

No. 46012-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS THOMPSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge  
Cause No. 12-1-01701-1

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BRIEF OF RESPONDENT

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Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's reasons for continuing the trial date several times over Thompson's objection constituted an abuse of discretion and a violation of his CrR 3.3 speedy trial right.
2. Whether the trial court erred when it denied Thompson's motion to dismiss based upon CrR 8.3 where Thompson failed to prove governmental misconduct by a preponderance of the evidence.
3. Whether the trial court violated Thompson's constitutional right to be present in the courtroom when, after excluding the defendant from the courtroom for being disruptive, it declined to remind him on the final day of testimony and the day the verdict was taken that he could return if he conducted himself appropriately.

#### B. STATEMENT OF THE CASE.

The State accepts Thompson's statement of the substantive facts as well as the procedural facts, with two corrections. Thompson lists the specific continuances of his trial, but he omits an order issued July 8, 2013, continuing the trial date to the week of September 23, 2013. CP 101; Appellant's Opening Brief at 8. Also, Thompson says he appeared in court in a restraint chair. Appellant's Opening Brief at 10. In fact, although he was in shackles, the court required him to appear on his own volition, not being wheeled into court in the restraint chair. RP 153.<sup>1</sup>

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<sup>1</sup> Unless otherwise noted, references to the Verbatim Report of Proceedings are to the six-volume trial transcript dated January 28 to February 5, 2014.

C. ARGUMENT.

1. The trial court did not abuse its discretion by continuing the trial date, over Thompson's objection, more than 60 days beyond the arraignment date.

A reviewing court will not disturb an order granting a trial continuance "absent a showing of a manifest abuse of discretion." State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). Whether a court correctly applied CrR 3.3 is a question of law reviewed de novo. State v. Lackey, 153 Wn. App. 791, 798, 223 p.3d 1215 (2009). Ruling on a motion to continue is discretionary with a judge because it involves "such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures." State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

A defendant being detained in jail must be brought to trial within 60 days of the "commencement date," which is usually the date of arraignment. CrR 3.3(b)(1). Periods of time excluded from this 60-day limit include those required by the administration of justice so long as the continuance will not prejudice the defendant's presentation of his case. CrR(e)(3), (f)(2). If a period 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). Thus, each

excluded period brings with it a 30-day extension of the speedy trial deadline. See CrR 3.3(b)(5).

CrR 3.3 is not constitutionally based. State v. Hall, 55 Wn. App. 834, 841, 780 P.2d 1337 (1989). Thompson has not claimed a constitutional violation. Continuances granted within the speedy trial time are not violations of the rule; dismissal is required only when the speedy trial period has expired. Unless that is the case, the defendant must demonstrate “actual prejudice” before his case will be dismissed. Id. Thompson has not claimed any prejudice, and none is apparent from the record.

Thompson’s arraignment occurred on December 26, 2012. A trial date was set for February 19, 2013, within the 60 day time limit. On January 28, 2013, defense counsel requested a continuance. O1/28/13 RP 4-5. The court agreed to a shorter continuance than requested and a new trial date was set for March 11, 2013. This carried with it a 30-day extension period, so the last day for trial was April 11, 2013. CP 15, 01/28/13 RP 7, 10. Defense counsel made the request because his investigator had just begun working on the case, the defendant was charged with four class A felonies, all with deadly weapon enhancements, and he could not be ready to try the case by the trial date of February

19. 01/28/13 RP 4-5. The State agreed that it was a complex case because there were multiple victims and further that medical reports were still coming in, some of which had not yet been provided to the defense. 01/28/13 RP 6. Thompson objected. 01/28/13 RP 9. Over his objection, the court continued the trial date to March 11, 2013, because defense counsel needed more time for preparation. 01/28/13 RP 9.

