CHAPTER 5
CRIMINAL TRIAL ISSUES

I. The Reluctant Victim -- Research

A. Not All Victims Refuse to Testify

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

B. Reasons Underlying Victim Reluctance or Refusal to Testify

1. Victims of domestic violence who are reluctant to testify often have the same reasons for their ambivalence as other violent crime victims have. These include:

    a. A fear of retaliation by the defendant

    b. An unwillingness to face the assailant again in the courtroom

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

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

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

2. These reasons are often heightened for victims of domestic violence by the following realities:

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

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

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

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

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

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

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

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

h. The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence, or in protecting the victim and children. This belief may be a result of past experience where the system did indeed fail to prevent the violence, and/or it may be based on the perpetrator's ability to convince the victim that "nothing will stop him."

NOTE: Suggested practices for dealing with a reluctant victim are set out in the attachment at the end of this chapter.

II. The Rights of Victims

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

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

In order to reduce the trauma of being present in court, the statute gives the victim the right to be provided, whenever practical, with a secure waiting area to shield the victim from contact with the defendant and family or friends of the defendant. RCW 7.69.030(6).

III. Procedures for Compelling Witnesses to Attend and Testify

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

A. Issuance and Service of Subpoenas

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

As a practical matter, subpoenas are usually issued by the attorney of record, and the court's involvement in the issuance of subpoenas is minimal. In superior court, issuance by an attorney is authorized by CR

45(a). In courts of limited jurisdiction, the authority is found in CrRLJ 4.8.

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

B. Enforcement

As discussed above, victims may have valid reasons for being unwilling (or unable) to testify. Given these realities, caution must be used before issuing an order for the victim's arrest to insure his or her presence at trial.

Because incarceration of a domestic violence victim/witness often serves only to re-victimize the victim, the court may want to consider adopting internal procedures that enable the arrested material witness to be brought directly before the court without having to spend time in jail waiting for the court to reconvene.

Enforcement options include warrants, attachment, and contempt.

1. Material witness warrants

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

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

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

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

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

A material witness is to be released from custody unless the court determines that the testimony of such witness cannot be secured adequately by deposition and that further detention is necessary to

prevent "a failure of justice." CrR 4.10(c). Release may be delayed for a "reasonable period of time" to arrange for the taking of a deposition under CrR 4.6. CrR 4.10(c). Depositions are discussed further at Chapter 4, Section IV, E.

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

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

A decision to issue a material witness warrant lies within the discretion of the trial court. *Bellevue v. Vigil*, 66 Wn. App. 891, 895-6, 833 P.2d 445, 448 (1992).

2. Attachment

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

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

3. Contempt

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

IV. Continuances to Secure the Presence of the Victim

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

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

A. Prosecutorial Efforts to Secure Victim's Presence

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

A continuance may still be proper if the prosecuting authority can establish that (1) it made reasonable and significant efforts to serve the missing witness with a subpoena but was unsuccessful and (2) there is good reason to believe the witness's presence can be secured in the near future. *State v. Henderson*, 26 Wn. App. 187, 191-2, 611 P.2d 1365, 1368-9 (1980). *Accord, State v. Nitschke*, 33 Wn. App. 521, 524-5, 655 P.2d 1204, 1205-6 (1982) (analysis under juvenile speedy trial rule).

There is no Washington case directly discussing the question of whether the government must have sought a material witness warrant prior to trial in order to prove that reasonable efforts were made to secure the presence of the non-appearing witness. Other jurisdictions have not required that the State have sought a material witness warrant in order to avoid dismissal for lack of prosecution when the witness fails to appear at trial. *See Dres v. Campoy*, 784 F.2d 996, 1000-1 (9th Cir. 1986); *Graver v. Jesus B*, 75 Cal. App. 3d 444, 451-2, 142 Cal. Rptr. 197 (1977).

In *State v. Hobson*, the court addressed the question of whether it is necessary for the State to have requested a material witness warrant in order to establish that "good faith" efforts were made to secure the presence of the witness at trial for purposes of ER 804(b)(1) – admission of former testimony. *State v. Hobson*, 61 Wn. App. 330, 335-6, 810 P.2d 70, 72 (1991)The court refused to adopt a firm rule and stated that the question of whether a material witness warrant is required "depends in part on the resulting hardship to the witness and the importance of the witness's testimony." *Id.* at 73-4, 338.

