

No. 36880-3 -II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

BOBBY D. BEASLEY, JR.,

Respondent.

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COUNTY OF MASON
COURT OF APPEALS
BY STATE DEPUTY PROSECUTOR

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00139-5

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

No. 1. The trial court erred in failing to recuse itself sue sponte because of the spousal relationship of Respondent counsel with one of the trial court's Court Commissioners.

No. 2. The trial court erred in failing to timely advise the parties that it was "uncomfortable" with making the factual determinations below.

No. 3. The trial court erred in making Finding of Fact No. 6 in granting the Respondent's Motion to Dismiss by order entered on September 5, 2007.

No. 4. The trial court erred in making Conclusion of Law No. A.3 in granting the Respondent's Motion to Dismiss by order entered on September 5, 2007.

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No. 8. The trial court erred in denying Appellant's motion to recuse by order entered on November 5, 2007.

No. 9. The trial court erred in denying Appellant's motion to reconsider by order entered on September 18, 2007.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. Does a trial court who is hearing a matter have a duty to recuse itself where the credibility of the two opposing counsel is central to

the factual determination of the matter and one of the opposing counsel is the spouse of the trial court's appointed court commissioner? (Assignments of Error 1 and 8.)

No. 2. The trial court did not disclose to the two opposing counsel that it was "uncomfortable" making a head on factual determination involving the credibility of the two opposing counsel until a statement of such discomfort was incorporated into the trial court's prepared oral decision on Respondent's Motion to Dismiss below. Did this untimely disclosure deny the Appellant the opportunity to timely move the trial court that it recuse itself and thus deny the Appellant a fair hearing? (Assignment of Error 2.)

No. 3. Respondent filed a Motion to Dismiss below grounded in alleged governmental misconduct. Central to such motion was a claim of interference by the deputy prosecutor during an interview conducted of witness Carl Hill on July 3, 2007. As part of numerous pleadings related to Respondent's Motion to Dismiss below, defense counsel filed a copy of his handwritten notes purporting to document the alleged interference of the deputy prosecutor during the interview conducted of witness Carl Hill on July 3, 2007. The trial court below, in rendering its prepared oral decision, indicated "most importantly to my factual determination, were the notes taken by defense counsel contemporaneously with that interview." The trial court then made a finding that "most significantly", the deputy prosecutor directed witness Carl Hill to not answer a question put to him as to why he was purportedly so hostile at the time of the interview. Such factual determination of the interference, deemed "most significant" by the court, is not supported by the "notes taken by defense counsel contemporaneously with that interview". Did the trial court's granting of the Respondent's Motion to Dismiss violate the requirement of a showing of governmental misconduct where the court's finding of misconduct specifically references a portion of the record that fails to support such finding? (Assignments of Error 3, 4, 5 and 9.)

No. 4. Defense counsel below, after filing a Notice of Appearance on the 64th day of the defendant's applicable 90 day time-for-trial period, first orally indicated on the 70th day of the 90 day time-for-trial period that he would be asking the court to authorize a deposition in regard to a witness that was allegedly refusing to talk to the defense. The court directed defense counsel on that 70th day to have his investigator contact the prosecutor's office to see about arranging an interview. No such

contact was made by the defense. Instead, defense counsel orally indicated to the court on the 74th day of the 90 day time-for-trial period that he would be asking the court to authorize depositions in regard to two witness that were allegedly refusing to talk to the defense. When the state's trial deputy prosecutor on the case learned of the situation on the 78th day of the 90 day time-for-trial period, he promptly contacted the two witnesses and arranged for interviews to be conducted on the necessary parties' next open and available day. He also learned that the witnesses had not refused to be interviewed but had asked for the state to be involved in any interviews. The interviews were conducted on July 3, 2007. Subsequent to those interviews, defense counsel moved for and was granted a thirty day "Campbell" continuance in order to have enough time to follow up on matters discussed in the interviews. Did the trial court's granting of the Respondent's Motion to Dismiss violate the requirement of a showing of governmental misconduct where it was the defense that failed to timely take steps to ensure interviews of the witnesses by neither following through on the court's initial directive nor filing and noting an actual written motion for deposition? (Assignment of Error 6.)

