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DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY  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

Reply Brief of Appellant

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A. FACTS

The State relies on the recitation of facts contained in the Brief of Appellant.¹

B. ARGUMENT.

The Brief of the Respondent conflates a number of separate and unrelated issues, most of which are red herrings, in an apparent attempt to obscure the fact that the defendant's position is unsupported by authority and without merit. Compounding this hodgepodge of arguments together does nothing to increase their merit, but does render consideration of the issue more confusing. Accordingly, the sword to cut through this Gordian knot of confusion is to consider each issue separately.

1. THE DEFENDANT IS NOT ENTITLED TO ASK THIS COURT TO PERMIT HIM TO RECORD THE WITNESS INTERVIEWS WHERE HE DID NOT CROSS APPEAL THE TRIAL COURT'S DENIAL OF HIS REQUEST TO DO SO.

The trial court entered an order authorizing defense counsel to depose three witnesses in this case. CP 64-65. The order does nothing else, and does not authorize audio recording of the interviews of the

¹ Herein, "Brief of Appellant" or "Br. App." refers to the Corrected Brief of Appellant, while "Brief of Respondent" or "Br. Resp." refers to the Corrected Brief of Respondent.

officers. CP 64-65. And the oral record makes clear that the court expressly rejected giving an order that the defense could record the interviews. RP 03-11-09, p. 11, ln. 13-23. That ruling was made notwithstanding the fact that the defense moved the court for an order to conduct audio interviews of the witnesses. CP 8-27. The defendant has neither assigned error nor cross-appealed the court's order with regard to the fact that it did not grant authority to tape record the witness interviews. As a consequence, the defense may not now on appeal claim a right to record interviews of the witnesses. *See, State v. McNally*, 125 Wn. App. 854, 863, 106 P.3d 794 (2005).

The defense nonetheless seeks to circumvent that bar via two arguments. First, the defense argues that the witnesses were refusing to discuss the case when they refused to have their interviews be tape recorded, and for that reason this Court should order that the defense can record the interviews. Second, the defense argues that recording the interviews would be more convenient for the defense than a deposition and should be allowed for that reason. Aside from the fact that the defendant is barred from relief on this issue where he failed to appeal it, the substantive arguments are also without merit, as will be explained in the relevant sections below.

2. DUE PROCESS DOES NOT REQUIRE THAT A DEFENDANT BE GIVEN THE RIGHT TO TAKE A DEPOSITION FOR DISCOVERY PURPOSES.

“There is no general constitutional right to discovery in criminal cases...” *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). *See also, State v. Gonzalez*, 110 Wn.2d 738, 750, 757 P.2d 925 (1988). In *Gonzalez*, the court rejected the defendant’s claim that he was entitled to take the deposition of a complaining witness. *Gonzalez*, 110 Wn.2d at 750-51.

The court in *Gonzalez*, also rejected the defendant’s claim that he had a right under the state Constitution to question the complaining witness about her sexual history. *Gonzalez*, 110 Wn.2d at 751. In so holding, the court noted that because of the identity in language between the state and federal due process clauses, while federal law does not control the interpretation of the state clause, federal cases are given great weight in construing the state clause. *Gonzalez*, 110 Wn.2d at 751. The court concluded there was no reason to construe the state due process clause differently than the federal clause. *Gonzalez*, 110 Wn.2d at 751.

The defense also argues that he possesses a due process right to compel witnesses. Br. Resp. 10. However, that right is not at issue here. There is no dispute that the defendant is entitled to compel the witnesses to testify *at trial*. *See, State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d

808 (1996). Moreover, that right is not absolute. *Maupin*, 128 Wn.2d at 924-25.

There is no authority for defendant's position that the due process right to compel witnesses to testify includes the right to compel witnesses to be audio or video recorded at an interview prior to trial – because the due process does not extend that far. In *State v. Burri*, which the defense primarily relies upon, the issue was that the State interfered with the defendant's preparation of his case by preventing him from conferring with his witnesses at all by obtaining an order that prohibited the witnesses from discussing the case with defense counsel, and particularly from discussing their testimony at a special inquiry hearing, the record from which the State intended to use at trial. Br. Resp. 10-11 (citing *State v. Burri*, 87 Wn.2d 175, 176-77, 550 P.2d 507 (1976)). Nothing in *Burri* implicated the witness' own decision to discuss the case with defense in an interview, but to refuse to have that discussion recorded. The witnesses were agreeable to being interviewed in advance of trial, they just weren't agreeable to having those interviews recorded.

