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Supreme Court No. 101234-9
(Court of Appeals No. 83054-6-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARTIN MORA-LOPEZ, Appellant.

ANSWER TO PETITION FOR REVIEW

ERIC J. RICHEY,
Whatcom County Prosecuting Attorney
By KIMBERLY A. THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210/ADMIN #91075
Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 778-5710

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Kimberly A. Thulin, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

Petitioner Mora-Lopez has asked this Court to review the Court of Appeals Division One published opinion in *State v. Mora-Lopez*, Case No. 83054-6-I.

The State requests this Court deny review.

C. ISSUES PRESENTED FOR REVIEW

1. Whether discretionary review is warranted pursuant to RAP 13.4(b)(1)(2), where the Court of Appeals opinion reflects the trial court miscalculated Mora-Lopez's remaining time for trial to conclude he faced a Hobson's choice and therefore abused its discretion by predicating its CrR 8.3(b) decision on an error of law.

D. STATEMENT OF THE CASE

The State relies on the Court of Appeals statement of the facts for the purposes of answering Mora-Lopez's petition for review. See, Court of Appeals Published Opinion dated

8/1/2022 (hereinafter “Opinion”) at 2-5, attached herein at Appendix A.

E. ARGUMENT

- 1. Discretionary review is not warranted pursuant to RAP 13.4 (b)(1)(2), where the Court of Appeals correctly calculated Mora-Lopez’s time for trial and determined the trial court predicated its decision to dismiss Mora-Lopez’s charges pursuant to CrR 8.3(b) on an error of law. Mora-Lopez did not face a Hobson’s choice when his charges were dismissed. Under these circumstances the Court of Appeals appropriately concluded the trial court’s reliance on *Michielli* to support its decision to dismiss Mora-Lopez’s charges, was misplaced and demonstrated the trial court abused its discretion.**

A Petition for Review will be accepted by the Supreme

Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4.

Mora-Lopez argues review is warranted because the Court of Appeals dismissed the Michielli decision as “no longer good law” and requests consequently, this Court grant review “to remind the Court of Appeals its precedent is binding.” PFR at 3. Mora-Lopez bases his argument on his assertion that the Court of Appeals miscalculated Mora-Lopez’s remaining time for trial pursuant to CrR 3.3 to conclude the trial court abused its discretion dismissing Mora-Lopez’s criminal charges. The decision in this case however, demonstrates the Court of Appeals appropriately relied on the plain language of CrR 3.3 to correctly calculate Mora-Lopez’s time for trial for purposes of evaluating the merits of the trial court’s decision (determined erroneous) that mismanagement placed Mora-Lopez in the untenable position of needing to waive his right to a timely trial or go to trial with unprepared counsel. Review is not warranted.

a. The Court of Appeals decision is consistent with precedent inclusive of *Michielli*, and does not insulate government mismanagement from consequences. Further review is not warranted.

Mora-Lopez mischaracterizes the opinion in this case.

The Court of Appeals decision does not conflict with *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997), nor does the Court of Appeals dismiss *Michielli* as no longer good law. See, PFR at 2-3. Actual prejudice may still warrant dismissal or sanctions notwithstanding the time for trial provisions of CrR 3.3, where new facts are interjected into a case which force a defendant to choose “between the right to a speedy trial and the right to prepare an adequate defense.” *State v. Krenik*, 156 Wn. App. 314, 321, 231 P.3d 252 (2010), *see also*, *State v. Brooks*, 149 Wn.App. 373, 203 P.3d 397 (2009).

The opinion in this case simply reflects the court determined no such dilemma was presented here. Consequently, the Court of Appeals concluded the trial court’s reliance on *Michielli* was

misplaced. See, Slip. Op. at 11.n5. This language does not suggest or infer *Michielli* is no longer good law.

Specifically, the court reasoned the trial court erred relying on *Michielli* because Mora-Lopez did not face a Hobson's choice when the trial court dismissed his charges. Mora-Lopez, Slip. Op. at 10. Had the trial court correctly calculated Mora-Lopez's remaining time for trial, it would have realized it still had over five weeks to timely bring Mora-Lopez to trial. CrR 3.3. Ample time for the parties to arrange appropriate interviews of the eight witnesses the State anticipated presenting. Slip. Op. at 10, CP 26. A trial court abuses its discretion when it predicates a discretionary decision on an error of law. *State v. Corona*, 164 Wn.App. 76, 261 P.3d 680 (2011).

