96672-9

Supreme Court No. _____
(Court of Appeals No. 76545-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ZYLSTRA,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Under CrR 8.3(b), dismissal of charges is appropriate where government mismanagement compromises a defendant's right to be represented by counsel who has had sufficient opportunity to adequately prepare his defense. Here, government mismanagement resulted in 911 recordings, police reports, and other evidence not being disclosed to the defense until more than three years after the incident and more than two-and-a-half years after Mr. Zylstra was charged. The trial court had already addressed the State's ongoing discovery violations with multiple orders compelling production, one order suppressing evidence, and 14 continuances.

Yet, in response to Mr. Zylstra's motion to dismiss, and despite agreeing the State's discovery violations were "extraordinary," the trial court denied the motion to dismiss and instead offered a 15th continuance. The Court of Appeals agreed the State's mismanagement was "ongoing and egregious," but affirmed the denial of the motion to dismiss on the basis that the speedy trial deadline was not imminent.

This Court should grant review to consider a more nuanced test for determining when dismissal is warranted. Dismissal should not be available only if the expiration date is imminent. Instead, where

mismanagement persists despite orders compelling production, multiple continuances, and rulings suppressing evidence, courts should apply the remedy of dismissal.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Nicholas Zylstra, through his attorney, Lila J. Silverstein, asks this Court to review opinion of the Court of Appeals in *State v. Zylstra*, No. 76545-1-I (filed November 26, 2018). A copy of the opinion is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

In determining whether dismissal is an appropriate remedy under CrR 8.3(b), should courts consider factors other than whether the State's misconduct forced a defendant to choose between his right to prepared counsel and a speedy trial? Specifically, should courts apply the remedy of dismissal where serious mismanagement has persisted despite the prior imposition of other remedies like continuances, orders compelling production, and rulings suppressing evidence? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. In June of 2013 Mr. Zylstra and his friends engage in target practice and a young woman tragically dies after being struck by a stray bullet.

Nicholas Zylstra is a lifelong Whatcom County resident. CP 403. When he was growing up, he apprenticed with his grandfather's construction business, and as a young adult, he started his own company. CP 403, 406. In his free time, he collected guns and engaged in target practice.

In June of 2013, Mr. Zylstra, his fiancée, and three acquaintances met at the home of Douglas Quiding. RP 1335. The group went to the Nooksack River with several guns and practiced shooting at various targets. RP 1338-40; CP 374. This is a common occurrence in the area, and there was another group shooting at a nearby location at the same time. RP 878, 1338, 1374, 1467; CP 375.

Most of the bullets that were fired were stopped by a berm across the river, but a few went above the berm and into an adjacent neighborhood. RP 901, 1553; CP 374, 376. Tragically, one errant shot struck and killed a young woman outside a house on Gadwa Road. RP 871, 888, 1055; CP 366.

Mr. Zylstra and his companions had no idea this occurred until they were later confronted by police officers. RP 1355. Although they had heard sirens toward the end of their target practice, they were stunned to hear the officers' allegations, and did not believe it possible that their shots had injured anyone. RP 1385.

One of the officers, Detective Francis, recognized Douglas Quiding. Quiding was a felon who had worked with Francis for years as a confidential informant. CP 367; RP 1369, 1377. He was not permitted to possess weapons in light of his criminal history. RP 1369; CP 375.

Although it was not his original assignment, Francis insisted on interviewing Quiding. CP 367. Quiding reenacted the group's activities for Francis, and claimed that Mr. Zylstra was firing unsafely and everyone else was firing responsibly. RP 1350, 1359-60, 1367, 1389-95. He also claimed he never fired the lethal weapon, an AK-47, but other participants told police Mr. Quiding had fired that gun. RP 1383, 1418, 1471, 1529; CP 375-76. Everyone agreed that the other men also fired the AK-47, and that Ms. Shinpaugh did not fire it. RP 1345, 1501; CP 375.

