IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. BOBBY D. BEASLEY, JR., Respondent.	Consolidated Nos. 36880-3-II 38860-0-II UNPUBLISHED OPINION

HUNT, J. — The State appeals the trial court's CrR 8.3(b) dismissal of criminal charges against Bobby D. Beasley, Jr. for governmental misconduct. It argues that the trial court erred in (1) failing to recuse itself *sua sponte*, based on the spousal relationship between Beasley's defense counsel, Bruce Finlay, and a superior court commissioner, Amber Finlay, who was not involved in the case; (2) making a factual determination about the credibility of counsel for both parties after stating that it was uncomfortable making such a determination; (3) entering finding of fact no. 6 and conclusions of law [A]3, [A]4, [B]2, and [B]3; (4) denying the State's motions to recuse, to reconsider, and to vacate; (5) failing to disclose to the parties that it had a local practice of not presiding over matters involving the credibility of local counsel; and (6) violating that practice. Finding no error, we reject the State's arguments and affirm.

FACTS

On March 23, 2007, the Mason County Sheriff's Office filed an affidavit of probable cause providing that Bobby D. Beasley had committed burglary first degree domestic violence by unlawfully forcing entry into Rene M. Demmon's residence while "armed with a flashlight" and assaulting Demmon and her friend, Carl Hills. Clerk's Papers (CP) at 403. On March 26, the State charged Beasley with first degree burglary under RCW 9A.52.020.

At Beasley's April 9 arraignment, the start date for his 90-day speedy trial period under CrR 3.3, Mason County Superior Court Judge James B. Sawyer set trial for June 26 and pretrial for June 18, noting July 9 as the final start date for speedy trial purposes.[1] Bruce Finlay was Beasley's defense counsel.

I. Defense Discovery Requests

On June 12, defense counsel filed a "notice of appearance [and] demand for discovery," requesting the "names and addresses of persons whom the prosecuting authority intends to call as witnesses . . . together with any written or recorded statements and the substance of any oral statements of such witnesses" and "[a]ny books, papers, documents, photographs, or tangible objects which the prosecuting authority intends to use" during trial or pre-trial hearing. CP at 382.

The deputy prosecuting attorney assigned to Beasley's case, Reinhold Schuetz, did not attend the June 18 pretrial hearing; instead, deputy prosecuting attorney Rebecca Jones Garcia stood in for him. Defense counsel told the trial court that he had talked to Schuetz by telephone

[1] Beasley was out of custody on bail.

and had agreed to Schuetz's request to set the pretrial hearing over to the following week.

Defense counsel said he would request authorization to depose one of the State's witnesses, Carl Hills, who "ha[d] been contacted by mail and by phone and basically told [defense counsel's] investigator to get lost." I Report of Proceedings (RP) at 10. Noting that "[t]he prosecution should have the opportunity to arrange the interview," I RP at 10, the trial court said, "[S]o, why don't you have [defense counsel's] investigator contact the prosecutor to see if that can't be arranged." I RP at 11. Garcia attached a "sticky note" to the case file, noting, "Carl Hills—we need to see if we can facilitate D i/vs. R." CP at 26, 28, 32.

A. State's Failure To Provide Discovery

Judge Toni Sheldon presided over the June 22 pretrial and omnibus hearings. This time a different stand-in deputy prosecuting attorney, Edward Lombaro, appeared in Schuetz's place. Defense counsel advised the trial court that in addition to Hills, another witness for the State, Linda Herrera, had failed to respond to his investigator's interview requests. Defense counsel said, "I told Ms. Garcia about [the interview with Hills] last time we were in court," I RP at 12, and, "I may have to ask the Court for depositions, and I'll prepare the paperwork to do that." I RP at 13. The trial court asked, "[A]nything from the State on the pretrial?" I RP at13. Lombardo replied, "No." I RP at 13. The trial court noted that trial would be called as a backup "next Tuesday," June 26. I RP at 13.

B. Defense Motion for Deposition

On June 26, defense counsel filed a "motion for deposition" of Hills and Herrera and an attached declaration. Defense counsel's declaration asserted that his investigator Gregory

Gilbertson, made at least two requests by letter for interviews and several attempts by telephone but received no response except for one telephone contact with Hills who declined an interview. CP at 369. The declaration also asserted that although defense counsel had advised Schuetz about interviewing Hills, and Schuetz had said that his detective would contact him (Hills), defense counsel received no further information from the State in response to his interview request.