On February 11, 2013, before the time for trial expired, the trial was continued to May 27, 2013, with speedy trial expiring on June 26, 2013. The defendant objected. CP 16. Thompson has not provided a transcript of this hearing and there is nothing in the record indicating the reason for that continuance. On April 23, again before the time for trial expired, another continuance was entered, setting the trial for the week of August 5, 2013, with speedy trial expiring on September 4, 2013. Thompson again objected, CP 19, but again he provides no transcript and there is no record before this court of the reasons for this continuance.

On July 8, 2013, again before the speedy trial time expired, defense counsel moved to continue the trial to the week of September 23, 2103. Thompson objected. 07/08/13 RP 5-7. Defense counsel told the court he had interviewed all of the

witnesses but transcriptions had not yet been done. In addition, Thompson had indicated a wish to pursue a diminished capacity defense and although counsel did not believe it was a viable defense, had agreed to have a forensic psychologist interview Thompson. Counsel also disagreed with some of the issues Thompson wanted to litigate, concluding they were not relevant to the case. However, Thompson was adamant that counsel argue those motions; counsel was unavailable to do so before the trial date of August 5. 07/08/13 RP 5-6, 8. Based upon counsel's representation about the seriousness of the case and Thompson's desire to investigate a diminished capacity defense, and finding that the defendant would not be prejudiced, the court continued the trial date to September 23, 2013. 07/08/13 RP 10; CP 101.

On August 1, 2013, the court addressed several motions that Thompson filed pro se. Another attorney stood in for Thompson's trial counsel at this hearing, and that attorney asked that the hearing be stricken so that trial counsel could note the motions if he believed they were appropriate. Thompson did not provide his attorney with notice of this hearing. The court continued the matters one week. 08/01/13 RP 4-7. Apparently, when the matter was called on August 8, he struck the motion, having changed his

mind about representing himself. On August 12 he again moved to proceed pro se, and his motion was set for hearing on August 15. 09/05/13 RP 42. On August 15, 2013, Thompson did not wish to proceed with that motion. 08/15/13 RP 6, 9, 11.

On September 5, 2013, still within the speedy trial time, defense counsel moved to withdraw. Thompson had made it plain to counsel that he held counsel responsible in part for what he perceived as a violation of his speedy trial right. 09/05/13 RP 30. Thompson was upset because he claimed not to have seen all of the discovery and he had a list of perceived failures on the part of his attorney. *Id.* at 31-35. Pro se, he asked for his case to be dismissed. *Id.* at 36. He believed he had been forced to agree to continuances—even though he had objected every time—in order to be represented by a prepared attorney. *Id.* at 37. When asked if he preferred to keep the current trial date of September 23, or get a new lawyer who would need additional preparation time, he refused to make a choice. *Id.* at 38. Defense counsel advised the court that within the last two to three weeks his relationship with Thompson had deteriorated to the point where he believed he could not adequately represent Thompson. *Id.* at 40.

The court found good cause to permit defense counsel to withdraw. 09/05/13 RP 48-50. That required setting a new trial date, to permit new counsel to prepare for trial, as well as another prosecutor to become familiar with the case, since the current prosecutor would shortly be going on maternity leave. Id. at 51-52. A new trial date was set for November 4, 2014, within 60 days. CP 158; 09/05/13 RP 54.

The new defense attorney apparently requested a continuance of the trial date. No transcript has been provided, but an order was issued on October 21, 2013, resetting the trial for January 27, 2014. That order reflected that speedy trial expired on February 27, 2014. CP 175. Trial began on January 28, 2014. Trial RP, Volume 1.

At no time did the time for trial expire before a new date was set, and Thompson does not claim that it did. His argument is that the court granted continuances without a justifiable reason, thus abusing its discretion.

