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No. 70904-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAN NORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 4

E. ARGUMENT 11

1. By creating a conflict for defense counsel on the day of trial, the State committed misconduct under CrR 8.3(b). The court abused its discretion in continuing the case based on that misconduct. The resulting delay of over a month violated the defendant's speedy trial rights under CrR 3.3 11

    a. By creating a conflict for defense counsel on the day of trial, the State committed governmental misconduct... 11

    b. The court abused its discretion in continuing the case. 14

    c. The misconduct and continuance prejudiced the defendant by delaying his trial past the expiration of his time for trial under CrR 3.3 16

2. There are reasonable grounds to believe that the defendant may have been prejudiced by the jury's consideration of extrinsic evidence 18

    a. Items left inside a backpack, including a cell phone, were extrinsic evidence that the jury should not have considered. 18

    b. By not telling defense counsel or the court that the backpack contained items, the prosecutor committed misconduct by knowingly having the backpack admitted with items inside. 22

c. Because there are reasonable grounds to believe that the defendant may have been prejudiced by the extrinsic evidence, this Court should reverse the convictions. ... 24

3. Because the charge for resisting arrest failed to allege that the arrest was lawful or that the defendant acted intentionally, that conviction should be reversed. ... 29

F. CONCLUSION ... 32

TABLE OF AUTHORITIES

United States Supreme Court Cases

Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967). 24

Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) 20

Washington Supreme Court Cases

Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973) 21

In re Pers. Restraint Petition of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 20, 23, 25

State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988) 16

State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994) 20

State v. Bandy, 164 Wash. 216, 2 P.2d 748 (1931) 31

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 23

State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949) 21, 24

State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009) 15, 17, 18

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) 30

State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000) 31, 32

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997) ..... passim

State v. Ortega, 177 Wn.2d 116, 297 P.3d 57 (2013) 31

State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) 21

State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004) 20, 21, 25

State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967) 21, 25

State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) 21, 25, 26, 27

Washington Court of Appeals Cases

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 796 P.2d 737 (1990) 21

State v. Boling, 131 Wn. App. 329, 127 P.3d 740 (2006) 25

State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989) 25

State v. Naillieux, 158 Wn. App. 630, 241 P.3d 1280 (2010) 31

State v. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006) 16

State v. Price, 126 Wn. App. 617, 109 P.3d 27 (2005) 24

State v. Ralph Vernon G., 90 Wn. App. 16, 950 P.2d 971 (1998) 18

State v. Simmons, 35 Wn. App. 421, 667 P.2d 133 (1983) 30

State v. Ware, 111 Wn. App. 738, 46 P.3d 280 (2002) 30

Other Cases

United States v. Zavala, 541 F.3d 562 (5th Cir. 2008) 26

Constitutional Provisions

Const. art 1, § 22 30

U.S. Const. amend. VI 30

Statutes

RCW 69.50.4013(1) 7

RCW 9A.76.040(1) 7, 29, 30

Rules

CrR 3.3 ..... passim

CrR 8.3(b) ..... passim

Other Authorities

http://en.wikipedia.org/wiki/Li-ion 26

A. INTRODUCTION

By the State's own account, this prosecution for possession of a controlled substance and resisting arrest was a simple case. After conducting pretrial matters, the State announced it was ready to proceed with the scheduled trial. Upon returning from lunch, however, the State inexplicably changed its tune. The State confessed it had really been scrambling to prepare and announced that a continuance was necessary because it might call a witness (known about since the inception of the case) represented by the same public defender's office as the defendant, thereby creating a conflict for defendant's counsel. The court accepted the State's eleventh hour request, but neglected to specify a new trial date. After two more State requested continuances, trial finally began. The State did not call the witness that the State had used to create the conflict. Because the State's misconduct resulted in the defendant's right to a speedy trial being unnecessarily sacrificed, this Court should reverse and order the charges dismissed with prejudice.

Alternatively, the convictions should be reversed and remanded for a new trial because the prosecutor knowingly submitted extrinsic evidence, extraneous items inside a backpack–including a cell phone–to the jury. In any event, the resisting arrest conviction should be reversed

and dismissed without prejudice because the charging document was defective.

B. ASSIGNMENTS OF ERROR

1. The State committed governmental misconduct or mismanagement under CrR 8.3.

2. The defendant's court rule based speedy trial rights were violated.

3. The court erred in continuing the case the day of trial and in granting further continuances.

4. A backpack, admitted into evidence, was improperly sent to the jury room with items inside that were not admitted.

5. The jury erred in considering extrinsic evidence.

6. The court erred in telling the jury that it could use the cell phone that the jury found in the backpack as evidence

7. The charging document failed to allege all of the essential elements for the offense of resisting arrest.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. On the day of trial, the State declared itself ready after conducting pretrial matters. After returning from lunch, the prosecutor stated for the first time that he intended to call a nonessential witness, who was represented by defense counsel's office. Based on this artificial

conflict, the court granted a continuance. This resulted in the defendant's trial being held over a month later, in violation of his rule based speedy trial rights. Did the court abuse its discretion in continuing the case and in denying the defendant's motion to dismiss for governmental misconduct and violation of his right to a speedy trial?

