

040.13-9

64073-9

NO. 64073-9-I

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

STATE OF WASHINGTON,
Appellant,

v.

LEROY OLSEN,
Respondent.

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

The Honorable John M. Meyer, Visiting Judge
Superior Court Cause No. 08-1-00066-5

APPELLANT'S REPLY BRIEF

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2010 FEB 22 11:10:48
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I. EXAGGERATIONS IN RESPONDENT'S ISSUE STATEMENT.

From the first sentence of his brief Respondent exaggerates and misstates the facts and issues in this appeal, in an apparent attempt to shore up the trial judge's arbitrary decision. Many of these exaggerations are slight, and would not ordinarily merit a response. In this case the combined effect of these numerous embellishments is to create a mountain out of a molehill. A frank and fair consideration of the record shows that the State's transgression was minor yet the punishment imposed by the court was the maximum allowed.

For example, the Respondent asserts as fact that the State advised of its intent to use retrograde extrapolation on "the day of trial." Resp. Br. at 1. The State acknowledges it should have made a more timely disclosure of the expected testimony. However, the disclosure was made on Friday, July 31, 2009, four calendar days, and two court days before the Tuesday, August 4 trial date.

Similarly, the Respondent now says the defense "required" an expert to respond, when the record shows lead defense counsel had considered the possibility of merely interviewing the toxicologist to

prepare for her testimony. 1RP 11¹. There is no indication in the record that trial counsel for Mr. Olsen made any attempt to determine availability of an expert witness between the Friday disclosure and the Tuesday trial date.

It strains credibility to say an expert would be hired to challenge the retrograde extrapolation testimony in this case. This is so because the defendant's blood alcohol level some two hours and ten minutes after driving was measured at 0.23 g / 100 mL of blood. CP 141. Since the vehicular assault statute's *per se* prong requires proof of a blood alcohol level greater than 0.08 g / 100 mL of blood "*within two hours after driving,*" the extrapolation needed only estimate his blood alcohol level approximately 10 minutes prior to the blood draw. RCW 46.61.522; RCW 46.61.502(1)(a).

Olsen "objected" to the State's assertion that the proposed extrapolation testimony was "legally gathered." Resp. Br. at 1. Although it is true that no one has suggested the extrapolation evidence was not legally gathered, the point is a factor in deciding whether dismissal was an

¹ The State will refer to the Verbatim Report of Proceedings as it did in its opening brief, as follows:

1RP – Pretrial hearing conducted before the Honorable Dave Needy on January 21, 2009 in Mt. Vernon.

2RP – Hearing conducted before the Honorable John Meyer on August 4, 2009 in Coupeville.

appropriate remedy. As argued in the State's opening brief, suppression of evidence is at odds with the truth-seeking function of a trial, and only justified to protect basic constitutional rights, as with illegally obtained evidence. App. Br. at 13 (citing *State v. Hughes*, 56 Wn.App. 172, 175, 783 P.2d 99 (1989)).

Olsen also "objects" to the State's description of the extrapolation evidence as "routine." In fact, Mr. Vargas, lead trial counsel for Olsen, agreed that such evidence was both "ordinary" and "very common" in his response to the State's motion to reconsider. CP 19-20. The words "routine," "ordinary" and "common" are synonyms, meaning "of a kind to be expected in the normal order of events." Merriam-Webster Online Dictionary, 2010. Retrieved February 18, 2010, from <http://www.merriam-webster.com/dictionary/ordinary>. Olsen is now beating a hasty retreat from his agreement with this awkward truth. Olsen has invited this Court to view the molehill of irregularities in this case through a telescope, in the hopes that your Honors will see them as the forbidding peaks of Annapurna².

² Reaching a height of 26,545 ft. in the Himalayas, Annapurna I is recognized as the most dangerous mountain for climbers, claiming 53 lives out of about 130 summit attempts.

