

No. 74300-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass North

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. ARGUMENT IN REPLY.....	1
A. The Superior Court’s decision violated RALJ 9.1 and did the exact opposite of what the rule requires. RALJ 9.1(g) requires the Superior Court to state the reasons for its ruling in writing. The Superior Court did not comply with this rule. Instead, the superior court faulted the municipal court for failing to state its findings in writing, even though RALJ 9.1 explicitly recognizes that municipal courts do <i>not</i> have to make their findings in writing.....	1
B. The Superior Court judge stated that the basis for the Municipal Court’s decision was unclear to him because there were no written findings of fact.	2
C. <i>None</i> of the <i>facts</i> that the Municipal Court relied upon <i>were disputed</i> . And the City further acknowledges that the Superior Court agreed with the Municipal Court that Stevens suffered significant prejudice.....	3
D. The only disagreement between the Municipal Court and the Superior Court is whether the undisputed facts “rise to the level” of mismanagement or arbitrary government action. <i>State v. Brooks</i> holds that it is <i>not</i> an abuse of discretion to rule that failure to provide timely discovery to the defendant constitutes mismanagement.	6
E. Here, as in <i>Brooks</i> , the trial court applied the correct test set forth in <i>Michielli</i>	7

	<u>Page</u>
F. No matter what definition of “abuse of discretion” is used, the Municipal Court’s conclusion that there was mismanagement or arbitrary action was not an abuse of discretion.	8
II. CONCLUSION.....	9

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	5
<i>State v. Brooks</i> , 149 Wn. App. 373, 203 P.3d 397 (2009).....	6, 7, 8
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	4, 6
<i>State v. Garcia</i> , 45 Wn. App 132, 724 P.2d 412 (1986).....	4
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	7, 8, 9
<i>State ex rel. Nugent v. Lewis</i> , 93 Wn.2d 80, 605 P.2d 1265 (1980).....	1
<i>State v. Oppelt</i> , 172 Wn.2d 285, 257 P.3d 653 (2011).....	6
Constitutional Provisions, Statutes and Court Rules	
RALJ 9.1	1, 2, 10
RAP 2.3.....	9, 10
JCrR 2.04(b)	1

I. ARGUMENT IN REPLY

- A. **The Superior Court's decision violated RALJ 9.1 and did the exact opposite of what the rule requires. RALJ 9.1(g) requires the Superior Court to state the reasons for its ruling in writing. The Superior Court did not comply with this rule. Instead, the superior court faulted the municipal court for failing to state its findings in writing, even though RALJ 9.1 explicitly recognizes that municipal courts do *not* have to make their findings in writing.**

Presenting an internally inconsistent argument, the City attempts to persuade this Court that the Superior Court committed no obvious errors and did not depart from the accepted and usual course of judicial proceedings. But the City's view of the applicable appellate rule is hopelessly muddled.

RALJ 9.1 speaks to the duties of both the trial court and the Superior Court sitting as an appellate court. RALJ 9.1(g) unambiguously states, "The decision of the superior court *shall* be in writing" and goes on to state, "The reasons for the decision *shall* be stated." (Italics added). The word "shall" dictates that the act described is mandatory. *See State ex rel Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980) (the word "shall" in JCrR 2.04(b), a rule for courts of limited jurisdiction, stated a command that created a mandatory duty).

Similarly, RALJ 9.1(b) states that the "superior court *shall* accept those factual determinations supported by substantial evidence," thereby creating another mandatory duty. This part of the rule extends that duty of

acceptance to *both* the factual determinations “which were expressly made by the court of limited jurisdiction” and to such other factual determinations “as may be reasonable inferred” from the judgment of the municipal court. Thus the rule states that the superior court must accept findings that are *not* explicitly made – either in writing or orally – so long as they are reasonably inferable from the municipal court’s decision.

In the present case, the Superior Court ignored its duty to state the reasons for its own decision in writing, thereby violating RALJ 9.1(g). After ordering the case sent back to the municipal court for a trial the Superior Court’s decision states only this: “Court finds there was an abuse of discretion.” (Appendix A). Why was there an abuse of discretion? The Superior Court’s written decision doesn’t say. Thus, “[t]he *reasons* for the decision” are never stated.

But at the same time, the Superior Court faulted the Municipal Court for failing to enter written findings of fact, thereby ignoring RALJ 9.1(b). Although the rule specifically acknowledges that municipal court decisions need *not* be supported by any explicit findings, the Superior Court ignored this portion of the rule as well.

B. The Superior Court judge stated that the basis for the Municipal Court’s decision was unclear to him because there were no written findings of fact.

As Petitioner Stevens noted in her opening brief, the reason that

allegedly supported the Superior Court's decision – which the Superior Court stated orally – was that the Municipal Court's failure to enter any written findings of fact made the Superior Court unsure of what the Municipal Court judge actually found. Thus, when Stevens' counsel said that the Municipal Court judge found that Stevens had been prejudiced by the failure to provide timely discovery, the Superior Court responded by stating: "I guess I'm, *I'm not sure the Court so found.*" RP IV, 7 (emphasis added). The Superior Court zeroed in on the absence of written findings, stating: "But obviously, one of the problems we have here is there weren't actual written findings and conclusions entered. There are oral statements by the judge in making his decision." *Id.*

Stevens' counsel then responded by pointing out that the appellate rule made it clear that no written and no oral findings were required, and that all that was necessary was a decision from which factual determinations could be "reasonably inferred" (RP I, 8).

