

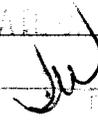
FILED
COURT OF APPEALS

NO. 39811-7-II

10 JUN -3 PM 4:37

STARBUCKS RESTAURANT

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY 

DEPUTY

STATE OF WASHINGTON, APPELLANT

v.

CORY LAMONT THOMAS, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner

No. 05-1-04377-8

Corrected Opening Brief of Appellant

MARK LINDQUIST
Prosecuting Attorney

By
Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ASSIGNMENTS OF ERROR..... 1

1. The trial court erred where it treated the defendant’s *pro se* objections as valid objections notwithstanding the fact in several instances that defense counsel did not object to some of the continuances and indeed agreed to several. CP 113-122 (Findings of Fact VIII, X, XII, XIII, XIV, XV, XVI) 1

2, The trial court erred where it dismissed the case because the criminal presiding judge failed to review the status of each courtroom prior to continuing the case for administrative necessity because no courtrooms were available. CP 139; 113-122; RP 08-26-09, p. 50, ln. 23 to p . 51, ln. 4..... 1

3. The trial court erred where it dismissed the case because it concluded that the time for trial had expired. CP 113-122 (Conclusions XI and XII)..... 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 2

1. Whether the trial court erred when it treated the defendant’s *pro se* objections to continuances as valid objections where defense counsel did not object? (Assignment of Error 1.) 2

2. Whether the trial court erred where it dismissed the case because the criminal presiding judge(s) did not review the availability of courtrooms and pro tem judges even though the case was never continued beyond the time for trial deadline? (Assignment of Error 2.) 2

3. Whether the trial court erred when it concluding the time for trial had expired and dismissed the case where the time for trial in fact never expired? (Assignment of Error 3.) 2

C.	<u>STATEMENT OF THE CASE</u>	2
	1. Procedure.....	2
	2. Facts	6
D.	<u>ARGUMENT</u>	9
	1. THE DEFENDANT WAS NOT ENTITLED TO OBJECTIONS WHEN HIS ATTORNEY AGREED TO CONTINUANCES.....	9
	2. THE CASE SHOULD NOT HAVE BEEN DISMISSED DUE TO THE LACK OF REVIEW OF COURTROOMS WHERE SUCH WAS NOT A BASIS FOR DISMISSAL UNDER CrR 3.3	10
	3. DISMISSAL WAS IMPROPER WHERE THE DEFENDANT’S TIME FOR TRIAL NEVER EXPIRED	23
E.	<u>CONCLUSION</u>	37-38

Table of Authorities

State Cases

<i>Hoke v. Stevens-Norton, Inc</i> , 60 Wn.2d 775, 778, 375 P.2d 743 (1962)...	1
<i>Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.</i> , 68 Wn.2d 172, 174, 412 P.2d 106 (1966)	1
<i>Rickert v. Pub.Disclosure Comm’n</i> , 161 Wn.2d 843, 847, 168 P.3d 826 (2007)	1
<i>State v. Buelna</i> , 83 Wn. App. 658, 661, 922 P.2d 1371 (1996).....	9, 10
<i>State v. Campbell</i> , 103 Wn.2d 1, 7, 691 P.2d 929 (1984).....	9, 35
<i>State v. Collins</i> , 152 Wn. App. 429, 216 P.3d 463 (2009).....	23
<i>State v. Downing</i> , 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)	25
<i>State v. Flinn</i> , 154 Wn.2d 193, 200, 110 P.3d 78 (2005)	11, 19, 20, 25, 28, 37
<i>State v. George</i> , 160 Wn.2d 727, 735, 158 P.3d 1169 (2007).....	23
<i>State v. Hegge</i> , 53 Wn. App. 345, 766 P.2d 1127 (1989).....	9, 10
<i>State v. Hightower</i> , 36 Wn. App. 536, 540, 676 P.2d 1016, <i>review denied</i> , 101 Wn.2d 1013 (1984).....	9
<i>State v. Johnson</i> , 132 Wn. App. 400, 132 P.3d 737 (2006)	9, 34, 35, 36, 37
<i>State v. Jones</i> , 117 Wn. App. 721, 729-30, 72 P.3d 1110 (2003).....	37
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009).....	20, 21
<i>State v. Kokot</i> , 42 Wn. App. 733, 713 P.2d 1121 (1986).....	16, 17, 18
<i>State v. Luther</i> , 157 Wn.2d 63, 78, 134 P.3d 205 (2006)	1

<i>State v. Mack</i> , 89 Wn.2d 788, 576 P.2d 44 (1978)	12, 13, 14, 15, 16, 18, 19
<i>State v. Silva</i> , 72 Wn. App. 80, 83, 863 P.2 597 (1993)	17, 18
<i>State v. Warren</i> , 96 Wn. App. 306, 979 P.2d 915 (1999)	18, 19
<i>Yousoufian v. Office of Ron Sims</i> , Slip. Op. No. 80081-2 p. 12, --- Wn.2d ---, --- P.3d ---, 2010 WL 1225083 (2010)	21

Rules and Regulations

CrR 3.3.....	10, 11, 12, 14, 25, 37
CrR 3.3 (1976-1978).....	15
CrR 3.3 (1978).....	14, 15, 16
CrR 3.3 (1979).....	14, 15
CrR 3.3 (1997).....	19
CrR 3.3 (2003).....	20, 23, 34
CrR 3.3(a)(1)	24
CrR 3.3(b)(1)-(2)	24, 26
CrR 3.3(b)(3)	26
CrR 3.3(b)(5)	25, 35
CrR 3.3(c)(1) (2002).....	20, 24
CrR 3.3(c)(2)	24
CrR 3.3(c)(2)(i), (iv).....	24
CrR 3.3(c)(2)(iv).....	25, 26
CrR 3.3(d)(8) (1997).....	17
CrR 3.3(e).....	14, 24, 25
CrR 3.3(e)(3), (8).....	24, 26, 27

CrR 3.3(e)(8)	21
CrR 3.3(f).....	15, 24
CrR 3.3(f) (1979).....	16
CrR 3.3(f)(1).....	26
CrR 3.3(f)(2).....	9, 24, 27, 36
CrR 3.3(h) (1997)	19, 21, 25
JCrR 3.08	13, 14, 15, 16

A. ASSIGNMENTS OF ERROR

1. The trial court erred where it treated the defendant's pro se objections as valid objections notwithstanding the fact in several instances that defense counsel did not object to some of the continuances and indeed agreed to several. CP 113-122 (Findings of Fact VIII, X, XII, XIII, XIV, XV, XVI)¹
2. The trial court erred where it dismissed the case because the criminal presiding judge failed to review the status of each courtroom prior to continuing the case for administrative necessity because no courtrooms were available. CP 139; 113-122; RP 08-26-09, p. 50, ln. 23 to p. 51, ln. 4.
3. The trial court erred where it dismissed the case because it concluded that the time for trial had expired. CP 113-122 (Conclusions XI and XII).

