

FILED
Court of Appeals
Division II
State of Washington
5/2/2019 2:20 PM
NO. 52063-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FERNANDO ANDRES CELAYA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh, Judge

No. 17-1-02378-9

Brief of Respondent

MARY E. ROBNETT
Prosecuting Attorney

By
KRISTIE BARHAM
Deputy Prosecuting Attorney
WSB # 32764

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Were the defendant's time for trial or speedy trial rights violated where the trial delays were brought by the defendant, or granted for good cause, and the defendant cannot establish the delays prejudiced him?..... 1

 2. Did the trial court abuse its discretion when it allowed the State to amend charges far in advance from the time for trial deadline, granted the defendant a continuance to prepare, and the continuance did not violate the defendant's time for trial timeline? 1

B. STATEMENT OF THE CASE..... 1

 1. PROCEDURE..... 1

 2. FACTS 7

C. ARGUMENT..... 10

 1. THERE WAS NO TIME FOR TRIAL OR SPEEDY TRIAL VIOLATION BELOW WHERE THE TRIAL DELAYS WERE BROUGHT BY THE DEFENDANT, OR FOR GOOD CAUSE, AND NONE OF THE DELAYS PREJUDICED DEFENDANT'S CASE..... 10

 2. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND CHARGES BEFORE TRIAL WHERE THE AMENDMENT DID NOT VIOLATE DEFENDANT'S RIGHTS..... 21

D. CONCLUSION..... 30

Table of Authorities

State Cases

<i>State v. Carson</i> , 128 Wn.2d 805, 814-15, 912 P.2d 1016 (1996)	12, 14
<i>State v. Chanthabouly</i> , 164 Wn. App. 104, 129, 262 P.3d 144 (2011) ...	29
<i>State v. Downing</i> , 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).....	11
<i>State v. Emery</i> , 161 Wn. App. 172, 201, 253 P.3d 413 (2011)	25
<i>State v. Gutierrez</i> , 92 Wn. App. 343, 961 P.2d 974 (1998)	21
<i>State v. Heredia-Juarez</i> , 119 Wn. App. 150, 153, 79 P.3d 987 (2003) ...	11
<i>State v. Iniquez</i> , 167 Wn.2d 273, 282, 217 P.3d 768 (2009)	10, 11, 15
<i>State v. Michielli</i> , 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997).....	24, 25, 26
<i>State v. Mohamed</i> , 187 Wn. App. 630, 649-50, 350 P.3d 671 (2015).....	22
<i>State v. Nguyen</i> , 68 Wn. App. 906, 914-15, 847 P.2d 936 (1993).....	12, 13
<i>State v. Ollivier</i> , 178 Wn.2d 813, 826, 312 P.3d 1 (2013).....	15, 16, 17, 18, 19, 20
<i>State v. Ralph Vernon G.</i> , 90 Wn. App. 16, 21, 950 P.2d 971 (1998).....	29
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)	24
<i>State v. Sherman</i> , 59 Wn. App. 763, 766, 801 P.2d 274 (1990).....	25, 26
<i>State v. Terrovona</i> , 105 Wn.2d 632, 651, 716 P.2d 295 (1986).....	11
<i>State v. Torres</i> , 11 Wn. App. 323, 331, 44 P.3d 903 (2002).....	11-12

Federal and Other Jurisdiction

Barker v. Wingo, 407 U.S. 514, 530-31, 92 S. Ct. 2182,
33 L. Ed 2d 101 (1972)..... 15, 16

United States v. Doggett, 505 U.S. 647, 656, 112 S. Ct. 2686,
120 L. Ed. 2d. 520 (1992)..... 10, 16

United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S. Ct. 2257,
165 L.Ed.2d 409 (2006)..... 10

Rules and Regulations

CrR 2.1(d) 21, 25

CrR 3.3 10, 12, 13, 14

CrR 3.3(b)(1)(i)..... 11

CrR 3.3(b)(5)..... 15

CrR 3.3(c) 11

CrR 3.3(e) 15

CrR 3.3(e)(a)..... 11

CrR 3.3(f)(1)-(2) 11

CrR 3.5 2, 12, 14

CrR 8.3 22, 23, 24

CrR 8.3(b) 21, 22, 24

RAP 2.5(a) 22, 23

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were the defendant's time for trial or speedy trial rights violated where the trial delays were brought by the defendant, or granted for good cause, and the defendant cannot establish the delays prejudiced him?
2. Did the trial court abuse its discretion when it allowed the State to amend charges far in advance from the time for trial deadline, granted the defendant a continuance to prepare, and the continuance did not violate the defendant's time for trial timeline?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On June 21, 2017, the State charged Fernando Celaya (the "defendant") with one count of assault in the second – domestic violence and one count of felony harassment – domestic violence. CP 3-4. Trial was set for August 8, 2017. CP 441. The parties jointly requested trial continuances on July 18, 2017 and September 19, 2017. CP 7, 12. On November 13, 2017, the defendant requested a trial continuance to issue

discovery to the State, and the court rescheduled trial for December 12, 2017. CP 24.