No. 5. Defense counsel below, after filing a Notice of Appearance on the 64th day of the defendant's applicable 90 day time-for-trial period, first indicated on the 70th day of the 90 day time-for-trial period that he would be asking the court to authorize a deposition in regard to a witness that was allegedly refusing to talk to the defense. The court directed defense counsel on that 70th day to have his investigator contact the prosecutor's office to see about arranging an interview. No such contact was made by the defense. Instead, defense counsel indicated to the court on the 74th day of the 90 day time-for-trial period that he would be asking the court to authorize depositions in regard to two witness that were allegedly refusing to talk to the defense. When the state's trial deputy prosecutor on the case learned of the situation on the 78th day of the 90 day time-for-trial period, he promptly contacted the two witnesses and arranged for interviews to be conducted on the necessary parties' next open and available day. He also learned that the witnesses had not refused to be interviewed but had asked for the state to be involved in any interviews. The interviews were conducted on July 3, 2007. Subsequent to those interviews, defense counsel moved for and was granted a thirty day "Campbell" continuance in order to have enough time to follow up on matters discussed in the interviews. Did the trial court's granting of the Respondent's Motion to Dismiss below violate the requirement that a

defendant must show actual prejudice for a motion to dismiss to be granted, where there would not have been sufficient time for the defense to follow up on the interviews within the applicable time-for-trial period even if such interviews had been conducted on the day defense counsel filed his notice of appearance in the matter? (Assignments of Error 6 and 7.)

No. 6. Subsequent to the interview conducted of witness Carl Hill on July 3, 2007, defense counsel moved for and was granted a “Campbell” continuance in order to have enough time to follow up on matters discussed in the Carl Hills interview and other defense interviews conducted on the same day. Defense counsel’s investigator and defense counsel subsequently conceded that the defense had “gleaned” everything they needed from Carl Hills during their interview of him on July 3, 2007. Did the trial court’s granting of the Respondent’s Motion to Dismiss below violate the requirement that a defendant must show actual prejudice for a motion to dismiss grounded in governmental misconduct to be granted? (Assignments of Error 6 and 7.)

No. 7 The defense was provided with an audio compact disc containing the Mason County Sheriff’s Office’s interviews of Carl Hill and Linda Herrera on July 20, 2007. (CP 107). The defense had been provided Detective Luther Pittman’s report summarizing those two statements in detail on June 28, 2007 (CP 47), prior to the interviews of those two witnesses that were conducted on July 3, 2007. Did the trial court’s granting of the Respondent’s Motion to Dismiss below violate the requirement that a defendant must show actual prejudice for a motion to dismiss grounded in governmental misconduct to be granted? (Assignments of Error 6 and 7.)

C. STATEMENT OF THE CASE

The respondent was arrested in the early morning hours of March 23, 2007 for Burglary in the First Degree. His first court appearance thereafter occurred on that same date, March 23, 2007, at which time the court found probable cause as to that charge, appointed counsel Ron Sergi

to represent him, set conditions of release, entered a domestic violence no-contact order naming a Rene Demmon as the protected party and set an arraignment date of April 9, 2007. (CP 1, 2, 3, 4, 5)

An Information charging Burglary in the First Degree was filed on March 26, 2007. (CP 6) The state filed its Omnibus Application on that same date. (CP 7) Both a Carl Hills and a Linda Herrera were among those listed as witnesses in that application.

The defendant was arraigned on the filed charge on April 9, 2007. (CP 11) On that same date, an Omnibus hearing was set for June 4, 2007, a pre-trial hearing was set for June 18, 2007, a trial date was set for June 26, 2007 and a final start date was calculated as falling on July 9, 2007, based on the defendant having posted bail and being out of custody. (CP 10) The domestic violence no-contact order was also renewed. (CP 9)

Retained counsel Bruce Finlay entered a Notice of Appearance in the matter on June 12, 2007. (CP 17) Counsel Finlay's spouse is one of the Mason County Superior Court's appointed Court Commissioners.¹ (CP 119, RP 205)

At the pre-trial hearing on Monday, June 18, 2007, 70 days into the applicable 90 day time-for-trial period and only six working days prior to

¹ She is also the Shelton Municipal Court judge. (CP 119)

the date set for trial, the defense asserted for the first time that one of the witnesses had refused to talk to the defense. (CP 22, RP 10) Deputy Prosecuting Attorney Rebecca Garcia-Jones was present for that hearing, as the trial deputy for the matter was unavailable. Defense counsel orally indicated "I'll be asking the court to authorize a deposition", after indicating that he would follow up with a written motion. (RP 10) Judge Sawyer directed the defense to first have its investigator contact the prosecutor's office to see about arranging that interview. (RP 10, 11) The pre-trial hearing was then continued to Friday, June 22, 2007. (RP 11)

The prosecutors' annual state-wide summer CLE conference occurred from Wednesday, June 20, 2007 through Friday, June 22, 2007 in Chelan, Washington, with the trial deputy in attendance. (RP 21)

At the continuation of the pre-trial hearing on Friday, June 22, 2007, the defense, in response to Judge Sheldon's inquiry about any outstanding discovery issues, now asserted that there were two witnesses who were refusing to talk to the defense. (RP 12) Again, defense counsel orally indicated "I may have to ask the Court for depositions, and I'll prepare the paperwork to do that". (RP 13) No record was made as to whether the defense had contacted the prosecutor's office as directed to attempt to arrange any interview. (CP 23, RP 12 – 14)

