

COURT OF APPEALS NO. 46832-8-II

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

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STATE OF WASHINGTON,

Appellant,

V.

SEAN TAUL,

Respondent.

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

The Honorable Gregory Gonzales, Judge

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BRIEF OF RESPONDENT

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A. RESTATEMENT OF THE ISSUES

1. Whether the trial court properly exercised its discretion to dismiss charges against respondent based on the prosecutor's misconduct in representing to the court on the day of trial that she needed a continuance solely due officer unavailability, when in fact the prosecutor had not served the complaining witness with a subpoena, nor spoken to her or confirmed she was available to testify?

2. Whether the state waived any advance notice requirement for a hearing on the motion to dismiss when the prosecutor did not request a continuance, was afforded a full opportunity to explain her position, represented she had not in fact misrepresented facts to the court – which was the basis for the motion to dismiss – and filed a motion for reconsideration, which the court agreed to hear, but which the prosecutor later withdrew after filing a notice of appeal?

3. Whether the record supports the court's finding of prejudice to respondent where the prosecutor was able to strengthen the state's case against respondent based on a misrepresentation to the court?

B. STATEMENT OF THE CASE<sup>1</sup>

On July 2, 2014, the Clark county prosecutor charged respondent Sean Taul with residential burglary and fourth degree assault. CP 45. The information alleged that on June 29, 2014, Taul unlawfully entered the dwelling of Ashley Anderson and pinched her. CP 44-45.

Taul and Anderson have a child together. CP 44. Anderson told police she accepted a ride home from Taul after work, but told him he could not come inside. CP 44. According to Anderson, Taul pinched her arm and forced his way into the residence. CP 44. According to Jamie Green, Anderson's mother, Taul would not leave until she got on the phone to call police. CP 44. Taul denied the accusations and told police he was in the area to retrieve his mother's car, which was parked near Anderson's residence. CP 44.

Omnibus was scheduled for July 23, 2014, and trial set for September 29, 2014. CP 48. Taul did not appear for omnibus and the court issued a warrant. The court did not strike the scheduled trial date, however. CP 49. The state thereafter filed an amended information charging Taul with bail jumping. CP 34-35.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as: "1RP" – 9/29/14; and

On September 24, 2014, the state filed its first witness list, including Vancouver police officer Ly Yong, Benjamin Keith Anderson, Ashley Anderson, Jamie Green and Nancy Campbell. CP 52.

The case was called for trial on September 29, 2014. Deputy Prosecuting Attorney Kristine Duncan told the court: "We were here for trial today, we were prepared; however" she received a call that morning from officer Yong to say she was too ill to come to court. 1RP 2 (emphasis added). Duncan asked for a continuance, asserting the officer's illness constituted good cause. 1RP 2-5.

Although there was still time on the speedy trial clock, defense counsel Shon Bogar objected to continuing the trial, as he had other obligations, including another trial scheduled. 1RP 5-6, 15, 17. Later during the hearing, counsel stated:

Regarding my scheduling, Your Honor, at the omnibus on July 23<sup>rd</sup>, I put on the record that this next month is really, really tough for me. This trial date is – is, you know, exceptionally tough.

My – I'm moving my mom from Montana to here from October 3<sup>rd</sup> to 6<sup>th</sup>. I have two – one of the – I've got a ton of stuff going on over the next month, Judge.

I mean, to – to try to set this case out for any period of time is going to be a substantial burden on

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"2RP" – 9/30/15.

my ability to represent Mr. Collin (sic) and to handle my other cases.

I have a Class A rape case coming up October 13<sup>th</sup> which I expect is going to go somewhere between five and seven, eight days.

1RP 17.

Bogar also objected on grounds there was no subpoena for the officer in the court file. In response, Duncan stated, "I believe the subpoenas went out last week." 1RP 6 (emphasis added). The officer received hers and intended to be here before becoming ill.

1RP 6.

Bogar followed up by asking whether there was a certificate of service, which he asserted was required in order for the court to find good cause to continue. 1RP 6-7; see e.g. State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988) (prosecution's mailing of subpoena to vocational home in accordance with home's internal procedures for handling subpoenas to residents in violation of criminal rule was not exercise of "due diligence," and thus, granting of continuance based on absence of essential witness, who was resident at home, violated juvenile speedy trial rule); State v. Nguyen, 68 Wn. App. 906, 915, 847 P.2d 936 (1993) (the requirement that the prosecution make a good faith effort to obtain a witness' presence at trial generally entails at least asking the

witness to attend and subpoenaing the witness if refused). Service by fax is insufficient under the rules. 1RP 7; CrR 4.8.<sup>2</sup>

Duncan acknowledged the subpoena was faxed: "That is how our office sends all of our officer subpoenas, we fax them."

1RP 7.

Bogar expressed additional concern about the state's failure to serve subpoenas on the other witnesses:

Furthermore, I have personal knowledge that neither of the other witnesses on the State's witness list were served.