¹ The State does not assign error to the sufficiency of the evidence to support the court's findings. Rather the State objects to the court's inherent conclusion of law that the defendant was entitled to make the objections pro se. Accordingly, although they are designated findings of fact, the State construes them as mixed findings of fact and conclusions of law and objects to the legal conclusion. A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact and vice versa. See, *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). See, *Hoke v. Stevens-Norton, Inc*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); See also, *Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court erred when it treated the defendant's *pro se* objections to continuances as valid objections where defense counsel did not object? (Assignment of Error 1.)

2. Whether the trial court erred where it dismissed the case because the criminal presiding judge(s) did not review the availability of courtrooms and pro tem judges even though the case was never continued beyond the time for trial deadline?
(Assignment of Error 2.)

3. Whether the trial court erred when it concluding the time for trial had expired and dismissed the case where the time for trial in fact never expired? (Assignment of Error 3.)

C. STATEMENT OF THE CASE.

1. Procedure

This appeal in this case relates to whether the time for trial rule was violated. Thus, the argument necessarily involves a very detailed review of the continuances in this case as part of the argument in section C.3 below. Because the history of continuances is covered in great detail, this review of the procedural posture has been limited to those facts necessary to orient the court, but no more.

On September 6, 2005, based on an incident that occurred on August 30, 2005, the State charged the defendant with four counts of domestic violence related crimes. CP 1-5. The case went to trial and the defendant was convicted. CP 9-12. The defendant appealed and the court of appeals reversed and remanded for retrial in an opinion that was published in part. CP 9-20. The mandate was entered April 2, 2008. CP 7.

The defendant first appeared in court again on April 25, 2008. RP 04-25-08, p. 2-3. At that hearing, the court set bail and scheduled trial for May 29, 2008. CP 24-25; 26. There were a series of agreed continuances that extended the trial date until April 22, 2009. CP 28; 52; 54; 65; RP 08-18-08, p. 4-5.

Starting April 22, 2009, the defendant began to consistently express a *pro se* objection to further continuances. CP 66; RP 04-22-09, p. 4, ln. 4 to p. 6, ln. 10. Some of the continuances were agreed to by the defendant's attorney, others the court granted on the State's motion in the administration of justice, and on three occasions short continuances occurred because no courtrooms were available. CP 66; 74; RP 04-22-09, p. 3, ln. 9-17; .CP 75; RP 07-06-09, p. 3, ln. 4 to p. 4, ln. 16. CP 76; RP 08-13-09, p. 17, ln. 9 to p. 19, ln. 4.

The three continuances that were made because no courtrooms were available occurred on June 15 (for one day), June 16 (for one day), and August 20, 2009 (for four days). CP 70; 72; 86; RP 06-15-09, p. 8, ln.

9-24; p. 12, ln. 5 to p. 13, ln. 16; RP 06-15-09, p. 8, ln. 15-17; RP 08-20-09, p. 2, ln. 10-20 20; p. 3, ln. 13 to p. 5, ln. 8. Each order reduced the time for trial days remaining by the appropriate number of days. CP 70; 72; RP 06-15-09, p. 8, ln. 15-17.

On June 15, the defendant also filed a one page motion *pro se* seeking dismissal of his case claiming that no courtrooms were available for criminal trials, as well as other reasons, but failing to cite to any legal authority. CP 71.

On June 17, 2009, the court entered an order continuing trial from June 17, 2009, to June 29, 2009, on the State's motion in the administration of Justice because the State's witnesses were unavailable 6/23-/30 and stating "no courtrooms today." CP 73; RP 06-17-09, p. 14, ln. 9 to p. 16, ln. 25. With the continuance, the court set the time for trial days remaining at 30 days, to which the defendant objected, believing it should be 17 days. CP 73; RP 06-17-09, p. 14, ln. 24 to p. 15, ln. 17; p. 16, ln. 3-12. The court's basis for setting the time at 30 days was that the unavailability of witnesses was good cause for a continuance. RP 06-17-09, p. 15, ln. 8-14.

On August 18, 2009, the defendant filed a motion to dismiss, *pro se*, claiming a speedy trial violation. CP 77-85.

On August 24, there were no courtrooms available in the morning, but that afternoon the case was assigned to the Honorable Roseanne Buckner for trial. CP 88.

Prior to selecting a jury, the court heard the motion to dismiss and on August 26 the court granted the defendant's motion. CP 108; RP 08-26-09, p. 49, ln. 5 to p. 53, ln. 16. The court did so because the continuances that were made for no courtrooms available did not include a delineation of what that meant on a department-by-department basis. RP 08-26-09, p. 50, ln. 23 to p. 51, ln. 4. The motion was considered based on briefing supplied by the parties, as well as exhibits, but the defense did not include transcripts of the proceedings as part of the record. RP 08-26-09, p.51, ln. 9 to p. 53, ln. 16. The court held that the written orders alone were sufficient to permit the defense to meet its burden. RP 08-26-09, p. 52, ln. 13 to p. 53, ln. 16. The court also scheduled a presentment hearing for September 25, 2009. CP 108.

The court's order dismissing the case was interlineated by hand on the scheduling order for the presentment hearing and not filed as a separate order at that time. CP 108; RP 08-26-09, p. 54, ln. 22-25. Accordingly, where no other order had been entered within 30 days of the entry of the trial court's order via the notation on the schedule order, the State filed a Notice of Appeal on September 24, 2009, in order to assure it did not miss the filing deadline. CP 109-112. Findings and conclusions were entered the following day. CP 113-122.

On September 29, 2009, the Court of Appeals sent a letter to the parties and the Superior Court Clerk that the notice of appeal was premature because an order had not been entered at the trial court, so the

decision of the trial court was not appealable. CP 123. The letter advised the State that it had 45 days to file a copy of a final order.

On September 30, 2009, the State filed an amended notice of appeal attaching a copy of the August 26 scheduling order on which the order of dismissal had been written. CP 124-138. On October 9, 2009, the court entered a formal Order of Dismissal *nunc pro tunc* to September 25, 2009. CP 139. On October 27, 2009, the State filed a Second Amended Notice of Appeal, which included a copy of the Order of Dismissal. CP 152-154.

2. Facts

The underlying facts of this case are irrelevant to the issues on appeal. The following summary of facts is taken from this court's opinion after the first trial along with the information and probable cause declaration. *See*, CP 1-5; 6-19.

Cory Thomas and Lavisha Bonds have known each other for 12 years and had a six-year-old child together, but did not live together on August 30th, 2005. Although Thomas did not have a key to Bonds's apartment, he did keep clothes and sometimes showered there and would at times enter the apartment through the bathroom window when Bonds was not there.