The defense also argues that if the court were to permit an interview not to be recorded, it would be the equivalent of suppressing evidence that is favorable to the defense, which is also a due process violation. Br. Resp. 13 (citing *City of Seattle v. Fettig*, 10 Wn. App. 773,

519 P.2d (1974)). However, *Fettig*, a DUI case, involved the destruction by police of a video tape that showed the defendant performing physical tests, which tape was potentially exculpatory. *Fettig*, 10 Wn. App. at 773-74. Thus, *Fettig* involved a *Brady* violation. See, *Fettig*, 10 Wn. App. at 774 (citing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)). However, that argument is misplaced for a number of reasons, not the least of which was that the video tape in *Fettig* was evidence that actually existed, while lack of recording of an interview is at best potential evidence that does not exist, and therefore cannot be exculpatory.

3. THE MERE FACT OF THE INVENTION OF RECORDING EQUIPMENT, BY ITSELF, DID NOT SOMEHOW SUBSEQUENTLY RENDER ALL DEFENSE COUNSEL INHERENTLY INEFFECTIVE WHERE THEY HAD NOT BEEN SO BEFORE.

The due process clause has been a part of American constitutional jurisprudence since the adoption of the Tenth Amendment's Bill of Rights in 1791, and was extended to the States via the Fourteenth Amendment in 1868. On the other hand, the ability to routinely make audio recordings did not become commonplace until some time after the invention of the compact cassette magnetic tape recording system (cassette tape) in 1964. See, http://en.wikipedia.org/wiki/Audio_recording (reviewing the history

of audio recording). If the argument of the defense had merit, it would mean that defense counsel were routinely effective prior to the invention of recording equipment, but that after the invention of recording equipment they are not effective unless they use recording devices. Somehow the mere fact of the invention of recording equipment alone rendered defense counsel inherently ineffective from that point forward to the present, and that ineffectiveness could only be cured by the use of recording devices in witness interviews.

Such a position is of course absurd. But it does highlight the fact that it is not the lack of recorded witness interviews that renders defense counsel ineffective.

4. THE LACK OF A RECORDED INTERVIEW WILL NOT RENDER DEFENSE COUNSEL INEFFECTIVE.

While recognizing that there are times when impeachment based upon the witness interview may be necessary, it is in fact the exception, and frankly rather uncommon. For extrinsic evidence of a prior statement to be admissible in and of itself, as a first requirement the statement may only be introduced by defense counsel if the witness disavows having made it. *See*, KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, VOL. 5A, § 613.10 (5th ed. 2007); *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). Second, the court must agree that the

witness's testimony and prior statement in the interview were in fact inconsistent. KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, VOL. 5A, § 613.4-6.13.9 (5th ed. 2007); *State v. Dixon*, 159 Wn.2d at 77; *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). Finally, the extrinsic evidence of the statement is only admissible for the limited purposes of impeaching the witness' credibility and not as substantive evidence. KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, VOL. 5A, § 613.3 (5th ed. 2007); *State v. Acheson*, 48 Wn. App. 630, 638, 740 P.2d 346 (1987), *State v. Classen*, 143 Wn. App. 45, 59, 176 P.3d 582 (2008).

The defense cites no authority for the proposition that they are entitled to memorialize the interview in their preferred format. They also provide no authority to indicate the lack of a recording renders them ineffective. Accordingly, the Court should not consider those arguments. Where a party fails to provide citations to relevant authority, the court will decline to consider the argument. *See, Ensley v. Pitcher*, Slip. Op. 61537-8, p. 18, ___ Wn. App. ___, ___ P.3d ___ (2009) (citing RAP 10.3(a)(6)).

The defense argues that a deficient investigation can render counsel ineffective. Br. Resp. 8. However, the means by which the information obtained in an interview is preserved, i.e. notes as opposed to a recording, has nothing to do with the thoroughness of the investigation and does not render it deficient. Accordingly, the lack of a recording does

not render counsel ineffective, because whether or not the interview is recorded, counsel still has the ability to obtain all relevant information from the witness prior to trial.