II. RESPONDENT'S MISTAKES IN PROCEDURAL FACTS

Olsen took a statement that former Deputy Prosecutor Patrick McKenna made with regard to Trooper Thompson, and incorrectly stated McKenna was referring to toxicologist Lisa Noble. Resp. Br. at 5. In describing the interchange between trial counsel and Judge Needy at the January 21, 2009 hearing, Olsen says that:

Mr. McKenna explained to the court and counsel, on the record in open court, that he did not have any additional opinions and did not expect any additional expert testimony from Trooper Thompson *or Ms. Noble* "outside the four corners" of the reports he had provided.

Resp. Br. at 5.

In fact, McKenna made that statement in response to a question from the court about whether the State would be calling an accident reconstructionist. It had nothing to do with the toxicological testimony from Ms. Noble. That exchange occurred before either attorney or the judge had mentioned toxicologist Noble. 1RP 8-10.

Olsen goes on in his brief to insinuate that the trial judge's next remark, "OK, I'll hold you to that..." applied to Ms. Noble's testimony as well. Clearly it didn't, as Ms. Noble had not even been mentioned up to that point in the hearing. 1RP 8-10, Resp. Br. at 5.

Subsequently, when questions were posed about Ms. Noble's anticipated testimony, McKenna provided a more guarded response. He

decidedly did not say he “did not expect any additional expert testimony.” To the contrary, he left the issue open by qualifying both of his statements regarding Ms. Noble with the assertion that she had not “at the moment” been asked to provide testimony regarding the effects of alcohol, and that “at this point,” she had not been asked to provide extrapolation testimony. 1RP 11-12.

III. REPLY TO RESPONDENT’S ARGUMENT

The trial court granted Mr. Olsen a windfall grossly out of proportion to the State’s lapses in handling the case. Olsen’s arguments simply do not, and cannot, distort the reality of the events below to justify dismissal of such a serious case where Olsen suffered no prejudice.

A. Linear Extrapolation Evidence is Commonplace and, Under the Facts of This Case, the Late Disclosure Did Not Prejudice the Defendant.

Olsen does not dispute that, to make a prima facie case, the State need only extrapolate his blood alcohol level to a point in time approximately ten minutes prior to the blood draw. The State’s case was premised on a blood draw occurring slightly more than two hours after the collision when Olsen was last driving. The exact time of the collision is unknown.

The Respondent doth protest too much³ when he devotes eight pages of his brief to what he calls the “complex and controversial” subject of retrograde extrapolation. Resp. Br. at 27 – 35.

This Court has previously noted that: “Retrograde extrapolation... is a familiar forensic technique used routinely in our trial courts.” *State v. Wilbur-Bobb*, 134 Wn App. 627, 634, 141 P.3d 665 (2006). Our DUI statute clearly contemplates the regular use of retrograde extrapolation evidence for tests of blood or breath taken more than two hours after a defendant has driven:

Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section....

RCW 46.61.502(4).

Olsen relies heavily on a pair of cases from Texas⁴, a state practically unique in its restrictive and convoluted law regarding retrograde extrapolation testimony. Texas judicial decisions have no precedential value in Washington.

It is critical to note that admissibility in Texas courts is dependent on the proponent showing the evidence is *reliable*, a question left to the

³ William Shakespeare, *Hamlet*, act 3, sc 2.

⁴ *Mata v. State*, 46 S.W.3d 902 (Tex.Crim.App. 2001) and *Bagheri v. State*, 119 S.W.3d 755 (Tex.Crim.App. 2003).

jury in Washington. *See, e.g., Bigon v. State*, 252 S.W.3d 360, 367 (Tex.Crim.App. 2008). “In Washington, whether a given scientific technique has been performed correctly in a particular instance ... goes to its weight, not admissibility.” *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006) (citing, *State v. Copeland*, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996)). Thus, the lengthy discussions in the Texas cases were necessary because the court was grappling with an admissibility problem that has little relevance to Washington law, and even less to the extrapolation testimony expected in this case.

