

Nº. 36800-5-II

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

STATE OF WASHINGTON
Respondent,

v.

MATTHEW SCOTT NESSETH,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAR -3 AM 9:29
STATE OF WASHINGTON
BY DEPUTY

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 06-1-00382-7
The Honorable Sally F. Olsen, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Mr. Nesseth's Sixth Amendment right to confront witnesses was violated by Agent Miyake's testimony.
2. Prosecutorial misconduct deprived Mr. Nesseth of a fair trial.
3. Mr. Nesseth's CrR 3.3 right to a speedy trial was violated.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is a defendant's Sixth Amendment right to confront witnesses violated where a witness testifies she has no first hand knowledge of certain events but then testifies as to the details of those events based on what other people have told her and what she has read in reports written by other people? (Assignment of Error No. 1)
2. Is it prosecutorial misconduct for a prosecutor to elicit testimony from a witness where the prosecutor knows the witness lacks a sufficient foundation to offer the testimony and which testimony violates a defendant's Sixth Amendment right to confront witnesses? (Assignment of Error No. 2)
3. Does the State's failure to secure the presence of a critical witness for trial provide a sufficient basis for the trial court to grant a continuance of trial over the defendant's objection? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

Factual Background

In the fall of 2005, Naval Criminal Investigative Services (NCIS) Special Agent Kara Miyake worked with a confidential informant named Thomas Beard and conducted a series of controlled buys of drugs. RP 31-43, 9/5/07, 34-38, 9/6/07.¹

The first controlled buy took place on October 3, 2005. RP 44-55, 9/5/07. Agent Miyake had Mr. Beard call "Scotty," the person Agent Miyake thought was Mr. Beard's dealer, and set up a drug sale in a 7-11 parking lot. RP 44-49, 9/5/07. Agent Miyake was unable to hear what was said on the other end of the phone call and Agent Miyake had no

¹ The Report of Proceedings is not numbered continuously between the volumes. Reference to the Report

way of knowing who Mr. Beard was talking to. RP 91-92, 9/5/07. Agent Miyake and other NCIS agents followed Mr. Beard to the scene of the drug sale and watched as Mr. Beard pulled into the 7-11 parking lot. RP 45-47, 9/5/07. Agent Miyake was positioned across the street from the 7-11 but other agents were in positions with better visibility. RP 47, 9/5/07.

Agent Miyake observed a white pickup truck pull into the 7-11 parking lot next to Mr. Beard's vehicle and saw a white male get out of the truck. RP 48-49, 9/5/07. Agent Miyake "didn't get a great physical description" of the man in the white truck and did not see anything after the man got out of the truck. RP 48, 50, 9/5/07. Later, other agents told Agent Miyake that the man who had gotten out of the pickup was Mr. Nesseth, but, based on her personal observation of the man who got out of the pickup, Agent Miyake could not have identified Mr. Nesseth as the man in the pickup. RP 48-49, 9/5/07. The pickup was not registered to Mr. Nesseth. RP 100, 9/5/07.

Agent Miyake saw the second man at the door to Mr. Beard's vehicle "for a very brief moment" and then the man walked into the 7-11. RP 50, 9/5/07. Mr. Beard then drove out of the parking lot and Agent Miyake followed him and recovered a baggie containing what ultimately was determined to be .49 grams of methamphetamine. RP 50-54, 9/5/07, 74-77, 9/6/07.

The second buy was conducted on October 6, 2005. RP 55-65, 9/5/07. Mr. Beard contacted someone by phone and set up a meeting at 1510 Snyder Avenue in Bremerton, Washington. RP 55-60, 9/5/07. Agent Miyake had no contact with the person on the other end of the phone, couldn't hear a voice, and had no way of knowing who Mr. Beard was talking to on the phone other than the phone number Mr. Beard called. RP 104-105,

of Proceedings will be made by giving the page number followed by the date of the hearing being cited.

9/5/07. Agent Miyake again followed Mr. Beard to the location while other agents set up surveillance around the location. RP 59-60, 9/5/07. The address was an apartment complex with several units. RP 61, 9/5/07. Agent Miyake observed Mr. Beard get out of his vehicle and walk to the front door of the rear apartment. RP 61-62, 9/5/07. Several minutes later, Agent Miyake saw Mr. Beard leave the area of the apartment. RP 62, 9/5/07. Agent Miyake could not see what went on inside the apartment. RP 108, 9/5/07. Agent Miyake made contact with Mr. Beard and recovered what eventually was determined to be .76 grams of methamphetamine. RP 62-65, 9/5/07, 77-81, 9/6/07.