As of this morning, the complaining witness in the assault case had not been served.

The mother of the complaining witness is my client's girlfriend. Okay. The mother of the complaining witness called me this morning and said that she's already been called off, that the prosecuting attorney's office called her and told her that somebody defending Mr. Taul was sick. Those were the words that she gave to me.

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<sup>2</sup> CrR 4.8(3) provides:

Service – How Made. A subpoena for testimony may be served by any suitable person over 18 years of age, by giving the witness a copy thereof, or by leaving a copy at the witness's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When service is made by any person other than an officer authorized to serve process, proof of service shall be made by affidavit or declaration. A subpoena for testimony may also be served by first-class mail, postage prepaid, together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear. Service by mail shall be deemed complete upon the filing of the returned waiver of personal service, signed in affidavit or declaration form.

Now, I'm not saying Ms. Duncan did that, and I expect that that's just a confusion somewhere along the lines. But the fact that somebody who – that the pro- -- this case is going to boil down at the end of the day to a bail jump where Mr. Taul turned himself in two days later.

The day he allegedly missed court was the day he lost custody of his child, Judge.

So they didn't do things right, and they're – we're going to try to put this young man –

1RP 8-9 (emphasis added).

At this point, the Honorable Gregory Gonzales interrupted to determine whether he presided over the custody case between Taul and Anderson. After determining he had not, the judge returned to the continuance request. 1RP 10-11.

Duncan indicated she was the one who contacted Jamie Green that morning. 1RP 9, 11. The court stated it did not want “to get into what he-said/she-said –[.]” 1RP 11. The court confirmed with Duncan that the continuance was based on the officer's illness, not the other witnesses:

THE COURT: The continuance is based upon the officer's illness at this point in time.

MS. DUNCAN: Yes, that is correct, Your Honor.

THE COURT: Regardless of whether or not she was subpoenaed, she was the witness, but you indicate that she was subpoenaed by fax.

MS. DUNCAN: Correct, Your Honor.

THE COURT: But there's no affidavit of service in the file concerning or acceptance of service regarding that subpoena.

MS. DUNCAN: I believe that is correct. Let me double-check. I have the fax, the proof of the fax that went through. But let me just look.

And the subpoena should be in the court file as well.

...

MS. DUNCAN: And I should just note that I do have the affidavit of service for Ashley Anderson, Benjamin Anderson –

THE COURT: Yeah, I'm not worried about his

–

MS. DUNCAN: Okay.

1RP 11-12 (emphasis added).

Bogar maintained service on the officer was improper and that the state should not be granted a continuance, particularly since the officer did not actually observe any of the events in question. 1RP 14.

Duncan disagreed the officer was not a material witness, as she interviewed Taul, took photos of Anderson's purported injuries and interviewed Anderson, the substance of which might become admissible, depending upon Anderson's testimony. 1RP 16.

The court found the officer was a material witness for the state. 1RP 19. The court also found the officer's illness constituted good cause and that "there's no other motive for the continuance at this time." 1RP 19. The court therefore turned to the question of when, if continued, the trial could be reset. 1RP 19, 23. The court wanted to take Bogar's time constraints into consideration. 1RP 23.

When the court indicated it had a civil trial it "could bump tomorrow to take this matter[.]" Bogar responded "Please, Your Honor." 1RP 21. Duncan was unsure whether the officer would be well enough by the next day, however. 1RP 21. Duncan also believed its witness on the bail jump charge would not be available the next day. 1RP 22.

The court asked Duncan, "Is the alleged victim here and will she be testifying today?" 1RP 26 (emphasis added). Duncan responded, "I told them to wait until we called them to let them know, Your Honor[.]" 1RP 26 (emphasis added).

To eliminate the need for a continuance, Bogar offered to stipulate to anything the officer would have been permitted to say had she been called as a live witness. 1RP 30. Defense counsel would not stipulate to the entire police report, however, as it

contained out-of-court statements by people who were not under subpoena and not going to testify. 1RP 30. But Duncan would not accept any stipulation unless it was to the “admissibility of the police report, the Smith<sup>3</sup> affidavit and the photographs.” 1RP 30.

Based on the lack of agreement, the court granted the state’s motion for a good cause continuance and gave Duncan an opportunity to call the officer. 1RP 31. Duncan determined Campbell would be available the next day, and the officer would try to be available as well. 1RP 32-35. The court resolved to set the matter over one day. 1RP 36.

At trial the next day, Duncan informed the court Anderson had been personally served and that she was at a hearing in District Court (as a defendant) that morning. 2RP 42, 45. Duncan sought a recess to determine time-wise when to bring her up. 2RP 42.

At this point, Bogar interjected to inform the court he had filed a motion to dismiss based on misrepresentations made by the prosecutor:

MR. BOGAR: I can answer that question,  
Judge.