C. *None of the facts that the Municipal Court relied upon were disputed. And the City further acknowledges that the Superior Court agreed with the Municipal Court that Stevens suffered significant prejudice.*

The City argues that the superior court judge then took a different tack, and shifted the basis for its ruling to *a lack of evidence in the record* to support the Municipal Court's decision that there was mismanagement or arbitrary conduct by the prosecution. *City's Answer*, at 12. Confusing

facts with legal conclusions, the City claims that “[t]he Superior Court ruled there simply were not facts supporting a finding of governmental misconduct [because] the record was completely absent of any mention that [the actions of the trial prosecutors] rose to the level of ‘gross^[1]’ mismanagement or arbitrary action, or willful violations by the prosecuting agency.” *Id.*

But the *facts* regarding the City’s actions *were undisputed*. The City did *not* dispute *any* of the following facts, all of which were relied upon by the Municipal Court:

1. In response to Stevens’ request the City prosecutors refused to produce their own notes from their interviews with the key witnesses.
2. The prosecutors asserted that they didn’t have to produce those notes because they constituted work product. RP I, 23.
3. When the defense informed the prosecutors that *State v. Garcia*, 45 Wn. App. 132, 724 P.2d 412 (1986) had rejected that exact same argument nearly 30 years ago the prosecutors *still* refused to produce their interview notes. (Attachment A, pp. 2-3, to Appendix I)
4. When the same witnesses failed to appear for their scheduled defense attorney interviews the prosecutors failed to promptly reschedule them. RP I, 25.
5. After bringing charges against Stevens the prosecutors waited

¹ The State inflates the requirement of mismanagement by asserting that a defendant must show *gross* mismanagement. No case so holds. In fact, the Supreme Court has explicitly rejected such a high standard. As noted in *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980), “we have made it clear that “governmental misconduct” need not be of an evil or dishonest nature, *simple mismanagement is sufficient*.”

for six months, until they were within two weeks of the readiness hearing, and then disclosed the existence of four new witnesses, two of whom were expert medical witnesses. (Appendix K).

6. The prosecutors failed to provide these expert witnesses with releases, thus insuring that their experts would not agree to be interviewed by defense counsel. (Appendix L, p. 3).
7. The prosecution took no action to insure that physical evidence, including the stick that was used to threaten defendant Stevens, was preserved. (Appendix I, ¶¶29-30.)
8. At the same time, one of the four additional witnesses the City disclosed at the last minute was described as a witness who would “testify to the type of broomstick” that the City allowed the alleged victim to destroy. (Appendix K, Witness #3).

The standard of review for a finding of fact is whether the record contains substantial evidence to support it. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Since these facts were *undisputed* there clearly was substantial evidence to support them. Moreover, in answer to Stevens’ motion for discretionary review, the City admits that many of these facts were expressly found by the Municipal Court: “*The trial court found* that the City endorsed four additional witnesses ‘less than two weeks before trial readiness,’ finding it significant that the City disclosed the witnesses six months after filing the charges.” *City’s Answer*, at 6. Moreover, based upon these undisputed facts, the Superior Court expressly agreed with the Municipal Court’s determination that these actions caused Stevens to suffer prejudice. *Id.* at 7.

D. The only disagreement between the Municipal Court and the Superior Court is whether the undisputed facts “rise to the level” of mismanagement or arbitrary government action. *State v. Brooks* holds that it is *not* an abuse of discretion to rule that failure to provide timely discovery to the defendant constitutes mismanagement.

Ignoring the applicable standard of “simple mismanagement,” the City argues, that the Superior Court RALJ judge properly concluded that the sum total of these undisputed facts does not “rise to the level of gross mismanagement.” *City’s Answer*, at 12. *See Dailey, supra*, at 457; *State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011). The Municipal Court concluded that it did. The Superior Court stated orally that it did not think it was. But the Superior Court’s oral comment is in direct conflict with *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009).

In Stevens’ case, as in *Brooks*, the prosecution failed to timely provide discovery. Here, as in *Brooks*, the prosecution’s failure to timely provide discovery was undisputed. In *Brooks* the prosecution took two months to transcribe a key witness statement. *Id.* at 382. It also noted the delay in producing the report of the lead detective in the case:

The State failed to deliver Deputy Smith's report and he was the lead detective on the case. It seems unlikely that this report could be immaterial in any circumstance and it was certainly material as to how defense counsel would have interviewed the investigator at trial. *The delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.*

Brooks, 149 Wn. App. at 390 (emphasis added).