Schuetz was present at the June 28 hearing on the motion before the trial court (Judge Sheldon). Defense counsel advised the trial court, "I filed an actual motion for the deposition and asked that it be put on as soon as possible because this thing's coming right up for trial and these witnesses are being totally uncooperative with us." I RP at 16. Defense counsel further stated:

> Today as I come into court, Mr. Schuetz gave me . . . [a] "six-page follow-up report by Detective Pittman, containing follow-up interviews with both of these witnesses that we have been unable to contact at all. Why could they not call us and say look, we're going to talk to these people, why don't you show up and you can talk to them too? Well, I don't know why; they didn't do it even though - that Mr. Schuetz knew we were trying to get interviews with these people.
>
> . . . .
>
> We cannot go to trial on a Class A felony in less than one day to review interviews by the witnesses, and it's clear now that we're not going to get interviews with the witnesses until next Tuesday. Even if the judge were to order a deposition today, I would have to find them and serve them and get it set up and I couldn't do that in less than 24 hours, and I doubt that we could get it done before the weekend, frankly, since this is Thursday.
>
> So, probably the best solution is leave the interviews set on[sic] at the prosecutor's office on Tuesday. I want the Court to know though that I'm not happy with continuously having to fight, beg and claw for interviews with witnesses that are going to testify for the State.

I RP at 16-17. He added, "I think it's going to be extremely difficult to be prepared for trial by the end of the speedy trial period, and this is not due to any delays of ours." I RP at 19-20.

Schuetz countered that although the case file contained a sticky note about the interviews, "[he] didn't physically see this file for the next three days," I RP at 20, because he was in court for the next two days and then out of town for a prosecutors' conference, during which he "ha[d]n't been told that there's been any request by the defense" to facilitate interviews. I RP at 21. He said, "[T]he first I heard that there was any issue . . . [was on June 26] when I got slapped with a motion." I RP at 21. The trial court granted Beasley's motion for deposition and apparently reset trial for July 5.

On July 3, defense counsel interviewed Hills in Schuetz's presence at the prosecutor's office. Defense counsel took handwritten notes contemporaneously with the interview. These notes included: (1) "RS interrupted and told the witness not to guess, he preferred that he say he didn't know," CP at 126; (2) "Why are you so hostile hear[sic] today?" "—Not going to answer that," CP at 127; and (4) "Schuetz interrupted again and attempted to tell the witness that he didn't need to answer the question if he didn't want to." CP at 127. Also on July 3, Schuetz provided defense counsel with a compact disc of photographs "of the alleged damage to the door." CP at 319.

II. Dismissal

A. Defense Motion To Dismiss for Governmental Misconduct

On July 5, the trial court called the case for trial. Beasley moved to dismiss the charges against him under CrR 8.3(b), asserting that the State's governmental misconduct prejudiced his

case because the State had failed to provide defense counsel with the requested discovery materials until shortly before the trial date, which prevented defense counsel from adequately preparing for trial within the 90-day speedy trial period.[2] Beasley also asserted that during defense counsel's July 3 interview with Hills, Schuetz "repeatedly interrupted the questioning," "told [Hills] that he did not need to answer certain questions," "constantly interrupted for the first ten or fifteen minutes of th[e] interview," and "provided for the first time [] a disc of photos that had been requested with discovery." CP at 366.

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[2] A defendant has a constitutional right to a speedy trial under the Sixth Amendment and article I, section 22 of the Washington State Constitution. *State v. Saunders*, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009) (citing *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996)); U.S. Const. amend. VI; Wash. Const. art. I, § 22. And in Washington, the "**TIME FOR TRIAL**" rules under CrR 3.3 protect a defendant's constitutional right to speedy trial by establishing standard time limits and final start days for trial and requiring dismissal with prejudice if the speedy trial period lapses without a trial. CrR 3.3(b) and (h); *Saunders*, 153 Wn. App. at 216-17; *see State v. Kenyon*, 167 Wn.2d 130, 135-37, 216 P.3d 1024 (2009) (to preserve the right to a speedy trial and the integrity of the judicial process, the trial court must strictly apply the rule's speedy trial requirements under CrR 3.3(h)).

Under CrR 3.3(b)(2)(i), the start date for a non-incarcerated defendant must occur within 90 days of his or her arraignment date. Although the rule excludes most "continuances" from this 90-day computation, such continuances are excludable only when requested by "written agreement," "signed by the defendant," or by "motion by the court or a party" when such a continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

In the case at bar, although neither party addresses CrR 3.3 in its briefing on appeal, we note that the rule's 90-day time frame for speedy trial purposes supports Beasley's argument that the State's failure to provide defense counsel with timely discovery and to facilitate witness interviews prejudiced his case, specifically by delaying his final speedy trial start date from July 9 to August 21 and by delaying his CrR 8.3(b) motion hearing from July 31 to August 14. We also note that because the State's mismanagement and delay forced Beasley to choose between his right to a speedy trial and his right to be represented by counsel who had adequate time to prepare for trial, the record supports the trial court's finding of actual prejudice. The record also suggests that because defense counsel's request for a continuance over Beasley's objection resulted from the *State's* underlying mismanagement and delay, it was not of the type "required in the administration of justice" with no prejudice to Beasley. CrR 3.3(f)(2).