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<sup>3</sup> In State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982), the court held the written statement of an alleged victim was admissible as substantive evidence under the hearsay exception for admission of prior inconsistent statements.

THE COURT: You may.

MR. BOGAR: I rode up the elevator with her. I just handed to the Court –

MS. DUNCAN: Oh, (inaudible), so she has –

MR. BOGAR: -- a motion to dismiss for prosecutorial mismanagement.

Specifically – and this is – I know nobody's seen the motion yet, I just handed it up, I just handed it to Ms. Duncan.

I have had major complaints with how – the Court heard everything yesterday about how the case was continued from yesterday to today. One of the things that Ms. Duncan said on the record yesterday was that Ms. Anderson had been served with the subpoena over the weekend.

I just looked at the subpoena. She just told me she wasn't served until she was in the DV docket downstairs.

So – and I looked at the subpoena; it clearly says September 30<sup>th</sup>, which could not have been known. It was on the record that Ms. Anderson had been served over the weekend. She had not.

I'd like the Court to consider my motion to dismiss for prosecutorial mismanagement. There's a bunch of stuff that's gone wrong in this case that the Defense has not been able to – [address.]

2RP 43.

In the written motion to dismiss, Bogar also explained the state had provided untimely discovery. CP 3-12. Bogar noted that despite a discovery deadline of two weeks prior to trial, he did not receive discovery for the bail jump charge until September 26. CP

5. Additionally, at 4:32 p.m. on September 29 – the date originally scheduled for trial – he received notice from the Clark County Domestic Violence Center indicating additional discovery was ready for pickup. CP 5.

When the court asked Duncan to respond to the issue of service on Anderson, Duncan admitted Anderson was not served until that morning:

MS. DUNCAN: Yes, Your Honor. She was served this morning, as I just said. I don't believe I ever put on the record that she was personally served over the weekend.

Her subpoena was mailed to her mother's house, and I believe this is what I put on the record. Her mother confirmed on the phone that she had her subpoena there and that – and I believe I put this on the record as well – and we can listen to the record, Your Honor, but I do not believe I ever represented to this Court that she was personally served over the weekend.

She was personally served this morning.

2RP 44.

The court indicated Duncan "led this Court to believe that all the witnesses had been served because Mr. Bogar at some point during the process indicated that he felt the alleged victim had not been served." 2RP 44. Duncan disagreed, stating:

I believe we stopped on that inquiry because you wanted us to focus on the officer.

So if I remember correctly, when we tried to go making more thorough records on that matter, we were limited to just the officer.

I was prepared yesterday if the victim didn't show up, we would have proceeded on the bail jump, which does also require the officer.

However, Your Honor, these situations are very fluid in DV cases.

2RP 45.

The court disagreed with Duncan's recall and questioned her integrity:

THE COURT: I don't – I don't believe you stated that she had been served, counsel, but the Court was led to believe that she had been served.

Regardless, that goes to your integrity and professionalism in this particular court.

It will not happen again.

MS. DUNCAN: And I greatly apologize, Your Honor.

THE COURT: Let me finish. Let me finish, counsel. When you come into this particular court or any court, whether it's Clark County or any other jurisdiction, you lay out the facts honestly and truthfully without trying to hedge one way or the other.

These cases are not important to your career one way or the other.

State the truth, because when Mr. Bogar indicated yesterday that he challenged whether or not witnesses had been served, I was led to believe – whether I'm incorrect or not – that all witnesses had been served.

Now Mr. Bogar indicates that the witness had not been served, so that goes to your integrity with this courtroom.

I will let it go this time. I will not let it go a second time. Understood?

2RP 46-47. The court initially denied the motion to dismiss. 2RP 47.

However, Bogar asked to heard further on the matter, noting that Taul had been prejudiced by the prosecutor's mismanagement. 2RP 47. Had the case proceeded to trial the previous day, the state would have been limited to the bail jump charge, as Anderson was under no obligation to appear. 2RP 47.

Duncan maintained that she merely represented that the subpoenas had been mailed on the 24<sup>th</sup> and that she had affidavits that they were placed in the mail. 2RP 49-50.

Regardless, the court reiterated that it was led to believe Anderson had been served and was ready to testify yesterday. 2RP 50-51; see also 2RP 55. The court asked point-blank whether it was now hearing Anderson was under no binding obligation to appear. 2RP 51-52. Duncan responded: "she was not personally served, and that's all I can represent to the Court." 2RP 52. Duncan also "did not have confirmation from [Anderson] that she had received" the subpoena that was sent in the mail. 2RP 52.

Duncan had no idea whether Anderson would have shown up for trial the preceding day. 2RP 52.

The court felt it had been hoodwinked to an extent by the prosecutor's representations the preceding day:

THE COURT: You could have said yesterday that we don't know if she's gonna show up. That's what you could have said: I don't know if she's gonna show up.