During the second controlled buy, Agent Miyake never saw Mr. Nesselth, but did know that two other people were in the apartment during the buy. RP 110, 9/5/07.

The third controlled buy took place on October 27, 2005. RP 65-70, 9/5/07. Mr. Beard contacted someone and set up a purchase of methamphetamine at 1510 Snyder Avenue. RP 65, 9/5/07. Again, Agent Miyake did not hear who Mr. Beard was talking to on the telephone or even if there was someone on the other end of the telephone call. RP 5-6, 9/6/07. Agent Miyake followed Mr. Beard to the residence and watched Mr. Beard first walk up to the apartment, then walk somewhere else, then walk back to the apartment again. RP 66-67, 9/5/07. After Mr. Beard exited the residence, Agent Miyake contacted Mr. Beard and obtained what was ultimately determined to be .56 grams of methamphetamine. RP 67-70, 9/5/07, 81-83, 9/6/07.

Following the third controlled buy, Agent Miyake arrested Mr. Nesselth at the Snyder Avenue residence. RP 70-71, 9/5/06. From Mr. Nesselth's wallet, Agent Miyake recovered the buy money given to Mr. Beard to purchase drugs in the third controlled buy. RP 72-73, 9/5/06.

Procedural Background

On March 7, 2006, Mr. Nesseth was charged with two counts of delivery of methamphetamine. CP 1-4.

Mr. Nesseth was arraigned on June 4, 2007, with a speedy trial cutoff date of August 3, 2007. CP 32-33. Mr. Nesseth's trial was originally set for July 24, 2007. RP 2, 7/24/07.

On June 21, 2007, counsel for Mr. Nesseth requested the phone number of a State witness, Robert Blackledge, believing Mr. Blackledge to be the confidential informant. CP 34-36. The prosecuting attorney provided a phone number for Mr. Blackledge to counsel for Mr. Nesseth on June 26, 2007. CP 34-36.

On July 9, 2007, counsel for Mr. Nesseth requested an alternate phone number for Mr. Blackledge. CP 34-36. On July 10, 2007, counsel for Mr. Nesseth informed the State that Mr. Blackledge was not the confidential informant and that counsel for Mr. Nesseth wanted to contact the informant, not Mr. Blackledge. CP 34-36.

On July 11, 2007, 13 days before the date of trial, the State contacted NCIS to obtain the identity of the identity of the confidential informant. CP 34-36. It is the policy of the Kitsap County Prosecuting Attorney's Office to not obtain the identity of confidential informants until a defendant requests it. CP 34-36. It is also the policy of the Kitsap County's Prosecuting Attorney's Office to proceed to trial on all possible charges once a defendant requests the identity of a confidential informant. CP 34-36.

The State learned that the informant was no longer in the Navy and that the Navy had no contact information for the informant. CP 34-36. On July 17, 2007, seven days before trial was scheduled to start, the State's investigator located the informant in New

Mexico. CP 34-36. On July 18, the State spoke with the informant and on July 19 the State provided the informant's contact information to counsel for Mr. Nesseth. CP 34-36.

On July 24, the date of trial, the State requested a continuance in order to transport the confidential informant, Mr. Beard, back to Washington State to testify at the trial. RP 2, 7/24/07. The State argued that, because it had located Mr. Beard on July 17, it needed an additional two weeks to transport Mr. Beard back to Washington by plane. RP 2, 4, 7/24/07. Mr. Nesseth objected to the continuance (RP 3, 7/24/07) but the trial court continued the trial until August 6, three days past Mr. Nesseth's speedy trial date. RP 4, 7/24/07. Counsel for Mr. Nesseth informed the trial court that she would be unavailable for trial on August 8, 9, 10, 16, and 17, but the trial court nevertheless scheduled the trial for August 6. RP 4, 7/24/07.

On July 26, 2007, Mr. Nesseth filed a Motion and Declaration to Re-Set Trial Date to Within Sixty Days of Arraignment and filed a Motion for Order to Shorten Time to hear the motion to reset the trial date. CP 30-33. The State responded to Mr. Nesseth's motion by arguing that "the confidential informant [was] the key witness to the State's case" and "[b]ecause the informant was located out of state only one week before trial, it was not feasible for the State to get him here in time for trial," "the administration of justice demand[ed] that a continuance be granted in order to have him present for trial." CP 34-36.