On August 29th, 2005, Thomas asked Bonds for some clothes back and she told him to return the next morning to get them. Bonds went out with a friend that evening, and returned home at about 2:00 to 3:00 a.m. The next morning Thomas entered Bonds's apartment through the bathroom window. He and Bonds got into a fight and Bonds's friend who had spent the night on the sofa called 911. When police arrived Thomas was gone, and Bonds was holding a bloody towel to her face. Bonds's friend took her to the emergency room where she was treated for a fractured nose and bruised tailbone.

At trial, Bonds testified that the night before the incident a former boyfriend had been over, that his car was out front and that Thomas called to ask who was there with her. When he found out who it was, Thomas got upset. Later that night, Bonds heard Thomas outside her bedroom window saying, "I told you about that dude, you black bitch" and that "[he was] going to beat [her] ass."

Bonds testified she awoke in the morning to find Thomas holding bags of his clothes. Thomas said something about the other boyfriend, came toward her and punched her in the face. Bonds tried to swing back, but fell to the floor. Thomas started kicking and hitting Bonds with an aluminum broom handle. Bonds got away from Thomas and went into the bathroom. Thomas followed her, they tussled some more, and then he ultimately left with his clothes.

Bonds had originally signed a statement that Thomas had beaten her up and fled, but subsequently recanted by way of a letter. At trial Bonds testified the incident was blown way out of proportion, but conceded that parts of her recantation were not true and that she had written it to lighten Thomas's sentence and minimize his time away from their son. She also testified that she and Thomas had had a lot of "tussles" but that he had never hurt her, that she had hit and punched Thomas and that she was never afraid of Thomas.

Thomas testified that Bonds had told him to return to the apartment for his clothes the morning of the incident, but that no one answered when he knocked so he entered through a window as he usually did if Bonds was not home. Thomas testified that as he was taking his clothes out of the closet when Bonds awoke and told him that he could not take his belongings unless he paid some of the bills. He claimed that Bonds then grabbed some clothes from his arms. When Thomas said he was taking the clothes to his new girlfriend's house, Bonds became upset and started clawing his face. Thomas pushed her away and she fell near the bed. As she started to get back up, Thomas walked into the living room, picked up his clothes and left.

D. ARGUMENT

1. THE DEFENDANT WAS NOT ENTITLED TO OBJECTIONS WHEN HIS ATTORNEY AGREED TO CONTINUANCES.

The court has held that a motion made “on behalf of any party waives that party’s objection to the requested delay.” *Johnson*, 132 Wn. App. at 413 (quoting CrR 3.3(f)(2)). This is so even where a defendant objects to a continuance but the defendant’s attorney requests the continuance. *State v. Campbell*, 103 Wn.2d 1, 7, 691 P.2d 929 (1984). Accordingly, even though the defendant himself may have objected to some of the continuances, those objections are without merit whenever the defendant’s attorney moved for or agreed to the continuances.

It is also worth noting that the defendant was not entitled to and did not have hybrid representation, nor was defense counsel stand-by. Accordingly, the defendant was not entitled to make *pro se* objections. Hybrid representation exists where both the defendant and an attorney actively participate in the presentation and share the duties of managing a defense. *State v. Buelna*, 83 Wn. App. 658, 661, 922 P.2d 1371 (1996) (citing *State v. Hegge*, 53 Wn. App. 345, 766 P.2d 1127 (1989); *State v. Hightower*, 36 Wn. App. 536, 540, 676 P.2d 1016, *review denied*, 101 Wn.2d 1013 (1984)). A defendant has no right to hybrid representation.

State v. Hegge, 53 Wn. App. 345, 766 P.2d 1127 (1989). As the court in *Hegge* noted, this is because there can be but one captain of the ship who is responsible for whether it safely makes its passage or founders. *Hegge*, 53 Wn. App. at 349.

On the other hand, the role of standby counsel is not to represent the defendant, but to provide technical assistance to the defendant and to be prepared to step in and represent the defendant if it becomes necessary to terminate the defendant's self-representation. *Buelna*, 83 Wn. App. at 660. Thus, defendants with standby counsel represent themselves.

Here, the court never approved neither hybrid counsel nor standby counsel. Accordingly, any objections for the defense needed to be made by defense counsel, and defense counsel only. To the extent that the defense did not object to any of the continuances, those objections were waived.

2. THE CASE SHOULD NOT HAVE BEEN DISMISSED DUE TO THE LACK OF REVIEW OF COURTROOMS WHERE SUCH WAS NOT A BASIS FOR DISMISSAL UNDER CrR 3.3.

The trial court dismissed this case because earlier continuances had been made for no courtrooms available without any review on the record of the reasons why the various courtrooms weren't available. RP 08-26-09, p. 50, ln. 23 to p. 51, ln. 4. The court concluded that was contrary to

the requirements as held in *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 78 (2005). Relying on *Flinn*, the court therefore dismissed this case. RP 08-26-009 p. 50, ln. 23 to p. 51, ln. 4.

The trial court erred in its holding for two different reasons. First, *Flinn* stands for the proposition that a review must be made for no available courtrooms only when the trial date is continued past the time for trial deadline. This case was never continued past the time for trial deadline, so the requirement of a courtroom by courtroom review does not apply. Second, under the version of the time for trial rule applicable in this case, the only basis for dismissal under the rule is a failure to bring a case to trial within the time limit established under the rule. Therefore, the failure to conduct a review of courtrooms does not serve as a basis for dismissal under the current version of the rule.

Flinn interpreted the language of CrR 3.3. That rule was substantially modified effective September 1, 2003. *Flinn* considered the pre-2003 version of the rule. This case falls under the post-2003 version of CrR 3.3. Therefore, in order to understand the applicability of *Flinn* to this case, it is necessary to review the pertinent differences between the pre- and post-2003 versions of the rule, the cases interpreting it as to this issue, and one case that interprets the post-2003 version of the rule on this issue.

There has been a lack of rigor of usage in reference to “speedy trial” both in the opinions of the courts, as well as in the usage of practitioners and the trial courts. To avoid confusion in what follows, the phrase “time for trial” will be used to refer to the standards established under CrR 3.3 in its various versions, while “speedy trial” will be reserved solely for reference to the constitutional right.

- a. The court had no obligation to review the status of the courtrooms when it continued the case for administrative necessity because no courtrooms were available.

The trial court held that prior to trial, the criminal division presiding judges in this case did not conduct a review of the status of the individual courtrooms when the case was continued in administrative necessity due to courtroom unavailability. RP 08-26-09, p. 50, ln. 24 to p. 51, ln. 3. The trial court held that the failure to conduct a review of the status of the individual courtrooms was an error that itself required dismissal. RP 08-26-09, p. 50, ln. 23 to p. 53, ln. 16. In order to focus solely on that issue, the argument in this section 2.a. operates on the assumption that the time for trial in fact never expired in this case. A detailed argument as to why the time for trial never expired is provided separately in section 3. below.