The state's trial deputy first had actual notice of the defense's requests for interviews on Tuesday, June 26, 2007 (RP 20, 21), the same day defense counsel first actually filed both a Motion for Deposition and a Motion for Deposition – Amended. (CP 24, 25) Both of the witnesses at issue, Carl Hills and Linda Herrera, were contacted and arrangements were made for a defense interview of them on the following Tuesday, July 3, 2007, based on their availability.² (CP 41, RP 15, 21, 82) The witnesses indicated that they had not refused to talk, but that they had asked for the state to be present for any interview (CP 81). A record was made of this on Thursday, June 28, 2007 before Judge Sheldon. (RP 21) Although defense counsel had not noted up the defense motions for depositions (RP 15), Judge Sheldon nevertheless provisionally ordered depositions for Thursday, July 5, 2007 in case the scheduled interviews did not take place for any reason. (CP 26, RP 21, 22) On that same date the state provided the defense with summaries of previously conducted interviews of those two witnesses by Mason County Sheriff's Office Detective Luther Pittman. (RP 16, 23, 86) The state had itself obtained such summaries from Detective Pittman that day. (RP 23)

² The state's deputy prosecutor was also involved in an unrelated trial, *State v. Eric Wise* (Mason County Superior Court Cause No. 07-1-00) for several days thereafter.

The interviews did in fact take place as scheduled. Present for the interviews were the deputy prosecutor, Mason County Sheriff's Office Detective Martin Borcharding, defense counsel Bruce Finlay and Gregory Gilbertson, a defense investigator. The defense also conducted an unscheduled interview of Detective Borcharding between the interviews of Carl Hills and Linda Herrera. At the next court appearance of July 5, 2007, the matter was called in for trial. (RP 25) However, defense counsel moved for and was granted a "Campbell" continuance after indicating to the court that he needed another thirty days in order to have enough time to prepare for trial and follow up on matters relating to the interviews conducted on July 3, 2007. (RP 30, 31)

The defense filed a motion to dismiss grounded in alleged governmental mismanagement on July 5, 2007. (CP 27) The motion was grounded solely on the assertions that the state had interfered with the Carl Hills interview and had not timely provided a disc of photos to the defense.

The defense was provided with an audio compact disc containing the Mason County Sheriff's Office's previously summarized interviews of Carl Hill and Linda Herrera on July 20, 2007. (CP 107).

The trial court heard the initial arguments on the motion on July 30, 2007. (RP 40 - 104) In the course of the argument, defense counsel

asserted, *inter alia*, “I asked twice for the prosecutor’s help in court on the 18th and the 22nd . . .”. (RP 49) The court indicated it would render a decision on July 31, 2007. (RP 103-104) The following day the state requested additional time to properly respond to assertions and disclosures made by the defense for the first time during the course of the previous day’s oral arguments.³ (RP 105 – 108) The court granted such additional time, noting that the defense had not timely filed the various attachments and declarations to its motion to dismiss and noting that the defense had made factual allegations in the course of the previous days oral argument that were not in the written pleadings. (RP 111) The court continued the matter to August 7, 2007. (RP 118, 118) On that same date the defense asked that the court reset the trial date to a date close to the end of the then-applicable time for trial period (RP 117), which the court did (RP 119) Among the responsive pleadings filed by the state was a declaration of Mason County Sheriff’s Detective Martin Borcharding indicating that the defense investigator, Gregory Gilbertson, had conceded in the course of a related matter that the defense had, on July 3, 2007, “gleaned”

³ Among such assertions were defense counsel’s repeated statements that the state had not timely provided a CD to the defense allegedly containing ten hours of recorded statements. (RP 62, 64, 99, 100) and the naming of a previously unnamed detective who had purportedly told defense counsel that the state’s trial counsel had previously given the detective the understanding that he should tell witnesses not to talk to the defense. (RP 56)

everything they needed from Carl Hills during their interview of him.⁴ (CP 52) The state also filed a responsive declaration by the Shelton Police Department Detective, Harry Heldreth, whom defense counsel had attributed a certain statement to, refuting such assertion. (CP 46)

In the ensuing week, however, the defense filed even more declarations (CP 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66.2) and then filed a Memorandum of Authorities on August 6, 2007 (CP 66.1), again putting the state in position of needing additional time to respond to late-filed declarations and pleadings. (RP 121, 122) and resulting in the court setting the matter over an additional week. (RP 127) One of the declarations filed by the defense, the Declaration of Dan Morse, confirmed the declaration of Detective Heldreth and refuted the assertions of defense counsel as to Detective Heldreth's alleged statements to defense counsel. (CP 57)

On August 14, 2007 the court, after briefly hearing additional argument, took a ten minute recess and then re-took the bench to deliver a prepared oral decision. (RP 157) After reciting into the record the timeline and pertinent dates of the case to date, the court turned to the issue of the alleged interference by the deputy prosecutor in the course of the Carl Hills interview of July 3, 2007 and stated:

⁴ Defense counsel later conceded on the record that this was true. (RP 148)

The Court, in assessing this particular issue, certainly has been uncomfortable because I have both of the attorneys practice before me on a daily - practically a daily basis. And to make a head-on determination of a factual question makes the Court uncomfortable, and I'll tell you what things I looked at to be able to make the determination of fact as I did.

