No. 74026-1-I

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

SOFIA DELAFUENTE,
Defendant-Appellant.

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

The Honorable Timothy Bradshaw, Judge

APPELLANT'S REPLY BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. REPLY ARGUMENT 1

A. THE TRIAL COURT SHOULD HAVE DISMISSED THE PROSECUTION UNDER CRR 8.3(B) 1

B. THE TRIAL COURT DEPRIVED DELAFUENTE OF HER RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDINGS 3

C. THIS COURT SHOULD STRIKE FOOTNOTE SIX FROM THE STATE'S BRIEF BECAUSE IT RELIES ON FACTS OUTSIDE THE RECORD 4

D. THE PROSECUTOR TWICE COMMITTED MISCONDUCT IN CLOSING ARGUMENT 4

1. The Prosecutor Misstated the Law of Accomplice Liability 4

2. The Prosecutor deliberately sought to Inflame the Jury 5

II. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) 1

Dep't of Labor & Indus. v. Brugh, 135 Wn. App. 808, 147 P.3d 588 (2006) 4

State v. Allen, 182 Wn.2d 364, 341 P.2d 268 (2015) 4

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 5

State v. Kone, 165 Wn. App. 420, 266 P.3d 916 (2011), *review denied*, 173 Wn.2d 1034, 277 P.3d 668 (2012) 2

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 4

State v. Salgado-Mendoza, 194 Wn. App. 234, 373 P.3d 357, *review granted*, 186 Wn.2d 1017, 383 P.3d 1028 (2016) 2

Rules

CrR 3.3 ..... 1, 2, 3

CrR 8.3 ..... 1, 2

I. REPLY ARGUMENT

In this reply, Delafuente will respond to only one of the State's arguments. Her failure to respond on the remaining issues is not a concession that the State's arguments should prevail. Rather, it is simply recognition that the other issue has been fully briefed.

A. THE TRIAL COURT SHOULD HAVE DISMISSED THE PROSECUTION UNDER CRR 8.3(B)

First, the State spends a good deal of time discussing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). But Delafuente makes no argument under *Brady*. Her argument is confined to CrR 8.3(b).

The State does devote a small section of its brief to a response to Delafuente's CrR 8.3(b) argument. The State does not refute in any meaningful way that the State (via the jail) assured Delafuente her calls with her lawyer were not recorded, providing access to those calls to Stangeland, failing to train Stangeland – particularly after her previous actions and dishonesty – deleting the call at issue, delaying disclosure of the intrusion and delaying disclosure of Stangeland's previous misconduct.

Rather, the State incorrectly argues that "a violation of defendant's time-to-trial rights under CrR 3.3 cannot be a basis for dismissal under

CrR 8.3." For this proposition, the State cites *State v. Kone*, 165 Wn. App. 420, 436, 266 P.3d 916 (2011), *review denied*, 173 Wn.2d 1034, 277 P.3d 668 (2012).

But in *State v. Salgado-Mendoza*, 194 Wn. App. 234, 373 P.3d 357, *review granted*, 186 Wn.2d 1017, 383 P.3d 1028 (2016), the Court held that the failure to identify the testifying State Toxicologist until three days before trial was prejudicial misconduct because it forced the Defendant to choose between his right to a speedy trial and his right to have adequately prepared counsel.

And *Kone* is inapplicable here because the State misconduct forced Delafuente to choose between her constitutional right to the effective assistance of counsel and her right to a speedy trial. The rule states that a charge not tried within the rule must be dismissed.

The State is simply incorrect when it states the disclosure was made "well before" the scheduled trial date. The State had knowledge of Detective Stangeland's violation on February 9, 2015. 3RP at 5, 7. Trial was set for March 30, 2015. A hearing was held on March 3, 2015, but the State did not disclose Stangeland's activities to the Court or counsel at or before that hearing. Instead, it delayed disclosure such that Delafuente had to seek a continuance. Thus, dismissal is required under the Sixth Amendment. See CrR 3.3(h).

B. THE TRIAL COURT DEPRIVED DELAFUENTE OF HER RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDINGS

Delafuente had a right to be present when the trial court, apparently on its own motion, twice continued the case because there were no judges available. The State's response demonstrates that her presence would have contributed to the fairness of the proceedings. Because these orders were entered outside the presence of Delafuente and her counsel, no record was made. The State has to rely on its recitation of facts outside the record in an attempt to justify excluding Delafuente. But had Delafuente and her counsel been present, they could have objected and reminded the court that it had to make detailed findings tied to specific, articulable facts, rather than generalized assertions. And, her absence deprived her of the opportunity to object in a timely fashion as required by CrR 3.3.

By the time she and her counsel next appeared in court, the five days had passed and she had no remedy for the delay. It is unclear if she or her lawyer even knew the reason the case was continued twice more. There was no way to remedy the fact that the trial had been continued outside her presence.

C. THIS COURT SHOULD STRIKE FOOTNOTE SIX FROM THE STATE'S BRIEF BECAUSE IT RELIES ON FACTS OUTSIDE THE RECORD

This Court does not address claims based on facts outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). The appropriate remedy is to strike the portions of a party's brief that present facts outside the record. See *Dep't of Labor & Indus. v. Brugh*, 135 Wn. App. 808, 822-23, 147 P.3d 588 (2006).

D. THE PROSECUTOR TWICE COMMITTED MISCONDUCT IN CLOSING ARGUMENT

1. The Prosecutor Misstated the Law of Accomplice Liability

When the State asked the jury to conclude that is was not "reasonable" that Delafuente did not know that Garcia-Mendez and Howard would commit an assault, she was arguing that Delafuente "should have known" the assault would happen and that she was assisting it. This was flagrant and ill-intentioned. Before the trial, our Supreme Court decided *State v. Allen*, 182 Wn.2d 364, 341 P.2d 268 (2015). There, the Court clarified that the argument that a "reasonable" person would have known is an impermissible "theory of constructive knowledge." Rather, "the jury must find actual knowledge but may make such a finding with circumstantial evidence." *Id.* at 374.

Here, the prosecutor did not argue that circumstantial evidence established that Delafuente knew that her co-defendants were going to assault the victim. She argued that a reasonable person should have known. The argument was prejudicial here because the State's theory of guilt was based solely on circumstantial evidence. And that circumstantial evidence demonstrating actual knowledge was weak.

2. The Prosecutor deliberately sought to Inflame the Jury

Here, the prosecutor told the jury that Delafuente was actually guilty of attempted murder or "execution." She was only spared because of the actions of the first responders. This argument was flagrant and ill-intentioned. If the prosecutor thought Delafuente or her co-defendants intended a murder, she could have brought that charge. But she did not. Instead, she argued that was their intention but somehow they were spared indictment on that charge. But if the prosecutor does not bring murder charges, it is misconduct to refer to them in closing argument. *State v. Boehning*, 127 Wn. App. 511, 522, 111 P.3d 899 (2005).

II.
CONCLUSION

For the reasons stated above, this Court should reverse Delafuente's conviction.

DATED this 7th day of February, 2017.

Respectfully submitted,

Suzanne Lee Elliott, WSBA #12634
Attorney for Sofia Delafuente

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

David Seaver
King County Prosecutor's Office
Appellate Unit
King County Courthouse
516 Third Avenue, W554
Seattle, WA 98104

Ms. Sophia Delafuente #326118
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

02/07/2017
Date

Peyush Soni