This Municipal Court reached the same conclusion in this case:

[T]here are four witnesses that have all refused to talk to defense counsel. These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed. Now trial readiness is tomorrow. . . . Because the defendant's speedy trial right expires February 2nd, 2015, this matter must proceed to trial this month and begin on January 20. *Defense counsel has not had a sufficient opportunity to adequately prepare a material part of the defense and the defendant will clearly be impermissibly prejudiced if the trial were to proceed this month.*

(Appendix O, at pp. 14-15).

In *Brooks* the Court of Appeals affirmed the dismissal of the charges finding no abuse of discretion because the undisputed facts supported the legal conclusion that there was mismanagement:

We hold that the trial court did not abuse its discretion by finding governmental mismanagement and prejudice.

Brooks, 149 Wn. App. at 391. The same is true here.

E. Here, as in *Brooks*, the trial court applied the correct test set forth in *Michielli*.

In *Brooks* the Court applied the two part test outlined in *State v. Michielli*, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997), which requires a defendant seeking dismissal to show (1) that the prosecution engaged in "simple mismanagement" of the case, and (2) that such conduct prejudiced the defendant's right to a fair trial.

Such prejudice includes the right to a speedy trial and the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense."

Brooks, at 384, quoting *Michielli*, at 240.

The trial court judge was fully aware of the legal standard set forth in *Michielli* and found exactly the same type of prejudice had resulted from the City's mismanagement of the case. He noted that Stevens either had to give up her right to effective assistance of counsel and a fair trial with a prepared defense attorney, or she had to give up her right to a speedy trial. "The government simply cannot force a defendant, a criminal defendant, to choose between these rights." (Appendix O, p. 15).

"A trial court's power to dismiss charges is reviewable under the manifest abuse of discretion standard. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *Michielli*, 132 Wn.2d at 240 (citations omitted). The Municipal Court's decision that the two part test for dismissal had been met was not a manifest abuse of discretion. Indeed, the only manifest abuse of discretion in this case was committed by the Superior Court. The Superior Court's failure to apply the manifest abuse of discretion review standard was itself a manifest abuse of discretion.

F. No matter what definition of "abuse of discretion" is used, the Municipal Court's conclusion that there was mismanagement or arbitrary action was not an abuse of discretion.

The City says:

The Superior Court found that, while there was "significant

evidence” of prejudice to the defendant, there was no governmental misconduct or arbitrary action.

City’s Answer, at 7. This statement essentially concedes the case, since it shows that the Superior Court made its own determination – its own “finding” (“it found”) – that there was no mismanagement or arbitrary action. But it is not within the Superior Court judge’s power to make such a determination himself. His only power was to decide whether the Municipal Court’s decision was so unreasonable that no reasonable judge would ever have made such a decision.

II. CONCLUSION

Stevens was entitled to have the Superior Court apply the highly deferential manifest abuse of discretion standard but she did not get it. The Superior Court’s failure to apply the manifest abuse of discretion review standard to the Municipal Court’s decision constitutes a radical departure from the usual course of judicial proceedings which warrants discretionary review under RAP 2.3(d)(4).

As the language from *Michielli* quoted above demonstrates, although there are several different ways of articulating the manifest abuse of discretion test, all of the phrases employed by Washington Courts state the same basic test. The test is simply whether the appellate court can say that the decision rendered below is unreasonable, which is the same thing as saying the reasons given for the decision are untenable, or as saying that

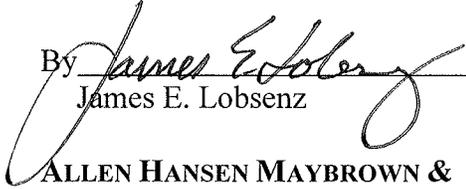
no reasonable judge would have made such a decision.

In this case, none of those things can be said about the Municipal Court's decision to dismiss the case. Obviously, (1) the trial judge did have "tenable reasons" for concluding that mismanagement or arbitrary governmental action has been shown; (2) it cannot be said that his decision was "manifestly unreasonable"; and (3) it cannot be said that "no reasonable judge" would have made the same decision.

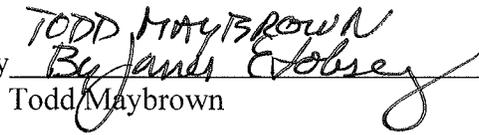
The Superior Court RALJ judge violated both RALJ 9.1(b) and RALJ 9.1(g), and disregarded the cases that hold that an appellate judge cannot reverse the dismissal of a criminal case absent a manifest abuse of discretion. Moreover, this is a case that presents an issue of public interest since hundreds of RALJ appeals are decided in this State every year, and there is not a single published decision that alerts the Superior Court bench to the danger of missing the important procedural distinction between the manner in which appellate review of factual determinations is conducted when the decision under review is one that was made by a court of limited jurisdiction rather than a Superior Court. Therefore discretionary review of the decision below is *also* warranted under RAP 2.3(d)(3).

Respectfully submitted this 29th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

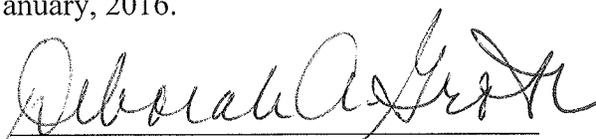
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DATED this 29th day of January, 2016.



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