The State was not ready to proceed to trial and requested additional time to respond to the motion to dismiss in writing. I RP at 25. Defense counsel told the trial court that Beasley "does not wish to waive his right to speedy trial," but that he (defense counsel) needed more time to prepare for trial because "the two witnesses, [Hills and Herrera], said quite a few things [in the follow up interviews] that were . . . not in the statements or the police reports." I RP at 26. Defense counsel then asked the trial court to grant Beasley's motion to dismiss for governmental misconduct; in the alternative, he requested a "*Campbell*"[3] continuance because he did not have adequate time to prepare for trial. I RP at 29-30. The trial court granted the continuance, which took "Mr. Beasley's final start date out to August 30," I RP at 33, reset trial for "the week beginning July 31,"[4] I RP at 33, and trial readiness for July 27, and advised the parties that it would hear argument on Beasley's motion to dismiss on July 12. On July 23, the trial court sent notice to the parties that it had scheduled a hearing on Beasley's motion to dismiss for July 30.

On July 25, defense counsel filed a declaration supporting Beasley's motion to dismiss. The declaration asserted that (1) contrary to the trial court's instructions, the State had failed to provide defense counsel with photographs of the alleged property damage until after he "was forced to ask for a continuance [of the trial date] over his client's objection," CP at 319; (2) the State had interfered with and delayed witness interviews, demonstrating governmental

[3] *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). As the trial court here noted, an attorney may request a *Campbell* motion for a continuance to continue over the client's objections when the attorney feels that he or she is not adequately prepared.

[4] The trial court noted, "[W]e don't have trials [on Mondays], so I went to the previous Tuesday [July 31], with a readiness hearing on July 27th." I RP at 33.

misconduct; (3) "[t]he first fifteen minutes of the interview [with Hills] consisted of almost constant interference from [deputy prosecutor] Schuetz," CP at 320; and (4) the State did not provide defense counsel with a disc of recorded witness interviews until July 20, even though it had conducted at least three of these interviews several weeks earlier in May and June. Defense counsel further declared, "I cannot complain strongly enough about [Schuetz's] behavior and lack of adherence to the discovery rules." CP at 325.

On July 27, defense counsel filed a declaration by his investigator, Gregory G. Gilbertson, similarly asserting that "Schuetz repeatedly interrupted" the interview and "Schuetz'[s] conduct was both distracting and detrimental" to defense counsel's interview. CP at 305. Also on July 27, in opposition to Beasley's motion to dismiss, the State filed declarations from Schuetz, Hills, and Sergeant Martin Borcherding, a sheriff's detective who had attended Hills' July 3 interview with defense counsel.

Schuetz asserted:

> At no time did I advise Mr. Hill[s] that he did not have to answer questions put to him by the defense. At no time did I advise Mr. Hill[s] that I did not want him to answer any questions that he did not feel like answering. At no time did I direct Mr. Hill[s] not to answer any questions. I did indicate to Mr. Hill[s] that if he did not know the answer to a particular question, then he should so indicate rather than hazarding a guess. At no time did I answer questions put to Mr. Hill[s] for him.

CP at 307-08. Using almost identical language, Hills asserted:

> 2.4 At no time did Mr. Schuetz advise me that I did not have to answer questions put to me by the defense.
> 2.5 At no time did Mr. Schuetz advise me that he did not want me to answer any questions that I did not feel like answering.
> 2.6 At no time did Mr. Schuetz direct me not to answer any questions.
> 2.7 Mr. Schuetz did indicate to me that if I did not know the answer to a

> particular question, then I should so indicate rather than hazarding a guess.
> 2.8 At no time did Mr. Schuetz answer questions put to me for me.

CP 311. Borcherding similarly declared:

> 2.4 At no time did Mr. Schuetz advise Mr. Hills that he did not have to answer questions put to him by the defense.
> 2.5 At no time did Mr. Schuetz advise Mr. Hills that he did not want him to answer any questions that he did not feel like answering.
> 2.6 At no time did Mr. Schuetz direct Mr. Hills not to answer any questions.
> 2.7 Mr. Schuetz did indicate to Mr. Hills that if he did not know the answer to a particular question, then he should so indicate rather than hazarding a guess.
> 2.8 At no time did Mr. Schuetz answer questions put to Mr. Hills for him.

CP at 313.

After hearing lengthy argument on July 30, the trial court continued the hearing until the next day "for a decision." I RP at 103. On July 31, however, the State filed additional declarations from: (1) Schuetz, which contained Mason County Sheriff's Office Detective Luther Pittman's "Detective's Reports" from March 23 and July 13, CP at 289; (2) Borcherding, (3) Garcia; (4) Tracie Core, a secretary at the Mason County Prosecutor's Office; (5) Shelton Police Department Detective Harry Heldreth; and (6) Mason County Sheriff's Office Detective Jack Gardner.

When the trial court called the matter for hearing on July 31, the State asked the trial court to reopen the hearing to give the State more time to present additional argument and declarations. I RP at 107-08. The State explained that, although it had noted Beasley's motion to dismiss on July 23, it had not received defense counsel's attached declarations until July 25, "giving the State two days, because of that gamesmanship, to try to pull a response together." I RP at 108. The trial court granted the State's request.

The trial court also noted that (1) because it had received six declarations from the State earlier that day, defense counsel "should have an opportunity to respond as well," I RP at 112; (2) its vacation would begin the following day; and (3) the final start date for Beasley's speedy trial period was August 30. The trial court then continued the hearing to August 7 and reset the trial date for August 21.

