

65127-7

65127-7

No. 65127-7-I

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

STATE OF WASHINGTON,
Respondent/Cross-Appellant,

v.

PEPPER NICOLE PRIGGER,
Appellant/Cross-Respondent.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Pepper Prigger's request for a continuance of her trial to retain counsel of her choice.

2. The trial court erred by denying Ms. Prigger's request for a brief continuance of her sentencing hearing so that she could be represented by retained counsel of her choice.

3. The State did not prove beyond a reasonable doubt Ms. Prigger was guilty of bribing a witness, Count 4.

4. The State did not prove beyond a reasonable doubt that Ms. Prigger was guilty of perjury, Count 1.

5. The State did not prove beyond a reasonable doubt that Ms. Prigger was guilty of perjury, Count 2.

6. The State did not prove beyond a reasonable doubt that Ms. Prigger was guilty of perjury, Count 3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment guarantees the accused the right to counsel, and a defendant who does not require court-appointed counsel is entitled to choose who will represent her. Pepper Prigger was dissatisfied with her court-appointed attorney due to a disagreement as to what defense to present, and on the first day of trial she requested a continuance to retain a specific private

attorney who was willing to take her case upon payment of a retainer. The case had only been continued once upon agreement of the parties, the case was not lengthy, and the State did not identify any specific scheduling problems. The trial court incorrectly balanced the timing of Ms. Prigger's request, which the court believed was strategic, with her right to an adequate defense rather than with her right to choice of retained counsel. Was Ms. Prigger's constitutional right to retain new counsel of her own choice violated when the court denied her motion to continue utilizing the incorrect legal standard?

2. Ms. Prigger asked to continue her sentencing hearing because she had retained James Lobsenz, who would be available to handle the hearing within two weeks. Ms. Prigger had disagreed with her court-appointed attorney over trial strategy and lost confidence in the public defender's ability to represent her at sentencing. The trial court refused to continue the sentencing hearing because it would inconvenience two witnesses who had missed work to attend the hearing. Did the trial court's refusal to continue the sentencing so that Ms. Prigger could be represented by retained private counsel violate her Sixth Amendment right to be represented by counsel of choice?

3. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Ms. Prigger was convicted of bribery of a witness because she unsuccessfully attempted to get Heather Moseley to sign a statement that would help Ms. Prigger pursue criminal charges, but Ms. Moseley was not a witness to an official proceeding and did not have information relevant to a pending criminal investigation.

a. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt Ms. Prigger had reason to believe Heather Moseley was about to be called as a witness in an official proceeding, an essential element of one alternative charged means of bribing a witness?

b. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt Ms. Prigger had reason to believe Ms. Moseley had information relevant to a criminal investigation, an essential element of the other alternative charged means of bribing a witness?

c. For purposes of the bribery of witness statute, "testimony" includes written statements that may be offered by a witness in an official proceeding. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable

doubt Ms. Prigger acted with the intent to influence Ms. Moseley's "testimony," an essential element of bribing a witness under both alternative means?

4. An essential element of the crime of perjury in the second degree is that the statement was made under oath required or authorized as law. Ms. Prigger was convicted in Count 1 of signing a statement under oath, but the statement did not conform to RCW 9A.72.085 because it did not include the place signed. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt Ms. Prigger made the statement under an oath as authorized by law?

5. Ms. Prigger was convicted of perjury in the second degree in Count 2 as an accomplice to Riannah Rammage on April 4. The statement signed by Ms. Rammage on April 4 did not conform to RCW 9A.72.085 because it did not include the place signed. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt Ms. Prigger was accomplice to Ms. Rammage's perjury when the statement was not made under an oath as authorized by law, an essential element of perjury in the second degree?

6. Ms. Prigger was convicted of perjury in the second degree in Count 3 as an accomplice to Ms. Rammage on April 30. The statement signed by Ms. Rammage on April 30 did not conform to RCW 9A.72.085 because it did not include the place signed. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt Ms. Prigger was accomplice to Ms. Rammage's perjury when the statement was not made under an oath as authorized by law, an essential element of perjury in the second degree?

C. STATEMENT OF THE CASE

Pepper Prigger and Kelly Gregerson are the parents of a son, Hunter, born May 7, 2007. 2RP 151-52; 4RP 192.¹ The couple separated when Hunter was a baby; afterwards they were involved in a contentious custody dispute in Thurston County family court. 2RP 16-17, 19-20, 153-55; 4RP 193, 195-96. In March 2009 a temporary parenting plan was in place that gave primary custody to Mr. Gregerson with visitation for Ms. Prigger. 2RP 17-18, 155. Exchanges normally occurred at a service agency in Olympia so that Ms. Prigger, Mr. Gregerson and his wife Christen Gregerson

¹ The transcripts of Ms. Prigger's jury trial, prepared by court reporter Stacey Lombardo, are referred to by the volume number assigned by the court reporter. Other volumes are referred to by date.

would not have to interact with each other. 2RP 18, 155; 3RP 119; 4RP 197.