On December 1, 2017, the State sought a continuance due to the unavailability of two officers on the trial dates, and for the CrR 3.5 hearing that was scheduled for the first day of trial. CP 15-17, 27. One officer was in training and the other officer was out of state. CP 27. The defendant objected to the continuance. CP 27. The court granted the continuance and rescheduled trial for January 17, 2018. CP 27.

Approximately two weeks before the January trial, the State requested a continuance based on the unavailability of two different officers. CP 33. The defendant objected. CP 33. The court granted a one-week continuance and rescheduled the trial for January 24, 2018. CP 33. Both parties declared ready at a trial readiness hearing earlier on that same day, and the State notified the defendant it would add one count of assault in the fourth degree – domestic violence on the day of trial. CP 28-30.

On January 24, 2018, the State requested a continuance because the prosecutor was in another trial. CP 35. The defendant objected. CP 35. Trial was briefly extended until February 8, 2018. CP 35. On January 30, 2018, the State notified the defendant via email and amended information that it would be adding one count of violation of a no contact order – domestic violence, and one count of tampering with a witness – domestic violence.

02/08/18 RP 4, 7-8, 11. On the day of trial, the defendant's counsel claimed that he did not receive notice of the amended charges until February 4th because he was out of the office for personal reasons. 02/08/18 RP 7-8. He objected to the amended charges because he felt he had to prepare a defense on the eve of trial. 02/08/18 RP 8. The State explained that it needed to contact a material witness before adding the charges, stating:

The State is not in charge when [sic] the defendant commits new crimes. That is the defendant that makes that decision. The defendant chose to call both Kaleena Jeffries on the 28th of June and then Mr. Pace on the 22nd. The reason why the State couldn't add charges before is we didn't know whether or not we could secure the cooperation of Mr. Pace, and that is an essential element of the Witness Tampering to know whether or not it was actually conveyed to Ms. Jeffries. I wasn't able to get that confirmation until I got a report from Detective Reda that is dated January 29, 2018. It was reviewed on January 30, 2018, which was the day it was provided to me.

02/08/18 RP 11. The State also explained that the defendant had not demonstrated prejudice. 02/08/18 RP 12-13. The State offered a motion to continue so that counsel could better prepare. 02/08/18 RP 13. The court eventually asked why the State had not added these charges earlier, since the calls occurred in June. 02/08/18 RP 22-23. The State responded, "[...] I'm not going to be able to prove that witness tampering without Brian [sic] Pace and without – because he is the one that conveys the message from that call to the alleged victim." 02/08/18 RP 23. The court asked, "What

about Ms. Jeffries? There is a conversation with her too, isn't there? You are saying that doesn't arise to witness tampering, that statement?" *Id.* The State responded,

It could have, but not enough that I wanted to press charges on it. With Mr. Pace's statements, he is the one where he says, go talk to her. And then proceeds to later say if she doesn't – so this is the one that actually has the threat. If she doesn't go to talk to the prosecutor's office, then kick her out of the house.

02/08/18 RP 23. The State then explained the months-long history of attempts to contact Pace. 02/08/18 RP 24-25. Mr. Pace did not get in contact with the State until January 30th, after the State sent a detective to his house. 02/08/18 RP 25. The State only then knew Pace would cooperate. 02/08/18 RP 26.

After hearing further argument from the defense passively alleging prosecutorial mismanagement, the court found that the State waited until it had a good-faith basis to bring the additional charges, stating:

I appreciate [the prosecutor] making the record with respect to the attempts to contact Mr. Pace and why contacting him, I guess, matters. While it may well have been better had a detective contacted Mr. Pace in September or October, the fact is that didn't happen. Apparently, that's what it took to get Mr. Pace to pay attention to what the State was trying to accomplish.

I say all of that because, in the absence of that information, I'm not sure what I'm about to say, which is I don't think that the State mismanaged the case. I understand why they felt like they couldn't – they didn't have a good-faith basis

to proceed on witness tampering charges. I don't know that I can say that about the violation of the no-contact order. Just the phone call on June 22nd was probably sufficient to violate the no-contact order.

02/08/18 RP 29-30. The State clarified that defendant's phone call to Jeffries was before the no-contact order was issued. 02/08/18 RP 30. The court found that there was no prosecutorial mismanagement of the case. 02/08/18 RP 32-33. Additionally, in ruling on the admissibility of the additional charges, the court noted that even if the court did not allow the amended information, the underlying conduct was still substantive evidence of the charges in the original Information. 02/08/18 RP 33. The court allowed the State to amend the charges and granted the defendant's request for a continuance. 02/08/18 RP 35, 38; CP 63. Trial was rescheduled for February 27, 2018. CP 63.