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the

reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

In those instances where Thompson has provided a transcript of the hearing regarding the continuance, the court has found that the continuance was necessary for the administration of justice, and either expressly found or implied that the defendant would not be prejudiced. 01/28/13 RP 9, 07/08/13 RP 10, 09/05/13 RP 48-50. An appellant bears the burden of providing an adequate record on appeal. Story v. Shelter Bay Company, 52 Wn. App. 334, 345, 760 P.2d 368 (1988). A reviewing court may not speculate about the existence of facts if they are not in the record. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). Thompson has not produced the record regarding the remaining continuances and this court cannot speculate that the court failed to make the necessary findings. He has made no showing that the trial court abused its discretion in granting any of the continuances.

All of the motions for continuance for which Thompson does provide the record were made by defense counsel. 09/05/13 RP 8. A motion made on behalf of a party waives that party's objection to the continuance. This waiver applies even where, as here, the

defendant personally objects to a continuance requested by defense counsel on his behalf. State v. Ollivier, 178 Wn.2d 813, 824-25, 312 P.3d 1 (2013).

Thompson cites to State v. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006), to support his argument that the trial court here abused its discretion in granting continuances. In that case, however, the court had continued the defendant's trial on the *State's* motion, representing that there were similar crimes being investigated. But there was never any evidence connecting Nguyen to those crimes and he was never charged with them. In Thompson's case, however, his trial was continued because his attorney needed additional time to prepare, 01/28/13 RP 5; the charges were serious and the defendant was facing what amounted to life in prison, 07/08/13 RP 5; the defendant wanted to litigate numerous pro se motions as well as pursue a diminished capacity defense, 07/08/13 RP 8, 09/05/13 RP 10; Thompson was ambivalent about proceeding pro se, 08/01/13 RP 4-5, 08/15/13 RP 7, 9; the case was complicated, involving more than 450 pages of discovery, 09/05/13 RP 8, 50; and counsel was dealing with a client who wanted him to stay on the case but do everything Thompson demanded of him, even if it made no sense. 09/05/13 RP 34-35.

By September 5, 2013, Thompson had filed so many pro se motions that the court couldn't sort them out. 09/05/13 RP 5. A trial court need not hear pro se motions filed by a represented defendant. State v. Hightower, 36 Wn. App. 536, 540-43, 676 P.2d 1016, *review denied*, 101 Wn.2d 1013 (1984). Nevertheless, the court in this instance did hear at least some of Thompson's pro se motions. It denied his motion to dismiss for violation of the speedy trial rule. 09/05/13 RP 36. It appears that at least some of the delay in bringing this case to trial resulted from Thompson's own ill-advised attempts to litigate his case while still being represented by counsel. There is no authority for the position that a defendant may cause disruptions in the progress of his case, causing delays of the trial, and then complain that he did not receive a trial within 60 days of arraignment.

Thompson discounts his trial counsel's assertions that the case was complex, based upon the evidence presented at trial and the fact that counsel declined to cross-examine the majority of the State's witnesses. Appellant's Opening Brief at 17. However, the attorney who represented Thompson at trial was not the same one who requested continuances based upon complexity. Further, the original attorney never claimed that there were complicated legal

issues. He was concerned because of the sheer number of witnesses and the volume of evidence, in addition to the fact that Thompson was charged with several class A felonies and was looking at an enormous amount of prison time. 01/28/13 RP 4-5; 07/08/13 RP 5-6, 8-9. It is not unreasonable for defense counsel to need a significant amount of time and effort to analyze the evidence, formulate strategy, interview witnesses, and, apparently, deal with an obstreperous client. The court did not abuse its discretion in continuing the trial dates. Even if it had, Thompson suffered no prejudice as a result and dismissal is not a remedy absent prejudice. Hall, 55 Wn. App. at 841.

2 The court correctly denied Thompson's motion to dismiss based upon CrR 8.3 because he failed to prove that the State interfered with his confidential communications with his attorney. Even if there had been such interference, there was no prejudice.

