CHAPTER 5
CRIMINAL TRIAL ISSUES

I. THE RELUCTANT VICTIM: RESEARCH

A. Not All Victims Refuse to Testify

Those who work in the court and criminal justice systems tend to remember the victims who were reluctant to testify, or who resist testifying, more clearly than they remember victims who agree to testify. Many victims are willing to testify even when anxious about testifying. Expressing ambivalence about testifying does not necessarily mean the victim will refuse to testify. If the court has a significant number of victims who refuse to testify or who do not appear, the court system may want to review its procedures to determine whether or not the court has inadvertently created obstacles to victim cooperation,

B. Reasons Underlying Victim Reluctance or Refusal to Testify

1. Victims of domestic violence are routinely threatened and manipulated by their abusers to drop charges or to refuse to cooperate with law enforcement.[1] In a recent study of how emotional manipulation can produce recantation in domestic violence cases, researchers analyzed recorded telephone calls from jailed felony defendants to their victims, most of whom ultimately agreed to recant their report of the crime. Most of the victims eventually succumbed to the defendants' appeals with their descriptions of their suffering in jail, and the prospect of their relationships ending. [2]

2. In addition to victim intimidation, domestic violence victims are reluctant to testify for many of the same reasons that other violent crime victims are reluctant. These include:

    a. A feeling of shame or guilt that perhaps their behavior in some way caused the abuse

    b. Desire to put the whole incident behind them and try to forget that it occurred

    c. Denial, ambivalence, withdrawal, and emotional swings that are a result of being a victim of severe trauma

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[1] See Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katafiasz, & David Martin, *Meet me at the hill where we used to park*, Interpersonal Processes Associated with Victim Recantation, 73 Soc. Sci. & Med. 1054 (2011)

[2] *Id.*.

3. These reasons are often heightened by the following realities:

   a. The defendant may be living with the victim, be familiar with her/his daily routine, and have ongoing access to the victim.

   b. The victim's past efforts to leave the perpetrator, or to seek protection from the justice system, may have resulted in further violence. The victim has likely learned that the perpetrator will follow through with threats of retaliation for the victim's efforts to leave or to seek help from the justice system.

      The court must be aware that a victim's fear is not simply theoretical. In most cases, the incident before the court has followed a history of escalating violence. Thus, there is a real basis for the victim's fears that she/he or the children will be harmed if the victim appears in court and testifies.

   c. The perpetrator may be maintaining coercive control over the victim through alternating displays of affection and threats or acts of violence if the victim testifies. (See Chapter 2 for further discussion.)

   d. The victim and defendant may have children together. Domestic violence must be considered by civil courts in determining child residential time in parenting plans. However, the perpetrator may have continuing access to the victim through arrangements for child visitation.

   e. The victim and/or children may be dependent on the defendant for economic support. Thus, the victim may have conflicting feelings about the possibility that criminal justice intervention may result in incarceration of the defendant and the loss of support.

   f. The defendant may be dependent on the victim for economic support, thus increasing the likelihood of further acts of intimidation by the defendant.

   g. The victim's community and family supports who have previously provided protection in the past from the abuse may be threatening to withdraw their support and protection if the victim testifies.

   h. The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence or protecting the victim and children. This belief may be a result of past experience where the system did indeed fail to prevent the

violence, and/or it may be based on the perpetrator's ability to convince the victim that "nothing will stop him."

II. THE RIGHTS OF VICTIMS

RCW 7.69.030 requires that the court and law enforcement agencies make reasonable efforts to ensure that victims, survivors of victims, and witnesses of crimes be treated with dignity and respect. Specific provisions require that the court and law enforcement agencies make reasonable efforts to ensure the physical safety of the victim (and any other witness) both in and out of the courtroom and to notify the victim and other witnesses of significant events in the case.

In felony cases, RCW 7.69.030(12) mandates that the victim (or survivor) be informed of the time and place of sentencing. Victims are also entitled to submit a victim impact statement which is to be included in the court file. The victim impact statement must also be sent to the institution if the defendant is to be incarcerated.

In order to reduce the trauma of being present in court, the statute gives the victim the right to be provided, whenever practical, with a secure waiting area to shield the victim from contact with the defendant and family or friends of the defendant. The statute also provides for a crime victim advocate to be present at any judicial proceeding, or at any prosecutorial or defense interview. RCW 7.69.030.