2. Methamphetamine and other items were found in a backpack in a car that the defendant had driven. The State moved to have some of the items from the backpack admitted separately. The State also successfully had the backpack itself admitted. Unbeknown to the defense and the court, other items not admitted into evidence remained in the backpack, including a cell phone, laptop, and a large sized shirt. Cell phones and laptops commonly have identifying information, and the defendant is a large man. The jury told the court it had found items in the backpack and asked if it could use the cell phone as evidence. The court answered yes. Are there reasonable grounds to believe that the defendant may have been prejudiced by the extrinsic evidence? Did the prosecutor commit misconduct in knowingly sending extrinsic evidence to the jury?

3. Two essential elements of resisting arrest are that the defendant acted intentionally and that the arrest was lawful. The information omitted these elements. Should the conviction for resisting arrest be reversed

because these elements do not appear in the charging document and cannot be fairly implied?

D. STATEMENT OF THE CASE

According to United States Border Patrol Agent Dante Moreno,[1] the Bellingham Police Department conducted a controlled buy of methamphetamine from Kayly West around 5:00 to 6:00 p.m. on January 10, 2013. 2RP 175, 177-78.[2] Police followed West, who was in a Honda, to a Wendy's restaurant. 2RP 178. After West and others left the Wendy's, police ceased their surveillance of the Honda. 2RP 179-180.

Later that evening, around 7:30 to 9:00 p.m., Moreno and Bellingham Police Detective William Medlen were getting coffee in the drive-through at a Starbucks. 2RP 176, 227-28. Medlen was not involved in the earlier surveillance of the Honda. 2RP 228. As they waited in line, Moreno saw the same Honda park. 2RP 176, 181. An Eagle Talon pulled up and parked next to the Honda. 2RP 176. Moments later, the two cars

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[1] Moreno testified he was attached to the Bellingham Police Department's Special Investigations unit. 2RP 175.

[2] The report of proceedings are referred to as follows: volume 1 ("1RP"); volume 2 ("2RP"); volume of proceedings from June 27, 2013 ("6/27/13RP"); and volume of proceedings from September 4, 2013 ("9/4/13RP"). Volume 1 contains the proceedings from June 17, 2013; July 18, 2013; July 25, 2013; and August 5, 2013. Volume 2 contains the proceedings from August 6 and 7, 2013.

Volume 1 does not have page numbers. All 102 pages, including the cover page but not a blank page, are counted.

left. 2RP 229. Moreno and Medlen followed the two cars to a nearby parking lot. 2RP 230-31.

From their vehicle about 20 yards away, Moreno and Medlen observed the driver of the Eagle Talon, later identified as Alan Nord, walk over to the driver's side of the Honda. 2RP 185, 231-32. Although they did not see any items passed, they saw what they thought was a hand to hand transaction between Nord and the driver of the Honda, a man. 2RP 185, 191, 232. Believing they had witnessed a drug transaction, they approached and identified themselves as police. 2RP 187, 234. The Eagle Talon had two passengers, a woman in the front and a man in the back. 2RP 234. The passenger in the Honda was West. 2RP 191. Medlen told Nord to stand on the sidewalk in front of the cars. 2RP 234-35, 237. Medlen asked if Nord had identification. 2RP 235. According to Medlen, Nord said he had identification in a backpack in the car. 2RP 235. Medlen told Nord to stay where he was and went to ask the passengers about the backpack. 2RP 236. The male passenger was not cooperative and swore at Medlen. 2RP 236. Medlen was unable to retrieve the backpack. 2RP 236. After Nord had been on the sidewalk for about two minutes, he ran away. 2RP 238. Moreno started to chase him, but stopped. 2RP 191.

Medlen requested a drug dog to sniff the cars. 2RP 239. Before the dog arrived, the police permitted the four people to claim possessions from the cars and walk away. 2RP 241-42, 268. When the dog arrived, it "alerted" to both cars and the police seized the cars. 2RP 240.

The next day, January 11, 2013, police arrested Nord on a Department of Corrections warrant. 1RP 19; 2RP 217. He was later released. See 2RP 118

Police executed a search warrant on the Eagle Talon on January 15, 2013. CP 6; 2RP 242, 269. Police found a backpack in the front passenger seat area of the car and searched it. 2RP 207, 244. Among the items inside were a knife, a laptop, and a book safe. 2RP 244-45. Inside the safe was a baggie of methamphetamine and a digital scale. 2RP 246. No identification was recovered from the backpack. 2RP 257. According to police, the registered owner of the Eagle Talon was a person named Samuel Alvorez. 2RP 266. Police did not contact Alvorez. 2RP 266.