On July 27, 2007, the trial court ruled it "was satisfied that the continuance [was] required in the administration of justice" and left the trial scheduled for August 6. RP 2-3, 7/27/07. Counsel for Mr. Nesseth again informed the court that she had a preplanned vacation on August 9, 10, 15, 16, 17. RP 3, 7/27/07. Counsel for Mr. Nesseth offered

August 13 as a possible trial date but the State informed the court that the prosecutor would be in trial on August 13. RP 3-4, 7/27/07. The trial court ultimately settled on August 20 as the date for trial. RP 4, 7/27/07, CP 37-38.

On August 20, the State requested a continuance of trial until September 4 in order to secure the presence of Mr. Beard and because the prosecutor on the case was in another trial. RP 4-5, 8/20/07. Mr. Nesseth objected to the continuance and the trial court set a new trial date of August 27. RP 5-7, 8/20/07.

On August 27, the State again requested a one week continuance, this time on grounds that Agent Miyake was deployed and would not be available for trial until the following week. RP 2, 8/27/07. The State informed that court that it had been unaware on August 20 that Agent Miyake would be available for trial. RP 2-3, 8/27/07. The State's position was that it had been planning to proceed to trial on August 27 without her testimony and would have instead called four other witnesses, some telephonically from Japan. RP 3, 8/27/07. However, once the State learned that Agent Miyake would be available, the State felt that it would serve judicial economy to call one witness instead of four and requested the continuance in order to secure Agent Miyake's presence. RP 3, 8/267/07. Counsel for Mr. Nesseth objected to the continuance and informed the court that, should the State seek to present witness testimony by telephone, Mr. Nesseth would object to any such testimony. RP 4-5, 8/27/07.

While acknowledging that Mr. Nesseth had a right to object to witnesses testifying by telephone, the trial court ultimately granted the continuance because Mr. Nesseth's objection to the telephonic testimony made Agent Miyake a necessary witness. RP 5-6, 8/27/07. The trial court grant a one week continuance for trial and set a new trial

date of September 4, 2007. RP 6, 8/27/07, CP 52.

On September 4, 2007, the State amended the charges against Mr. Nesseth to add a third count of delivery of methamphetamine and to add the special allegation that all the deliveries of methamphetamine took place within one thousand feet of a school bus route stop. CP 94-98.

On September 5, prior to trial beginning, Mr. Nesseth informed the trial court that he wished to have new counsel appointed. RP 10, 9/5/07. The trial court conducted a hearing regarding Mr. Nesseth's concerns with his attorney, but ultimately denied his request. RP 13-24, 9/5/07.

Trial commenced on September 5, 2007 (RP 31, 9/5/07), and the jury returned verdicts of guilty on counts I and III and not guilty on count II. CP 141-142. The jury also found that counts I and II had occurred within 1,000 feet of a school bus route stop. CP 143-144.

Notice of appeal was timely filed on September 21, 2007. CP 157-170.

D. ARGUMENT

1. **Introduction of Agent Miyaki's testimony regarding facts which she testified she had no direct knowledge of but knew based on her conversations with other agents and reading the reports of other agents violated Mr. Nesseth's 6th Amendment right to confront witnesses.**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. amend. VI. In its watershed 2004 decision, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court reformulated the analysis of confrontation clause claims. *Crawford* explained that the confrontation clause

“bars ‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54, 124 S.Ct. 1354).

While *Crawford* “left for another day any effort to spell out a comprehensive definition of ‘testimonial,’” the Court did identify that a “core class of ‘testimonial’ statements exist.” Without selecting among them, the Court provided three possible formulations of that core class, including “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

State v. Ohlson, 162 Wn.2d 1, 10, 168 P.3d 1273 (2007), citing *Crawford*, 541 U.S. at 51-52, 53 n. 4, 68, 124 S.Ct. 1354).

- a. *Agent Miyake’s identification of Mr. Nesseth as the man she observed during the first controlled buy was based on the statements of other agents and was a violation of Mr. Nesseth’s 6th Amendment rights under Crawford.*

Agent Miyake testified that during her observation of the October 3 buy she “didn’t get a great physical description” and that she “wouldn’t be able to say that on that specific day I knew it was [Mr. Nesseth].” RP 48-49, 9/5/07. Despite this, Agent Miyake testified that the agents positioned themselves “where Mr. Beard and Mr. Nesseth were going to meet,” and that she saw Mr. Nesseth get out of the pickup that drove into the 7-11 parking lot. RP 47-48, 9/5/07.