I'm inclined – I tend to believe Mr. Bogar at this particular time because instead of just telling the Court yesterday, We don't know if the alleged victim, complaining witness, will be present in court to testify, we somehow bootstrapped the illness of the officer to allow the Court to find a reasonable, rational basis to set this matter over.

If we proceeded yesterday without the complaining witness, the only charge that you probably could have proven would have been the bail jump, if that. That's my understanding.

And I believe you indicated Ms. Campbell was going to testify yesterday.

MS. DUNCAN: Correct, Your Honor.

2RP 53.

The court proceeded to read aloud the rules of professional conduct regarding the duty of candor to the court. 2RP 55. The court questioned whether Duncan knowingly made a false statement or failed to correct a false statement of material fact, as required by the rules. 2RP 55.

The court urged the parties to “put aside each other’s angst toward one another and rationally see if you can resolve this case.” 2RP 56. The court therefore recessed to give the parties an opportunity to discuss the case before ruling on the motion to dismiss. 2RP 56.

When court reconvened, the court allowed Duncan to make a complete record with regard to her position on the dismissal motion. 2RP 57-62. Duncan reiterated that she did not believe she had misrepresented anything to the court. 2RP 57-58. She also indicated she tried to make a more thorough record about it, but that the court wanted to focus solely on the officer. 2RP 58.

After taking a short recess at the state’s request, the court issued its ruling on the motion to dismiss:

The Court was led to believe that the State was prepared to proceed to trial. In fact, at the opening statement by State’s counsel, quote:

“We were prepared; however,”

end quote. And later in the dialogue with Court regarding the materiality of the officer, the State stated – when the Court asked, the Court asked the following question:

“Is the victim here and will she be testifying?”

Answer from the State:

“I told them to wait until we know – I told them to wait until we called them to let them know.”

So as I stated on the record on September 30<sup>th</sup>, 2014, this morning, the Court was led to believe that the

complaining witness, the alleged victim in this matter, had been prepared to testify at yesterday's hearing.

The court was led to believe that the materiality of the officer would not pose prejudice or the unavailability of the officer – by setting over the trial from one day to the next day would not pose prejudice to the defendant.

However, based upon the defendant's presentation today, it appears the alleged victim, complaining witness was not prepared to testify at yesterday's hearing. Thus, the State did not correct that particular aspect of the presentation yesterday on September 29<sup>th</sup> concerning the presence of the complaining alleged victim in this matter.

Had the Court known the alleged victim, complaining witness was not prepared to testify yesterday or present to testify, the Court probably and more likely than not would have not granted the one-day continuance.

The Court granted the one-day continuance based upon the lack of prejudice to the defendant in question. And when the alleged victim and the complaining witness and the investigating officer are not present to testify, there would be prejudice to the defendant.

The Court was led to believe that it was only the officer's unavailability that would lead to the good cause basis for a one-day setover.

But today the Court has learned that the alleged victim, complaining witness was not subpoenaed to testify according to Mr. Bogar.

Therefore, based upon the motion to dismiss based upon the fact that there was prejudice to defendant Taul, the Court will grant the motion to dismiss[.]

.2RP 67-69; see also CP 13. The court dismissed counts 1 and 2 without prejudice. CP 31; CrR 8.3(4).

The parties and court thereafter proceeded to trial on the bail jump charge, but a mistrial was declared after the jury was unable to reach a verdict. 2RP 70; CP 54. Taul subsequently pled guilty to attempted bail jump on a gross misdemeanor. CP 132-38.

Meanwhile, the prosecutor filed a 9-page a motion to reconsider the court's order of dismissal, on grounds she had not misrepresented facts to the court or engaged in misconduct. CP 55-63. Duncan essentially reiterated everything she said at the September 30<sup>th</sup> hearing. CP 60-61. Duncan further alleged any prejudice to Taul was speculative, as "[t]here is no way to know whether or not Ms. Anderson would have shown up at the hearing because it was cancelled." CP 62. Finally, Duncan alleged proper procedure was not followed, as she did not receive advance notice of the motion to dismiss. CP 62.

Duncan thereafter filed an amended motion to reconsider, which had as appendices the subpoenas that were sent in the mail and a transcript of the September 29<sup>th</sup> hearing. CP 64-122. The court entered an order striking the trial date and indicating it would hear the motion to reconsider on November 13, 2014. CP 123.

The state thereafter filed a notice of appeal and withdrew its motion to reconsider, however. CP 14, 124. The court entered

lengthy findings of fact and conclusions of law regarding its order of dismissal, which mirrors its oral ruling. CP 17-31.

Subsequently, the court entertained a defense motion for imposition of sanctions. The defense had obtained an affidavit from Anderson indicating that: “[P]rior to trial set for the 29<sup>th</sup> of September 2014, I had never spoken with, or had a meeting with, Clark County Deputy Prosecuting Attorney Kristine Duncan.” CP 127. She received a subpoena in the mail, but never received a written waiver of service to sign and return to the prosecutor. CP 127. Anderson declared under penalty of perjury she was not available for trial on September 29. CP 127.