On August 2 and 3, defense counsel filed responsive declarations.[5] Defense counsel declared that (1) he did not receive the State's disc of witness interviews, including interviews of Hills and Herrera, until July 20; (2) he did not receive a transcript of these interviews; and (3) he and his private investigator, Gilbertson, had "submitted [them]selves to polygraph[ ] [tests]," which showed "[n]o [d]eception [i]ndicated" about the truth of their original declarations [that Schuetz had interfered with their interview of Hills]. CP at 242. Defense counsel further asserted that Garcia's and Heldreth's declarations indicated that [Marianne Jacobson, the State's witness] "had been instructed not to talk to us without the prosecutor," and that "Schuetz had given [Heldreth] the understanding that such advice to witnesses was acceptable and proper." CP at 262.

[5] Defense counsel also filed declarations from attorney James K. Gazori, private investigator Dan Morse, and attorney David Lousteau. Gazori declared that it had been hard to obtain discovery from Schuetz on unrelated matters. Morse declared that Schuetz had previously interrupted defense interviews, instructed witnesses not to answer questions from the defense, and advised witnesses not to speak to the defense in his (Schuetz's absence). And Lousteau declared that Schuetz had "unethically interfered with [his] access to a witness." CP at 255.

Defense counsel filed additional declarations: (1) paralegal Clory Moore declared that Schuetz acted unprofessionally and interfered with defense interviews; (2) Rene Demmon declared that, in trying to persuade her to testify against Beasley, Schuetz had threatened her and called her a liar; and (3) 2000 domestic violence victim Mary Morse declared that Schuetz had instructed her not to speak with the defense unless he (Schuetz) was present at the interview.

On August 7, defense counsel was "prepared to proceed" with the hearing on Beasley's motion to dismiss. I RP at 121. But deputy prosecutor Schuetz reported that the State was "not" ready because it did not have time to respond to the "continuing flood of piecemeal filings by the defense." I RP at 121. Apparently treating this report as a State request for a continuance, the trial court reset the motion hearing for August 14.

On August 14, the trial court completed the hearing on Beasley's motion to dismiss. The trial court ruled that Schuetz's absence from the June 18 and June 22 hearings was not a valid excuse for having failed to provide the requested discovery to Beasley. The trial court noted that when defense counsel had asked Hills why he was acting hostile during the interview, the State had advised [Hills] that he need not answer the question; "at multiple other times during the defense interview of Mr. Hills the State interrupted the defense interview and the flow of that interview and interjected instructions or advice to the witness"; and "in assessing this particular issue,"

> The Court [] certainly has been uncomfortable because I have both attorneys practice before me on a daily [] basis. And to make a head-on determination of a factual question makes the Court uncomfortable, and I'll tell you what things I looked at to be able to make the determination of fact as I did.

I RP at 161.

Specifically, the trial court explained that (1) the declarations filed for the State "were exact carbon copies of each other"; (2) "[p]eople don't generally speak in that way when they're giving their own information," and "[t]hey don't exactly mimic what someone else said"; and (3) "most importantly to my factual determination, were the notes taken by defense counsel

contemporaneously with that interview," which reflected that Schuetz had repeatedly interrupted and told the witness he need not answer certain questions. I RP at 161. The trial court further noted that the State did not provide defense counsel with a compact disc containing photographs of door damage until July 3 and did not provide a compact disc containing May and June witness interviews until July 19.

B. Dismissal Based on State's Failure To Produce Timely Discovery

Based on the foregoing facts, the trial court orally ruled that the State had failed "to timely produce discovery." I RP at 162. The trial court specifically found: "[T]here [has been] governmental misconduct by the delay in providing discoverable information until after the first-set trial date and as we approach the final start date and later." I RP at 163. "[T]he State interfered with the interview of Mr. Hills being attempted by the defense team by interrupting on multiple occasions, and most significantly, by instructing the witness that he did not have to answer the question about why he was so hostile."[6] I RP at 163. And the State's delay in providing defense counsel with the necessary discovery materials caused defense counsel to request a continuance over Beasley's objections to avoid proceeding to trial unprepared, thereby prejudicing Beasley by interfering with his speedy trial rights. Based on these findings of governmental mismanagement of discovery, the trial court dismissed the charges against Beasley.

C. State's Motions for Reconsideration and Court Recusal

On August 24, the State filed a "motion to reconsider," with supporting declarations, in

[6] The trial court also noted that if the State had had concerns about this interview, it could have requested a protective order under CrR 4.7(h)(4), but it failed to do so.

which it argued: (1) "[S]ubstantial justice has not been done," CP at 109, (2) "there is no evidence justifying certain portions of the oral decision," CP at 109, and (3) "reasonable inferences from the evidence justify a contrary decision." CP at 109. On September 5, the State filed a one-page amended motion to reconsider with additional accompanying declarations, and a motion and supporting memorandum asking the trial "court to recuse itself from this matter" under Code of Judicial Conduct (CJC) Canons 1, 2, and 3(D)(1). CP at 42. In the memorandum, the State noted the trial court's acknowledged discomfort with making a factual determination "of the opposing counsels'[sic] credibility," the case's focus on counsel's credibility, and that defense counsel's spouse "is a sitting court commissioner." CP at 43. The State argued that these concerns "cast[] an appearance and impartiality concern on this proceeding that mandates recusal."[7] CP at 43.