Importantly, the opinion in this case also does not infer that CrR 3.3(h) 'supersedes' CrR 8.3(b) or any other rule that allows dismissal based on prejudicial delay. See, PFR at 16. While a trial court's decision to grant or deny a continuance

pursuant to CrR 3.3, rests within its discretion, that discretion is not without limits. See, *State v. Denton*, __ Wn.App. ____ (Slip.Op. 37497-1-III. (the trial court abused its discretion continuing the defendant's trial date beyond remaining time for trial pursuant to CrR 3.3 (f)(2), in the administration of justice where the alleged congestion asserted as the basis for the request was not sufficiently detailed in the record). And while trial preparation may support a trial court's decision to continue a trial date beyond the expiration of time for trial, neither *State v. Flynn*, 154 Wn.2d 193, 110 P.3d 748 (2005), nor the opinion in this case infer that a trial may be continued beyond remaining time for trial pursuant to CrR 3.3(f)(2), where good cause is predicated on mismanagement. Dismissal may, depending on the circumstances presented, be warranted pursuant to CrR 3.3(h) if a continuance is improvidently granted beyond time for trial, or pursuant to CrR 8.3(b) if mismanagement actually prejudices a defendant's material

ability to obtain a fair trial within remaining time for trial. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 403 P.3d 45 (2017).

b. The Court of Appeals appropriately relied on the plain language of CrR 3.3 to correctly calculate Mora-Lopez's remaining time for trial for purposes of evaluating the trial court's CrR 8.3(b) decision.

Mora-Lopez claims review is warranted because the Court of Appeals erred calculating his remaining time for trial in the context of evaluating the trial court's CrR 8.3(b) decision. Mora-Lopez is mistaken. Review is not warranted.

Pursuant to CrR 3.3 (b)(1), Mora-Lopez was required to be brought to trial within 60 days after the time for trial commencement date or the time specified under subsection 3.3(b)(5). Under CrR 3.3 (c)(1), the initial commencement date was April 23, 2021, the date of arraignment. Pursuant to CrR 3.3 (b)(1)(i), Mora-Lopez's time for trial expired 60 days later, on June 22, 2021. His trial date was initially scheduled for June 14, 2021. On June 14, 2021, fifty-two days of time for trial had run and eight days remained. Mora-Lopez sought and obtained

two one-week continuances of his trial date. First, on May 19, 2021, Mora-Lopez moved to continue his trial date from June 14 to June 21, 2021 and then again on June 3, 2021, he requested the trial court move his trial date from June 21 to June 28, 2021.

Time for trial deadlines are impacted by certain occurrences that trigger *excluded* periods of time that do not count toward a time for trial expiration within which a defendant must be brought to trial. A continuance is one such occurrence. 3.3 (e)(1)-(9). CrR 3.3(e)(3) defines a ‘continuance’ as a delay granted by the court pursuant to section CrR 3.3(f). 3.3(f)(1),(2) states a continuance of a trial date may be granted by written agreement or by a motion of the court or party with findings. “Continuances appropriately granted by the court are periods of time that are excluded from the calculation of time for trial *and extend the allowable trial date to 30 days after the end of the excluded period.*” *State v.*

Hatt, 11 Wn. App. 2d 113, 150, 452 P.3d 577 (2019) (*emphasis added quoting* CrR 3.3(b)(5), (e)(3), (f)).

Mora-Lopez argues relying on *State v. Iniguez*, 143 Wn. App. 845, 180 P.3d 855 (2008), *rev'd*, 167 Wn.2d 273, 217 P.3d 768 (2009) that the ‘excluded period’ pursuant to CrR 3.3(e)(3), (f)(2) begins on the day of the event that introduced the delay, instead of the duration of time between the date of the existing trial date and the newly set trial date. See PFR at 22. This argument was appropriately rejected by the Court of Appeals.