Agent Miyake also testified that she never saw Mr. Nesseth during the second controlled buy (RP 108-110, 9/5/07) and during the third controlled buy she only saw Mr. Beard walk up to the apartment and leave the apartment. RP 66-67, 9/5/07.

Agent Miyake’s only personal knowledge of Mr. Nesseth’s appearance is what she observed during the first controlled buy and during Mr. Nesseth’s arrest subsequent

to the third controlled buy. RP 48-49, 66-67, 108-110, 9/5/07. However, Agent Miyake testified that, during the investigation, she was made aware of Mr. Nesseth's appearance from other agents who had a better view of Mr. Nesseth and who retrieved a photograph of Mr. Nesseth. RP 47-49, 9/5/07.

Agent Miyake also testified that, following each controlled buy, the other agents would discuss the case with Agent Miyake and Agent Miyake would incorporate what she had observed as well as what other agents had told her into her report. RP 79, 9/5/07. Agent Miyake testified that she reviewed the reports in the case prior to testifying. RP 78-79, 9/5/07.

Agent Miyake's in-court identification of Mr. Nesseth as the man she saw on October 3 is directly contrary to her own testimony that she would not be able to identify Mr. Nesseth as the man she saw based only on her observations of October 3. The only way Agent Miyake would have obtained sufficient knowledge of Mr. Nesseth's appearance to make an in-court identification of Mr. Nesseth as the man she saw on October 3 would have been for Agent Miyake to be informed by other agents, either directly or through the reports generated in the case, of the description of the man seen on October 3 and to be informed by other agents that the man they saw was Mr. Nesseth.

Any statements made by the other agents to Agent Miyake or in their own reports would fall under the definition of "testimonial statements" identified in *Ohlson*. Whether or not the statements were contained in the official reports of the other agents or made verbally to Agent Miyake and incorporated by her into her report, an objective witness would reasonably believe that those statements would be available for use at a later trial. The other agents were not called as witnesses, were not available for trial, and Mr.

Nesseth did not have the opportunity to interview them prior to trial. Agent Miyake's identification of Mr. Nesseth as the man seen on October 3 was therefore a repetition of the testimonial statements of the other agents and was testimonial hearsay of the sort barred by *Crawford*.

- b. *Agent Miyake's identification of Mr. Nesseth as the man Mr. Beard spoke with on the phone was based on the statements and reports of the other agents and was a violation of Mr. Nesseth's 6th Amendment rights under Crawford.*

Agent Miyake repeatedly testified that Mr. Nesseth was the individual with whom Mr. Beard was meeting during the controlled buys.

When testifying about the October 3 controlled buy, Agent Miyake testified that Mr. Beard called Mr. Nesseth over the phone and arranged a meeting for Mr. Beard to purchase drugs. RP 44-46 (9/5/07).

With regard to the October 6, buy, Agent Nesseth testified that Mr. Beard called Mr. Nesseth to set up the buy. RP 55, 9/5/07. Counsel for Mr. Nesseth objected and a sidebar was held wherein it was established that Agent Miyake lacked sufficient knowledge to allow the State to lay a foundation that she knew Mr. Beard was calling Mr. Nesseth. RP 55-58, 9/5/07. Despite this, Agent Miyake again testified that Mr. Beard had called Nesseth via cell phone. RP 59, 9/5/07. Counsel for Mr. Nesseth again objected on the basis of hearsay and the objection was sustained. RP 59, 9/5/07. The very next question asked by the prosecutor was, "What happened after Mr. Beard Spoke with Mr. Nesseth on his cell phone?" to which Agent Miyake replied, "We set up a controlled buy." RP 59, 9/5/07.

Regarding the third controlled buy on October 27, Agent Miyake testified that Mr. Beard contacted Mr. Nesseth and set up a purchase of methamphetamine. RP 65, 9/5/07.

On cross-examination, Agent Miyake admitted that there was no way for her to verify on October 3 who Mr. Beard was talking to on the phone and that she couldn't hear what was being said on the other end. RP 91-92, 9/5/07. Agent Miyake also testified on cross-examination that there was no way for her to know who Mr. Beard was talking to or hear what the person on the other end of the call was saying in regards to the October 6 buy. RP 104-105, 9/5/07. Similarly, when cross-examined about the telephone call made by Mr. Beard to set up the October 27 buy, Agent Miyake admitted that she did not hear the voice on the other end of the phone and did not know if there even was a voice on the other end of the phone. RP 5-6, 9/6/07.