D. Findings of Fact and Conclusions of Law

Also on September 5, the trial court entered findings of facts and conclusions of law granting Beasley's CrR 8.3(b) motion to dismiss. Finding of fact no. 6 provided:

> On July 3[], an interview of witness Carl Hills took place in the prosecutor's office. Mr. Hills was already in the prosecutor's library/conference room when the defense team arrived. Mr. Hills appeared very hostile and angry. When asked why he [Hills] was hostile, the State advised the witness that he need not answer the question, and at multiple other times during the defense interview of Mr. Hills the State interrupted the defense interview and the flow of that interview and interjected instructions or advice to the witness.
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> To make this credibility determination, the Court reviewed the declarations

[7] At the September 5 hearing for presentment of findings of fact and conclusions of law, the trial court stated that it could not address the State's motion to recuse and the State's amended motion to reconsider at that time because it had just received them and, thus, had had no opportunity to review them. The trial court advised the parties that it would set over the State's motions for reconsideration and recusal.

> that were filed, and compared what the declarations actually said and what was left out. Second, the State's declarations were essentially carbon copies of each other; the same language was used in them, which is not generally how people speak when giving their own information. The third consideration was the notes taken by defense counsel during the interview of Mr. Hills.
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> Additionally on July 3[], the defense was provided with a compact disc containing photographs of the door that was allegedly kicked in. Although the State argued that it is the policy of its office to provide that type of discovery earlier on, apparently it wasn't done and that was not brought to their attention.

CP at 33.

The trial court also found that: (1) "trial was set for June 26, 2007, with a final start date 90 days after arraignment, which was July 9, 2007," CP at 31 (finding of fact no. 1); (2) at the June 28 hearing on the motion for deposition, defense counsel advised the trial court that he had "just received discovery, that being a report of two witnesses in follow-up interviews and two other witness interviews," some of which "went back to April 2007" but "were not provided to the defense until June 28," CP at 32 (finding of fact no. 5); and (3) on July 19, the State advised defense counsel that he had a compact disc of witness interviews including two "that were 18 and 16 minutes respectively" and "were recorded . . . significantly prior to the date they were made available to the defense" on May 17, June 11, and June 22. CP at 33 (finding of fact no. 8).

The trial court's conclusions of law appear under two headings: "A. Governmental Mismanagement," CP at 34, and "B. Prejudice to the Defendant," CP at 35. Under "Governmental Mismanagement," the trial court concluded that (1) the State failed "to timely produce discovery, which the State has an ongoing obligation to provide," conclusion of law [A]1, CP at 34; (2) "[t]here is governmental mismanagement by the delay in providing discoverable information until after the first-set trial date and as we approach the final start date

and later," conclusion of law [A]2, CP at 34; (3) "[t]he State interfered with the defense interview of Carl Hills by interrupting on multiple occasions and by instructing Mr. Hills that he did not have to answer the question about why he was so hostile in the interview" because "the question about Mr. Hills' hostility was a relevant and legitimate question" and "investigations by opposing counsel are not to be impeded, pursuant to CrR 4.7(h)(1)," conclusion of law [A]3, CP at 34; and (4) "[t]he actions of the Sate by interfering in the defense interview of Carl Hills constituted governmental mismanagement," conclusion of law [A]4. CP at 34.

Under "Prejudice to the Defendant," CP at 35, the trial court ruled: (1) "Prejudice is shown when there is an effect on the [D]efendant's right to a fair trial, which includes the right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a defense," conclusion of law [B]1, CP at 35; (2) "[Beasley] was prejudiced" because "he was unable to go forward to trial when the trial date was initially set" and defense "counsel [ ]was [un]prepared," conclusion of law [B]2, CP at 35; (3) Beasley "established by a preponderance of the evidence that the [State's] interference with the defense attempts to interview a witness, as well as the very late disclosure of discoverable material, required the defense counsel to request a continuance over [Beasley's] objection so that he, defense counsel, was not proceeding to trial unprepared," conclusion of law [B]2, CP at 35; and (4) because "[t]here has been prejudice to the rights of the defendant that materially affected his right to a fair trial," his "motion to dismiss is granted" conclusion of law [B]2. CP at 35. The trial court did not enter a dismissal order at this time.