On February 27, 2018, the defendant sought a continuance due to defense counsel's vacations. 02/27/18 RP 3; CP 66. The new trial date was March 19, 2018, at defendant's request. 02/27/18 RP 5; CP 66. On March 19, 2018, no courtrooms were available. 03/19/18 RP 2, 10-11. No courtrooms were available on March 20th or 21st, either. CP 71-72, 75. Due to defense counsel's second vacation, trial was set out to April 12, 2018. CP 75. In deciding the rescheduled trial date, the trial court explained that it had courtrooms available between that March day and April, but due to the

attorney's schedules, the trial would have to have recessed in the middle of trial. 03/21/18 RP 25. The defendant requested the April 12th trial date and agreed that time for trial would not "tick down." 03/21/18 RP 26.

The State sought a continuance on April 4, 2018, due to witness unavailability. CP 81. The defendant did not object. 04/04/18 RP 34. Trial was reset for April 17, 2018. CP 81.

At trial, the State presented evidence from seven witnesses, including Jeffries, Pace, and several officers. 04/19/18 RP 64, 102; 04/23/18 RP 73, 133; 04/24/18 RP 37, 71, 124. The defendant did not present any evidence or testify in his defense. The jury found the defendant not guilty of assault in the second degree and it was unable to reach a unanimous verdict on a lesser included assault in the fourth degree. CP 333, 334, 340, 341. The jury found the defendant guilty of felony harassment, assault in the fourth degree, violation of a no-contact order, and tampering with a witness. CP 335, 337-339. The jury also returned special verdicts finding that the defendant and Ms. Jeffries were members of the same household. CP 334, 337-339.

At sentencing, the court faced the issue that the witness tampering charge may go unpunished if the defendant was sentenced to concurrent sentences. 06/19/18 RP 19. Agreeing with the State's argument, the court imposed a total of an 84-month sentence: 24 months for the witness

tampering conviction and 60 months for the remaining convictions. 06/19/18 RP 29-30. The court imposed 364 days to run concurrent for the defendant's misdemeanor convictions. 06/19/18 RP 30. The defendant filed a timely notice of appeal. CP 410.

2. FACTS

The defendant and victim Kaleena Jeffries dated for almost two years. 04/19/18 RP 103. At the time of the incident, they lived with Brien Pace. 04/19/18 RP 103, 106. On June 19, 2018, Ms. Jeffries was in her and the defendant's room at Pace's house doing her makeup. 04/19/18 RP 106. The defendant was sleeping. *Id.* When the defendant woke up, he began arguing with Jeffries, accusing her of being unfaithful. 04/19/18 RP 107. The two began arguing. *Id.*

During the argument, Ms. Jeffries called the defendant names. 04/19/18 RP 108. The defendant grabbed Ms. Jeffries foot and bit her. *Id.* He pulled her off the bed and kept biting her foot and ankle. *Id.* Ms. Jeffries kicked the defendant trying to defend herself. *Id.* She tried to leave, but the defendant blocked the door and pulled her around by the hair. *Id.*

The defendant continued to hit Jeffries, and then tell her, "Why do you do this? Why are you doing this? Why do you treat me the way you treat me, and you say those things and you make me hit you?" 04/19/18 RP

109. This argument lasted off and on all day and into the next. 04/19/18 RP 108, 112.

The next day, Jeffries woke the defendant up and the argument about faithfulness continued. 04/19/18 RP 112, 113. The defendant lunged at Ms. Jeffries, grabbed her by the hair, and threw her to the ground. 04/19/18 RP 113-114. The defendant would not let Jeffries leave until he did. 04/19/18 RP 114. When she returned home, the defendant was asleep. 04/19/18 RP 118. Ms. Jeffries grabbed her packed bags and attempted to leave, but the defendant woke up. 04/19/18 RP 118-19.

The defendant immediately accused Ms. Jeffries of leaving him for someone else. 04/19/18 RP 119. He grabbed her by the throat and hair and told her he would kill her if she left him for someone else. *Id.* The defendant threw Ms. Jeffries on the ground and got on top of her as he started squeezing her throat so hard she could not breathe. *Id.* He said, "You're going to die, bitch." *Id.* Ms. Jeffries was afraid he would kill her. *Id.*

During the struggle, the defendant threw Ms. Jeffries in the closet and landed on top of her. 04/19/18 RP 122. She "freaked out" and began biting and scratching the defendant, trying to get him off of her. *Id.* He put his hand over her mouth and nose, cutting off her ability to breathe. 04/19/18 RP 122-23. He looked in her eyes and said, "Die, bitch." 04/19/18 RP 123. When Ms. Jeffries tried to defend herself with a machete she found in the

closet, the defendant took it from her. 04/19/18 RP 123-4. The defendant eventually threw a sandwich at Ms. Jeffries, hitting her in the face. 04/19/18 RP 125. After Jeffries grabbed her phone and toiletries to take a shower, the defendant told her if she was going to call the cops, he would give her a reason to. *Id.* Ms. Jeffries convinced the defendant to let her shower and called the police. *Id.*