In *State v. Mack*, the court held that court congestion did not constitute good cause justifying a continuance under the time for trial rule.

State v. Mack, 89 Wn.2d 788, 576 P.2d 44 (1978). In *Mack*, which consisted of three consolidated cases, the trial date was set well outside of the 60 day limit. *Mack*, 89 Wn.2d at 789. The defendants moved for trial within the 60 day period, but the motions were denied, and once the 60 day period had expired the defendant's brought motions to dismiss. *Mack*, 89 Wn.2d at 789-90. The reason the cases were originally set beyond the 60 day period was because the existing trial settings and the judge's schedules made compliance with the 60-day rule difficult so that the clerk understood it to be the courts' policy that jury demand waived the 60-day requirement. *Mack*, 89 Wn.2d at 790.

The court in *Mack* considered the former JCrR 3.08.² JCrR 3.08 is a one paragraph rule that states:

RULE 3.08. CONTINUANCES—TRIAL WITHIN SIXTY
DAYS—DISMISSAL

Continuances may be granted to either party for good cause shown. Also, the court, on its own motion, may postpone the trial for good and sufficient reason. In either case, the continuance or postponement must be to a date certain. If the defendant is not brought to trial within 60 days from the date of appearance, except where the postponement was requested by the defendant, the court shall order the complaint to be dismissed, unless good cause to the contrary is shown. Dismissal under such circumstances shall be a bar to further prosecution for the offense charged.

JCrR 3.08 (1976-1978). [Emphasis added.]

² JCrR refers to Justice Court Criminal Rules. The former justice court system was the precursor and equivalent to the current courts of limited jurisdiction.

The court in *Mack* held that JCrR 3.08 should be construed consistent with CrR 3.3. *Mack*, 89 Wn.2d at 792. The *Mack* opinion was issued in 1978. CrR 3.3 was changed significantly from 1976 through 1979, and the opinion in *Mack* does not specify which version of the rule it considered. However, given that the Court’s analysis of CrR 3.3 in *Mack* is mainly focused on the underlying purpose of the rule, and the fact that JCrR 3.08 should be interpreted consistent with CrR 3.3, the changes to the particular language of the rule from 1976 through 1979 were apparently not significant to the analysis in *Mack*.

CrR 3.3 was titled the “speedy trial” rule until 1978, after which it was titled the “time for trial” rule. Cp. CrR 3.3 (1978) and CrR 3.3 (1979). The purpose of the rule (as well as JCrR 3.08) is to protect the defendant’s constitutional right to a speedy trial. *Mack*, 89 Wn.2d at 791-92. The rules are designed to protect, but not guarantee that right. *Mack*, 89 Wn.2d at 792.

Until 1978, continuances were governed by CrR 3.3(e) which provided that:

(e) Continuances. Continuances or other delays may be granted as follows:

- (1) On motion of the defendant on a showing of good cause.
- (2) On motion of the prosecuting attorney if:
 - (i) the defendant expressly consents to a continuance or delay and good cause is shown; or
 - (ii) the state’s evidence is presently unavailable, the prosecution has exercised due diligence, and there

are reasonable grounds to believe that it will be available within a reasonable time; or
(iii) required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of his defense.

(3) The court on its own motion may continue the case when required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of his defense.

CrR 3.3 (1976-1978). [Emphasis added.]

As a result of the changes that became effective November 17, 1978, CrR 3.3(f) governed continuances and provided that:

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Upon written agreement of the parties which must be personally signed by the defendant or all defendants and must be approved by the court.

(2) On motion of the state or on its own motion or on the motion of a party the court may continue the case when required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of his defense. The court must state its reasons therefore.

CrR 3.3 (1979). [Emphasis added.]

The language of the rules applicable in *Mack* has been cited here in order to clarify an ambiguity. In *Mack*, the court refers to “good cause” justifying a continuance. *Mack*, 89 Wn.2d at 794. The “good cause” language derives directly from JCrR 3.08 as it existed at the time. Similar language occurs in the pre-1979 version of CrR 3.3 with regard to motions for a continuance made by either the defendant, or by the prosecuting attorney with the agreement of the defendant. *See* CrR 3.3 (1978).

However, under that version of CrR 3.3, the “good cause” language does not apply to actions by the court on its own motion. With the 1978 amendment to CrR 3.3, the “good cause” language was removed. CrR 3.3(f) (1979). This is worth noting because the “good cause” language the court in *Mack* used when it interpreted JCrR 3.08 and CrR 3.3 creeps into subsequent opinions even though “good cause” no longer accurately reflects the language of CrR 3.3.

In *State v. Kokot*, the court held that where a case was continued beyond the time-for-trial for “administrative necessity” that was in fact as a result of court congestion, the continuance was an abuse of discretion. *State v. Kokot*, 42 Wn. App. 733, 713 P.2d 1121 (1986). In so holding, the court went on to say that nothing in the record indicated how many courtrooms were available, the availability of visiting judges, unoccupied courtrooms, etc, and that without such facts the continuance was an abuse of discretion. *Kokot*, 42 Wn. App. at 737 (citing *Mack*, 89 Wn.2d at 795). As to the relevant argument in *Mack*, the respondents had suggested that the failure to use judges *pro tempore* was based primarily on a concern for cost, and the court noted with some interest that there was no suggestion that funds generated by the courts or available to them were insufficient to meet the expense of a judge *pro tempore* program. Cp. *Mack*, 89 Wn.2d at 759. Contrary to the *Kokot* court’s use of *Mack*, the opinion in *Mack* does not by itself support the position that courts were required to review the status of the courtrooms in order to continue a case beyond the time-

for-trial deadline as a result of congestion. Nonetheless, through *Kokot* that became the standard in subsequent cases.

In *State v. Silva*, the court held that the trial court did not abuse its discretion when it granted a 5-day extension of the trial date that moved the trial only 2 days beyond the time for trial deadline. *State v. Silva*, 72 Wn. App. 80, 83, 863 P.2d 597 (1993). In doing so, the court noted that the *Silva* case was distinguishable from *Kokot*.

First, any potential prejudice in *Silva* was *de minimis* because in *Silva* the trial was extended a total of five days under CrR 3.3(d)(8) (1997), and only two days beyond the time-for-trial deadline, in contrast to 27 days in *Kokot*. *Silva*, 72 Wn. App. at 84. Second, *Silva* did not allege that he had suffered any prejudice from the delay. *Silva*, 72 Wn. App. at 84. Finally, rather than rely on a mere suggestion of docket congestion, the trial court in *Silva* followed the recommendation of the court in *Kokot* and made a careful record as to why each department was unavailable to try the case, and when defense counsel noted that two courtrooms were available, the court offered to call in a judge *pro tempore* to try the case, but *Silva* declined. *Silva*, 72 Wn. App. at 84-85.