First of all, comparing what the declarations - opposing declarations actually said and what was left out. Secondly, in reading the declarations filed on behalf of the State, they were essentially carbon copies of each other. The same language was used in the declarations, such as: at no time did - and then it would go on. And they were exact carbon copies of each other. People don't generally speak in that way when they're giving their own information. They don't exactly mimic what someone else said. And thirdly, and most importantly to my factual determination, were the notes taken by defense counsel contemporaneously with that interview. (RP 161)

The court then orally granted the defendant's motion to dismiss.

(RP 164)

The court then took scheduled annual leave for a matter of weeks. (RP 193) The matter was next before the court on September 5, 2007 for entry of written findings. (RP 165) In the interim, the state filed a Motion for Reconsideration (CP 107), together with various supporting declarations (CP 108, 109). The state also prepared and distributed a Motion to Recuse with a request that it be considered via a chambers conference as a courtesy to the court (RP 165). The court declined to consider the merits of the motion to recuse and proceeded to the

consideration of the proposed findings and conclusions (RP 169, 171), which were ultimately entered that day (CP 122). The state had also filed that date an Amended Motion for Reconsideration (CP 121) based on newly discovered evidence. The consideration of the state's Motion for Reconsideration, Amended Motion for Reconsideration and Motion to Recuse were set over. (RP 171)

The state's motions were heard by the court on September 18, 2007. (RP197, 209) Each motion was denied (RP 208, 265, CP 132, 140).

D. ARGUMENT

1. Does a trial court who is hearing a matter have a duty to recuse itself where the credibility of the two opposing counsel is central to the factual determination of the matter and one of the opposing counsel is the spouse of the trial court's appointed court commissioner? (Assignments of Error 1 and 8.)
2. Did the trial court's untimely disclosure that it was uncomfortable making the factual determination below deny the Appellant the opportunity to timely move the trial court that it recuse itself and thus deny the Appellant a fair hearing? (Assignment of Error 2.)

The Code of Judicial Conduct (CJC) governs the conduct of judges in the State of Washington. As noted in its Preamble, the CJC is intended to establish standards for ethical conduct of judges. Specifically:

It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Comments. The text of

the Canons and the Sections, including the Terminology and Application Sections, is authoritative.

Those Canons provide, in pertinent part, as follows:

CANON 1

Judges shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

Judges should avoid impropriety and the appearance of impropriety in all their activities.

(A) Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Judges should not allow family, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

CANON 3

Judges shall perform the duties of their office impartially and diligently.

The judicial duties of judges should take precedence over all other activities. Their judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

...

(D) Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter or such lawyer has been a material witness concerning it;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(d) the judge or the judge's spouse or member of the judge's family residing in the judge's household, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(Emphasis supplied)

Case law in this area has consistently held that this is an area where a court must err on the side of caution.

Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution. (Footnote omitted). Under Canon 3(D)(1), “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” In re Disciplinary Proceeding Against Sanders, 159 Wash.2d 517, 145 P.3d 1208 (2006), citing State v. Graham, 91 Wash.App. 663, 670, 960 P. 2d 457 (1998), quoting Sherman v. State, 128 Wash.2d 164, 205-06, 905 P.2d 355 (1995).

The Sanders court noted that the Sherman court had:

. . . set the test for determining impartiality: [I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating.... The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that “ a reasonable person knows and understands all the facts.” (Footnote omitted) Sanders, supra, at 524 – 525.

What is not relevant to the question at hand is whether the court itself feels it can be or is fair and impartial.

The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case.

...

Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the

judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.

...

“ The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all of the circumstances.”

Sanders, supra, at 526, citing and quoting with approval from Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir.1978).

In the matter below, the objective facts were that:

1. The court had appointed the spouse of counsel for the defendant as one of its appointed court commissioners.
2. The court had before it said commissioner's spouse as counsel for the defendant.
3. The credibility of counsel for the defendant was central to a decision as to the defendant's motion to dismiss.

