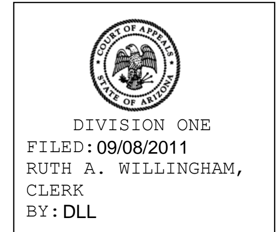
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 09/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellant,	1 CA-CR 10-0114 1 CA-CR 10-0123 1 CA-CR 10-0289 (Consolidated)
v.	DEPARTMENT B
DONNIE JACKSON, Appellee.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-030406-001SE
CR2009-030788-001SE
CR2009-030788-001SE

The Honorable Timothy J. Ryan, Judge

VACATED AND REMANDED WITH DIRECTIONS

William G. Montgomery, Maricopa County Attorney — Phoenix
By Lisa Marie Martin, Deputy County Attorney
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellee

W I N T H R O P, Chief Judge

¶1 In this consolidated appeal, the State of Arizona, by and through the Maricopa County Attorney, appeals the trial court's orders dismissing criminal charges against Donnie Jackson with

prejudice. For the following reasons, we vacate the dismissal with prejudice of the charges against Jackson and remand to the trial court with instructions to dismiss the 2008 charges without prejudice and to reinstate the 2009 charges against Jackson.

FACTS AND PROCEDURAL HISTORY[1]

¶2 The following facts are supported by the record: On October 30, 2008, police arrested Jackson for a violent home invasion that occurred on October 22, 2008. The next day, the Maricopa County Attorney's Office charged Jackson by direct complaint with two counts of armed robbery, each a class two dangerous felony. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-1904 (2010).[2] A grand jury issued a supervening indictment on November 7, 2008, and the case was assigned cause no. CR2008-030406-001SE in the Maricopa County Superior Court ("the 2008 case").

¶3 Given the nature of the allegations and Jackson's alleged prior criminal record, the trial court set bond at $250,000, and Jackson remained incarcerated throughout pendency of the case. At his November 17, 2008 arraignment, Jackson entered a plea of not guilty. At that time, the last day for trial was April 16, 2009. *See* Ariz. R. Crim. P. ("Rule") 8.2(a)(1) (limiting the time between arraignment and trial to 150 days for in-custody defendants). Due

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[1] We view the facts in the light most favorable to sustaining the court's determination. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

[2] We cite the current version of the applicable statute if no revisions material to our analysis have since occurred.

to numerous time extensions occasioned by the defense throughout pendency of the case, however, the last day eventually became December 5, 2009. *See* Ariz. R. Crim. P. 8.2(d).

¶4 The State and Jackson entered plea negotiations, and on April 1, 2009, they engaged in a settlement conference, at which Jackson was advised the State was considering additional charges, including kidnapping and aggravated assault. Jackson, however, declined the State's plea offer and indicated he was willing to take the risk of the additional charges being brought against him before trial.

¶5 In April 2009, Jackson filed a notice that he planned to call an identification expert at trial, ostensibly to challenge the victims' identification of him as one of the perpetrators. At the June 9, 2009 status conference, defense counsel agreed to exclude time to allow scheduling for the expert witness and noted that the witness would only be available "in early July or after September 15th. If we have to file a motion to continue until after the last day, we can do that." To accommodate defense counsel's request, the trial court (Judge Emmet J. Ronan of the Southeast Facility of the Superior Court) set trial for September 14, 2009, and a trial management conference for August 31, 2009.

¶6 On July 24, 2009, the trial court held an evidentiary hearing on a defense motion to suppress evidence of a handgun

seized during Jackson's arrest. The court took the matter under advisement.

¶7 On August 25, 2009, the State filed a motion to continue the trial until September 28 due to the unavailability of one of its witnesses.[3] Defense counsel did not object, and at the August 31 trial management conference, the court granted the State's motion. The court also set a new trial management conference for September 21. At that time, the last day for trial was October 14, 2009.

¶8 On September 17, 2009, defense counsel filed a motion to continue, contending that the defense's expert witness was unavailable until sometime in early November.[4] At the September 21 trial management conference, coverage counsel appeared for both sides. Defense counsel requested that the trial management conference be reset for September 24, 2009, because counsel did not know about the availability of her expert. Defense counsel also agreed to waive time, and the trial court vacated the September 28 trial date.

¶9 On September 24, 2009, defense counsel renewed her request for a continuance. After noting that her expert had scheduled a vacation and would be out of the country, defense

[3] This was the State's first such motion.

[4] At no time before trial did defense counsel, the State, or the court explore the possibility that the expert witness's testimony might be introduced through videotape or some manner other than live testimony.

counsel stated that the next available date for her expert would be Monday, November 16. Coverage counsel for the State agreed to the continuance, and the court reset trial for November 16, scheduled a trial management conference for Monday, November 9, and excluded time, making the new last day December 5, 2009. After the court set the dates, defense counsel advised that her expert would be available to testify on either November 16 or 18, and counsel intended to have the expert testify on November 18.

¶10 In the meantime, the prosecutor in the 2008 case (Mr. Sean Kelly) was also assigned to the case of State v. Careaga, which was also assigned to Judge Ronan.[5] At the October 5, 2009 trial management conference in the Careaga case, defense counsel requested a continuance. Coverage counsel for Mr. Kelly noted that the prosecutor's calendar indicated he was "available the week of the 9th, 23rd or 30th of November." The court reset the Careaga trial for Monday, November 9, and set a trial management conference for Monday, November 2. The court also advised counsel that the Careaga case was a "priority" case that would "not be continued for any other trial conflicts." At the November 2 trial management conference, the court confirmed the November 9 trial date, stating

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[5] We take judicial notice of the record in State v. Careaga, Maricopa County Superior Court cause no. CR2008-031153-001SE. *See State v. Valenzuela*, 109 Ariz. 109, 110, 506 P.2d 240, 241 (1973) (recognizing that an appellate court may take judicial notice of the records of the superior court).