E. Hearing on State's Reconsideration and Recusal Motions

At the September 18 hearing on the State's pending motions to reconsider dismissal and for the trial court to recuse, the State also asked the trial court to vacate its prior orders. Noting that its concerns began with the trial court's August 14 "disclosure," II RP at 199, that it was uncomfortable making a factual determination about Schuetz's credibility, the State argued that (1) the Canons of Judicial Conduct govern a trial court's decision to take action *sua sponte*; (2) Canon 3(D)(1) "calls for self disqualification . . . where the [trial] [c]ourt's impartiality might reasonably be questioned," II RP at 200; and (3) case law demonstrates that the trial court "should err on the side of caution." II RP at 202. Defense counsel countered that in a discretionary recusal situation, a motion to recuse or to disqualify a judge, and an affidavit of probable cause "have to be made prior to the decision," because "otherwise, we're just judge shopping." II RP at 205.

The trial court ruled that (1) "[n]one of the mandatory requirements for a court to recuse herself are present," II RP at 208; (2) "[i]n this particular case, all counsel were well aware that the Court has these two counsel before it on a regular basis," and "the court regularly hears cases that they argue before it," II RP at 209; and (3) case law provides no example of "where a court is required to recuse herself because a court commissioner's husband . . . could or would be appearing before that court." II RP at 209. The trial court denied the State's request "at this late date to recuse." II RP at 209.

Addressing the State's other motion, the trial court ruled, "The Court at this time will not reconsider and make any changes, with one minor exception to the findings of fact and conclusions of law that were earlier entered."[8] II RP at 265. The trial court entered an order

granting Beasley's motion for dismissal and denying the State's motion for reconsideration. On January 26, 2009, the trial court denied the State's motion to vacate judgment.

The State appeals.

ANALYSIS

I. Governmental Mismanagement

The State argues that the trial court erred in entering finding of fact no. 6, asserting that substantial evidence did not support a finding that [Schuetz] interfered with the interview of Carl Hill, Br. of Appellant at 24, and that "nothing shows [Schuetz's] presence caused anyone in the interview to behave differently than would otherwise have been the case." Br. of Appellant at 27. More specifically, the State contends that the trial court improperly relied on defense counsel's notes, discounted the State's declarations, and ignored "that it was the defense's inaction, rather than the states'[sic] actions, that resulted in the defense counsel's need for a *Campbell* continuance." Br. of Appellant at 24. This argument fails.

A. Standard of Review

When a party challenges a trial court's findings of fact on appeal, we determine only whether substantial evidence supports these findings and whether these findings, in turn, support the trial court's conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *Vickers*, 148 Wn.2d at 116 (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970

[8] The trial court explained that because it had just received a copy of the "sticky note" from Schuetz's files (about facilitating Hills' interview for defense counsel), it would add a finding about the note's contents. II RP at 265. The sticky note provided, "Carl Hills—we need to see if we can facilitate D i/vs. R." II RP at 265-66.

P.2d 722 (1999)). When substantial, but disputed, evidence supports a trial court's findings of fact, we will not disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). We treat unchallenged findings of fact as verities on appeal. *State v. Moore*, 161 Wn.2d 880, 884, 169 P.3d 469 (2007).

We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992); *see State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are not subject to appellate review). We review a trial court's decision under CrR 8.3(b) for an abuse of discretion; an abuse of discretion occurs when a trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Michielli,* 132 Wn.2d 229, 240, 937 P.2d 587 (1997). We find no abuse of discretion here.

B. CrR 8.3(b) Dismissal

CrR 8.3(b) provides:

> **On Motion of Court**. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

CrR 8.3(b). Accordingly, to obtain dismissal under CrR 8.3(b), a defendant must demonstrate (1) arbitrary action or governmental misconduct and (2) prejudice affecting his right to a fair trial. *Michielli,* 132 Wn.2d at 239. Simple mismanagement is sufficient to establish governmental misconduct. *Michielli,* 132 Wn.2d at 239-40. CrR 4.7(h) clearly sets forth the State's duty to

provide continuing discovery to the defense and to refrain from interfering with the defendant's investigation of the case.

At the outset, we emphasize that, as the finder of fact, the trial court was in the best position to evaluate the persuasiveness and credibility of the parties' opposing declarations, which determinations we do not reevaluate on appeal. *Walton*, 64 Wn. App. at 415-16.

1. Interference with defense interview

Substantial evidence supports the trial court's finding that Schuetz interfered with Beasley's attempt to interview Hills. The declarations include (1) defense counsel's July 3 interview notes that "[Schuetz] interrupted and told the witness not to guess, he preferred that he say he didn't know," CP at 126; and that "Schuetz interrupted again and attempted to tell the witness that he didn't need to answer the question if he didn't want to," CP at 127; (2) defense counsel's assertion that Schuetz repeatedly interrupted during the interview, and that "[t]he first fifteen minutes of the interview consisted of almost constant interference from Mr. Schuetz," CP at 320; (3) defense investigator Gregory G. Gilbertson's assertions that "Schuetz repeatedly interrupted [the interview]," and, "Schuetz'[s] conduct was both distracting and detrimental" to defense counsel's interview, CP at 305; and (4) defense counsel's assertions that "Schuetz did interfere with the interview of Mr. Hills as described in [his] original declaration," CP at 241 (emphasis omitted), and that he (defense counsel Finlay) and Gilbertson had "submitted [them]elves to polygraph[ ] [tests] as to the truth of [their] original declarations," CP at 241, which showed, "No [d]eception [i]ndicated." CP at 242 (emphasis omitted).