Hunter was visiting with his mother in Arlington for the weekend when there was a snow storm. 4RP 199-200. Ms. Prigger called Mr. Gregerson and his attorney early on the morning of March 9, 2009, because there was a travel advisory and she was afraid to transport Hunter to Olympia without a four-wheel-drive vehicle. 2RP 43, 20, 155-57; 4RP 200-01. Mr. and Mrs. Gregerson therefore met Ms. Prigger at the Smokey Point Arco AM/PM in Arlington. 2RP 157-58.

Ms. Prigger had turned on a hand-held recorder, and Mr. Gregerson stated she did not have his permission to record the conversation. 2RP 176-77; 3RP 125-26; 4RP 196-97. Ms. Prigger asked Mr. Gregerson to look at a scratch on Hunter's arm to confirm it was not infected. 2RP 177; 3RP 124-25; 4RP 217. When Mr. Gregerson would only agree the cut was not infected "under duress," Ms. Prigger took Hunter inside the AM/PM store, where a store clerk confirmed the cut looked normal. 2RP 178-79; 3RP 103-4, 125; 4RP 226-27. Eventually, Mr. Gregerson picked Hunter out of his mother's arms, put him in his car, and drove away. 2RP 181-84; 3RP 135-36; 4RP 229-30.

Ms. Prigger and the Gregersons' accounts of the exchange of Hunter differ. Ms. Prigger claimed that Mr. Gregerson grabbed her recorder from her hand, threw it on the ground, and stepped on it. 4RP 219-22. When she squatted down to pick up the recorder, Mr. Gregerson pushed Ms. Prigger and she fell back, causing a small abrasion on her hand.² 4RP 220, 222-23. Mr. and Mrs. Gregerson, however, testified Mr. Gregerson did not take the recorder or push Ms. Prigger and that Hunter was in Ms. Prigger's arms until the end of the meeting. 2RP 185-86, 190; 3RP 136-37.

Ms. Prigger reported the incident to the Arlington Police Department a little over a month later. 1RP 25, 28, 33; 3RP 197-98; Exs.2, 4. Ms. Prigger had waited because she was trying to locate a potential witness. Mr. Prigger had noticed a woman in the car parked next to her truck and asked that woman to be a witness, but the woman declined because she did not want to get involved. 4RP 210-11. Ms. Prigger had a difficult time contacting and getting a statement from the woman, who had left before the incident ended. 1RP 29-30; 2RP 95, 97; 3RP 212-13, 224-27; 4RP 36-37.

Ms. Prigger gave the police a notarized statement signed by Ms. Rammage, Exhibit 3. 1RP 37, 43. Ms. Rammage was also

² Ms. Prigger had put Hunter down so he was not hurt. 4RP 221.

interviewed by the police and provided a second statement, Exhibit 38. In the statements, Ms. Rammage reported that she was at the mini mart and saw a man grab a small object from a woman's hand and smash it with his foot. Exs. 3, 38. As the woman bent to pick it up, the man lightly pushed her and she landed on her rear end. Exs. 3, 38. Ms. Rammage then left in her car. Exs. 3, 38.

The police investigation of the incident, however, did not result in charges being filed against Mr. Gregerson. Instead, the Snohomish County Prosecutor's Office charged Ms. Prigger with three counts of perjury and one count of bribing a witness. CP 82-83, 97-98. When the police interviewed Mr. and Mrs. Gregerson about the incident, Detective Peter Barrett obtained a photograph Mrs. Gregerson had taken that day showing Mr. Gregerson, Ms. Prigger, and Hunter in front of Ms. Prigger's father's truck in the parking lot. 2RP 97; 3RP 130-32, 183-74; 4RP 41-42. Detective Barrett determined the car parked where Ms. Rammage's vehicle should have been instead belonged to the son of an AM/PM store employee, who asserted the car was parked there all day and never moved. 2RP 218-20; 4RP 42-43.

Detective Barrett therefore re-contacted Ms. Rammage and told her he did not believe she had been at the AM/PM that day and

thought she was lying. 4RP 48-49. Ms. Rammage began crying and provided another written statement which led to Ms. Prigger's arrest. 4RP 50.

Prior to trial, Ms. Rammage was appointed counsel and granted immunity for her testimony. 2/18/10RP 23-24; 3RP 3-5, 44. Ms. Rammage then testified she did not really witness the incident and her statements were false. 3RP 21, 30. She asserted that Ms. Prigger paid her to sign the statements. 3RP 84-86.

Ms. Rammage claimed she met Ms. Prigger on March 11, 2009, while she was trying to file a temporary parenting plan in the Snohomish County Courthouse. 3RP 11. Ms. Prigger offered to help by watching Ms. Rammage's two-year-old, and giving them a ride. 3RP 13-15. When Ms. Prigger told her that her child's father had broken her recorder and pushed her to the ground, Ms. Rammage sympathized and signed two statement so that Ms. Prigger would have a witness on her side. 3RP 18-21, 25, 27-29. Ms. Rammage explained Ms. Prigger gave her cigarettes, coffee, gift cards, and cash and paid for occasional meals. 3RP 17, 84-86. Ms. Prigger also helped Ms. Rammage when she moved to the home of Heather Moseley due to financial problems. 2RP 48, 64; 3RP 8-9, 16-17. Ms. Moseley confirmed that Ms. Prigger brought

Ms. Rammage coffee and cigarettes, offered money, and begged Ms. Rammage to go the Arlington Police Department and make a statement. 2RP 61-63, 67.