The court in *Silva* noted that the trial court “substantiated its assertion that court congestion was unavoidable by carefully making a record of why each trial department was unavailable to try [the] case.” *Silva*, 72 Wn. App. at 84. “Thus, the court made every effort to

responsibly manage its resources and to try Silva within time for trial time limits.” *Silva*, 72 Wn. App. at 84.

In *State v. Warren*, the court held that the trial court abused its discretion when it continued the case two days past expiration of the time-for-trial deadline because of courtroom unavailability. *State v. Warren*, 96 Wn. App. 306, 979 P.2d 915 (1999). As the court noted, courtroom unavailability is synonymous with court congestion and is not “good cause.” *Warren*, 96 Wn. App. at 309 (citing *Mack* 89 Wn.2d at 794; *Kokot*, 42 Wn. app. at 737). Dismissal is required without “good cause.” *Warren*, 96 Wn. App. at 309 (citing *Mack* 89 Wn.2d at 794).

Of particular significance here is that the court in *Warren* discusses the fact that the *Mack* rule requiring dismissal without “good cause” has not been rigidly applied. *Warren*, 96 Wn. App. at 309-10 (citing *Kokot* and *Silva*, 72 Wn. App. at 83). Thus, the court in *Warren* recognizes that the review of courtrooms discussed in *Kokot* was a mechanism for ameliorating the harshness of the rule in *Mack*.

The point of *Warren* is that the trial court’s review of courtrooms is not an additional and separate obligation the court is required to comply with. Rather, it is used to make the *Mack* rule less rigid when trial has been extended beyond the time-for-trial deadline as a result of court congestion. Thus, the trial court’s failure to provide a review of courtrooms does not independently require dismissal. That is especially so where trial was not extended beyond the time-for-trial deadline.

It is also worth considering the version of the rule that applied in *Warren*. On June 23, 1997, Warren’s trial was continued to June 25, 1997, so that the relevant version of CrR 3.3 was the 1997 version. *See*, CrR 3.3 (1997). The 1997 version of the rule regarding continuances is substantially similar to the 1979 version with one exception that does not apply here.³ Both versions require the court to state the reasons for the continuance, and neither version uses the “good faith” language of the pre-1979 version of the rule. Thus, properly the “good faith” language has been misapplied in later cases.

In *State v. Flinn*, the court held that court congestion is not a valid reason for continuances beyond the time for trial period. *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 78 (2005) (emphasis added) (citing *State v. Mack*, 89 Wn.2d 788, 794, 576 P.2d 44 (1978)). Thus, when the primary reason for continuing the trial date beyond the time-for-trial deadline is court congestion, the court must record details of the congestion. *Flinn*, 154 Wn.2d at 200.

The court in *Flinn* held that there was no violation of the time-for-trial deadline because the continuance beyond the previously set time-for-trial deadline in that case was done in the administration of justice to allow the prosecutor to prepare for Flinn’s diminished capacity defense. *Flinn*,

³ Under subsection (2) it contains the additional sentence: “The motion must be filed on or before the date set for trial or the last date of any continuance exception granted pursuant to this rule.” CrR 3.3(h) (1997).

154 Wn.2d at 200-01. The court specifically held that the continuance was not made for court congestion even though court congestion was subsequently considered in setting the trial date once the determination was made to continue the case in the administration of justice. *Flinn*, 154 Wn.2d at 200-01.

It is also worth noting that the court in *Flinn* considered the pre-2003 version of the time for trial rule. *Flinn*, 154 Wn.2d at 199 (citing CrR 3.3(c)(1) (2002)).

Since the trial court issued its ruling in this case, the Washington Supreme Court has issued another case that is applicable and indeed controlling. See, *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009). In *Kenyon*, the court considered the current version of the time for trial rule. *Kenyon*, 167 Wn.2d at 131 (citing CrR 3.3 (2003-2009)). The specifics of that rule are considered in detail as they apply to this case in the following section 3.

The court in *Kenyon* considered two issues. First, whether the unavailability of a judge to preside over trial qualifies as an excluded period for an unavoidable or unforeseen circumstance that permits continuance of the trial date past the time-for-trial deadline. *Kenyon*, 167 Wn.2d at 135. The court considered a second question of whether the trial court must make a careful review of the availability of courtrooms and *pro tempore* judges under the post-2003 version of CrR 3.3. *Kenyon*, 167 Wn.2d at 135-36 (citing CrR 3.3 (2003)).

As to the first issue, under the facts of the case the court concluded that in a county with two judges, where one judge was on vacation and the other was in trial, the unavailability of a courtroom constituted court congestion, and was not unavoidable or unforeseen circumstances that constituted an excluded period under CrR 3.3(e)(8). *Kenyon*, 167 Wn.2d at 136-37, 138-39. As to the second issue, the court in *Kenyon* held that a court can take action and continue a case beyond the time-for-trial deadline for court congestion, however, to justify doing so it must document the availability of *pro tempore* judges and unoccupied courtrooms. *Kenyon*, 167 Wn.2d at 138-39.

At the hearing before the trial court, defense counsel also cited to a number of unpublished opinions. However, unpublished opinions have no precedential value and should not be considered by the courts.

Yousoufian v. Office of Ron Sims, Slip. Op. No. 80081-2 p. 12, --- Wn.2d ---, --- P.3d ---, 2010 WL 1225083 (2010). Accordingly, the unpublished cases cited in the report of proceedings are not discussed here.

- b. The trial court erred where it dismissed the case for a lack of review under the current version of CrR 3.3. Dismissal is only allowed when the time for trial has expired.

CrR 3.3(h) provides in pertinent part that:

A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. ... No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute or the state or federal constitution.

The trial court's failure to conduct a review why each courtroom is unavailable and whether *pro tempore* judges are available is not a basis for dismissal under the plain language of the current version of the rule.

Here, when there were no courtrooms available, the judges did not extend the time for trial deadline. Instead they maintained the deadline on its original date and reduced the count of time for trial remaining each time they continued the case.

This Court should take this opportunity to interpret the current version of the rule according to its plain language and to exorcise the detritus of language from previous versions of the rule that seems to be inadvertently carried forward through successive published opinions.

Regardless of whether or not it any longer falls under a "good faith" analysis, a review of courtrooms may still be used to justify continuing the trial date beyond the time-for-trial deadline as a result of court congestion. Nonetheless, the trial court's conduct of a review of courtrooms and *pro tempore* judges is not an independent requirement upon the trial court. A review of courtrooms is only required as a saving mechanism where the case would otherwise be dismissed because the trial date was continued for court congestion. Moreover, there is no requirement, nor indeed any need for a review of courtrooms, where the trial date is not continued beyond the time-for-trial deadline in the first place.

