No. 70904-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ALAN NORD, Appellant.

BRIEF OF RESPONDENT

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ORIGINAL

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2. Whether a defendant may raise a violation of time for trial rights under CrR 3.3 where he did not object to continuing the trial date on the day that the trial was scheduled to proceed and the attorney conflict was raised and did not move for a trial within the time for trial period within 10 days after the resetting of the trial date.

3. Whether the trial court abused its discretion in continuing the trial date where defense counsel did not object to the case being continued and where a potential conflict with counsel arose on the day the trial was to proceed.

4. Whether items inside the backpack that were not separately admitted or identified constituted extrinsic evidence where defense counsel did not object to the backpack's admission and was on notice there were other items inside it, and whether there is reasonable ground to believe that the jury was prejudiced by observations of those items where the items were innocuous.

5. Whether the charge of resisting arrest should be dismissed without prejudice to refile the charge because the essential elements of intent and lawful arrest cannot be construed from the language of the information even under a post-verdict liberal construction review.

C. FACTS

1. Procedural facts

On January 29, 2013, Appellant Alan John Nord was charged with two counts of Unlawful Possession of Controlled Substance, To-Wit: Methamphetamine, in violation of RCW 69.50.4013(1), and one count of Resisting Arrest, in violation of RCW 9A.76.040, for his actions on or about January 10th and 24th, 2013. CP 4-5. Nord ultimately went to trial on only one count of unlawful possession of drugs because the State agreed to dismiss count II pursuant to a defense motion to suppress under CrR 3.6. CP 32-33; 1RP 5[1], 82-86. A jury found Nord guilty of both counts, and he was sentenced to a standard range sentence of 24 months, with an offender score of 14, on the unlawful possession of methamphetamine conviction, and to 90 days on the resisting arrest, concurrent with one another and consecutive to all other sentences. CP 56, 70-72; 3RP 4, 20-21.

2. Substantive Facts[2]

On January 10th, 2013 around 9 p.m. Det. Medlen of the Bellingham Police Special Investigations Unit and Agent Moreno of the

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[1] 1RP refers to the verbatim report of proceedings for 6/17/13, 7/18/13, 7/25/13 and 8/5/13. 2RP refers to the proceedings for 6/27/13 and 3RP for 9/4/13.

[2] The State has not included a summary of the resisting arrest charge facts because it is conceding that conviction must be dismissed without prejudice to refile because of a defective information.

Border Patrol were in the drive-through of the Sehome Village Starbucks when Agent Moreno saw a Honda vehicle that he had observed involved in a controlled buy earlier that day. 2RP 174-75, 227-29. The officers were in plain clothes and in an unmarked car. 2RP 175. The Honda was parked in one of the parking spaces at the Starbucks and another car, an Eagle Talon, parked next to it. 2RP 176, 229. It looked like the occupants were talking with one another while the engines of the cars were still running. 2RP 176, 229.

Moreno had seen the Honda around 5-6 p.m. that day when its occupants had engaged in a controlled buy of methamphetamine. 2RP 176-77. The target of that investigation had been Kayly West, and she had been a passenger in the Honda from whom the confidential informant had bought methamphetamine. 2RP 177-78. After the buy occurred, Moreno had followed the Honda around town and had observed it park at a Wendy's. 2RP 178-79. He had seen the occupants of the Honda enter the Wendy's, had seen other persons join them inside, and then saw two persons get into the Honda and three persons he did not recognize get into the Talon and then leave. 2RP 179-80, 199. He did not pursue either vehicle after they left Wendy's, and it was just coincidental that the vehicles were at the Starbucks when Moreno was. 2RP 130-81.

After about 30 seconds, while the officers were still in the drive-through, the Honda and the Talon drove over to a more isolated area of the Village parking lot, to an area where there were no other cars parked nearby. 2RP 181-82, 186, 229. The officers observed the cars as they moved to the other area of the parking lot, and then proceeded to park about 20 yards away from them. 2RP 202, 230-31. The officers saw Nord, the driver of the Talon, get out of the Talon, walk between the two cars and talk to the driver of the Honda. 2RP 185-86, 231. The window of the Honda rolled down and Nord and the driver engaged in a hand-to-hand, simultaneous, exchange of items, which raised Det. Medlen's and Moreno's suspicion that a drug deal had just occurred. 2RP 185, 202-03, 210, 232-33.

The officers walked over to the cars, with Medlen contacting Nord in between the cars and Moreno positioning himself on the passenger side of the Honda. They identified themselves as law enforcement. 2RP 187, 234. Given the number of persons in the cars, Medlen told Nord to move away from the cars and to go stand on the sidewalk in front of one of the stores. 2RP 187-88, 234-35. Nord initially went to the sidewalk, and Medlen asked Nord if he had any identification on him. 2RP 188, 235. Nord told him his identification was in his backpack in the car and said that he would go get it for Medlen. 2RP 188, 235. Medlen told Nord no,

to stay on the sidewalk and that he would ask one of the passengers if they would get it for him. 2RP 189, 235-36.

Medlen went to the driver's side of the Talon and asked the passengers, Teresa Fox, Nord's girlfriend, and Leroy Olson if they would get him the backpack. 2RP 128, 236. Olson cussed at Medlen, but Fox was more cooperative. 2RP 236. While Medlen was talking with the passengers, Nord moved to in front of the car. Nord kept walking up on Medlen, and Medlen had to tell him twice to get back on the sidewalk. 2RP 190, 237. Instead, Nord lit a cigarette and started pacing back and forth in front of the Talon. 2RP 237. After two minutes of pacing, Nord took off at a full sprint across the parking lot and Moreno gave chase initially, but stopped due to concerns regarding Medlen's safety. 2RP 190-91, 237-38.