When the police arrived, the defendant was jogging away from the house. 04/24/18 RP 79-80. An officer directed the defendant to get on the ground. 04/24/18 RP 81. Another officer contacted Ms. Jeffries in the bathroom. 04/23/18 RP 76-77. She was upset, crying, and shaking. 04/23/18 RP 78. The police photographed the injuries to both the defendant and Jeffries. 04/23/18 RP 85; 04/24/18 RP 45. The defendant had “irregularities” around his eye, neck, lip, and arm. 04/24/18 RP 45-46. Ms. Jeffries had “irregularities” on her shins, hand, thigh, knee, foot, calf, forehead, chest, and neck. 04/24/18 RP 48-56. The defendant was transported to the jail. 04/23/18 RP 121.

On June 21, 2017, the court entered a no-contact order prohibiting the defendant from contacting Jeffries. 04/24/18 RP 74-5. The order prohibited third-party contact. 04/24/18 RP 75. Prior to the court entering the no contact order, the defendant called Ms. Jeffries from the jail. 04/24/18 RP 17; CP 437-440, Exh. 14A. After the order was entered, the defendant

made 197 incomplete calls to Ms. Jeffries phone number between June and July. 04/24/18 RP 145-6. Also after the order was entered, the defendant called Brien Pace. 04/23/18 RP 157. The defendant told Pace that if Ms. Jeffries didn't drop the charges, Pace should tell her to "get the fuck out." 04/24/18 RP 101-2; CP 437-440, Exh. 14B. Pace told Ms. Jeffries that the defendant wanted her to drop the charges. 04/24/18 RP 121-22.

C. ARGUMENT.

1. THERE WAS NO TIME FOR TRIAL OR SPEEDY TRIAL VIOLATION BELOW WHERE THE TRIAL DELAYS WERE BROUGHT BY THE DEFENDANT, OR FOR GOOD CAUSE, AND NONE OF THE DELAYS PREJUDICED DEFENDANT'S CASE.

Some pretrial delay is often inevitable. *State v. Iniquez*, 167 Wn.2d 273, 282, 217 P.3d 768 (2009) (citing *United States v. Doggett*, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d. 520 (1992)). Trial courts require wide latitude to manage the demands of their calendars, even when that management impacts a defendant's constitutional rights. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2257, 165 L.Ed.2d 409 (2006).

CrR 3.3 requires that jailed defendants be tried in 60 days unless one of several events occurs, such as a continuance granted based on agreement, unforeseeable consequences, or a continuance advances the administration

of justice in a way that does not prejudice the defendant. CrR 3.3(b)(1)(i), (c), (e)(a), (f)(1)-(2). The decision to grant a continuance will not be reversed absent a manifest abuse of discretion, which only occurs when a court relies on untenable grounds or reasons. *State v. Heredia-Juarez*, 119 Wn. App. 150, 153, 79 P.3d 987 (2003). The statutes and rules governing the time for trial merely provide “a framework” and “are not themselves a guaranty of constitutional rights.” *Iniguez*, 167 Wn.2d at 287 (emphasis in original); see *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986) (criminal trial within 60 days is not a constitutional mandate). Pretrial delay alleged to impinge upon a defendant’s constitutional right to a speedy trial receives de novo review. *Iniguez*, 167 Wn.2d at 281.

- a. The court did not abuse its discretion in granting the December or January continuances and the defendant’s time for trial was not violated.

The decision to grant a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The proper administration of justice may be served in many ways. Allowing personnel essential to the justice system periodic reprieve from their duties is one of them: a vacation reasonably scheduled by defense counsel, a presiding judge, a police witness or a prosecutor is recognized to be a valid basis for continuing a criminal defendant’s trial. *State v. Torres*,

11 Wn. App. 323, 331, 44 P.3d 903 (2002). Aside from vacations, other unavailability of a material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available in a reasonable time, and there is no substantial prejudice to the defendant. *State v. Nguyen*, 68 Wn. App. 906, 914-15, 847 P.2d 936 (1993).

Additionally, CrR 3.3's term "administration of justice" is not limited to the administration of justice in just one case. When a prosecutor, defendant's counsel, or the assigned judge is unavailable because of involvement in another trial, a continuance of the defendant's case may be granted unless it would prejudice the presentation of his defense. *State v. Carson*, 128 Wn.2d 805, 814-15, 912 P.2d 1016 (1996).

Here, a detailed view of the continuances in this case will provide the necessary clarity that the defendant's time for trial was not violated.

