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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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DEPUTY

STATE OF WASHINGTON, APPELLANT

v.

CLARK MANKIN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 08-1-02352-6

Corrected Brief of Appellant

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Table of Contents

A.	<u>ASSIGNMENTS OF ERROR</u>	1
1.	The trial court erred when it entered the order of April 9, 2009, permitting counsel for the defendant to depose witnesses.....	1
2.	The trial court erred when it concluded that a defense attorney has the right to question witnesses prior to trial. CP 62 (Conclusion of Law 2).....	1
3.	The trial court erred when it held that a defense pre-trial interview of a law enforcement officer who is a witness to the case is not a private conversation governed by the Washington State Privacy Act. CP 62 (Conclusion of Law 4); RP 02-10-09, p. 17, ln. 18 to p. 19, ln. 3.....	1
4.	The trial court erred when it determined that the witnesses were the State’s witnesses. RP 02-10-09, p. 17, ln. 3-10.	1
5.	The trial court erred when it concluded that the witnesses were refusing to speak to defense counsel when they refused to have their interviews recorded. RP 02-10-09, p. 18, ln. 21-25	1
6.	The trial court erred when it held that if the witnesses were unwilling to be tape recorded they should be subject to a deposition. RP 02-10-09, p. 19, ln. 1-3.	1
B	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
1.	Whether the trial court exceeded its authority when it ordered a deposition where the witnesses were willing to “discuss the case” with defense counsel about the case and be interviewed, but were unwilling to have the interview be tape recorded? Assignments of Error 1, 4, 5, 6	2

2.	Whether the witnesses' right to refuse to be interviewed also establishes by logical necessity that the witness has the right to control the interview? Assignments of Error 1, 2, 4, 5, 6.....	2
3.	Whether the court's order that the interview be recorded violated the private conversation statute? Assignments of Error 1, 3, 4, 5, 6.	2
4.	Whether the State may advise the witness of the witness' rights at the interview, so long as the State does not advise the witness as to how to exercise those rights? Assignment of Error 1, 4.	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure.....	2
2.	Facts	4
C.	<u>ARGUMENT</u>	5
1.	THE TRIAL COURT'S ORDER VIOLATES CrR 4.6(a) WHERE THE WITNESSES WERE WILLING TO DISCUSS THE CASE WITH EITHER COUNSEL.	5
2.	A WITNESSES' ESTABLISHED RIGHT TO REFUSE THE INTERVIEW BY LOGICAL NECESSITY ALSO ESTABLISHES THE WITNESSES' RIGHT TO CONTROL THE INTERVIEW	9
3.	THE COURT CANNOT ORDER THAT THE INTERVIEW BE RECORDED AS SUCH AN ORDER WOULD VIOLATE THE STATUTE THAT PROHIBITS RECORDING PRIVATE CONVERSATIONS	13
4.	THE STATE MAY ADVISE THE WITNESS OF THE WITNESS'S RIGHT'S AT THE INTERVIEW, SO LONG AS THE STATE DOES NOT ADVISE THE WITNESS AS TO HOW TO EXERCISE THOSE RIGHTS.	14
D.	<u>CONCLUSION</u>	15