Medlen, who didn't know who Nord was at the time, attempted to determine who Nord was by asking Fox and Olson, as well as the driver of the Honda, Anthony Skondin. 2RP 191, 238-39. Kayly West was the passenger in the Honda. 2RP 191. No one would tell Medlen who Nord was. 2RP 238-39. Medlen eventually determined who Nord was when another officer suggested he look at Nord's booking photo. 2RP 253.

Medlen radioed in the direction Nord fled and requested a drug dog. 2RP 240. After the drug dog alerted to the Talon, Medlen informed

the passengers he was going to seize the car, asked them if they had any personal property in it, and told them to remove any personal property before the car was towed. 2RP 193, 240-41. Fox took her purse and Olson took nothing, and neither took a backpack from the car. 2RP 193, 240-41. Neither claimed ownership of anything else in the car. 2RP 193. Fox allowed Medlen to search her purse before she left, but he didn't find any drugs or large amount of cash in it. 2RP 241, 252. No one was permitted entry back into the car after the drug dug alerted. 2RP 268-69.

Medlen obtained a search warrant and found only one backpack, a black Dakine one, in the Talon vehicle, on the front passenger seat. 2RP 242-44, 255. Medlen impounded the backpack into evidence. 2RP 244. Medlen remembered that there was a knife that had black gunk on it in one of the pockets, a laptop, and a book safe in the pack. 2RP 244. Inside the safe was a digital scale, a bag of methamphetamine, as well as drug paraphernalia. 2RP 244-46. Medlen did not find any identification in the backpack, but there were other personal-type items in it. 2RP 258, 267.

D. ARGUMENT

1. The trial court did not abuse its discretion in denying Nord's motion to dismiss because the continuance granted on the day trial was scheduled to begin did not force Nord to choose between his time for trial rights and conflict free counsel.

Nord asserts that he was forced to make a "Hobson's choice" between his "speedy trial" rights and conflict free counsel when the prosecutor informed the court and counsel that the prosecutor might need to call Ms. West as a rebuttal witness when the case was called for trial. Nord asserts that the prosecutor committed misconduct under CrR 8.3 by delaying so long in identifying West as a witness, and that he was prejudiced because his "speedy trial" rights were impacted. The prosecutor did not commit misconduct because he informed the court that it was testimony at the CrR 3.5 hearing that morning that caused him to consider calling West and because defense counsel had yet to provide him with a summary of the defense witnesses' testimony to which West might provide rebuttal. Moreover, defense counsel did not object, and the prosecutor and defense counsel agreed to obtain a new trial date within the then 30 day expiration time period. However, it was defense counsel's unavailability that caused the case not to be reset within that time period.

The trial court did not abuse its discretion in denying Nord's motion to dismiss.

a. The State did not commit misconduct in raising the issue of the potential conflict of interest issue when it did.

A trial court's decision on a CrR 8.3 motion may be overturned on appeal only if there has been a manifest abuse of the court's discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Abuse of discretion exists only when the trial court's decision was manifestly unreasonable or was exercised on untenable grounds or for untenable reasons. Id. In order to dismiss under CrR 8.3(b), the defendant must demonstrate arbitrary action or governmental misconduct and prejudice. Id at 831-32; State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Absent a finding of governmental misconduct or arbitrary action, a trial court cannot dismiss charges under CrR 8.3. Michielli, 132 Wn.2d at 240. Dismissal is an extraordinary remedy only available when the governmental conduct actually prejudiced the rights of the accused, materially affecting his right to a fair trial. Blackwell, 120 Wn.2d at 830.

On July 31, 2013, defense counsel filed a motion to dismiss alleging a violation of the time for trial rules in CrR 3.3, which motion was heard on August 5, 2013. CP 28-31; 1RP 70. The following dates

reflect what transpired prior to the court's decision to continue the case on June 17, 2013:

2/1/13:	Nord was arraigned and held in custody pending a trial date of 3/25/13. CP 97
2/8/13:	Nord was released from custody. Supp CP __, Sub Nom. 13
3/13/13:	Nord moved for continuance in order to have interviews and continuance was granted by agreed order; new trial date was set for 6/17/13. CP 98; Supp CP __, Sub Nom. 14.
4/12/13:	Nord was returned to jail due to new charges. Supp CP __, Sub Nom. 16.
6/5/13:	Case set over to 6/6/13 for Nord to enter plea. Supp. CP __, Sub Nom. 17
6/6/13:	Nord didn't enter a guilty plea; court granted "continuance" to "6/17" for case to go to trial after trial in his other case. Supp CP __, Sub Nom. 19.
6/6/13:	Nord filed motion to suppress and motion to sever. CP 9-14.
6/13/13:	Nord filed defense witness list. CP 103.
6/14/13:	Defense counsel filed note for docket for trial *or plea* on 6/17/13. Supp CP __, Sub Nom. 25.