On January 24, 2013, Detective Josh Danke and Border Patrol Agent James Balkman went to arrest Nord based on suspicion that he had been in possession of the methamphetamine found in the backpack. 2RP 118, 213. In an unmarked vehicle and in plain clothes, they parked about ten yards away in a parking lot adjacent to a residence where they

suspected Nord might be. 2RP 119-20. Since it was about 8:00 p.m., it was dark. 2RP 151.

They saw Nord walk out of the residence and start to approach the driver's side of a vehicle. 2RP 122-23. Danke and Balkman snuck up on Nord. 2RP 121, 215. They announced themselves as police and told Nord that he was under arrest. 2RP 124, 215. The non-uniformed officers told Nord to get on the ground or put his hands behind his back. 2RP 124. Nord did not and a struggle ensued where police elbowed Nord in his face and kneed him in his stomach. 2RP 127, 141. After a uniformed police officer arrived, police successfully handcuffed Nord. 2RP 172, 217.

The State charged Nord with possession of a controlled substance, methamphetamine, RCW 69.50.4013(1),[3] and resisting arrest, RCW 9A.76.040(1). CP 5, 32-33. In March 2013, the parties agreed to continue the trial date to June 17, 2013. Supp. CP __; Sub. No. 15.

On the day of trial, June 17, 2013, the court heard pretrial motions and held a CrR 3.5 hearing to determine the admissibility of statements by Nord. 1RP 3-45. Law enforcement officers testified about their interaction with Nord and the statements he purportedly made. 1RP 14-

[3] Nord was also charged with another count of possession of a controlled substance, but this charge was dismissed by the State. CP 5, 32-33; 1RP 4.

40. The court admitted the statements. 1RP 44. Afterward, the parties and the court broke for lunch before proceeding to jury selection. 1RP 46. Before breaking, the prosecutor stated the trial would not take long and that the State was ready to proceed. 1RP 45-46.

After returning from lunch, the prosecutor stated he had to "bring up a matter." 1RP 48. He confessed he had been "scrambling" to the get this case to court and that he had been preparing for a separate, but more complicated case involving Nord. 1RP 49. He admitted, "to tell you the truth, I had been getting ready for that case." 1RP 49. He then stated that based on the testimony elicited from law enforcement at the CrR 3.5 hearing (Nord did not testify or call any witness), he had decided he might call Kayly West and that he would issue a subpoena. 1RP 50-51. The prosecutor asserted that West could have knowledge of who owned the backpack. 1RP 52. This presented a conflict for Nord's counsel because West was represented by the same public defender's office. 1RP 51. If the prosecutor called her, new counsel would have to be appointed for either her or Nord. 1RP 52.

Based on the prosecutor's representations about the possible conflict, the court continued the case. 1RP 59. The court, however, did not enter an order and neglected to set a new trial date, leaving it to the parties to determine a new trial date. 1RP 60-61.

Ten days later, a different judge heard from the parties. 6/27/13RP. The potential conflict was resolved. 6/27/13RP 6. Nord's trial counsel remained the same. 6/27/13RP 6. Nord reiterated that he had been ready for trial and objected to continuing the case. 6/27/13RP 6. The judge confirmed the other judge's finding of good cause and set a trial date for July 22, 2013. 6/27/13RP 8.

Four days before July 22, the State moved to continue the trial to July 29 because a police officer the State planned to call was scheduled to be on vacation. 1RP 62, 64. Over Nord's objection, the court granted the request. 1RP 64.

On July 25, history repeated itself. Four days before the rescheduled trial date of July 29, the State again moved to continue the trial. 1RP 66. A different police officer was on vacation on July 29. 1RP 66. Over Nord's objection, the court continued the case, again, to August 5. 1RP 66-67.

On August 5, Nord moved to dismiss for mismanagement and violation of his right to a speedy trial. 1RP 72; CP 28-31. The court denied the motion. 1RP 77. At trial, Nord did not testify or call any witnesses and the State did not call West to testify. 2RP 117-273. West was not on either party's witness list. 2RP 116-17; Supp. CP __; Sub. No. 24, 45.

At the State' request, the court admitted the backpack as an exhibit. 2RP 245; Ex 5. The knife, book safe, bag of methamphetamine, and the digital scale were admitted as separate exhibits. 2RP 247, 250; Ex. 1-4. During deliberations, the jury asked if it could consider as evidence a cell phone that the jury had found when examining items left inside the backpack. CP 55; 2RP 322. The prosecutor explained that he had not removed all the items out of the backpack, including a laptop, and had admitted the backpack as it was. 2RP 323 ("If they picked it up, you can feel there is [sic] items. There is a laptop computer in there and other objects."). The State urged the court to answer "yes." 2RP 323. Nord argued the answer was "no." 2RP 324. The court answered yes, the jury could consider the cell phone as evidence. CP 55; 2RP 327.