The defendant requested his first continuance on July 18, 2017. CP 7. He requested his second continuance on September 19, 2017. CP 12. On this same day, the parties entered an omnibus order, where the need for a CrR 3.5 hearing was indicated. CP 15-17. The CrR 3.5 hearing was scheduled for the first day of trial. *Id.*

Defendant requested his third continuance on November 13, 2017. CP 24. After his third continuance, the defendant's time for trial was set to expire on January 11, 2018. *Id.*

The State requested three continuances that the defendant objected to. The first of these continuances was on December 1st because two material police witnesses were unavailable on the then-scheduled trial dates, and the prosecutor was going to be unavailable shortly thereafter due to vacation. CP 27. Material witness unavailability and counsel's reasonable vacations are valid grounds for continuing a criminal trial. *Nguyen*, 68 Wn. App. at 914-15. As such, the trial court did not abuse its discretion in granting this continuance for the administration of justice and extending the time for trial expiration date under CrR 3.3.

The State requested the second challenged continuance on January 5th because a material police witness was going to be out of state for training during trial. CP 33. Similar to the earlier continuance, the trial court did not abuse its discretion in granting a brief continuance to allow for this material state witness to become available.

The State requested the final challenged continuance on January 24th. CP 35. The prosecutor assigned to the defendant's case was assigned out on another trial, and could not go forward with trial on that day. *Id.* A prosecutor's unavailability due to being scheduled on another matter is a

valid basis to grant a continuance. *See Carson*, 128 Wn.2d at 814-15. The trial court did not abuse its discretion in granting this continuance.

b. The State was not disingenuous in its requests for continuances based on officer unavailability.

The defendant incorrectly claims the State's continuances were because the officers were unavailable for a CrR 3.5 hearing. Brief of Appellant, 23. Additionally, the defendant argues the continuances were improperly sought based on needing the officers for a CrR 3.5 hearing when the State never intended to use the defendant's statements against him. Brief of Appellant, 3. First, the defendant requested the CrR 3.5 hearing. *See* CP 15-17, 40-45. He never subsequently waived this request. Second, a review of the orders shows that the officers were unavailable on the set trial dates as well as the CrR 3.5 hearing because the hearing was scheduled for the first day of trial. CP 27, 33. The defendant's argument that the State was disingenuous in its requests for continuances based on officer unavailability is misplaced. The officers were unavailable for both trial and any requested pretrial hearings. Accordingly, any argument that the State's continuances were requested in bad faith is unfounded.

The three State continuances that the defendant objected to were based on recognized, valid grounds of the administration of justice to continue a criminal trial. CrR 3.3 entertains exactly the circumstances that

the trial court faced, and the trial court did not abuse its discretion in granting the three challenged continuances. Because each continuance was properly granted, the time for trial timeline was extended under CrR 3.3(b)(5), (e). Once the parties appeared for trial within the new time for trial period, the defendant continued to make additional continuance requests. CP 63, 66.

c. The defendant's constitutional speedy trial rights were not violated.

The criminal rules set up a time for trial framework, and as argued, there was no violation of those rules. Likewise, there was no violation of the defendant's right to a speedy trial, and this Court should affirm his convictions.

Under a constitutional speedy trial right, there is no specific period of time for trial. *Iniquez*, 167 Wn.2d at 282-83. A speedy trial analysis is fact-specific and dependent upon specific circumstances of each case. *Barker v. Wingo*, 407 U.S. 514, 530-31, 92 S. Ct. 2182, 33 L. Ed 2d 101 (1972). *Barker* has set out a balancing test to determine whether a constitutional speedy trial violation has occurred. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). The four-factor nonexclusive test examines: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.*

Naturally, this analysis incorporates many of the same facts as outlined in the above argument.

- i. **If an examination has been triggered, the length of delay extended only slightly beyond the bare minimum to trigger such examination.**

The length of delay is a two-part analysis. *Id.* at 827. The first part requires an allegation that the delay was presumptively prejudicial. *Id.* The defendant has not made any such allegation.

However, if he had made that allegation, courts have held an eight-month delay to be presumptively prejudicial sufficient to trigger a *Barker* analysis. *Id.* at 828. The second part of the test requires consideration of “the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Id.* (quoting *United States v. Doggett*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d. 520 (1992)).

Here, the defendant went to trial ten months after being first charged. Under *Ollivier*, this delay may qualify as being presumptively prejudicial such to trigger a *Barker* analysis. However, the delay did not stretch significantly beyond the bare minimum. And particularly noteworthy, the first six months of delay after charging, and then the delays between February and March 19th, and then between March 21th to April 4th, were attributable to the defendant. *See* CP 24, 66; *see also* 03/21/18 RP 26 (the

defendant would prefer to continue trial to avoid risk of short recess of trial where courtrooms would be available before requested trial date). The final continuance between April 4th and April 17th was agreed upon by the parties to ensure officer availability. CP 81; 04/04/18 RP 34.

The ten-month delay in this case is far shorter than other periods of delay that Courts have not regarded as exceptionally long. *See Ollivier*, 178 Wn.2d at 828-29 (non-violative delays ranging from 21 to 58 months). Specifically, where many of the early delays are attributable to the defendant, this factor weighs against him.

ii. The defendant is responsible for most of the lengthy delays.

