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Court of Appeals
Division III
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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION III

STATE OF WASHINGTON, Respondent

v.

DAVID MCCONVILLE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY
THE HONORABLE JUDGE RANDALL C. KROG

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it held the State had not waived its use of defendant's custodial statements for impeachment.
- B. The trial court abused its discretion by denying the defense motion to exclude custodial statements because of the State's failure to meet the discovery requirements of CrR 4.7.
- C. The judgment and sentence are not conformed to the trial court's order that time on the felony and the misdemeanor are to be served concurrently.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Where the prosecutor tells the trial court the defendant did *not* make any custodial statements and twice declines the need for a CrR 3.5 hearing, has the State waived its right to use custodial statements?
- B. Where the prosecutor fails to forward required material that it knows of to the defense until after the defendant has testified, does the discovery violation warrant suppression of the statement?

C. At sentencing, the court ordered the sentence for the felony and the gross misdemeanor to be served concurrently. The written period of confinement to designate concurrence in §4.1(a) of the judgment and sentence was left blank. Should the judgment and sentence be amended to reflect the court's ruling?

II. STATEMENT OF FACTS

Klickitat County prosecutors charged David McConville by information with burglary first degree under RCW 9A.52.020(1)(b). CP 1-2. The information was later amended to include one count of bail jumping under RCW 9A.76.170(1). CP 41-42.

Discovery and CrR 3.5 Matters

On June 17, 2016, the State filed a Notice of Intent To Offer Defendant's Statements under local rule 10. CP 17. In the omnibus application, filed June 20, 2016, defense counsel requested discovery of all oral, written or recorded statements made by the defendant to investigating officers. CP 22. After noting the need for a CrR 3.5 hearing, defense counsel, Ms. Duggan, said:

The other issue is, repeatedly within the police reports they talk about having done videos of his interview there at the scene where – was arrested on his trip from Wishram to Goldendale. I do not have those.

RP 6. The prosecutor responded he would look into it, and the parties agreed to a CrR 3.5 hearing. RP 6; CP 19, 26-27.

A month later, July 18, 2016, the prosecutor struck the CrR 3.5 hearing, telling the court, “We’re here for a status hearing, your Honor. There’s a 3.5 hearing that scheduled-stricken- we don’t --...so we’re just here for status¹. RP 9.

On October 17, 2016, the court asked about the need for a CrR 3.5 hearing. The prosecutor replied, “There was no – no custodial statements were made, your Honor.” RP 16.

The matter proceeded to a jury trial. After the state rested its case and McConville had undergone direct examination, the prosecutor asked for a CrR 3.5 hearing. The prosecutor said,

¹ Original defense counsel, Ms. Duggan, passed away, and Mr. Thompson was appointed to continue McConville's representation on July 7, 2016. CP 28. A third counsel was appointed on April 4, 2017, after Mr. Thompson was disqualified. CP 46; RP 46.

We did not have a 3.5 hearing. But –but we chose not to do it. But this is now rebuttal evidence your Honor.

RP 197.

Despite having told the court there were no custodial statements, the prosecutor said:

But until – I mean, I – In my defense, I didn't intend to offer them, I didn't intend to offer them. I didn't think the defendant was going to testify – did – and then.

RP 205.

Defense counsel objected to the hearing:

We are not prepared for a 3.5 hearing. We have not reviewed the defendant's statements *because the state was not intending to offer them*. So, we're certainly not prepared for a 3.5 hearing. I think it's incredibly prejudicial to the defendant,...

RP 206. (Italics added).

The court determined it would hold a 3.5 hearing mid-trial.

RP 207. During the hearing, defense counsel became aware the state may not have provided a copy of a tape of the deputy questioning McConville. RP 216. The prosecutor argued that defense counsel had notice there was a tape and could have

asked for it,² referring to the police report: “first line in that paragraph, which indicates that it was ‘activated my camera and microphone in my car.’” RP 217. The court gave the parties until the next morning to investigate whether the video had been provided to the defense. RP 231.

The following morning, citing to CrR 4.7, defense counsel moved for a dismissal of the charges or at the least, suppression of the statements because of the discovery violation: the state had not provided the video until the night before at 5:55 p.m. RP 233; 244. Defense counsel told the court this was not an isolated incident and had happened in other cases. RP 235,239.

Although the sheriff testified it had forwarded all materials to the prosecutor's office, the prosecutor told the court he was aware the sheriff's office was *not* forwarding evidence, and he did not receive the tape. RP 216, 236. The court declined to dismiss the case or to suppress the statements. The court did find a clear discovery violation and stated it would consider other sanctions for the state's violation of discovery rules. RP 244.

² This video had been requested by McConville's first attorney in June 2016 at the omnibus hearing.

The second issue the court considered was whether it was even appropriate to hold a 3.5 hearing mid-trial. RP 244.