The jury found Nord guilty of the two charges. CP 56. The court sentenced Nord to two years in prison for the possession conviction with the 90 day sentence for resisting arrest to be served concurrently. CP 72; 9/4/13RP 20.[4]

[4] The two years were to be served consecutive to a sentence from a different case. CP 72; 9/4/13RP 6-7, 20. Nord is also appealing that case. The case number for that case is 70806-6-I.

E. ARGUMENT

1. By creating a conflict for defense counsel on the day of trial, the State committed misconduct under CrR 8.3(b). The court abused its discretion in continuing the case based on that misconduct. The resulting delay of over a month violated the defendant's speedy trial rights under CrR 3.3.

The State mismanaged this simple case, depriving Nord of his right to a speedy resolution. After having months to prepare, the State obtained an eleventh hour continuance on the day of trial by announcing it might call a witness represented by the same public defender's office that employed Nord's attorney, creating a conflict. The State's action qualifies as misconduct under CrR 8.3(b) and the court abused its discretion in continuing the case. Because this resulted in violation of Nord's right to a speedy trial under CrR 3.3, this Court should reverse the convictions and order them dismissed with prejudice.

a. By creating a conflict for defense counsel on the day of trial, the State committed governmental misconduct.

The State was responsible for creating a conflict for Nord's counsel that unnecessarily delayed the trial. The State knew about Kayley West since the inception of the case, but waited until the eleventh hour to decide that it might call her as a witness. This improperly forced Nord to choose between conflict free counsel and his right to a speedy trial, qualifying as misconduct under CrR 8.3(b).

To obtain dismissal under CrR 8.3(b),[5] a defendant must show arbitrary action or governmental misconduct. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Simple mismanagement is sufficient to show misconduct. Id.

Michielli is representative of what facts may constitute governmental misconduct. Id. at 243. Charged with one count of theft, the defendant exercised his right to trial. Id. at 244-45. Five days before trial, the prosecutor moved to add four charges. Id. at 243. Despite having all the information necessary to file these charges at the beginning, the State had waited until only days before trial to amend the information. Id. The trial court allowed the State to amend the information. Id. 233. This improperly forced the defendant to sacrifice his right to a speedy trial and seek a continuance to prepare for the new charges. Id. at 245.

Like in Michielli, the State unnecessarily delayed. The State was aware of West since charging Nord in January 2013. In fact, the

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[5] The rule reads:

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

CrR 8.3(b).

prosecutor's fourth question to the first witness at the CrR 3.5 hearing named West. 1RP 15 ("you had been observing an individual named Kayly West throughout the day; is that correct?"). The prosecutor was also aware that West was being prosecuted and who was representing her because he was the prosecutor assigned to West's case. CP 30. Despite the State's knowledge, the State had not planned to call her as a witness and had not filed a subpoena to secure her testimony.[6] See 1RP 50, 61. Only right before jury selection did the State change its mind, creating a conflict.

Below, the prosecutor claimed that his decision was based on facts elicited from the witnesses (all called by the State) at the CrR 3.5 hearing. 1RP 50. He asserted that the defense would likely present witnesses claiming that the backpack was not Nord's and that West would have knowledge about whose backpack it was. 1RP 51. The prosecutor did not substantiate these claims and it is unclear from the record what information elicited from State witnesses at the CrR 3.5 hearing was new. Even if new information had been elicited, that was no excuse. The three

[6] The docket indicates that the State had not yet filed its witness list. The State later filed a "supplemental" witness list on June 26, 2013, which only listed one police officer. Supp. __; Sub. No. 32. The State's "amended" witness list, filed on August 5, 2013, did not list West. Supp. __; Sub. No. 45; 2RP 116-17.

testifying witnesses were law enforcement officers within the State's control.

The long delay and the prosecutor's inadequate explanation "suggests less than honorable motives." Michielli, 132 Wn.2d at 244. The record shows that the State was not actually ready for trial and that it likely used West as an artifice for delay. Before breaking for lunch, the State claimed it was ready for trial. 1RP 46 ("I believe this case is simple and straightforward. We are ready to proceed."). After returning from lunch, the State did an about face. The prosecutor confessed that he had been "scrambling" to get the case ready and that he had been preparing for a more serious case involving Nord for the following Monday. 1RP 48-50, 55. The prosecutor blamed his lack of preparation on Nord because Nord had dared to exercise his right to a trial. 1RP 49, 52.

Even assuming no ill motive, the prosecutor could have resolved the problem by timely bringing up the matter before the trial date. At the very least, the failure to resolve the conflict sooner qualifies as "simple mismanagement."

b. The court abused its discretion in continuing the case.

A trial court's decision to continue a case is reviewed for an abuse of discretion. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024

(2009).