5. DEFENSE COUNSEL'S PREFERENCE OR CONVENIENCE DOES NOT PROVIDE A LEGAL BASIS FOR THE COURT TO ORDER EITHER A DEPOSITION OR A TAPE RECORDING.

The defense cites no authority for the proposition that they are entitled to memorialize the interview in their preferred format. Where a party fails to provide citations to relevant authority, the court will decline to consider the argument. See, *Ensley v. Pitcher*, Slip. Op. 61537-8, p. 18, ___ Wn. App. ___, ___ P.3d ___ (2009) (citing RAP 10.3(a)(6)). Even if the court were to construe the defendant's argument as one based purely on policy, it is without merit.

The essence of defense counsel's position is that if the witness doesn't agree to the practical equivalent of a video deposition (albiet not under oath), the defense is entitled to a court order for a deposition. This is not contemplated by CrR 4.6(a). Indeed, such an argument makes no rational sense and is its own contradiction. If CrR 4.6(a) really meant that defendants were entitled to record witnesses, it wouldn't have used the language "refuses to discuss the case with either counsel." Instead, it would say that defense counsel are entitled to record the interview by whichever means they prefer, and if the witness refused to agree, the

defense would be entitled to a deposition. Moreover, the rule provides for a deposition generally, and does not specify a video deposition. *See*, CrR 4.6(a). There is no legal authority granting defendants their preferences regarding the conduct of witness interviews.

6. DEFENSE COUNSEL'S PREFERENCE OR
CONVENIENCE DOES NOT EQUATE TO JUDICIAL
ECONOMY.

Defense counsel claims he believes it is absolutely necessary to have an accurate transcript of the interviews in order to provide effective assistance of counsel. Br. Resp. p. 5. However, that claim is unsupported by citation to relevant authority. Again, where a party fails to provide citations to relevant authority, the court will decline to consider the argument. *See, Ensley v. Pitcher*, Slip. Op. 61537-8, p. 18, ___ Wn. App. ___, ___ P.3d ___ (2009) (citing RAP 10.3(a)(6)). Even if the court were to construe the defendant's argument as one based purely on policy it is without substantive merit.

Here the officers did not refuse to have the interview transcribed. They only refused to have it tape recorded. Defense counsel never asked that the interview be transcribed in lieu of a recording. *See*, CP 9; 30; 62 (findings 5-6); RP 03-11-09, p. 4, ln. 3 to p. 6, ln. 3. Thus, the defense argument is without merit under the facts of this case.

The defendant claims that it is in the interest of both the defense and the officers to have an accurate transcript of the interview. Br. Resp.

p. 6. The defense presumes to know what is in the officers' best interest even though he doesn't represent them and his interests are largely contrary to the officers'. As it turns out, the officers may have other interests which cause them not to want to be recorded, and it is the officer who can best decide how to balance those interests. Many officers who work in an undercover capacity are very reluctant to have recordings made of their voice or appearance because such recordings could pose an actual danger to their safety. Many officers do their investigative work without electronically recording witness statements, and some believe that the defense should operate on an equal footing. Officers may have any number of additional reasons why they don't want to be recorded. The defense is not entitled to second guess witness' determinations about what their own interests are.

Similar arguments apply to other types of witnesses. Victims of sexual abuse may be particularly sensitive to having their image and answers recorded, and especially becoming public. And some witnesses may have safety concerns about a recorded interview becoming public in a way that threatens their safety, e.g. if they get labeled a "snitch" or are targeted by criminal elements. All these concerns are particularly acute in the internet era.

The defendant also claims that a court reporter is not a sufficient solution because of the inflections, pauses and other non-verbal communication. Br. Resp. 6. However, this argument comes on the heels

of defense counsel arguing the need for an accurate transcript. Moreover, if this argument has merit, the court would video record all proceedings in court where the record is paramount. After a re-trial, defense can only avail themselves of a transcript for impeachment purposes. Thus, defense is arguing that in a witness interview he is entitled to what he claims is a better record than that made at trial.

It is also worth noting that a recording is not necessarily more reliable. Recording equipment can fail without giving notice that a recording is not being made. Additionally, a recording often does not pick up everything. If persons are soft spoken, turn away from the microphone or talk over each other, the recording is often unintelligible. And again, unlike a transcriptionist, a recording doesn't give notice when it has missed something or the recording is unintelligible. These problems do come up, not infrequently, with RALJ appeals of District Court proceedings that are audio recorded.

