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No. 52947-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TOMMY COOK, SR.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF REPLY 1

B. ARGUMENT IN REPLY 1

 1. The trial court abused its discretion by continuing the case beyond the time for trial in the absence of good cause given the prosecutor’s failure to establish due diligence in obtaining the witness 1

 2. The trial court abused its discretion by qualifying Detective Grall as an expert and allowing him to opine on Mr. Cook Sr.’s criminal intent 6

 3. Improper argument by the prosecutor in closing deprived appellant of a fair trial10

C. CONCLUSION.....12

TABLE OF AUTHORITIES

Washington Supreme Court

<u>State v. Adamski</u> , 111 Wn.2d 574, 761 P.2d 621 (1988)	4
<u>State v. Anderson</u> , 121 Wn.2d 852, 855 P.2d 671 (1993)	3
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	9
<u>State v. Duggins</u> , 121 Wn.2d 524, 852 P.2d 294 (1993)	4, 5
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012)	11
<u>State v. Flinn</u> , 154 Wn.2d 193, 110 P.3d 748 (2005)	2
<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009)	6
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006)	11
<u>State v. Price</u> , 94 Wn.2d 810, 620 P.2d 994 (1980)	5
<u>State v. Striker</u> , 87 Wn.2d 870, 57 P.2d 847 (1976)	3
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011)	11
<u>State v. Williams</u> , 87 Wn.2d 916, 557 P.2d 1311 (1976)	3

Rules

CrR 3.3	1, 2, 5, 6
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Washington Court of Appeals

<u>State v. Anderson</u> , 153 Wn.App. 417, 220 P.3d 1273 (2009)	11
<u>State v. Campbell</u> , 78 Wn.App. 813, 901 P.2d 1050 (1995)	7
<u>State v. Castaneda-Perez</u> , 61 Wn.App. 354, 810 P.2d 74 (1991)	10
<u>State v. Fleming</u> , 83 Wn.App. 209, 921 P.2d 1076 (1996)	10
<u>State v. Henderson</u> , 26 Wn.App. 187, 611 P.2d 1365 (1980)	4

<u>State v. McPherson</u> , 111 Wn.App. 747, 761, 46 P.3d 284 (2002).....	7
<u>State v. Nguyen</u> , 68 Wn.App. 906, 847 P.2d 936, review denied, 122 Wn.2d 1008 (1993).....	5, 6
<u>State v. Roman</u> , 94 Wn.App. 211, 972 P.2d 511 (1999).....	5
<u>State v. Saunders</u> , 120 Wn.App. 800, 86 P.3d 232 (2004)	9
<u>State v. Saunders</u> , 153 Wn.App. 209, 220 P.3d 1238 (2009)	3, 6

United States Courts of Appeal

<u>United State v. York</u> , 572 F.3d 415 (7 th Cir. 2009).....	9
<u>United States v. Foster</u> , 939 F.2d 445 (7 th Cir. 1991).....	8
<u>United States v. Mejia</u> , 545 F.3d 179 (2 nd Cir. 2008).....	7
<u>United States v. Upton</u> , 512 F.3d 394 (7 th Cir. 2008).....	9

A. SUMMARY OF REPLY

Mr. Cook Sr.'s trial was continued past the time dictated by CrR 3.3 in the absence of good cause or due diligence on the part of the prosecutor. Mr. Cook Sr.'s right to a fair trial was further compromised by the admission of improper expert opinion that touched on the ultimate question for the jury. Finally, the prosecutor's argument in closing had the effect of eroding the constitutional burden of proof. Reversal is required.

B. ARGUMENT IN REPLY

1. The trial court abused its discretion by continuing the case beyond the time for trial in the absence of good cause given the prosecutor's failure to establish due diligence in obtaining the witness

Mr. Cook's objection to the continuance was summarized by defense counsel:

There's not been a sufficient showing, number one, that the state made due diligence to try to find this witness within a reasonable period of time. There's no showing that the state contacted the defense as soon as they found out that Ms. Matthews was not available. There's nothing before the court to show when the attempt was made to first serve Ms. Matthews with a subpoena. So, I mean, all of these things are missing from the record to support a continuance on behalf of the state that would then result in a trial setting beyond my client's speedy trial rights.