Like Mr. Quiding, Robert Lee (who was Quiding's stepson) said that Mr. Zylstra fired in an inappropriate manner, holding the AK-47 at his hip and firing rapidly. RP 1335, 1459; CP 375. But Mr. Quiding said that Robert Lee also aimed too high, and that in fact he aimed higher than everyone else. CP 376; RP 1375.[1] Robert Lee was on Department of Corrections supervision at the time he was firing weapons with the group. RP 1452.

Kyle Buck, who was dating Quiding's stepdaughter, also claimed Mr. Zylstra engaged in "quick firing" from the hip, but he did not say this until his second interview. CP 375; RP 1336, 1509-10, 1521.

2. The State charges Mr. Zylstra with manslaughter but commits numerous discovery violations, resulting in a delay of over two and a half years before trial starts.

On February 12, 2014 the State charged Mr. Zylstra with first-degree manslaughter. CP 1-2. His attorney, Robert Butler, filed a Notice of Appearance and demand for Discovery on February 20, 2014. CP 368, 519. On March 5, 2014, he filed Defendant's Request to the State of Washington for Disclosure of Exculpatory Evidence, asking

[1] Quiding later retracted this statement. RP 1549.

"that the State of Washington produce any evidence within its control or by which, by the exercise of reasonable diligence may be obtained, that is favorable to or exculpates defendant in any way, that tends to establish a defense in whole or in part to the allegations in the Information." CP 368, 520-21.

The State was intransigent and dilatory in producing discovery. CP 377-78 (court's findings on motion to dismiss). Because of ongoing issues with missing and late discovery, trial was continued 14 times and did not begin until the end of November, 2016 – more than two and a half years after the State filed the charge and more than three years after the incident. CP 368; RP 2-106, 355-87.

On September 2, 2015, the court granted Mr. Zylstra's motion to compel discovery, and ordered the State to produce certain items by certain dates. CP 15-16, 368-69; RP 2-34.

Over a year later, discovery problems continued. Detective Francis and Mr. Quiding had refused to answer questions during defense interviews, so Mr. Zylstra filed a motion to compel them to comply. CP 522-59. The court granted the motion, and ordered both Detective Francis and Mr. Quiding to "answer truthfully, all questions posed by defense counsel." CP 560-61. The court also mandated that

"Whatcom County Prosecutor's Office shall follow the rules of discovery and shall not impede defense investigations in accordance with CrR 4.7." *Id.*; CP 369.

On November 28, 2016, the court conducted a hearing on a motion to suppress statements under CrR 3.5 and also addressed motions in limine. CP 369; RP 160-352. The defense informed the court that the State still had not complied with an important part of the court's discovery order from over a year earlier: Defense counsel still had not received any materials regarding the nature of the agreement between the State and Mr. Quiding, who had agreed to testify for the prosecution and was not charged in the homicide. CP 370.

The next day, November 29, 2016, defense counsel informed the court that the State had just provided the 911 calls from the day of the shooting. CP 370; RP 358. The defense was unaware that the recordings existed because they are usually destroyed within 90 days of the event in question. CP 370. But the State discovered they were still available and that their agencies had had them for over three years. The prosecution stated it wanted to use them at trial. CP 370. Defense counsel asked the court to exclude the recordings due to the

extraordinarily late disclosure. The court granted the motion. CP 82, 370; RP 387.

That same day, defense counsel alerted the court that the State had just disclosed the existence of additional officers who responded to the scene over three years earlier. RP 357, 363-77. Sergeant Davis filed a report noting that he, Officer Healy, and Officer Vanderyacht all responded to the scene. CP 372, 377. The defense did not receive that report until the first day of trial. CP 372.

The prosecutor said, "we were not aware that there were any other police reports. These were things that were done by another agency, Ferndale. And when counsel asked for it, I understand that Detective Roff went out and was able to find the police reports from Ferndale and provided them to counsel." RP 366. The court responded:

> [T]he problem that I'm having with these late disclosures is twofold. First of all, I don't think there's any way that I could look at this to say anything other than these are late disclosures. I understand, Mr. Richey, and I believe that, you know, you're turning things over as you get them. But it is not my problem, nor is it the defense's problem, that the various agencies you're working with aren't giving you stuff.