Had the trial court adhered to the trial schedule, the governmental misconduct would have been inconsequential. But the court accepted the State's argument, reasoning that "we have a jury cooling their heels downstairs, but it's better to thank them and send them packing now than to get into some sort of log jam three or four days hence." 1RP 55.

This was a solution in search of a problem. The State did not claim that West was an essential witness; the State only claimed it might call her in rebuttal. 1RP 51-52. But it was not even clear that Nord would testify or that he would call any witnesses (he ultimately did not). Further, the record fails to show that any testimony by West would have been relevant. West was not in the same car that the backpack was found. It is unclear what knowledge, if any, she would have of the backpack. If West was called by the State, the matter could have been dealt with then rather than push back Nord's trial by over a month. Perhaps the jury would have been inconvenienced, but Nord's right to a speedy trial would have not been unnecessarily sacrificed.

The State's delay in bringing up the possible conflict was inexcusable. West was not a person that the State learned about the day of trial or even shortly before. The State had known about her since the

beginning and only decided that it might call her as a witness on the day of trial. The court failed to consider these key facts.

Because the conflict was speculative and the State inexcusably delayed in deciding whether to call West as a witness, the trial court abused its discretion in continuing the case to an unspecified date. See State v. Adamski, 111 Wn.2d 574, 577-78, 761 P.2d 621 (1988) (court abused discretion in continuing case when prosecutor did not exercise due diligence in serving a subpoena upon an essential witness); State v. Nguyen, 131 Wn. App. 815, 821, 129 P.3d 821 (2006) (court abused discretion in continuing case so that State could "track" case with other cases of home invasion robberies).

c. The misconduct and continuance prejudiced the defendant by delaying his trial past the expiration of his time for trial under CrR 3.3.

In addition to a showing of misconduct under CrR 8.3(b), there must be prejudice affecting the right to a fair trial. Michielli, 132 Wn.2d at 240. This includes the right to a speedy trial. Id.

The misconduct and the court's erroneous continuance resulted in a violation of Nord's right to a speedy trial under CrR 3.3. CrR 3.3 governs the time for trial. "The purpose underlying CrR 3.3 is to protect a defendant's constitutional right to a speedy trial." Kenyon, 167 Wn.2d at

136. An alleged violation of the speedy trial rule is reviewed de novo. Id. at 135.

Nord was charged on January 29, 2013. CP 4-5. He was arraigned on February 1, 2013 and trial was set for March 25, 2013. Supp. CP __; Sub. No. 12. By agreement of the parties, the trial date was continued to June 17, 2013. Supp. CP __; Sub. No. 15; see CrR 3.3(f)(1). This meant that the time for trial expiration date was 30 days later, July 17, 2013. CrR 3.3(b)(5). After the readily avoidable conflict was created by the State on the day of trial, the case was continued for an unspecified time and then ultimately set for July 22, well past the deadline of July 17. CrR 3.3(b)(5); Supp. CP __; Sub. No. 34. Over Nord's objections, trial was then further delayed. Four days before July 22, the State obtained another continuance to July 29 because a police officer the State wanted to call would be on vacation on July 22. 1RP 62, 64. Four days before July 29, the State obtained another continuance because a different police officer would be on vacation on July 29. 1RP 66-67. Finally, trial began on August 5. 1RP 85.

As argued earlier, the State improperly created a conflict for Nord's counsel at the eleventh hour, culminating in the violation of his right to a speedy trial under CrR 3.3. This constitutes prejudice. See Michielli, 132 Wn.2d at 244 ("Defendant was prejudiced in that he was

forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial."); State v. Ralph Vernon G., 90 Wn. App. 16, 21, 950 P.2d 971 (1998) ("the State may not, without excuse, compel defendants to choose between their right to assistance by an attorney who has had an opportunity to adequately prepare for trial, and their right to a speedy trial."). Absent the State's misconduct or the abuse of discretion by the court in continuing the case, Nord's trial would have been timely.

Under CrR 3.3 and CrR 8.3(b), the remedy is reversal and dismissal of the charges with prejudice. Kenyon, 167 Wn.2d at 132; Michielli, 132 Wn.2d at 246. Accordingly, this Court should reverse and order the charges dismissed with prejudice.

2. There are reasonable grounds to believe that the defendant may have been prejudiced by the jury's consideration of extrinsic evidence.

a. Items left inside a backpack, including a cell phone, were extrinsic evidence that the jury should not have considered.

Police found a backpack inside the car Nord had been driving. 2RP 244. Inside the backpack, there was a knife, laptop, and book safe. 2RP 244. Inside the book safe was a bag of methamphetamine and a digital scale. 2RP 246. Excluding the laptop, which the State did not move to admit, these four items were admitted as separate exhibits. Ex. 1-

4; 2RP 247, 250-51. Officer Medlen testified that there had been other items inside the backpack, like a pair of socks or a handkerchief, but that he did not document these items as being impounded. 2RP 258. The State successfully moved to have the backpack admitted as evidence. Ex. 5; 2RP 245.