Table of Authorities

State Cases

<i>Enterprise Leasing, Inc v. City of Tacoma</i> , 139 Wn.2d 546, 552, 988 P.2d 961 (1999)	8
<i>Millay v. Cam</i> , 135 Wn.2d 193, 198, 955 P.2d 791 (1998)	7
<i>Rettkowski v. Department of Ecology</i> , 128 Wn.2d 508, 515, 910 P.2d 462 (1996)	8
<i>State v. Chhom</i> , 162 Wn.2d 451, 458-59, 173 P.3d 234 (2007)	7
<i>State v. Gonzalez</i> , 110 Wn.2d 738, 744, 757 P.2d 925 (1988)	5, 6, 7
<i>State v. Grant</i> , 9 Wn. App. 260, 511 P.2d 1013, <i>review denied</i> , 83 Wn.2d 1003 (1973), <i>cert. denied</i> , 419 U.S. 849, 95 S. Ct. 87, 42 L. Ed. 2d 78 (1974).....	14
<i>State v. Greenwood</i> , 120 Wn.2d 585, 592, 845 P.2d 971 (1993).....	7
<i>State v. Hofstetter</i> , 75 Wn. App. 390, 397, 878 P.2d 474, <i>review denied</i> , 125 Wn.2d 1012, 889 P.2d 499 (1994).....	10, 11, 12, 14, 15
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 893, n. 5, 959 P.2d 1061 (1998).....	7
<i>State v. Mullins</i> , 128 Wn. App. 633, 642, 116 P.3d 441 (2005).....	8, 13
<i>State v. Sweet</i> , 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999).....	7, 8
<i>State v. Wilson</i> , 108 Wn. App. 774, 779, 31 P.3d 43 (2001), <i>aff'd State v. Wilson</i> , 149 Wn.2d 1, 65 P.3d 657 (2003).....	10, 11, 12
<i>Vashon Island Comm. For Self-Gov't v. State Boundary Review Bd.</i> , 127 Wn.2d 759, 771, 903 P.2d 953 (1995).....	8

Federal and Other Jurisdictions

Byrnes v. United States, 327 F.2d 825, 833 (9th Cir. 1964)..... 10, 12

Gregory v. United States, 125 U. S. App. D.C. 140,
369 F.2d 185 (1966) 10

Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir. 1981), *cert. denied*
456 U.S. 980 (1982) 10, 11

Mota v. Buchanan, 26 Ariz. App. 246, 249,
547 P.2d 517, 520 (1976) 11, 12

United States v. Benson, 495 F.2d 475, 479 (5th Cir 1972)..... 10

United States v. Bittner, 728 F.2d 1038, 1041 (8th Cir. 1984)..... 10

United States v. Black, 767 F.2d 1334 (9th Cir. 1985)..... 10, 11, 14, 15

United States v. Carrigan, 804 F.2d 559, 603 (10th Cir. 1986) 11

United States v. Pinto, 775 F.2d 150, 152 (10th Cir. 1985)..... 10

United States v. Rice, 550 F.2d 1634, 1374 (5th Cir. 1977) 10

United States v. Scott, 518 F.2d, 261, 268 (6th Cir. 1974) 10

Statutes

RCW 9.73.030 13, 14

RCW 9.73.030(1)(b)..... 13

RCW 9.73.040 14

Rules and Regulations

CR 26(b)5, 6
CrR 4.6.....6, 8
CrR 4.6(a)5, 6, 9
CrR 4.7(h) 11
Fed. R. Crim. P. 15(a); 2 C Wright, Federal Practice § 2416

Other Authorities

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1804-05 (2002) ...13
WEBSTER’S THIRD NEW WORLD DICTIONARY 648 (2002)8

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered the order of April 9, 2009, permitting counsel for the defendant to depose witnesses.
2. The trial court erred when it concluded that a defense attorney has the right to question witnesses prior to trial. CP 62 (Conclusion of Law 2).
3. The trial court erred when it held that a defense pre-trial interview of a law enforcement officer who is a witness to the case is not a private conversation governed by the Washington State Privacy Act. CP 62 (Conclusion of Law 4); RP 02-10-09, p. 17, ln. 18 to p. 19, ln. 3.
4. The trial court erred when it determined that the witnesses were the State's witnesses. RP 02-10-09, p. 17, ln. 3-10.
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6. The trial court erred when it held that if the witnesses were unwilling to be tape recorded they should be subject to a deposition. RP 02-10-09, p. 19, ln. 1-3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court exceeded its authority when it ordered a deposition where the witnesses were willing to “discuss the case” with defense counsel about the case and be interviewed, but were unwilling to have the interview be tape recorded? Assignments of Error 1, 4, 5, 6.