"[t]here will be an order affirming trial for next Monday on the master calendar before Judge [Timothy J.] Ryan."[6]

¶11 On November 9, the court (Judge Ronan) held a trial management conference in the 2008 case. Coverage counsel again appeared for the prosecutor, and defense counsel reminded the court that her expert witness planned to testify on November 18. The court confirmed that trial would begin on November 16 and advised counsel that the case would be transferred downtown to "the master calendar [before Judge Ryan], but we will send them a note that you

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[6] In a March 30, 2010 minute entry, Judge Ryan explained the master calendar system as follows:

> As of July, 2009, the Criminal Department of the Maricopa County Superior Court disbanded the Criminal Case Transfer system for reassignment of trial ready cases, and replaced it with the Master Calendar. Stated simply, cases would be managed by the entire department, then, on the day of trial, be assigned to a particular judge to begin jury selection.
>
> This transformation did not impact the cases assigned to the Southeast Facility of the Superior Court. Those judges managed several hundred cases individually. The transfer of the downtown Phoenix Courts to the Master Calendar left the Southeast Courts without an ability to reassign cases for trial close in time to the trial date, as the Criminal Case Transfer system had been disbanded.
>
> The solution for the Courts and attorneys in the Southeast Facility was to reassign matters for trial to the Master Calendar during the Final Trial Management Conference, scheduled several days before trial. At the Final Trial Management Conference, the attorneys were advised of the reassignment to downtown Phoenix. They were advised that Master Calendar Trial Assignment Calendar started promptly at 8:00 a.m. They were advised to come to this Division to learn which judge would be assigned to their case for trial.

have the witness." Defense counsel also inquired about the status of the motion to suppress the handgun, and noted that the court had previously indicated its "inclination was to listen to what the witnesses had to say [at trial] before making a final ruling." The court advised counsel that the motion would have to be ruled on by "the judge you're placed with."

¶12 Despite the fact that both sides' counsel were prepared for trial in the Careaga case, that case was continued until November 10,[7] and it was later continued until November 12, due to court unavailability. On Thursday, November 12, 2009, the court (Judge Ryan) assigned the Careaga case to Commissioner Julie P. Newell and, to accommodate defense counsel in that case, ordered that jury selection in that priority trial would begin the afternoon of November 16. The court scheduled a final trial management conference in the Careaga case for the afternoon of Friday, November 13.

¶13 Later in the afternoon of November 12, the prosecutor filed a notice of trial conflict in the 2008 case, explaining that trial in that case, which was scheduled to begin November 16, would conflict with his scheduled trial in the Careaga case, which "was supposed to begin on Monday, November 9, 2009; however, due to the

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[7] The court's November 2 minute entry, which was electronically filed November 5, indicates that the court changed the trial date from November 9 to November 10 sometime after the November 2 trial management conference had concluded because "the Master Calendar Assignment Judge is not available for trial on November 9, 2009."

unavailability of any judge to try the case, we were not set to begin trial until Monday, November 16, 2009 in front of Commissioner Newell." The prosecutor noted that trial in the Careaga case was expected to continue through at least Wednesday, November 18, and he requested that, due to numerous other scheduling conflicts, trial in the 2008 case be rescheduled for late December or early January.[8]

¶14 On Monday morning, November 16, counsel in the 2008 case met before Judge Ryan, the master calendar assignment judge, who considered the State's notice of trial conflict, characterizing it as a motion to continue. Defense counsel objected to a continuance, explaining, "I understand that Mr. Kelly is in trial and can't be in two places at once, but . . . Mr. Jackson's been in custody for well over a year. In addition, we have secured an expert." Defense counsel noted the trial had been set with the schedule of the defense's expert witness in mind. Judge Ryan asked how the case came to be on his calendar, and defense counsel explained, "Because Judge Ronan decided at our TMC [trial management conference] last Monday that he had 15 trials set for today, and that our case did not take precedent, and he sent us down here." Defense counsel further noted that Judge Ronan had held "a full evidentiary hearing" on the motion to suppress in

[8] Trial in the Careaga case ultimately lasted four half-days, including return of verdict, because trial was held only during the afternoons due to Commissioner Newell's schedule as an "afternoon only" judge.

July, but had still not ruled on the motion because "he wanted to hear what the witnesses said at trial before making a final decision." The court questioned how counsel could "make opening statements if you don't know what the evidence will be," and defense counsel agreed that the issue should have been resolved earlier because "we don't know . . . if the evidence is going to come in or not." The court then noted that it did not "have any judges left to pin a trial to this morning." Defense counsel replied that "it's not my client's problem" and warned the court that "it's my understanding the judge has to get permission from the Supreme Court to exclude time." The court replied that it need not exclude time because the current last day was December 5. Defense counsel argued against continuation of the case, even within time limits, maintaining that "if we don't go today, then the expert is not going to be available to testify," and insinuating her client's (Jackson's) due process rights might therefore be violated. The court then denied in part the State's motion, vacated the November 16 trial date, reset the trial date to commence and for assignment on November 17, and stated that the trial would be considered a priority trial.

¶15 On Monday afternoon, November 16, trial began in the Careaga case. That same afternoon, the State filed a motion to dismiss the 2008 case without prejudice, explaining that the prosecutor was unable to proceed to trial due to a scheduling

conflict. The State avowed the motion was not being filed for the purpose of avoiding Rule 8 and further stated that the State had complied with all victims' rights.

