

FILED

MAY 13, 2014

Court of Appeals
Division III
State of Washington

NO. 315991-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Darin Richard Barry,

Appellant.

Appeal From The Superior Court
Of Whitman County
Case No. 12-1-00206-6
The Honorable David Frazier

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENTS OF ERROR

A. Defendant argues the trial court abused its discretion in denying defendant's motion to dismiss under CrR 8.3 and CrR 4.7, for violation(s) of the discovery rules.

B. Defendant also argues that the trial court abused its discretion in denying a motion to dismiss count 3 on the day of trial, based on the Misdemeanor Compromise statute, RCW 10.22. 020.

C. Defendant argues the trial court abused its discretion in allowing photographs of spray painted 'KKK' images to be admitted as exhibits in this case of Malicious Mischief

The State believes there was no error.

II. STATEMENT OF THE CASE

On or about August 13, 2012, Defendant damaged the property of three people in the town of LaCrosse, WA. He spray painted various items with threatening language in orange spray paint, broke a window,

and damaged two doors. He did this because defendant's own house had been burglarized and his money stolen. He thought the three people who's property he damaged had been involved in the burglary of defendant's house and he wanted to put fear into them. See CP 112-120 (report of investigators); RP 62-66 and RP 81-91 (transcript of defendant's recorded statement to investigators).

On or about August 16, 2012, Defendant confessed to two sheriff's office investigators that he committed the crimes and why he did so. That confession was recorded, although the recording was stopped early on, and then re-started after the Defendant asked the investigators a question. The Defendant was well aware that the interview was recorded and consented thereto. The confession was summarized in some detail in the officer's narrative report, as well as the fact that the interview was recorded. See CP 110 – 187 (Declaration of Counsel with attached narrative report) (especially CP 112-113 and CP 119-120); See also RP 108-110 (Court's oral findings). The narrative report was sent to defense counsel on December 5, 2012, along with a CD recording of the first part of Defendant's interview. CP 110-111.

The Sheriff's office provided the prosecutor's office with two separate CD's of Defendant's interview: one containing the first part of the interview (up to the point when the recorder was stopped at

Defendant's request so he could ask a question), and the second containing the rest of the interview (including Defendant's confession). However, that second CD was not provided to the prosecutor's office until February 14 or 15. In preparing for trial, the prosecutor's office and investigators reviewed the materials and discovered that the second part of the interview had mistakenly not been provided to the prosecutor's office. The sheriff's office investigator immediately made a copy of the second CD, delivered it to the prosecutor, and the prosecutor delivered a copy to defense counsel at the earliest opportunity after the error had been discovered, February 15th before 9:00am. See CP 110 – 111.

An issue at trial was the valuation of the damage to one of the three victims, since the charge regarding that victim alleged a damage amount over \$750 (which makes the charge a felony). That victim had suffered damage to a window, door jambs, doors, horse trailer, boat, garbage can, and tarp.

On December 5 and 7, 2012, defense counsel was sent a packet of discovery materials. It contained an estimate from Eric Heise to remove the paint on that victim's boat and trailer, along with Mr. Heise's address (in the same small town as defense counsel's office) and phone and identified Mr. Heise's business (Auto Body and Glass). The discovery

indicated an estimate of \$300 to \$400. (See CP 110-111 and 158; See also RP 108-110 – Court’s oral findings) Mr. Heise testified at trial.

Also in the December 5 and 7 discovery packet was the victim’s estimate to repair and replace other damaged items. (See CP 110-111 and 157-160, and 164). Approximately a month before trial, defense counsel informed the prosecutor that he felt the victim’s estimates were too high. A local business (Steve’s Glass) that specializes in glass and door repair and replacement was contacted by sheriff’s investigator the week of February 11th. On February 14, Sandy Trump, one of the managers of the business, provided a written estimate to repair window, door jamb, and doors. It included her business address (about a block from defense counsel’s office) and phone number. That was provided the same day to defense counsel. (See CP 110-111 and 169; see also RP 108-110) Ms. Trump testified in accordance with the estimate.

At trial, defense called their own ‘expert’ witness as to the dollar value of the damage. He testified that the damage was less than \$750 total.

III. ARGUMENT

A. The Trial Court properly exercised its discretion in denying defendant's motion to dismiss, based on a minimal violation of the discovery rules and a lack of prejudice to defendant to justify such dismissal.

Defendant seeks dismissal of all charges, based on alleged discovery violations. This brief addresses whether any of the alleged violations would warrant dismissal. Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution's actions. State v. Cannon 130 Wn.2d 313 (1996).

