

NO. 44086-5-II

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

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STATE OF WASHINGTON, Respondent

v.

ARVELL LAMONT KINDELL, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01129-0

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE STATE WAS NOT RELIEVED OF ITS BURDEN
- II. KINDELL HAD EFFECTIVE ASSISTANCE OF COUNSEL
- III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT
- IV. THE COURT DID NOT ABUSE ITS DISCRETION IN CONTINUING KINDELL'S TRIAL PURSUANT TO CrR 3.3
- V. KINDELL STIPULATED TO THE COMPARABILITY OF HIS OUT-OF-STATE CONVICTIONS

B. STATEMENT OF THE CASE

Kindell was tried for Burglary in the First Degree with a firearm enhancement, and Unlawful Possession of a Firearm. Prior to the beginning of trial, the State twice requested a continuance of the trial date. The first continuance was granted and was within the initial 60 day time for trial as required by CrR 3.3(b)(1); CP 29. The State's second request for a continuance was made because the assigned prosecutor had a pre-scheduled vacation for the new trial date, and a police officer witness was on a pre-scheduled vacation on the new trial date. CP 32-33; 1 RP at 9-22. On August 22, 2012, after hearing argument from the State and defense, the trial court granted a one week continuance of the trial date. CP 34; 1 RP at 22. The new trial date was 63 days after arraignment. Trial was held

on the new date, September 4, 2012, and Kindell was convicted of Burglary in the First Degree with a firearm enhancement and Unlawful Possession of a Firearm. CP 3.

The State agrees to the substance of the trial testimony as summarized by Kindell in his Brief of Appellant. Any additional information is provided within the argument below.

At sentencing, the State, Kindell, and Kindell's defense attorney signed a "Declaration of Criminal History" which listed Kindell's prior criminal history from the States of Colorado and Washington, and assigned points to certain prior convictions. CP 13-14.

C. ARGUMENT

I. COURT RELIEVED STATE OF ITS BURDEN BY IMPROPERLY RESPONDING TO A JURY QUESTION

Kindell argues that the trial court improperly responded to a jury question and thereby improperly relieved the State of its burden of proving Kindell guilty of the crime of Burglary in the First Degree. This Court should decline to decide this issue as Kindell did not preserve this issue at the trial court level. Kindell agreed to the response the trial court gave the jury. Through his counsel he, in the end, agreed to the response given. 2 RP at 304-05. Further, Kindell showed during the discussion on what

answer, if any, the court should give the jury on its questions, that he had the ability and presence of mind to speak up. He gave his own input on an answer proposed by the court. 2 RP at 301. This showed his ability to contribute. Kindell himself expressed no objection to the answer given to the jury, and his counsel agreed to it.

An appellate court may refuse to review an assignment of error raised for the first time on appeal. RAP 2.5(a). Kindell agreed to the responses given by the trial court. Kindell did not object and did not preserve this issue for appeal. Kindell does however claim the trial court's response to the jury question is a manifest error which affects his constitutional rights. However, the response to the jury did not shift the burden of proof in any way, or diminish the State's burden. Within the answer to the jury questions to which Kindell now assigns error, the court stated that all four elements must be proved beyond a reasonable doubt to return a verdict of guilty. This emphasized for the jury what the instructions previously indicated: the State must prove all elements beyond a reasonable doubt in order to find the defendant guilty. The court's answer did not diminish this burden or allow the jury to convict without finding these elements were met. Even if this Court finds Kindell did preserve the issue, or that it is an issue which affects his constitutional rights, the trial court did not improperly relieve the State of its burden of

proof. The court's response did not convey any affirmatively inaccurate information, and the information it did convey did not improperly impact the jury's verdict

The decision of whether to respond to a question from a jury during deliberations is within the discretion of the trial court. *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997). A court reviews the trial court's decision to answer a question from a jury for abuse of discretion. *See State v. Becklin*, 163 Wn.2d 519, 530, 182 P.3d 944 (2008) (finding the trial court did not abuse its discretion in answering a jury question). Kindell is correct that a reviewing court reviews the denial of constitutional rights de novo. *See Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005). Kindell argues that his constitutional rights to due process were violated. If this is the case, then the correct standard is de novo. However, as the trial court did not relieve the State of its burden, Kindell's constitutional rights were not violated. And the trial court did not err in answering the jury's questions. As the trial court's answer to the jury questions did not give any affirmative answer, there is no prejudice to Kindell and his claim fails.