CrR 3.3 (f) contemplates by its plain language continuances *of the trial date to a specified date*, not continuances of trial status hearings as argued by Mora-Lopez. CrR 3.3 (e)(3). Thus, the duration of time between the existing trial date *to a prospective specified trial date* is the period excluded from the time for trial calculations pursuant to CrR 3.3(e)(3). Here, the two excluded periods triggered by Mora-Lopez’s requests for trial date continuances pursuant to CrR 3.3(e)(3), (f)(1) is the duration between the trial date on June

14, 2021- to the new June 21, 2021 trial date and then again, the one-week continuance from the June 21, 2021 trial date to the new trial date of June 28, 2021. The two one-week trial continuances excluded from time for trial calculations in this case also triggered no more than a 30-day buffer as allowable time to bring Mora-Lopez to trial pursuant to CrR 3.3(b)(5). Such buffer is added to the end of the excluded period.¹ The second excluded period of time in this case ended June 28, 2021. Mora-Lopez's time for trial was therefore not set to expire until July 28, 2021. Importantly, the continuances Mora-Lopez sought were unrelated to the mismanagement later alleged and litigated in the trial court. Had Mora-Lopez not

¹ CrR 3.3 was overhauled in 2003 to allow “‘flexibility in avoiding the harsh remedy of dismissal with prejudice,’ by providing a “‘30-day buffer period’” for excluded periods and a “‘one-time ‘cure-period’ ... that allows the court to bring a case to trial after the expiration of the time for trial period.’” *State v. Walker*, 17 Wn. App. 2d 275, 279, 485 P.3d 970, review granted, 198 Wn.2d 1001, 493 P.3d 730 (2021) citing, *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009) (quoting *State v. Flinn*, 154 Wn.2d 193, 199 n.1, 110 P.3d 748 (2005)); CrR3.3(b)(5), (g).

continued his trial date and the State failed to timely provide its witness list within a week of trial, the trial court would have been well within its discretion to dismiss his charges pursuant to CrR 8.3(b) based on prejudicial mismanagement. Moreover, if the trial court had continued Mora-Lopez's trial date into July and mismanagement prevented him from interviewing witnesses or resulted in additional discovery, either of which implicated his material ability to prepare for trial, the imposition of sanctions or dismissal pursuant to CrR 8.3(b) would be left to the trial courts discretion. Neither scenario was presented here.

Mora-Lopez's argument rests on the strained reading of CrR 3.3 (e)(3), (f) and on *State v. Iniguez* and former CrR 3.3. In that case, the order continuing the trial date was entered in conjunction with the execution of a waiver of speedy trial to a future specified date. Consequently, the period of time between the entry of the waiver to the future specified date was properly excluded in computing speedy trial. While the excluded periods

began in *Iniguez* on the date the continuances were ordered, it was the entry of the speedy trial waiver that triggered the excluded period beginning immediately.

Iniguez does not hold contrary to the plain language of CrR 3.3, that the excluded period contemplated by CrR 3.3 is calculated from the date the delay is introduced when the order entered prospectively continues the scheduled trial date to a future specified trial date. *See Mora-Lopez*, Slip. Op. at 8 (CrR 3.3(f)(2) contemplates a continuance of the trial date). In this circumstance, the excluded period is the duration between the original trial date and the future specified trial date pursuant to CrR 3.3(f)(2). Therefore, Mora-Lopez time for trial expired July 28, 2021, not July 6, 2021.

Under these circumstances the Court of Appeals appropriately reasoned that the trial court abused its discretion concluding Mora-Lopez faced a Hobson's choice when the trial court dismissed charges on June 24, 2021, five weeks before Mora-Lopez's time for trial would have expired. See attached

timeline attached as Appendix B, previously filed as Appendix A to the State's Reply Brief in *State v. Mora-Lopez*, 83054-6-I on 01/25/22.

Dismissal is an extraordinary remedy that trial courts should only resort to in “egregious cases of mismanagement or misconduct.” *State v. Wilson*, 149 Wn.2d 1, 10, 65 P.3d 657 (2003) citing *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993). The trial court in this case failed to consider taking intermediary steps and miscalculated Mora-Lopez's remaining time for trial which led the court to erroneously conclude the State's late witness list was sufficiently prejudicial to warrant dismissing his charges pursuant to CrR 8.3(b). The Court of Appeals recognized this and simply applied applicable law consistent with CrR 8.3(b), *Michielli*, and CrR 3.3, concluding the legal basis for the trial court's decision was flawed as a matter of law and therefore the court abused its discretion dismissing Mora-

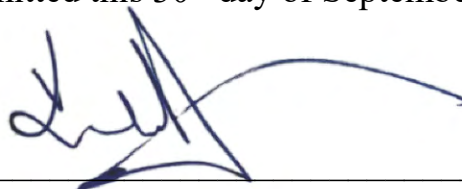
Lopez's charges. Further review of the decision in this case is not warranted.