On June 17, 2013 when the case was called for trial the prosecutor and defense counsel informed the judge, Judge Uhrig, that they anticipated the case would be finished on Wednesday. 1RP 3. The judge inquired about efforts to resolve the case, and the prosecutor and defense counsel stated there had been extensive negotiations to resolve the case along with Nord's more serious case that was set for the following Monday. 1RP 4-5. Defense counsel informed the court that Nord wanted him removed from the case, and Nord informed the court that defense counsel had just started

interviewing witnesses on the other case which previously had been set to go the prior Monday. 1RP 6. After confirming with defense counsel that he was prepared to go forward on the current case, the court held the CrR 3.5 hearing and other preliminary motions. 1 RP 7-44.

Prior to recessing the prosecutor indicated he felt the case wouldn't take very long to present, that it was a straightforward case, and defense counsel informed the court that two of his witnesses, Ashenfelter and Skondin, were in custody and would need to be brought over from the work center. 1RP 45-47.

After the recess, the prosecutor informed the court that something had come up. 1RP48. He explained that defense counsel and he had been scrambling to get the case before the court after Nord changed his mind about entering a plea agreement involving both cases, which had resulted in the other case having to be continued from the previous Monday. 1RP 48-49. The prosecutor admitted he had been preparing for that case because it was the more serious case, but the court had continued the trial in that case for two weeks at defense request. 1RP 49. As soon as that case was set over, interviews had been conducted and he had prepped this case for trial. 1RP 50.

The prosecutor then informed the judge that some new facts had come to light in the testimony at the CrR 3.5 hearing that morning, which

had prompted him to consider calling another witness, Kayly West, who had been in the second car and had been investigated by police earlier that day for drug dealing. 1RP 50-51. The prosecutor believed that Ms. West might have information about whether Nord had been in possession of drugs and whether it was Nord's backpack that was found in the car. 1RP 51. He informed the judge that he believed the defense witnesses[3] would testify that the backpack was not Nord's though he had not yet been provided with a summary of what they would say, which he had requested in order to determine whether he would need to call Ms. West or not. 1RP 51-52.

The prosecutor told the judge he had a subpoena for Ms. West which normally wouldn't have been a problem, but explained she was represented by the public defender's and had pending charges, so he wanted to make sure the judge and defense were aware of this. 1RP 51. He was informing the judge in an "abundance of caution" in case he had to call Ms. West and an issue regarding representation arose. 1RP 52. The prosecutor suggested that he serve the subpoena on Ms. West and the matter be set over for Ms. West to be appointed new counsel and advised regarding testifying because some of her charges were related to testimony

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[3] Defense counsel informed the court the day trial testimony was heard that he did not intend to call those witnesses. 1RP 77.

she might be asked to provide in the trial. 1RP 52. The prosecutor noted that he could not talk with Ms. West to see what she would testify to because she was represented. 1RP 55-57. The prosecutor also informed Judge Uhrig that Nord's other case was set to go on Monday, and that defense counsel had spoken with Ms. West's attorney, and apparently they were going to determine what the public defender's office policy was given the situation.

Judge Uhrig then asked defense counsel what his position was about continuing the case to the next available date, and counsel responded: "Your Honor, Mr. Nord, as he expressed earlier today, would prefer to have myself conflicted out. I think he understands the dynamics that are kind of happening here." 1RP 57. The prosecutor then informed the judge that that would not resolve the issue, that the conflict issue was with Ms. West. 1RP 58. Nord then made some comments[4] to the court and ended with telling the court that if the prosecutor wanted his witness, Nord wanted new counsel. 1RP 58. The judge informed Nord that he had already denied that request and then stated that he believed there was good

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[4] Nord stated: "Personally, your Honor, if Mr. Chambers wants to call in Kayly West, do you know what I mean, then he is doing it so late in the game, I have already expressed concerns about my attorney and taking forward in this trial. ... Appoint new counsel, allow the witness to come testify and it is what it is. You know, I can only say from, you know, I don't feel comfortable going in a trial, do you know what I mean? So, I would like new representation. I was expressed that. If he wants his witness, then I would like new counsel." 1RP 58

cause to continue the case and no prejudice to Nord's presentation of the case. 1RP 58-59; CP 99.

The prosecutor noted that would give them 30 days from that date to continue the case and suggested that defense counsel and he get together to obtain a date within the next 30 days, and defense counsel agreed. 1RP 59-60. The prosecutor indicated he would send out the subpoena for Ms. West, thus prompting the public defender's office to determine if new counsel was needed. Judge Uhrig advised that defense counsel should proceed with notifying his office and not wait. 1RP 60-61.

Nord's counsel never objected when the State suggested that a continuance would be appropriate given the potential attorney conflict facing the public defender's office. Defense counsel never resisted the continuance motion by requesting that the trial proceed and to let the potential attorney conflict issue be resolved, if necessary, during trial.[5] In fact, defense counsel did not contest any of the information the prosecutor relayed to the trial court regarding the status of the case and what had transpired since the morning CrR 3.5 hearing. Defense counsel had yet to provide the prosecutor with the summary of the two defense witnesses' anticipated testimony. There is nothing in the record to indicate that the

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[5] *See*, State v. Ramos, 83 Wn. App. 622, 628-30, 922 P.2d 193 (1996) (RPC 1.09/1.10 conflict was resolved by co-defendant's waiver and therefore trial court erred in permitting substitution of counsel without determining if actual conflict existed).

prosecutor realized before that morning of the potential need for Ms. West as a rebuttal witness.