RP 81-82. In the face of this specific objection, Judge Rohrer's conclusion that "there's adequate cause to continue it, good cause," cannot be

sustained on this record. RP 86; State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009); State v. Flinn, 154 Wn.2d 193, 200-01, 110 P.3d 748 (2005).

The significance of these shortcomings was most clearly illustrated when the parties reconvened a month later and the prosecutor reported that Ms. Matthews was now in the final stages of pregnancy and her doctor recommended that she not travel. RP 96.

The State now argues that

[t]he trial court pointed out that failure to find out that Matthews was not in Forks was not the issue. RP 73. Rather, law enforcement knew she wasn't in Forks, but they didn't know where she was. RP 73.

BoR at 4. It was defense counsel, however, who asserted that law enforcement would have known she was not in Forks, but failed to act in a timely manner to locate and formally subpoena her. RP 73. In any event, it was this failure to act in light of that knowledge that was at the heart of Mr. Cook's objection. Id.

Judge Rohrer's decision was untenable, therefore, because CrR 3.3(a)(1) makes it clear, that it is 'the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.' The rule tasks the trial court with ensuring that trial occurs within the time provided by the rule and does not give the court discretion to simply

decide that “it doesn’t seem like a big deal to continue” the case beyond the dates dictated by the rule. See State v. Striker, 87 Wn.2d 870, 877, 57 P.2d 847 (1976).

The trial court’s finding that the prosecutor had not been “tardy” in identifying the need to secure the witness’s presence is untenable because the record does not support it. State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009) (continuances unsupported by valid or tenable reasons where granted to permit ongoing plea negotiations over the defendant’s objection and contrary to his desire to go to trial). The State must exercise due diligence in bringing defendants to trial, not simply waiting until trial is suddenly in the offing. This requires the prosecutor to take the procedural steps necessary in a timely fashion. State v. Anderson, 121 Wn.2d 852, 855 P.2d 671 (1993). Certainly, if “the State must exercise good faith and due diligence in ‘attempting to bring to trial defendants who are in out of state or federal jails or prisons’ when a mechanism is available to do so,” then the standards can be no less here where witnesses are out-of-state and the legal mechanisms are available to facilitate the witness’s presence. Anderson, 121 Wn.2d at 858-59; State v. Williams, 87 Wn.2d 916, 920, 557 P.2d 1311 (1976).

Henderson, upon which the State relies, illustrates the importance of diligence on the part of both the prosecutor and sheriff. State v.

Henderson, 26 Wn.App. 187, 191, 611 P.2d 1365 (1980). It is a marked contrast to the efforts in Mr. Cook's case. This is the very concern expressed by defense counsel who noted her early requests to interview the witness the State now seeks to call material. The trial court erred when it found that the witness was material given the lack of information regarding her potential testimony following the apparent absence of contact.

While continuances may be granted if the State's witness is material and presently unavailable, Mr. Cook contends the prosecution must also have exercised the due diligence that would have established this witness would not be available within a reasonable time. Granting a continuance under these circumstances was an abuse of discretion because the State failed to act with due diligence where it did not even timely contact let, alone subpoena, Ms. Matthews. See State v. Adamski, 111 Wn.2d 574, 578, 761 P.2d 621 (1988) ("due diligence requires the proper issuance of subpoenas to essential witnesses."); State v. Duggins, 121 Wn.2d 524, 525, 852 P.2d 294 (1993) ("the State cannot show due diligence, for purposes of JuCR 7.8, unless the subpoena was served by one of the methods described in CR 45(c).") The failure to take these necessary steps to ensure the proper service of process is a failure to act

with due diligence and an untenable basis for a continuance beyond the time for trial. CrR 3.3.