RP 382-83; *see also* CP 377-78.

The next day, November 30, 2016, the State gave the defense another police report that had not been disclosed previously, a report by

Sergeant Crisp. RP 694; CP 377. This occurred despite the fact that a day earlier the prosecution promised there would be no more surprises and that all police reports had been given to the defense. CP 370.

The prosecutor said, "Somehow he found his report today when he was looking, and there's no explanation as to why it wasn't turned in." RP 696. The court was incredulous:

> THE COURT: You know, this is maddening to me.
>
> MR. RICHEY: Well, and –
>
> THE COURT: We've had multiple discovery hearings over the last year plus and, you know, I have ordered the State repeatedly to comply. And, you know, what is my remedy at this point? They're completely hamstrung if they're getting bits and pieces of information. There are other things we've talked about it's like "okay. I can understand why that might be, you know, right at the deadline or even after" but police reports?
>
> MR. RICHEY: Right.
>
> THE COURT: There's no excuse for them to be coming in three days into trial. It's – I'm speechless.

RP 696.

3. <u>The court denies Mr. Zylstra's motion to dismiss and trial begins on November 30, 2016</u>.

Mr. Zylstra moved to dismiss the charge pursuant to CrR 8.3(b). RP 698; CP 370.

> MR. BUTLER: The remedy, Your Honor, is 8.3. And that is to say, you know what? No fault of maybe any particular person, but this has been litigated so many times over the last two years that this is clear evidence of mismanagement. I mean to have a detective sergeant or sergeant detective find a report 30 something months after; to have Ferndale be trickling in reports. This is information that we would have integrated into a strategy. Going back to what ruling you already made, the 911 tapes, just as an example.
> …
> [Y]es, we knew -- you know, we anticipate officers write reports. We thought we had everything because we were told we had everything pursuant to the year ago's order. "Forty-five days before trial you must have" now we're in trial a year later, and we're still getting reports. I don't know how it can be excused, especially under the case law where if one knows they all know. I think this case should be dismissed based on mismanagement and put everybody out of their misery on this.

RP 697-98.

The court stated it would contemplate the motion to dismiss during a recess. RP 699. It stated that in the meantime it would enter an order compelling the State to produce the reports of the newly disclosed responding officers. RP 700.

The court reviewed materials over lunch, and determined that there were four newly disclosed police officers that were not on prior witness lists. RP 751. It also noted that one of the late-disclosed police reports revealed that there were other people shooting guns at the same time, and although those shooters were using guns of a different

caliber, they were firing in the same area. RP 751. The court said it was "stunned by being handed a police report that I was told an hour ago didn't exist." RP 752.

The court nevertheless denied the motion to dismiss on the basis that late-disclosed evidence was not material. RP 752. The court offered to continue the case, but that remedy was inadequate for Mr. Zylstra. RP 753. Defense counsel explained, "He's the sole breadwinner; he's building homes for people. People are expecting their home to be finished. He took this time off with those buyers, to be here. And we're three days in, and we haven't even gotten a jury yet because of the State's stuff." RP 754.[2]

Following the denial of the motion to dismiss, the parties proceeded to select a jury and present opening statements. RP 763-811. The State called the decedent's relatives and friends as witnesses. RP 867-977. They testified that they were having a barbecue in the backyard when bullets started flying overhead. RP 876-77, 900, 940. They called 911, tried to ascertain where the shots originated, and yelled for the shooters to stop. RP 883, 901-04, 942-46. After a break

[2] Defense counsel later "withdrew" the motion to dismiss, but this was after the motion had already been denied and the court had offered a continuance instead. RP 758-59.

in the shooting, the group heard shots being fired again; some people sat down to avoid the bullets and others ran toward the house. RP 886, 901, 946. Ms. Smith screamed and said she had been hit. RP 888, 906. Officers responded and started caring for her. RP 889.