Victims of domestic violence are also entitled to reasonable leave from employment and must be notified of this right. RCW 7.69.030(9). See also RCW 49.76.

III. PROCEDURES FOR COMPELLING WITNESSES TO ATTEND AND TESTIFY

This portion of the manual summarizes the mechanics of issuing and enforcing subpoenas, but some details are omitted because the subject is covered in detail elsewhere. For a thorough discussion of the rules and statutes and their interpretation, see the Washington State Judges' Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. Although that benchbook covers only the procedures in courts of limited jurisdiction, the procedures in superior court are substantially the same.

Many witnesses will testify once ordered to do so by the court. Some may feel relief at being able to inform the defendant that they have been ordered to testify, and that the decision to testify is in the control of the court, not the witness.

A. Issuance and Service of Subpoenas

In superior court, CrR 4.8 states simply, "Subpoenas shall be issued in the same manner as in civil actions." The procedures for issuing subpoenas are spelled out in CR 45. In courts of limited jurisdiction, the procedures are set forth in CrRLJ 4.8.

As a practical matter, subpoenas are usually issued by the attorney of record and the court's involvement in the issuance of subpoenas is minimal. In superior court, issuance by an attorney is authorized by CR 45(a). In courts of limited jurisdiction, the authority is found in CrRLJ 4.8.

In courts of limited jurisdiction, service of subpoenas is governed by CrRLJ 4.8(c) which allows for both personal and mailed service. Proof of service by mail, however, is not sufficient to form a basis for issuance of a material witness warrant or citation for contempt. CrRLJ 4.8(e)(2).

B. Enforcement

As discussed above, victims may have valid reasons for being unwilling (or unable) to testify. Because incarceration of a domestic violence victim/witness may often serve only to re-victimize the victim, and may deter the witness from making future complaints about the violence to law enforcement, the court may want to consider adopting internal procedures that enable an arrested material witness to be brought directly before the court without having to spend time in jail waiting for the court to reconvene.

Enforcement options include warrants, attachment, and contempt.

1. Material witness warrants

   The provisions governing issuance of a material witness warrant are covered in CrR 4.10. Such a warrant—which calls for the arrest of the witness—may be issued when:

   (a) The witness has refused to submit to a deposition ordered by the court pursuant to CrR 4.6; or

   (b) The witness has refused to obey a lawfully issued subpoena; or

   (c) It may become impracticable to secure the presence of the witness by subpoena.

   The court must hold a hearing to determine whether the proposed testimony is material and whether continued detention is appropriate no later than "the next judicial day" after arrest. CrR 4.10(b). The witness is

entitled to counsel and counsel must be appointed for an indigent witness. CrR 4.10(b).

A material witness is to be released from custody unless the court determines that the testimony of such witness cannot be secured adequately by deposition and that further detention is necessary to prevent "a failure of justice." CrR 4.10(c). Release may be delayed for a "reasonable period of time" to arrange for the taking of a deposition under CrR 4.6. CrR 4.10(c). Depositions are discussed further at Chapter 4, Section IV, E.

The court may require the witness to furnish a bond or other security as permitted by CrR 3.2 in return for his or her release, to ensure the witness's appearance at a deposition and/or trial. CrR 4.10.

As indicated above, in courts of limited jurisdiction, failure to respond to service by mail cannot, by itself, be the basis for issuance of a material witness warrant. CrRLJ 4.8(e)(2).

A decision to issue a material witness warrant lies within the discretion of the trial court and is reviewed under the manifest abuse of discretion standard. *Bellevue v. Vigil*, 66 Wn. App. 891, 895-6, 833 P.2d 445, 448 (1992). In exercising such discretion it may be worthwhile to consider the risk posed by the defendant to the victim and the public.[3] Counsel is not permitted to ask the witness about the warrant under direct testimony. *State v. Bourgeois*, 133 Wn. 2d. 389, 401-402, 945 P. 2d 1120 (1997).

2. Attachment

When a witness has actually refused to obey a subpoena, the court, under RCW 5.56.070, may direct the sheriff to "attach" a witness who has refused to obey a subpoena, and bring the witness to court to answer for contempt and in the matter the witness was originally subpoenaed for (more on contempt below). RCW 5.56.080 states that the attachment shall be executed in the same manner as a warrant. RCW 12.16.030 specifically provides for attachment of witnesses who fail to appear for district court trials.