Moreover, as to a recording, defense counsel's own production of a transcript from a recorded interview is itself inadmissible for purposes of impeachment. Defense counsel would need to play the recording. Doing so would likely undermine judicial economy, rather than promote it.

Defense counsel would not know what parts of the recording contain prior inconsistent statements and are necessary for impeachment purposes until after the witness testifies and then also denies making the prior inconsistent statement. Only at that point does defense counsel have

a basis to impeach the witness. But that involves the parties agreeing, or the court determining, what portion of the recording is relevant for context; queuing the recording; redacting anything that may not be properly put before the jury; and then playing it for the jury, etc. That all takes considerable time, which makes recordings an inefficient tool from the perspective of judicial economy. From the court's perspective, having a witness to the interview testify is generally considerably more expedient. Since the purpose of the impeachment is limited to challenging the credibility of the witness, defense counsel's desire for the perceived perfect impeachment is not warranted in light of the challenges to the court.

Defense counsel claims that it is virtually impossible for a person to take accurate, much less verbatim, handwritten notes during an interview. However, that is precisely what shorthand was invented for. Moreover, the defense argument's focus on differences in the exact wording of the statement as well as nuances of intonation and body language also reflects a kind of cognitive dysfunction of hyper-literalism. Attempting to nitpick variations in each word or intonation does not serve the purposes of judicial economy, and instead functions to undermine the judicial process by bogging the system down so it can't properly function. It is a basic quality of the human intellect that it does not function with the kind of exact identity and literalism that computers and digital media manifest.

The defense's policy arguments are without merit and do not equate to judicial economy.

7. DEFENDANT'S ARGUMENT THAT A WITNESS INTERVIEW IS NOT A PRIVATE CONVERSATION IS WITHOUT MERIT

Under a plain language reading of the private conversation statute, a witness interview is a private conversation unless the witness decides to make it public. Such a plain language analysis was undertaken in the Brief of the Appellant. *See*, Br. App. 13-14 (analyzing RCW 9.73.030(1)(b)). The respondent undertakes no plain language analysis under the statute.

8. REFUSING TO BE RECORDED IS NOT A DE FACTO REFUSAL TO DISCUSS THE CASE WITH COUNSEL.

The defendant claims that a witness' refusal to be recorded is a de facto refusal to be interviewed. Br. Resp. 8. That claim is unsupported by citation to relevant authority. And again, where a party fails to provide citations to relevant authority, the court will decline to consider the argument. *See, Ensley v. Pitcher*, Slip. Op. 61537-8, p. 18, ___ Wn. App. ___, ___ P.3d ___ (2009) (citing RAP 10.3(a)(6)). Even if the court were to construe the defendant's argument as one based purely on policy, it is without substantive merit.

The plain language of CrR 4.6(a) refers to a witnesses who “refuses to *discuss* the case with either counsel.” [Emphasis added.] Whether the interview is electronically recorded, a record is made by a transcriptionist, or counsel takes notes, has nothing to do with whether the witness discusses the case with counsel. The witness’ discussing of the case and counsel’s preserving of the information from the interview are two separate matters. They are separate activities, as is indicated by the fact that there is no necessary connection between them, and either can occur independent of the other.

Indeed, it is defense counsel who is refusing to permit the witnesses to discuss the case with him unless they agree to be recorded. Such a position is without lawful authority and without merit. When the witness remains willing to discuss the case with counsel, counsel should not be permitted to fabricate a refusal by imposing on the witness conditions that are odious to that witness. Under the plain language of CrR 4.6, a witness’ refusal to discuss the case with counsel does not implicate or relate to refusing to agree to have the discussion recorded. Accordingly, a witness’ refusal to have the interview recorded is not a *de facto* refusal to discuss the case with counsel.

9. THE DEFENSE IMPROPERLY FOCUSES ON THE WITNESS' STATUS AS OFFICERS.

The defense repeatedly emphasizes the witness' status as officers. Presumably, this is done in the hope that the court will be less sympathetic to officers' refusal to have their interviews recorded. It may well be that different types of witnesses will have different interests that cause them not to agree to a recording of the interview. However, the status of the witness is irrelevant to the legal issues involved with this case. CrR 4.6(a) only refers to witnesses, and does not distinguish between types of witnesses, or whether or not they are law enforcement.

