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Court of Appeals
Division III
State of Washington

NO. 345149

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN ALLEN DUNLAP

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Scott R. Sparks

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it granted a continuance past the speedy trial date to allow defense counsel time to prepare against new charges the state filed the day before trial.

2. The trial court violated the defendant's constitutional right to a speedy trial.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court violate the defendant's right to a speedy trial when it granted a continuance past his speedy trial date to allow his counsel time to prepare to defend new charges the state filed the day before trial? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

Substantive Facts

From the day they were married, Justin Allen Dunlap (Mr. Dunlap) and his wife always lived together. Mr. Dunlap made some mistakes for which he served time in jail. But, every time he was released from custody, he returned home to his wife. 5/24/16 RP 148.

Over the years, the couple had a son. The family moved around a bit, but eventually settled in an apartment in Ellensburg that was leased to Mr. Dunlap's wife. 5/24/16 RP 180. To subsidize her rent payment, Mr. Dunlap's wife received federal subsidized housing assistance. Under the federal housing assistance program, the government based her rent subsidy on how many people were in her household. 5/24/16 RP 150; 5/24/16 RP 195.

Mr. Dunlap's wife did not include him as part of her household. He was in and out of jail. He was also an ex-felon, which, generally meant under federal law, he was

not allowed to live with her in subsidized housing. 5/24/16 RP 148; 5/24/16 RP 196. The landlord could have made an exception for Mr. Dunlap, had his wife appealed the decision. 5/24/16 RP 197. To do that, however, would have probably proved difficult. Mr. Dunlap was under a protection order that prohibited him from contacting his wife. 5/25/16 RP 249. In spite of the protection order and the landlord's complaints about Mr. Dunlap living at the apartment, he kept his all personal belongings there and he even had a key. 5/24/16 RP 182; 5/25/16 RP 243.

The situation which brought this case against Mr. Dunlap came about when he left Ellensburg to attend to outstanding court matters in another town. 5/25/16 RP 229; 5/25/16 RP 242. He settled his legal affairs and hitchhiked back home to Ellensburg. He arrived at the apartment and used his key to open the door. When the door would not open, he pushed and a butter knife flew out. 5/25/16 RP 229.

Mr. Dunlap did not pay much attention to the butter knife. He and his wife often secured the door with a butter knife, so their young son could not open it. 5/24/16 RP 167; 5/24/16 RP 229. He went inside the apartment and made his way down the hall to their bedroom. He stopped at the bedroom doorway when he noticed a man. The man's penis exposed and he was standing over Mr. Dunlap's wife and child, who were asleep in bed. 5/24/16 RP 175; 5/25/16 RP 231. Mr. Dunlap switched to protection mode. He grabbed the first thing he saw, a crow bar, from a nearby closet. 5/25/16 RP 231. His wife awoke, jumped out of bed, and pushed him back in the hallway. 5/25/16 RP 234.

As his wife pushed him back, the man charged towards Mr. Dunlap. In an effort to ward the man off, Mr. Dunlap hit the man with the crow bar. 5/24/16 RP 111. Somehow, the crow bar was dislodged from Mr. Dunlap's hand and the two men

scuffled. The men scuffled from the hallway to the living room. During the scuffle, a hallway picture frame was broken. 5/24/16 RP 114; 5/25/16 RP 237-40.

The man eventually overpowered Mr. Dunlap. He picked Mr. Dunlap up, and slammed him down. Then the man got on Mr. Dunlap's back and applied a rear-naked chokehold until Mr. Dunlap lost consciousness. 5/25/16 RP 235-236; 5/25/16 RP 238. All the while, Mr. Dunlap's son was asleep in bed. Mr. Dunlap's wife managed to pull the man off Mr. Dunlap and ordered the man to leave. 5/25/16 RP 238-39; 5/24/16 RP 115. The man went downstairs and called police. 5/24/16 RP 115.

By the time police arrived at the apartment, Mr. Dunlap was gone. Police later determined the man was a friend of Mr. Dunlap's wife. They worked together at a local restaurant and were engaged in a sexual relationship. 5/24/16 RP 102-103; 5/24/16 RP 163-164; 5/25/16 RP 222-223. The man told police Mr. Dunlap hit him with a crow bar and pushed his wife to the wall which such force she broke a hallway picture frame. 5/24/16 RP 113.