Courts sort neutral reasons attending the administration of justice from improper reasons for which a party can bear blame. *Id.* at 831. One end of the spectrum begins with speedy-trial right waiving agreements to a delay. Here, those continuances consist of the defendant's first three continuances, the February 8th continuance, the February 27th continuance, and the March 21st continuance. CP 7, 12, 24, 63, 66, 75.

On the other end of the spectrum are deliberate delay to frustrate the defense. *Ollivier*, at 831. The State continuances in December and January, as discussed above, were requested based on material witness and

prosecutor unavailability. These reasons are legitimate and should not be weighed heavily against the State.

The defendant then alleges the State's amendment of charges on February 8th forced him into choosing between his time for trial and the right to prepare a defense. However, the amendment and subsequent two-and-a-half-week delay did not extend the trial date beyond the defendant's time for trial deadline. CP 63, 66. Nor were these amendments in an effort to frustrate the defense. But, even if this particular delay is weighed against the State, the delay was brief, did not violate time for trial, and the defendant returned requesting more continuances for defense counsel's vacations. CP 66.

Delays due to overcrowded courts are weighed against the government. *Ollivier*, at 862. Trial was pushed back two days in March due to courtroom unavailability. CP 71, 72. The defendant requested the next continuance, pushing trial back until April, so that the trial did not run the risk of a recess in the middle for judicial conferences and defense counsel's unavailability. *See* 03/21/18 RP 22-23. Courtrooms were available before the April trial date, but the trial court granted the continuance until April 4th at the defendant's request. Because the defendant extended the delay more than necessary, the delay should be attributed to him. The final

continuance between April 4th and April 17th was due to officer unavailability and was agreed by the parties.

The only delay attributable to the State, or the trial court, amounted to approximately a two-month delay *if this* Court finds the State responsible for the February 8th continuance. Still, looking at the totality of the circumstances, this factor weighs against finding a speedy trial violation where most of the delay was agreed to or attributable to the defendant.

iii. Defendant only asserted his right once he received delays that benefitted him.

A defendant's "failure to assert his right will make it difficult for a defendant to prove he was denied a speedy trial." *Ollivier*, at 832. The defendant only began objecting to continuances after he delayed trial for six months. CP 7, 12, 24. The defendant's delay pushed the entire timeline back, which then caused conflict in the winter months with material State witness availability. Then, once State witnesses were unavailable due to the defendant's delay, the defendant started claiming his rights were violated. Further delays followed due to other scheduling conflicts and then defense accommodations for counsel's vacations. The speedy trial right should not be able to be asserted only when convenient for the defendant, and then released when the delay would advantage the defendant's case. This factor should weigh against finding a speedy trial violation.

iv. The defendant suffered no prejudice from the delays.

A defendant must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized. *Ollivier*, at 840. The presumption of prejudice is appropriately applied only where post-charge delay lasted “at least five years.” *Id.* at 842. The defendant’s case is far below that bar. Thus, prejudice cannot be presumed. The defendant must show that the delay impeded his defense or deprived him of a fair trial. *Id.* He cannot show either.

The defendant alleges prejudice only by arguing “fading witness memories.” Brief of Appellant, 33. The defendant has not and cannot show that any alleged memory deficiency was the result of the State’s continuances. And even if the defendant could demonstrate the State’s delay was the cause, he fails to show that faded witness memories prejudiced his case. The defendant presented no witnesses. Arguably, the faded memory of a State’s witness would make the State’s case less persuasive, favoring the defendant’s case. For example, the defendant argues that the victim of the case had faded memory such that her memory needed to be refreshed – by the State. Brief of Appellant, 33; 04/19/18 RP 111. The State needing to refresh Jeffries’s memory would lessen her credibility, and consequently, the strength of the State’s case.

As such, the defendant has not shown that he was prejudiced by the continuances. The trial court did not abuse its discretion in granting the State's continuances, and the continuances did not violate the defendant's speedy trial right. Accordingly, this Court should affirm the defendant's convictions.

2. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND CHARGES BEFORE TRIAL WHERE THE AMENDMENT DID NOT VIOLATE DEFENDANT'S RIGHTS.

This Court should affirm the trial court's decision to allow the State to amend the charges before trial, where the amendment did not prejudice the defendant's rights.

A trial court may permit the State to amend an Information at any time before the verdict, unless the amendment prejudices the defendant's substantial rights. CrR 2.1(d). A trial court's decision to allow amendment of information is reviewed for abuse of discretion. *State v. Gutierrez*, 92 Wn. App. 343, 961 P.2d 974 (1998). Here, the trial court properly exercised its discretion where it (1) allowed the amended charges, and (2) did not dismiss the amended charges under CrR 8.3(b).

- a. The defendant assigns error to a decision the trial court never made, and this Court should not review his argument.