The case of State v. Ramos, 83 Wn. App. 622, 628-30, 922 P.2d 193 (1996) is instructive. On the morning of trial a co-defendant entered a guilty plea the morning of trial and agreed to testify for the State. The State immediately notified defense counsel for Ramos. Id. at 625. There was some confusion as to the spelling of the co-defendant's name which resulted in defense counsel for Ramos not being aware there was a potential conflict of interest until the next day when he received a copy of the plea agreement. Id. at 626. The conflict of interest was based on the fact that the public defender agency of which Ramos's counsel was a member had also previously represented the co-defendant on an unrelated charge. Id. Defense counsel then moved for substitution of counsel due to the potential conflict which the State objected to because it asserted the conflict could be avoided if the co-defendant waived the privilege, which the co-defendant in fact did. Id. Ramos's counsel asserted however that the waiver did not resolve the conflict and the court appointed independent counsel to advise Ramos. Id. at 626-27. Independent counsel asserted a conflict still existed, was appointed, and Ramos then moved for dismissal asserting that the State had mismanaged the case by failing to properly identify the co-defendant's name, which had forced him to choose

between his speedy trial right and a conflict free counsel. Id at 627. The State appealed the trial court's grant of the motion dismissing the case.

On review the court determined that the trial court had erred in concluding that there was a conflict of interest because the matters were not substantially related under RPC 1.09(a), the former client waived the conflict, and the cross examination would not involve questioning regarding former confidences under RPC 1.09(b). Id. at 631-32. The court further did not find that the State had committed mismanagement, finding that the State had honored its discovery obligations, despite the alternative spellings of the co-defendant's names, and that the State had disclosed that the co-defendant would be a witness as soon as the State knew for sure that the co-defendant would accept the plea agreement by entering into the plea. Id. at 635-36. Ultimately the appellate court concluded that Ramos had not been presented with a "Hobson's choice" because he had in fact been brought to trial within speedy trial, there was no showing that substitute counsel could not have been able to go to trial within the time for trial expiration date, and Ramos had invited the error of the order for substitute counsel, so he could not complain of being "forced" to choose between "speedy trial" and an adequately prepared counsel. Id. at 638.

As with most trials, an issue arose as this case was being readied for trial, which was complicated here by the fact that Nord had another

case that was being readied for trial during the same time period. The prosecutor here informed counsel and the court regarding the potential conflict issue, and Judge Uhrig decided to continue the case to avoid the potential conflict and possible delay mid-trial. Nord was not forced to choose between a "speedy trial" and conflict free counsel.

b. Nord was not prejudiced by the continuance because the case did not go to trial within the 30 day expiration period because of defense counsel's unavailability not because of the potential attorney conflict.

Nord was not forced to go to trial outside the time for trial because of the conflict issue. As of the June 17th trial date, the time for trial expiration date was July 17th, 2013. Defense counsel had moved for a continuance on March 13, 2013 for a new trial date of June 17, 2013. Under CrR 3.3 if any time is excluded for one of the reasons listed in section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(b)(5). Under section (e), the delay granted by a court pursuant to section (f), which includes motions for continuances by a party, is an excluded period. CrR 3.3(e)(3); CrR 3.3(f)(2). The only thing defense counsel informed the court of at the hearing was that Nord wanted him off the case. Therefore, Nord's time for trial expiration on June 17th, 2013 was July 17th, and Nord could have requested a shorter continuance within his time for trial period to

determine whether the potential conflict of counsel would affect his representation. In fact as of June 27, 2013 the conflict apparently had been resolved. 2RP 6-7. The understanding as of June 17th was that the trial would be continued to a period within 30 days of that date.

Nord neglects to inform the court as to why the case was not set within the 30 days as originally contemplated. On June 27, 2013 the State sought to enter a trial setting order in accordance with Judge Uhrig's good cause determination for a continuance[6]. 2RP 3. At that hearing, defense counsel informed the judge, Judge Garrett, that Nord wanted to remove him as counsel and to dismiss the case on speedy trial grounds. 2RP 3. He noted that Nord was refusing to sign the trial setting order, but asked the judge to sign it over Nord's objection. 2RP 3-4. Subsequent to that, for the first time, defense counsel informed the court that they didn't want the continuance and that they were objecting to the continuance, although Judge Uhrig had already found good cause to continue the case. 2RP 6. When Judge Garrett commented that Judge Uhrig had found good cause based on a conflict, defense counsel confirmed that there had been a conflict at the time, though that conflict had since been resolved. 2RP 6-7.

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[6] Defense counsel filed a Note for Docket for a motion to continue on June 19th. Supp Cp __, Sub Nom. 28. The State then filed a note for docket on June 24th for entry of trial setting order. Supp CP __, Sub Nom. 30. On June 26, 2013 defense counsel also filed a note for a motion to remove counsel to be heard the next day. Supp CP __, Sub Nom. 31

When Judge Garrett inquired as to whether the date that was on the trial setting order, July 22nd, was the soonest the case could go to trial, defense counsel stated that it was. 2RP 8. The prosecutor informed the judge that Nord's other case was set to be heard on July 8th, and *defense counsel then informed the judge that he was not available on July 15th*. 2RP 8. But for defense counsel's unavailability on July 15th, the case could have been set for that date, within the pre-existing time for trial period. In fact, Judge Garrett informed Nord that if he had had a trial date set already, she would have considered holding him to it since the conflict with the witness had been resolved. 2RP 8.