In stark contrast with the defense declarations, the trial court found that the State's

declarations "were exact carbon copies of each other," and "[p]eople don't generally speak in that way when they're giving their own information." I RP at 161. And, again, in contrast with the defense declarations, the State's declarations included no interview notes, polygraph results, or supporting materials other than the "carbon copy," I RP at 161, statements of Schuetz, Borcherding, and Hills, which the trial court found less persuasive than the more credible defense declarations. We hold, therefore, that to the extent that the trial court may have disregarded the State's declarations, it properly acted within its exclusive province as the finder of fact to weigh the evidence and to determine the credibility of witnesses.

We further hold that the evidence was sufficient to persuade "a fair-minded rational person" that "the State interrupted the defense interview and the flow of that interview and interjected instructions or advice to the witness," finding of fact no. 6, CP at 33; *Vickers*, 148 Wn.2d at 116. And finding of fact no. 6 supports the trial court's conclusion of law that "[t]he actions of the State by interfering in the defense interview of Carl Hills constituted governmental mismanagement," conclusion of law [A]4. CP at 34.

2. Prejudice

We also reject the State's argument that Beasley failed to show actual prejudice. Contrary to the State's assertion, the record supports the trial court's conclusion that, because of the State's failure to comply with discovery rules and because of the State's interference with witness interviews, "[Beasley] was prejudiced . . . he was unable to go forward to trial when the trial date was initially set, and [with] counsel who was prepared," conclusion of law [B]2. CP at 35.

Unchallenged findings of fact nos. 1-5, 7 and 8 provide that (1) the State failed to notify

defense counsel about follow-up witness interviews until after the initial June 26 trial date; (2) the State failed to notify defense counsel about the compact disc witness interviews until after the July 9 final start date; (3) defense counsel raised the issue of arranging witness interviews at both the June 18 and June 22 hearings, but deputy prosecutor Schuetz said he "had no notice of the defense's request for facilitation of witness interviews until June 26," finding of fact no. 5, CP at 32; and (4) consequently, defense counsel requested a *Campbell* continuance because he "was not prepared for trial," finding of fact no. 7. CP at 33.

Here, the State assigns error to only finding of fact no. 6, the trial court's unchallenged findings of fact, nos. 1-5, 7 and 8, are verities on appeal. *Moore*, 161 Wn.2d at 884. And these unchallenged findings are sufficient to support the trial court's conclusion that "[Beasley] was prejudiced," conclusion of law [B]2. CP at 35

As we noted in *State v. Brooks*, because a criminal defendant has separate constitutional rights to a speedy trial and to effective assistance of counsel, the State cannot force a defendant to choose between his speedy trial rights and his right to effective counsel. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009) (citing *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). And when the State causes a series of delays in the discovery process, inexcusably fails to provide substantial amounts of discovery, or fails to disclose discovery materials until shortly before a crucial stage in the litigation process, it may prejudice one or both of these constitutional rights. *Price*, 94 Wn.2d at 814; *see Brooks*, 149 Wn. App. at 388, (noting that the State's long delay in providing a "'substantial' amount" of important discovery supported the finding of actual prejudice to the defendant).

As Beasley asserts, our Supreme Court has noted that for purposes of demonstrating governmental misconduct under CrR 8.3(b), a defendant's showing of "prejudice . . . affecting [his] right[ ] to a fair trial," Br, of Resp't at 12, includes the right to speedy trial and the right to counsel who has had a sufficient opportunity to prepare for trial. *Michielli*, 132 Wn.2d at 240. Here, as Beasley argues, the record shows that the State's "very late" disclosure of discoverable material caused defense counsel to seek and to obtain a continuance over Beasley's objection, which continuance caused Beasley to miss his original June 26 trial date and caused his trial date to be delayed until after July 9 (the final start date for the purposes of speedy trial) more than 90 days after his April 9 arraignment and approximately six weeks after the standard 90-day time limit for trial. Br. of Resp't at 18; CrR 3.3(b). In fact, as a direct result of governmental mismanagement, Beasley's case did not go to trial on July 30; and the trial court did not rule on Beasley's motion to dismiss until August 14, seven weeks after his original set date for trial (June 26), and approximately five weeks after his original final start date for speedy trial (July 9).

Because Beasley was forced to choose between his speedy trial rights and his right to effective counsel, the facts support the trial court's conclusion that "[t]here has been prejudice to the rights of the defendant that materially affected his right to a fair trial," conclusion of law [B]3. CP at 35. These facts also demonstrate that the trial court granted Beasley's motion to dismiss based on tenable grounds and for tenable reasons. Accordingly, we hold that the trial court did not abuse its discretion in dismissing the charges against Beasley.

II. Recusal

The State also argues that the trial court erred in failing to recuse itself *sua sponte*[9] when

"a member of the judge's judicial family was in fact both acting as a lawyer before the judge and was[10] in fact a material witness in the proceeding before the same judge."[11] Br. of Appellant at 17. This argument also fails.