Thompson brought a pretrial motion to dismiss the charges against him, pursuant to CrR 8.3, on the basis that the State had wrongfully confiscated two pages of a letter he had written to his then-attorney, Patrick O'Connor, and further that not only had the State gained access to information about his trial strategy, but he was forced to cease written communications with his attorney for

fear that such communications would not be confidential. CP 212-14; 01/13/14 RP.

A hearing was held regarding this motion on January 13, 2014. Thompson presented evidence from other inmates and by his own testimony that a search of the cell block in which Thompson was housed occurred in March of 2013. 01/13/14 RP 5, 25, 30, 45. The inmates were removed to a recreation area while the search occurred and did not see any part of the search. 01/13/14 RP 31, 37, 46, 52. Thompson claimed that when the inmates were returned to their cells following the search he found that a manila envelope, which he had sealed and marked as legal mail, had been opened. 01/13/14 RP 46-48. He said it contained a four-page letter to his attorney, Patrick O'Connor, and that two pages of the letter were missing. 01/13/14 RP 46. He immediately informed a corrections officer about the missing pages and filed a grievance, but nothing came of it and the pages were never returned. 01/13/14 RP 49-50. Thompson said he did communicate with O'Connor for the remainder of the time that O'Connor represented him, both face-to-face and by mail, but he did not discuss trial strategy in the written material after the search. 01/13/14 RP 51-52.

Another inmate, Larry Corbin, testified that he was an inmate at the time of the search but since then had overdosed on drugs and remembered virtually nothing about the search. Corbin said he saw corrections officers reading seized papers; he was not positive he was recalling that specific search, but even if it were, he did not know what papers the jail personnel were reading. 01/13/14 RP 6-8, 15-16.

A cell mate of Thompson's, Jesse Lee Harkcom, also testified. He said that he was "pretty sure" that Thompson had marked an envelope as legal mail. 01/13/14 RP 34. He did not see any corrections officer reading any of Thompson's papers. 01/13/14 RP 36. He was positive that the envelope was sealed when the inmates were removed prior to the search. He had helped Thompson prepare the document the night before and while he didn't read it before Thompson sealed it in the envelope, he was sure it was the same document. 01/13/14 RP 35, 41.

Two corrections officers testified for the State. Sgt. Teresa Becker said that searches of the living units in the jail were done regularly and routinely. 01/13/14 RP 57-58. During these searches sealed envelopes will be opened even if they are marked as legal mail to prevent inmates from putting contraband in such envelopes

before the search and retrieving it following the search. 01/13/14 RP 64-66. The officers scan the contents of the envelopes and if the material appears to be legitimate legal material, it is left in the cell. 01/13/14 RP 67-68, 71, 73. If legal papers were confiscated for any reason, a report would be written to document where they went and why they went there. 01/13/14 RP 68. Becker did not search Thompson's cell and was never able to determine who did. The jail does not keep records of which officer searches which cells. No reports were written concerning the search of Thompson's cell. 01/13/14 RP 68-69, 77. Becker did search another inmate's cell, where she located a large stack of papers containing song lyrics, which inmates are not allowed to have. She took them to a table in the day room in the central unit where anyone in the cells could see her, and reviewed them. 01/13/14 RP 69-70. Harkcom had testified that Becker had papers in her hand when the inmates returned to their cells following the search, seeming to infer that she was holding the papers that Thompson claimed were missing. 01/13/14 RP 44.

Corrections Officer Corey Luck also testified for the State. He said that searches are done randomly and no log is kept of who searches what cells. 01/13/14 RP 87. Luck did not search

Thompson's cell and didn't know who did. 01/13/14 RP 88-89. He recalled Thompson complaining that he was missing some legal mail the day of the search and filing a later grievance; Luck recalled it because it was unusual. He'd never heard of that kind of complaint before. 01/13/14 RP 90-91.

Following the hearing, the court found that it was unclear whether State misconduct occurred, but even assuming that there was, Thompson had failed to show that he was prejudiced. The court could not infer misconduct and would not infer prejudice. 01/13/14 RP 109-110; CP 367-68. Thompson's motion to dismiss was denied. *Id.* Thompson now challenges that ruling on the grounds that the trial court abused its discretion.