Once the trial setting order had been entered, the time for trial expiration date then became 30 days beyond that date, or Aug. 22nd. CrR 3.3(b)(5); CrR 3.3(e)(3); CrR 3.3(f)(2). The State then did seek two continuances based on officer unavailability, valid bases for continuances, so trial did not begin until August 5th. Supp CP __, Sub Nom. 36, 37, 40, 41; *see,* State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992) (investigating officers' vacations justified continuances under "due administration of justice" reason of former CrR 3.3).

Nord was not forced to choose between a "speedy trial" and conflict free counsel on June 17, 2013. The only thing defense counsel informed the court of at the hearing on June 17th was that Nord wanted

him removed from the case. The prosecutor did not commit misconduct, and certainly not any mismanagement warranting dismissal of the charges under CrR 8.3. *See*, State v. Redd, 51 Wn. App. 597, 754 P.2d 1041, *rev. den.*, 111 Wn.2d 1007 (1988) (appellant's accusation that the State's willful misuse of the appeal process compromised his speedy trial rights was without merit as the State had the right to file for discretionary review of the trial court's pretrial ruling). Therefore, there was no prejudice to Nord's time for trial rights under CrR 3.3, and the trial court did not abuse its discretion in denying his motion to dismiss the case.

2. The trial court did not abuse its discretion in determining that a continuance was warranted under CrR 3.3.

Nord also asserts that the trial court abused its discretion in continuing the trial date from June 17, 2013. First, Nord may not raise an issue with the date that was set for trial because he failed to object below and to move within 10 days of the trial setting order for a trial date within the expiration period. Moreover, he views the trial court's decision with hindsight as to what transpired after the court's decision rather than as the facts and circumstances presented themselves on the day the court had to decide. The trial court did not abuse its discretion in continuing the case where defense counsel never informed the judge that he objected to a continuance and where the extent of the conflict was unclear.

a. Nord cannot raise this issue on appeal because he did not move within 10 days for the case to be heard within the time for trial expiration date

Defense counsel has an obligation to bring CrR 3.3 violations to the attention of the trial court, so that the trial court can ensure that the defendant is brought to trial within the parameters of CrR 3.3. State v. Carson, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996). Under CrR 3.3(d) a defendant who objects to a set trial date based on the grounds that it is not within the CrR 3.3 time limits "must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits." CrR 3.3(d)(3). "[D]efense counsel has an affirmative duty to investigate those easily ascertainable facts that are relevant to setting the trial date within the speedy trial period." State v. Malone, 72 Wn. App. 429, 435, 864 P.2d 990 (1994). Failure to move for a trial date within the 10 day time period after notice is given constitutes waiver of an objection to the new trial date. State v. MacNeven, 173 Wn. App. 265, 269, 293 P.3d 1241 (2013); State v. Farnsworth, 133 Wn. App. 1, 12, 130 P.3d 389 (2006), *rev. granted and remanded on other grounds*, 159 Wn.2d 1004 (2007). Failure to object can also constitute waiver of the trial date if counsel is aware of the speedy trial expiration date and waits to assert a violation until after the date has expired. Carson, 128 Wn.2d at 819.

Counsel's objection must be specific enough to inform the trial court as to the error and timely so that the trial court can ensure that the defendant is brought to trial within the time for trial provisions. State v. Chavez-Romero, 170 Wn. App. 568, 581, 285 P.3d 195 (2012), *rev. den.*, 176 Wn.2d 1023 (2013).

Here, the case was called for trial and the parties indicated they were ready to proceed. 1RP 3. After holding the CrR 3.5 hearing and addressing the defense motion for severance and motion to suppress, the court took a break. 1RP 48. As noted in the previous argument section, when the parties convened after the break, the prosecutor informed the judge regarding the potential conflict issue. When the judge inquired as to defense counsel's position, defense counsel did not object to the continuance, but just reiterated that Nord wanted him removed as counsel (which also would have required a continuance). While defense counsel asserted he was objecting to the continuance at the time the trial setting order was entered on June 27th, he did not request a different trial date, or an earlier trial date. 2RP 3-8. Defense counsel did not move the court for a trial setting within the prior expiration period (July 17th) after the trial setting order was entered on June 27th. Instead on July 31st, he filed a motion to dismiss due to a speedy trial violation. CP 28-31.

At the time when the court was considering whether to continue the trial or proceed on June 17th, defense counsel did not object. He also did not file the requisite motion under CrR 3.3(d)(2) for a trial setting within 10 days after the date was set. Nord therefore lost his ability to object to the trial date.

b. The trial court did not abuse its discretion in continuing the case

A trial court's decision to grant a continuance under CrR 3.3 rests in the sound discretion of the trial court and is reviewed only for a manifest abuse of discretion. Carson, 128 Wn.2d at 814. A trial court abuses its discretion if its decision is based upon untenable grounds. Id. On the other hand, when the question is the application of the CrR 3.3 time for trial rule to a particular set of facts, the standard of review is de novo. State v. Branstetter, 85 Wn. App. 123, 127, 935 P.2d 620, *rev. den.* 132 Wn.2d 1101 (1997); State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).