Defendant argues the trial court abused its discretion in failing to dismiss charges under CrR 8.3(b). Brief of Appellant, 1. This Court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Exceptions are a manifest error affecting a constitutional right. *Id.* To raise an error for the first time on appeal, an appellant must demonstrate (1) the error is truly of constitutional magnitude, and (2) the error is manifest. *State v. Mohamed*, 187 Wn. App. 630, 649-50, 350 P.3d 671 (2015). “Manifest,” within meaning of the rule, requires a showing of actual prejudice. *Id.* The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *Id.*

Here, the defendant never presented the trial court with a CrR 8.3 motion, there was no manifest constitutional error, and this Court should not review his argument.

The parties appeared before the presiding judge on March 19, 2018, for courtroom assignment. 03/19/18 RP 2. The defense counsel stated to the court, “Though it’s not procedurally appropriate is [sic] I have not filed a declaration. The State wants to hear what our motion will be in regards to that, I’d be happy to share it [...]” 03/19/18 RP 3. Counsel continued to

explain that he was considering bringing a CrR 8.3 motion. 03/19/18 RP 3-7. The presiding judge responded by telling the defense counsel that she would not hear his motion at that time. 03/19/18 RP 7, 9.

The next day, the State again asked whether the defendant was seeking a CrR 8.3 motion because no briefing had been filed. 03/20/18 RP 14. Defense counsel stated, "I did not feel it was appropriate to put on the record at that time, but at the insistence of [the State], I would be looking at these issues; and if I felt it appropriate, I would file it appropriately with a declaration." 03/20/18 RP 14. The defendant never filed a motion or declaration.

A trial court cannot err for failing to grant a motion the defendant never brought. Further, the defendant alleges prejudice in that the amendment forced him to choose between his right to a speedy trial and the right to present a defense. As argued above, the defendant's speedy trial right was not violated, and he cannot establish prejudice. As such, the defendant failed to bring this issue properly before the trial court below, he cannot demonstrate manifest constitutional error warranting review, and this Court should not review his argument now under RAP 2.5(a).

- b. Even if this error was preserved properly, the trial court did not abuse its discretion by not dismissing charges where the defendant did not prove prejudice.

If this Court determines the defendant preserved his argument that the trial court erred by not dismissing the amended charges, his claim still fails, because the defendant did not establish prejudice with a properly filed CrR 8.3(b) motion.

Under CrR 8.3(b), a trial court may dismiss charges in the furtherance of justice, *after notice and hearing*, 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. Reviewing courts have stressed that dismissal of charges is an extraordinary remedy of last resort reserved for truly egregious cases where incurable prejudice is *proved*. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*citing State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997)).

The defendant never filed a declaration, presented evidence, or otherwise supported his oral indication that he was considering bringing a CrR 8.3 motion. A trial court may not dismiss charges under CrR 8.3(b) unless the defendant proves the above-listed prejudice by a preponderance of the evidence. *Michielli*, at 239-40. Because the defendant failed to prove prejudice by a preponderance of the evidence with a correctly offered and supported motion, the trial court did not err by not dismissing the charges.

- c. The trial court did not abuse its discretion in allowing the State to amend charges, and the amendment and subsequent continuance did not force the defendant to waive his speedy trial rights.

As stated above, the State is permitted to amend an Information at any time before the verdict. CrR 2.1(d). An exception is if the amendment prejudices the defendant's substantial rights. *Id.* A defendant bears the burden of demonstrating prejudice. *State v. Emery*, 161 Wn. App. 172, 201, 253 P.3d 413 (2011). Here, the defendant argues that the State mismanaged the case, resulting in a late amendment which caused a speedy trial violation. The defendant cannot establish prejudice by the amendment, his speedy trial right was not violated, and the trial court did not abuse its discretion.

In cases where the defendant was forced to choose between the right to prepare a defense and the right to a speedy trial, the State sought to amend charges so close to the expiration of time for trial, that the prejudice was apparent. *See State v. Sherman*, 59 Wn. App. 763, 766, 801 P.2d 274 (1990) (time for trial period expired on day of motion to dismiss after an amended Information was entered 8 days after trial was supposed to begin), *see also, Michielli*, at 244-45 (new charges added three days before trial would require continuance beyond time for trial expiration).

Here, as argued above, the defendant's time for trial period was extended properly under the court rules following continuances from both parties. Before the amendment, time for trial expired on March 10th. CP 35. On January 30th, the State sent defense counsel notice via email that it was amending charges to include one count of witness tampering and one count of a no-contact order violation. Defense counsel alleges he did not receive that email until February 4th, four days before trial because he was out of the office for personal reasons. The State cannot be attributed blame for defense counsel's schedule that was unknown to the State. The defendant was given notice ten days before trial was to begin, and over a month before time for trial expired, that the State would be adding charges. Accordingly, the defendant had notice of the amendments far in advance from the time for trial deadline, unlike the defendants in *Sherman* or *Michielli*. The two and a half week continuance granted on his behalf so that his counsel could better prepare to defend the new charges did not force the defendant to waive the time for trial. The trial court set the new trial date before the expiration of the March 10th date, so even if the continuance granted was excluded from the time for trial countdown, there was still no violation. The trial court did not abuse its discretion in allowing the amendment with plenty of time before the time for trial expiration, and where it cured any

potential prejudice by granting the defendant a continuance to prepare within his previously set timeline.

i. There was no government misconduct in bringing the amended charges.