¶16 On the morning of Tuesday, November 17, 2009, defense counsel and coverage counsel for the prosecutor appeared before Judge Ryan, who stated it was his understanding the 2008 case was being dismissed. Defense counsel confirmed that "it's being dismissed and refiled right now" and argued that the case should be dismissed with prejudice.[9] Defense counsel reminded the court that it had denied the State's motion to continue the previous day and set the 2008 case as a priority trial to accommodate the defense's expert. Defense counsel then argued:

> Mr. Kelly ignored your order, went to Commissioner Newell's courtroom yesterday and picked a jury in a case that was set on his motion[[10]] and started that case. And then at 4:30 I received a motion to con -- motion to dismiss yesterday afternoon, was being E-filed, and now it's being re-filed this morning. This is clearly a violation of my client's right to due process and clearly a violation of his speedy trial right, when we were told by Your Honor specifically that we were to start today.

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[9] That day, a grand jury issued a new indictment, again charging Jackson with two counts of armed robbery, each a class two dangerous felony (Counts I and II), as well as two counts of kidnapping, each a class two dangerous felony (Counts III and IV), two counts of aggravated assault, each a class three dangerous felony (Counts V and VI), and one count of burglary in the first degree, a class two dangerous felony (Count VII), based on the events that allegedly occurred on October 22, 2008. The case was assigned cause no. CR2009-030788-001SE in the Maricopa County Superior Court ("the 2009 case").

[10] The record does not support defense counsel's avowal that the Careaga case was re-set on the prosecutor's motion.

> My client is 17 years old[11] and he's been in custody for over a year. It's bad faith on the part of the State, Your Honor, to blatantly ignore your order and dismiss and re-file, to try and circumvent Rule 8.

The court denied the State's motion to dismiss without prejudice and assigned the case to Judge Glenn Davis to begin trial that day.

¶17 Later that morning, the court (Judge Ryan) was advised that Judge Davis was not available for trial. At a subsequent status conference, the prosecutor (Mr. Kelly) requested that the court reconsider the State's motion to dismiss. The court acknowledged the prosecutor's dilemma but denied the State's motion to reconsider:

> MR. KELLY: Judge, I would like to have you reconsider my motion this morning. I am currently in trial in front of Commissioner Newell. I was assigned for trial there last Thursday, we started last Friday. We are still in trial. I cannot try two cases at the same time.
>
> THE COURT: You can't but this was a trial set up by Judge Ronan where there was an out-of-state witness flying in and a date certain that the trial was supposed to go forward yesterday as scheduled. There were additional complications that were happening that we continued to today. So for those reasons I denied the motion to dismiss without prejudice.
>
> I can understand you can't do two trials at once; I never had expected you to do that. However, as every one [sic] is aware, in the county attorney's office since I worked there, and long before I worked there and since that time, sometimes you have trial conflicts that can't be resolved because you're in trial and that is when other attorneys in your office step up and assist and take a trial if they are not in trial.

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[11] Jackson's eighteenth birthday occurred on December 6, 2009.

MR. KELLY: That is what I tried to do yesterday after we were here and that didn't happen and that is why I filed the motion to dismiss.

THE COURT: I understand, Mr. Kelly. But there is literally several hundred witnesses -- I'm sorry -- several hundred attorneys in your firm to handle this trial. So the fact that no one stepped up doesn't mean that they are not available. So that's why I denied the motion to dismiss without prejudice at this time.

And also there was a material omission of fact, when we were talking about this case yesterday, when I wasn't advised, that there was a probable cause determination that would take place in this trial today. I wasn't advised of that.

MR. Kelly: Judge, I understand that and I understand the defense's perspective. I was supposed to finish the trial last week but for not being placed until this week and that's why I tried to set it this week so –

THE COURT: Your motion for reconsideration is respectfully denied.

The court placed the matter with Judge Sam J. Myers to begin trial that day, advised the prosecutor that he could re-urge the motion with Judge Myers, and further advised that "we will not be ordering a jury today so we will defer to Judge Myers to work out the trial schedule with counsel."

¶18 At a hearing before Judge Myers later that day, the prosecutor re-urged his motion to dismiss and advised the court of the conflict that had been created due to the late re-scheduling of the trial in the Careaga case. The prosecutor explained that the Careaga trial had been continued from November 9 and re-set on Thursday, November 12, for trial on Monday, November 16. He further explained that, after trial in the Careaga case had been

rescheduled, he went back to his office but could find no one else who could take the 2008 case, so he immediately filed a notice of conflict, which was denied, and then filed a motion to dismiss without prejudice, which had been denied with leave to re-urge the motion.

¶19 Defense counsel argued the case should be dismissed with prejudice because (1) she had arrived early the previous morning for calendaring, and by the time the prosecutor arrived, there was no more court availability for that day; (2) the defense had "a very small window" of availability for its expert; and (3) Jackson had "been in custody for over a year" and asking him to choose between going to trial before the last day without his witness or waiving additional time until his expert could testify was "no choice at all," especially given his age. Defense counsel further maintained that the prosecutor had "willfully withheld [] information from Judge Ryan yesterday" because, after the court denied his motion to continue, the prosecutor had not disclosed that he planned to continue with the Careaga trial and "pick a jury in front of Commissioner Newell." Defense counsel further avowed that "Mr. Kelly didn't tell, as far as I know, did not tell Commissioner Newell about the problem with my case in front of Judge Ryan," and maintained that just because the prosecutor's "schedule is overwhelmed" was no reason to "disregard" the court's

ruling denying a continuance and seek a dismissal without prejudice.