According to Ms. Moseley, on May 21, Mrs. Prigger also offered money to her son Michael Moseley to sign a statement. 2RP 68-70, 86-87. Michael testified Ms. Prigger offered money to both of them to sign a statement without explaining the contents. 2RP 50, 55. Ms. Moseley thought the statement was about the assault and destruction of the tape recorder, but neither she nor her son saw a statement. 2RP 52, 69-70.

The jury convicted Ms. Prigger of (1) perjury in second degree for a written statement she signed on April 19, (2) perjury in the second degree as an accomplice for a written statement Ms. Rammage signed April 19, (3) perjury in the second degree as an accomplice for a written statement Ms. Rammage signed April 30, and (4) bribing a witness, Ms. Moseley. CP 39-42. The court imposed a sentence of 17-months confinement and financial obligations of \$ 1762. CP 14-24. Ms. Prigger appealed, and the State cross-appealed. CP 1-13.

D. ARGUMENT

1. MS. PRIGGER WAS UNREASONABLY DENIED
HER CONSTITUTION RIGHT TO COUNSEL OF
CHOICE AT TRIAL

a. The constitutional right to counsel guarantees that the accused be represented by counsel of her own choosing if she can afford to retain counsel. The Sixth Amendment of the United States Constitution guarantees the accused the right “to have the Assistance of Counsel for his defence.” Unless the accused is unable to afford an attorney, she has the constitutional right to be represented by counsel of her own choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). “[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” Id. (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)).

“Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.” United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005), aff’d, 548 U.S. 140 (2006). Thus, “defendants

are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.” Id. at 928 (quoting United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir.), cert. denied, 474 U.S. 994 (1985)). The right to choice of counsel is derived from the right of the defendant to determine the defense to be utilized. Gonzalez-Lopez, 399 F.3d at 928 (quoting United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir. 1992)). Thus, the defendant must be given a reasonable opportunity to employ counsel of her own choice. A violation of the right to counsel of choice is a structural error not subject to a harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150.

The right to counsel of choice is not without limits, however, as a defendant may not exercise the right in manner that obstructs the administration of justice. Gonzalez-Lopez, 548 U.S. at 144; Wheat v. United States, 486 U.S. 153, 159, 163-64, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The trial court thus has discretion in granting a continuance for purposes of substitution of counsel and must strike a balance between the defendant’s right to be represented by counsel of her own choice and the court’s interest in the “orderly administration of justice.” Gonzalez-Lopez,

399 F.3d at 939 (quoting Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984)); accord State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

b. Ms. Prigger asked for a continuance so that she could be represented by retained counsel of her choice. Ms. Prigger was charged with a single count of witness tampering on September 30, 2009. CP 97-98. In December, both parties agreed to continue the original January 19, 2010, trial date to February 5. SuppCP ____ (Agreed Trial Continuance, 12/18/09, sub. no. 17).

Defense counsel was investigating an unsigned letter Ms. Prigger found on her doorstep that appeared to show that the Gregersons were paying Ms. Rammage to change her testimony, and was trying to obtain fingerprints from the Gregersons and Ms. Rammage to compare with fingerprints located on the document. 1/29/10RP 15-26; CP 88. Based upon the State's concern that Ms. Prigger would be using a document at trial and the State would not have time to conduct an independent examination, the court re-set the trial date to February 19, 2010, over Ms. Prigger's objection. SuppCP ____ (Order Resetting Trial, 2/5/10, sub. no. 35-4). There were no courtrooms available on February 19, however, and the presiding judge held the case until February 26. 2/19/09RP 2-5.

At the trial calendar on February 26, Ms. Prigger's court-appointed attorney, Mary Beth Dingley informed the presiding judge that Ms. Prigger had contacted a private attorney, Anna Goykhman, who was willing to take Ms. Prigger's case upon payment. Ms. Dingley requested a continuance so that Ms. Goykhman could substitute, informing the court that Ms. Prigger sought new counsel due to disagreements about how to defend the charges. Ms. Dingley suggested the court review Ms. Prigger's concerns in camera to protect attorney-client confidentiality. 2/26/10RP (Nishimoto) 2, 4-5.³

The presiding judge assigned the case to the Honorable Michael Downes to address the continuance motion. 2/26/10RP (Nishimoto) 5. Ms. Dingley promptly informed Judge Downes that Ms. Prigger wanted to continue the trial so that she could be represented by her counsel of choice, Ms. Goykhman. 2/26/10RP (Meek) 3,10. Ms. Prigger provided the court with a letter about her differences of opinion with Ms. Dingley, which the court reviewed in camera and sealed. 2/26/109RP (Meek) 10-11; 2/26/10RP (Avery) 2-3; 3RP 114-16; Ex. A at 1-2. The sealed material shows

³ Three separate court reporters prepared transcripts of hearings occurring on February 26, 2010. These volumes are referred to by date with the court reporter's name in parentheses.