An officer canvassed the apartment and noted the front door to the apartment would not stay closed and broken glass was in the hallway. The officer also noted a kitchen drawer had been pulled out and its contents dumped. 5/25/16 RP 222-223.

Procedural Facts

The state charged Mr. Dunlap with:

- one count first-degree burglary- domestic violence, for breaking into the apartment when his young son was asleep in a bedroom;
- one count second-degree assault, for hitting the man with the crow bar;
- one count fourth-degree assault- domestic violence, for pushing Ms. Dunlap against the wall; and,
- one count third-degree malicious mischief- domestic violence for damaging the picture in the hallway and for emptying the kitchen drawer.

CP 1; CP 7-8; CP 10-11.

Mr. Dunlap pleaded not guilty and opted for a jury trial. 3/21/16 RP 18; CP 14. Trial was set for May 17th. 5/13/16 RP 41.

The day before trial, Mr. Dunlap's attorney told the court she was ready to proceed with trial on the original charges, but she received notice the state intended to add the following charges to Mr. Dunlap's original charges that very day: one count tampering with a witness and one count violation of a protection order-domestic violence. CP 108-109; 5/16/16 RP 43.

The state alleged Mr. Dunlap called his mother-in-law on May 9th from jail and tried to get a message to his wife in an effort to influence her testimony for trial. CP 111-113; 5/24/16 RP 186. The state further alleged Mr. Dunlap violated the protection order when his wife yelled to him from the background, "I love you." CP 111-113.

Mr. Dunlap's attorney asked the court for cause to continue trial. She did not believe she could render fair and adequate representation on the new charges, unless she had more time to prepare. 5/16/16 RP 43-44. Mr. Dunlap objected to a continuance and asserted his right to a speedy trial. 5/16/16 RP 47-51. Over Mr. Dunlap's objection, the court authorized the state to amend the charges. Mr. Dunlap pleaded not guilty to those charges and the court set a new date for trial on May 24th, past Mr. Dunlap's speedy trial date. 5/16/16 RP 45; CP 114. The court never asked the state why it waited until the day before to amend the charges and the state never offered an excuse.

Trial began on May 24th. The state presented its evidence and Mr. Dunlap testified on his own behalf. 5/25/16 RP 226. The jury could not reach verdicts on the first-degree burglary- domestic violence and on the second-degree assault charges. CP

252; CP 253; CP 254; CP 256. On those charges, the court declared a mistrial. 5/25/16 RP 375. The jury found Mr. Dunlap not guilty of malicious mischief, fourth-degree assault, and witness tampering; but guilty of violation of a protection order. 5/25/16 RP 369; CP 255; CP 257; CP 259; CP 258.

The state dismissed the first-degree burglary- domestic violence and the second-degree assault charges. And the court sentenced Mr. Dunlap to 60 months incarceration, for the violation of a protection order conviction. CP 269-282. This appeal followed. CP 290.

IV. ARGUMENT

THE TRIAL COURT VIOLATED MR. DUNLAP'S RIGHT TO SPEEDY TRIAL WHEN IT FORCED HIM TO CHOOSE BETWEEN SPEEDY TRIAL RIGHTS AND EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of review

A court necessarily abuses its discretion when it denies a criminal defendant's constitutional rights. State v. Perez, 137 Wn.App. 97, 105, 151 P.3d 249 (2007). This court will review de novo whether the trial court violated Mr. Dunlap's right to a speedy trial. State v. Carlyle, 84 Wn.App. 33, 35-36, 925 P.2d 635 (1996); *See* Brown v. State, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); State v. Iniguez, 167 Wn. 2d 273, 280-81, 217 P.3d 768, 771 (2009). [T]he decision to grant or deny a motion to continue rests within the trial court's sound discretion. However, this court must disturb the trial court's decision if there is a clear showing the decision is manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (*quoting* State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Analysis