¶20 The prosecutor explained that the basis for his dismissal request was his "unavailability to try the case when it is being set" and, from the State's perspective, the case could likely be tried within the time limits because "the problem is this week." He further avowed that he had mentioned the trial conflict in his motion and had spoken with Commissioner Newell about the situation, and "she had told me she was going to contact Judge Ryan." He also noted that dismissal did not prevent the defense "from presenting the same defense that they want to present."

¶21 The trial court (Judge Myers) granted the State's motion to dismiss and took the issue of prejudice under advisement. After discussing the matter with Judge Ryan, the court ordered that Judge Ryan would rule whether the dismissal should be with prejudice following written briefing by the parties. The court also ordered that Jackson be released from custody as to the 2008 case but denied his motion for release on the newly filed charges in the 2009 case.

¶22 On November 25, 2009, defense counsel filed a brief in support of a dismissal with prejudice, arguing that the prosecutor's trial conflict was not good cause for requesting a dismissal and the dismissal prejudiced Jackson because "he remains in custody" and it was unclear when his expert witness would again

be available to testify. Defense counsel maintained that the motion to dismiss was "on its face" a violation of Rule 8.

¶23 The State responded that the length of time Jackson had been incarcerated was largely due to the numerous requests for continuance made on his behalf before trial in the 2008 case, and the conflict was created by rescheduling of the Careaga trial, which was a priority case that involved an in-custody defendant charged with four felonies, three of them dangerous, and "involved victims coming in from out of town." The State argued that, given the conflict, the prosecutor simply could not proceed to trial, and it had been "not possible or practical" for another attorney to take one of the trials on such short notice, especially given the "serious, violent crimes" involved. The State also noted that both the notice of trial conflict (motion for continuance) and the motion to dismiss were filed "well before the last day," and thus Rule 8 time limits had not been violated, and the defense had been unwilling to consider any continuation of the case, even within time limits. Additionally, the State maintained that its request for a dismissal had not been made to harass Jackson or gain a tactical advantage over him, and Jackson had suffered no actual prejudice as a result of the delay because he had not shown that his witness would be unavailable at a future date.

¶24 On December 11, 2009, defense counsel replied that the State had gained a tactical advantage by having more time to

prepare for trial and that because the last day for trial in the 2008 case (December 5) had subsequently passed, the court should deem Rule 8 to have been violated.

¶25 On January 19, 2010, the trial court (Judge Ryan) held oral argument on the deferred motion to dismiss the 2008 case with prejudice. At the hearing, the court asked the prosecutor why he had not sought another attorney to try the 2008 case when he realized a conflict existed, and the prosecutor replied that he had contacted his bureau chief, who could find no one in his trial division to take over the case. The court appeared to accept the prosecutor's explanation at the time, stating: "And I know you as an attorney. I know you asked. I know [you] looked around. I know you talked to the bureau chief. So I know it wasn't an issue of you saying, well, gosh, I have got a trial conflict."

¶26 Nevertheless, after taking the matter under advisement, the trial court dismissed the 2008 case with prejudice; accordingly, the court also dismissed with prejudice Counts I and II of the 2009 case.[12] The State moved for reconsideration, and in a minute entry dated February 1, 2010, the court denied the State's motion. The court found that "the sole purpose of the Notice of

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[12] As the State notes, the trial court made no express finding whether the dismissal with prejudice was "in the interests of justice." *Compare State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991), *with Quigley v. City Court of City of Tucson*, 132 Ariz. 35, 36-37, 643 P.2d 738, 739-40 (App. 1982). *See also infra* ¶ 36.

Trial Conflict and the Motion to Dismiss were to circumvent Arizona Criminal Rule 8."[13]

¶27 On February 3, 2010, the State filed a notice of appeal with regard to the trial court's dismissal with prejudice of the 2008 case. That appeal was assigned case no. 1 CA-CR 10-0114 in this court. Two days later, the State filed a notice of appeal with regard to the dismissal with prejudice of Counts I and II in the 2009 case. That appeal was assigned case no. 1 CA-CR 10-0123.

¶28 On March 10, 2010, the parties filed a joint pretrial statement in the 2009 case. Defense counsel listed as one of its witnesses the same expert witness on identification that the defense had planned to use in the 2008 case. That same day, defense counsel filed a motion to dismiss the remaining counts of the 2009 case on the basis of prosecutorial misconduct, arguing that the prosecutor had engaged in vindictive prosecution and the counts should be dismissed based on the events in the 2008 case. The State opposed the motion to dismiss, arguing that Jackson was trying to re-litigate the court's February order that had only dismissed the first two counts; Jackson had not established an appearance of vindictiveness because the State had previously advised him it was considering the additional charges; the State should not be penalized because the Careaga trial had been

[13] The court also found that the prosecutor arrived late on November 16 and 17, 2009, and, in a footnote, found that had the prosecutor arrived on time on November 16, the matter would have been placed for trial that day.

rescheduled due to court unavailability, which resulted in the conflict with the 2008 case; and Rule 8 had not actually been violated.

¶29 On March 23, 2010, the trial court (Judge Ryan) heard argument on the motion to dismiss. Defense counsel argued that the additional charges alleged in the 2009 case were based on the same facts as in the 2008 case, should have been alleged in the 2008 case, and were subsequently being used by the State as a vindictive measure to hold Jackson in jail longer and "persecute" him for choosing to exercise his right to a trial. The State argued that trial in the 2008 case had to be continued due to the scheduling conflict with the trial in the Careaga case, and that such a conflict was not foreseeable at the time it arose. The State maintained it filed a notice of trial conflict as soon as it became aware of the conflict, the last day wasn't until December 5, 2009, and the case could still have been tried within the time limits.