Any testimony by Agent Miyake as to who Mr. Beard called and spoke to on October 3, 6, and 27 was not based on any first-hand knowledge on her part and was based on what other people had told her. As such, Agent Miyake's testimony about who Mr. Beard spoke with on the phone was a repetition of testimonial hearsay and was a violation of Mr. Nesseth's 6th Amendment right to confront the witnesses against him.

2. **It was prosecutorial misconduct for the prosecutor to elicit testimony from Agent Miyake regarding who Mr. Beard spoke with to set up the October buy where the prosecutor knew Agent Miyake lacked sufficient factual knowledge to offer the testimony and the testimony violated Mr. Nesseth's Sixth Amendment right to confront witnesses.**

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is given a fair trial.” *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied* 396 U.S. 1019, 90 S.Ct. 587, 24 L.Ed.2d 511 (1970). The Washington Supreme Court has characterized the duties and responsibilities of a

prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in Huson, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to **seek justice as opposed to merely obtaining a conviction**.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981) (citations omitted) (*quoting State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)). (Emphasis added).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

In *Napue v. Illinois*, the United States Supreme Court wrote that, "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall [sic] under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, *allows it to go uncorrected when it appears.*" *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217

(1959). (Citations omitted) (emphasis added).

As discussed above, Agent Nesseth testified that on October 6, Mr. Beard called Mr. Nesseth to set up the buy. RP 55, 9/5/07. Counsel for Mr. Nesseth objected and a sidebar was held wherein it was established that Agent Miyake lacked sufficient knowledge to allow the State to lay a foundation that she knew Mr. Beard was calling Mr. Nesseth. RP 55-58, 9/5/07. Despite this, Agent Miyake again testified that Mr. Beard had called Nesseth via cell phone. RP 59, 9/5/07. Counsel for Mr. Nesseth objected on the basis of hearsay and the objection was sustained. RP 59, 9/5/07. The very next question asked by the prosecutor was, “What happened after Mr. Beard spoke with Mr. Nesseth on his cell phone?” to which Agent Miyake replied, “We set up a controlled buy.” RP 59, 9/5/07.

a. *It was improper prosecutorial misconduct for the prosecutor to ask, “What happened after Mr. Beard spoke with Mr. Nesseth on his cell phone?”*

Immediately following the objection to Agent Miyake testifying that Mr. Beard called Mr. Nesseth, and immediately following the prosecutor’s own acknowledgement that he could not establish the foundation necessary to have Agent Miyake testify that Mr. Beard had called Mr. Nesseth, the prosecutor asked a question which assumed the very facts the prosecutor had just admitted he could not elicit.

The prosecutor’s act of questioning Agent Miyake in this manner was prosecutorial misconduct. The prosecutor was fully aware that Agent Miyake could not testify that she knew Mr. Beard had called Mr. Nesseth, but the prosecutor avoided the problem of establishing a foundation for the testimony by asking the question in a manner which assumed the truth of the inadmissible facts. This was a knowing violation of the

rules of evidence as well as improper prosecutorial misconduct.

b. Mr. Nesseth was prejudiced by the prosecutor's actions.

The prosecutor's action arose in the introduction of evidence to support convicting Mr. Nesseth for delivery of methamphetamine on October 6, 2007. While the jury ultimately found Mr. Nesseth not guilty of this count, the prosecutor's improper question prejudiced Mr. Nesseth in that the question increased Agent Miyake's credibility in the eyes of the jury by making it appear that Agent Miyake had personal knowledge of more facts than she actually did. Given that Agent Miyake and Mr. Beard were the only witnesses who could establish the details of the alleged drug sales, any improper bolstering of the credibility of either witness was highly prejudicial to Mr. Nesseth.

The prosecutor knowingly elicited evidence which was inadmissible, specifically that Agent Miyake knew the identity of the person called by Mr. Beard on October 6. The prosecutor did this over objection of defense counsel and after acknowledging that he could not lay the foundation for proper introduction of this evidence. This was improper conduct on the part of the prosecutor which prejudiced Mr. Nesseth.

3. The trial court abused its discretion in granting a continuance due to the State's failure to secure the presence of Mr. beard for trial and the grant of the continuance deprived Mr. Nesseth of his right to a speedy trial.