Alleged Discovery Violations:

1. List of Witnesses

Defendant suggests that the provision of a formal list of witnesses the day before trial was a discovery violation. However, every witness was identified in the discovery material sent to defense counsel on December 5th, months before trial; with the one exception of Sandy Trump. But the substance of Ms. Trump's testimony was identified as

soon as the State became aware of her. The trial court found this did not constitute a discovery violation. See RP 108-110. The State believes there was no violation of any discovery rule, but if there was, it was in form and not in substance, and defendant has not shown any prejudice thereby.

In addition, at the time of trial, there remained eight days in the speedy trial period. If defense counsel was actually surprised and needed more time to prepare, he could have asked for a delay without needing to waive any speedy trial right. He did not do so. This failure to seek a continuance also applies to all other alleged discovery violations.

2. Criminal convictions of State's witnesses

The State disclosed the convictions of its witnesses, with the one exception that Mr. Heise had a conviction for Negligent Driving First Degree in 2004. The only possibly useful conviction information would be the convictions of Mr. Heniken (one of the misdemeanor victims who testified) for Malicious Mischief 2 in 1998 and Assault 3 in 1999, and the convictions of Mr. Marshall (another of the misdemeanor victims who testified) in 2005 for Theft 3 and Rendering Criminal Assistance 2. That information was disclosed shortly before trial. Defense counsel was able to cross examine the witnesses regarding that, but did not do so. Neither

Mr. Heniken, nor Mr. Marshall testified to anything more than that their property had been spray-painted. They did not know who did it. Their criminal history information simply could not have played a role in the outcome of the case.

To the extent the disclosure of any criminal conviction information was late-provided, the defendant has not shown that he was prejudiced thereby.

3. The recording of Defendant's confession

The State did not provide the second disc (which contained the defendant's recorded confession) of the recorded interview until February 15, 2013. It was provided as soon as the prosecutor's office had it, but it was the error of the State to not provide it to defense counsel earlier. However, the existence of the recording, and a written summary thereof, was referenced in the narrative report provided months earlier. In addition, the Defendant himself knew the confession was recorded. Even if the recording had not been found, the two sheriff's deputies who witnessed the confession would have testified to the substance of it.

Again, the defendant has not shown how the admittedly late-provided recording prejudiced him.

The court found that the violation (of not providing the recording earlier) was not so prejudicial as to justify dismissal. See RP 108-110.

The court did not err.

B. The trial court did not err by also denying the motion to dismiss Count 3 via a Misdemeanor Compromise.

The trial court was presented with a motion to dismiss Count 3 (a charge of a gross misdemeanor Malicious Mischief) on the day of trial. The motion was based on the Misdemeanor Compromise statute: RCW 10.22.020. The court ruled the motion was too late. RP 109-110. The clerk's office had gone to the trouble of summoning a jury. Both parties had prepared for trial. The witness as to that Count 3 (the victim) had been subpoenaed. Based on all that, it was within the discretion of the trial court to deny the motion.

C. The trial court did not abuse its discretion in admitting photographs of the damage done by the defendant.

Some of the damage done by defendant included spray painting "KKK" in various spots on the victims' property. Defendant argues that the court abused its discretion in admitting one photo of each instance of "KKK". But the trial court weighed the probative value

versus the danger of unfair prejudice and came down on the side of probative value. This weighing can be seen at RP 109.

The defendant's speculation about unfair prejudice is just that: speculation. The court's ruling was not error.

IV. CONCLUSION

For all of the above reasons, this court is respectfully requested to uphold the defendant's conviction and deny his appeal.

Respectfully submitted this 13 day of May, 2014.



Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON, Plaintiff, v. DARIN BARRY, Defendant,	No. 315991 AFFIDAVIT OF DELIVERY
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STATE OF WASHINGTON)
COUNTY OF WHITMAN)

KRISTINA COOPER, being first duly sworn, deposes and says as follows: That on the 13th day of May, 2014 I caused to be delivered a full, true and correct copy(ies) of the original BRIEF OF RESPONDENT on file herein to the following named person(s) using the following indicated method:

- Will Ferguson: 409 N Main St, Colfax WA 99111

DATED this 13th day of May 2014.

Kristina Cooper

KRISTINA COOPER

SIGNED before me on the 13th day of May 2014.



Robert J. Lotz

NOTARY PUBLIC in and for the State of
Washington, residing at: *Colfax*
My Appointment Expires: *1/1/2015*