B. Absence of a Subpoenaed Witness

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

CrR 4.10(a)(2) provides that the failure of a witness to respond to a subpoena may be grounds for issuance of a material witness warrant. It is thus logical to assume that the rules contemplate the granting of a continuance so that the warrant may be served. Even when the prosecuting authority has not requested a material witness warrant, a continuance may still be proper, given the psychological pressure put on domestic violence victims. Certainly, if there is any indication that the defendant has in any way encouraged the victim/witness to ignore the subpoena, a continuance would be proper.

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

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

In *State v. Day, supra*, the Court of Appeals upheld the trial court's decision to continue a case in which the defendant was accused of

murdering his first wife. Trial was continued to permit entry of a dissolution order of the defendant's second marriage so that the testimonial bar of RCW 5.60.060(1) would not apply. *Id.* at 1024, 549.

NOTE: Two cases that are frequently cited by defense counsel for the proposition that the unexplained failure of a subpoenaed prosecution witness to appear for trial cannot be grounds for a continuance no longer are controlling. *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 84, 605 P.2d 1265, 1267 (1980) and *State ex rel. Rupert v. Lewis*, 9 Wn. App. 839, 842-3, 515 P.2d 548, 550 (1973) both rely on a version of JCrR 3.08 that differs substantially from the current court rules. *See State v. Henderson*, 26 Wn. App. at 191-92, 1368-9; *State v. Nitschke*, 33 Wn. App. at 524, 1205.

C. Prejudice to the Defendant

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

D. Continuance Within the Speedy Trial Period

In *State v. Wake*, 56 Wn. App. at 475, the court implied that there is more latitude to continue a case when the new trial date is still within the original speedy trial period as opposed to situations when the new date is outside of that time frame. In *State v. Nitschke*, 33 Wn. App. at 524, the court distinguished *State ex rel. Rupert v. Lewis* on the grounds that the continuance there was to a date outside the speedy trial period while the continuance sought in *Nitschke* was within the 60-day time frame.

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

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

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

Tatum at 85, 1126.

F. Reliance on Subpoena Issued by Opposing Party

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

V. Dismissals Pursuant to CrR 8.3(A)

A. Dismissals Based Solely on the Request of the Victim

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

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

The Task Force recommends that the victim be referred to a domestic violence advocate for counseling before dismissing a case. The victim

should be specifically informed that the authority to request a dismissal is vested with the prosecuting attorney's office. In counties where domestic violence legal advocates are not on staff, the prosecutor should meet with the victim to offer support and information.[1]

B. Limitations on the Power to Dismiss

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

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

C. Is a Dismissal Under CrR 8.3(A) a Dismissal with Prejudice?

RCW 10.46.090, which provided that a dismissal of a misdemeanor or gross misdemeanor for lack of prosecution was with prejudice, has been repealed. Laws of 1985, ch. 76, § 29. Extreme caution must be used in reading pre-1984 opinions concerning dismissal for lack of prosecution.

VI. Jury Selection

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

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

The United States Supreme Court in *Johnson v. California*, 545 U.S. 162, 162 L.Ed. 2d 129, 125 S. Ct. 2410 (2005) clarified the quantum of proof that must be elicited by a defendant alleging purposeful discrimination in the use of peremptory challenges before the burden of justification shifts to the State. A defendant need only present sufficient evidence to raise an "inference" of

discrimination. Proof by a preponderance is not required. In evaluating a prosecutor's stated rationale for a non-discriminatory use of a preemptory challenge the court is to review all available evidence to determine whether the explanation is plausible. *Miller-El v. Dretke,* 162 L.Ed. 2d 196, 125 S. Ct. 2317 (2005).