As stated above, Mr. Nesseth was arraigned on June 4, 2007, which would create a speedy trial cutoff date under CrR 3.3(b)(1) of August 3, 2007. CP 32-33. On June 24, 2007, the trial court granted the State's motion for a continuance of the trial finding that the State's failure to secure the presence of Mr. Beard was "good cause" to continue the trial until August 6, three days beyond Mr. Nesseth's speedy trial cutoff date. RP 2-4, 7/24/07.

- a. *The State has an obligation to exercise due diligence in securing the presence of critical witnesses for trial.*

“The right to compulsory attendance of material witnesses is a fundamental element of due process and goes directly to the right to present a defense.” *State v. Carlisle*, 73 Wn.App. 678, 679, 871 P.2d 174 (1994). “Due diligence must be exercised to secure the attendance of a witness, and that due diligence includes the issuance of a subpoena and the taking of necessary steps to enforce attendance.” *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972), citing *State v. Fortson*, 75 Wn.2d 57, 448 P.2d 505 (1968). When a key witness is unavailable, the State has the burden to present substantial evidence that it exercised due diligence in attempting to secure the witness for trial. *State v. Rivera*, 51 Wn.App. 556, 559, 754 P.2d 701 (1988).

Here, the State acknowledged pretrial that Mr. Beard was a “key witness” to the State’s case. CP 34-36. Thus, when the prosecutor moved to continue the trial based on the unavailability of Mr. Beard, the State had the burden to present substantial evidence that it had exercised due diligence in attempting to secure Mr. Beard’s presence for trial.

- b. *The State failed to exercise due diligence in securing Mr. Beard’s presence in time for the original trial date of August 3.*

Due diligence requires a reasonable, good faith attempt. *State v. DeSantiago*, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003). “Due diligence to compel the attendance of a witness includes not only the issuance of a subpoena, but also the taking of necessary steps to enforce attendance. The prosecutor must show that he had made timely use of the legal mechanisms available to compel the attendance of witnesses.” *State v. Henderson*, 26 Wn.App. 187, 194, 611 P.2d 1365, review denied 94 Wn.2d 1008 (1980), citing *Toliver*, 6 Wn.App. at 533, 494 P.2d 514, and *State v. Smith*, 56 Wn.2d 368, 353

P.2d 155 (1960).

CrR 4.8 provides, “Subpoenas shall be issued in the same manner as in civil actions.” CR 45 governs subpoenas in civil actions.

This court has long held the position that due diligence requires the proper issuance of subpoenas to essential witnesses. In *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960), this court expressly declared that “[t]he **failure to cause a subpoena to issue clearly constitutes such a lack of due diligence as to justify the denial of a motion for continuance.**”

State v. Adamski, 111 Wn.2d 574, 578, 761 P.2d 621 (1988) (emphasis added).

“[F]ailure to properly subpoena an essential witness falls below the standards of due diligence.” *Adamski*, 111 Wn.2d at 578, 761 P.2d 621. Further, the failure to issue subpoenas is grounds for denial of a motion for continuance. See *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960), and *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972).

Here, the State argued that on July 24, the date of trial, a continuance was necessary to transport the confidential informant, Mr. Beard, back to Washington State to testify at the trial. RP 2, 7/24/07. The State argued that, because it had located Mr. Beard on July 17, it needed an additional two weeks to transport Mr. Beard back to Washington by plane. RP 2, 4, 7/24/07. Mr. Nesselth objected to the continuance (RP 3, 7/24/07) but the trial court continued the trial until August 6, three days past Mr. Nesselth’s speedy trial date. RP 4, 7/24/07.

On July 26, 2007, Mr. Nesselth filed a Motion and Declaration to Re-Set Trial Date to Within Sixty Days of Arraignment and filed a Motion for Order to Shorten Time to hear the motion to reset the trial date. CP 30-33. The State responded to Mr. Nesselth’s motion by arguing that “the confidential informant [was] the key witness to the

State's case" and "[b]ecause the informant was located out of state only one week before trial, it was not feasible for the State to get him here in time for trial," "the administration of justice demand[ed] that a continuance be granted in order to have him present for trial." CP 34-36. On July 27, 2007, the trial court ruled it "was satisfied that the continuance [was] required in the administration of justice" and left the trial scheduled for August 6. RP 2-3, 7/27/07.

In this case, the State failed to exercise any diligence whatsoever to secure Mr. Beard's presence for the initial trial date of July 24. Had the State exercised due diligence and attempted to subpoena Mr. Beard, the State would have discovered much earlier Mr. Beard's location and that arrangements would have had to be made to transport Mr. Beard to Washington.