The court stood by its prior finding that Duncan misled the court into believing the complaining witness was ready, willing and able to testify on September 29. It noted it had admonished Duncan in open court on September 30 about not jeopardizing her integrity and reminding her of the relevant RPCs. The court found the admonishment and dismissal of counts 1 and 2 to be a sufficient sanction and denied the motion for further sanctions. CP 132-34.

C. ARGUMENT

THE COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS COUNTS 1 AND 2 WITHOUT PREJUDICE BASED ON THE PROSECUTOR'S MISCONDUCT.

The state claims the court abused its discretion in dismissing the charges against Taul because: the state did not receive proper notice of the "impromptu" hearing on the motion to dismiss; the court made no finding of misconduct to support dismissal or alternately, the court's finding of misconduct is not supported by the record; the court's finding of prejudice was based on untenable reasons; and the court failed to consider intermediate steps as an alternative to dismissal.

As will be discussed below, however, the state waived any notice issue. Moreover, the state's argument that the court did not make a finding of misconduct is specious. The court clearly found Duncan misled the court or, at best, failed to correct a material misrepresentation of fact. The court's finding of misconduct is amply supported by the record. The court's finding of prejudice is likewise supported by the fact that the state was able to strengthen its case against Taul based on the misrepresentation the continuance was solely for purposes of officer unavailability where in reality, it gave the state time to serve the complaining witness

and secure her presence at trial. Finally, there is no requirement that the court state on the record that it considered other intermediate steps to dismissal. Regardless, any other sanction, such as excluding Anderson's testimony, would have led to the same result as dismissal. For all these reasons, this Court should affirm the trial court's proper exercise of discretion.

CrR 8.3(b) authorizes the court to dismiss charges "in the furtherance of justice:"

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The court may require dismissal of charges under CrR 8.3(b) upon a showing of two factors. First, the defendant must show arbitrary action or governmental misconduct. State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Second, a defendant must show prejudice affecting the defendant's right to a fair trial. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). A court's order of dismissal under this rule is reviewed for a 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. Blackwell, 120 Wn.2d 830.

1. The State Waived any Potential Issue as to Notice

The state claims the court abused its discretion in granting the motion to dismiss, on grounds it failed to give the state proper notice before it moved “headlong into what was purportedly a hearing on the CrR 8.3(b) motion.” Brief of Appellant (BOA) at 20. This argument should be rejected because the prosecutor was afforded a full and fair opportunity to repudiate the allegation she misled the court, which was the basis for the motion, and because the state withdrew its motion to reconsider, which the court had agreed to hear and noted for a hearing.

Procedural rules can be waived by conduct. See e.g. State v. Heddick, 166 Wn.2d 898, 215 P.3d 201 (2009); State v. Myers, 86 Wn.2d 419, 545 P.2d 538 (1976). Chapter 10.77 RCW outlines procedures courts must follow once any reason to doubt a defendant’s competency arises before a trial judge. In Heddick’s case, a court found him incompetent and sent him to Western State Hospital for 90 days. The court thereafter found his competency restored. Heddick, 166 Wn.2d at 901.

However, defense counsel later raised additional concerns about Heddrick's competency. In response, the trial court orally ordered a new evaluation by an expert retained by the defense. Also, the court directed that a written report be prepared by a staff psychologist at WSH and circulated to the parties. Heddrick, 166 Wn.2d at 901-902.

Near the due date for production of the report, defense counsel informed the court that Dr. White had found Heddrick competent. She further informed the court that she declined production of Dr. White's report due to cost. As a result, the WSH staff psychologist's report was not entered into evidence. Counsel withdrew Heddrick's competency motion. Heddrick was convicted of harassment after a jury trial. Heddrick, at 902.

On appeal, Heddrick argued he was denied due process of law when the court failed to follow the procedures required under RCW 10.77.060. The court agreed the outlined procedures were not followed. Heddrick, at 904. However, the court held that the procedures in chapter 10.77 RCW can be waived. Id. at 906-907. Moreover, the court held Heddrick "effected a waiver at trial when his counsel [Tracy] Lapps withdrew the challenge to competency." Id. at 908.

At issue in Myers was the court's admission of Myers' and his co-defendant's statements to police, following their arrest for robbery. The court presiding over Myers' and his co-defendant's bench trial did not conduct a formal CrR 3.5 hearing. Myers, 86 Wn.2d at 426. The issue specifically came up during trial, however, and both defendants were advised of their rights under the rule. At that time, they both indicated a desire to defer any testimony about the voluntariness of their custodial statements until later in the trial during the regular presentation of their cases. Counsel for appellant and codefendant Adwell agreed to the admission into evidence of the statements on the issue of voluntariness subject to further evidence on the issue. There was no further evidence, however, as neither defendant testified about the circumstances of his statement. Myers, at 426.