At the outset, we note that Amber Finlay, the spouse of Beasley's defense counsel Bruce Finlay, served only as a Mason County Superior Court Commissioner and Shelton Municipal Court Judge during the period in question in 2007, and not as a superior court judge.[12] And she was not involved in any aspect of Beasley's proceedings below. On the contrary, the record demonstrates that only Mason County Superior Court Judges Sawyer and Sheldon participated and ruled in Beasley's case. Thus, there was no conflict or other basis for the trial court's

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[9] Contrary to RAP 10.3(a)(6) the State cites no standard of review or authority for its assertion that the trial court should have recused itself *sua sponte* from the proceedings below; thus, we do not consider this argument.

[10] Emphasis omitted.

[11] In its supplemental brief, the State further argues that the trial court erred in denying its motion to vacate judgment, failing to disclose its local practice of not presiding over matters involving the credibility of local counsel, and violating this local practice. These arguments are unpersuasive. Although the State asserts in its assignments of error that the trial court erred in denying its motion to vacate judgment and in failing to consider defense counsel's alleged statement about lying to the trial court, the State fails to support this point and to develop this argument in its briefing, contrary to RAP 10.3(a)(6). Therefore, we do not further consider these arguments.

We also reject the State's argument that the trial court's failure to disclose and/or to follow its local practice violates the CJC and requires our reversal because a "local practice" is not equivalent to a local rule; and, as we note in the analysis above, a trial court's violation of the CJC provides no basis for our review. Supp. Br. of Appellant at 9.

[12] *See* Br. of Appellant at 5, fn.1: "Finlay's spouse is one of the Mason County Superior Court's appointed Court Commissioners," and, "She is also the Shelton Municipal Court judge." In addition, we take judicial notice that later, as of 2008, Amber Finlay began serving as a Mason County Superior Court Judge.

disqualification.

A. Untimely Motion for Statutory Recusal or CrR 8.9 Disqualification

But even if the State had shown some basis for the trial court's recusal, the State's recusal request was untimely. The State did not seek recusal until September 5, 22 days *after* the trial court had orally ruled on Beasley's motion to dismiss on August 14.[13] Former RCW 4.12.050 allows one "affidavit of prejudice" against a judge as follows:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion*,

Former RCW 4.12.050 (emphasis added).[14] Because the State did not file an affidavit of prejudice before the trial court made its discretionary ruling on Beasley's motion to dismiss, the State waived its ability to seek recusal under former RCW 4.12.050(1).

The State's failure to act also operated as a waiver of its ability to seek disqualification of the trial court under CrR 8.9. CrR 8.9 allows a "**CHANGE OF JUDGE**" only as follows:

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[13] As Beasley correctly notes, "[A]ll of the relevant facts and circumstances were known to the parties in advance of the [dismissal] hearing, and neither party asked [the judge] to recuse herself." Br. of Resp't. at 18. For example, the State's deputy prosecutor was well acquainted with defense counsel; they had appeared opposite each other in previous criminal matters before the same judge and, as the trial court noted, they had argued "before [her] on a daily [ ] basis," I RP at 161. Thus, the State would have known about the judicial familial relationship about which it complained too late, before the trial court set Beasley's speedy trial and hearing dates.

[14] The legislature amended this statute in 2009. Laws of 2009, ch. 332, § 20, effective July 26, 2009. But this amendment, which added the words "or she" following the word "he" in two instances, made no substantive changes to the statute.

> Any right under RCW 4.12.050 to seek disqualification of a judge *will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge.* If a case is reassigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

CrR 8.9 (Emphasis added). Again, the State did not seek recusal of the assigned trial judge until September 5, 71 days after Beasley's original June 26 trial date, 60 days after the reset July 5 trial date, and 37 days after the final reset July 30 trial date.[15] Because the State failed to seek disqualification of the pre-assigned judge at least 30 days before any of the trial dates, it waived its ability to seek a change under CrR 8.9.

Accordingly, we affirm the trial court's denial of the State's motion to recuse.

B. Code of Judicial Conduct

To the extent the State requests reversal based on the trial court's alleged violation of the CJC, this argument also fails.

The CJC "establish[es] standards for ethical conduct of judges" based on "broad statements called Canons." But contrary to the State's argument, the court is not the proper forum in which to pursue disciplinary complaints against the judiciary under the CJC. Br. of Appellant at 12 (citing CJC).

The CJC Preamble provides that "the Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. *It is not designed or intended as a basis for civil liability or criminal prosecution.*"

[15] Because the trial court dismissed the charges against Beasley and, therefore, the case never went to trial, we refer to the various dates set for trial, all of which pre-dated the trial court's discretionary dismissal of Beasley's charges in its September 5 order.

(Emphasis added). We hold, therefore, that the CJC does not provide a ground for reversing the trial court's dismissal of Beasley's criminal charges as a result of governmental misconduct.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, CJ.

Van Deren, J.