2. Whether the witnesses’ right to refuse to be interviewed also establishes by logical necessity that the witness has the right to control the interview? Assignments of Error 1, 2, 4, 5, 6.

3. Whether the court’s order that the interview be recorded violated the private conversation statute? Assignments of Error 1, 3, 4, 5, 6.

4. Whether the State may inform the witness of the witness’ rights at the interview, so long as the State does not advise the witness at to how to exercise those rights? Assignment of Error 1, 4.

C. STATEMENT OF THE CASE.

1. Procedure

On May 15, 2008, Clark Mankin was charged and arraigned with one count of unlawful manufacturing of a controlled substance, methamphetamine. CP 1. This was based on an incident that occurred on May 14, 2008. CP 1, 2-3.

Defense counsel Underwood arranged to interview three Tacoma Police Officers involved with the case on January 16, 2009. CP 9; 30. Defense counsel Underwood sought to make a tape recording of each interview. CP 9; 30; RP 02-10-09, p. The officers refused to have the interview tape recorded. CP 9; 30; RP 02-10-09, p. 9, ln. 23-25. However, the officers were otherwise agreeable to participating in the interview and answering questions from defense counsel. CP 30; RP 02-10-09, p. 9, ln. 23-25; p. 11, ln. 6-7. Defense counsel Underwood terminated each interview because the officers would not agree to be tape recorded. CP 9; 30; RP 03-11-09, p. 4, ln. 3 to p. 5, ln. 22.

The defense subsequently filed a motion to depose the witnesses, which motion was supported by a memorandum. CP 7; 8-27. The State filed a response opposing the defense motion. CP 29-33. The court issued an oral ruling in which it ordered depositions on February 10, 2009. RP 2-10-09, p. 16, ln. 7 to p. 19, ln. 3.

The State filed its Notice for Discretionary Review on March 10, 2009, and within 30 days of the court's oral ruling. CP 36-58. On March 11, 2009, the court held a hearing regarding the defendant's proposed findings of fact and conclusions of law. RP 03-11-09, p. 3. The State objected to a number of the proposed findings and conclusions. RP 03-11-09, p. 3. The court struck all the material the State objected to and limited

its ruling to a determination that the witness interviews were not a private conversation. RP 03-11-09, p 8, ln. 25 to p. 9, ln. 6; *See generally*, p. 4 to 12.

A written order was not filed until April 9, 2009. CP 64-65. At that time, findings and conclusions that comported with the court's ruling were also entered. CP 61-63.

2. Facts

Clark Mankin was charged on January 29, 2008, in Count I with unlawful manufacturing of a controlled substance, methamphetamine. CP 1. According to the probable cause declaration filed in the case, the City of Tacoma Waste Management staff conducted a site survey at 1849 E. 34th Street in Tacoma where the officer observed tubing connected to a propane tank that led to a cooler outside of a trailer parked on City of Tacoma property. CP 2. Officers arrived and observed a pile of waste that appeared to include rock salt dumped at the steps of the trailer. CP 2. Mankin was observed leaving the trailer. CP 2. Officers obtained a warrant to search the trailer and found a number of items related to the manufacture of methamphetamine, including items that tested positive for ephedrine and methamphetamine. CP 2. At the time, Mankin was on supervision with the Department of Corrections. CP 2.

C. ARGUMENT.

1. THE TRIAL COURT'S ORDER VIOLATES CrR 4.6(a) WHERE THE WITNESSES WERE WILLING TO DISCUSS THE CASE WITH EITHER COUNSEL.

Rule 4.6 DEPOSITIONS

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition order to prevent a failure of justice, the court any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

“[T]he scope of discovery allowable through depositions in criminal cases historically has been more limited than in civil cases.”