Kindell argues that the trial court's answer to the jury question relieved the State of its burden in proving Kindell committed the crime of Burglary. Kindell concedes the instructions given to the jury were proper

in this regard. *See* Br. of Appellant, p. 16. The answer to the jury's question reiterated that "All 4 elements must be proved by [*sic*] a reasonable doubt to return a verdict of guilty." CP 92. The court also stated, "rely on the instructions as a whole." CP 92. Though the court also told the jury that whether possessing a firearm is a crime against property is a "factual determination you need to collectively decide," this information was negative in nature, and did not relieve the State of its burden of proof.

It is not reversible error for a judge to give a jury additional instruction, or answer to a question that is negative in nature and conveys no affirmative information. *State v. Safford*, 24 Wn. App. 783, 794, 604 P.2d 980 (1979); *State v. Colson*, 9 Wn.2d 424, 426-28, 115 P.2d 677 (1941); *State v. Lewis*, 37 Wn.2d 540, 547-48, 225 P.2d 428 (1950); *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960), *cert. denied*, 366 U.S. 934, 6 L. Ed. 2d 846, 81 S. Ct. 1658 (1961); *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980).

When a judge communicates with a jury in the absence of counsel, it is not reversible error if the communication does not convey any affirmative information. *Russell*, 25 Wn. App. at 948. Such a communication is not prejudicial. *Id.*

This situation is less prejudicial to Kindell than if the judge had conveyed information to the jury without the benefit of counsel, and nonetheless, even if Kindell and his attorney had not been consulted, there would have been no prejudice to Kindell because the information conveyed was not affirmative in nature. In the end, the jury was left with the instruction that the State must prove all 4 elements prior to a guilty verdict being rendered, and that they decide the factual issues. Though the issue of whether the crime of Unlawful Possession of a Firearm is a crime against property therein may be a legal issue, the court's failure to instruct on that issue is not reversible error. The court's response to the jury was the equivalent of giving no response. No response would have meant the jury would rely on the jury instructions as a whole.

Kindell cites to *State v. Devitt*, 152 Wn. App. 907, 218 P.3d 647 (2009) for support that the trial court improperly relieved the State of its burden of proof. Had the trial court answered the jury's fourth question in the affirmative, the State would agree, the conviction would be improper. In *Devitt*, the Court held that unlawful entry into a residence with the intent to obstruct police in their capture of the individual is not sufficient to support a conviction of burglary. *Devitt*, 152 Wn. App. at 909. The facts of *Devitt* are notably different from the facts in the present case. *Devitt* did not assault the owner of the residence in order to obtain entry into the

residence; Devitt did not handle a firearm and make comments about shooting himself or another while in the residence; Devitt did not place the owner of the residence in fear for her safety; and Devitt did not engage in a multi-hour standoff with S.W.A.T. The prosecutor's theory of the case against Kindell is accurate- it was a man who had the intent to do anything, to do whatever it took to avoid apprehension by police, including intentionally assaulting a little girl. There was sufficient evidence of Kindell's intent to commit a crime against persons or property within the residence for a jury to make such a finding.

The answer to the jury question to which Kindell assigns error did not diminish the State's burden of proving all elements of the crime of Burglary beyond a reasonable doubt. The court's answer did not change the elements of the crime and did nothing more than tell the jury that the jury was the fact-finder in the case. The court did not comment on the evidence and did not make any affirmative statement regarding the case. Though it may have been proper for the court to make an affirmative statement in this situation, it was not error for the court to fail to do so.

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II. KINDELL RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)

(stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s

challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Kindell alleges his attorney is ineffective for failing to request a bill of particulars in this case and for failing to object to the court's answer to the jury questions. A bill of particulars would have not provided the defense with any additional information as the State did not have to elect which crime it believed the defendant had the intent to commit within the residence. It is clear from pre-trial proceedings, that both defense counsel and the defendant were fully aware of the facts upon which the State relied to support the Burglary charge. 1 RP at 1-20. Kindell would have received no advantage from a bill of particulars and his attorney would have been no more or less prepared for trial. The police reports and other discovery provided to defense made it clear the events that the State relied upon to prove each charge.

Kindell's argument that his counsel was ineffective and that he was prejudiced by his failure to object to the court's answer to the jury question is without merit. As discussed above, the court's answer to the

jury was not prejudicial to Kindell. The State maintained its burden of proving every element of the crime beyond a reasonable doubt.

Kindell's counsel was not ineffective, but even more, Kindell cannot show prejudice based on what he claims were his counsel's shortcomings. Kindell must show prejudice based on his attorney's actions or failure to act; he has not met this burden.