Although technically available in criminal matters, the attachment procedure has been largely superseded by the material witness process of CrR 4.10.

[3] A helpful guide might be to consider risk factors relating to reabuse or lethality in the context of pretrial release, as referenced in Chapter IV, Section II.

3. Contempt

The court may invoke its contempt powers to enforce a subpoena or to compel a reluctant witness to appear in court or respond to questions in the courtroom. Under RCW 7.21.010(c), a person's intentional "[r]efusal as a witness to appear, be sworn, or, without lawful authority, to answer a question" is contempt of court.

IV. CONTINUANCES TO SECURE THE PRESENCE OF THE VICTIM

Difficulties can arise when a domestic violence victim fails to appear to testify on the date of trial. Case law in this area is not entirely clear—primarily because both CrR 3.3 and CrRLJ 3.3 (formerly JCrR 3.08) have been amended several times.

The current versions of CrR 3.3(f) and CrRLJ 3.3(f)(2) are identical and provide that upon motion of the court or any party, a continuance may be granted when "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." The period of the continuance is excluded in computing the speedy trial period. CrR 3.3(e)(3). Pursuant to CrR 3.3(b)(5), the speedy trial period expires no sooner than "30 days after the end of that excluded period." A decision to grant or deny a continuance lies within the discretion of the trial court. *State v. Campbell*, 103 Wn.2d 1, 13 691 P.2d 929, 937 (1984), *cert. denied*, 471 U.S. 1094 (1985). *Bellevue v. Vigil*, 66 Wn. App. 891, 892, 833 P.2d 445, 446 (1992). The following is a summary of the factors used by the appellate courts in evaluating whether the trial court abused its discretion in continuing a case.

A. Prosecutorial Efforts to Secure Victim's Presence

It is generally an abuse of discretion to continue a case to secure the presence of the victim when the prosecuting attorney did not subpoena the victim to court. *State v. Wake*, 56 Wn. App. 472, 476 783 P.2d 1131, 1133 (1989); *State v. Gowens*, 27 Wn. App. 921, 925-6, 621 P.2d 198, 201 (1980).

A continuance may still be proper if the prosecuting authority can establish that (1) it made reasonable and significant efforts to serve the missing witness with a subpoena but was unsuccessful and (2) there is good reason to believe the witness's presence can be secured in the near future. *State v. Henderson*, 26 Wn. App. 187, 191-2, 611 P.2d 1365, 1368-9 (1980). The Washington State Supreme Court has granted a continuance when the prosecutor exercised due diligence in attempting to secure a co-participant's attendance and there was no prejudice to the defendant in the delay. *State v. Nitschke*, 33 Wn. App. 521, 524-5, 655 P.2d 1204, 1205-6 (1982) (analysis under juvenile speedy trial rule).

A trial court's decision to not grant a continuance and to dismiss charges pursuant to CrR 8.3(b) and CrRLJ 8.3(b) will be reviewed under an abuse of discretion standard. *See, e.g., City of Kent v. Sandler*, 159 Wn. App. 836, 247 P.3d 454

(2011) (dismissal affirmed when subpoenaed trial witness twice failed to appear at scheduled time).

B. Absence of a Subpoenaed Witness

Where there is no prejudice to the defendant, a continuance to secure the presence of a properly subpoenaed witness generally is proper— at least where the prosecutor can establish both a valid reason for the witness's unavailability and where it is reasonable to believe that the witness will become available in a "reasonable time." *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, 1023 (1988).

CrR 4.10(a)(2) provides that the failure of a witness to respond to a subpoena may be grounds for issuance of a material witness warrant. It is thus logical to assume that the rules contemplate the granting of a continuance so that the warrant may be served. Even when the prosecuting authority has not requested a material witness warrant, a continuance may still be proper, given the psychological pressure put on domestic violence victims. Certainly, if there is any indication that the defendant has in any way encouraged the victim/witness to ignore the subpoena, a continuance would be proper. In a case where there is clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, he or she forfeits the right to confront the witness. *State v. Dobbs,* No. 87427-7, slip op. (Wash. Mar. 13, 2014)

The most difficult and most common situation occurs when a properly served witness fails to appear and the prosecuting attorney has no explanation for the witness's absence.