State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925 (1988). The court in *Gonzales* went on to note as an example that in a criminal case a court order is necessary before a deposition can be held, while in a civil case it is not. *Gonzalez*, 110 Wn.2d at 744 (comparing CrR 4.6(a) with CR 26(b)). The court in *Gonzalez* did note that the Washington rule on criminal depositions was a little broader than the federal rule inasmuch as the Washington rule has an additional provision that allows for depositions

where a witness is unwilling to “discuss the case” with either attorney, so that under the federal rule criminal depositions are used primarily for preservation of testimony, not discovery. *Gonzalez*, 110 Wn.2d at 744-45 (citing Fed. R. Crim. P. 15(a); 2 C Wright, Federal Practice § 241, at 4 (2d ed. 1982)). When the Washington rule was originally adopted it was the same as the federal standard. *Gonzalez*, 110 Wn.2d at 745 (citing Proposed Rules, Comments to rule 4.6(a), at 68)). While the rule was subsequently amended so that depositions can be ordered in cases where witnesses refuse to talk with an attorney, the court in *Gonzalez* noted that the rule has not been amended to loosen materiality requirements in the same manner as CR 26(b). *Gonzalez*, 110 Wn.2d at 745. Because of these significant differences in the civil and criminal rules, the court in *Gonzalez* went on to decline to read the “reasonably calculated to lead to the discovery of admissible evidence” language of CR 26(b) into CrR 4.6(a). *Gonzalez*, 110 Wn.2d at 745.

At issue here is the language of CrR 4.6(a) that depositions may be taken where witnesses refuse to talk with either attorney. Nearly all the cases that consider CrR 4.6 address the issue of witness unavailability. The few that discuss witnesses’ refusal to discuss the case with counsel merely note that the rule contains that provision, but do not further elaborate upon or interpret it. *See, State v. Hutchinson*, 135 Wn.2d 863,

893, n. 5, 959 P.2d 1061 (1998). *Gonzalez* is the case that gives the issue anything more than passing reference, but even the discussion in *Gonzalez* is only slightly more than passing mention. See, *Gonzalez*, 110 Wn.2d at 744-45.

Where the Washington rule was originally modeled upon the Federal, it too does not generally serve discovery purposes, but rather preservation purposes like the federal rule. See, *Gonzalez*, 110 Wn.2d at 744-45. The one narrow exception to this is where a witness refuses to “discuss the case” with either counsel. In that limited circumstance only, the Washington rule also serves the purpose of discovery.

When interpreting court rules, the court approaches the rules as if they were drafted by the legislature and applies principles of statutory construction in interpreting the rule(s). See, *State v. Chhom*, 162 Wn.2d 451, 458-59, 173 P.3d 234 (2007); *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Interpretation of a statute is a question of law reviewed de novo. *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P.2d 791 (1998). “[T]he fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature “which is done by ‘first look[ing] to the plain meaning of words used in a statute.’” *State v. Sweet*, 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999). When words in a statute are plain and unambiguous, further statutory construction is not

necessary and the statute is applied as written. *Sweet*, 138 Wn.2d at 478; *Enterprise Leasing, Inc v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). If the statute does not define a term, the plain and ordinary meaning should be determined from a standard dictionary. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). However, if a statute is ambiguous, the court refers to methods of statutory construction. *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Vashon Island Comm. For Self-Gov't v. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). But it is not ambiguous simply because different interpretations are conceivable and the court does not search for ambiguity by imagining a variety of alternative interpretations. *Mullins*, 128 Wn. App. at 642.

Where a court rule does not define a term, the plain and ordinary meaning should be determined from a standard dictionary. The dictionary defines “discuss” as “...to discourse about: present in detail...to converse or talk about: exchange views or information about...to make clear or open : EXPLAIN : disclose in speech.” WEBSTER’S THIRD NEW WORLD DICTIONARY 648 (2002).

CrR 4.6 specifies that depositions are permitted when witnesses refuse to “discuss the case” with counsel. It does not say when they refuse

to be “recorded” or “transcribed” by counsel. The trial court’s ruling does not fall within the plain language of the rule, and is therefore an abuse of discretion.

