

FILED  
Court of Appeals  
Division III  
State of Washington  
6/7/2019 4:43 PM

No. 97313-0  
COA No. 35726-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANDRES FUENTES III,

Petitioner.

---

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

---

PETITION FOR REVIEW

---

THOMAS M. KUMMEROW  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER ..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUE PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED ..... 3

The State’s mismanagement prejudiced Mr. Fuentes requiring  
dismissal..... 3

F. CONCLUSION ..... 5

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const. amend. V ..... 3

U.S. Const. amend. XIV ..... 3

FEDERAL CASES

*Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 173 L.Ed.2d 701(2009).... 4

WASHINGTON CASES

*State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980)..... 4

*State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997)..... 4

*State v. Salgado-Mendoza*, 189 Wn.2d 420, 403 P.3d 45 (2017) ..... 3, 4

RULES

CrR 8.3 ..... 1, 3, 4, 5

RAP 13.4 ..... 1

A. IDENTITY OF PETITIONER

Nicholas Fuentes asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Nicholas Andres Fuentes III*, No. 35726-1-III (May 9, 2019). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

CrR 8.3(b) authorizes the trial court to dismiss an action where there has been governmental misconduct. Simple mismanagement by the State is sufficient to constitute governmental misconduct. Mr. Fuentes unsuccessfully moved for dismissal under CRrR 8.3 after the State gave notice on the eve of trial it intended to call the only eyewitness to the alleged scuffle. Is an issue of substantial public interest presented entitling Mr. Fuentes to reversal of his conviction when the court's denial of the CrR 8.3 motion prejudiced him, denying him a fair trial?

#### D. STATEMENT OF THE CASE

Nicholas Fuentes was charged with attempted first degree robbery and second degree assault arising out of a confrontation in a convenience store. CP 1-5. On the day assigned for the trial to start, Mr. Fuentes moved to dismiss the matter under CR 8.3(b) because the State had notified the defense that it intended to call Bruce Rhymer, a witness not previously listed by the State, who would testify he observed the confrontation between Mr. Fuentes and the convenience store clerk. 7/17/2107RP 2-3. In the alternative, defense counsel moved for a one week continuance to interview the witness, to which Mr. Fuentes objected. 7/17/207RP 3.

The State conceded it had only notified defense counsel on the eve of trial, but nevertheless objected to the motion and indicated it was ready for trial. 7/17/2017RP 3-5. The trial court denied the motion to dismiss, refusing to find the State's mismanagement "egregious." 7/17/2017RP 7. The court did agree to grant a short continuance. *Id.*

At the conclusion of the State's evidence at trial, the court granted Mr. Fuentes's motion to dismiss the attempted robbery count

for insufficient evidence. CP 56; RP 199.<sup>1</sup> The jury subsequently convicted Mr. Fuentes of the remaining count of second degree assault. CP 47.

The Court of Appeals rejected Mr. Fuentes's argument and affirmed his conviction. Decision at 4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

**The State's mismanagement prejudiced Mr. Fuentes requiring dismissal.**

The right to a fair trial is recognized as a right guaranteed by the right to due process under the Fifth and Fourteenth Amendments. *See, e.g., Cone v. Bell*, 556 U.S. 449, 551, 129 S.Ct. 1769, 173 L.Ed.2d 701(2009) (“The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, ....”)

“If a party fails to comply with the rules of discovery, trial courts have broad authority to compel disclosure, impose sanctions, or both.” *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct; the governmental misconduct need not be of

---

<sup>1</sup> The two volumes of trial transcripts are consecutively paginated and will be referred to as “RP.” The remaining volume will be referred to by its date.

an evil or dishonest nature, *simple mismanagement is enough*. *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). Further, violations of obligations under the discovery rules can support a finding of governmental misconduct. *Id.*, at 375-76. Where governmental misconduct is shown, dismissal is the appropriate remedy. *State v. Michielli*, 132 Wn.2d 229, 243, 937 P.2d 587 (1997).

CrR 8.3(b) requires that governmental misconduct “materially affect[ed]” the defendant’s right to a fair trial, typically referred to as “actual prejudice.” *Salgado-Mendoza*, 189 Wn.2d at 436. Actual prejudice may result where the late disclosure compels the defendant to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel. *Id.*

Here, the trial court incorrectly ruled the State’s actions had to be “egregious” in order to constitute misconduct. Besides being wrong on this fact, the trial court never addressed on the prejudice prong of CrR 8.3(b). Further, Mr. Rhymer’s testimony here constituted the corroboration of the convenience store clerk’s actions as observed from outside the store. This was unique testimony since the witness was the only witness who witnessed the scuffle. Further, the witness’s

testimony went to the only remaining count before the jury; the assault count for which Mr. Fuentes was found guilty.