Other states have refused to follow the two Texas cases cited by Olsen. *E.g. State v. Sweeney*, 300 Wis.2d 581, 730 N.W.2d 461 (Wis.App. 2007) (Declining to follow *Mata* because it “arose in a *Daubert*⁵ state” and focused on reliability of the proffered evidence as a precursor to admissibility); *State v. Downey*, 141 N.M. 455, 463, 157 P.3d 20, 28 (2007) (rejecting *Mata* because, in Texas, the proponent of scientific evidence must demonstrate by clear and convincing evidence that the evidence is reliable, an enhanced burden New Mexico does not place on the proponent of evidence). Even Texas courts have retreated from the 2001 *Mata* decision, and attempted to confine it to its facts. *See*,

⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).

Kennedy v. State, 264 S.W.3d 372, 376 (Tex.App. 2008) (Subsequent Texas cases leave little doubt that, as a general proposition, the Court of Criminal Appeals views retrograde extrapolation as a valid science if it is properly applied.); *Owens v. State*, 135 S.W.3d 302 (Tex.App. 2004) (“The testifying expert does not need to know every single personal fact about the defendant in order for retrograde extrapolation testimony to be reliable; otherwise, no valid extrapolation could ever occur without the defendant's cooperation, since a number of facts known only to the defendant are essential to the process.”)

Olsen expends great effort attacking the reliability of retrograde extrapolation evidence in general, and Lisa Noble's separate 10-minute and one-hour extrapolations of Mr. Olsen's blood level in particular. As noted previously, the time period of extrapolation in this case is extremely short. Olsen's extended exposition on the consideration of extrapolation evidence by Texas courts, even if persuasive in Washington, obscures the fact that extrapolation evidence was not going to be the center of gravity around which this case could orbit.

Retrograde extrapolation evidence is very common in trials of alcohol-related traffic crimes in Washington and Texas, the two states where lead trial counsel Vargas has practiced. CP 59. Olsen contends, without support in the record, that Vargas “knew that he would need an

expert to review the state's evidence, consult with counsel, and probably testify at trial." Resp. Br. at 13, n. 6. It strains credibility to assert that Mr. Vargas, recognized as a leading practitioner in his field, is not highly familiar with retrograde extrapolation evidence, though that is exactly what Olsen suggests when he says: "Knowing the law well is not the same as being a scientific expert." *Id.* Even if an expert were needed, and might have assisted in this trial, there is absolutely nothing in the record to show Mr. Olsen would have suffered any prejudice had the trial been continued to afford Mr. Vargas the opportunity to obtain such an expert.⁶

It is worth noting that Olsen's counsel made no attempt to consult with an expert, or even determine one's availability, prior to trial. Since Olsen's motions to suppress evidence, and dismiss under CrR 8.3 were within the discretion of the trial judge, and not guaranteed, one might have expected Vargas to have made some inquiry in case he found himself having to try a case involving what he characterizes as complex testimony.

⁶ It seems unlikely that Vargas actually would have obtained an expert since there is no evidence he secured an expert to review the headspace gas chromatograph blood alcohol test prior to the date set for trial. For that matter, he never even interviewed toxicologist Lisa Noble about the test or laboratory protocols. CP 62. One wonders why he would eschew the opportunity to mount a challenge to the crux of the case, but cry foul based on an alleged inability to confront routine linear extrapolation evidence.

B. The Remedy For Dilatory Discovery Compliance Must Match The Degree of the Transgression.

“Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps.” *State v. Koerber*, 85 Wn.App. 1, 3-4, 931 P.2d 904 (1996). Here, the trial judge deployed a weapon of mass destruction to exterminate a garden pest. In his response brief, Olsen attempts to reshape a single lapse into numerous instances of egregious prosecutorial mismanagement throughout the proceedings.