¶30 In a minute entry dated March 23, 2010, the trial court dismissed the 2009 case with prejudice and ordered that Jackson be released from custody. In a subsequent minute entry dated March 30, 2010, the court provided a detailed explanation of its decision to dismiss the 2009 case with prejudice. The court's findings included the following:

> The Court [] finds, in review of the record set forth in this minute entry, that the assigned Deputy County Attorney failed to provide thorough, competent representation for the State, failed in his duties to victims to handle the matter in a way that ensured a

> speedy trial and a prompt and final conclusion of the case, failed in his responsibilities as to his duty of candor to opposing counsel, failed in his responsibilities as to his duty of candor to the Court, and failed in his responsibilities as a Minister of Justice, and not just an advocate, pursuant to ER 3.8 of the Arizona Rules of Professional Conduct.
>
> . . . .
>
> The Court finds, from the record, that the assigned Deputy County Attorney engaged in prosecutorial misconduct warranting dismissal with prejudice. Even if the Court did not so find, there is ample evidence to infer a presumption of vindictive prosecution, which the State has failed to rebut. Stated simply, the State has proferred no good reason for its conduct, and the record is riddled with numerous instances of misconduct, ranging from the inadequate to the purposeful.
>
> In *Jackson* I, the assigned Deputy County Attorney failed. He failed to appear at almost all of the pretrial settings. He failed his office by refusing to provide salient case information to court coverage. He failed to meaningfully communicate information regarding trial conflicts to the Courts and to opposing counsel. He failed to comply with Court orders. Yet to date, the State has owned up to none of its responsibilities for such failures.

¶31 The State filed a timely notice of appeal from the order dismissing all counts of the 2009 case, and that appeal was assigned case no. 1 CA-CR 10-0289. This court granted the State's motion to consolidate the appeals in case nos. 1 CA-CR 10-0114, 1 CA-CR 10-0123, and 1 CA-CR 10-0289. Case no. 1 CA-CR 10-0114 was designated the primary case number. We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4032(1) (2010).

ANALYSIS

¶32 The State argues that the trial court's orders dismissing with prejudice the 2008 case and Counts I and II of the 2009 case, and its order dismissing the remaining counts of the 2009 case, were an abuse of discretion. We agree.

¶33 We review a trial court's dismissal of a case with prejudice and its disposition of a claim of prosecutorial vindictiveness for an abuse of discretion. *See generally State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997); *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997); *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991). In general, a trial court abuses its discretion if the record fails to provide substantial support for its decision or it commits an error of law in reaching its decision. *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶34 Rule 8.6, Ariz. R. Crim. P., provides that if a court determines a Rule 8 time limit has been violated, the court "shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice." Thus, Rule 8.6 makes clear that, even when there has been an actual speedy trial violation (something that did not occur here because the last day was December 5, 2009 – eighteen days after the case was dismissed), a dismissal with prejudice is not mandated. *See State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991). Because that is

true, even if we accept the trial court's finding that the State was trying to "circumvent" Rule 8 time limits, we must also recognize that "not every attempt to avoid an impending time limit merits dismissal with prejudice." *Id.*

¶35 In the absence of a Rule 8 violation, we turn for guidance to Rule 16.6, Ariz. R. Crim. P., which addresses the dismissal of criminal charges. *See id.* Rule 16.6 provides, in pertinent part, as follows:

> **a. On Prosecutor's Motion.** The court, on motion of the prosecutor showing good cause therefor, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8.
>
> . . . .
>
> **c. Record.** The court shall state, on the record, its reasons for ordering dismissal of any prosecution.
>
> **d. Effect of Dismissal.** Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be without prejudice.

¶36 Thus, under Rule 16.6, dismissal without prejudice is generally favored.[14] *See Quigley*, 132 Ariz. at 36, 643 P.2d at 739.

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[14] Jackson argues that, because the trial court ultimately found the State was trying to avoid the time limits of Rule 8, the court erred in dismissing the 2008 case in the first place. *See State v. Paris-Sheldon*, 214 Ariz. 500, 508, ¶ 23, 154 P.3d 1046, 1054 (App. 2007) ("[I]f the court concludes the state is attempting to avoid Rule 8, the court must deny the motion to dismiss altogether." (citing Ariz. R. Crim. P. 16.6(a))). Rule 16.6(a), however, addresses only the prosecutor's ability to dismiss criminal charges. Trial courts have the inherent power (and under Rule 8.6, the specific authority) to dismiss criminal charges, though there

When dismissing a case with prejudice, Rule 16.6(d) "requires a reasoned finding that the interests of justice require the dismissal to be with prejudice." *Garcia*, 170 Ariz. at 248, 823 P.2d at 696; *accord Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. "This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant." *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993) (holding "that the trial court's perfunctory statement that the 'interests of justice' required dismissal with prejudice" was insufficient to constitute a reasoned finding).

¶37 In the context of speedy trial violations, "courts have concluded that the interests of justice require dismissal with prejudice only when the prosecutor has delayed in order to obtain a tactical advantage or harass the defendant and the defendant has demonstrated resulting prejudice." *State v. Huffman*, 222 Ariz. 416, 420, ¶ 11, 215 P.3d 390, 394 (App. 2009) (citations omitted); *accord Garcia*, 170 Ariz. at 248, 823 P.2d at 696; *see also State ex rel. Jenney v. Superior Court*, 122 Ariz. 89, 90, 593 P.2d 312, 313 (App. 1979) (recognizing "that the court, prior to dismissing a criminal case, [must] properly balance the conflicting interests involved, society's and the defendant's, in deciding whether to make the dismissal with or without prejudice").