"[D]ismissal of criminal charges is an extraordinary remedy . . . available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial." State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970). Pursuant to CrR 8.3(b), a defendant must first show arbitrary action or governmental misconduct; absent such a showing, the trial court cannot dismiss the charges under this court rule. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). "The level of governmental misconduct needed to prove a violation of due

process must shock the conscience of the court and the universal sense of fairness.” State v. Martinez, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004). The defendant’s burden of proof is by a preponderance of the evidence. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Second, even if there is government misconduct, the defendant must show not just prejudice, but prejudice that affected his right to a fair trial. Id. at 240. The decision of the trial court is reviewed for manifest abuse of discretion. “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” Id., quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Fairness to the defendant is the underlying principle of CrR 8.3(b). Prejudice is not proved by inconvenience or expense, but by actual interference with the defendant’s ability to present his case. State v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011).

In State v. Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), the Washington Supreme Court found that where there was a proven State interference with communications between the defendant and his attorney, there is a rebuttable presumption of

prejudice. Id. at 819. The burden in that event is on the State to prove beyond a reasonable doubt that the defendant was not prejudiced. Id. at 820. Where there is no State misconduct, however, the court need not even reach the question of prejudice. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2002).

Thompson is correct that the trial court relied on the lack of prejudice in denying the motion to dismiss, but the court did find that, while there was "some indication" that two pages of a letter were taken, there is was "no clear evidence" of misconduct." CP 368. What that means is that Thompson failed to prove by a preponderance of the evidence that his legal mail was, in fact, confiscated. "The evidence was insufficient to prove misconduct occurred." Conclusion of Law No. 1, CP 368. The court further found that there was no evidence that Thompson's right to a fair trial was materially affected. Conclusion of Law No. 2, CP 368. Thompson argues that the court overlooked Thompson's loss of trust in the confidentiality of his written communications to his attorney, thus cutting off "confidential written access to his counsel." Appellant's Opening Brief at 21. But there was zero evidence presented that this in any way prevented him from discussing his case with his attorney face-to-face, and in fact Thompson testified

that this happened. 01/13/14 RP 51. He testified that he had attorney/client meetings with his lawyer and wrote multiple letters to the State, his defense attorney, and the Court after the time he said that his papers were taken. 01/13/14 RP 52. Thompson did not allege that any of the information he claimed was in the missing papers was used against him or even mentioned in any way in any proceeding. The State, if required to prove the lack of prejudice, can only prove the negative. Nothing happened that could be attributed to that document.

Thompson failed to carry his burden of proof in establishing either governmental misconduct or prejudice. If the court were to assume interference with attorney/client communications, the State established beyond a reasonable doubt that he did not suffer any prejudice. The trial court did not abuse its discretion by denying the motion to dismiss.

3. The court acted within its discretion and preserved Thompson's constitutional right to be present at his trial when it repeatedly informed him of the mechanism by which he could return to the courtroom if he chose to conduct himself appropriately.

During his trial, Thompson refused to come to court on one occasion and when he finally appeared by video from the jail,

without the jury present, was agitated and uncooperative. RP 109, 117, 123. The trial court found that he was voluntarily refusing to appear and explained to him that if at any time he wanted to come to the courtroom, that would be made to happen. RP 135. Thompson expressed a willingness to come to court but only if dressed in jail clothes and confined to a restraint chair. RP 140. The trial resumed in Thompson's absence. The court indicated that at the end of the day Thompson would be advised again that if he could come to court if he changed his mind. RP 181. After the jury was excused for the day, the court instructed the jail personnel to advise Thompson that "If you change your mind and would like to come to court, you need to make a request to staff." The court even wrote down the words on a piece of paper and gave it to Sgt. Matthews of the corrections staff, with the instruction to remind Thompson he had the ability to change his mind at any time. RP 315-16.