Not only did the State fail to subpoena Mr. Beard, the State failed to even ensure it had accurate contact information for Mr. Beard. The State's failure to know Mr. Beard's correct address was not the result of any attempts on the part of Mr. Beard to avoid service or hide his whereabouts. Rather, the State's lack of knowledge of Mr. Beard's whereabouts was due entirely to the internal policy of the Kitsap County Prosecutor's office that, for purposes of plea bargaining, the names and addresses of confidential informants are not obtained until after being requested by the defendant. CP 34-36. Thus, the State's inability to have Mr. Beard present for the initial trial date was due entirely to the State's own intentional ignorance of Mr. Beard's contact information in order to further the plea bargaining policy of the prosecuting attorney's office.

Given that Mr. Beard was the confidential informant who had purchased the drugs, and given that the State admitted that that Mr. Beard was the "key witness" in the

State's case (CP 34-36), the State had a duty to exercise due diligence in securing Mr. beard's presence for trial. As stated above, "failure to properly subpoena an essential witness falls below the standards of due diligence." *Adamski*, 111 Wn.2d at 578, 761 P.2d 621. In this case, the State did more than fail to issue a subpoena, the State remained intentionally ignorant of the location of a "key witness" until counsel for Mr. Nesseth demanded the contact information of the confidential informant.² It is the State's own policy which created the State's "need" for a continuance.

Presumably, had counsel for Mr. Nesseth not requested the contact information of the informant, the State would not have obtained it and would have been unable to secure Mr. Beard's presence for the original July 24 trial date. In that situation, the State would have had to move for a continuance to secure Mr. Beard's presence. However, having failed to even issue a subpoena to secure Mr. Beard's presence, the State would have had no grounds to request a continuance and the trial court would have properly denied such a motion.

The only reason the State was even made aware it did not have correct contact information for Mr. Beard was due to defense counsel's request to receive such information. It is true that the State made efforts to learn Mr. Beard's location once it

² While not directly relevant to any issue raised in this appeal, it is important to note that the Kitsap County Prosecutor's policy of not disclosing the contact information of confidential informants in all cases until specifically requested by the defendant is contrary to the prosecutor's discovery disclosure obligation under CrR 4.7(a)(1). Under CrR 4.7(f)(2), disclosure of confidential informants is not required "where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant." However, the State made no such claim in this case, and CrR 4.7(f)(2) also provides that, "[d]isclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied." The Kitsap County Prosecutor's policies of not obtaining contact information for confidential informants but then proceeding to trial on all possible charges once the informant's information is obtained and disclosed not only risks violating a defendant's rights to proceed to trial in a timely manner or to proceed to trial with adequately prepared counsel, but also puts the defendant in the position of having to choose between entering into plea negotiations or conducting full discovery into the charges brought against him or her. At the very least, as this case makes clear, even if the informant's information is not turned over to the defendant, the State should still obtain the information if for no other reason than

became apparent that Mr. Beard did not live where the State thought he did, but these efforts began on July 11, a mere thirteen days prior to the date trial was scheduled to start. Not only does the prosecutor have the obligation use legal mechanisms to compel the attendance of witnesses, but the use of those mechanisms must be *timely*. *Henderson*, 26 Wn.App. at 194, 611 P.2d 1365; *citing Toliver*, 6 Wn.App. at 533, 494 P.2d 514. Considered in the light of the State's duty to exercise due diligence in securing the presence of essential witnesses for trial, the efforts of the State in locating Mr. Beard for trial were too little, too late.

In *State v. Wake*, 56 Wn.App. 472, 783 P.2d 1131 (1989), noting that the issuance of a subpoena is a critical factor in granting a continuance and that the State had failed to do so, the court held that unavailability of a State's witness due to congestion at the State crime lab was not a sufficient basis for granting a continuance and dismissed the charges against Mr. Wake. *Wake*, 56 Wn.App. at 475-476, 783 P.2d 1131. In so ruling, the *Wake* court held,

[T]he State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. **If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem...**the prosecutor knew of the conflict almost 2 weeks before trial was scheduled, and had an opportunity to make alternative arrangements. **Thus, this was not an unavoidable circumstance beyond the control of the State.**

Wake, 56 Wn.App. at 475-476, 783 P.2d 1131. (Emphasis added).