For these reasons, the trial court erred when it dismissed the case. Here, the presiding judges did not conduct a review of the unavailable courtrooms or *pro tempore* judges when the court continued the case as a result of congestion. However, that was not improper because the continuance was done one day at a time, the time for trial deadline was maintained on the same date, and the case was never continued beyond the time-for-trial deadline as a result of court congestion. Under these facts, the presiding judge had no need or obligation to conduct a review of courtrooms. The trial court's subsequent dismissal for the lack of a review was improper and error. The trial court's dismissal of the case should be reversed.

3. DISMISSAL WAS IMPROPER WHERE THE DEFENDANT'S TIME FOR TRIAL NEVER EXPIRED.

a. The Time For Trial Never Expired.

The court substantially revised CrR 3.3, the time for trial rule in 2003. The post 2003 version of the rule is the authority that controls this case. For that reason, cases interpreting the earlier version of the rule are generally inapplicable to the present version.

Court rules are interpreted according to the rules of statutory interpretation. *State v. Collins*, 152 Wn. App. 429, 216 P.3d 463 (2009) (citing *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007)).

It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). The rule requires that a defendant be brought to trial within 60 days if the defendant is detained in jail, or within 90 days if the defendant is released from jail or was never detained in jail in the first place. CrR 3.3(b)(1)-(2).

The initial date by which trial must commence is the date of arraignment. CrR 3.3(c)(1). However, the commencement date, and thus the time for trial deadline, can be reset based upon any of several different occurrences. CrR 3.3(c)(2). Relevant here are first, waiver by the defendant and second, appellate review or stay. CrR 3.3(c)(2)(i), (iv). There are also a number of periods that shall be excluded from the computation of the time for trial. CrR 3.3(e). Two of those are relevant to this analysis: continuances; and unavoidable or unforeseen circumstances. CrR 3.3(e)(3), (8).

Continuances may be granted upon written agreement of the parties, or on the motion of the court or a party when required in the administration of justice and the defendant will not be prejudiced in his defense. CrR 3.3(f). A continuance made on the motion of the court or a party must be made before the time for trial has expired, and the court must state on the record or in writing the reasons for the continuance. CrR 3.3(f)(2).

Certain periods, including continuances, are excluded from the computation of the time for trial. CrR 3.3(e). Those periods are referred

to in the rule as “excluded periods.” CrR 3.3(b)(5), (e). Additionally, the time for trial shall not expire earlier than 30 days after the excluded period. CrR 3.3(b)(5). The net effect of this provision is that after any excluded period, the time for trial remaining is either the time that was remaining before the continuance, or 30 days, whichever is greater.

Finally, the rule specifically provides that no case shall be dismissed for time-to-trial reasons except as expressly required by the rule, a statute or state or federal constitutions. CrR 3.3(h). Under the rule, a charge not brought to trial within the time limit shall be dismissed. This is the only basis permitting dismissal under the rule. CrR 3.3(h).

A decision to grant or deny a continuance falls within the sound discretion of the trial court. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). The reviewing court will not disturb the trial court’s decision unless it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Flinn*, 154 Wn.2d at 199 (citing *Downing*, 151 Wn.2d at 272).

When CrR 3.3 is applied to the facts of this case, the case did not persist past the allowable time for trial period.

For purposes of the issues on appeal, the analysis begins with the entry of the mandate from the prior appeal on April 2, 2008, which reset the commencement date. CrR 3.3(c)(2)(iv). After that, the defendant then first appeared in court on April 25, 2008. At the time he was in custody,

resulting in an initial time-for-trial deadline 60 days later, which was June 24, 2008. CrR 3.3(b)(1); (c)(2)(iv). The first trial date was set for May 29, which left 26 time-for-trial days remaining.

On May 22, 2008, the court entered an order continuing the trial date upon written agreement of the parties to August 18, 2008. CP 28. That was permissible under CrR 3.3(e)(3); CrR 3.3(f)(1). The period of the continuance was therefore excluded from the calculation of the time for trial. CrR 3.3(e)(3). That would have resulted in a remaining time for trial of 26 days, except that the defendant was now also out of custody, which extended the time for trial to 90 days, thereby adding an additional 30 days to the total. CrR 3.3(b)(3). Thus, the defendant's correct time for trial remaining was $26+30=56$ days. The trial court's order incorrectly lists the time-for-trial remaining as 30 days. CP 28. The order therefore incorrectly calculates the expiration date as September 16, 2008, when in fact it should have been October 13, 2008.

Because the court repeatedly continued the cases, and continuances are excluded periods, the 56 days of remaining time-for-trial transmits through to the rest of the orders until such point as there would be a continuance that did not qualify as an excluded period.

Thus, on August 18, 2008, the court entered an order continuing the trial date upon the written agreement of the parties to October 16, 2008. CP 52. This was permissible under CrR 3.3(e)(3); (f)(1). The period of the continuance was excluded from the time for trial calculation,

so that the time-for-trial deadline was now 56 days later than the new trial date, which was December 11, 2008. Again, the expiration date and time for trial days remaining as calculated on the continuance order were in error. CP 52.

On October 16, 2008, the court entered an order continuing the trial date upon written agreement of the parties to February 3, 2009. CP 54. The correct new time for trial deadline was then 56 days later, which was March 31, 2009. This order also incorrectly listed the expiration date as March 5, 2009, and the time for trial remaining as 30 days.

On February 3, 2009, the court entered an order continuing the trial on the State's motion as required in the administration of justice because the prosecutor was in trial. This was permissible under CrR 3.3(f)(2). The defense did not object. CP 65. Trial was continued to April 22, 2009, so that the correct time for trial expiration was 56 days later, June 17, 2009. *See*, CrR 3.3(e)(3).

On April 22, 2009, the court entered an order continuing trial from April 22, 2009, until June 15, 2009, on the motion of the State, Defendant and Court because the defense attorney was in trial and the case was being assigned to a new deputy prosecuting attorney. CP 66; RP 04-22-09, p. 3, ln. 9-17. Notwithstanding that the motion was brought in part by the defense because defense counsel was in trial on another case, the defendant objected on this occasion. CP 66; RP 04-22-09, p. 4, ln. 4 to p. 6, ln. 10. The defense did not clearly articulate the basis for the objection,

however it does not appear to be to the fact of the continuance itself, since defense counsel was in another trial, but rather to the length of the continuance, which was 54 days, because a new deputy prosecutor was being assigned to the case.