The circumstances here do not resemble the disgraceful facts in the cases Olsen relies on. In *Brooks*, the Court of Appeals upheld dismissal where, after a previous continuance at the State’s request, the trial court found a "total failure to provide discovery in a timely fashion," which included the report of the lead case detective, the 60-page victim's statement and disclosure of two new witnesses, all of which had been available for weeks. *State v. Brooks*, 149 Wn.App. 373, 388, 203 P.3d 397 (2009).

The *Brooks* court acknowledged that dismissal was an extraordinary remedy, but pointed out that the facts of the case were extraordinary. *Brooks*, 149 Wn.App. at 393. In the case at bar, the extrapolation evidence was ordinary. The violation was not so

monumental as to warrant suppression of a piece of evidence necessary to make a prima facie case. It surely did not warrant dismissal.

Olsen remarks that, like *Brooks*, “this was not a case where the defense was lying in the weeds on this issue.” Resp. Br. at 12. In fact, there is a suggestion that the defense was at least kneeling in the weeds. Lead trial counsel noted he was “happy” about Mr. McKenna’s representation at the January 21, 2009 hearing. Then, three court days before the August 4, 2009 trial, he sent the State a copy of the transcript of that hearing with Mr. McKenna’s statements. 2RP 16-18.

Olsen also tries to compare this case to *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990). In *Sherman*, however, the prosecutor’s actions were far more egregious than the deputy prosecutor’s here. In that case, the court had specifically ordered the prosecutor to prepare a witness list and to obtain and provide a specific collection of evidence, by a specific date, about 75 days hence. The specific collection of evidence was the victim’s IRS records. The IRS records were central to the defense of that embezzlement case because they apparently showed the defendant’s employer (the victim) reported as income to the defendant the money that she allegedly stole. *Sherman*, 59 Wn.App. at 771. The importance of the records was emphasized by defense counsel who, apparently deciding not to lay in the weeds, wrote to the prosecutor two

weeks after the discovery order, reiterating the urgent need for the defense to obtain those records.

The state never obtained the records, and on the day before trial, the prosecutor sought to amend the discovery order. The prosecutor exacerbated the situation by seeking a handwriting sample from the defendant the day before trial. Then, eight days after trial was supposed to begin, the prosecutor amended a single aggregated count of first degree theft into three counts of second degree theft and two counts of first degree theft. This Court observed with dismay: “The prosecutor had merely broken down the original charge of first degree theft into smaller component parts, alleging that each separate theft involved an individual check.” *Sherman*, 59 Wn.App. at 765.

Finally, ten days after trial was to begin, and on the last day of the speedy trial period, the State, who still had not provided the witness list, nor obtained the IRS records, notified the defense that it would be calling an expert witness in handwriting comparison. The trial court dismissed the case under CrR 4.7. This Court upheld the dismissal but concluded it must have been under CrR 8.3 – prosecutorial misconduct. *Sherman*, 59 Wn.App. at 766-67.

Likewise, *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 3567 (1980), is exemplary of reprehensible conduct on the part of the State. The deputy

prosecutor charged two individuals with negligent homicide arising out of a motor vehicle collision, though clearly only one was responsible. The State failed to comply with an order to provide a bill of particulars specifying which defendant would be tried. Worse, 10 days before trial the court learned that the State did not provide any of the laboratory reports it had in its possession for over a month. It was also alleged that the State allowed some evidence to be destroyed. On the Friday before the Monday trial was to begin, the State's witness list went from 5 witnesses to 16. Throughout the wrangling over the bill of particulars and discovery, the trial court was closely involved, and repeatedly allowed the State additional grace periods to comply. The Supreme Court upheld dismissal under CrR 8.3. *Dailey*, 93 Wn.2d at 459.

Those cases represent the worst of what the State has done in prosecuting criminal matters. The common thread they share is a series of egregious violations often while under tight management of the trial court. They also involve situations in which the defense was substantially prejudiced in its defense.