Contrary to the Court of Appeals conclusion, the State's mismanagement of its case prejudiced Mr. Fuentes. Under CrR 8.3(b), he was entitled to dismissal of the matter due to this mismanagement. The trial court erred in failing to dismiss, resulting in a violation of Mr. Fuentes's right to a fair trial.

This Court should grant review to clarify that the standard for CrR 8.3(b) and rule Mr. Fuentes was prejudiced by the State's mismanagement.

#### F. CONCLUSION

For the reasons stated, Mr. Fuentes asks this Court to grant review, reverse his conviction, and remand for a new trial.

DATED this 7<sup>th</sup> day of June 2019.

Respectfully submitted,

s/ Thomas M. Kummerow  
State Bar Number 21518  
Washington Appellate Project (91052)  
1511 Third Ave, Suite 610  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2711



## APPENDIX

**FILED**  
**MAY 9, 2018**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 35726-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
NICHOLAS ANDRES FUENTES III,	)	
	)	
Appellant.	)	

PENNELL, A.C.J. — Nicholas Andres Fuentes III appeals his conviction for second degree assault. Mr. Fuentes argues that the case against him should have been dismissed based on the delayed disclosure of a State’s witness. Mr. Fuentes also challenges the trial court’s imposition of legal financial obligations (LFOs). We affirm Mr. Fuentes’s conviction but remand for correction of LFOs as warranted by recent statutory changes.

**FACTS**

In March 2017, Mr. Fuentes attempted to steal a can of beer from a gas station convenience store. His actions caught the attention of the store clerk. When the clerk confronted Mr. Fuentes about the attempted theft, Mr. Fuentes became irate. Mr. Fuentes went around the store’s checkout counter and began physically attacking the clerk. During the skirmish, Mr. Fuentes broke one of the clerk’s fingers before the clerk escaped

to outside the store. Once outside, the store clerk called for help from customers who were fueling their cars. Mr. Fuentes briefly chased the clerk before fleeing the scene.

Bruce Rhimer was one of the customers pumping gas during the altercation. He saw portions of the interaction between Mr. Fuentes and the store clerk. Mr. Rhimer also called 911.

Mr. Fuentes was charged with attempted first degree robbery and second degree assault. Trial was scheduled to begin on Monday, July 17, 2017. The Wednesday before trial, the State disclosed that it would be calling Mr. Rhimer as a witness. Although Mr. Rhimer's identity was previously disclosed through the 911 records, this was the first time the State had indicated that Mr. Rhimer would testify. The State explained its delay as attributable to difficulties making contact with Mr. Rhimer.

The disclosure of Mr. Rhimer as a State witness prompted Mr. Fuentes to make an oral motion for dismissal of charges under CrR 8.3(b). Mr. Fuentes also sought an alternative remedy of a short continuance of the trial date. However, Mr. Fuentes complained that the State's late disclosure should not force him to "choose between waiving his speedy trial right or going . . . to trial unprepared." Report of Proceedings (RP) (July 17, 2017) at 2. The trial court denied Mr. Fuentes's motion to dismiss, but granted a short continuance.

No. 35726-1-III  
*State v. Fuentes*

At trial, the State called four witnesses: the store clerk, Mr. Rhimer, and two police officers. Mr. Fuentes testified on his own behalf. After conclusion of the State's case-in-chief, the court dismissed the charge of attempted first degree robbery on grounds of insufficient evidence. A jury convicted Mr. Fuentes of the remaining second degree assault charge. The court sentenced Mr. Fuentes to 72 months' confinement and 18 months' community custody.

Mr. Fuentes now brings this timely appeal.

#### ANALYSIS

##### *Dismissal motion*

A trial court may dismiss a criminal charge under CrR 8.3(b) "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." Disposition of a CrR 8.3(b) motion is reviewed for abuse of discretion. *State v. Williams*, 193 Wn. App. 906, 909, 373 P.3d 353 (2016).

Dismissal based on CrR 8.3(b) can be predicated on "simple mismanagement," rather than "evil or dishonest" conduct on behalf of the State. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000). Nevertheless, dismissal is an "extraordinary remedy." *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). When it comes to

a CrR 8.3(b) motion based on an alleged discovery violation, dismissal is inappropriate if a lesser remedial action, such as suppression of testimony, can adequately address prejudice to the defense. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 430-31, 403 P.3d 45 (2017).