It is respectfully submitted that a reasonable person faced with these facts might reasonably question the court's impartiality. Canon 3D sets forth a non-exclusive list (“including but not limited to”) of instances in which judges should disqualify themselves. Specifically included in that list are instances where a member of the judge's family living in the judge's household is acting as a lawyer in a proceeding or is, to the judge's knowledge, likely to be a material witness in a proceeding before

the judge. The case at hand is disturbingly analogous: a member of the judge's judicial family was in fact both acting as a lawyer before the judge and was in fact a material witness in the proceeding before the same judge. As such, the trial court had a duty to err on the side of caution and recuse itself.

Having failed to do so *sue sponte* when it first became apparent that the credibility of counsel for the defendant, the spouse of the court's court commissioner, was central to the decision on the defendant's motion to dismiss, the trial court further compounded the error , both when it failed to disclose that it was "uncomfortable" making a "head-on" factual decision relating to respective counsels' credibility and then by denying the state's motion to recuse and, in doing so, failing to recognize and acknowledge that it was the court's initial duty, rather than the parties', to recognize the very real issue before it and take the appropriate action. Especially disturbing is the court's failure to correctly analyze the issue presented to it. In denying the state's motion to recuse, the court stated that none of the mandatory situations in which a court is required to recuse itself was present in the particular case before it (RP 208) and that none of the opinions the court had reviewed dealt with the fact situation before the court. (RP 209) In doing so, the court incorrectly treated the list set forth in Canon 3D as exclusive rather than non-exclusive and ignored the

introductory language of Canon 3D: “**Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned** . . .”. (Emphasis supplied) Similarly, in noting that no reported opinions had dealt with this situation, the court inappropriately avoided any analysis of the actual factual relationship that was squarely being presented to it. Simply put, if the standard was merely one of whether a previous opinion had dealt with the situation, then the list of situations would automatically be made finite. That is not the intent of the specific “including but not limited to” language of Canon 3D. Nor is the prior existence of a similar factual situation the test. Judges are required to ask themselves whether “their impartiality might reasonably be questioned”, not whether a situation has previously been held to require recusal.

The court then went on to acknowledge its responsibility where a court, in choosing not to recuse itself, is required to advise the parties of some situation so that the parties might have the chance to take appropriate action. (RP 208) Yet the court failed to do this very thing when it failed to timely disclose to the parties that it was “uncomfortable” making a “head-on” factual determination relating to the credibility of counsel. Thus, the court both failed to take the initial appropriate recusal action and then failed to make the appropriate disclosure that would have

given the parties a fair opportunity to address the court's acknowledged but late-disclosed discomfort.

Rather than recuse itself and err on the side of caution, the court below instead engaged in actions that can fairly be described as eroding the public's confidence in the judicial system, especially when considered in the light of the relationship the court had with defense counsel through its court commissioner. The court below ignored the fact that Judge Sawyer had previously directed the defense to have its investigator contact the prosecutor's office and that the defense failed to do so. The court below ignored the fact that the defense made a repeated verbal show of wanting depositions but never properly filed and noted any such motion for timely consideration. The court below then granted defense counsel's motion for depositions even though it was not properly before the court and even though the state had affirmatively indicated that, given the witness' stated willingness to be interviewed, grounds for a deposition did not exist. The court below ignored the fact that defense counsel asserted that a witness was refusing to be interviewed when in reality the witness had merely invoked his right to have the state present for the interview. The court below ignored repeated misstatements and exaggerations by defense counsel, including a documented history of a false accusation previously made against the state's deputy prosecuting attorney. (CP 107)

The court below discounted the credibility of declarations made under penalty of perjury submitted by the state because the declarations used identical language in indicating that alleged incidents of interference had not occurred, even though such is not an uncommon pleading practice and the declarants had obviously endorsed the language they were affixing their signatures to as the truth. The court below ignored the admission of both the defense investigator and defense counsel that they had gotten everything they needed from the interview of Carl Hills and held that the defense was prejudiced by not having the witness state why he was supposedly hostile on the day of the interview. Under the totality of the circumstances, it can fairly be said that the court below, rather than err on the side of caution on the question of recusal, threw caution to the winds.

3. Did the trial court's granting of the Respondent's Motion to Dismiss violate the requirement of a showing of governmental misconduct where the court's finding of misconduct specifically references a portion of the record that fails to support such finding? (Assignments of Error 3, 4 and 5.)
4. Did the trial court's granting of the Respondent's Motion to Dismiss violate the requirement of a showing of governmental misconduct where it was the defense that failed to timely take steps to ensure interviews of the witnesses by neither following through on the court's initial directive nor filing and noting an actual written motion for deposition? (Assignment of Error 3.)