One of the barbecue attendees testified that shots "kept coming" after Ms. Smith was hit. RP 950. However, both Ms. Smith's father and her fiancé testified that they did not remember any shots being fired after Ms. Smith was hit. RP 889, 907.

The other shooters who were with Mr. Zylstra on the day in question testified that Mr. Zylstra was the last to shoot the AK-47 and that he fired it in a careless manner. RP 1335-36, 1350, 1376, 1459. But Mr. Quiding admitted that in exchange for his testimony against Mr. Zylstra the prosecution dismissed a charge of unlawful possession of a firearm and agreed to recommend only electronic home monitoring for the remaining charge. RP 1386. Also, although Mr. Quiding told the jury that Mr. Zylstra was the last to fire the AK-47, he admitted he had previously told officers that Mr. Lee was the last to shoot. RP 1375-77.

Ms. Shinpaugh testified that either Mr. Lee or Mr. Buck shot the AK-47 last, but she acknowledged that she had earlier told detectives that either Mr. Quiding or Mr. Zylstra was last to shoot. RP 1429-31.

Ms. Shinpaugh testified that she believed the men were still shooting after they all heard sirens. RP 1427.

Mr. Lee testified that Mr. Zylstra was the last to shoot the AK-47. RP 1459. He admitted that he originally told police it was either Mr. Zylstra or Mr. Quiding, but at trial he insisted Mr. Quiding never fired the gun in question. RP 1472.

Mr. Quiding later returned to the witness stand to finish his testimony. On redirect examination, he emphatically stated that Nick Zylstra was the last person to shoot the AK-47. RP 1551.

While trial was ongoing, defense counsel interviewed the newly disclosed officers during recesses. CP 372. Officer Healy's recollection contradicted that of his colleague, Officer Davis. CP 372. Officer Healy indicated that bullets were still flying overhead as they attended to the wounded woman, and thus, whoever shot the AK-47 last was not necessarily the person who caused the death. CP 127-28, 132-33, 381. But the parties were already well into trial by the time this information was uncovered, so Officer Healy did not testify. The defense also learned later that one of the 911 calls would have supported Officer Healy's recollection of the timeline of events. RP 1957.

In closing argument, Mr. Zylstra argued that the State did not prove beyond a reasonable doubt that he was the person who fired the fatal shot. RP 1864, 1876. Among other things, he reminded the jury there was conflicting testimony about whether additional shots were fired after Ms. Smith was hit, and therefore the State did not show that the last person to shoot the AK-47 fired the bullet that struck Ms. Smith. RP 1876. The prosecution's closing argument countered that the testimony showed Mr. Zylstra fired recklessly and was the last to shoot, and therefore must have fired the bullet that struck the victim. RP 1818, 1891.

The jury found Mr. Zylstra guilty of second-degree manslaughter. CP 440.

4. After Mr. Zylstra is convicted of manslaughter, the court denies his renewed motion to dismiss but emphasizes the State committed "myriad" material discovery violations.

Post-trial, Mr. Zylstra renewed his motion to dismiss for government mismanagement. CP 206-30, 366-83; RP 1931-78. The court heard argument on the motion on January 10 and issued its ruling on January 30, 2017. RP 1931-78. The court ruled the State violated the discovery rules and court orders and that the violations were material.

CP 378-81; RP 1975. But it denied the motion to dismiss, ruling that Mr. Zylstra waived his right to make the motion because he did not renew it during trial after it was denied on November 30. RP 1977-78; CP 381-83. The court also ruled that because Mr. Zylstra "was not up against the running of speedy trial," the appropriate remedy would not have been dismissal, but only a continuance. CP 382-83.