Ms. Prigger wanted to defend the charges by arguing the Gregersons had bribed Ms. Rammage to change her testimony whereas Ms. Dingley would be arguing Ms. Rammage changed her testimony to avoid being charged with a crime. Ex. A. Noting that Ms. Prigger had not yet retained the new lawyer, the court denied the motion to continue the case for substitute counsel and ordered the trial begin on March 1. 2/26/10RP (Avery) 4-7.

In denying Ms. Prigger's motion to continue to obtain counsel of her choice, the court accused Ms. Prigger of gamesmanship because she announced she was ready for trial on February 5 and February 19 when the material witness was not present and was requesting a continuance now that the material witness was available. 2/26/10RP (Avery) 4-5. The court concluded Ms. Prigger's request for a continuance was untimely. 2/26/10RP (Avery) 5. The court also found Ms. Prigger's disagreements with her court-appointed lawyer concerned trial strategy and did not demonstrate Ms. Dingley was unprepared for trial. 2/26/10RP (Avery) 5-7. The court concluded:

Balancing all that, including giving far greater weight to the defendant's ability to have an adequate defense and have a fair trial, and the timing of the request to delay getting another attorney being made,

after she said she was ready last week, the motion is denied.

2/26/10RP (Avery) 7.

Ms. Prigger supplemented her information concerning her differences with her court-appointed attorney on the first day of trial. 1RP 2-3; 3RP 114-16; Ex. A at 3-4. At the end of the third day of trial, Ms. Dingley requested the court conduct an in camera hearing because Ms. Prigger wanted to move for a mistrial and substitution of retained counsel of her choice. 3RP 238-39. The next morning Ms. Dingley updated the court on the fingerprint examinations of the letter. Ms. Dingley made it clear that she would not order any further testing of the document or attempt to introduce it at trial and that her client disagreed with this decision and wanted the court to order Ms. Rammage to provide another set of fingerprints.⁴ 4RP 2-5, 13. The court denied the motion. 4RP 18-19. Ms. Prigger then addressed the court and described her disagreement with her court-appointed lawyer concerning what defense to prepare and utilize, but the court was not persuaded to change the ruling. 4RP 22-2, 27, 29.

⁴ The first set of fingerprints Ms. Rammage provided was not of sufficient quality for the needed testing, but the expert could do the testing in one day if given "major case prints." 4RP 4.

c. The denial of Ms. Prigger's motion to continue violated her Sixth Amendment right to be defended by retained counsel of her choice. A defendant has the constitutional right to fire her court-appointed attorney and hire a new attorney for any reason unless the substitution would cause significant delay or inefficiency. Gonzalez-Lopez, 548 U.S. at 144, United States v. Rivera-Corona, ___ F.3d ___, 2010 WL 3239458 at * 3 (9th Cir. No. 08-30286, 8/18/10). In considering a defendant's motion for a continuance in order to be represented by counsel of choice, the trial court must balance the defendant's right to retain counsel with the public's interest in the administration of justice. Gonzalez-Lopez, 548 U.S. at 144; Wheat, 486 U.S. at 163-64; Slappy, 461 U.S. at 11-12. Whether there is a conflict between the defendant and her current counsel is only relevant if the court is required to balance the defendant's reason for requesting new counsel against the scheduling demands of the court. Rivera-Corona, 2010 WL at *3;

Here, the trial court did not apply the correct test in determining whether to grant Ms. Prigger's continuance because the court never identified the right at issue. The Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the

accused be defended by the counsel he believes to be best.”

Gonzalez-Lopez, 548 U.S. at 146. Instead of viewing the issue as whether Ms. Prigger was entitled to counsel of choice, however, the trial court looked at whether she had “an adequate defense” and a “fair trial.” 2/26/10RP (Avery) 7. A trial court abuses its discretion if the decision is based on “untenable grounds or for untenable reasons.” State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based upon untenable grounds or reasons if it rests on facts not supported by the record or “was reached by applying the wrong legal standard.” Id. The trial court here failed to identify the correct constitutional right at issue and applied the wrong balancing test. It therefore abused its discretion in denying Ms. Prigger’s request for a continuance in order to be represented by counsel of her choice.

The trial court’s consideration of the factors weighing against Ms. Prigger’s constitutional right to choice of counsel was also in error. In reviewing continuances to permit a defendant to be represented by retained counsel of choice, Washington courts have looked to (1) the number of continuances previously granted and whether they were requested by the defense, (2) whether the defendant’s dissatisfaction with her current counsel is legitimate

even though counsel was still providing competent representation, and (3) whether substitute counsel has been retained and how soon she could be prepared to go to trial.⁵ State v. Price, 126 Wn.App. 617, 632, 109 P.3d 27, rev. denied, 155 Wn.2d 1018 (2005); State v. Roth, 75 Wn.App. 808, 881 P.2d 268, rev. denied, 126 Wn.2d 1016 (1995). The review of these factors shows that the court's insistence on a particular trial date was not justified in this case.

i. Prior continuances and difficulty in rescheduling trial date. This is not a case that had been continued many times as a result of the defense. Instead, this case had been continued only one time, from January 19 to February 5, upon agreement of both parties. The case was later held on the trial calendar at the State's request and over defense objection.

Ms. Prigger did not request continuances even when the State filed two amended informations that significantly raised the number and severity of the charges against which she had to defend. The second amended information was filed after the scheduled trial date. 1/29/10RP 2-3; 2/18/10RP 2-18; CP 1, 82-85, 92-93.