Generally, a trial court's decision is reviewed to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. Dorsey v. King County, 51 Wash.App. 664, 668-69, 754 P.2d 1255, *review denied*, 111 Wash.2d 1022 (1988). Unchallenged findings of fact are verities on appeal. State v. O'Neill, 148 Wash.2d 564, 571, 62 P.3d 489 (2003). Here, substantial evidence did not support a finding that the state's deputy prosecutor interfered with the interview of Carl Hills on July 3, 2007. The state's deputy prosecutor, together with the state's witness to the interview and the interviewee himself, each filed declarations indicating no interference had occurred. The court then discounted those declarations, feeling that their use of identical language somehow impacted on their credibility and noting that "People don't generally speak in that way when they're giving their own information". Apparently the fact that the declarations were given under penalty of perjury was of no importance to the court. After this elevating of form over substance, the court specifically indicated that it was defense counsel's notes of that interview which were the most important component of its factual determination of this issue and found that the state's deputy prosecutor had instructed witness Carl Hill not to answer a question as to why he was supposedly hostile at the time of the interview. However, a close reading of "the notes taken by defense

counsel contemporaneously with that interview” plainly reveals, however, only the following:

“Why are you so hostile hear (sic) today?”

“Not going to answer that”

The first of these two notes is presumably a question posed to the witness, although it is not noted whether it was asked by defense counsel or the defense investigator. The second of these two notes is plainly the witness’ purported answer as written by defense counsel. These two notes comprise the entirety of the exchange as noted contemporaneously by defense counsel. There is absolutely no note before, during or after these two notes indicating that the state’s deputy prosecutor had any involvement with either this exchange generally or the witness’ answer specifically. In other words, there are no “notes taken by defense counsel contemporaneously with that interview” that support the court’s finding that “when asked why he was hostile, the State advised the witness that he need not answer the question. . . .”. This is especially significant, as it is this particular exchange that the court cited as providing the prejudice required for the granting of the defendant’s motion.

There is no dispute that neither a prosecutor nor a defense counsel “shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel, or

showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.” CrR 4.7(h)(1), State v. Hofstetter, 75 Wash.App. 390, 878 P.2d 474 (2001). At the same time:

The equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts. No right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense. Hofstetter, supra, at 397, citing Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir.1981), cert. denied, 456 U.S. 980, 102 S.Ct. 2250, 72 L.Ed.2d 856 (1982)

. . . the Ninth Circuit noted that “both sides have the right to interview witnesses before trial.” 767 F.2d at 1337. However, a defendant's right of access to a witness “exists co-equally with the witnesses' right to refuse to say anything.” United States v. Rice, 550 F.2d 1364, 1374 (5th Cir.), cert. denied, 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977)... The defendant's right of access is not violated when a witness chooses voluntarily not to be interviewed. While the prosecution may not interfere with a witness's free choice to speak with the defense, we agree with courts in other circuits that merely informing the witness that he may decline the interview is not improper. Hofstetter, supra, at 397, citing United States v. Black, 767 F.2d 1334 (9th Cir.), cert. denied, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985),

A witness, however, is not the exclusive property of either the prosecution or the defendant. United States v. Matlock, 491 F.2d 504 [cert. denied, 419 U.S. 864, 95 S.Ct. 119, 42 L.Ed.2d 100] (6th Cir.1974); United States v. Scott, 518 F.2d 261 (6th Cir.1975). A prosecution witness need not grant an interview to defense counsel unless he chooses to do so . . . in short, “The decision as to whether the interview be private is neither for the prosecutor nor the defense counsel but rests with the witness. Hofstetter, supra, at 398 - 399, citing Mota v. Buchanan, 26 Ariz.App. 246, 249, 547 P.2d 517, 520 (1976)

The court in Hofstetter supplemented its decision by observing:

Nothing herein is intended to imply that a prosecutor may not inform a witness of his or her right to choose whether to give a pre-trial interview, or of his or her right to determine who shall be present at the interview; like several of the courts quoted above, we recognize that giving information about the existence of a right is different from instructing or advising on how it should be exercised. Nothing herein is intended to imply that a trial court may not reasonably control access to a witness under appropriate circumstances, assuming of course that each party has notice and an opportunity to be heard. Nothing herein is intended to imply that only the prosecutor is bound by the principles we have discussed; we assume, though we need not hold, that defense counsel is bound as well, except when the witness is his or her client. Hofstetter, supra, at 402.