Here, the witnesses are willing to “discuss the case” with defense counsel. The witnesses’ only unwillingness is for defense counsel to tape record the interview. Because the primary purpose of criminal depositions is not discovery, and because both the witnesses are willing to talk with defense counsel, the conditions precedent of the rule are not met, and defense counsel is not entitled to a deposition. The rule does not permit either defense counsel or the trial court to impose a tape recording upon the witnesses.

For this reason, the State requests the Court to hold that the trial court’s ruling does not comply with the requirements of CrR 4.6(a), and to reverse the trial court’s order that defense counsel can depose the witnesses.

2. A WITNESSES’ ESTABLISHED RIGHT TO REFUSE THE INTERVIEW BY LOGICAL NECESSITY ALSO ESTABLISHES THE WITNESSES’ RIGHT TO CONTROL THE INTERVIEW.

It is well established under both Washington and Federal law that while a defendant has the right to attempt to interview any witness, the witness has an equal right to refuse to be interviewed. *State v. Wilson*,

108 Wn. App. 774, 779, 31 P.3d 43 (2001), *aff'd State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003); *State v. Hofstetter*, 75 Wn. App. 390, 397, 878 P.2d 474, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994); *United States v. Black*, 767 F.2d 1334 (9th Cir. 1985); *United States v. Pinto*, 775 F.2d 150, 152 (10th Cir. 1985); *United States v. Bittner*, 728 F.2d 1038, 1041 (8th Cir. 1984); *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), *cert denied*, 456 U.S. 980 (1982); *United States v. Rice*, 550 F.2d 1634, 1374 (5th Cir. 1977); *United States v. Scott*, 518 F.2d, 261, 268 (6th Cir. 1974); *Gregory v. United States*, 125 U. S. App. D.C. 140, 369 F.2d 185 (1966); *Byrnes v. United States*, 327 F.2d 825, 833 (9th Cir. 1964). A government witness who does not wish to speak or be interviewed by the defense prior to trial may not be required to do so. *United States v. Benson*, 495 F.2d 475, 479 (5th Cir 1972). All that the defendant is entitled to is access to the witness, but such access may not lead to an actual interview. *Rice*, 550 F.2d at 1374; *Scott*, 518 F.2d at 268.

In *State v. Hofstetter* the Court held that prosecutorial misconduct existed where the prosecutor directed a witness not to discuss the case with the defense. *Hofstetter*, 75 Wn. App. 390. In undertaking that analysis, the court noted that:

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 pretrial interview, or of his or her right to determine who shall be present at the interview...

The court in *Hofstetter* reached its conclusion after first noting that, “CrR 4.7(h) tends to indicate that Washington is in accord with the foregoing authorities.” *Hofstetter*, 75 Wn. App. at 401. Several of those authorities indicated that the defendant’s right to interview the witness is limited by the witnesses’s right to refuse to be interviewed. *Hofstetter*, 75 Wn. App. at 397-98 (citing *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), *cert. denied* 456 U.S. 980 (1982); *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985); *United States v. Carrigan*, 804 F.2d 559, 603 (10th Cir. 1986); *Mota v. Buchanan*, 26 Ariz. App. 246, 249, 547 P.2d 517, 520 (1976).

In *State v. Wilson* the Court considered the State’s challenge to the trial court’s dismissal of the case for prosecutorial misconduct. *Wilson*, 108 Wn. App. at 777-78. In *Wilson*, the claimed misconduct was the prosecutor’s failure to arrange a defense interview of a witness as ordered by the court. *Wilson*, 108 Wn. App. at 780. In analyzing whether the prosecutor’s action constituted misconduct, the court noted that the

prosecutor could not have legally compelled the witness to be interviewed by the defense, and was therefore incapable of accomplishing the act ordered by the court:

In this case the prosecutor could not have compelled the witness to speak to defense counsel because the witness was under no obligation to speak to anyone outside of court.

Wilson, 108 Wn. App. at 779.