There is no legal basis for treating officers differently from other witnesses. Accordingly, this Court should not take into consideration the witness' status as officers, especially where any rule it adopts will apply equally to all classes of witnesses.

10. CRR 4.6(A) DOES NOT AUTHORIZE COUNSEL TO REQUIRE THAT WITNESS INTERVIEWS BE RECORDED.

The issues in this case begin and end with the proper interpretation of CrR 4.6(a). For that reason, it is worth repeating a few paragraphs from the Brief of Respondent.

“[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 at 744. 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 Fed. R. Crim. Proc. 15(a). *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 discuss the case with either counsel, 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.

Here, the trial court expressly stated that she made her ruling because her background was in civil practice, and being unfamiliar with criminal practice she could not see calling a note taker at the interview as the better or more reasonable course. RP 02-10-9, p. 16, ln. 17 to p. 17, ln. 10. *See generally*, RP 02-10-09, p. 16, ln. 17 to p. 19, ln. 13. Said otherwise, rather than attempt to interpret and apply CrR 4.6, the court decided she did not like criminal practice because it was unfamiliar to her and ruled against the State on that basis.

Two notes to the 1944 adoption of Fed. R. Crim. Proc. 15 make it clear that the difference from the civil standard was express and intentional.

Note to Subdivision (a). 1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under *dedimus potestatem* and *in perpetuam rei memoriam*, 28 U.S.C. former § 644. This statute has been generally held applicable to criminal cases, *Clymer v. United States*, 38 F.2d 581, C.C.A.10th; *Wong Yim v. United States*, 118 F.2d 667, C.C.A.9th, certiorari denied, 313 U.S. 589, 61 S. Ct. 1112, 85 L. Ed. 1544; *United States v. Cameron*, C.C.E.D.Mo., 15 F. 794, C.C.E.D.Mo.; *United States v. Hoffmann*, 24 F.Supp. 847, S.D.N.Y. Contra, *Luxenberg v. United States*, 45 F.2d 497,

C.C.A.4th, certiorari denied, 283 U.S. 820, 51 S. Ct. 345, 75 L. Ed. 1436. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary “in order to prevent a failure of justice.”

2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Civil Procedure, 28 U.S.C., Appendix), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore.

[Formatting of case names in citations modified to comply with this court’s requirements.]

Dedimus potestatem means:

A commission issuing from the court before which a case is pending authorizing a person named in the commission to compel the attendance of certain witnesses, to take their testimony on the written interrogatories and cross-interrogatories attached to the commission, to reduce the answers to writing and to send it sealed to the court issuing the commission.

BLACK’S LAW DICTIONARY 443 (8th ed. 2004).

In perpetuam rei memoriam means:

In perpetual memory of a matter. • This phrase refers to a deposition taken to preserve the deponent’s testimony.

BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

Indeed, there are a number of good policy reasons why depositions are not necessary in criminal cases as they are in civil cases. Most witnesses are interviewed by law enforcement officers as part of the investigation process, so their statements have generally been memorialized early on. If a witness gives a false statement to officers, they commit the crime of making a false statement to a public official. *See*, RCW 9A.76.175. Additionally, officers sign any warrants of probable cause declarations under penalty of perjury.

In civil cases, there often is no early investigation. The investigators are usually not law enforcement officers, but rather private investigators working for the attorneys, and false statements to them are not a crime. As a result, in civil cases depositions are much more necessary to determine the likely testimony at trial.

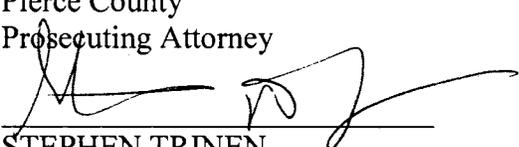
Because CrR 4.6(a) does not authorize counsel to require that witnesses agree to be recorded in their interviews, the lower court's order for a deposition was error and should be reversed.

C. CONCLUSION.

For the foregoing reasons the Court should hold that the order for a deposition was issued without lawful authority, and reverse the trial court.

DATED: February 8, 2010.

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WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*Suzanne Elliott
Travis Stearns
Keb Underwood*

2-8-10 *Sheela Kar*
Date Signature

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