F. CONCLUSION

For the reasons set forth above, Respondent, State of Washington, respectfully requests this Court deny Mora-Lopez's Petition for Review.

This document contains 2,286 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 30th day of September, 2022



KIMBERLY A. THULIN
WSBA No. 21210
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 83054-6-I
)	
Appellant,)	
)	DIVISION ONE
v.)	
)	
MARTIN OSCAR MORA-LOPEZ,)	
)	PUBLISHED OPINION
Respondent.)	
_____)	

MANN, J. — Martin Oscar Mora-Lopez was charged with assault in the second degree and felony harassment after an alleged incident outside a homeless shelter in Bellingham. The trial court dismissed the charges with prejudice under CrR 8.3(b). The State appeals and argues that the trial court abused its discretion in finding government mismanagement, and that Mora-Lopez was prejudiced because of potential violation of his time-for-trial right under CrR 3.3.

The trial court did not abuse its discretion in determining that the State’s late filing of its witness list amounted to government mismanagement. The trial court erred, however, in finding that Mora-Lopez was actually prejudiced because of a potential violation of his time-for-trial right. We reverse.

FACTS

On April 10, 2021, Mora-Lopez was arrested in Whatcom County and held in the county jail in lieu of bail. According to the affidavit of probable cause, after being denied entry to the Base Camp homeless shelter, Mora-Lopez confronted Jacob Moyer. Mora-Lopez used his shoulder to bump Moyer with enough force to knock him back. Mora-Lopez then pulled a knife from his pocket and took several swings at Moyer. It was later discovered that the jacket Moyer was wearing had two large, clean cuts on the left sleeve. Mora-Lopez was charged with one count of assault in the second degree with a deadly weapon and one count of felony harassment.

On April 16, 2021, Mora-Lopez's counsel filed a notice of appearance and demand for discovery. The discovery requests included a request for the "names and addresses of persons [the State] intends to call as witnesses at hearing or trial, any written or recorded statements . . . and the substance of any oral statements of such witnesses."

On April 21, 2021, the State filed and served its demand for discovery. The demand included a statement that the "State's Witness List will include all those named and referenced in Discovery provided to the defendant, including any necessary custodian of records required for proof of chain of custody, certification or authentication." That same day, the State provided Mora-Lopez's counsel with discovery materials that referenced several named and unnamed individuals, including: an unnamed Base Camp staff member that called 911 to report the altercation, Base Camp employee Adrian Hartnup who described the altercation to Officer Michael Shannon, Base Camp employee Adam Estrada who showed Officers Shannon and

Wubben surveillance footage of the incident, Officer Marty Otto, Officer Eric Kingery, an unnamed Based Camp staff, and unnamed CSI laboratory photographers.

On April 23, 2021, Mora-Lopez was arraigned and entered a plea of not guilty to both counts. A status/omnibus hearing was set for May 19, 2021, and a trial for June 14, 2021. On May 19, the parties agreed to continue the trial date from June 14, 2021, to June 21, 2021. On May 26, 2021, the court delayed the status/omnibus hearing for one day so that Mora-Lopez could be present.

On May 27, 2021, Mora-Lopez's counsel requested a one-week continuance without objection. The court scheduled a new status/omnibus hearing for June 3, 2021, with a new trial date of June 28, 2021. During the June 3 omnibus hearing, both parties confirmed the June 28, 2021, trial date. Consistent with Whatcom County Criminal Rule (WCCrR) 6.18(b)(3), the trial court directed the parties to submit witness lists by the end of the day.¹ An omnibus order was prepared and signed by both parties and filed at the end of the day on June 3. The omnibus order instructed both parties to file a witness list "2 weeks prior to trial," which conflicted with the trial court's oral instruction that the lists be provided by the end of the day. The State did not file a witness list on June 3 or two weeks prior to trial.