In addition to the lack of any substantial evidence supporting a finding of interference with the Carl Hills interview, the record plainly shows that it was the defense's inaction, rather than the states' actions, that resulted in the defense counsel's need for a Campbell continuance. Defense counsel filed a Notice of Appearance on the 64th day of the defendant's applicable 90 day time-for-trial period. Defense counsel first indicated on the 70th day of the 90 day time-for-trial period that he would be asking the court to authorize a deposition in regard to a witness that was allegedly refusing to talk to the defense. The court directed defense counsel on that 70th day to have his investigator contact the prosecutor's office to see about arranging an interview. No such contact was made by the defense. Instead, defense counsel indicated to the court on the 74th day of the 90 day time-for-trial period that he would be asking the court to

authorize depositions in regard to two witness that were allegedly refusing to talk to the defense. When the state's trial deputy prosecutor on the case learned of the situation on the 78th day of the 90 day time-for-trial period, he promptly contacted the two witnesses and arranged for interviews to be conducted on the necessary parties' next open and available day.⁵ The interviews were conducted on July 3, 2007. Subsequent to those interviews, defense counsel moved for and was granted a thirty day "Campbell" continuance in order to have enough time to follow up on matters discussed in the interviews. (RP 30)

The time line and record of proceedings of the matter below plainly show that it was the defense, rather than the state, that failed to timely take steps to ensure interviews of the witnesses. It cannot be said that it was the state's conduct which required the defense to request a Campbell continuance.

5. Did the trial court's granting of the Respondent's Motion to Dismiss below violate the requirement that a defendant must show actual prejudice for a motion to dismiss to be granted, where there would not have been sufficient time for the defense to follow up on the interviews within the applicable time-for-trial period even if such interviews had been conducted on the day defense counsel filed his notice of appearance in the matter? (Assignment of Error 6, 7 and 9.)

⁵ He also learned that the witnesses had not refused to be interviewed but had asked for the state to be involved in any interviews.

6. Did the trial court's granting of the Respondent's Motion to Dismiss below violate the requirement that a defendant must show actual prejudice for a motion to dismiss grounded in governmental misconduct to be granted, where defense counsel's investigator and defense counsel subsequently conceded that the defense had "gleaned" everything they needed from Carl Hills during their interview of him on July 3, 2007. ? (Assignment of Error 6, 7 and 9.)

7. Did the trial court's granting of the Respondent's Motion to Dismiss below violate the requirement that a defendant must show actual prejudice for a motion to dismiss grounded in governmental misconduct to be granted, where the defense was provided with an audio compact disc containing the Mason County Sheriff's Office's interviews of Carl Hill and Linda Herrera on July 20, 2007. And the defense had been provided Detective Luther Pittman's report summarizing those two statements in detail on June 28, 2007 (CP 47), prior to the interviews of those two witnesses that were conducted on July 3, 2007.? (Assignments of Error 6, 7 and 9.)

It is beyond dispute that prosecutorial misconduct alone is insufficient to warrant a dismissal. The court in Hofstetter noted:

We turn now to the question of remedy. Generally, the cases hold that prosecutorial misconduct of the type present here will warrant reversal only if the defendant was prejudiced. Mussehl, 408 N.W.2d at 847; Kines, 669 F.2d at 9; York, 632 P.2d at 1265; Story, 721 P.2d at 1043; Arboleda, *supra*; Nichols v. State, 624 So.2d 1325, 1327 (Ala.1992); United States v. Pepe, 747 F.2d 632, 655 (11th Cir.1984); *see also*, Ben, 798 P.2d at 654 (absent prejudice, State not entitled to exclude witness's testimony due to misconduct of defense counsel). We agree and so hold.

Prejudice has not been shown in these cases. Satterfield's counsel ultimately interviewed Leonard, and Hofstetter's counsel ultimately interviewed both Leonard and Chambliss. Although a prosecutor was

present, there is no evidence that the prosecutor's presence precluded the defendant from pursuing a specific avenue of inquiry; caused the defendant to reveal to the State information that was otherwise non-discoverable; or precluded the defendant from adequately preparing to cross-examine the witness at trial. In short, nothing shows the prosecutor's presence caused anyone in the interview to behave differently than would otherwise have been the case, and thus reversal is not warranted.

The Washington Supreme Court agrees, holding:

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. State v. Blackwell, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993) (citing State v. Lewis, 115 Wash.2d 294, 298, 797 P.2d 1141 (1990)). Governmental misconduct, however, “need not be of an evil or dishonest nature; *simple mismanagement is sufficient.*” Blackwell, 120 Wash.2d at 831, 845 P.2d 1017 (emphasis added). Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b):

We repeat and emphasize that CrR 8.3(b) “is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to **593 substitute their judgment for that of the prosecutor.” State v. Cantrell, 111 Wash.2d 385, 390, 758 P.2d 1 (1988) (quoting State v. Starrish, 86 Wash.2d 200, 205, 544 P.2d 1 (1975)).

The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. See State v. Cannon, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996). Such prejudice includes the right to a speedy

trial and the “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense....” State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994 (1980).

State v. Michielli, 132 Wash.2d 229, 937 P.2d 587 (1997).