CrR 3.3 defines a judicially created procedural right, not the constitutional right to a speedy trial. State v. Andrews, 66 Wn. App. 804, 809-10, 832 P.2d 1373 (1992). "On a 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." CrR 3.3(f)(2). A continuance under this provision is permissible as long as it does not "substantially prejudice" the defendant. *See*, State v. Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985) (continuance granted for administration of justice upheld where defendant was not substantially prejudiced by trial held one day after speedy trial had run under former CrR 3.3(h)(2)). An assigned attorney's unavailability can be a justified basis for continuing the trial date under CrR 3.3. *See*, Carson, 128 Wn.2d at 814-15(attorneys' and trial court's unavailability due to being in trial on another matter constituted an unforeseen and unavoidable circumstance under former CrR 3.3(d)(8)). Trial preparation time and scheduling conflicts are also valid bases for a trial court's decision to continue a trial. MacNeven, 173 Wn. App. at 270. The unavailability of a material State witness can constitute good cause for continuing the trial if there is a valid reason for the unavailability, the witness will become available within a reasonable period of time and the defendant is not substantially prejudiced. State v. Nguyen, 64 Wn. App. 906, 914, 847 P.2d 936, *rev. den.*, 122 Wn.2d 1008 (1993).

Nord asserts that a continuance was unnecessary, claiming that the witness was only a rebuttal witness, and that it wasn't clear that the defense would even call any witnesses whose testimony would present the

need for rebuttal. However, what the court was presented with at the time it had to make a decision was that defense counsel had filed a witness list which had two witnesses on it, the testimony of which had not yet been disclosed to the prosecutor. If the prosecutor did call Ms. West as a rebuttal witness to those witnesses' testimony and she didn't waive her conflict, the public defender representing Nord would have been precluded from representing Nord if it was determined that the matter was substantially related and Nord's interests were materially adverse to Ms. West's. RPC 1.9(a), (b); RPC 1.10(a). Furthermore, if Nord's counsel believed there was no substantive basis for a conflict, he had an obligation to tell the court. The court didn't know the facts of the case and had to rely on both counsel's representations in order to decide whether to continue the case under CrR 3.3(f)(2). Finally, the understanding was that the trial would be reset within the time for trial expiration period. Judge Uhrig did not abuse his discretion in granting a continuance.

Judge Garrett also did not abuse her discretion in entering the trial setting order setting over the trial to July 22nd. It was defense counsel's unavailability that was the reason the case could not be set for trial on July 15th, within the then existing expiration period, and he informed her that there was no earlier date that would work. *See*, State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003), *rev. den.*, 151 Wn.2d 1006 (2004)

(defense counsel's unavailability due to vacation was valid basis to continue case under CrR 3.3).

c. Alternatively, trial commenced within the time for trial expiration date when the court heard preliminary motions

While the trial court did not rest its denial of Nord's motion to dismiss on grounds that the trial was commenced within the time for trial under CrR 3.3, that is an alternative basis that was raised by the prosecutor below. This Court may consider this alternative basis for affirming upon review. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

A trial commences for purposes of CrR 3.3 when the case is called or assigned for trial and the court hears and disposes of preliminary motions. Carson, 128 Wn.2d at 820. "Hearing and disposition of preliminary motions by the trial judge after a case is assigned or called for trial is a customary and practical phase of a trial." State v. Mathews, 38 Wn. App. 180, 183, 685 P.2d 605, *rev. den.*, 102 Wn.2d 1016 (1984). "Preliminary motions" includes but is not limited to "pretrial motions that are customarily made." Redd, 51 Wn. App. at 608; *see also*, Carlyle, 84 Wn. App. 33(trial commenced for purposes of CrRLJ 3.3 when judge heard two motions in limine, one to exclude witnesses and the other regarding the gaze nystagmus test.).

On June 17th, the case was called and the trial court heard and decided the CrR 3.5 motion, the CrR 3.6 motion to suppress and the motion to sever. 1RP 3-4, 8-44. In doing so, the trial actually commenced on that day within the time for trial expiration date. Therefore, even if the time for trial period expired on July 17, 2013, the trial commenced within the time for trial expiration period under CrR 3.3.

3. The items in the backpack were not extrinsic evidence even though there wasn't testimony that individually identified each of the items.

Nord asserts that items in the backpack that were not separately identified or admitted at the time of the backpack's admission into evidence were improper extrinsic evidence considered by the jury and that there is reasonable ground to believe the jury was prejudiced by its observation of those items. There is no requirement that all items within a container be separately identified before the container may be admitted into evidence. The backpack was admitted and defense counsel was on notice that there were other items in the backpack by the detective's testimony. There are no reasonable grounds to believe that the jury was prejudiced by the observation of the items in the backpack because the jury did not consider the cellphone as evidence before it reached its verdict and the items themselves were innocuous.

"It is a fundamental rule that jurors may not receive evidence out of court." Tarabochia v. Johnson Line, Inc., 73 Wn.2d 751, 756, 440 P.2d 187 (1968)(quoting A.L.R.2d 355 (1964)). Consideration of extrinsic evidence by a jury can be grounds for a new trial. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Under CrR 7.5 a court may order a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected" by "[r]eceipt by the jury of any evidence ... not allowed by the court." CrR 7.5(a)(1). However, "[a] strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." Balisok, 123 Wn.2d at 117-18. A new trial may be warranted if a jury considers extrinsic evidence. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). "Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." Id. at 554, n 4.

a. The cell phone and other items inside the backpack not separately identified were not extrinsic evidence.

Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 199 n.3, 75 P.3d 944 (2003). All

physical evidence that was admitted at trial may go back to the jury room for the jury's consideration in its deliberations. CrR 6.15(e); State v. Boggs, 33 Wn.2d 921, 928, 207 P.2d 743 (1949), *overruled on other grounds by* State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980).