On February 3, 2014, the fourth day of the trial, Thompson interrupted the testimony of an emergency room doctor by pushing over the counsel table at which he was seated, yelling profanities, and scuffling with corrections officers who eventually subdued him and removed him from the courtroom. RP 677-80. Following a

hearing into the availability of further restraints, the court found that the least restrictive alternative was to remove the defendant from the courtroom, but allow him to watch the proceedings via a video feed from another location. RP 723. Defense counsel would be in the courtroom but the court would recess following the direct examination of each State witness, counsel would go to another courtroom where Thompson was watching the trial on video, confer with him, and return to the trial courtroom. Thompson was able to see the judge, the witnesses, and the attorneys, and could hear everything that happened in the courtroom. RP 743-45.

For the remainder of that day of trial and the following day, February 4, that course of action was followed. RP 755, 770, 782, 810, 849, 857, 889. At the conclusion of the State's case, defense counsel went to the courtroom where Thompson was to confer with him about testifying, and the court conducted a colloquy with Thompson via video. RP 943-45.

At the end of the day on February 3, the court reminded Thompson that he had the right to be present in the courtroom upon his assurance that he would not be disruptive and to claim that right he had only to inform either his attorney or someone on the corrections staff. RP 788.

The evidentiary portion of the trial concluded on February 4, 2014. RP 942, 949, the jury was instructed and closing arguments were made, RP 950-1069, and the jury retired to deliberate at 4:45 p.m. RP 1071. The jury returned verdicts on February 5, 2014. RP 1086-89, 1107-10.

A defendant has the right under both the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington Constitution, to be present at all critical stages of the trial proceedings. State v. Chapple, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). That right is not absolute and can be considered waived if the defendant is so persistently disruptive that his conduct interferes with the orderly and dignified administration of justice. Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); Chapple, 145 Wn.2d at 318. The trial court has considerable discretion to deal with a disruptive defendant, and several options from which to choose: binding and gagging the defendant in the courtroom, citing the defendant for contempt, or removing the defendant until he assures the court that he will conduct himself appropriately in the courtroom. Chapple, 145 Wn.2d at 319.

In Chapple, the court drew from both Allen and State v. DeWeese, 117, Wn.2d 369, 816 P.2d 1 (1991), guidelines for the trial court to use: (1) the defendant must be warned that his conduct could result in his removal from the courtroom; (2) the behavior must be egregious enough to justify removal from the courtroom; (3) the court must adopt the least severe alternative available to prevent the defendant from disrupting the trial; and (4) the defendant must be allowed to return to the courtroom if he assures the judge that he will behave appropriately. Chapple, 145 Wn.2d at 320.

An appellate court reviews de novo whether the defendant's right to participate in his defense has been violated. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

Thompson does not take issue with any action of the trial court, except that he argues that the court did not follow the fourth criteria. He claims the court failed to inform him on the fourth, fifth, and sixth days of trial that he could return to the courtroom if his behavior was appropriate. Appellant's Opening Brief at 24-25. The record does not support this argument.

The trial began on January 28, 2014. The defendant was present in the courtroom. RP 7. On the morning of January 29,

Thompson refused to come to court. RP 109. The morning and much of the afternoon was taken up with hearings involving the defendant appearing by video from the jail to discuss his appearance in court, evidence taken from the corrections personnel regarding security, and rulings by the court. CP 258. It was not until 2:34 p.m. that the jury entered the courtroom for the first time that day and testimony began. *Id.* Thompson was not present. RP 188. He had been told, however, that if at any time he wanted to come to court that would happen, and the jail staff was, as described above, instructed to remind him at the end of the day. RP135, 179, 181, 313-316.