On appeal, Myers argued the court should remand for a determination of whether his statement was voluntary. The Supreme Court disagreed, holding that Myers waived his right to a hearing and that remand under the circumstances would be pointless:

The facts in this case support the conclusion that the appellant knowingly, intelligently, and voluntarily waived his right to a voluntariness hearing.

Even constitutional rights can be waived by conduct. See In re Smith, 85 Wn.2d 738, 741, 539 P.2d 83 (1975), and the conduct of appellant in this case was clearly sufficient to constitute an effective waiver. The trial court informed the appellant and his codefendant of their right to a voluntariness hearing and both acknowledged their rights. They voluntarily decided, however, not to testify then as to the circumstances surrounding the taking of their custodial statements. Instead, they indicated that such testimony would be part of their regular testimony. Both appellant and his codefendant testified in their respective defenses, but neither made any further comment about the custodial statements. In fact, the appellant denied any recollection at all of both the robbery and the circumstances surrounding his statement to the police. No objection was made to the trial court's failure to hold formal [CrR 3.5] hearing. In this situation, there can be little doubt that the appellant effectively waived his rights under [the rule]. . . . Moreover, there was absolutely no evidence to indicate that the statements were not voluntary. We assume that appellant would not change his trial testimony upon remand and now remember the circumstances surrounding his statement. Therefore, a remand for a voluntariness hearing and the formal entry of findings would be an idle and useless procedure.

Myers, 86 Wn.2d at 427.

Applying the reasoning from Heddick and Myers here, it is evident the state waived any notice issue. The prosecutor did not object or request a continuance to prepare to meet defense counsel's allegation she misled the court. Moreover, the issue was a question of fact, for which Duncan was allowed a full opportunity

to rebut or explain. In her opinion, she did not misrepresent anything. She explained that she meant she mailed the subpoenas and confirmed with Anderson's mother that she had received it. Duncan asserted she never stated she personally served Anderson or that Anderson was a certainty to testify.

The problem is the court felt hoodwinked by what Duncan *did* say into believing the complainant was on board and ready to testify. And Duncan made no effort to ameliorate that misperception, which the court found she caused by stating she was prepared for trial, that she had an affidavit of service for Anderson and that she "told them to wait until we called them to let them know[,]" when the court asked if the alleged victim would be present and testifying that day. 1RP 26.

As in Myers, there is absolutely no evidence Duncan would have said anything different had she been given more time – which she did not ask for. Duncan filed a motion for reconsideration which mirrored what she said in court.

Perhaps most significantly, however, the court agreed to hear Duncan's motion to reconsider and scheduled a hearing. But Duncan withdrew the motion, opting instead to take her chances with this Court. The state should not be allowed to now argue it

was not afforded a full and fair opportunity to litigate the motion to dismiss. That ship has sailed.

2. The Court's Finding of Misconduct is Clear

The state claims: "Here, there is no explicit finding, in either the report of proceedings, findings of fact, or conclusions of law that the State engaged in arbitrary action or government misconduct." BOA at 21. According to the state, this Court must therefore presume Taul failed to carry his burden of proof to show misconduct. BOA at 15, 21-22 (citing State v. Armenta, 134 Wn.2d 1, 14, 949 P.2d 180 (1997)). This argument is specious, as the record clearly demonstrates the court found misconduct and even questioned Duncan's integrity and reminded her of the Rules of Professional Conduct.

When court convened on September 29, the prosecutor represented she was ready to proceed but for the officer's unexpected illness: "We were here for trial today, we were prepared; however, I received a call this morning around 8 A.M. from the officer in this case" saying she was ill. 1RP 2. Duncan stated she needed a continuance to accommodate the officer's illness.

When defense counsel objected the prosecutor had not subpoenaed the officer, Duncan asserted: "I believe the subpoenas went out last week." 1RP 6. While she admitted the subpoena was faxed to the officer (1RP 7), she represented she had "the affidavit of service for Ashley Anderson, Benjamin Anderson[.]" 1RP 11-12. When the court asked Duncan whether the alleged victim was present and ready to testify that morning, the prosecutor represented: "I told them to wait until we called them to let them know, Your Honor." 1RP 26.

Upon finding out Duncan had not in fact served Anderson until the next day, the court was noticeably aggravated. 2RP 46-47. 2RP 46-47. On several occasions, the court noted it had been led to believe the complainant was ready, willing and able to testify. 2RP 46-47, 50-51, 55.

The court believed Duncan had used the officer's illness to gain time to serve the complaining witness:

Instead of just telling the Court yesterday, We don't know if the alleged victim, complaining witness, will be present in court to testify, we somehow bootstrapped the illness of the officer to allow the Court to find a reasonable, rational basis to set this matter over.