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are limitations on when they may dismiss with prejudice. *See, e.g., State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978).

¶38 The most important consideration in deciding whether a dismissal should be with or without prejudice is whether delay will actually prejudice the defendant. *Granados*, 172 Ariz. at 407, 837 P.2d at 1142 (citation omitted); *see also In re Arnulfo G.*, 205 Ariz. 389, 391, ¶ 9, 71 P.3d 916, 918 (App. 2003) ("The type of harm that will justify dismissal with prejudice is a harm that would actually impair the accused's ability to defend against the charges." (citation omitted)).

¶39 In this case, the record does not support a conclusion that Jackson was prejudiced by the dismissal of the 2008 case. Defense counsel's speculative claim that the defense's expert witness might not be available at a later date was insufficient to establish actual prejudice, *see, e.g., State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993), and was belied at least in part by the expert witness's subsequent inclusion in the March 10, 2010 joint pretrial statement. We find no indication that the dismissal impacted Jackson's ability to defend against any charges (including those in the 2009 case) or to present the same defense he had contemplated.

¶40 Jackson's continued imprisonment due to his inability to make bail also did not establish the actual prejudice necessary for a dismissal with prejudice. *See State v. Pruett*, 101 Ariz. 65, 69, 415 P.2d 888, 892 (1966); *State v. Soto*, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1978); *see also State ex rel. DeConcini v.*

Superior Court (Apodaca), 25 Ariz. App. 173, 175, 541 P.2d 964, 966 (1975) (recognizing that annoyance or financial burden are generally insufficient to establish prejudice). The record indicates that Jackson was in jail throughout pendency of the proceedings due to his inability to post the secured bond, which the court set at $250,000 due to the severity of the alleged crimes and Jackson's alleged prior criminal history. Further, on numerous occasions the last day was set back and the start of trial delayed due to continuances requested by and granted to accommodate the defense.[15] The record makes clear that dismissal of the 2008 case did not actually prejudice Jackson, and any delay in setting and commencing trial in that case was occasioned at least as much by the inflexibility of the defense (and the court itself) as by any actions of the prosecutor.

¶41 Because Jackson failed to establish that legally cognizable prejudice would ensue if the charges were dismissed without prejudice, the trial court erred in dismissing the criminal charges in the 2008 case (and Counts I and II of the 2009 case) with prejudice. The State sought dismissal due to a likely inability to meet the speedy trial deadline, and Jackson's arguments that he might not be able to produce his witness and

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[15] Before the actual trial conflict resulting from the events of November 2009, the State had requested only one continuance. Further, defense counsel had previously indicated a willingness to "file a motion to continue until after the last day" to accommodate scheduling of the expert witness if necessary.

would probably have to continue to sit in custody because charges were re-filed and he would be unable to post bond are speculative claims insufficient to establish prejudice.

¶42 We also note that the court's findings in its orders, and particularly its March 30, 2010 order regarding dismissal of the remaining counts in the 2009 case, are not fully supported by the record, and we express concern that numerous inconsistencies exist between the record and the facts found and inferences drawn by the court; in fact, some of the court's findings are clearly contradicted by the record. For example, trial in the Careaga case was delayed not by the prosecutor (as defense counsel in the 2008 case claimed), who the record reflects was prepared for trial in that case, but by court unavailability, which caused that trial to be set back on at least three occasions. Nonetheless, the court's order sharply criticized the prosecutor for his failure to inform the court as early as November 2, 2009, of the conflict between the trial dates of the Careaga and 2008 cases.[16] The court noted that, as of November 2, the Careaga trial was set for November 9 and the 2008 case was set for November 16, 2009. According to the joint pretrial statement filed in the Careaga case, trial in that case was expected to last four days, and the court calculated that, because Wednesday, November 11, was a holiday, a four-day trial

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[16] The court also criticized the prosecutor for failing to mention the conflict at the October 5, 2009 trial management conference in the Careaga case, but as we explain subsequently, the record makes clear that no conflict existed at that time.

taking place on November 9, 10, and 13 would necessarily carry over to and conflict with the 2008 trial, which was set to commence on November 16. The court's order, however, ignores the existence of Thursday, November 12, which would have supplied the fourth day of the Careaga trial so that, as of November 2, that trial would not have conflicted with trial in the 2008 case. Accordingly, the court's finding that the prosecutor "sat on [his] hands and said nothing" and ignored his affirmative obligation to inform the court of a conflict as of November 2 is not supported by the record.

¶43 Further, even after trial in the Careaga case was set back to November 10 due to the unavailability of the master calendar assignment judge, the prosecutor might reasonably have believed that, even if the Careaga trial lasted four days, coverage counsel could have covered either the last afternoon of the Careaga trial (if it only involved instructions and return of verdict) or jury selection on the first day of the 2008 trial. Although we express concern that the prosecutor apparently did not immediately notify the court of an impending conflict after the Careaga trial was again continued on November 10, and instead waited until an actual conflict was created on November 12 by rescheduling of the Careaga case for November 16, we do not view such a failure as warranting dismissal of the 2008 case with prejudice.[17] As we have

[17] In fact, given the record in this case, it appears that continuances based on a lack of court resources to handle the burgeoning case volume in the superior court were so commonplace as to almost become expected by counsel and the court itself. As of

noted, the prosecutor avowed that, before filing the notice of trial conflict (motion for continuance), he discussed the matter with his bureau chief, and before seeking dismissal of the 2008 case, he discussed the matter with Commissioner Newell, the Judge *Pro Tem* in the Careaga case, who had indicated she would discuss the matter with Judge Ryan.[18] We also note that the Careaga case had been designated a priority case by no later than October 5, 2009, and counsel in that case had been warned it would "not be continued for any other trial conflicts," whereas the court did not designate the 2008 case as a priority case until November 16, after the prosecutor's notice of trial conflict (motion for continuance) had been denied.[19]

August 29, 2011, the Maricopa County Superior Court's website states that more than 28,000 criminal cases are filed in the county's superior court each year, with "a 90% increase in felony cases filed in Superior Court" over the past decade. *See* www.superiorcourt.maricopa.gov/SuperiorCourt/CriminalDepartment.