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

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

VII. Confrontation Clause Issues

A. Closed-Circuit Television

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

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

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

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

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

D. Hearsay

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

VIII. Special Substantive Law Issue: The Applicability of Community Property Laws in Criminal Prosecutions

The applicability of community property laws to criminal prosecutions has at times been somewhat confusing.[2] The Washington Supreme Court clarified the issue in *State v. Coria*, 146 Wn.2d 631, 642, 48 P.3d 980, 984 (2002). In *Coria*, the Court held that a spouse who destroys community property may be criminally prosecuted for destruction of the "property of another" under the malicious mischief statute. As the Court explained, "damaging co-owned personal property is effectively like an ouster of other co-owners. The defendant's right to possess his community property is not a defense here, because his right was not exclusive of his wife's right to possession. Both spouses have undivided half interests in community property. The defendant's rights in their community property, as co-owner, do not include the right to infringe Mrs. Coria's." *Id.* at 639 (internal citations omitted).

IX. Special Jury Instruction Issue: Multiple Acts of the Charged Offense

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

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

X. Trial Court's Role in Determining Validity of No-Contact, Restraining or Protection Order

In *State v. Miller*, 156 Wn.2d 23, 123 P.3d. 827 (2005), the Supreme Court unanimously concluded that the validity of a no-contact order (and presumably a protection order) is not an implied element of the offense of violation of a no-contact order. The Court overruled a number of decisions from the Court of Appeals to the extent that the opinions were inconsistent with this holding. *See*

e.g. State v. Miller, 123 Wn. App. 92, 96 P.3d 1001 (2004)**,** *State v. Marking*, 100 Wn. App. 506, 512, 97 P.3d 461 (2000); *State v. Edwards*, 87 Wn. App. 305, 941 P.2d 697 (1997).

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

> An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged, n.4. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. *State v. Miller at 31*.

Thus, although the Supreme Court rejected the rationale used by the courts in *Marking and Edwards,* the Court was satisfied that the results in those cases were appropriate because the orders were not "applicable."

Finally, the *Miller* Court, in footnote 4**,** emphasized that the trial court's role is not to entertain collateral attacks on orders, stated that "[s]uch challenges should go to the issuing court, not some other judge."

XI. Jury Access to 911 Tape During Deliberation

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

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

In *State v. Ross*, the Court of Appeals held that a trial court abused its discretion in sending the 911 tape and a playback machine into the jury room. 42 Wn. App. 806, 812, 714 P.2d 703, 707 (1986) (*Ross* has been "effectively overruled" on other grounds. *See State v. Davis*, 116 Wn. App. 81, 87-88, 64 P.36 664, 665 (2003)).The court was concerned that the jury would place too much emphasis on this one item of evidence and that the court had no means of controlling how often the tape was reviewed by the jury.

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

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

XII. Post-Trial Motion for New Trial: Recanting Witness

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

> Whether there is independent corroborating evidence to support the recanting witness' original testimony is not a controlling factor. Recantations are inherently suspect and "[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court."

Macon at 804 (*quoting State v. Wynn*, 178 Wash. 287, 289, 34 P.2d 900 (1934)). Cases such as *State v. Landon*, 69 Wn. App. 83, 90, 848 P.2d 724, 729 (1993), which appeared to have adopted a "bright line" requiring the granting of a new trial when a defendant is convicted solely on the testimony of a witness who later recants are of doubtful continuing validity.

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

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

Motions for withdrawal of a guilty plea based on manifest injustice under CrR 4.2(f) may also involve recanting victims. In general, a defendant who has pled guilty by way of an Alford/Newton plea because of the recantation of a victim is entitled to an evidentiary hearing to determine the credibility of the recanting witness. *State v. D.T.M.*, 78 Wn. App. 216, 220-1, 896 P.2d 108, 110-1 (1995). In contrast, a defendant who admits guilt may have a more difficult time establishing a manifest injustice, particularly where independent evidence (aside from the recanted testimony) exists. *State v. Mitchell*, 81 Wn. App. 387, 914 P.2d 771 (1996).

ATTACHMENT 1

VICTIM RELUCTANCE OR REFUSAL TO TESTIFY: RECOMMENDED PRACTICES

1. Require a victim's presence in court by issuing a subpoena or ordering a victim already in court to return on another date.