C. The Defendant Was Not Prejudiced By the Late Disclosure of Ordinary Extrapolation Evidence

Olsen contends that he was prejudiced because he was forced to choose between his right to speedy trial and his right to an adequately

prepared attorney. Resp. Br. at 27. Olsen neglects to mention that there were still 30 days remaining in the speedy trial period. The Washington Supreme Court has held it is appropriate for a judge to continue a case *beyond* the speedy trial period in order to permit counsel adequate time to prepare for trial. *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985). In *Guloy*, one co-defendant in an aggravated murder case requested a continuance when the State announced, two days prior to trial, that it had six additional witnesses. The other co-defendant objected to the continuance, and asserted his right to a speedy trial under CrR 3.3. The Supreme Court upheld the trial court's decision to continue the trial over the defendant's objection. The Court further held "that under CrR 3.3(h)(2), the State, the court, or a party may move for, and the court may grant a continuance when the administration of justice requires it and a defendant will not be *substantially* prejudiced in the presentation of his defense." *Id.* (emphasis in original).

In this case, the trial judge's decision necessarily resulted in the dismissal of the State's case. Thus, although the court found that Olsen had not shown dismissal under CrR 8.3 was appropriate, the court reached the same result. The trial court reached that result without the requisite showing of actual prejudice that CrR 8.3 requires. Olsen seems to acknowledge that prejudice needs to be shown before a trial judge can

make a discretionary decision dismissing a prosecution. *See* Resp. Br. at 27.

Dismissal under CrR 8.3(b) for government misconduct requires a showing of actual prejudice. CrR 8.3(b); *State v. Rohrich*, 149 Wn.2d 647, 658, 71 P.3d 638, 643 (2003). Speculative prejudice is insufficient to warrant the extraordinary remedy of dismissal. *Id.* Olsen has shown no actual prejudice. The trial judge should have continued the matter under CrR 3.3, as did the court in *Guloy*, because the interests of justice demanded it, and Olsen's rights would not have been substantially prejudiced by a brief continuance.

D. Olsen's Reliance on *State v. Hutchinson* Is Misplaced.

Olsen points to *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), *certiorari denied* 119 S.Ct. 1065, 525 U.S. 1157, 143 L.Ed.2d 69 (1999) as the only case in Washington where suppression of evidence was ordered as a sanction for a discovery violation. *Hutchinson* has no bearing on this case, and is limited to its peculiar facts. Darrin Rand Hutchinson, who shot and killed two Island County Sheriff's Deputies, claimed a diminished capacity defense in his aggravated murder trial. Because there were no statutory procedures for a State mental

examination in diminished capacity cases⁷, the State's exam was ordered pursuant to CrR 4.7(b)(2)(viii). Hutchinson repeatedly refused to participate in the State's exam and defied multiple court orders that he do so. The trial court ultimately ordered Hutchinson to either submit to the State's psychiatric exam, or have his own psychiatric expert's testimony excluded. Hutchinson never complied, and testimony of one of his experts was not allowed.

In upholding the trial court's ruling, the Supreme Court noted that: "To allow a defendant to refuse, at the outset, to answer any question on the grounds he may incriminate himself would render an examination useless; the trial court's power under CrR 4.7 to order such an examination would be meaningless." *Hutchinson*, 135 Wn.2d at 879. The Court later added: "A defendant simply has no incentive to comply with an order that he submit to an examination unless exclusion is a remedy." *Hutchinson*, 135 Wn.2d at 882.

The *Hutchinson* Court recognized the difference between that case, and the typical situation where a trial court is called upon to remedy a discovery violation.