The State notes that Adamski and Duggins involved application of the juvenile court rule, but see State v. Nguyen, 68 Wn.App. 906, 847 P.2d 936, review denied, 122 Wn.2d 1008 (1993), holding that the rule described in Admaski requires the State to make “timely use of the legal mechanisms available to compel the witness’s presence in court” in order to obtain a continuance under CrR 3.3(h)(2). Nguyen, 68 Wn.App. at 915 (quoting Adamski, 112 Wn.2d at 579).

Similarly, State v. Roman, upon which Mr. Cook relies, stands for the proposition that the State has an overarching duty of due diligence that runs throughout the criminal process. See State v. Roman, 94 Wn.App. 211, 216, 972 P.2d 511 (1999). In the same way, where the prosecution “fails to act with due diligence [during discovery], and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process,” a defendant's right to a speedy trial or his right to be represented by adequately prepared counsel may be impermissibly prejudiced. State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). This same obligation to exercise due diligence applies to both bringing the defendant before the court and ensuring that appropriate steps have been

taken to have prosecution witnesses are present. Nguyen, 68 Wn.App. at 915.

CrR 3.3 makes the remedy for a violation very clear. “A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.” CrR 3.3(h). Where the accused’s speedy trial rights have been violated, it is the appellate court’s obligation to reverse the trial court and remand for entry of an order dismissing the charge pursuant to the rule. State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009).

The rule’s importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials.

Id., at 220; State v. Kenyon, 167 Wn.2d at 138-39; State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009). Mr. Cook Sr. requests, therefore, that this Court reverse the trial court and remand the case for dismissal.

2. The trial court abused its discretion by qualifying Detective Grall as an expert and allowing him to opine on Mr. Cook Sr.’s criminal intent.

The comparison of Detective Grall’s proffered expertise in the “drug culture” to that of police testimony regarding gang activity is simply not apt given the nature and purpose for which it was offered. While such evidence can, in appropriate circumstances, assist the trier of fact in

understanding the State's theory of the case, it was not "acceptable to substitute expert testimony for factual evidence of" the crime charged. United States v. Mejia, 545 F.3d 179, 195 (2nd Cir. 2008); Cf. State v. Campbell, 78 Wn.App. 813, 823, 901 P.2d 1050 (1995).

The "drug culture" evidence the prosecution offered here was fundamentally different because of its proffer by a primary fact witness and it is treading so directly on the ultimate question for the jury. Detective Grall certainly had considerable experience in narcotic investigations, but the testimony the prosecution offered was not relevant to explain unique terminology or practices. Cf. State v. McPherson, 111 Wn.App. 747, 761, 46 P.3d 284 (2002). It did not assist the jury in weighing the evidence or determining the truth of the charge. Instead, the prosecutor offered this "expert opinion" to counter an argument inferred in voir dire, that "a dealer is not gonna ever be a user." RP 350. But voir dire is not evidence and no such argument was before the jury. The detective's "expert opinion" testimony about use and sales, therefore, was not otherwise relevant. See RP 352-53.

Mr. Cook's case did not require expert opinion to decipher slang or code, nor provide technical insights into the manufacturing or processing of the drugs. Judge Rohrer's conclusion that the detective's testimony might be helpful in some way does not serve to identify the unique level of

expertise envisioned by ER 702 that is necessary in areas of technical or scientific expertise. RP 354. To base admissibility on such grounds is untenable and an abuse of the discretion provided under ER 702.

The prejudice from Detective Grall's improper expert testimony became manifest in the State's rebuttal. The prosecutor specifically asked "Based upon your training and experience, in your conversations with the drug users, how often do users weigh and measure out their own dose?" RP 391. When Judge Rohrer overruled the objection, Detective Grall went on to testify that "In my experience, I have not interviewed anyone that has stated that as an addict or a user ... that they use digital scales to weigh out the dosage of controlled substances that they consume." RP 393. The prosecutor emphasized the prejudice with the following question to which Detective Grall replied, "In my experience these digital scales are to weigh out quantities of controlled substances for distribution." RP 393.