Here, Mr. Fuentes fails to show dismissal was necessary to preserve his right to a fair trial. Mr. Rhimer had long been identified as a witness to the events at the gas station. Mr. Rhimer did not offer any new information in support of the State's case. He instead corroborated the store clerk's testimony. In addition, although the State did not include Mr. Rhimer's name on its initial witness list, it did disclose Mr. Rhimer as a State's witness several days before trial. Mr. Fuentes never formally asked for suppression of the witness's testimony instead of dismissal. The only affirmative alternative to dismissal was a short continuance.<sup>1</sup> Given the foregoing circumstances, it was not manifestly unreasonable for the trial court to deny Mr. Fuentes's motion to dismiss. We find no abuse of discretion.

---

<sup>1</sup> During the hearing on the motion to dismiss, counsel for the State suggested that, if the trial court found there was prejudice, suppression would be a more appropriate remedy than dismissal. While defense counsel affirmed that she would be "happy with suppression," she reiterated that the "primary objective" of the motion was dismissal with an alternative remedy of continuance. RP (July 17, 2017) at 6.

No. 35726-1-III  
*State v. Fuentes*

*LFOs*

Citing *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Mr. Fuentes has filed a supplemental brief, arguing the trial court erred in imposing a \$200 criminal filing fee and a \$100 deoxyribonucleic acid (DNA) collection fee at sentencing.<sup>2</sup> *Ramirez* was decided after Mr. Fuentes filed his opening brief. That decision held that the 2018 amendments<sup>3</sup> to Washington’s LFO scheme apply prospectively to cases on direct appellate review at the time of enactment. *Ramirez*, 191 Wn.2d at 747. The 2018 amendments prohibit imposition of a \$200 criminal filing fee on defendants who are “indigent” at the time of sentencing as that term is defined by RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also prohibited is the assessment of a DNA database fee if the state has previously collected the defendant’s DNA as a result of a prior conviction. RCW 43.43.7541.

The record supports Mr. Fuentes’s claim for relief from the \$200 criminal filing fee and \$100 DNA collection fee. Mr. Fuentes has no financial resources. He is unemployed and has no prospects for future employment. Accordingly, Mr. Fuentes meets the definition of indigence set forth by RCW 10.101.010(3)(c). In addition, the

---

<sup>2</sup> The State has not responded to Mr. Fuentes’s supplemental assignment of error.

<sup>3</sup> LAWS OF 2018, ch. 269.

No. 35726-1-III  
*State v. Fuentes*


record reflects that Mr. Fuentes has a lengthy felony history. We therefore accept defense counsel's uncontested representation that Mr. Fuentes has previously paid a \$100 DNA collection fee.

Mr. Fuentes's request for LFO relief is granted. We direct the trial court to strike the \$200 criminal filing fee and the \$100 DNA collection fee from Mr. Fuentes's judgment and sentence.

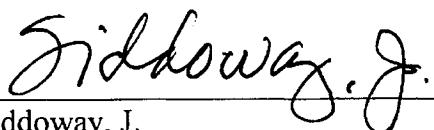
#### CONCLUSION

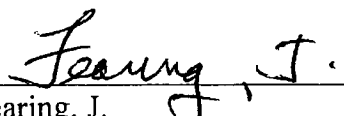
The judgment of conviction is affirmed. This matter is remanded to the trial court with instructions to strike the \$200 criminal filing fee and \$100 DNA collection fee from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, A.C.J.

WE CONCUR:

  
\_\_\_\_\_  
Siddoway, J.

  
\_\_\_\_\_  
Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. ) COA NO. 35726-1-III  
 )  
NICHOLAS FUENTES III, )  
 )  
PETITIONER. )

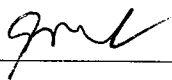
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF JUNE, 2019, I CAUSED THE ORIGINAL PETITION FOR REVIEW TO THE SUPREME COURT TO BE FILED IN THE COURT OF APPEALS – DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN ( ) U.S. MAIL  
[SCPAappeals@spokanecounty.org] ( ) HAND DELIVERY  
SPOKANE COUNTY PROSECUTOR'S OFFICE (X) E-SERVICE VIA PORTAL  
1100 W. MALLON AVENUE  
SPOKANE, WA 99260

[X] NICHOLAS FUENTES III (X) U.S. MAIL  
913062 ( ) HAND DELIVERY  
WASHINGTON STATE PENITENTIARY ( ) \_\_\_\_\_  
1313 N 13<sup>TH</sup> AVE  
WALLA WALLA, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 7<sup>TH</sup> DAY OF JUNE, 2019.

X 



# WASHINGTON APPELLATE PROJECT

June 07, 2019 - 4:43 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35726-1  
**Appellate Court Case Title:** State of Washington v. Nicholas Andres Fuentes, III  
**Superior Court Case Number:** 17-1-01016-3

### The following documents have been uploaded:

- 357261\_Petition\_for\_Review\_20190607164321D3017701\_2495.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was washapp.060719-04.pdf*

### A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- greg@washapp.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20190607164321D3017701**