Mr. Nesseth's case is like Mr. Wake's case. The unavailability of the State's witness in Mr. Nesseth's case was due to the State's policy of not obtaining the contact information of confidential informants until requested by the defendant. Like the hiring

securing the presence of the informant for trial.

of additional staff discussed in *Wake*, the State has complete control of whether or not it chooses to obtain the contact information of confidential informant to secure their presence for trial. The State's lack of knowledge of Mr. Beard's whereabouts was not an unavoidable circumstance beyond the control of the State. Like the State's hiring decisions discussed in *Wake*, the State's internal policies regarding plea bargaining should not be allowed to trump Mr. Nesseth's right to speedy trial.

The State failed to exercise due diligence in securing the presence of Mr. Beard for trial.

c. The State's failure to exercise due diligence to secure Mr. Beard's presence for the original trial date of August 3 did not constitute "good cause" to grant a continuance and the trial court abused its discretion in granting the continuance on these grounds.

The grant or denial of a continuance under CrR 3.3 is reviewed under an abuse of discretion standard. *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986), *cert. denied* 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id., 110 Wn.App. at 99, 38 P.3d 1040.

As discussed above, the State failed to exercise due diligence in securing Mr. Beard's presence for trial prior to moving for a continuance. The only grounds presented by the State in requesting the continuance on July 24 was that the State needed more time

to secure Mr. Beard's presence for trial since it had only discovered Mr. Beard's whereabouts on July 17 and would take two weeks to fly Mr. Beard to Washington from New Mexico. However, this request was made on the date of trial. The prosecutor had the duty to exercise due diligence to make sure that Mr. Beard was present and ready to appear on that date. Given that the prosecutor's failure to know that Mr. Beard was out of State was due to the prosecutor's intentional ignorance, and, given that had the prosecutor exercised due diligence in determining the whereabouts of Mr. Beard, the State could have easily had Mr. Beard present for trial, the fact that it would take two weeks to fly Mr. Beard to Washington did not constitute "good cause" to delay the trial.

Under CrR 3.3(f)(2), a continuance may be granted on motion of a party "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."

However, "A violation of a defendant's right to a speedy trial caused by the State's failure to exercise due diligence cannot be excused simply because the defendant cannot show prejudice." *Adamski*, 11 Wn.2d at 579, 761 P.2d 621.

The facts of the case are that the State needed more time to secure Mr. Beard's presence because the State knowingly and intentionally remained ignorant of Mr. Beard's current address and failed to exercise due diligence in serving a subpoena on Mr. Beard, an essential witness. These facts do not meet the legal standard necessary for the trial court to grant a motion to continue. Further, it is irrelevant whether or not the delay caused Mr. Nesseth any prejudice since the delay was caused by the State's failure to exercise due diligence.

The trial court abused its discretion on granting the State's motion to continue

trial on July 24 and setting the new trial date for August 6, three days after Mr. Nesseth's time for speedy trial expired. The erroneous granting of the State's motion to continue trial deprived Mr. Nesseth of his right to a speedy trial.

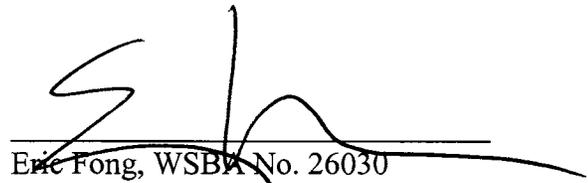
E. CONCLUSION

Mr. Nesseth's right to confront witnesses was violated by Agent Miyake's testimony based on the statements and reports of other NCIS agents who did not testify. Mr. Nesseth's right to a fair trial was violated by the prosecutor asking a question which assumed the truth of inadmissible facts. Finally, Mr. Nesseth's right to a speedy trial was violated when the trial court continued Mr. Nesseth's trial beyond the speedy trial cutoff date because the State failed to exercise due diligence in obtaining the presence of a necessary witness.

This court should vacate Mr. Nesseth's convictions and remand for a new trial.

DATED this 14 day of February, 2008.

Respectfully submitted,



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BY [Signature]

DEPUTY

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)

Respondent,)

vs.)

MATTHEW SCOTT NESSETH,)

Appellant.)

Appeal No. 36800-5-II
Superior Court No. 06-1-00382-7

AFFIDAVIT OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton
Attorney at Law
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Mr. Matthew Scott Nesseth
DOC #839826 (C-5-C-5-2)
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a true copy of the Brief of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 29th day of February 2008, at Port Orchard, Washington.

[Signature]
ANN BLANKENSHIP

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