The court emphasized, however, that the denial "in no way excuses the State's handling of this case." CP 383. The court found the State "failed in its discovery obligations in a myriad of ways[,]" CP 378, and "[t]here is no excuse for the repeated discovery failures on the part of the State, regardless of whether the failure is the failure of the police or the Prosecutor's office." CP 383. The judge concluded:

> If the Court and the defense cannot rely upon the State to provide complete discovery by the deadlines set by the Court in both rules and written and oral orders, the Court cannot ensure that the defendant is assured his right to due process and a fair trial, the underlying reason for the existence of the discovery rules in the first place.

CP 378.

Mr. Zylstra was sentenced to 63 months in prison followed by 18 months of community custody. CP 441-42. He timely appeals. CP 467.

5. The Court of Appeals agrees the State's discovery violations were "ongoing and egregious," but declines to apply a remedy.

On appeal, Mr. Zylstra argued the conviction should be reversed and the charge dismissed with prejudice due to the State's myriad discovery violations. *See State v. Dailey*, 93 Wn.2d 454, 456, 610 P.2d 357 (1980); *State v. Martinez*, 121 Wn. App. 21, 36, 86 P.3d 1210 (2004); *State v. Sherman*, 59 Wn. Ap. 763, 773, 801 P.2d 274 (1990).

The Court of Appeals agreed the State's discovery violations were "ongoing and egregious." Slip Op. at 1. But it affirmed the conviction because the state's misconduct "did not force the defendant to choose between his right to a speedy trial and his right to adequately prepared counsel." *Id.* at 1; *see also id.* at 5 (citing *State v. Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014); *id.* at 7 (citing *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982)).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because a meaningful remedy must be applied where the State engages in what the trial court and Court of Appeals describe as "myriad discovery violations" that are "ongoing and egregious."

Both the trial court and Court of Appeals agreed with Mr. Zylstra that the State engaged in "extraordinary" mismanagement of the

case that was "ongoing and egregious." *See* CP 378; Slip Op. at 1. But both courts decided a continuance was a satisfactory remedy because "ample time remain[ed] before the speedy trial deadline." Slip Op. at 7. While this is technically true, the only reason time remained is that Mr. Zylstra had already acquiesced to 14 continuances due to the State's ongoing mismanagement. Slip Op. at 2.

Mr. Zylstra should not have been required to accept a 15th continuance as a "remedy" for the egregious discovery violations. He had already accepted 14 continuances, two or three orders compelling production, and an order suppressing evidence. CP 368; RP 370, 376, 383; RP 387. Despite the imposition of these less-drastic remedies, the discovery violations continued. The only remedy remaining was dismissal, and it should have been imposed. Another continuance would only have harmed Mr. Zylstra, and sent the message that the State can engage in continual, extraordinary mismanagement with impunity.

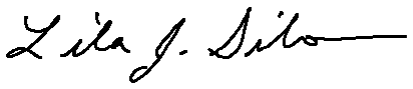
In order to further justice, this Court should adopt a more nuanced test than one that depends solely on whether the speedy trial deadline is imminent. *Cf. State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (establishing new prejudice test for prosecutorial

misconduct because "past efforts to address" the problem "have proved insufficient to deter such conduct"). Courts should consider the duration and seriousness of the mismanagement, as well as the responses to remedies previously imposed. Where mismanagement persists despite orders compelling production, multiple continuances, and orders suppressing evidence, courts should apply the remedy of dismissal.

F. CONCLUSION

Nicholas Zylstra respectfully requests that this Court grant review to address the remedy that should be applied following ongoing egregious mismanagement.

DATED this 19th day of December, 2018.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS ADAM ZYLSTRA, Appellant.	No. 76545-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 26, 2018

BECKER, J. — A motion to dismiss a criminal charge because of the State's material misconduct will be granted only if the defendant shows prejudice. In this case, the trial court did not abuse its discretion by denying the defendant's motions to dismiss. Although the State's discovery violations in this case were ongoing and egregious, they did not force the defendant to choose between his right to a speedy trial and his right to adequately prepared counsel.