There is no dispute here that the backpack was admitted into evidence. Ex. 5. Nord asserts, however, that items, including the cell phone, should have been admitted separately, and that defense counsel was unaware that other items were inside the backpack. Appellant's brief at 18-19. Nord provides no authority for his proposition that items inside a container are distinct from the container itself and must be separately admitted or described. Appellant's brief at 21.

At trial the detective testified that the backpack had a knife with black gunk on it in one of the pockets (the knife was sent to the lab for testing and was separately admitted as exhibit 2), and that there was a laptop and a booksafe inside the pack. 2RP 244. The backpack was admitted without objection as exhibit 5. 2RP 245. The safe was admitted as exhibit 4. The detective testified further that there was a digital scale, Ziploc baggies, Qtips, a meth pipe, floss picks, needles and aluminum foil inside the safe as well as a bag of meth. 2RP 246. The bag of methamphetamine was separately admitted as exhibit 1. 2RP 247. The digital scale was separately admitted as exhibit 3. 2RP 247. Upon cross-

examination, the detective again testified that he had searched the backpack and found a knife, a laptop and a booksafe inside it. 2RP 257-58. Defense counsel then asked, "Was there anything else in the backpack?" to which the detective responded:

> I'm sure there is, but it was – if it's personal or, I don't want to say personal items, but if it's like unique items, there might be a pair of socks in there, there could be a handkerchief and I don't document that as being impounded. Those are like I put down personal affects (sic), and that's where I leave it.

2RP 258. Defense counsel then confirmed with the detective that if there had been identification in the backpack, he would have documented it. 2RP 258.

Even if defense counsel had not previously examined the backpack before it was admitted, defense counsel was certainly on notice by the detective's testimony that there were other items inside the backpack aside from the laptop, booksafe and knife. He did not then move to have the items either removed from the backpack before the backpack went back as an exhibit to the jury room, nor did he attempt to move for reconsideration of admission of the backpack into evidence on those grounds. There is no requirement that items contained in containers must be separately admitted into evidence. For example, Nord does not complain on appeal that it was improper for the booksafe to have been admitted with the Ziploc baggies, meth pipe etc. inside it, although the digital scale was separately admitted.

CP 110. When the issue came up after the jury submitted its question inquiring if it could use the cellphone as evidence, the trial court ultimately concluded that the "clear answer" was yes, that they could consider the cellphone. 2RP 327.

Nord asserts that the prosecutor committed misconduct in seeking to have the backpack admitted without separately identifying *all* the other items in the backpack. He essentially asserts that the prosecutor attempted to sneak evidence in before the jury. There is nothing from the record that reflects the prosecutor acted in bad faith. The prosecutor assumed that defense counsel had done his job and had reviewed the evidentiary exhibits before they were admitted. The judge assumed this too. 2RP 325. Defense counsel had informed the court on June 17th that he had reviewed all the evidence he felt was important. 1RP 8. The prosecutor informed the court that the backpack had been up there for days, that he had showed it to defense counsel, and that it was obvious there were other items inside it if one picked up the backpack[7]. 2RP 325. While it would have been helpful if the detective had remembered what else was in the backpack on the stand and had specifically testified to the items, he did testify that there

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[7] Nord takes exception to the prosecutor's terminology in referring to the operation of the adversarial process as a game. The prosecutor's analogy was not said in front of the jury, there is nothing in the record that demonstrates that the prosecutor treated the trial as merely a "game."

were other things in the backpack, although no identification[8]. The prosecutor did not commit misconduct in seeking to admit the backpack with some unspecified items inside it.

Defense counsel had an opportunity to examine the backpack and object to its admission. From the testimony, he was on notice that other items existed in the backpack and chose not to further examine the backpack. He cannot complain that backpack was improperly admitted with items inside it now. The jury was entitled to review the evidence that was admitted and submitted to them. *See,* State v. Everson, 166 Wash. 534, 536-37, 7 P.2d 603 (1932)(jury's examination of exhibit was proper where examination of admitted evidence was merely a more critical examination of an exhibit than had been made of it in court).

b. Even if the items in the backpack were extrinsic evidence, there are not reasonable grounds to believe they prejudiced Nord.

Even if the items contained in the backpack were not "admitted" when the backpack containing them was, reversal is not required unless there is a reasonable ground to believe that Nord may have been prejudiced by the jury's observation of those items. Nord asserts that

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[8] It is also possible that the cell phone was just missed in the search of the backpack. The prosecutor stated it had been looked through and the detective testified he searched the backpack. 2RP 326. Presumably if either of them had been aware of it and had thought it had any evidentiary value, they would have obtained a search warrant to examine its contents.

there are reasonable grounds to believe that the items inside the backpack, the cell phone, a box with a power adaptor for a laptop inside it, USB cables, a charging adaptor, a flash drive, an SD card and a long-sleeved shirt[9] prejudiced him. Nord's argument is premised upon a significant amount of speculation as to what the jury may have done with the items and how that might have been prejudicial to him. Such speculation does not rise to level of a reasonable ground to believe that Nord was prejudiced by the jury's observation of the items.