On June 18, 2021, Mora-Lopez's counsel e-mailed the State's attorney informing them that they had been unsuccessful in locating the alleged victim and sought

¹ WCCrR 6.18(b)(3) requires:

The parties must file a witness list by the end of the day on which the Omnibus Order is entered. Both parties must immediately contact their witnesses to confirm availability for trial. If a witness is not available, the party shall immediately notify the opposing party and file a motion to continue the trial date or make any other arrangement the Court may order, noting the motion for hearing on the next regular motion calendar, or as a special set with leave of the court. The Court will waive the 5-day notice requirement for a motion based on unavailability of a witness.

assistance setting up an interview. The e-mail also requested interviews with the police officers identified in the State's April 21, 2021 discovery responses. The State did not reply to the e-mail and no witness interviews were scheduled.

On June 21, 2021, the State served its witness list on the public defender's office—four business days before the scheduled trial. The State's list named eight witnesses—the alleged victim, Moye, Base Camp staff members Hartnup and Estrada, and police officers Shannon, Wubben, Otto, Kingery, and Murphy. The list did not include others referenced in the April 21, 2021, discovery.

On June 23, 2021, Mora-Lopez moved to exclude witnesses, or alternatively, to dismiss pursuant to CrR 8.3(b). Mora-Lopez argued that the State's failure to submit a witness list by the deadline was misconduct, and that the absence of the list led him to believe that the prosecution intended to forgo calling witnesses and rely on a surveillance video instead. Mora-Lopez also asserted that he was left with insufficient time to prepare for trial.

The trial court heard Mora-Lopez's CrR 8.3(b) motion to dismiss on June 24, 2021. The court concluded that the State's late filing of its witness list constituted government mismanagement and resulted in actual prejudice to Mora-Lopez's ability to prepare the case for trial. In support of its conclusion that Mora-Lopez was prejudiced, the trial court calculated the CrR 3.3(b) time-for-trial date as no later than July 7, 2021. As a result, the court concluded that the State's late disclosure left insufficient time for defense to prepare prior to the expiration of the time for trial. The trial court granted Mora-Lopez's CrR 8.3(b) motion and dismissed the case with prejudice. The trial court

denied the State's motion for reconsideration and entered findings of fact and conclusions of law supporting its decision.

The State appeals.

ANALYSIS

The State argues that the trial court abused its discretion in dismissing the charges against Mora-Lopez under CrR 8.3(b). The State asserts that the trial court erred both in determining that there was government mismanagement and that Mora-Lopez was actually prejudiced. We disagree with the State and agree with the trial court that the State committed government misconduct. We agree with the State, however, that Mora-Lopez was not actually prejudiced.

A. Dismissal under CrR 8.3

CrR 8.3(b) addresses dismissal of criminal charges based on arbitrary government acts or misconduct:

The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

"The dismissal of charges under CrR 8.3(b) is an 'extraordinary remedy.'" State v. Kone, 165 Wn. App. 420, 432, 266 P.3d 916 (2011) (quoting State v. Rohrich, 149 Wn.2d 647, 658, 71 P.3d 638 (2003)). A trial court may only dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. Rohrich, 149 Wn.2d at 654. "Governmental misconduct need not be evil or dishonest. Simple mismanagement is sufficient." Kone, 165 Wn. App. at 433. The

defendant, however, “must show actual prejudice, not merely speculative prejudice affected his right to a fair trial.” Kone, 165 Wn. App. at 433.

When we review a trial court’s dismissal of charges under CrR 8.3 we “must ask whether the trial court’s conclusion that both elements were satisfied was a ‘manifest abuse of discretion.’” Rohrich, 149 Wn.2d at 654 (emphasis added) (quoting State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). A trial court’s decision is an abuse of discretion if it is “manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is untenable “if it results from applying the wrong legal standard or is unsupported by the record.” State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

B. Government Mismanagement

The State first raises several arguments in support of its claim that the trial court erred in concluding that there was government misconduct.