Cases interpreting CrR 4.7(h)(7)(i) have typically involved the failure to produce evidence or identify

⁷ By contrast, Chapter 10.77 RCW regulates mental examinations where a defense of insanity is asserted.

witnesses in a timely manner. *See, e.g., State v. Linden*, 89 Wn.App. 184, 947 P.2d 1284 (1997) (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information). *Violations of that nature are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence.* Where the State's violation of the rule is serious, mistrial or dismissal may be appropriate. *See, e.g., [State v.] Jones*, 33 Wn.App. [865] at 868-69, 658 P.2d 1262 [(1983)](holding State's numerous failures to adhere to trial judge's discovery orders justified mistrial).

Hutchinson, 135 Wn.2d at 881 (emphasis added).

The *Hutchinson* Court concluded that exclusion as a sanction for CrR 4.7 violations is an extraordinary remedy that should be applied narrowly. The factors that should be considered in deciding whether to exclude evidence are:

(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Hutchinson, 135 Wn.2d at 883.

It is clear from these factors that *Hutchinson* addressed the issue of suppressing evidence proposed by the defense. Even if the same factors were to apply to the State, the standard would not result in suppression in this case. Here, there were more effective sanctions (that would not interfere with the truth-seeking function of a trial) such as a continuance.

Here, the impact of excluding the testimony would be dismissal for the State's inability to make a prima facie case. The third factor has no applicability to this case. Here, the violation was not willful.

E. Washington Appellate Courts Have Not Hesitated To Reverse Discretionary Trial Court Orders Dismissing Cases When Appropriate.

Olsen asserts that "the state does not cite ... a case in which the appellate court reversed as an abuse of discretion a trial court's order excluding the state's evidence where the state violated the court rules...." Resp. Br. at 36. That is because there are no cases where trial courts have suppressed the State's evidence as a discovery sanction. However, the State cited numerous cases in its opening brief where our appellate courts have upheld the principle that suppression is not an appropriate remedy for discovery violations.

More to the point, in a case such as this one where the suppression order resulted in dismissal, the courts have reversed decisions dismissing cases for prosecutorial discovery violations. The following excerpt from *Sherman* provides a sampling:

When they deem it necessary, Washington appellate courts have not hesitated in overturning a trial court's dismissal of charges. *See, e.g., State v. Getty*, 55 Wn.App. 152, 777 P.2d 1 (1989) (dismissal of juvenile action reversed because even if government did commit misconduct, defendant suffered no

prejudice); *State v. Coleman*, 54 Wn.App. 742, 775 P.2d 986, *review denied*, 113 Wn.2d 1017 (1989) (dismissal overturned because State's dilatory actions produced no demonstrable prejudice to defendant); *State v. Clark*, 53 Wn.App. 120, 124-25, 765 P.2d 916 (1988), *review denied*, 112 Wn.2d 1018 (1989) (trial court's dismissal of charges inappropriate when sex abuse victim refused to give any statements to the defense in pretrial interviews, and the State had not interfered in the interviews in any way).

Sherman, 59 Wn.App. at 767-768.

IV. CONCLUSION

The trial judge abused his discretion by effectively terminating a prosecution when more effective remedies were available to address a discovery lapse that did not actually prejudice the defendant in any way. The decision was at odds with the truth-seeking function of a trial. The decision should be reversed.

Respectfully submitted, February 19, 2010.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LEROY E. OLSEN, III,

Defendant/Appellant.

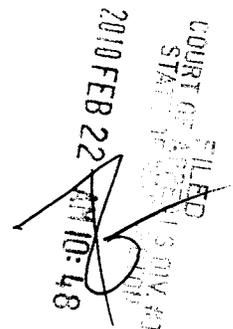
NO. 64073-9-I

DECLARATION OF SERVICE

I, PATTI I. SWITZER, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

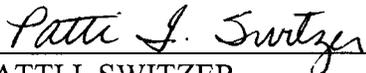
That on the 19th day of February, 2010, a copy of Appellant's Reply Brief, the February 19, 2010 letter to the Clerk of the Court of Appeals, and Declaration of Service were served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

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Signed in Coupeville, Washington, this 19th day of February,
2010.



PATTI I. SWITZER