2RP 53.

The court proceeded to read the Rules of Professional Conduct relating to an attorney's duty of candor to the court. 2RP 55. At best, the court found Duncan failed to correct a false statement of material fact. At worst, Duncan intentionally misled the court. 2RP 55. This was clearly a finding of misconduct by the court. The state's argument to the contrary should be rejected. Armenta is inapplicable.

Alternatively, the state contends that any finding of governmental misconduct is based on untenable grounds. BOA at 22. According to the state, the court's misimpression about the complainant's availability "cannot be laid at the feet of the State." BOA at 22.

A court's factual findings will be upheld on appeal when they are supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994). "Substantial evidence" would persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. Generally, credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The court's finding Duncan either intentionally misled the court or failed to correct a false statement of material fact is

supported by the record. Duncan stated she was prepared to proceed but for the officer's illness. She said the subpoenas went out last week. She acknowledged the officer's subpoena had been faxed. However, she stated she had an affidavit of service for Anderson. This made it sound as if she had personally served Anderson. When asked if the complainant would be testifying that morning, Duncan said she told "them" to hold off until she knew whether trial would go on as planned. This suggested she was in contact with Anderson and that Anderson was ready to testify.

Yet, as Duncan admitted on September 30, she had no idea whether Anderson would have shown up for trial on September 29, and had only served her the morning of September 30, the day after the case was called for trial. 2RP 52. Thus, contrary to the state's argument, the court's misperception that Anderson was on board to testify on the 29<sup>th</sup> most certainly can, and should, be "laid at the feet of the state."

There is substantial evidence on the record to persuade a fair-minded, rational person that Duncan misled the court. And wrapped up in the court's finding in this regard is undoubtedly a rejection of Duncan's credibility when she attempted to explain it

was not her intent to mislead the court, which is not subject to review.

The state also claims that although it did not personally serve Anderson, “the record is otherwise unclear as to whether the victim was planning on or eventually did show up on September 29 for trial.” BOA at 22, n.2. However, as defense counsel correctly recounted, Anderson had not been served. Accordingly, she was under no obligation to appear for trial.

Moreover, Anderson stated in an affidavit: “[P]rior to trial set for the 29<sup>th</sup> of September 2014, I had never spoken with, or had a meeting with, Clark County Deputy Prosecuting Attorney Kristine Duncan.” CP 127. Anderson received a subpoena in the mail, but not a written waiver of service to sign and return to the prosecutor. CP 127. Anderson declared under penalty of perjury she was not available for trial on September 29. CP 127.

Thus, any argument Duncan did not mislead the court because Anderson could have shown up of her own accord should be rejected. The bottom line is that Duncan made it seem as if Anderson’s testimony was assured, when that was not in fact the case.

Finally, the state avers “commonsense dictates that the State was not involved in any gamesmanship in order to secure a continuance” because it might have secured a continuance at the time of the readiness hearing, based on the complainant’s unavailability, had it requested one. This is sheer speculation. Based on Bogar’s busy schedule, the court had maintained the originally scheduled trial date of September 29. Moreover, the issue here is what the state represented at the time it did in fact ask for a continuance. In that vein, the court stated it most likely would not have granted the request, had it not been misled into believing Anderson was ready, willing and able to testify.

This Court should reject the state’s argument the finding of misconduct is not supported by the record or based on untenable grounds.

(3) The Court’s Finding of Prejudice Is Supported by the Record.

As the state recounts, the trial court concluded Taul was prejudiced by the government’s misconduct, because had the trial court known Anderson was not prepared or present to testify on the 29<sup>th</sup>, the court “more likely than not would have not granted the one-day continuance.” 2RP 15. As a result, the state would have

had to proceed solely on the bail jump charge. BOA at 26-27; 2RP 67-69. The state claims this does not qualify as prejudice, however. BOA at 27 (citing State v. Duggins, 121 Wn.2d 524, 852 P.2d 294, affirmed 121 Wn.2d 524, 852 P.2d 294 (1993)).

In Duggins, the question was whether the court abused its discretion in denying the defense motion to dismiss, when the state's witness officer Lone did not appear for trial and had not been personally served with a subpoena. Duggins, 68 Wn. App. at 397. Significantly, Duggins did not address the trial court's discretion to dismiss a charge when the prosecutor makes misleading statements to the court. For that reason, Duggins is inapposite.

In addressing the necessity for a defendant to show prejudice in support of dismissal, the court stated:

We are not persuaded that in adopting the rule the Supreme Court meant to abolish the trial court's traditional discretion to grant continuances within the speedy trial time limits so long as the defendant is not unduly prejudiced thereby. In this context, undue prejudice to a defendant means there is some interference with his ability to present his case, for example, the unavailability of a witness or some substantial additional time in custody awaiting trial. It does not mean merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness.