Nord asserts that the jury's viewing of the cell phone specifically was prejudicial. First, after the jury inquired about whether it could use the cell phone as evidence[10], the court was careful to make a record that the jury had not received the court's answer to its question before it reached a verdict. 2RP 329-33. The jury would not have asked the question if it thought it could. Therefore, it is highly unlikely that the jury used the cell phone as evidence in its deliberations. Moreover, it is not reasonable to assume that the jury would have attempted to turn on the cell phone or that they determined that it belonged to Nord from its contents

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[9] Appellants Brief at 20. Respondent's counsel has not actually seen the items because a trial deputy was present at the time appellate counsel viewed the backpack.
[10] The jury's question stated: "When reviewing items from backpack, there is a cell phone. Can we use as evidence?" CP 55.

by activating the phone over six months after it had been seized, as Nord suggests.[11]

The question before this Court is whether there is a *reasonable* ground to believe that Nord was prejudiced by the jury's view of a cell phone, the shirt and the other items referenced by Nord. None of the items in and of themselves identified that backpack as belonging to Nord. While cell phones can carry a lot of personal information inside them, cell phones are ubiquitous and the existence of one, in and of itself, inside a backpack is innocuous.

Nord also speculates that the jury could have used the "L" size of the t-shirt as circumstantial evidence that the backpack belonged to Nord because an officer testified Nord was a large man. The officer's testimony was that Nord was a "big man," such a big man that he was able to pull two officers, who were not small men and one of whom weighed 200 pounds, away from the car. 1RP 125, 144. Based on the officer's testimony, it is more likely that Nord would have worn an "XL" not an "L" sized shirt. In addition, one of the passengers inside the car was a man, a man with whom the officers had had a number of previous

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[11] The State objects to Nord's reference to matters outside the record in order to substantiate his supposition that the cell phone's battery still held a charge. Appellant's brief at 26. If Nord wishes this Court to consider matters outside the record, he should file a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

dealings. The size of the shirt is not a reasonable ground to believe that the jury's observation of the shirt prejudiced Nord.

Contrary to Nord's argument, the evidence against Nord was not weak. In fact, the jury didn't require an answer from the court to its question before it was able to reach a verdict. Nord told the officer when he was asked for identification that his identification could be found in his backpack in the car. There was no other testimony about another backpack in the car. The officers observed Nord engage in a hand-to-hand exchange with a person who had been under investigation earlier in the day for having delivered drugs. In the officer's experienced opinion, given the circumstances of how the two cars met up and drove to another, more isolated, place in the parking lot, it appeared that Nord had engaged in a drug deal. Nord drove the car in which the backpack was found. He fled from the scene *when the officer went to retrieve the backpack* in which Nord said his identification could be found. The passengers claimed their belongings, leaving the backpack, and left the vehicle.

There are not reasonable grounds to believe that Nord was prejudiced by the jury's observation of the other items in the backpack. Nord said he had a backpack in the car and there was only one backpack in the car. That was sufficient to prove actual possession of the backpack, although the prosecutor alternatively argued that Nord constructively

possessed the backpack when he drove the car from the one location in the parking lot to the other. 2RP 289-91. None of the backpack items that were not separately admitted or identified was prejudicial to Nord's case.

4. As all the elements of the charge of resisting arrest were not included in the information, the conviction should be dismissed without prejudice.

Nord next asserts that the resisting arrest conviction should be dismissed without prejudice because the information did not include all the essential elements of the charge. The State concedes that the information did not include all the essential elements of the crime of resisting arrest, even under the applicable post-verdict liberal construction standard. The information does not allege either that the resisting was done intentionally or that the arrest was lawful. Therefore, the charge should be dismissed without prejudice to refile.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. Id. at 103. A different standard of review

is employed post verdict in order to "encourage defendants to make timely challenges to defective charging documents and to discourage 'sandbagging,' i.e., waiting to assert a defect in the charging document because asserting it in a timely manner would only result in an amendment of the information. Id. Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. If the information failed to allege the essential elements, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). "Essential elements consist of the statutory elements of the charged crimes and a description of the defendant's conduct that supports every statutory element of the offense." State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 493 (2009), *overruled on other grounds*, State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and

expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' Kjorsvik, 117 Wn.2d at 100.

The statutory language for resisting arrest provides:

> A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.

RCW 9A.76.040(1). WPIC 120.06 sets forth the elements of the crime as: (1) that the defendant prevented or attempted to prevent a peace officer from arresting him; (2) that the defendant acted intentionally; (3) that the arrest or attempt to arrest was lawful; and that the acts occurred in the State of Washington. The mens rea element of intentionally is an essential element of the offense. *See*, State v. Ware, 111 Wn. App. 738, 745, 46 P.3d 280 (2002) (where evidence was sufficient to find that juvenile committed offense intentionally, remand for revision of findings was appropriate where court's findings only indicated that juvenile acted knowingly in resisting arrest).

Here the information alleged:

> 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...

CP 4-5, 32-33. The information failed to allege that the Nord intentionally prevented or attempted to prevent the officer from arresting him, and

failed to allege that the arrest was lawful. Therefore, the State concedes that the information was deficient even under the liberal post-verdict standard. The resisting arrest conviction should be dismissed without prejudice for the State to refile.

E. CONCLUSION

The State respectfully requests this Court to affirm Nord's conviction for Unlawful Possession of a Controlled Substance and to reverse for dismissal without prejudice the Resisting Arrest conviction.

Respectfully submitted this 6th day of October, 2014.

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Richard Lechich
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

DAStarik
Legal Assistant

10/9/14
Date