Moreover, the Supreme Court has made clear that it is actual, rather than speculative prejudice that must be shown. In State v. Rohrich, 149 Wash.2d 647, 71 P.3d 638 (2003), the Supreme Court reversed a Court of Appeals decision upholding a trial court’s dismissal of a case under CrR 8.3 (b):

A second problem in the court's conclusion is its assumption that Rohrich was not obliged to show actual prejudice to meet the CrR 8.3(b) requirement, but could satisfy the requirement by showing speculative prejudice to his right to a fair trial. The Court of Appeals stated that Rohrich had established prejudicial delay because the memories of witnesses “*could have faded*” or because Rohrich's power of recollection “*could have been compromised.*” *Id.* (emphasis added). Prior cases considering whether preaccusatorial delay violated a defendant's due process rights provide cogent support for requiring a showing of actual prejudice for purposes of a CrR 8.3(b) dismissal. In State v. Norby, 122 Wash.2d 258, 858 P.2d 210 (1993), we held that “ [t]he mere *possibility* of prejudice is not sufficient to meet the burden of showing actual prejudice.” *Id.* at 264, 858 P.2d 210 (citing State v. Ansell, 36 Wash.App. 492, 498-99, 675 P.2d 614) (holding that “ [t]he possibility that memories will dim is not in itself enough to demonstrate [the defendant] could not receive a fair trial”), (*review denied*, 101 Wash.2d 1006 (1984)). We explicitly stated in Norby that “ [a] mere allegation that witnesses are unavailable or that memories have dimmed is insufficient.” 122 Wash.2d at 264, 858 P.2d 210; State v. Bernson, 40 Wash.App. 729, 735, 700 P.2d 758 (asserting that “ [t]he possibility that memories will fade is not in itself sufficient to

demonstrate prejudice”) (citing Ansell, 36 Wash.App. at 499, 675 P.2d 614), (review denied, 101 Wash.2d 1006, 1984 WL 287351 (1985)). Indeed, it would seem incongruous, on the one hand, to permit a trial court to find “simple governmental mismanagement,” Michielli, 132 Wash.2d at 243, 937 P.2d 587, and dismiss the State's charges with prejudice on speculative prejudice alone when, on the other hand, a defendant seeking reversal and a new trial for prosecutorial misconduct must establish not only the misconduct but also the “substantial likelihood” that the misconduct had a prejudicial effect on the jury. State v. Pirtle, 127 Wash.2d 628, 672, 904 P.2d 245 (1995). That dismissal under CrR 8.3(b) is an “extraordinary remedy” likewise argues against allowing dismissal based on speculative prejudice to the accused's right to a fair trial. Baker, 78 Wash.2d at 332, 474 P.2d 254; Orwick, 113 Wash.2d at 830, 784 P.2d 161. We thus conclude that dismissal under CrR 8.3(b) for government misconduct or arbitrary action resulting in a delay in charging requires a showing of actual prejudice.

No actual prejudice has been shown by the defense in this cause.

On the day defense counsel Bruce Finlay filed his Notice of Appearance below, only 26 days remained in the defendant's time-for-trial period. Thus, even if the interviews at issue had been conducted on the very day counsel entered his notice appearance, defense counsel would not have had the necessary thirty days remaining in the defendant's time-for-trial period for the thirty day post-interview follow-up period he ultimately indicated he needed.

Just as significantly, that Carl Hills interview concluded to the defense's satisfaction, by the defense investigator's and defense counsel's

own admission, after all information sought had been “gleaned” from the witness.

Lastly, while the audio versions of the two witnesses’ statements were provided to the defense on July 20, 2007, the defense had been provided detailed written summaries of those statements on June 28, 2007, prior to the interviews of those witnesses on July 3, 2007.

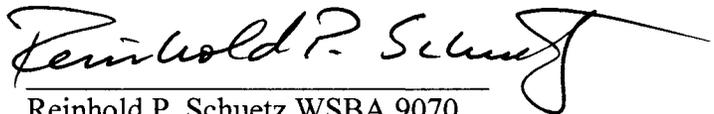
The necessary actual prejudice has not been shown here.

E. CONCLUSION

For the reasons set forth above, it is respectfully requested that the lower court’s granting of the defendant’s motion to dismiss be reversed.

DATED this 21st day of March, 2008.

Respectfully submitted,



Reinhold P. Schuetz WSBA 9070
Deputy Prosecuting Attorney
Attorney for Appellant

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

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 BOBBY D. BEASLEY, JR.,)
)
 Respondent.)
 _____)

No. 36880-3-II
DECLARATION OF
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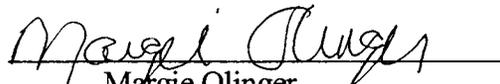
I, MARGIE OLINGER, declare and state as follows:

On March 21, 2008, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF APPELLANT), to:

Bruce J. Finlay
Attorney At Law
PO Box 3
Shelton, WA 98584

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 21st day of March, 2008, at Shelton, Washington.


Margie Olinger

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