Both, the federal and Washington state constitutions, guarantee a criminal defendant's right to a speedy trial. U.S. Const. amend. VI; Const. art. I, § 22; State v. Lackey, 153 Wn. App. 791, 799, 223 P.3d 1215, 1219 (2009). Superior court criminal rule (CrR) 3.3 governs speedy trial in our state. The rule's underlying purpose is to protect the defendant's constitutional right to speedy trial. U.S. Const. amend. VI; Const. art. I, sec. 22 (amend.10); State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009) citing State v. Mack, 89 Wn.2d 788, 791–92, 576 P.2d 44 (1978); State v. Cummings, 87 Wn.2d 612, 615, 555 P.2d 835 (1976). It provides time limits for arraignment and trial to ensure criminal defendants are brought to trial in a timely manner. However, the rule provides courts some flexibility when computing speedy trial dates. Courts will exclude from the time for trial continuances for unavoidable or unforeseen circumstances. CrR 3.3(e)(8),(f); State v. Kenyon, 167 Wn.2d 137.

A defendant can be prejudiced by delay, no matter what the source. State v. Mack, 89 Wn.2d 793, 576 P.2d 44 (1978). Allowing counsel time to prepare for trial is a valid basis for continuance. State v. Flinn, 154 Wn.2d 193, citing State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). However, when the state, without excuse, delays filing an amended information until a point when this action will compel the defendant to seek a continuance, the resulting period of delay is not excluded in calculating the time elapsed before trial under CrR 3.3. State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). This rule recognizes the state may not, without excuse, compel defendants to choose between

their right to assistance by an attorney who has had an opportunity to adequately prepare for trial, and their right to a speedy trial. Price, 94 Wn.2d at 814, 620 P.2d 994.

For example, in State v. Ralph G., 90 Wn.App. 16, 950 P.2d 971 (1998), G. was charged with sexual crimes related to one child. The day before trial, and three days before the speedy-trial period was to expire, the state added additional charges related to different victims. Id. at 19. The record showed the state was aware of the factual basis for the charges for nearly a month. Id. at 18. Despite defense counsel's objection that he was not prepared to address the additional charges, the trial court proceeded with a hearing on the admissibility of children's statements, including those related to the additional charges. Id. at 19-20. Defense counsel then waived his client's right to a speedy trial and requested a continuance, which the trial court granted. Id. On appeal, this court dismissed the original charges and held in part that the state's delay in filing the additional charges unfairly compelled the defendant to choose between his right to a speedy trial and his right to effective representation. Id. at 20-22.

The facts in State v. Ralph G. are similar to the facts here. Like what happened in that case, here, trial was set for May 17th when on the day before, the state moved the court to add new charges. 5/16/16 RP 43; CP 111-113. The state alleged the new charges stemmed from a telephone conversation Mr. Dunlap had with his mother-in-law on May 9th. CP 111-113.

Mr. Dunlap's attorney told the court she was ready to proceed with trial the following day, on the state's original charges. But, without more time to prepare, she did not believe she could effectively represent Mr. Dunlap on the new charges. 5/16/16 RP

43. Mr. Dunlap objected to the continuance, and urged the court to move forward with trial. 5/16/16 RP 51.

Over Mr. Dunlap's objection, the court allowed the state to amend the charges, found cause to continue trial, and set trial for May 24th, past Mr. Dunlap's speedy trial date. 5/16/16 RP 52-53. The court never inquired as to why the state waited until the day before trial to add new charges and the state never offered an excuse. Furthermore, although the state in State v. Ralph G. waited for nearly one month to file charges, whereas the state here waited for one week, the state's delay still forced Mr. Dunlap to unfairly choose between his right to a speedy trial and effective assistance of counsel.

V. CONCLUSION

Although the jury only found him guilty of one charge, Mr. Dunlap asks this court to dismiss that conviction. Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. State v. Greenwood, 57 Wn.App. 854, 860, 790 P.2d 1243 (1990), *aff'd on other grounds*, 120 Wn.2d 585, 845 P.2d 971 (1993); *see State v. Helms*, 72 Wn.App. 273, 275, 864 P.2d 23 (1993), *review denied*, 124 Wn.2d 1001, 877 P.2d 1287 (1994).

Submitted this 13th day of March, 2017.

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DECLARATION OF SERVICE

March 13, 2017

Court of Appeals Case No. 345149

Case Name: *State of Washington v. Justin Allen Dunlap*

I declare under penalty and perjury of the laws of Washington State that on **Monday, March 13, 2017**, I filed an appellant's opening brief with Division Three Court of Appeals and served copies to:

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