FACTS

On June 16, 2013, Whatcom County deputies responded to a report of shots fired in a rural area near the Nooksack River. Alyssa Smith was attending a backyard barbecue on the west side of the river. Suddenly, rapid gunfire was heard and bullets came flying over the back yard. A stray bullet struck Smith in the chest. She was taken to a hospital where she was pronounced dead.

The deputies determined that the shots had likely been fired from the other side of the river, roughly half a mile from the Smith residence. Officers found appellant Nicholas Zylstra and four friends walking away from that general

location. Zylstra's group had been engaged in target practice with various firearms. They had been firing across the river in the direction of the Smith residence, relying on a raised berm along the river bank to stop their bullets. An AK-47 belonging to Zylstra was soon identified as the source of the bullet that killed Smith.

The State charged Zylstra with first degree manslaughter in February 2014. Two and a half more years elapsed before Zylstra was brought to trial in November 2016. The trial court granted 14 continuances that were agreed upon by the parties.

By the time the trial was called on Monday, November 28, 2016, the State had evidence that, while the men in Zylstra's group had taken turns firing the AK-47, Zylstra was the one who was shooting it when someone heard a scream from across the river and then the sound of sirens. According to some of his companions, Zylstra had been shooting from the hip in a manner known as "bump firing." With this technique, which uses the force of the firearm's recoil to achieve rapid firing, it is difficult to aim accurately. The State alleged that Zylstra fired recklessly or carelessly in the direction of the Smith residence without realizing that the shots were going high enough to clear the berm. Zylstra's defense theory was that it was impossible to know who had fired the shot that killed Smith.

The State had repeatedly violated its discovery obligations. The problem of belated discovery became acute on November 30, 2016. Three days into the trial, with the parties about to complete voir dire, the State disclosed more items

of evidence, including 911 recordings, computer aided dispatch logs from the day of the shooting, and new police reports. The trial court found the situation "maddening" and said, "We've had multiple discovery hearings over the last year plus and, you know, I have ordered the State repeatedly to comply. And, you know, what is my remedy at this point? They're completely hamstrung if they're getting bits and pieces of information."

At this point, defense counsel asserted that the appropriate remedy was dismissal under CrR 8.3(b). "We thought we had everything because we were told we had everything pursuant to the year ago's order . . . now we're in trial a year later, and we're still getting reports. I don't know how it can be excused. . . . I think this case should be dismissed based on mismanagement and put everybody out of their misery on this." Defense counsel pointed out the difficulty of finding time during the trial for defense interviews of the witnesses identified in the newly-disclosed documents.

The court took the motion to dismiss under advisement while voir dire continued. Before the afternoon session began, the court said the newly disclosed information did not appear to be "material to the point that would result in dismissal." But the court recognized that the defense had a legitimate interest in exploring the new information and interviewing the officers involved. The court offered Zylstra a continuance: "I think I have to conclude at this point that that's the only option I have."

Zylstra did not want a continuance. "Give us maybe tomorrow to get the State to comply, and we can proceed." The court offered to give Zylstra's

defense team the rest of the week to "catch up" in lieu of a continuance, recognizing that defense interviews could lead to development of material evidence. Zylstra agreed to that plan. "I'll withdraw the motion to dismiss at this point, but if we continue to get reports, we do get to raise it in an ongoing manner. So we will withdraw our motion to dismiss based on 8.3(b), and we can proceed if the Court were to grant us a bit of time."

The prosecutor argued for a formal continuance: "So I'd like to be given more time to make sure we have everything." The court firmly rejected the idea of continuing the trial for the State's benefit. "What I am telling you is that, you know, we're going to move forward. . . . [The defense is] ready to proceed, they're not asking for a continuance or a dismissal at this point, but I'm not preventing them from renewing such a request if we continue to have this problem."

The trial proceeded on that basis. The jury was empaneled by the end of the day. During trial recesses, defense counsel interviewed the new witnesses. The defense did not renew the request for a dismissal during the trial.