[18] The trial court's orders and record do not reflect whether such a discussion subsequently occurred. Section IV of the Rule 8 Guidelines adopted by the Maricopa County Criminal Department Judges provides that, in the event an attorney cites a calendar conflict as grounds for a motion to continue, the judge hearing the motion "should consult the lawyers and the judge presiding over the conflicting case to ascertain whether, in fact, an actual conflict exists." In the event of such a conflict, the Guidelines provide that "the judges assigned to the cases should consult one another and decide the case to be tried taking into consideration the age of the cases, the nature of the charges, the custody status of the defendants and any other relevant factors."

[19] As we have recognized, in arguing against the motion to continue on November 16, defense counsel acknowledged the 2008 case had been sent downtown because Judge Ronan determined it "did not take precedent" over the other cases before him at the time.

¶44 The trial court was also highly critical of the prosecutor for his failure to interview the defense's expert witness before trial, stating at the March 23 oral argument that the prosecutor "hadn't done the interview ordered by the courts, or that were presumed to be done by the time limits" and intimating the prosecutor's motion to dismiss was motivated by his unpreparedness for trial and a resultant tactical interest in delaying the trial. In its March 30 minute entry, the court stated that the prosecutor was on notice that the need to interview a defense expert was not a basis to continue trial, and the court concluded that, in seeking a trial continuance, the prosecutor concealed from the court that he had not yet interviewed the defense's expert witness. Specifically, the court found that the prosecutor's failure to interview the expert witness supported the conclusion "that there was a purposeful concealment of facts and information that the assigned Deputy County Attorney was obligated to present."

¶45 Although we do not find in the record that the prosecutor ever sought to interview the expert witness, we also do not find a court order or other requirement that he do so, any indication his failure to do so was a tactical error he expected to impact his case, or any indication that this issue was raised as a basis to continue trial. Moreover, we express perplexity as to why the court raised and relied on this allegation for the first time at

the March 23 oral argument, especially when it was not raised by the defense and the inference drawn was not fully supported by the record. There are simply no demonstrable facts in the record that support the trial court's finding that the prosecutor was seeking, or in fact that he gained, a tactical advantage by delaying the trial because he had not yet interviewed the defense's expert witness.[20]

¶46 Jackson argues on appeal that the prosecutor sought to gain a tactical advantage by delaying the trial because "[i]t is obvious that the State did not want a prosecutor not familiar with the case to have to try it." Even assuming Jackson is correct as to the motive ascribed, the strategy was not an attempt to gain a tactical advantage so much as an attempt to avoid a tactical disadvantage. *See State v. Ferguson*, 120 Ariz. 345, 347, 586 P.2d 190, 192 (1978) (concluding that a defendant was not deprived of his speedy trial rights where a delay in trial occurred because the prosecutor was trying another case and the State argued the case was too complicated for another prosecutor to try on such short notice); *State v. Mendoza*, 170 Ariz. 184, 194, 823 P.2d 51, 61 (1992) (recognizing that the unavailability of the assigned

[20] Furthermore, as we have noted, defense counsel and the court recognized at the November 16 conference that, because Judge Ronan had not ruled on the motion to suppress, the issue would have to be addressed before trial, and "a full evidentiary hearing" might again have to be held before trial in the 2008 case could begin. Thus, some delay in the start of trial was likely inevitable in any circumstance. (Also, by the time the 2008 case was assigned to

prosecutor may amount to an extraordinary circumstance meriting an excludable delay in the interests of justice); *cf. State v. Schaaf*, 169 Ariz. 323, 328, 819 P.2d 909, 914 (1991) (recognizing that the absence of key court personnel may constitute an extraordinary circumstance for purposes of Rule 8). *See also State v. Toney*, 553 A.2d 696, 703 (Md. 1989) ("We think that the State's interest in maintaining prosecutorial continuity is a significant interest which in some instances may qualify as good cause for a postponement . . . ."). Further, Jackson has not demonstrated, and the record does not support the conclusion, that the State acted in bad faith or intentionally delayed trial in the 2008 case to gain a tactical advantage. *See Garcia*, 170 Ariz. at 248, 823 P.2d at 696.

¶47 The trial court's March 30 minute entry also criticizes the prosecutor for multiple discovery violations; a failure to appear at numerous conferences; habitual lateness, presumably causing the case to often be called long after the time it was scheduled; and a failure to communicate with the alleged victims in the case. There exists little support in the record, however, for the court's criticism. Any discovery issues were resolved early in the case, and they were not argued by the defense as a basis for a dismissal with prejudice. Further, the record reflects that both the prosecution and the defense used coverage counsel throughout pendency of the case, and we hardly see the need to criticize the

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Judge Myers, the record reflects that jury selection could have begun no earlier than November 18 due to court availability.)

prosecutor for employing coverage counsel at brief status conferences, when the court at the same time criticized the prosecutor for not utilizing such counsel as a last-minute replacement to cover trial in one of the two conflicting cases. Additionally, whether the prosecutor was actually late to the various pretrial conferences is generally not reflected in the record, and the record does not support the court's insinuation that the use of coverage counsel caused numerous conferences to be reset.[21] Finally, in its motion to dismiss, the State avowed that it had complied with all victims' rights requirements, and despite the trial court's subsequent finding to the contrary, we find nothing in the record to dispute that avowal.

