 38 Wn. 2d 932, 234 P. 2d 495 (1951).

On the first day of the trial, the State informed the Court of the changed circumstances with regard to the victim and her children as witnesses. RP, 34. The Court was then informed in detail of the State's plans to make use of the victim's excited

utterances to Officer Rogers and the basis for doing so. RP, 36 – 44. After hearing argument, the Court determines that the excited utterances about the event would be admissible. RP, 49. The victim's statements about the history of domestic violence perpetrated by Petitioner would not be. RP, 50.

The Court determined that the hearsay decision should be revisited on the second day of trial. RP, 107. One of the considerations about which the Court desired more information was the efforts to secure the presence of the victim, April. Among other factors impeding the State's ability to bring her to court was her rapid move out of State. To the best of the State's knowledge, she had gone to Oregon. RP, 109. As of two to three weeks prior to trial, the State expected April and her daughters to be present. RP, 111. Despite Petitioner's assertions to the contrary, not until the Friday before trial, November 27, did it become clear that April was non-compliant, not merely non-committal. RP, 115. Defense counsel had similar experiences, and although he suspected the reality, did not know until the last minute that April would not be located. RP, 125.

The detailed record of the State's efforts to obtain her presence and the related problems are provided at RP 108 – 122.

Under the circumstances as presented to and found by the trial court, there was a basis for obtaining a material witness warrant under the provisions of CrR 4.10(a)(3). The State had not found a valid address for April and her daughters and until shortly before trial, had no reason to expect that she would be uncooperative and that formal process as provided for in RCW 10.55 and CrR 4.10 would be needed. When forced to, the State had also made an analysis of the possibility of going forward without those witnesses. As the trial court initially ruled consistent with the State's argument on December 1, it is clear that the State's analysis was valid and not done in bad faith. There was a more than ample basis upon which the trial court could conclude that the State had acted with due diligence under the circumstances as they evolved. *State v. Eller*, 84 Wn. 2d 90, 524 P. 2d 242 (1974). The only information in the record does not detail the effort required for the State to locate the witnesses. The record only reflects that it was one week between the issuance of the material witness warrants and the certification by the trial judge. CP, 133, 138, 143; 144 – 150.

Petitioner's misunderstanding of the process by which the trial was started and then stopped for a period introduces error into

the analysis of this issue. The State will concede that the distinction has been missed by all involved at some point; there seems to be an on-going confusion of what actually happened, a "recess", with what it was often labeled, a "continuance". The undersigned has not been immune to that. However, the distinction is critical. The entire critique of the State's efforts, and subsequently, defense counsel's performance, reflects an analysis based upon case law about continuances. Assuming without conceding that Petitioner's analysis would be correct if this were in fact a "continuance", it is not relevant. That case law is simply not applicable here. The Court's discretion with regard to recessing for a period of time to allow the State to locate and serve the witnesses once trial has started is substantial, and the review deferential.

More correctly, the State's efforts had to be "reasonable" in order to be a "good faith effort" to ensure that the witnesses were present. *State v. Hurtado*, 173 Wn. App. 592, 294 P. 3d 838 (2013). Reasonableness by its nature requires an objective analysis; "reason" is "… a rational ground or motive …", or "… a sufficient ground of explanation or of logical defense …". https://www.merriam-webster.com/dictionary/reason, last accessed September 25, 2017. Comparing the state's efforts here to the

analysis a fair trial, and that is what the Petitioner was entitled to receive – a fair trial. "A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one." *State v. Barry*, 183 Wn. 2d 297, 316 – 317, 352 P. 3d 161 (2015)(citation omitted).

DATED this 27th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Attorney for Petitioner

Lisa E. Tabbut
Attorney at Law
P.O. Box 1319
Winthrop, WA 98862-3004
ltabbutlaw@gmail.com

DATED this 27th day of September, 2017.

Rebecca D. Schoos

Rebecca Schoos, Legal Secretary

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Attorney for Petitioner

Lisa E. Tabbut
Attorney at Law
P.O. Box 1319
Winthrop, WA 98862-3004
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DATED this ____ day of September, 2017.

_____
Rebecca Schoos, Legal Secretary

KITTITAS COUNTY PROSECUTOR'S OFFICE

September 27, 2017 - 2:38 PM

Transmittal Information

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