

No. 40482-6-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALBERT LYLE WHALEN

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEFENDANT

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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SUPPLEMENTAL STATEMENT OF THE CASE

Appellant's statement of the case is adequate except as argued below, and except for the following factual corrections: Whalen states that he testified that "his aunt was a heroin user." Brief of Appellant 6. Whalen cites "RP 53'54" for this factual assertion. Id. But Whalen did not testify "that his aunt was a heroin user." RP 53-54. In fact, Whalen did not put on any evidence at trial to support the assertion that his aunt was a heroin user. RP 53-55 (at least as far as Respondent can find).¹ Whalen's trial *attorney*, however, did tell the trial court in a request for a continuance that it was his "understanding" that Whalen's aunt "is also a heroin user." RP 6.

But at the trial on January 8, 2010, Whalen presented no testimony or evidence during the jury trial to support his the assertion in his brief that his aunt was a heroin user. RP 53-55. Whalen's attorney also told the court that Whalen did not tell him about this witness (his aunt) until late on the day before the trial. RP 5. Whalen himself tried to contact his aunt about testifying but she told Whalen she would not come to court. RP 6. The trial court

¹ Making things more even confusing, Whalen's brief does not contain a single citation to the record for factual assertions he makes in the argument sections of his brief. Brief of Appellant 8,11,14, 15, 16.

denied Whalen's request for a continuance to secure the presence of his "aunt," stating:

I'm not inclined to grant a continuance, unless there's an effort made to try to get her here, and given the fact that she's apparently less than two or three blocks away I don't see why that couldn't be at least attempted. I'm not inclined to grant a continuance.

RP 7. The trial court then allowed Whalen a brief recess so his attorney could try to find the witness. RP 8. Upon returning to court, Whalen's counsel said that, " I traveled to the apartment building where this witness is reported to live. I spoke with the state patrolman and she indicated that although my client refers to her as his aunt, it's not really his aunt." RP 9. Whalen's counsel said he went to every apartment on the third floor of the building where Whalen's aunt supposedly lived and that one person was home at that time and she had never heard of Victor Whalen. Id. That person also said she did not know anyone who knew Victor Whalen. Id. In denying the continuance, the trial court explained:

The case was assigned this trial date on the 15th of October. An Omnibus Hearing was scheduled for November 5th and confirmation on the 31st [of December], which was last week. Due diligence . . . on the part of the defendant requires that the defendant make some effort to notify his counsel of potential witnesses sometime other than the day before trial. . . . there's no showing . . . this witness . . . sold this container that supposedly contained the heroin to him. . . . there's no showing . . . that she would come and testify

consistent with this story. Under the circumstances, I'm denying the request for a continuance.

RP 12. The trial went forward and Whalen was convicted as charged. RP 74.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED WHALEN'S MOTION FOR A CONTINUANCE ON THE DAY OF TRIAL BECAUSE WHALEN HAD OVER FOUR MONTHS TO GET HIS WITNESS TO TRIAL.

The trial court did not abuse its discretion when it denied Whalen's request for a continuance on the day of trial because Whalen did not "offer a good reason for the delay in obtaining the desired evidence." Brief of Appellant 9, *citing Molsness v. City of Walla Walla*, 84 Wn.App. 393, 400-01, 928 P.2d 1108 (1996). Namely, Whalen's claim that he needed time to find his "aunt Helen" to have her testify the baggie was hers was not a "good reason" because Whalen did not tell his attorney about this witness until the eve of trial and because the witness told Whalen she would not testify. Accordingly, this court should affirm.

A trial court's denial of a motion for a continuance is reviewed for an abuse of discretion. *State v. Flinn* 154 Wash.2d 193, 199-201, 110 P.3d 748 (2005). Reversal of a trial court's discretionary decision is appropriate only if it is manifestly

unreasonable, or exercised on untenable grounds or for untenable reasons. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Furthermore, a trial court's discretionary decision to deny a continuance will be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974), *overruled on other grounds* by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). There are no mechanical tests to determine whether a denial of a continuance deprives a criminal defendant of a fair trial. The reviewing court must examine the circumstances presented in each case. Eller 84 Wn.2d at 96. Of particular interest are the reasons presented to the trial judge at the time the request is denied. State v. Kelly, 32 Wn. App. 1 12, 114-1 15, 645 P.2d 1146, *review denied*, 97 Wn.2d 1037 (1982).

The reasons Whalen presented in the present case did not justify a continuance, nor did the denial of a continuance deprive Whalen of a fair trial.