Most victims will testify once ordered to do so by the court. Many feel considerable relief at being able to tell the defendant that the decision to testify is out of their hands, as they have been ordered to do so by the court. Even victims who are willing to testify should be ordered by the court to do so. This reinforces to the defendant that the court, not the victim, controls the proceedings, and that any attempt to manipulate or intimidate the victim in an effort to avoid criminal prosecution will be unavailing.

2. If the victim appears reluctant to testify, the reasons underlying the reluctance should be assessed in order to determine the best course of action.

The following checklist is intended to assist the court in discovering the reasons a victim is reluctant or refuses to testify, and in ascertaining whether a victim has been coerced or intimidated into asking that the charges against the defendant be dropped. Generally these questions should be asked by the victim advocate or prosecutor in the course of interviewing the victim. Where there is no advocate, the court should establish procedures for obtaining this information.

- ☐ Why do you feel reluctant to (or refuse to) testify?
- ☐ When did you become reluctant (or decide to refuse) to testify?
- ☐ Were you living with the defendant when the incident happened?
- ☐ Are you now living with the defendant?
- ☐ If not, does the defendant know where you are staying?
- ☐ Are you financially dependent on the defendant?
- ☐ Do you and the defendant have children together?
- ☐ Have you discussed the case with the defendant?
- ☐ Has the defendant made any promises to do something for you if you do not testify?

- ☐ Is that promise to do something the reason you do not wish to proceed/or testify?

- ☐ Has the defendant or anyone else threatened you, your children, or your family and told you not to testify?

- ☐ Is there some other reason you are afraid of the defendant?

- ☐ Are you aware that this court can issue an order telling the defendant to stay away from you and have no contact with you or your family?

- ☐ Are you aware that if the case is prosecuted that the defendant can be required to get counseling, pay for your damages, and stay away from you and your family?

- ☐ (If injuries alleged or visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?

- ☐ Have you talked about your desire not to testify with the prosecutor, victim/witness staff, or staff of the local domestic violence agency?

- ☐ If not, would you be willing to talk with them now?

- ☐ Are you aware that the people of this state are bringing these charges, and that the decision to prosecute the defendant is up to the prosecutor rather than up to you?

- ☐ (If victim was subpoenaed) Are you aware that the fact that you have been subpoenaed means that the prosecutor decided to call you as a witness, that you must testify, and that you may be held in contempt if you do not do so?

- ☐ Would you like to have a court officer to escort you from the building when you leave today?

3. If the victim remains reluctant to testify, the court may want to consider continuing the case for a period of hours to permit the victim to obtain information and options counseling from the victim/witness program or local domestic violence program.

a. Victim advocates can give accurate information regarding the court process, and can assist the victim in setting up a safety plan. This will often remedy reluctance, which stems from fear of the defendant, belief

that there is no alternative but to return home, or inaccurate information regarding possible outcomes of the criminal court process.

b. Referring reluctant victim/witnesses to a victim advocate plays a critical role in reducing victim reluctance, and thus reduces the perpetrator's ability to control the victim. Jurisdictions that provide victim advocacy services to domestic violence victims report a dramatic decrease in victim reluctance to testify. In San Francisco, 70 percent of domestic violence victims who were initially reluctant to proceed with a criminal complaint subsequently became willing to testify after they had spoken with a victim advocate. (Family Violence Project, 1982).

In several courts, judges report that battered women are more willing to cooperate and testify when they receive information, emotional support, community referrals, and trial preparation from victim advocates.[3]

4. The problems associated with victim/witness reluctance in domestic violence cases can be ameliorated by improving the justice system's response to domestic violence.

As recommended by the National Council of Juvenile and Family Court Judges (NCJFCJ), " . . . judges must provide leadership in their courts and in their communities to ensure that family violence cases are effectively managed and that adequate resources are available."[4]

5. Most victims will appear when ordered by the court. In rare instances however, it may be necessary for the court to require law enforcement to bring the witness before the court to testify.

a. See section below.

b. The courts should require that the victim be personally served with the subpoena before requiring law enforcement to bring the witness to court. The victim may not have received the subpoena, either because of being in hiding or because the defendant intercepted the subpoena.

c. In domestic violence cases, requiring law enforcement to bring a victim/witness before the court may serve only to re-victimize the victim, and should only be considered after the victim has been given ample opportunity to speak with domestic violence victim advocates. For this reason, every effort should be made to avoid scheduling domestic violence cases on the last day possible in order to allow the court time to ensure that the victim speaks with a victim advocate.

d. In cases where the victim was personally served with the subpoena, and is brought before the court, the witness should be brought directly before the

court without having to spend time in jail waiting for the court to reconvene.