Unbeknown to defense counsel or the court, however, the laptop and other items remained inside the backpack. 2RP 323. During deliberations, the jury discovered these items, which included a cell phone, and asked: "When reviewing items from backpack, there is a cell phone. Can we use as evidence?" CP 55 (emphasis added). While discussing how the court should answer the question, the prosecutor admitted that other items, including a laptop, were in the backpack. 2RP 323. Over Nord's objection, the court answered "yes," to the jury's question. CP 55.

An examination[7] of the backpack itself reveals a litany of miscellaneous items inside. See Ex. 5. Among these items was the cell

[7] Appellate counsel examined the items inside the backpack in the presence of a Whatcom County prosecutor and a Bellingham Police Department evidence technician on June 6, 2014. The evidence technician removed items from the backpack and handled them. The technician returned the items to the backpack.

phone,[8] revealed to be a Verizon Motorola Droid smartphone, model number XT912. See Ex. 5. While a box with a Hewlett-Packard laptop power adaptor inside was in the backpack, a laptop was not.[9] See Ex. 5. Other significant items included: USB (Universal Serial Bus) cables and a two-pronged charging adaptor that might be used to charge the cell phone; a USB flash drive; a micro-SD (Secure Digital) card within an SD Card adaptor; and a large Old Navy long-sleeved shirt. See Ex. 5.

"[A jury's] verdict must be based upon the evidence developed at the trial." Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id. Thus, "[i]t is error to submit evidence to the jury that has not been admitted at trial." In re Pers. Restraint Petition of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012); see also State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). A jury's consideration of extrinsic evidence is misconduct. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). This Court has defined "extrinsic evidence" as "information that is outside

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[8] Consistent with the State's position that any cell phone should not be turned on in the absence of a court order (a position that the State did not take when asked at trial whether the jury could consider the phone as evidence), the evidence technician did not attempt to power on the cell phone at the viewing.

[9] It is unclear what happened to this laptop computer. At the time of filing, counsel is still investigating the matter.

all the evidence admitted at trial . . . ." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Extrinsic evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). It also improper because it bypasses the rules of evidence.

The cell phone and other items inside the backpack were improperly submitted to the jury. They were never admitted. They were not subjected to the rules of evidence or objection by Nord. Items inside a container are distinct from the container itself. Thus, the items were extrinsic evidence and the jury should not have received them. See Pete, 152 Wn.2d 554-55 (receipt of unadmitted written statement by defendant and police report improper); State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (receipt of unadmitted newspaper editorial and cartoon improper); State v. Smith, 55 Wn.2d 482, 484, 348 P.2d 417 (1960) (receipt of alias on jury instructions and forms improper as alias deemed inadmissible); State v. Boggs, 33 Wn.2d 921, 925-26, 207 P.2d 743 (1949) (receipt of unadmitted gun and bullets improper) (overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980)).

b. By not telling defense counsel or the court that the backpack contained items, the prosecutor committed misconduct by knowingly having the backpack admitted with items inside.

Nord did not object to the admission of the backpack. 2RP 245. However, the record shows that defense counsel did not know that items (including the laptop) were left in the backpack until the jury submitted its question on whether it could consider the cell phone as evidence. See 2RP 325 ("I am at a loss as to how those things would have been admitted."). The trial court was also unaware until the jury submitted its question. See 2RP 323 ("And the question is different than I thought it would be. It says, when reviewing items from the backpack, there is a cell phone, it would suggest there are other items in the backpack."); 2RP 324 ("I don't know anything about this cell phone.").

Notwithstanding these facts, the State maintained that the jury could properly consider the items as evidence because Nord had not objected to the admission of the backpack. 2RP 325. The court apparently accepted this argument because it answered "yes" to the jury's question. The State's argument should have been rejected. The State's approach in admitting some of the items inside the backpack separately would be redundant if the backpack could have been properly admitted

with all the items inside it. Defense counsel and the court reasonably assumed the backpack did not have other items inside.

Most of the case law on "extrinsic evidence" involves evidence that was inadvertently submitted to the jury or the jury's unilateral consideration of extrinsic evidence. Here, however, the prosecutor admitted to knowingly submitting the backpack with items left inside without making his intent known to defense counsel or the court. Because the prosecutor's conduct invited the jury to consider matters outside the evidence, this qualifies as prosecutorial misconduct. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (prosecutorial misconduct to invite jury to consider matters outside the evidence); see also Glasmann, 175 Wn.2d 705-06 (prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence and constituted misconduct).