Duggins, at 401.

The state seizes on this language in support of its argument the court relied on untenable reasons for finding prejudice to Taul. BOA at 26-27. The state's comparison to Duggins should be rejected for three reasons, however.

First, in finding prejudice the court was not relying merely on the fact that if the case went to trial without the continuance, Taul might be acquitted because of the absence of the witness. On the contrary, the state would not have been able to proceed at all. And it was not just one witness the state failed to serve, it was all of them.

Second, the court's finding of prejudice should be affirmed because the state was able to strengthen its case against Taul by misleading the court about the continuance, because it allowed the state time to secure the complainant's presence at trial. Thus, it did affect Taul's ability to defend against the charge. It should also be noted the court was concerned with Bogar's schedule and his ability to remain as counsel if the case was set out too far.

Finally, Duggins involved the "Draconian penalty" of dismissal of charges with prejudice. Duggins, at 398. The same concern is not present here.

In sum, it's the state's burden to prove the court abused its discretion in granting the motion to dismiss. Under the circumstances here, the state cannot prove the court's decision was manifestly unreasonable.

(4) The Court's Remedy of Dismissal Should Be Affirmed.

Finally, the state claims "the trial court abused its discretion by resorting to the extraordinary remedy of dismissing a criminal charge without first considering intermediate and less drastic remedial steps." BOA at 27 (citing State v. Koerber, 85 Wn. App. 1, 3, 931 P.2d 904 (1996)). According to the state, the court should have considered "case-law approved intermediate steps that include the suppression of evidence, the exclusion of a witness' testimony, the release of the defendant from custody (the defendant was in custody), or a continuance of the trial date." BOA at 28.

The state's argument should be rejected. Exclusion of the evidence or exclusion of Anderson's testimony – or the other witnesses, such as her mother – whose presence Duncan failed to secure would have led to the same result: dismissal of the charges,

because the state would have no way to prove the alleged burglary or assault.

Moreover, Taul's release or a continuance would have been a poor remedy for the state's misconduct, as Bogar explained how busy his schedule was and that it would be difficult for him to remain as Taul's attorney if the case was set out for any significant period. Under these circumstances, the court did not abuse its discretion in finding dismissal to be the most appropriate remedy, especially where the state did not ask the court to consider any other remedy.

The circumstances of this case are unlike those in Koerber, cited by the state. The night before trial in Koerber's case, the state was informed that one of its witnesses was sick with the flu. The trial judge determined that because the witness was critical to the state's case, was not presently available and because the state was unable to advise the court when the witness would be available, the case against Koerber would be dismissed with prejudice for "want of prosecution."

Koerber, 85 Wn. App. at 905.

Regardless of whether "want of prosecution" was a valid basis to dismiss or whether the court's discretion is circumscribed

by CrR 8.3(b), the appellate court held the trial court abused its discretion because there was neither governmental misconduct nor prejudice to the defendant:

Criminal convictions [sic] should not be dismissed for minor acts of negligence by third parties that are beyond the State's direct control when there is no material prejudice to the defendant. The State did not engage in any unfair "gamesmanship" or intentional acts, to prevent the court from administering justice. The State's conduct did not warrant dismissal of its case against Koerber, and was an untenable ground for dismissal.

Koerber, 85 Wn. App. at 905.

Unlike the situation in Koerber, the court here did find gamesmanship by the state in its representation that the complainant was on board, when in fact the prosecutor had not even spoken to her. Moreover, the court found Taul was prejudiced by the state's unfair tactics. Accordingly, Koerber is inapposite.

While the Koerber Court also found it was an abuse of discretion for the court in that case not to have considered less drastic measures, the trial court there dismissed the case with prejudice. That is not the case here. Finally, unlike the situation in Koerber, there were no reasonable alternatives to dismissal, as set forth above. Any exclusion of evidence or testimony would have had the same result as dismissal. A continuance would have left

Taul in a potentially worse position. Accordingly, the court's choice of dismissal as the appropriate remedy for the prosecutor's misconduct should be affirmed.

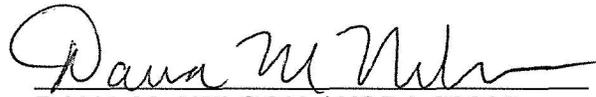
D. CONCLUSION

The court properly exercised its discretion to dismiss the charges based on Duncan's misconduct. This Court should affirm.

Dated this 30<sup>th</sup> day of June, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239

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Attorneys for Respondent

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

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STATE OF WASHINGTON )

Appellant, )

v. )

SEAN TAUL, )

Respondent. )

COA NO. 46832-8-II

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SEAN TAUL  
420 LEXINGTON WAY  
VANCOUVER, WA 98664

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JUNE 2015.

x Patrick Mayovsky

**NIELSEN, BROMAN & KOCH, PLLC**

**June 30, 2015 - 1:15 PM**

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