After reviewing the evidence, the trial court concluded that the State had committed government misconduct. The court stated:

Government misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. Here, the State mismanaged its case by failing to file and serve a witness list in a timely manner as required by CrR 4.7, CrR 4.5, Whatcom County Local Court Rule WCCrR 6.18(b)(3), and the oral ruling of the court; failing to communicate with its witnesses regarding trial availability in a timely manner; and failing to attempt to make its witnesses available for defense interviews.

We agree with the State that substantial evidence does not support the trial court’s conclusion that the prosecutor admitted that he had not communicated with the alleged victim-witness. The prosecutor did not make this admission. Rather, he stated,

“so I’m ready to go on this case. I’ve subpoenaed all of my witnesses, I believe most everyone is available, but I’m prepared to go to trial Monday.” Thus, the record supports that the prosecutor had in fact communicated with the victim-witness. We also agree with the State that the trial court’s conclusion that had the State contacted the victim-witness earlier, Mora-Lopez would have had sufficient time to prepare for trial, was speculative. But even without these statements, the trial court’s conclusion that the State mismanaged the discovery process was supported by substantial evidence and not an abuse of discretion.

The State failed to file and serve its witness list until four business days before trial. In doing so the State violated CrR 4.7,² WCCrR 6.18(b)(3), the trial court’s oral ruling during the omnibus hearing requiring the parties to provide witness lists by the end of the day, and the agreed written omnibus order for disclosure two weeks before trial. While the State argues that its initial discovery included all the names ultimately included on its witness list, the witness list contained only a subset of the individuals identified in its discovery materials. Moreover, the identifications included in the initial discovery did not comply with the requirements of CrR 4.7(a)(1)(i), including addresses and substance of statements. The State’s failure to submit its witness list on time interfered with Mora-Lopez’s ability to conduct witness interviews or preparing a defense prior to the scheduled trial date. The trial court did not abuse its discretion in concluding that the State mismanaged discovery. Thus, the first element for dismissing charges under CrR 8.3 was satisfied.

² CrR 4.7(a)(1)(i) requires the State to provide its witness list, including names, addresses, along with any written or recorded statements and the substance of any oral statements. The list must be filed no later than the omnibus hearing.

C. Time for Trial

Next we consider whether the second element for dismissing charges under CrR 8.3—prejudice affecting the defendant’s right to a fair trial—was satisfied. The State contends that the trial court predicated its decision on an erroneous calculation of Mora-Lopez’s remaining time for trial. We agree.

The time-for-trial rule, CrR 3.3, was amended in 2003 based on a recommendation from the Washington Court’s Time-For-Trial Task Force. State v. George, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007). Under the revised CrR 3.3, a defendant must be brought to trial within 60 days of arraignment if they are detained on a pending charge, “or the time specified under subsection [3.3(b)(5)].”

Under CrR 3.3(b)(5), the time-for-trial clock tolls during nine specified “excluded periods” identified in CrR 3.3(e). One of the allowed excluded periods under CrR 3.3(e)(3) is for continuances granted under CrR 3.3(f). CrR 3.3(f)(2) allows the trial court to continue the trial dated based on motion of the court or party.

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party’s objection to the requested delay.

(Emphasis added).

Thus, where a trial date has been continued, the time between the continuance and the new trial date is an excluded period under CrR 3.3(b)(5). Under CrR 3.3(b)(5), the new time for trial excludes this time, and “the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.”

Mora-Lopez's commencement date, the date of his arraignment, was April 23, 2021. Under CrR 3.3(b)(1), Mora-Lopez's original time-for-trial date was June 22, 2021. On May 19, the trial court continued the trial to June 21, 2021.³ Based on the plain language of CrR 3.3(e)(3), the end of the excluded period would have been June 21.⁴ Under CrR 3.3(b)(5), because this date was within 30 days of Mora-Lopez's time for trial, it extended his time-for-trial date to July 21, 2021.

On May 27, 2021, Mora-Lopez's counsel requested a one-week continuance without objection. The court scheduled a new status/omnibus hearing for June 3, 2021, with an updated trial date of June 28, 2021. Again, based on the plain language of CrR 3.3(e)(3), the end of the excluded period would have been June 28, 2021. And because this date is within 30 days of Mora-Lopez's time for trial, under CrR 3.3(b)(5), the time-for-trial date was extended to no earlier than 30 days after the excluded period, or July 28, 2021. State v. Farnsworth, 133 Wn. App. 1, 11-12, 130 P.3d 389 (2006).