Once the court has good cause for continuing the trial, the court has discretion as to which date to continue it to. *Flinn*, 154 Wn.2d at 201. On June 15, 2009, the court entered an order continuing the trial date one day from June 15, 2009, to June 16, 2009, on the court's motion for administrative necessity because no courtrooms were available. CP 70; RP 06-15-09, p. 8, ln. 9-24; p. 12, ln. 5 to p. 13, ln. 16. The order reduced the time for trial days remaining by one day. CP 70; RP 06-15-09, p. 8, ln. 15-17. The correct calculation of the time for trial remaining was 53 days, although the court's order listed it as 29. CP 70. The order also noted that the State's witnesses were unavailable from June 23 to 30, and from July 15 to 22. CP 70. The defendant filed a one page motion *pro se* seeking dismissal of his case, claiming that no courtrooms were available for criminal trials, as well as other reasons, but failing to cite to any legal authority. CP 71.

On June 16, 2009, the court entered an order continuing trial one day from June 16, 2009, to June 17, 2009, on the motion of the court for administrative necessity because no courtrooms were available for trial.

CP 72. The defendant noted his second objection to courtroom unavailability. The correct calculation of time for trial remaining was 52 days, although the court's order listed it as 28. CP 72.

On June 17, 2009, the court entered an order continuing trial from June 17, 2009, to June 29, 2009, on the State's motion in the administration of Justice because the State's witnesses were unavailable June 23 to 30. June 17 was a Wednesday, and the State's concern was that the parties could not proceed far enough in the trial to call the State's witness before June 23. CP 73; RP 06-17-09, p. 14, ln. 9-12. The court held that the witness unavailability provided good cause for the court to continue the case. RP 06-17-09, p. 15, ln. 8-12. Because the court found good cause for the continuance, it re-set the time for trial remaining after the new trial date at 30 days. CP 73; RP 06-17-09, p. 15, ln. 8-14.

Defense counsel did not object to the continuance, but rather to the calculation of the remaining time for trial, stating that the defense believed there were only 17 days remaining. RP 06-17-09, p. 15, ln. 1-17; p. 16, ln. 5-14. The parties had originally recorded on the order that the trial date would be continued to July 2, 2009, however, the court moved that date up three days to June 29, 2009, and then adjusted the time for trial remaining under the defense calculation from 14 to 17 days, and adjusted the time for trial expiration date as determined by the court to June 30, 2009. CP 73; RP 06-17-09, p. 16, ln. 9-21.

Notwithstanding defense counsel's lack of objection to the continuance, in addition to signing the order, the defendant wrote on the order above his signature that he objected to the continuance. CP 73. Additionally, the court noted that the defense had preserved its objection on that issue. RP 06-17-09, p. 15, ln. 12-13. The order also stated "no courtrooms today." CP 73; RP 06-17-09, p. 14, ln. 9 to p. 16, ln. 25.

Because the court validly continued the case for good cause shown, the correct remaining time for trial was 52 days, not 30. However, even if the defense objection had merit and the continuance was not for good cause shown, the time for trial remaining would be shortened by 12 days to 40, not the 17 claimed by the defense.

On June 29, 2009, the court entered an order continuing trial from June 29, 2009, to July 6, 2009, on the motion of the defendant and the court, and upon agreement of the parties because there were no courtrooms available and "[d]efense counsel unavailable due to medical 7/1+7/2." CP 74. July 1 and 2, 2009, were a Thursday and Friday, so that July 6 was the following Monday.

The defendant objected, noting on the order, "Δ believes the initial no courtrooms has caused other prejudice such as witness unavailability and Δ counsel unavailability." CP 74.

Because the continuance was upon agreement of the parties, the court reset the time for trial remaining to 30 days. However, correctly it should have remained at either 52 or 40 days depending upon whether the

court properly continued the case in the administration of justice on June 29.

On July 6, 2009, the court entered an order continuing the trial from July 6, 2009, to August 13, 2009, on the motion of the State in the administration of justice because a police officer had a family emergency and was unavailable this week and other scheduling conflicts through July and August, noting “[d]efense counsel is on scheduled vacation 7/20-8/4.” CP 75; RP 07-06-09, p. 3, ln. 4 to p. 4, ln. 16. Defense counsel agreed to the continuance. RP 07-06-09, p. 3, ln. 23 to p. 4, ln. 4. The defendant noted his objection on the order because he believed that no courtrooms was the cause. CP 75. Presumably, the defendant was again asserting his theory that all subsequent continuances were caused by the earlier continuances where no courtrooms were available.

Because the court continued the case in the administration of justice, it set the time for trial remaining at 30 days. CP 75. However, again the correct calculation was either 52 or 40 days depending upon whether the case was properly continued on June 29.

On August 13, 2009, the court entered an order continuing the trial date from August 13, 2009, to August 20, 2009, upon agreement of the parties because defense counsel was in another trial and anticipated finishing in one week. CP 76; RP 08-13-09, p. 17, ln. 9 to p. 19, ln. 4. The order noted that the State had not verified witness availability for the new trial date and may need a brief continuance. CP 76. Instead of

signing the order, the defendant noted an objection, writing, “Δ asserts that original no-courtrooms is the cause for all subsequent continuance requests and herewith objects to continuances.” CP 76.

Because the August 13 continuance was upon agreement of the parties, the court set the remaining time for trial at 30 days. CP 76. However, again, the correct time for trial remaining was either 52 or 40 days.

On August 18, 2009, the defendant filed a motion to dismiss, *pro se*, claiming a speedy trial violation. CP 77-85.

On August 20, 2009 the court entered an order continuing the trial date from August 20, 2009, to Monday August 24, 2009, on the motion of the court because no courtrooms were available. CP 86; RP 08-20-09, p. 2, ln. 10-20 20; p. 3, ln. 13 to p. 5, ln. 8. The order also scheduled the defendant’s motion to dismiss to be heard on August 24. The defendant objected to the no courtrooms continuance. CP 86. On the order, the court counted down four times for trial days, and showed 26 days remaining in the time for trial. After reducing for the four days, the correct calculation was either 48 or 36 days, depending upon the validity of the June 29 continuance.

On August 24, the court entered an order continuing trial that continued the trial date from 08-24-09 at 8:30 a.m., to 08-24-09 at 1:30 p.m., because no courtrooms were available in the morning. CP 87. The order directed the parties to report back at 1:30 p.m. CP 87. The

defendant objected, stating “Δ object to no-courtrooms and continuances thereon Δ re-note [sic] dismissal motion.” That afternoon the case was assigned to the Honorable Roseanne Buckner for trial. CP 88.

Thus, at no time did the time for trial remaining ever expire. Even under the defendant’s own calculation, the lowest the time for trial remaining ever got was 17 days on June 29, 2009. RP 06-17-09, p. 14, ln. 24 to p. 15, ln. 17; p. 16, ln. 3-12. However, on that day the case was continued on the motion of the defense, and upon the agreement of the parties in order to work around defense counsel’s unavailability on July 1 and 2. CP 74.⁴

- b. There is no merit to the defendant ‘s claim that after the June 17 continuance for no courtrooms, all subsequent continuances could not be for good cause or be excluded.