6. Use of the court's civil contempt power to insure compliance with its orders.

a. A small percentage of victims may refuse to testify even after the above-listed steps have been taken. In some of these cases, the victim has accurately concluded based on past experience that testifying against the defendant is more dangerous to the victim, the victim's children, and the victim's family than seeking protection from the criminal justice system. If the court concludes that there is a reasonable likelihood that the perpetrator may inflict lethal violence on the victim in retaliation for testimony, the court should not coerce victim testimony unless the victim is provided with a victim/witness protection program, such as is provided for witnesses in drug and organized crime cases.

b. The court may want to consider granting a similar stay of execution to victims of domestic violence charges with contempt for failing to testify against the alleged assailant. Although the above statutes may not explicitly apply to victims of domestic violence, the two groups are similar enough that the same exceptions could be made for domestic violence victims. This will allow the victim time to speak with a victim advocate who can assist her/him in setting up a safety plan, and in realistically assessing the consequences of testifying in light of that plan.

c. Incarceration of a domestic violence victim to compel testimony generally should not be ordered, since such an action may serve only to re-victimize the victim. Instead, the court could consider ordering a victim/witness who is found to be in civil contempt, to attend or to do community service with a group that serves victims, such as with the local domestic violence program.

7. Presence of victim support persons in court.

RCW 7.69.030(10) provides victims of violent and sex crimes have the right to a crime victim advocate or other support person present at any prosecutorial or defense interviews and at any judicial proceedings related to the acts committed against the victim. It is noted that this right applies "if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case." Some communities have programs within the courts, which provide victim advocacy for domestic violence victims.[5]

See Section II, Rights of Victims for additional information.

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

[2] See, e.g., *City of Bellevue v. Jacke*, 96 Wn. App. 209, 210, 978 P.2d 1116, 1117 (1999) (In a dispute over the right to occupy an apartment leased with community funds, the Court held that the application of community property principles to a domestic violence prosecution would frustrate the legislative mandate to fully enforce domestic violence laws, regardless of the marital status of the parties); *State v. Kilponen*, 47 Wn. App. 912, 919, 737 P.2d 1024, 1028-9, *review denied*, 109 P.2d 1019 (1987) (Where a husband entered family home now occupied by a wife, the court found the issuance of a no-contact order rendered entry into home unlawful, regardless of ownership); *State v. Webb*, 64 Wn. App. 480, 824 P.2d 1257, *review denied*, 119 Wn.2d 1015 (1992); *State v. Goodman*, 108 Wn. App. 355, 361, 30 P.3d 516, 520 (2001), *review granted*, 144 Wn.2d. 1008 (2001) (declined to address the community property issue in a case where the defendant was convicted of burning down a home owned by defendant and his wife but upheld an exceptional sentence based on an on-going pattern of domestic violence).

[3] See G. A. Goolkasian, *Confronting Domestic Violence: The Role of Criminal Court Judges* (National Institute of Justice: Research in Brief, United States Department of Justice, 1986).

[4] *Family Violence: Improving Court Practice* (Recommendations from the National Council of Juvenile and Family Court Judges (NCJFCJ), Reno, 1990).

[5] Federal STOP Grants to the Courts provided funds for court-based domestic violence advocates in Walla Walla, Whatcom, and Chelan Counties' superior courts in 2005. In each county, the court contracted with a local service agency for advocates' services to assist victims. Contact the courts for information about those programs. See Washington Court Directory at http://www.courts.wa.gov/court_dir/. Information about the STOP Grants to the Courts should be directed to the Gender and Justice Commission at gender.justice@courts.wa.gov.