Because the witness has a right to refuse to be interviewed and the court cannot compel the witness to speak, the necessary logical corollary is that the witness also has the right to set any conditions on the interview. Indeed, the courts have upheld the refusal of witnesses to speak to defense except upon the conditions set by the witness. *See, Byrnes*, 327 F.2d at 833 (holding that the refusal to testify unless government or private attorneys were present by government employees who were witnesses was within the rights of the witnesses). Washington law has also recognized the right of witnesses to set conditions on the interview: “The decision as to whether the interview be private is neither for the prosecutor nor the defense counsel but rests with the witness.” *Hofstetter*, 75 Wn. App. at 399 (quoting *Mota v. Buchanan*, 26 Az. App. 246, 249, 547 P.2c 517, 520 (1976)).

Because the witness has a right to refuse to be interviewed, the witness also has the right to refuse to be interviewed except on those conditions set forth by the witness.

3. THE COURT CANNOT ORDER THAT THE INTERVIEW BE RECORDED AS SUCH AN ORDER WOULD VIOLATE THE STATUTE THAT PROHIBITS RECORDING PRIVATE CONVERSATIONS.

The court's order that the interview be recorded expressly violates RCW 9.73.030(1)(b) which prohibits the electronic recording of any private conversation without the consent of all the parties.

"Private conversation" is not defined within the Chapter, so as a matter of statutory interpretation the court should look to the ordinary dictionary meaning of the word. *Mullins*, 128 Wn. App. at 642. "Private" means "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804-05 (2002). "Conversation" means "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 498 (2002).

In interpreting RCW 9.73.030, at least one court has held that "private conversation" is an all-embracing term, broad enough to include a conversation between a defendant and his attorney or a police officer.

State v. Grant, 9 Wn. App. 260, 511 P.2d 1013, *review denied*, 83 Wn.2d 1003 (1973), *cert. denied*, 419 U.S. 849, 95 S. Ct. 87, 42 L. Ed. 2d 78 (1974).

Moreover, the decision of whether an interview is private rests neither with defense counsel nor the prosecutor, but with the witness. *See, Hofstetter*, 75 Wn. App. at 399.

Nor does the Court here have authority to issue an order contrary to RCW 9.73.030. Per RCW 9.73.040, the superior court may issue orders permitting private conversations to be recorded only when those orders are applied for by an attorney general or prosecuting attorney, and must be based upon specified reasons. None of those conditions are satisfied in this case, so that the court lacks authority under the statute to order a tape recording of the interview.

4. THE STATE MAY INFORM THE WITNESS OF THE WITNESS'S RIGHTS AT THE INTERVIEW, SO LONG AS THE STATE DOES NOT ADVISE THE WITNESS AS TO HOW TO EXERCISE THOSE RIGHTS.

The witness in a criminal prosecution is not a partisan and belongs to neither party. *See, Hofstetter*, 75 Wn. App. at 395-97. Therefore, it is improper for the State to advise the witness not to speak to defense counsel, or to advise the witness not to consent to an interview unless a prosecutor is present. *Hofstetter*, 75 Wn. App. at 402; *Black*, 767 F.2d at

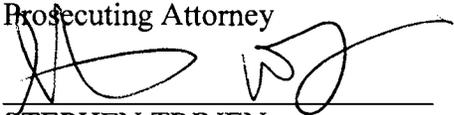
1337-1338. However, it is not improper for a prosecutor to correctly inform the witness of their rights. *Hofstetter*, 75 Wn. App. 402-03. Nor is it improper for the prosecutor to request to be present at the interview. *Hofstetter*, 75 Wn. App. at 402; *Black*, 767 F.2d at 1338.

D. CONCLUSION.

The trial court's order exceeded its authority. Unlike civil cases, depositions in criminal cases generally serve no discovery function and depositions may only be ordered where witnesses refuse to discuss the case with attorneys for either side. Here, the witnesses were willing to talk to defense counsel. Their only refusal was to have the interviews tape recorded. The court had no authority to order the witness interviews to be tape recorded because the witness, not the attorneys, controls the interview. Accordingly, the court's order should be reversed.

DATED: September 18, 2009.

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