The defendant’s claim that his time for trial expired in fact has a different basis than application of the rule to calculate the time for trial remaining. The defendant’s position is that once his case was continued for no courtrooms available, the time for trial remaining began to count

⁴ Indeed, if all of the days involved in continuances where the case was continued for no courtrooms were added together, they only add up to 6 days. Moreover, even if this Court were to hold that the continuance on June 17 was improper and add the 12 days of that continuance to the 6 days of no courtrooms, the total is still only 18 days. In no case do the days counted off exceed 30 days, much less the 54 with which the defendant properly started on June 15, 2009. This is mentioned only to show that even by a measure that is overly generous to the defendant, he still never came anywhere close to having his time for trial expire.

down, and no subsequent continuance, no matter whether in the administration of justice or upon agreement of the parties, could stop that clock from ticking. Said otherwise, the defendant's position is that once the case was continued for no courtrooms available, the case had to be brought to trial within the time for trial remaining at that point, or it would have to be dismissed.

However, that argument is without merit. First, it is inconsistent with a plain reading of the rule, which imposes no such prohibition. The position is also inconsistent with case law.

State v. Johnson controls this case. *State v. Johnson*, 132 Wn. App. 400, 132 P.3d 737 (2006). *Johnson* was decided under the new post-2003 version of CrR 3.3. *Johnson*, 132 Wn. App. at 411. In *Johnson*, the court held that the time for trial was not violated where the trial date was continued when there were no courtrooms available and then subsequently continued for other reasons in the administration of justice. *Johnson*, 132 Wn. App. 413.

After the initial trial date had been set, the defendant objected to a continuance, but the court reset the trial date to a new date that was still within the time for trial deadline. *Johnson*, 132 Wn. App. 400, 412, 132 P.3d 737 (2006). The court next continued the trial date over the defendant's objection because the prosecutor was in trial on another matter. The court then continued the case another time with the agreement of both counsel, but possibly over the objection of the defendant, in order

for the parties to prepare and respond to a motion to dismiss by defense counsel. *Johnson*, 132 Wn. App. at 412. At the next date, there were no courtrooms available for trial, but both attorneys wanted a date for the motion to be heard separately, so the case was continued again over the defendant's objection. *Johnson*, 132 Wn. App. at 412. The case was then "sent out" for trial and preliminary motions were heard when the state found out the detective in the case was not available, so the State sought a continuance which was granted over the defendant's objection. *Johnson*, 132 Wn. App. at 412-13. It was on the date after this that trial finally commenced. *Johnson*, 132 Wn. App. at 413.

The court in *Johnson* held that the continuances are excluded periods. *Johnson*, 132 Wn. App. at 413. After an excluded period, a minimum 30 day period of time for trial remaining applies. CrR 3.3(b)(5). The court also held that where a trial date was rescheduled to a new trial date that was still within the original time-for-trial period, there was no need for it to consider whether there was an adequate basis for rescheduling the trial date. *Johnson*, 132 Wn. App. at 412. The court further held that defense counsel could continue the trial date notwithstanding the objection of the defendant. *Johnson*, 132 Wn. App. at 412, 413 (citing *State v. Campbell*, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), *cert. denied* 471 U.S. 1094, 105 S. Ct. 2169, 85 L.Ed.2d 526 (1985)). Finally, the court in *Johnson* noted that a motion made "on behalf

of any party waives that party's objection to the requested delay.”

Johnson, 132 Wn. App. at 413 (quoting CrR 3.3(f)(2)) (emphasis added).

As in *Johnson*, here, each time the trial date was rescheduled for no more courtrooms, the new date was within the time for trial deadline, which was maintained on the same date it had been and the time for trial remaining was counted down the appropriate number of days. Otherwise, all the continuances were in the administration of Justice, and thus excluded periods after which the minimum time for trial was 30 days.

The June 17 continuance in this case was because of the unavailability of the State's witnesses, although the order also noted that no courtrooms were available in response to the defendant's *pro se* objection even though objected to by defense counsel. This is similar to the May 10, 2004, continuance in *Johnson* in which there were no courtrooms available, but the lawyers wanted to continue the case in order to have a hearing on the dismissal motion prior to trial. *Johnson*, 132 Wn. App. at 412. The court in *Johnson* separately held that it was appropriate for the trial court to continue the case due to witness unavailability even where it was unexpected and the case had already been “sent out” for trial. *Johnson*, 132 Wn. App. 412-13. Here, as to the June 17 continuance, the parties had known in advance about the witness unavailability problem well in advance and as to the July 6, 2009, continuance because the officer was unexpectedly unavailable, the case had not yet been “sent out” to trial.

Thus, both those continuances, but especially the June 17 continuance, fall well within the ambit of *Johnson*.

In *State v. Jones*, the court held that where the trial court did not abuse its discretion in granting a continuance in the administration of justice for unavoidable or unforeseen circumstances beyond the court's control (defense attorney was out ill on trial date) that additional continuances for other valid reasons do not result in a violation of the time for trial, nor do they justify dismissal. *State v. Jones*, 117 Wn. App. 721, 729-30, 72 P.3d 1110 (2003). The opinion in *Jones* pre-dated the 2003 version of CrR 3.3, and thus was decided under the much less flexible older version of the rule.

In *State v. Flinn*, the court held that where the court continued the case for good cause in the first place, the court had discretion in placing the new trial date on the court's calendar and could move the trial date beyond the upcoming judicial conference period (equivalent to court congestion for purposes of a continuance). *Flinn*, 154 Wn.2d at 201. Moreover, *Flinn* was also decided under the pre-2003 version of the court rule. *See, Flinn*, 154 Wn.2d at 199, n. 1.

E. CONCLUSION.

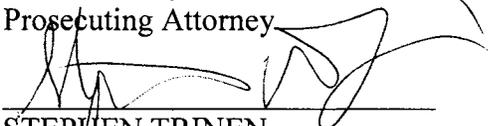
The defendant was not entitled to independently make pro so objections that were not made by his attorney, and all such objections should be disregarded for purposes of this appeal. The trial court erred

where it granted the defendant's motion to dismiss on the basis that the presiding judges failed to conduct a review of the unavailability of courtrooms or pro tempore judges because the failure to conduct a review is not an independent basis for dismissal under the rule where the time for trial has not expired. Finally, because the defendant's trial date was never continued beyond the time for trial deadline so that his time for trial never expired, dismissal was improper and the court erred in granting such.

The trial court's dismissal should be reversed.

DATED: June 3, 2010.

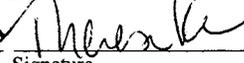
MARK LINDQUIST
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
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.

6-3-10 
Date Signature

FILED
COURT OF APPEALS
10 JUN -3 PM 4:37
STATE OF WASHINGTON
BY _____
DINITY