On January 30, 2014, Thompson was present in the courtroom. RP322. He remained there all day. The next day of trial was Monday, February 3. Because of an incident in the jail the previous Friday, the State requested that additional restraints be placed on Thompson. RP 618. The court heard testimony from Sgt. Matthews of the jail corrections staff, RP 619-649, and then ruled that Thompson would wear both a leg brace and a device that would use electricity to immobilize him if he created a danger. RP 658-59. Thompson returned to the courtroom at approximately 10:30 a.m. RP 663; CP 262. At approximately 10:47 a.m.,

Thompson flipped over the counsel table and created the disruption that resulted in his removal from the courtroom. RP 677-79, CP 263. The court took additional evidence regarding the incident, RP 692-710, before excluding Thompson from the courtroom, noting that he had the right to return if he made real assurances that he would not be disruptive. RP 724. For the remainder of that day Thompson was in another courtroom, watching by video feed. RP 744. At the conclusion of the day, the court advised Thompson he could return to court upon his assurance he would not be disruptive, and that he had only to inform his attorney or the corrections staff. RP 788. Since this was the end of the day, the court could only have been referring to the following day of trial.

The trial resumed on February 4, 2014, with Thompson in another courtroom, listening and watching on video and audio. RP 795. Responding to a question from the prosecutor, the court said, "I am not going to inquire further into that issue [Thompson's presence in court], because yesterday I made it clear at the close of our hearing, the mechanism in which Mr. Thompson could come back before the court, either by a request to Corrections or through [defense counsel]. None of that information has been presented." RP 797.

The case went to the jury at the end of the day on February 4, 2014. RP 1071. The verdicts were returned on February 5, RP 1086-89, and there is nothing in the record to indicate that Thompson was again informed of his right to return to the courtroom if he conducted himself appropriately.

Thompson is incorrect when he asserts that he was not informed at any time during the fourth, fifth, or sixth days of trial that he could return to the courtroom. Appellant's Opening Brief at 24. He was advised during the day on February 3, and again at the end of that day directed at the following day, February 4. There is no record of an advisement on February 5, when the evidentiary portion of the trial was over and the verdicts were rendered.

Thompson's argument assumes, without authority, that a defendant must be repeatedly and continuously reminded of his right to return to the courtroom. Nothing in the cases cited requires that. In Allen, the court remarked that "Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner." Allen, 397 U.S. at 346. That court reported what happened but never required "constant" reminders. The issue in Allen was whether removing the defendant from the courtroom was a constitutionally acceptable method of

dealing with a disruptive defendant. Id. at 338. Allen did not address the required number or frequency of admonitions about returning.

Similarly, in DeWeese the court was answering a question about the trial court's discretion to remove a disruptive defendant from the courtroom, and did not address the requirement of informing the defendant of his right to return, other than noting that the trial court offered him that opportunity. DeWeese, 117 Wn.2d at 381. The opinion in Chapple only says that the defendant must be allowed to return to his trial if he assures the court his conduct will be appropriate. Chapple, 145 Wn.2d 310. That opinion does say that "multiple warnings are not required prior to a defendant's removal from the courtroom." Id. at 321. If that is the case, it would logically follow that the court is not required to give multiple advisements of the right to, and mechanism for, returning to the courtroom.

The court in this trial did everything constitutionally required to preserve Thompson's right to be present at his trial. There was no error.

D. CONCLUSION.

The trial court in Thompson's case did not violate his court rule right to a speedy trial, correctly denied his motion to dismiss for governmental misconduct, and properly preserved his right to be present at his trial. The State respectfully asks this court to affirm all of his convictions.

Respectfully submitted this 6<sup>th</sup> day of February, 2015.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief on the date below as follows:

*Electronically filed at Division II*

TO: DAVID C. PONZOHA, CLERK  
COURTS OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

AND

JOHN A. HAYS, ATTORNEY FOR APPELLANT  
JAHAYSLAW@COMCAST.NET

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of February, 2015, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**February 06, 2015 - 1:12 PM**

## Transmittal Letter

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Court of Appeals Case Number: 46012-2

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