In *City of Bellevue v. Vigil*, 66 Wn. App. 891, 833 P.2d 445 (1992), the victim failed to appear for trial, even though she had been properly subpoenaed. The prosecution moved for a material witness warrant and for a continuance. The court declined to issue the material witness warrant but continued the case for two days. When the victim again did not appear, the trial court granted the defense motion to dismiss. The court of appeals found no abuse of discretion under the facts of *Vigil* but specifically held that a continuance to obtain the presence of a witness, even when the reason for the witness's failure to appear is unexplained, is permissible. *Id.* at 895, 448.

In *State v. Day, supra,* the Court of Appeals upheld the trial court's decision to continue a case in which the defendant was accused of murdering his first wife. Trial was continued to permit entry of a dissolution order of the defendant's second marriage so that the testimonial bar of RCW 5.60.060(1) would not apply. *Id.* at 1024, 549.

C. Prejudice to the Defendant

Prejudice in this context refers to a delay that will "substantially prejudice[d] [the defendant] in the presentation of his or her defense." CrR 3.3(f)(2). The mere fact that a continuance would permit the State to obtain evidence that is adverse to the accused does not establish "prejudice." The *Day* court emphasized that only a continuance which would result in "unfair" or "unjust" prejudice is barred.

D. Continuance Within the Speedy Trial Period

In *State v. Wake*, 56 Wn. App. at 475, the court implied that there is more latitude to continue a case when the new trial date is still within the original speedy trial period than when the new date is outside of that time frame. In *City of Seattle v. Clewis*, 159 Wn. App. 842, 237 P. 3d 449(2011), the court did not abuse its discretion when it granted a brief continuance, within the trial period, based upon the absence of the subpoenaed witness, where there was evidence that the witness feared appearing in court.

E. A Party Does Not Need to Reissue a Subpoena after a Trial Date Has Been Continued

In *State v. Tatum*, the court addressed the question of whether a party is required to reissue a subpoena to secure the presence of a witness if the original trial date is continued. *State v. Tatum*, 74 Wn. App. 81, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002 (1994). The court concluded that a witness is under subpoena until he or she is "discharged by the court or the summoning party." *Id*. at 86, 1126. The court concluded that a requirement to issue a new subpoena upon each setting of a trial date would be unduly burdensome. As the court stated:

> Particularly in the context of brief continuances of the trial date, the parties involved should have the authority to arrange for compliance with a subpoena without fear that the failure to issue a new subpoena will, as a matter of law, constitute a failure to adequately procure the witness's presence for trial.

Tatum at 85, 1126.

F. Reliance on Subpoena Issued by Opposing Party

In *State v. Simonson*, 82 Wn. App. 226, 233-4, 917 P.2d. 599, 603, *review denied*, 130 Wn.2d 1012 (1996), the Court of Appeals found that the trial court had abused its discretion in refusing to continue a case so that the defendant could secure the presence of a witness originally subpoenaed by the state. The prosecutor, who knew that the defense was intending to call the witness, excused that witness without informing either the defense attorney or the court that the witness appeared. At least where counsel makes clear his or her intent to rely on a

subpoena issued by opposing counsel, counsel may rely on the subpoena and is entitled to a continuance to secure the presence of the witness so long as it is established that the testimony of that witness would be material.

V. DISMISSALS PURSUANT TO CrR 8.3(A)

A. Dismissals Based Solely on the Request of the Victim

Sometimes, the court will be asked to dismiss a case pretrial on the grounds that the victim does not wish to pursue prosecution. The Final Report of the 1991 Washington State Domestic Violence Task Force contains the following recommendation:

> To avoid inappropriate dismissals, decisions to dismiss should be made only where evidentiary problems have developed which preclude the possibility of proving all elements of the crime. Having a reluctant witness or victim cannot be the sole basis for dismissing a case. The obstacle of reluctant witnesses can often be overcome with referral to domestic violence victims' advocates, timely processing of cases, appropriate case preparation, and appropriate procedures.

The Task Force recommends that the victim be referred to a domestic violence advocate for counseling before dismissing a case. The victim should be specifically informed that the authority to request a dismissal is vested with the prosecuting attorney's office. In counties where domestic violence legal advocates are not on staff, the prosecutor should meet with the victim to offer support and information.[4]

B. Limitations on the Power to Dismiss

RCW 10.99.040(1)(a) specifically bars certain dismissals. That statute provides that the court: "[s]hall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings."