On December 19, the jury convicted Zylstra on the lesser included offense of second degree manslaughter.

Two weeks after the jury verdict, Zylstra brought new motions for dismissal under CrR 4.7 and CrR 8.3. The trial court denied these motions in an 18-page written ruling.

Zylstra assigns error to the denial of the CrR 8.3 motion brought during trial and the two post-conviction motions. He contends that the State's "rolling

discovery" of material information prejudiced his constitutional right to a fair trial with adequately prepared counsel. He asks this court to reverse his conviction and remand for dismissal of the charge with prejudice.

ANALYSIS

We review a trial court's CrR 4.7 and CrR 8.3 rulings for the abuse of discretion. State v. Barry, 184 Wn. App. 790, 797, 339 P.3d 200 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Barry, 184 Wn. App. at 797.

CrR 4.7(h)(7) authorizes a trial court to grant a continuance or dismiss an action if a party fails to comply with discovery obligations:

> (i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

To support a motion to dismiss based on a discovery violation, a defendant must show, not only that the prosecution failed to act with due diligence and withheld material facts, but also that the discovery violation essentially compelled the defendant to choose between two distinct rights: the right to a speedy trial and the right to adequately prepared counsel. Barry, 184 Wn. App. at 796-97; State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

CrR 8.3(b) allows for dismissal for governmental misconduct:

> 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.

Dismissal under CrR 8.3(b) is an extraordinary remedy to which the court should resort only in truly egregious cases of mismanagement or misconduct. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). The misconduct must result in prejudice affecting the defendant's right to a fair trial, including the right to a speedy trial and the right to adequately prepared counsel. Barry, 184 Wn. App. at 797.

On November 30, 2016, three days into the trial, Zylstra orally moved to dismiss the charge under CrR 8.3(b) on the basis of the new police reports and other evidence that had just been disclosed. At the time, Zylstra had about 30 more days left in his speedy trial period. When the court stated that a continuance rather than dismissal was the appropriate remedy, Zylstra withdrew the motion. The State contends Zylstra thereby waived any claim of error with respect to the trial court's decision on that date.

A defendant may waive an objection by affirmatively withdrawing a motion. State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983). Zylstra contends that he withdrew the motion only because the trial court had refused to grant it at that time. For that reason, he argues, the withdrawal of the motion he made during trial should not be deemed a failure to preserve the alleged error. He argues that the record shows he was prejudiced by the State's egregious mismanagement of discovery.

Even if Zylstra did not waive the issue by withdrawing the motion to dismiss on November 30, 2016, or by failing to renew it until after the jury's

verdict came in, he has failed to show the trial court abused its discretion by rejecting his motions to dismiss. The trial court concluded that, assuming the motion was timely, it nevertheless was properly denied because Zylstra failed to show he was prejudiced by the late discovery. We reach the same conclusion.

When Zylstra moved to dismiss during trial, he still had ample time remaining before the speedy trial deadline. In this situation, a trial court does not abuse its discretion by determining that a continuance is the appropriate remedy. State v. Brush, 32 Wn. App. 445, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983). "Because the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor's noncompliance with the discovery rule was not prejudicial error." Brush, 32 Wn. App. at 456. Such an error is reversible "only when it is prejudicial." Brush, 32 Wn. App. at 456.

Relying on Brush, the trial court concluded in its written post-conviction ruling that Zylstra was not entitled to a dismissal because he had rejected the offer of a continuance to ensure that defense counsel was adequately prepared. The court said, "The fact that the defense did not like its remedy doesn't change the fact that there was one." The court observed that with a continuance, counsel for Zylstra "would have had time to review the late produced material. The choice not to take the continuance may have been a strategic one, but that does not entitle Zylstra to now obtain a dismissal when alternative remedies were not taken. To do so would create an incentive for defendants to withhold

objections and refuse remedies provided under the law and 'lie in wait' to later seek dismissal."