⁵ A separate consideration, whether the denial will result in material prejudice to the defendant's case, is no longer valid under Gonzalez-Lopez.

Additionally, this case was tried in one week and involved only one defendant. While the State called twelve witnesses, none were expert witnesses and none resided outside of the state; only three witnesses did not reside in Snohomish County.

The trial court, however, found the case was a management problem for the prosecutor's office solely because Ms. Rammage was released on personal recognizance from a material witness warrant and was required to contact the prosecutor's office daily. 2/26/10RP 4-5. By the time of trial, however, Ms. Rammage had been appointed counsel, offered immunity, and was very cooperative with the court process and police. 2/18/10RP 23-24; 2/19/10RP 4; 3RP 44, 88; 4RP 56-57. The State's problems with one witness did not create a scheduling nightmare that outweighed Ms. Prigger's constitutional right choice of counsel.

ii Dissatisfaction with current counsel. The trial court found that Ms. Prigger's dissatisfaction with court-appointed counsel was based upon differences in trial strategy and did not show that the public defender was unprepared or a complete breakdown in communication. 2/26/10RP (Avery) 5-6. The defendant's constitutional right to choice of counsel, however, is based upon her right to determine her defense. Gonzalez-Lopez,

399 F.3d at 928; Mendoza-Salgado, 964 F.2d at 1014. Ms. Prigger does not need to show she was denied effective counsel or her right to a fair trial, but only that she was denied her choice of counsel. Gonzalez-Lopez, 548 U.S. at 146.

Here, Ms. Prigger and her court-appointed counsel were at an impasse concerning the defense to use. Ms. Dingley tried to show that Ms. Rammage changed her testimony because she was afraid the police would arrest and charge her. 2RP 80-81; 3RP 79-82. Ms. Prigger, however, wanted to defend by arguing Ms. Rammage was paid to lie by the Gregersons. Ex. A. These are different defenses, not mere differences of opinion about the details of a trial strategy as the trial court found. 2/26/10RP (Avery) 5-7. This factor thus weighed in favor of a continuance not, as the trial court found, against it.

iii. Whether substitute counsel was retained and when she could be prepared to try the case. Ms. Prigger's chosen counsel, Ms. Groykham, had not yet been paid. But Ms. Groykham had communicated with Ms. Dingley and indicated she would take the case when paid, and Ms. Prigger believed she could do so that week. 2/26/10RP (Nishimoto) 2; 2/26/10RP (Meek) 3. The trial court, however, refused to continue the case even if Ms. Groykham

appeared on Monday ready to go. 2/26/10RP (Avery) 11-12. While this factor arguably weighs against denying the continuance it alone does not outweigh Ms. Prigger's constitutional right to choice of counsel.

Thus, the trial court abused its discretion in denying Ms. Prigger's request for a continuance in order to retain counsel of her own choice. The trial court abused its discretion by applying the incorrect balancing test. The trial court accused Ms. Prigger of gamesmanship, whereas she was actually involved in a major disagreement with the lawyer concerning the defense to raise. The case had only been continued once, on agreement of both parties, and did not pose a serious scheduling problem for the court or the prosecutor's office. The denial of Ms. Prigger's request for a continuance thus violated her constitutional right to counsel of choice.

d. Ms. Prigger's convictions must be reversed. The violation of a defendant's Sixth Amendment right to choice of counsel is a structural error that is not subject to the constitutional harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150-51. Because Ms. Prigger's constitutional right to retain counsel of her choice was

violated, her convictions must be reversed and remanded for a new trial.

2. MS. PRIGGER WAS IMPROPERLY DENIED HER CONSTITUTION RIGHT TO COUNSEL OF CHOICE AT SENTENCING

Ms. Prigger's constitutional right to choice of counsel was also violated when the trial court refused to continue her sentencing hearing even though she had lost confidence in her court-appointed attorney and had retained private counsel who could be ready within two weeks. Ms. Prigger's sentence should be vacated and her case remanded for a new sentencing hearing with her chosen attorney.

Sentencing is a critical stage of the proceeding where the defendant is entitled to the assistance of counsel. State v. Saunders, 120 Wn.App. 800, 819-25, 86 P.3d 232 (2004); CrR 3.1(b)(2). "Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process." State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999). Thus, the constitutional right to choice of counsel is applicable to sentencing as well as to trial. See Aguirre, 168 Wn.2d at 364-66 (addressing right to choice of counsel at sentencing hearing).

The jury found Ms. Prigger guilty on March 3, 2010, and her sentencing hearing was held only two weeks later, on March 17. 3/3/10RP 18, 24. On the day of sentencing, Ms. Prigger requested a continuance so that she could be represented by James Lobsenz, 3/17/10RP 2-3. Ms. Prigger had already retained Mr. Lobsenz, and he was available to appear as soon as March 31. 3/17/10RP 2. The trial court denied the motion to continue, noting that (1) Ms. Prigger had requested the early sentencing date, (2) Ms. Prigger had made a last-minute request to continue the trial, (3) Ms. Prigger was represented by skilled counsel, and (4) a continuance would be unfair to Mr. and Mrs. Gregerson, who had taken time off from work and traveled from Thurston County to attend the sentencing hearing.⁶ 3/17/10RP 6-10.