The trial court concluded that the State's mismanagement resulted in actual prejudice to Mora-Lopez, based on its assumption that the time-for-trial right under CrR

³ Mora-Lopez argues that the May 19, 2021 order continuing the trial to June 21, 2021, did not result in an exclusionary period because the trial court did not base it on CrR 3.3 (f)(1) or (2). This appears to be a scrivener's error, as the court did not check a box next to either reasoning for the continuance. The order also lacked Mora-Lopez's signature, but the Washington State Supreme Court had issued a fifth and revised and extended order pertaining to COVID-19 that approved the use of remote hearings and eliminating the requirement that the court obtain signatures on orders to continue. Fifth Revised & Extended Order Regarding Court Operations, No. 25700-B-658, In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, (Wash. Feb. 29, 2021). Regardless of either of these arguments, the subsequent continuance on May 27, 2021, still affects Mora-Lopez's time to trial date, leading to the same calculation whether or not the court factored in the earlier continuance.

⁴ "Just as the construction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule." Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997). As with statutes, we must give effect to the plain meaning of a rule's language. Dep't of Licensing v. Lax, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995).

3.3(b)(1)(i) expired no later than July 7, 2021—approximately two weeks after the State served its late witness list. The trial court explained:

This mismanagement resulted in actual prejudice to the defendant. A defendant is prejudiced when delayed disclosure shortly before litigation, forces him to choose between his trial date and to be represented by an adequately prepared attorney.

The court continued:

The court has considered lesser remedies to dismissal and finds them inadequate in this case. While a continuance would have arguably allowed time for the defense attorney to prepare, it would have come at the expense of Mr. Mora-Lopez's right to a speedy trial and thus inadequate under State v. Michielli. With a Commencement Date of April 23, 2021, and accounting for excluded periods (written agreed continuance between May 19, 2021 and June 3, 2021), time for trial under CrR 3.3(b)(1)(i) would have run no later than July 7, 2021.


The trial court incorrectly calculated Mora-Lopez's time-for-trial dates based on the dates of the continuances, not the continued date of the trial itself. CrR 3.3(f) states that, upon written agreement or a motion by the court or a party, the court may continue the "trial date," not the date from the order of continuance.

Thus, the trial court's calculation of Mora-Lopez's new time-for-trial deadline was incorrect. Instead of July 7, 2021, Mora-Lopez's time for trial was July 28, 2021—over a month after the State's filed its untimely witness list. Another continuance of Mora-Lopez's trial date to allow time for the defense to prepare after the State's witness disclosure would not have resulted in a violation of Mora-Lopez's CrR 3.3(b) time for trial. The trial court's conclusion that the State's mismanagement resulted in actual prejudice to Mora-Lopez was based on an incorrect legal standard and an abuse of discretion. Salgado-Mendoza, 189 Wn.2d at 427.

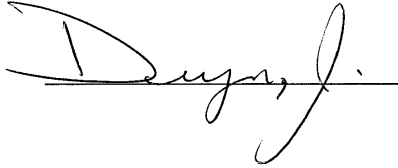
Under CrR 3.3(h), “[n]o case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.”

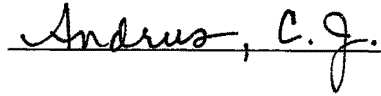
Because Mora-Lopez’s time-for-trial right under CrR 3.3 was not violated, dismissal of the charge under CrR 8.3 was error. State v. Kone, 165 Wn. App. at 436.⁵

Reversed.