Here, Whalen's reasons for requesting a continuance *on the day of trial* strain credulity. Whalen had *over four months* to "compel the presence" of his so-called "exculpatory witness" for

trial. CP 1-3; RP 5,6. Whalen obviously knew from "day one" that he was at least charged with possessing heroin--but he waited until the day before trial to mention to his attorney that the baggie containing heroin residue was given to him by his "aunt." RP 5, 6. The charges were filed on August 24, 2009. CP 1-3. On October 15th a jury trial date of January 8, 2010 was set. RP 12. There was an omnibus hearing on November 5th and trial confirmation on December 31, 2007. RP 12. But Whalen waited until the *eve of trial* to even mention to his attorney the possibility of getting his "aunt" to testify. RP 5,6.

Furthermore, Whalen admitted that his "aunt" and he were "not getting along" at the time of trial and that she had told him "she would not come to court." RP 6. For that matter, there is nothing in this record to indicate that Whalen did anything but invent this entire story about his "aunt" supposedly being the "real" owner of the residue-containing baggie. RP 10 (doubts being expressed by the trial court). Furthermore, the trial court did give Whalen a brief recess to try to contact his "aunt"--as she lived nearby. RP 8. But the witness could not be found. Id.

And then we have the *other* evidence that calls into question Whalen's late "the-other-guy-did-it" claims: the belt and syringe

sitting on the seat of Whalen's vehicle--seen in plain view by the arresting officer at the time of arrest, and known by the officer to be items associated with illicit drug use. RP 42-44. At trial, all Whalen could come up with was that it was not his belt and it was not his syringe. RP 51, 52. The officer also inspected Whalen's arms at the time of arrest and saw "track marks" and fresh injection sites, all indicating drug use. RP 44. At trial, Whalen denied he had any track marks on his arms. RP 52.

All of these facts overwhelmingly show that (a) there was no "good reason" to grant Whalen's continuance, and (b) that it was Whalen who was responsible for this crime--not some mysterious "Aunt Helen." RP 10. Given Whalen's inexcusable four-month delay before telling his attorney to subpoena his "aunt Helen," not to mention the fact that Whalen himself admitted that "aunt Helen" told him she would not come to court--show that the trial court did not abuse its discretion when it denied Whalen's tardy motion to continue this case on the day of trial. Accordingly, Whalen's conviction should be affirmed.

B. THE TRIAL COURT DID NOT "REFUSE TO ALLOW" WHALEN TO PRESENT "EXCULPATORY PHYSICAL EVIDENCE" AND DID NOT ABUSE ITS DISCRETION WHEN IT SUSTAINED THE STATE'S OBJECTION TO WHALEN'S REQUEST TO "SHOW THE JURY HIS ARMS."

Whalen also argues that when the trial court sustained an objection to Whalen's request to show the jury his arms, purportedly to show his arms had no "track marks," "denied him a fair trial." Brief of Appellant 12-16. This argument is also without merit.

Admission of evidence is within the trial court's sound discretion, and an appellate court we will not disturb its decision on review absent a showing of abuse. State v. Stubsjoen, 48 Wn.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983). Whalen has not met that burden here.

First of all, the trial court did not "refuse to allow" Whalen to *present evidence* regarding his supposed lack of track marks. In fact, Whalen testified that he did not have any "track marks or

scars" on his arms that might indicate he used intravenous drugs. RP 52. Therefore, Whalen did indeed give testimony to rebut the State's claim that his arms contained track marks. Id.

More importantly though, it appears that Whalen's argument that it was essential for him to show the jury his arms is based upon his further admission that, "[b]y far, the state's best evidence to rebut the . . . claim of unwitting possession was Trooper Murphy's testimony that she saw a syringe in his truck and **fresh** 'track marks' on his arm." Brief of Appellant 14 (emphasis added). But the jury trial occurred more than four months after the arrest, when the officer saw the "fresh" track marks on Whalen's arms. RP 34, 44; RP 5-6. Thus, common sense tells us that the likelihood that Whalen's arms would still show "fresh" needle sticks or track marks some *four months later* is extremely unlikely. And again, Whalen did testify that he did not have track marks on his arms at all. RP 52.

Moreover, assuming Whalen's claim about the lack of track marks was correct, showing the jury his arms would have been unnecessarily cumulative, since Whalen himself told the jury his arms had no track marks. RP 52. Accordingly, the trial court did not err when it sustained the State's objection to Whalen's request

to show the jury his arms to rebut evidence of transitory needle pokes seen by the officer *four months earlier*. RP 44, 52. This Court should affirm.

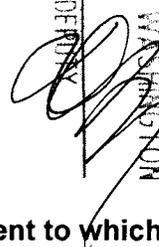
CONCLUSION

For the reasons set out above, this Court should affirm Whalen's conviction in all respects.

RESPECTFULLY SUBMITTED this 27th day of September, 2010.

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Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

John Hays
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Dated this 27th day of September, 2010, at Chehalis, Washington.