RCW 10.99.040(1)(a) does not bar a trial court from exercising its discretion in evaluating whether it is proper to continue a case to secure the presence of a victim. *Bellevue v. Vigil,* 66 Wn. App. at 892-93.

[4] *Final Report of the Washington State Domestic Violence Task Force 1991* (Administrative Office of the Courts, PO Box 41170, Olympia, WA 98504-1170, 360-753-3365, 1991).

VI. JURY SELECTION

A. Peremptory Challenges

The use of peremptory challenges to exclude jurors based on their sex is prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S 127, 129, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89 (1994) (excluding men from jury). *Accord*, *State v. Beliz*, 104 Wn. App. 206, 213-4, 15 P. 3d 683, 688 (2001); *State v. Burch*, 65 Wn. App. 828, 836, 830 P.2d 357, 362 (1992) (excluding women). This is an extension of the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986), which barred the use of racially motivated peremptory challenges.

In *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33 (1992), the United States Supreme Court held that the defense— as well as the prosecution—is barred from engaging in intentional racial discrimination in the exercise of peremptory challenges. *Accord State v. Vreen*, 143 Wn.2d 923, 926-7, 26 P.3d 236, 237-8 (2001). The rationale of *McCollum* would apply equally to prohibit the defense from exercising peremptories on gender-based grounds.

The United States Supreme Court in *Johnson v. California*, 545 U.S. 162, 162 L.Ed. 2d 129, 125 S. Ct. 2410 (2005), clarified the quantum of proof that must be elicited by a defendant alleging purposeful discrimination in the use of peremptory challenges before the burden of justification shifts to the State. A defendant need only present sufficient evidence to raise an "inference" of discrimination. Proof by a preponderance is not required. In evaluating a prosecutor's stated rationale for a non-discriminatory use of a preemptory challenge the court is to review all available evidence to determine whether the explanation is plausible. *Miller-El v. Dretke*, 125 S. Ct. 2317, 162 L.Ed. 2d 196, (2005).

A Batson challenge to the prosecutor's use of a peremptory challenge triggers the following analysis:

1. The defendant must first establish a prima facie case of purposeful discrimination.

   The trial court may, but need not, find a prima facie case of discrimination based on striking the only juror on a venire that is from a "constitutionally cognizable group." *State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). If no prima facie case of purposeful discrimination is found, no further analysis is needed.

2. If a prima facie case of purposeful discrimination is established, the burden shifts to the prosecutor to provide a race-neutral explanation for the challenge.

3. The court then determines whether the race-neutral explanation is valid.

Race-neutral reasons recognized are discussed in the following cases:

- *State v. Thomas*, 166 Wn.2d 380, 397-98, 208 P.3d 1107 (2009) (venire member made comments hostile to the State)

- *State v. Hicks*, 163 Wn.2d 477, 494, 181 P.3d 831 (2008) (venire member was a teacher and social worker)

- *State v. Medrano*, 80 Wn. App. 108, 114, 906 P.2d 982 (1995) (venire member was a public health nurse with considerable experience with narcotics addicts and defense was diminished capacity based on drug use)

- State v. Saintcalle, 178 Wn.2d 34, 56, 309 P.3d 326 (2013) (venire member might have trouble sitting on the jury of a murder trial because someone she knew had recently been murdered)

State v. Vreen, *supra*, and *State v. Wright*, 78 Wn. App. 93, 99, 896 P.2d 713, 717, *review denied*, 127 Wn.2d 1024 (1995), contain helpful discussions of the analysis to be undertaken by a trial court in addressing a Batson challenge.

The question of whether peremptory challenges are being exercised in a discriminatory fashion may be raised *sua sponte* by the trial court. *State v. Evans*, 100 Wn. App. 757,759, 998 P.2d 373, 376 (2000).

B. CHALLENGES FOR CAUSE

Courts may dismiss prospective jurors on the basis of actual bias, which is "the existence of a state of mind . . . which satisfies the court that the challenged person cannot try the case impartially." *State v. Noltie*, 116 Wn.2d 831, 838-40, 809 P.2d 190 (1991). More than a possibility of prejudice must be shown. *Id.*

Implied bias, as defined in RCW 4.44.180, another basis for dismissal for cause, arises if the juror:

1. is a family member of a party;
2. has some other relationship to a party (e.g., employer); or
3. has served on a jury in another trial involving the defendant.