¶48 The trial court also apparently agreed with defense counsel's argument that filing of the 2009 case was presumptively vindictive. In its March 30 minute entry, the court found that

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[21] For example, the court found, "On January 6, 2009, the Trial Judge met with attorneys regarding this case. The assigned Deputy County Attorney was not present, and the matter, originally scheduled for 8:30 a.m., was not called until 10:31 a.m." The clear insinuation and inference to be drawn from the context of this passage and others surrounding it is that the prosecutor was the cause of the delay. The transcript of the January 6 proceedings does not explicitly state the reason for the delay; however, it makes clear that, although coverage counsel appeared for the State, defense counsel failed to timely appear. In the transcript, apparently late-arriving coverage counsel for the defense advises the court that "we've not been able to get a hold of [Jackson's] attorney of record," and that "[i]t's my understanding he's with the Public Defender's Office downtown." After a discussion regarding the whereabouts of defense counsel, the court states, "[w]ell, he's not here," continues the conference to January 28, 2009, and excludes time for the continuance "because it is occasioned by the defense counsel."

"using the identical investigation . . . the State added additional felony counts, which the State concedes could have been filed over one year earlier on November 7, [2008]," and "it is clear that the decision to dismiss and file with additional charges came only after the State's Motion to Continue was denied." Although we express some concern at the timing of the State's decision to add charges, the trial court's findings alone simply do not support finding that filing of the 2009 case was presumptively vindictive.[22]

¶49 As a basic principle, the State may not retaliate against a person "for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Because "[t]he imposition of punishment is the very purpose of virtually all criminal proceedings," however, a punitive motivation alone cannot distinguish justifiable governmental conduct from an impermissible governmental response to a defendant's protected activity, and the presumption of vindictiveness is therefore limited to "cases in which a reasonable likelihood of vindictiveness exists." *Id.* at 372-73. Thus, "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382-83. Further, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."

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[22] We also note that Jackson has never suggested the underlying facts as alleged do not support the additional charges.

Id. at 384. Courts in Arizona should consider the totality of the circumstances, including whether a change in the charging decision has occurred pretrial or post-trial, in evaluating whether to apply a presumption of prosecutorial vindictiveness. *See State v. Mieg*, 225 Ariz. 445, 448-49, ¶¶ 15-16, 18, 239 P.3d 1258, 1261-62 (App. 2010) (recognizing that "it would ill-serve the public good to penalize the state when a prosecutor chooses not to bring all conceivable charges at the outset" (citing *Goodwin*, 457 U.S. at 382 n.14)).

¶50 In this case, the record demonstrates that the additional charges had long been contemplated by the State. At the time of his settlement conference, Jackson was informed of and acknowledged the possibility that additional charges would be brought if he did not enter a guilty plea. Further, the State sought dismissal of the 2008 case because a direct trial conflict existed and the prosecutor's request for a continuance had been denied.

¶51 In its order, the trial court also found "that the flawed decision-making demonstrated by the State in this case is identical to the decision-making process in *State v. Tsosie*, 171 Ariz. 683, 832 P.2d 700 (App. 1992), that warranted dismissal with prejudice." In *Tsosie*, the defendant obtained a dismissal without prejudice after he successfully invoked his right to a speedy trial, and the trial court dismissed the re-indictment of the defendant on more serious charges upon applying a presumption of prosecutorial

vindictiveness. *Id.* at 684-85, 832 P.2d at 701-02. This court affirmed. *Id.* at 688, 832 P.2d at 705. We do not, however, find *Tsosie* directly applicable. In this case, Jackson was warned of the possibility of additional charges during plea negotiations, whereas the facts of *Tsosie* provide no indication that the defendant in that case was ever warned of the possibility of increased charges. Furthermore, unlike *Tsosie*, no actual Rule 8 violation occurred in this case. *See id.* at 684-85, 832 P.2d at 701-02. Under the circumstances present, we do not agree with Jackson that the record supports the conclusion the State acted in a presumptively vindictive fashion by bringing previously contemplated charges when Jackson was re-indicted in the 2009 case.

¶52 Because Jackson failed to demonstrate the necessary prejudice for a dismissal with prejudice, we conclude that the trial court abused its discretion in dismissing the 2008 case and Counts I and II of the 2009 case with prejudice. Further, because the trial court's orders are not fully supported by the record, we conclude that the court abused its discretion in dismissing the remaining counts of the 2009 case with prejudice.

CONCLUSION

¶53 We recognize the difficult task faced by the superior court in scheduling and managing the numerous trials within its system. This case highlights the confusion that can result from an overcrowded court system designed to push cases off from one

division of the court to another and from one judge to another in an effort to deal with an ever-burgeoning caseload. Based on the record, it appears that the problems in this case resulted at least as much from a lack of court resources and inflexibility on the part of defense counsel as from the actions of the prosecutor. Given the fact that Rule 8 was not actually violated and the case might still have been tried within time limits, the lack of prejudice demonstrated by Jackson, the lack of demonstrable bad faith or improper motives by the prosecutor, and the lack of support for many of the trial court's findings, we conclude that the trial court abused its discretion in dismissing the criminal charges against Jackson with prejudice. Consequently, we vacate the dismissal with prejudice of the charges against Jackson and remand to the trial court with instructions to dismiss the 2008 charges without prejudice and to reinstate the 2009 charges against Jackson.

/S/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Judge

/S/
PETER B. SWANN, Judge