The prosecutor defended his actions by asserting that it would have been "obvious" to defense counsel that there were items inside if defense counsel had tried to pick the backpack up. 2RP 325. The prosecutor then compared the trial to a "game" that defense counsel had failed to play well. See 2RP 326 ("he didn't object. And that's kind of how the game goes."). But a "criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice . . . ." Giles

v. Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) (Fortas, J. concurring). The prosecutor's misconduct makes a mockery of the rules of evidence. The prosecutor put before the jury evidence that was not subject to the crucible of our adversarial system. This Court should make clear that it is improper for parties to effectively sneak in "evidence" through bags, backpacks, packages, purses, or other containers. In accordance with the rules of evidence and fundamental fairness as mandated due process, this Court should hold that before an exhibit that could hold other items is admitted, the party must disclose whether there are inside of it.[10] This Court certainly should not tolerate this prosecutor's gamesmanship with a citizen's liberty and hold that the prosecutor committed misconduct.

c. Because there are reasonable grounds to believe that the defendant may have been prejudiced by the extrinsic evidence, this Court should reverse the convictions.

"[I]t is reversible error for a trial court to allow physical objects not admitted in evidence to go to the jury room." Boggs, 33 Wn.2d at 933. "The 'long-standing rule' is that 'consideration of any material by a jury

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[10] While it would be preferable to have all items in the backpack separately marked, if this was impractical, then the proper way to do this would be to take the items out and place them in a clear container. See State v. Price, 126 Wn. App. 617, 644-45, 109 P.3d 27 (2005) (admission of items from backpack as one exhibit proper where items were placed in a clear plastic bag).

not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" Glasmann, 175 Wn.2d at 705 (quoting Pete, 152 Wn.2d at 555 n. 4) (emphasis added); see also Rinkes, 70 Wn.2d at 862; Boggs, 33 Wn.2d at 933. Phrased differently, a "new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (internal quotation and citation omitted). In making this assessment, the court makes "an objective inquiry into whether the extraneous evidence could have affected the jury's determinations . . . ." Id. at 55 (emphasis added). Any doubt must be resolved in the defendant's favor. Smith, 55 Wn.2d at 484. The State bears the burden to overcome the presumption of prejudice. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006).

Applying these rules, this Court should reverse. There are reasonable grounds to believe that the extrinsic evidence, especially the cell phone, prejudiced Nord. The question by the jury plainly implies that it thought the cell phone was relevant evidence. Otherwise, the jury would not have asked. Cell phones generally "contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers." United States v. Zavala, 541 F.3d 562, 577 (5th

Cir. 2008). Thus, it is reasonable to believe that the cell phone contained identifying information that would have connected Nord to the backpack. Regardless, any doubt must be resolved in Nord's favor. See Smith, 55 Wn.2d at 484.

Given the jury's question, it is reasonable to believe that the jury turned the cell phone on and found information identifying Nord. The trial court speculated that it was unlikely that the jury would be able to power the phone on. 2RP 323. The court's intuition was incorrect. Cell phones (like the one here) commonly have lithium-ion batteries. When in a device that is turned off, lithium-ion batteries have a slow loss of charge. Manufacturers of these batteries typically state that they have a discharge rate of 1.5 to 2 percent per month.[11] Thus, assuming that the phone had been even partially charged and turned off when seized in late January 2013, it would have retained a sufficient charge to be turned on in August 2013. Moreover, assuming access to an electrical socket, the jury might have been able to use the USB cables and adaptor inside the backpack to charge the phone. See Ex. 5. A juror might also have had a portable

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[11] http://en.wikipedia.org/wiki/Li-ion (accessed on June 9, 2014) (citing http://www.rathboneenergy.com/articles/sanyo_lionT_E.pdf; http://www.hardingenergy.com/pdfs/5%20Lithium%20Ion.pdf).

charging device. Again, any doubt must be resolved in Nord's favor. See Smith, 55 Wn.2d at 484.

While the jury did not ask about a laptop, the laptop (assuming, as the prosecutor later confessed, it was actually in the backpack at the time) may have also been turned on. The jury might then have accessed the files on the computer or even inserted the USB flash drive or SD card into it. A juror could have even inserted the micro-SD card (contained in one of the SD card adaptors) into another phone (many smart phones have a micro-SD card slot). See Ex. 5. Like the cell phone, the jury may have found incriminating information from this extrinsic evidence.

Additionally, the jury may have impermissibly considered the large shirt, which has an "L" on the tag. See Ex. 5. As Detective Danke testified and the prosecutor argued, Nord is a large man. 2RP 125, 286. Thus the shirt was circumstantial evidence that linked Nord to the backpack.

The weakness of the admitted evidence solidifies the presumption that Nord was prejudiced. The State's theory that Nord had constructively possessed the backpack was problematic. Nord, while he had driven the car, was not the registered owner of the car. There were two passengers in car. The backpack, found on the passenger side, might have belonged to either of these two. Even if the backpack was Nord's, the passengers had

the opportunity to place items in the backpack. They were even allowed to retrieve items in the cars before the drug dog arrived. Police were unaware if the other passengers had handled the backpack. 2RP 208. Thus, one of the passengers might have placed the book safe with methamphetamine inside it in the backpack.