A trial court's denial of a challenge for cause is reviewed for abuse of discretion. The appellate court greatly defers to the trial court, who has the opportunity to judge the demeanor of the juror. *Noltie*, 116 Wn.2d at 840.

If a defendant's challenge for cause is erroneously denied, but the defendant then uses a peremptory challenge to remove that juror, there is no basis for reversal because the

defendant has not been prejudiced by the error. *State v. Fire*, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001).

VII. CONFRONTATION CLAUSE ISSUES

A. Closed-Circuit Television

RCW 9A.44.150, which permits a child-victim to testify under certain circumstances by way of closed-circuit television, does not apply to adult victims. There is no comparable statute for adult victims.

B. Unintentional Obstructions of the Defendant's View of Witnesses

A defendant's right to confront witnesses may be violated by even an unintentional interference. Thus, a physical barrier which exists simply as a matter of courtroom geography but which blocks a defendant's view of the witness stand may violate the confrontation clause. *State v. Wright*, 61 Wn. App. 819,829, 810 P.2d 935, 940, *review denied*, 117 Wn.2d 1012 (1991) (issue not decided because there was no showing of prejudice).

C. Prosecutorial Comment on the Defendant's Exercise of Confrontation Rights

It is misconduct for a prosecutor to cross-examine a defendant about the exercise of his right to confront the witnesses by, for example, asking the defendant if he was "staring" at the witness while the witness was testifying. Closing argument in this vein is also improper. *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85, 94 (1993), *review denied*, 124 Wn.2d 1018 (1994).

D. Hearsay/Forfeiture

A discussion of hearsay problems that frequently arise in domestic violence cases is found in Chapter 6.

VIII. SPECIAL SUBSTANTIVE LAW ISSUE: THE APPLICABILITY OF COMMUNITY PROPERTY LAWS IN CRIMINAL PROSECUTIONS

The applicability of community property laws to criminal prosecutions has at times been somewhat confusing. The Washington Supreme Court clarified the issue in *State v. Coria*, 146 Wn.2d 631, 642, 48 P.3d 980, 984 (2002). In *Coria*, the Court held that a spouse who destroys community property may be criminally prosecuted for destruction of the "property of another" under the malicious mischief statute. As the Court explained, "damaging co-owned personal property is effectively like an ouster of other co-owners. The defendant's right to possess his community property is not a defense here, because his right was not exclusive of his wife's right to possession. Both spouses have undivided half interests in community property. The defendant's rights in their community property,

as co-owner, do not include the right to infringe Mrs. Coria's." *Id.* at 639 (internal citations omitted).

IX. SPECIAL JURY INSTRUCTION ISSUE: MULTIPLE ACTS OF THE CHARGED OFFENSE

Where the evidence adduced at trial establishes more than one instance of the charged offense, either the prosecution must elect the act on which it is relying for conviction or the court must instruct the jury that it must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173, 178 (1984); *State v. Dyson*, 74 Wn. App. 237, 249, 872 P.2d 1115, 1122, *review denied*, 125 Wn.2d. 1005 (1994). No election or instruction is required, however, where the evidence shows that there was a continuing course of conduct. *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000, 1003, *review denied*, 111 Wn.2d 1012 (1988).

The courts use a "common sense" approach in determining whether the evidence establishes a continuing offense. For example, in *Dyson*, 74 Wn. App. at 249, the court concluded that multiple phone calls constituted a continuing offense because one of the means of committing the offense of telephone harassment requires proof of repeated calls.

X. TRIAL COURT'S ROLE IN DETERMINING VALIDITY OF NO-CONTACT, RESTRAINING, OR PROTECTION ORDER

In *City of Seattle v. May*, 171 Wn.2d 847 (2011), the Supreme Court held that in in a proceeding for violation of a domestic violence protection order, the defendant may not litigate the validity of the protection order unless the order is void on its face. The *May* court upheld *State v. Miller*, 156 Wn. 2d 23, 123 P.3d. 827 (2005), which had unanimously concluded that the validity of a no-contact order is not an implied element of the offense of violation of a no-contact order.

The *Miller* Court, however, did recognize that trial courts have an important "gateway" function and that only "applicable" orders are properly admitted into evidence.