The defendant argues governmental misconduct required him to waive his speedy trial rights. As argued above, the defendant did not waive his time for trial timeline, or his speedy trial rights, by getting a two and a half week continuance on February 8th. The defendant has not alleged the amendment prejudiced any other substantial right.

The defendant claims the State had “no valid explanation for the delay in amending the charges.” Brief of Appellant, 25. The defendant’s characterization of events is misleading. The State waited to add charges until it interviewed Brien Pace, a witness material to proving the no-contact order violation and witness tampering. The calls that violated the no-contact order were from the defendant to Pace. Similarly, the witness tampering charge was predicated on a call from the defendant to Pace, where the defendant asked Pace to threaten the victim if she did not go to the prosecutor’s office and “drop the charges.”

While the State knew of these calls earlier in the case’s history, the State had been unable to get Pace to cooperate in the investigation until January 30th when a detective went to Pace’s home, despite the State

consistently attempting to contact Pace for months. Then, after interviewing Pace, the State felt it then had the information and material witness to support adding the new charges, and the State immediately filed notice to the defendant that it intended to do so.

The defendant argues that Pace was not a “necessary” witness, and the State used his testimony as a scapegoat for the amendment timing. Brief of Appellant, 32. While the jail custodian may have been able to lay the foundation for the jail calls to be introduced into evidence, Pace was certainly the best witness to support the charges, provide context for the jury, and corroborate the otherwise out-of-context jail phone calls between the defendant and Pace. Additionally, the State wanted to interview Pace to gather more information before bringing additional charges against the defendant, instead of bringing new charges solely based on jail phone calls.

It was proper for the State to wait to add the charges until it believed there was a sufficient basis to file the charges and prove them at trial. To rule otherwise would be contrary to public policy, as it would send the message that the State *must* bring charges as soon as it becomes aware of the underlying potentially criminal conduct, with no corroboration, regardless of whether it has the best evidence to prove the charges. Allowing the State the latitude to bring charges once it has the proper witnesses and

evidence, but before it infringes on a defendant's constitutional rights, serves the public's and the criminal justice system's best interests.

All of this information was presented to the trial court. The defendant has not assigned error to the trial court's oral ruling that the State waited to proceed on the additional charges until it had a good-faith basis to do so. That ruling becomes a verity on appeal. *State v. Chanthabouly*, 164 Wn. App. 104, 129, 262 P.3d 144 (2011) (Unchallenged oral rulings are verities on appeal). Thus, the trial court did not abuse its discretion in allowing the State to amend charges because the defendant did not demonstrate prejudice to his rights. Any prejudice that may have resulted from the amendment was cured by the continuance that allowed his counsel to prepare to defend the new charges.

The defendant incorrectly alleges he was forced into a "Hobson's choice" between his speedy trial right and his right to prepare a defense. Even if it is assumed that the State waited, without excuse, to amend in order to compel the defendant to seek a continuance, the continuance period is simply excluded from the time for trial calculation under the court rules. *See State v. Ralph Vernon G.*, 90 Wn. App. 16, 21, 950 P.2d 971 (1998). Even if this Court finds the period should be excluded from the calculation, the new trial date of February 28th did not surpass the March 10th time for trial deadline that was set prior to the amendment. The amendment did not

violate defendant's rights. The trial court did not abuse its discretion in allowing the State to amend charges weeks before the time for trial deadline, granting a continuance to allow the defendant to prepare, and setting the new trial date within the time for trial period.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this Court affirm the defendant's convictions.

DATED: May 2, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Angela Salyer
Appellate Intern

KRISTIE BARHAM
Deputy Prosecuting Attorney
WSB # 32764

Certificate of Service:
The undersigned certifies that on this day she delivered by ^{efile} US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/2/19
Date

Johnson
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 02, 2019 - 2:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52063-0
Appellate Court Case Title: State of Washington, Respondent v. Fernando A. Celaya, Appellant
Superior Court Case Number: 17-1-02378-9

The following documents have been uploaded:

- 520630_Briefs_20190502141947D2903081_6157.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Celaya Response Brief.pdf

A copy of the uploaded files will be sent to:

- harry@harrywilliamsllaw.com
- harrywilliams4@gmail.com
- jcummings@gth-law.com

Comments:

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

Filing on Behalf of: Kristie Barham - Email: kristie.barham@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7875

Note: The Filing Id is 20190502141947D2903081