The same balancing test applies when a defendant requests a continuance of her sentencing hearing in order to retain counsel of her choice: the trial court must balance the defendant's constitutional right to choice of counsel with the public's interest in the administration of justice. Aguirre, 168 Wn.2d at 365. The trial

⁶ The prosecutor informed the court that the Gregersons had traveled from Thurston County, but the court's witness rosters indicate they resided in Puyallup, which is in King and Pierce Counties. SuppCP ____ (Cost Bill - Witness Fees, sub. no 109, 4/9/10); 3/17/10RP 5. Defense counsel may not have been aware of the witnesses' address, however, as their attorney asserted it was "confidential" but testified they did live as far south as Olympia. 2RP 19.

court, however, did not mention Ms. Prigger's constitutional right to choice of counsel in denying the requested continuance and thus abused its discretion by using the wrong test.

The court thus relied upon improper factors in making its decision. The court faulted Ms. Prigger for requesting a continuance of the trial to retain counsel. That request, however, was denied and was not relevant to the court's consideration except to show Ms. Prigger's dissatisfaction with her court-appointed counsel. Nor was it relevant that Ms. Prigger had initially requested an early sentencing date.⁷

The court also noted that Ms. Dingley a skilled advocate, but Ms. Prigger was constitutionally entitled to retain counsel to advocate for her at sentencing. Additionally, while Ms. Dingley prepared a pre-sentence report, she did not have a plan in place to request a first offender waiver. CP 35-36; 3/17/10RP 5. Finally, the court found the continuance was unfair to the Gregersons, who attended the hearing, but the inconvenience to two witnesses does not outweigh Ms. Prigger's constitutional right to counsel of choice.

⁷ Ms. Prigger had requested a quick hearing because the court had ordered her into custody when the guilty verdicts were entered even though she had appeared at every court hearing and was not a flight risk. 3/8/10RP 22-23.

In Aguirre, the Washington Supreme Court upheld the denial of an eight-week continuance for sentencing so that the defendant's newly-retained attorney could represent him. Aguirre, 168 Wn.2d at 365-66. The court granted a shorter continuance to permit the defendant's military chain of command to attend the sentencing hearing, and the defendant withdrew his request for substitute counsel because his new lawyer did not feel she could prepare in the shorter period of time. Id. at 357-58. The defendant had already had two months to prepare for sentencing, and the rape and assault victim, who had a state constitutional right to appear at the sentencing hearing, was traveling from Pennsylvania. Id. at 358, 365-66; Const. art. I § 35.

Here, in contrast, Ms. Prigger and her court-appointed lawyer had only two weeks to prepare for sentencing, and counsel had not prepared a recommendation for a first offender waiver. CP 35-36; 3/17/10RP 5. Unlike the rape victim in Aguirre, the public and not the Gregersons were the victims of Ms. Prigger's crimes, and they had no constitutional right to be present. The Gregersons did attend the hearing, but they did not have to undergo a cross-country airplane journey, as they lived only 65 miles from the Snohomish County Courthouse. SuppCP ____ (Witness Roster, sub

no. 108, 4/9/10). Mr. Gregerson spoke at length at the sentencing hearing, but he was reading a prepared statement which he could have submitted in writing if he and/or his wife were unable to come to court on a new date.⁸ 3/19/10RP 13. And, unlike Aguirre, there had not been a prior continuance of the sentencing hearing.

The trial court denied Ms. Prigger's motion to continue her sentencing hearing because it might cause the Gregersons to miss work. The court thus improperly placed more weight on the witnesses' possible lost time from work with Ms. Prigger's constitutional right to counsel of choice. Ms. Prigger had retained an attorney who could be ready to represent her in as little as two weeks. Ms. Prigger's sentence must be vacated and her case remanded for a sentencing hearing where she may be represented by retained counsel of choice. Gonzalez-Lopez, 548 U.S. at 150-51.

⁸ Although concerned about the Gregersons' schedule, the court did not consider the option of permitting them to speak and then continuing the sentencing for new counsel to appear.

3. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT MS. PRIGGER
COMMITTED BRIBED A WITNESS

a. The State was required to prove every element of bribing a witness beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the government prove every element of a crime beyond a reasonable doubt.⁹ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Smith, 155 Wn.2d at 501.

⁹ The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Fourteenth Amendment prohibits, in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his owns behalf, to have a speedy public trial by an impartial jury . . ."

Ms. Prigger was charged and convicted of bribery of a witness under RCW 9A.72.090; CP 39, 67. The statute reads:

(1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:

(a) Influence the testimony of that person; or

(b) Induce that person to avoid legal process summoning him or her to testify; or

(c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or

(d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) Bribing a witness is a class B felony.

RCW 9A.72.090. "Official proceeding" is defined by statute and includes a court proceeding. RCW 9A.72.010(4). The jury was also instructed that "benefit" meant "any gain or advantage to the person benefitted" or to a third person. CP 68.