### III. THE PROSECUTOR'S ARGUMENTS DID NOT AMOUNT TO MISCONDUCT

Kindell argues the prosecutor committed misconduct by misstating the law and by urging the jury to convict on an improper basis. Kindell's argument is without merit; Kindell did not object to the prosecutor's statements at trial, the prosecutor did not misstate the law or urge the jury to reach an improper verdict, and if there was any misconduct, it was not so flagrant and ill-intentioned that it resulted in incurable prejudice.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v.*

*Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*,

150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In

doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

Kindell alleges the prosecutor emphasized that the jury only had to be convinced the defendant intended to commit *any* crime when he entered the victim's residence. However, when you look at the State's closing argument as a whole, which case law requires us to do, it is clear the State argued the elements required to prove the crime of Burglary. Kindell misrepresents the prosecutor's argument by starting the quotation mid-thought. The prosecutor discusses the elements of the crime of Burglary and she begins the statements regarding the second element as follows:

Number 2 is that the entering or remaining was with the intent to commit a crime against a person or property therein. Now, I don't have to prove to you what crime he intended to commit...

2 RP at 262. This argument by the prosecutor does not in any way diminish her burden or argue to the jury that she did not need to prove that the defendant had the intent to commit a crime against a person or property within the residence. The prosecutor never argued during her closing or rebuttal arguments that the jury should find that the crime he

intended to commit within the residence was unlawful possession of a firearm.

Not only did the prosecutor not misrepresent the law or argue to the jury an improper basis for conviction, but her conduct was not so flagrant and ill-intentioned that it could not have been cured. Defense counsel did not object which shows that her statements, taken in consideration of her argument as a whole, were not objectionable. But further, an instruction from the judge that the elements of the crime included that the crime intended by the defendant had to be against person or property within the residence would have cured any possible misstatement by the prosecutor.

Kindell also argues the prosecutor committed misconduct when the prosecutor indicated that the police did not commit misconduct. The prosecutor's statements were supported by the evidence in the case. There was no evidence presented of any misconduct by any member of the police force. Defense counsel also did not object to these statements made during the prosecutor's rebuttal argument. These statements by the prosecutor, while possibly ill-advised, were not so flagrant and ill-intentioned that the resulting prejudice could not have been cured by an instruction on the jury to disregard her argument. Kindell's argument that

the prosecutor committed misconduct which prejudiced him thereby requiring a new trial is without merit.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO CONTINUE DUE TO PROSECUTOR AND WITNESS UNAVAILABILITY

A defendant detained in jail is entitled to a trial date within 60 days of arraignment. CrR 3.3(b)(1). The trial court may grant a continuance when it is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). The time during which a case is continued pursuant to CrR 3.3(f)(2) is an excluded period of time as long as it is required by the administration of justice and so long as the continuance does not prejudice the defendant. CrR 3.3(e)(3), (f)(2). If a period of time is excluded, then "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). On appeal, whether a trial court correctly applied CrR 3.3 is a question of law that is reviewed de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009). The trial court's decision to grant a continuance is reviewed for abuse of discretion. *State v. Yuen*, 23 Wn. App. 37, 378-79, 597 P.2d 401 (1979). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

Kindell argues that he was denied his right to speedy trial because his trial was held on the 63<sup>rd</sup> day after arraignment. Kindell assigns error to the first continuance requested by the State to obtain lab testing of evidence. However, this first continuance was within speedy, set for the 59<sup>th</sup> day after arraignment, and therefore the Court did not need to find any good cause or requirement of justice for the continuance. But even if it had, waiting for lab analysis of physical evidence is valid reason for continuing a trial. *State v. Osborne*, 18 Wn. App. 318, 321, 569 P.2d 1176 (1977). However, Kindell's violation of speedy trial argument would more accurately rest on the second continuance requested by the State, the continuance which pushed trial past the 60<sup>th</sup> day of speedy. The State requested a continuance of the trial date set for August 27, 2012 on the ground that the assigned prosecutor was unavailable due to a pre-scheduled vacation, and that a necessary and material witness for the State was unavailable for the trial date. The trial court granted the continuance over Kindell's objection and reset trial for September 4, 2012, on which date trial was ultimately held. Kindell has failed to preserve this issue for appeal because he did not move to dismiss the case for failure to provide trial within speedy trial timeline. The trial court's obligation to dismiss a

prosecution for violation of CrR 3.3 is triggered by a motion by the defendant. *State v. Barton*, 28 Wn. App. 690, 693, 626 P.2d 509 (1981). Although Kindell opposed the continuance, he did not move to dismiss. This issue has not been preserved for appeal.

Even if this Court finds Kindell did preserve this issue for appeal, the trial court did not abuse its discretion in granting the State's motion to continue. The unavailability of a material witness is a legitimate reason for continuing a trial when there is a valid reason for the unavailability of the witness and the witness will become available within a reasonable time, and there is not substantial prejudice to the defendant. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). In *State v. Grilley*, 67 Wn. App. 795, 840 P.2d 903 (1992), the Court upheld a short continuance due to a police officer's previously scheduled vacation, finding the trial court did not abuse its discretion.