WE CONCUR:

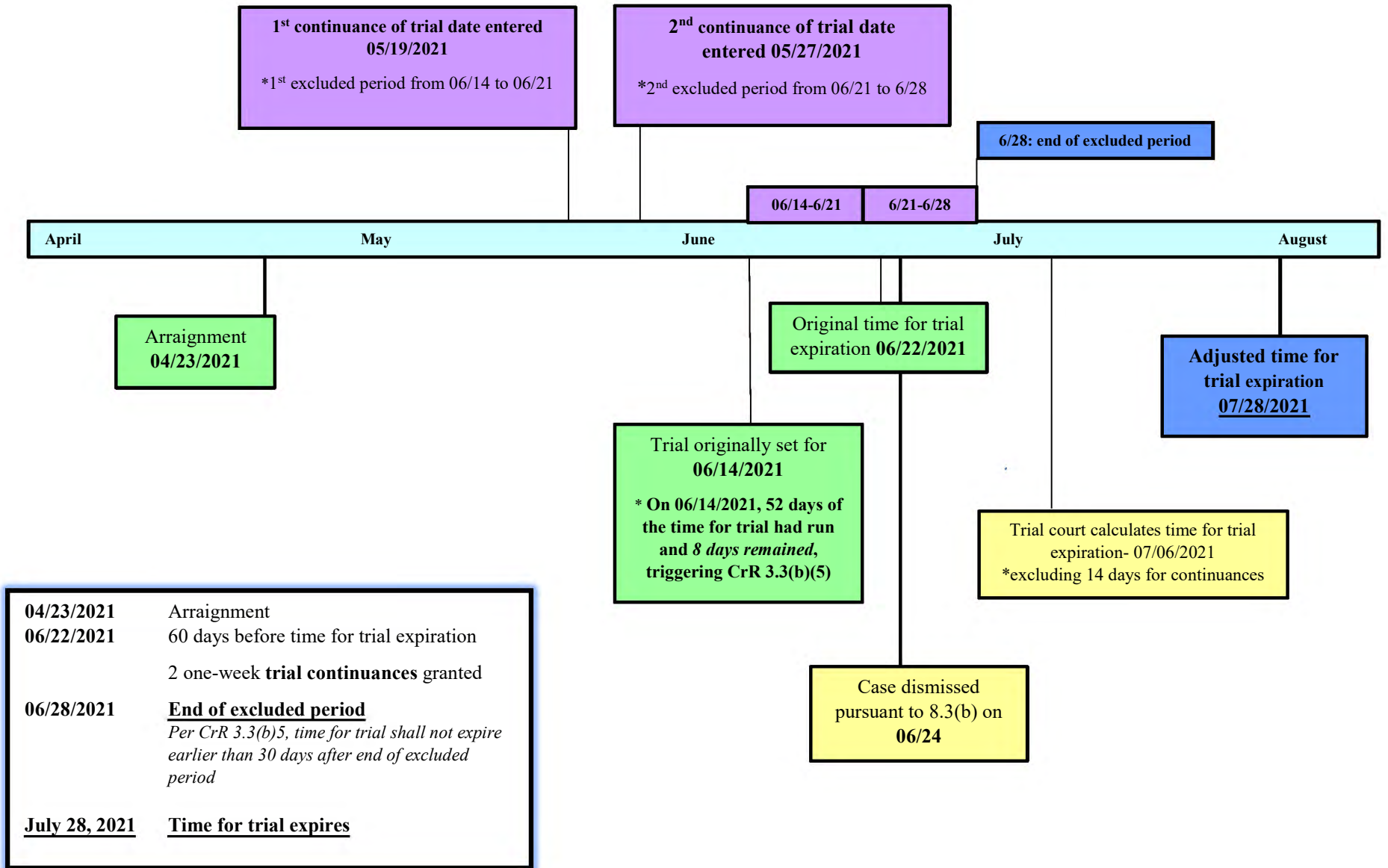




⁵ The trial court relied in part on our Supreme Court’s 1997 decision in Michielli. In that case, the court affirmed dismissal of charges under CrR 8.3 after the State added four new charges just before the scheduled trial date, thus forcing the defendant into either waiving his time-to-trial right or proceeding to trial unprepared. The trial court’s reliance was misplaced. Michielli was decided before the 2003 amendment to CrR 3.3, which added both the CrR 3.3(b)(5) excluded periods and the restriction on dismissals under CrR 3.3(h) unless there has been a violation of CrR 3.3. Here, because the trial continuances were excluded under CrR 3.5(b)(5) and Mora-Lopez did not face a choice between violating his time-to-trial right or preparing for trial, Michielli is inapposite.

APPENDIX B

Mora-Lopez Time for Trial
21-1-00360-37



WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

September 30, 2022 - 11:21 AM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Martin Oscar Mora-Lopez
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