Zylstra contends that the prejudice from the late disclosure did not become apparent until defense counsel had the opportunity during trial to interview newly disclosed Ferndale Police Officer Michael Healy. Officer Healy was one of the first officers to arrive, but he did not write a report. In the interview, Officer Healy remembered bullets were still flying overhead as he and another officer attended to the victim. The State's case emphasized the testimony of Zylstra's companions that Zylstra was the last person to fire the AK-47. If Officer Healy had testified at trial that rapid shooting continued after Smith fell to the ground, it would have supported Zylstra's argument that the last person to fire the AK-47 was not necessarily the one who fired the fatal bullet.

The trial court's post-conviction ruling discussed the potential testimony of Officer Healy. The court noted that other witnesses gave similar testimony, including Smith's sister, who recalled hearing bullets whiz by overhead after she realized Smith had been hit. The court thus agreed with Zylstra that Officer Healy could have given material evidence. The court nevertheless concluded that Zylstra was not prejudiced by the belated disclosure of Officer Healy, because it did not force Zylstra to choose between his right to a speedy trial and his right to have adequate time to prepare a defense.

We agree with the trial court's reasoning. At the beginning of trial when the court first considered Zylstra's motion to dismiss, the court did not see anything material in the belated disclosures, but the court permitted defense

interviews to occur during trial recesses knowing that they might produce material evidence. The court invited Zylstra to renew the motion to dismiss if that happened and signaled that such a motion might well be granted. Zylstra did not renew the motion to dismiss during trial. Zylstra could have called Officer Healy as a witness. The reason he gives for not calling Officer Healy—that in light of the State's ongoing new disclosures, he "could not take the risk that the prosecution would disclose new evidence undercutting Officer Healy's testimony"—is unconvincing.

A dismissal is an extraordinary remedy. Wilson, 149 Wn.2d at 9. The general approach to discovery violations is "to impose the least severe sanction that adequately addresses the prejudice." State v. Salgado-Mendoza, 189 Wn.2d 420, 431, 403 P.3d 45 (2017). The discovery violations did not prevent Zylstra from highlighting the inconsistencies within the State's timeline. His closing argument pointed out the conflicting testimony about whether additional shots were fired after Smith was hit. Zylstra's trial strategy was to convince the jury that it was impossible to know who fired the fatal shot. He does not demonstrate that his strategy would have been altered if Officer Healy or the other late items of evidence had been disclosed earlier.

Zylstra cites several cases in which a trial court's decision to dismiss for mismanagement of discovery was affirmed on appeal: State v. Dailey, 93 Wn.2d 454, 456, 610 P.2d 357 (1980), State v. Martinez, 121 Wn. App. 21, 36, 86 P.3d 1210 (2004), as amended on reconsideration (Apr. 20, 2004), and State v. Sherman, 59 Wn. App. 763, 773, 801 P.2d 274 (1990). Here, as in Barry, we

affirm a trial court's exercise of discretion to deny a motion to dismiss. The trial court ruled with a firm grasp on the facts of the case and the relevant case law. The denial of Zylstra's motions to dismiss was not manifestly unreasonable.

The sentence imposed on Zylstra included $200 as a legal financial obligation for a criminal filing fee as was then required under former RCW 36.18.020(2) (2017). The legislature has since amended that statute through House Bill 1783, effective June 7, 2018. Under the statute, as now amended, the $200 fee remains mandatory "except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." RCW 36.18.020(2)(h). The amendments apply prospectively to cases pending on appeal. State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 721-23 (2018). In light of Ramirez, we allowed Zylstra to file a supplemental assignment of error challenging the $200 fee. The State concedes that Zylstra is considered indigent and the fee should be stricken from the judgment and sentence. Accordingly, we remand for the trial court to amend the judgment and sentence to strike the obligation to pay the $200 fee.

The conviction is affirmed. The sentence is remanded for correction as set forth above.

Becker, J.

WE CONCUR:

Chun, J.

Andrus, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76545-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 19, 2018

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