It is also proper for the trial court to grant a motion to continue due to a prosecutor's unavailability.

Fairness in administration and effective justice requires that responsibly scheduled vacations of deputy prosecutors be honored by the State. To construe CrR 3.3 otherwise would be to deprive deputy prosecutors of the dignity they deserve, and would result eventually in less effective justice as well as in unfairness in the administration of justice.

*State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). Further, there is no per se requirement of reassignment of a case to another prosecutor when the prosecutor is unavailable for the scheduled trial date. *State v. Heredia-Juarez*, 119 Wn. App. 150, 155 79 P.3d 987 (2003). A trial court is “to consider all relevant factors” in deciding whether to grant or deny a motion to continue. *Id.* In *Heredia-Juarez*, the Court of Appeals recognized the importance of the prosecutor building a rapport with victims in certain kinds of cases and that that is a proper consideration of the trial court when determining whether to continue a case due to a prosecutor’s unavailability. *Id.*

The prosecutor in Kindell’s case had met with the elderly victim of a case (and indicated she spent considerable time with the victim and became involved in the case). 1 RP at 10-11. As the Court stated in *Heredia-Juarez*, “[t]he necessity to build rapport with victims, especially those involved in serious crimes, may properly be considered by the trial court in determining whether to require reassignment.” *Heredia-Juarez*, 119 Wn. App. at 156. The prosecutor in Kindell’s case also immediately alerted the Court to her conflict, even prior to the court scheduling the trial for the date of her vacation. 1 RP at 1; CP 30-31.

Finally, Kindell can show absolutely no prejudice from the 3 day delay past his speedy trial time. The trial court must determine if the

defendant would be “substantially prejudiced” by the delay. CrR 3.3(h)(2). Here, Kindell does not contend that the 3 day delay in his trial prejudiced the presentation of his defense. There is no evidence that he was prejudiced in the presentation of his defense by waiting 3 extra days to go to trial.

The continuance past the presumptive 60 day time frame to go to trial was very short. The State had compelling reasons in the unavailability of the assigned prosecutor and the unavailability of a material witness for the court to continue the trial date. Kindell was also not prejudiced by the continuance. Under all the circumstances in this case, the trial court did not abuse its discretion in granting the short continuance to accommodate the prosecutor and the witness’s scheduled vacations. Kindell’s claim fails.

V. KINDELL STIPULATED TO HIS OFFENDER SCORE AND THE COMPARABILITY OF HIS OUT-OF-STATE CONVICTIONS

Kindell assigns error to his sentence for failure of the State to prove his prior out-of-state convictions are comparable to Washington felonies, and for inclusion of alleged misdemeanors in his offender score. However, Kindell stipulated to his offender score and the comparability of his out-of-state convictions, and waived his right to appeal his score.

A defendant who stipulates that his out-of-state convictions are comparable to Washington offenses waives the opportunity to challenge their comparability on appeal. *State v. Hickman*, 116 Wn. App. 902, 904, 68 P.3d 1156 (2003) (citing to *State v. Hunter*, 116 Wn. App. 300, 302, 65 P.3d 371 (2003)). Kindell agreed, by signing his declaration of criminal history, not only that he had certain prior convictions from the State of Colorado and the State of Washington, but that certain Colorado convictions counted as points in his offender score, thus were comparable offenses. Kindell cannot now claim error to an offender score he stipulated to. He was properly sentenced.

Kindell alleges a prior conviction for Malicious Mischief in the Third Degree out of Clark County in 2011 was counted in his offender score. Though his stipulated declaration of criminal history does mark 1 point for that conviction, it is apparent from the proper calculation that it was not used in determining his offender score. As Kindell had two current felony offenses, they each counted against the other for scoring, along with 4 prior comparable offenses out of the State of Colorado, Kindell had an offender score of 5, and this is the offender score the trial court used in sentencing him.

D. CONCLUSION

Kindell's assignments of error are without merit. The trial court's response to the jury's questions did not deny him a fair verdict; his attorney was effective; the prosecutor did not commit misconduct; the trial court properly granted the State's request for a continuance pursuant to CrR 3.3; and Kindell's sentence was proper. The State respectfully requests the trial court be affirmed in all respects.

DATED this \_\_\_\_\_ day of July, 2013.

Respectfully submitted:

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By:

\_\_\_\_\_  
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# CLARK COUNTY PROSECUTOR

## July 15, 2013 - 11:54 AM

### Transmittal Letter

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Court of Appeals Case Number: 44086-5

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