The State's evidence consisted only of testimony from law enforcement that Nord said his identification was in a backpack in the car and that Nord had fled the scene. Nord's identification, however, was not found in the car or the backpack. As for Nord's flight, this was not necessarily indicative of guilt for possession of the methamphetamine. Nord had a Department of Corrections warrant. See 1RP 19, 2RP 217. He may have fled because he did not want to get arrested on this warrant, or for any number of reasons.

While there was some uncertainty on the matter, the record indicates that the jury reached its verdict shortly before the court answered the jury's question on the cell phone. 2RP 327-33. The jury, however, was already instructed that "[t]he evidence is testimony and the exhibits." CP 36. The court further instructed that "[y]ou will be given the exhibits admitted in evidence . . . . The exhibits that have been admitted into evidence will be available to you in the jury room." CP 53. Thus,

following the court's instructions, the jury would have considered the extrinsic evidence.

The prejudice taints both the possession and resisting arrest convictions. As explained, the extrinsic evidence linked Nord to the backpack and the methamphetamine. Once that was established, the jury would have readily concluded that Nord's subsequent arrest for possession was "lawful," which is an element of the offense of resisting arrest. RCW 9A.76.040(1). Accordingly, because there are reasonable grounds to believe Nord may have been prejudiced by the extrinsic evidence and the State cannot meet its burden to overcome the presumption of prejudice, this Court should reverse the convictions and remand for a new trial.

3. Because the charge for resisting arrest failed to allege that the arrest was lawful or that the defendant acted intentionally, that conviction should be reversed.

In the charge for resisting arrest, the information did not allege that the arrest was lawful or that the resisting was intentional. Because these are essential elements that cannot be fairly implied from the document, this Court should reverse the conviction for resisting arrest.

"A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her." RCW 9A.76.040(1) (emphasis added). Accordingly, the State must prove that the defendant acted intentionally and that the arrest was

lawful. State v. Ware, 111 Wn. App. 738, 745, 46 P.3d 280 (2002) (analyzing sufficiency of evidence on intent element); State v. Simmons, 35 Wn. App. 421, 424-25, 667 P.2d 133 (1983) (addressing argument that instruction erroneously removed the issue of lawfulness of the arrest from the jury).

Neither the initial information nor the amended information alleged that the arrest was lawful or that Nord intentionally resisted arrest. They both read:

> That on or about the 24th day of January, 2013, the said defendant, ALAN JOHN NORD, then and there being in said county and state, did prevent or attempt to prevent a police officer from arresting him, in violation of RCW 9A.76.040(1), which violation is a Misdemeanor; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Washington.

CP 5, 33.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art 1, § 22; U.S. Const. amend. VI. When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be

found, in the charging document?" Kjorsvik, 117 Wn.2d at 105. If the court does not find the missing element, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). If the element is found, the court analyzes whether the defendant was actually prejudiced by the inartful language. Kjorsvick, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 425.

The two missing elements cannot be fairly implied. The information simply says that that Nord prevented or attempted to prevent a police officer from arresting him. But not all arrests are lawful. See e.g., State v. Ortega, 177 Wn.2d 116, 120, 297 P.3d 57 (2013). And a person does not necessarily intentionally resist arrest by preventing a person who is a police officer from arresting him or her. For example, the person may lack knowledge that the person is actually a peace officer. See State v. Bandy, 164 Wash. 216, 221, 2 P.2d 748 (1931) (conviction for offense of interfering with a public officer in the performance of his duties reversed for lack of sufficient evidence establishing that defendant knew men were officers). The information erroneously told Nord that resisting arrest is a strict liability crime and that it is irrelevant whether police acted with proper authority.

That a charging document cites the pertinent statute does not make it valid. State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010).

Thus, it is irrelevant that the charging document cited the resisting arrest statute.

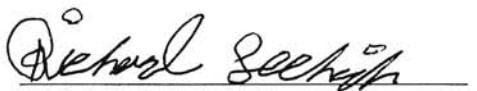
Because the information omitted two essential elements of resisting arrest, this Court presumes prejudice and should reverse the conviction. McCarty, 140 Wn.2d at 425-26.

F. CONCLUSION

The State's improper creation of a conflict for defense counsel at the eleventh hour forced a continuance past Nord's time for trial under CrR 3.3. The State's action qualifies as governmental misconduct under CrR 8.3(b), requiring reversal and dismissal of the charges with prejudice. Alternatively, this Court should reverse the convictions and remand for a new trial because there are reasonable grounds to believe that Nord may have been prejudiced by the extrinsic evidence. Regardless, the conviction for resisting arrest should be reversed and dismissed without prejudice because of the faulty language in the charging document.

DATED this 20th day of June, 2014.

Respectfully submitted,



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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70904-6-I
	)	
ALAN NORD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	ALAN NORD 883130 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JUNE, 2014.

X_____

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