The State's comparison now on appeal to United States v. Foster, is not helpful because the detective there identified a long series of unique behaviors that were consistent with drug trafficking. United States v. Foster, 939 F.2d 445, 452 (7th Cir. 1991). Detective Grall, however, opined on the ultimate fact, the criminal intent to distribute when he testified as an expert that no one uses digital scales except for distribution. RP 393.

As noted before, the prejudice inherent in this form of hybrid testimony where a fact witness then opines as an expert about the meaning or intent of the defendant because of the likelihood that the jury might "be smitten by an expert's 'aura of special reliability' and therefore give his factual testimony undue weight." United State v. York, 572 F.3d 415, 425 (7th Cir. 2009); see also United States v. Upton, 512 F.3d 394, 401 (7th Cir. 2008) For that reason, it is imperative that courts distinguish between an officer's admissible testimony about subcultural mores, symbols, and internal structure as opposed to impermissible propensity testimony extrapolated from those generalities.

Ultimately then, the expert opinion testimony regarding "drug culture" improperly invaded the province of the jury allowing the prosecution witness to testify about the veracity of the defendant's testimony regarding his intent and the significant of his admitted possession of scales and related paraphernalia. See State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Finally, admission of improper opinion testimony that invaded the sole province of the jury was constitutional error requiring reversal. State v. Saunders, 120 Wn.App. 800, 813, 86 P.3d 232 (2004) (improper admission of opinion testimony was constitutional error).

3. Improper argument by the prosecutor in closing deprived appellant of a fair trial

The prosecutor's closing argument sought to bolster the credibility of her witnesses by posing a false dichotomy to the jury that it had to decide that

Detective Pickrell was making up those two statements, he either hallucinated it because he's crazy or he made it up and that's what you need to decide when you go into the jury room, because if you believe Detective Pickrell and find him credible, the defendant is guilty. So, who's the most believable, who's the most credible.

RP 486. The State's improper argument in this otherwise close and contentious case denied Mr. Cook a fair trial by bolstering the credibility of the prosecution witnesses and creating this false choice for the jury.

The prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing that the jury must find the State's witnesses are lying in order to acquit the defendant. State v. Fleming, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996). These arguments mislead the jury by presenting a false choice, because "[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." State v. Castaneda-Perez, 61 Wn.App. 354, 363, 810 P.2d 74 (1991). It was not necessary, therefore, for the jury to find that Detective Pickrell "made it

up” or that he “hallucinated it because he’s crazy,” in order to return a not guilty verdict.

Furthermore, when State presents such argument in a rhetorical question, it puts the prosecutor in the position of improperly vouching for a witness by conveying a personal belief in the veracity of a witness and effectively arguing that evidence not presented at trial supports the witness’s testimony. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). The prejudice from this occurs when it is clear and unmistakable that counsel is not arguing an inference from the evidence. State v. Anderson, 153 Wn.App17, 428, 220 P.3d 1273 (2009); State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006).

Here the prosecutor’s improper argument was plainly inappropriate such that an instruction could only have highlighted the prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The improper argument resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” Id. at 761; Thorgerson, 172 Wn.2d at 455. In Mr. Cook’s case, the prosecutor’s argument, answering her own rhetorical question, was both improper and prejudicial to the extent that it undercut the burden of proof and the

presumption of innocence, and instead put the prosecutor's own personal stamp of sufficiency on the evidence.

C. CONCLUSION

Mr. Cook Sr.'s right to timely trial was violated by a continuance granted in the absence of either good cause or due diligence on the part of the prosecutor. Furthermore, Mr. Cook Sr.'s right to a fair trial was compromised by the detective's "expert" opinion regarding the possession and use of scales as well as the prosecutor's improper argument in closing. Finally, the cumulative effect of these errors combined to violate Mr. Cook Sr.'s right to a fair trial. Reversal is required.

DATED this 23rd day of March, 2020.

Respectfully submitted,



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