> An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. *State v. Miller* at 31.

XI. JURY ACCESS TO 911 TAPE DURING DELIBERATION

A frequent exhibit in a domestic violence prosecution is a recording of a 911 call made by the victim or by a witness. Although the tape recordings are hearsay, they are often admissible as either excited utterances or present sense impressions. Of course, the usual foundation requirements for voice recordings must also be satisfied. *See* ER 901(b)(5).

Assuming that the 911 tape is admitted into evidence as an exhibit, the court must decide how the tape is to be handled when deliberations begin.

In *State v. Ross*, the Court of Appeals held that a trial court abused its discretion by sending the 911 tape and a playback machine into the jury room. 42 Wn. App. 806, 812, 714 P.2d 703, 707 (1986) (effectively overruled on other grounds in *State v. Palomo*, 113 Wn. 2d 789, 783 P.2d 575(1989), cert denied, 489 U.S. 826, 111 S. Ct. 80, 112 L.Ed 2d 53 (1990)). The court was concerned that the jury would place too much emphasis on this one item of evidence and that the court had no means of controlling how often the tape was reviewed by the jury.

Later cases have significantly pulled back from *Ross*. *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997) involved a tape recording of a tape recording made of a drug transaction. The tape was admitted into evidence and both the tape and a playback machine were provided to the jury during deliberations. The court found because the tape recordings bore directly on the charge and were not unduly prejudicial, there was no error. An exhibit is unduly prejudicial if it is likely to stimulate "such an emotional response in the jury as to overpower reason." *Castellanos* at 100. *Accord, State v. Elmore*, 139 Wn.2d 250, 296, 985 P.2d 289, 316 (1999) (no error in providing jury with playback machine with taped confession of defendant).

Certainly, a trial court may exercise discretion in this regard and may decide, particularly if the tape recording is especially graphic, to limit access. Courts have approved several different procedures. *See, e.g.*, *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126, 132 (1983) (playback machine not provided to jury; tape included with other exhibits; jury permitted to re-hear tape upon request); *State v. Smith*, 85 Wn.2d 840,852, 540 P.2d 424, 431 (1975) (after notification to counsel, tape played in absence of counsel and parties). On the other hand, it is error to refuse a jury's request to rehear—at least once—a 911 tape. *State v. Oughton*, 26 Wn. App. 74, 82, 612 P.2d. 812, 817, *review denied*, 94 Wn.2d 1005 (1980).

XII. POST-TRIAL MOTION FOR NEW TRIAL: RECANTING WITNESS

When a defendant is convicted solely on the testimony of a witness who has subsequently recanted, the trial court must first determine the reliability of the recanting testimony before ruling on a motion for new trial. *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996).

Whether there is independent corroborating evidence to support the recanting witness' original testimony is not a controlling factor. Recantations are inherently suspect and "[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court." *Macon* at 804 (*quoting State v. Wynn*, 178 Wash. 287, 289, 34 P.2d 900 (1934)).

Cases such as *State v. Landon*, 69 Wn. App. 83, 90, 848 P.2d 724, 729 (1993), which appeared to have adopted a "bright line" requiring the granting of a new trial when a defendant is convicted solely on the testimony of a witness who later recants, are of doubtful continuing validity.

When independent evidence corroborates the testimony of a witness who later recants, the decision to grant a new trial has always been vested in the trial court. *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078, 1079 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899, 905, 540 P.2d 893, 897 (1975).

Procedurally, a motion for new trial based on a recanting witness requires sworn testimony. *See Landon, supra* at 90-93 (personal restraint petition supported by unsworn statement of recanting witness does not justify the granting of new trial by the appellate court but does support ordering trial court to hold evidentiary hearing).

Motions for withdrawal of a guilty plea based on manifest injustice under CrR 4.2(f) may also involve recanting victims. In general, a defendant who has pled guilty by way of an Alford/Newton plea is entitled to an evidentiary hearing to determine the credibility of the recanting witness. *State v. D.T.M.*, 78 Wn. App. 216, 220-1, 896 P.2d 108 (1995). In contrast, a defendant who admits guilt may have a more difficult time establishing a manifest injustice, particularly where independent evidence (aside from the recanted testimony) exists. *State v. Mitchell*, 81 Wn. App. 387, 914 P.2d 771 (1996).