The jury was instructed concerning two alternative means of bribery. CP 67. The first alternative required the jury to find beyond a reasonable doubt that Ms. Prigger (1) offered, conferred, or agreed to confer a benefit on Ms. Moseley, (2) had reason to

believe Ms. Moseley was about to be called as a witness in an official proceeding, and (3) acted with intent to influence Ms. Moseley's testimony. CP 67. The second alternative required the jury to find Ms. Prigger (1) offered, conferred, or agreed to confer a benefit on Ms. Moseley, (2) had reason to believe Ms. Moseley might have information relevant to a criminal investigation, and (3) acted with intent to influence Ms. Moseley's testimony. CP 67; see RCW 9A.72.090(1); State v. Henjum, 136 Wn.App. 807, 811, 150 P.3d 1170 (2007). Here, the State did not prove either alternative because Ms. Moseley was not a witness to the custody incident under investigation, and Ms. Prigger had no reason to believe Ms. Moseley was about to be called as a witness or that she had information relevant to the criminal investigation.

b. The State failed to prove beyond a reasonable doubt every element of the two charged alternative means of bribing a witness. At the time Ms. Prigger approached Ms. Moseley, there were no official proceedings pending to which Ms. Moseley was a potential witness and Ms. Moseley had no information relevant to a criminal investigation. Instead, the State asserted Ms. Prigger tried to pay Ms. Moseley to become a false witness to support her allegations against Mr. Gregerson. The State was thus unable to

prove the elements of bribing a witness beyond a reasonable doubt.

First, the State did not prove beyond a reasonable doubt that Ms. Prigger had a reason to believe Ms. Moseley was about to be a witness in an official proceeding. Ms. Moseley and her son Michael testified that Ms. Prigger offered them money if they signed statements. 2RP 50, 68-70, 86. Neither Ms. Moseley nor Michael saw the statements or were aware of the content. 2RP 51-52, 55, 69-70. Michael thought Ms. Prigger wanted him to sign a statement saying she had not done anything wrong. 2RP 52. His mother thought the statements were for a custody dispute. 2RP 69-71. Ms. Moseley admitted that she had been a bit intoxicated at the time. 2RP 78-79.

The Moseleys claimed Ms. Prigger approached them on May 21. 2RP 50, 69. No assault charges were ever filed against Mr. Gregerson, and the witness tampering charge against Ms. Prigger was not filed until September 30, 2009. CP 97. There is no evidence Ms. Moseley was about to be a witness in the family law case. Thus, the State did not prove beyond a reasonable doubt Ms. Prigger had reason to believe Ms. Moseley was “about to be called as a witness in any official proceeding.” RCW 9A.72.090(1);

CP 67. The State thus failed to prove Ms. Prigger was guilty of bribing a witness under the first alternative means submitted to the jury.

Second, the State failed to prove beyond a reasonable doubt the Ms. Prigger had reason to believe Ms. Moseley might have information relevant to the criminal investigation on May 21. At the time the police were investigating Ms. Prigger's allegation that Mr. Gregerson pushed her and broke her recording device. Ms. Moseley was not present at the AM/PM parking lot that day and had no information relevant to that investigation. Even if the attention of the police had turned to investigating witness tampering by May 21, Ms. Prigger was unaware of that investigation until she was arrested on May 27. 2RP 139-41; 4RP 50-51. She thus had no reason to believe Ms. Moseley had information relevant to a criminal investigation.

The conviction may not be based upon the potential investigation of Ms. Prigger for witness tampering. In Henjum, this Court upheld the pre-trial dismissal of a bribery charge where an intoxicated defendant ran his jet boat aground and told nearby houseboat residents they could have the boat if they would take him and his passenger to the marina and not call the authorities.

Henjum, 136 Wn.App. at 809. Even though it appeared the defendant was operating a vessel under the influence of alcohol, the Henjum Court pointed out that no criminal investigation was pending at the time of the defendant's offer. Id. at 811. Similarly, there was no criminal investigation into Ms. Prigger's witness tampering pending at the time of her purported offer to Ms. Moseley on May 21. Thus, the State failed to prove the second alternative means under which the jury may have convicted Ms. Prigger.

Third, the intent element common to both alternative means is that the defendant acted to influence Ms. Moseley's "testimony." RCW 9A.72.090(1)(a); CP 67. "Testimony" is defined to include "written statements . . . that may be offered by a witness in an official proceeding." RCW 9A.72.010(6). But Ms. Moseley had no testimony to provide in any pending official proceeding. No charges were pending against Mr. Gregerson, and Ms. Moseley had no intention of providing written statements to the police or even the family courts. Thus, the State did not prove beyond a reasonable doubt that Ms. Prigger acted with intent to influence Ms. Moseley's testimony, an essential element of both charged alternative means of bribery of a witness. RCW 9A.72.090(1)(a); CP 67.

c. Ms. Prigger's conviction for bribing a witness must be reversed and dismissed. The State did not prove beyond a reasonable doubt that Ms. Prigger (1) had reason to believe Ms. Moseley was about to be called as a witness in an official proceeding or (2) had reason to believe Ms. Moseley might have information relevant to a criminal investigation, or (3) acted with the intent to influence Ms. Moseley's "testimony." Because these are essential elements of bribing a witness as charged, Ms. Prigger's conviction must be reversed and dismissed. Smith, 155 Wn.2d at 505-06; State v. Green, ___ Wn.App. ___, 2010 WL 3769081 at ¶¶ 30-36 (No. 63001-6-I, 9/27/10).

4. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MS. PRIGGER COMMITTED THREE COUNTS OF PERJURY IN THE SECOND DEGREE

Ms. Prigger was also convicted of three counts of second degree perjury, one as a principal and two as an accomplice to Ms. Ramage. CP 40-42, 58-60. A person commits perjury in the second degree when she makes a materially false statement, which she knows to be false, under oath with the intent to mislead a public servant. RCW 9A.72.030(1). The statute reads:

(1) A person is guilty of perjury if, in an examination under oath under the terms of a contract

of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.

(2) Perjury in the second degree is a class C felony.

RCW 9A.72.030.¹⁰ (emphasis added).

RCW 9A.72.085 details the manner in which a statement may be certified to be a person's sworn statement when required by statute or court rule.

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

¹⁰ A "materially false statement" is defined as "any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding. . . ." RCW 9A.72.010(1). The portion of the definition requiring the judge to determine whether a statement is material as a matter of law was found unconstitutional in State v. Abrams, 163 Wn.2d 277, 178 P.3d 1021 (2008).

The certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

.....
.....

(Date and Place) (Signature)

This section does not apply to writing requiring an acknowledgement, depositions, oaths of office, or oaths required to be taken before a special official other than a notary public.

RCW 9A.72.085. The jury in Ms. Prigger's case was therefore instructed that written statements are treated as if they were made under oath if they comply with RCW 9A.72.085. CP 66. Instruction 20 reads:

Oath includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

Written statements shall be treated as if made under oath if it is a statement, declaration, verification, or certificate, signed by the person, which recites that it is certified or declared to be true under penalty of perjury under the laws of the State of Washington and which states the date and place of its execution.

CP 66 (emphasis added).

The first count of second degree perjury, Count 1, was based upon the written statement signed by Ms. Prigger on April

19, 2009. CP 58. The statement in question, Exhibit 2, is dated and signed by Ms. Prigger at the bottom of each page under the statement, "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." Ex. 2. The statement, however, does not state the "place of its execution" as required by Instruction 20 and RCW 9A.72.085.

The statement is on an Arlington Police Department Victim/Witness Statement form with the address of the police station at the bottom. Ex. 2. The statement, however, was not written or signed at the police department; instead, Ms. Prigger took a blank statement form and returned it to the police department. 1RP 31. Sergeant Cone did not witness Ms. Prigger sign the statement, but signed that he received it. 1RP 31. Thus, the statement did not state the place of execution and was not under oath as required or authorized by law, an essential element of second degree perjury. RCW 9A.72.085.

For Count 2, Ms. Prigger was charged as an accomplice for encouraging Ms. Rammage to sign a false statement on April 9, Exhibit 3.¹¹ CP 59. Ms. Rammage testified that she signed the

¹¹ A person is an accomplice if she, with knowledge that it will promote or facilitate the commission of a crime, solicits, commands,

statement before a notary at Kinko's. 3RP 19-21, 70-71. This statement indicates it was signed before a notary on April 9, but it does not state where this occurred as required by statute. Thus, the State did not prove Exhibit 3 was executed under oath as required by law.

Count 3 is based upon a statement Ms. Rammage signed on April 30 delivered to the police department by Ms. Prigger. CP 60. That statement, Exhibit 38, is on a Arlington Police Department witness statement form and also does not state the place where it was signed. 3RP 27, 30; Ex. 38. Ms. Rammage did not remember where she was when she signed the statement. 3RP 27. Here, again, the statement is not in the form required by statute.

None of the three documents relied upon by the State to prove perjury comply with the requirements of RCW 9A.72.085, as none contain the place where they were signed. As a result, the State did not prove beyond a reasonable doubt that the statements were made "under an oath required or authorized by law," an essential element of perjury in the second degree. RCW 9A.72.030(1). All three of Ms. Prigger's convictions for second

encourage, or request another person to commit that crime. RCW 9A.08.020.

degree perjury must therefore be reversed and dismissed. Smith, 155 Wn.2d at 505-06; Green, 2010 WL 3769081 at ¶¶ 30-36.

E. CONCLUSION

Ms. Prigger's convictions for three counts of perjury in the second degree and one count of bribery of witness must all be reversed and dismissed, as in each case the State failed to prove an essential element of the crime beyond a reasonable doubt.

The trial court also violated Ms. Prigger's constitutional right to choice of counsel at trial and at sentencing. Ms. Prigger's convictions and/or her sentence must be reversed and remanded for a new trial or sentencing hearing.

DATED this 7th day of October 2010.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 65127-7-I
)	
PEPPER PRIGGER,)	
)	
Appellant/Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|---|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | PEPPER PRIGGER
339294
WACC FOR WOMEN
9601 BUJACICH RD NW
GIG HARBOR, WA 98332 | (X)
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HAND DELIVERY
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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 OCT -7 PM 4:53

SIGNED IN SEATTLE, WASHINGTON, THIS 7TH DAY OF OCTOBER, 2010.

X _____ *fr*