Defense counsel pointed out that on numerous occasions the state had indicated there was no need for a 3.5 hearing because no statements were going to be introduced. RP 246-247. The state position was that it never intended to bring the statements into its case in chief, but because the defendant testified, it could use them in rebuttal. RP 248-249. The state contended it had not waived the right to introduce the statements. RP 251.

Relying on *State v. Thompson*³, the court ruled there had not been an express waiver by the State. The court found the defendant's statements were knowing, voluntary, and intelligent when made, and admitted them. RP 253. The court entered findings of fact and conclusions of law for the CrR 3.5 hearing. CP 167-169.

Substantive Facts

Devin Delatorre, his mother, and his girlfriend lived with Steve Neal in his Wishram home. RP 63. The home occupants used methamphetamines on a daily basis. RP 99, 139. In May

³ *State v. Thompson*, 73 Wn.App. 122, 867 P.2d 691 (1994).

2016, McConville visited the home and gave \$40 to Delatorre. RP 65. Several days later, on May 12th, McConville was at Neal's home and wanted either his money back or the \$40 worth of methamphetamine that he was due⁴. RP 178,180. There was an argument, but no physical contact. RP 79. McConville testified that Delatorre's girlfriend gave him \$20 worth of meth and he went outside to smoke it. RP 272.

Several minutes later he saw Delatorre leave the house. RP 82, 272-273. He chased Delatorre down the street but was never close to him. RP 70-72, 189, 273. Police arrested Mr. McConville on May 14th. RP 216.

As a result of the ruling that the prosecutor could use statements he made to officers, McConville testified on continued direct examination that he had not been truthful with police. Afraid he would be charged with a drug offense Mr. McConville told police that Delatorre did not owe him money and that he had not been at the house on May 12th. RP 267.

⁴ Mr. Delatorre testified the money was for gas and groceries. RP 66; his girlfriend testified she did not know what the money was for, but it was not for drugs. RP 88. Steven Neal testified that Delatorre was a "middleman" who collected money and delivered drugs. RP 147-148.

Bail Jumping

A former Klickitat County deputy who managed courtroom safety and security on January 3, 2017, testified on behalf of McConville. RP 167-168. He said that McConville was in court on that date and was surprised that “[l]ater in the day when they called for him, -- I turned to look out and I noticed he was not here anymore.” RP 169,172.

McConville testified that he was in the court at 9 a.m. for the status hearing. RP 193. He approached his attorney (Michael Thompson) and talked with him before he sat down. RP 193. While he waited, he received a phone call and learned that his step-father was having triple bypass surgery and there was concern he would not survive. RP 193. McConville left the courtroom and drove to the Portland hospital. RP 195-196.

The jury found Mr. McConville not guilty of first-degree burglary, but guilty of the lesser included charge of assault fourth degree, and bail jumping. CP 166. At sentencing, the court imposed 84 months on the bail jumping conviction and 364 days for the assault in the fourth degree. RP 394. The court ordered the time for the convictions to be served concurrently. RP 394.

Section 4.1(a) of the written judgment and sentence left blank the actual number of months of total confinement. CP 174.

Mr. McConville makes this timely appeal. CP 184-197.

III. ARGUMENT

A. The Trial Court Erred When It Found The State Had Not Waived Its Right To Use The Defendant's Statements.

The constitutional right to a fair trial under Washington Constitution Article I, § 3, and the United States Constitution Fourteenth Amendment, includes the right to be apprised of the state's evidence with adequate time to investigate and prepare an answer to it. *State v. Cayetano-Jaimes*, 190 Wn.App. 286, 295-96, 359 P.3d 919 (2015).

Under Washington CrR 4.5 (d), the parties are directed to present all motions and requests prior to trial at the omnibus hearing. Failure to raise or give notice at the hearing of any issue of which the party has knowledge may constitute a waiver of the issue.

Here, the defendant notified the court at the omnibus hearing that it wanted discovery of all oral, written or recorded statements made by the Defendant and requested a CrR 3.5

hearing. CP 22. On the same day, the State filed a notice of intent to use the defendant's statements to law enforcement and requested a CrR 3.5 hearing to determine the admissibility of the statements. CP 17,19. After that, the State twice declined a CrR 3.5 hearing. On October 17, 2016, the prosecutor specifically told the court there were no custodial statements. RP 16. The question for this Court on review is whether the State waived its right to use the statements.

A waiver is the voluntary relinquishment of a right. See *Black's Law Dictionary* 1574 (7th ed.1999). In *Thompson*, the defendant asserted the state had waived its right to use custodial statements. *Thompson*,73 Wn. App. at 127. At the omnibus hearing, Thompson's counsel requested a CrR 3.5 hearing. The state's attorney told the court it was not offering any statements of the accused, there was no interrogation, so there was no need for a hearing on the matter. *Id.* at 125. Defense counsel pointed out to the court there was a defendant statement made to an officer, and the state's attorney again replied they were not going to offer it. Defense counsel withdrew the request for the hearing. *Id.*

In a later pretrial conference hearing, the *Thompson* prosecutor clarified the issue of the 3.5 hearing saying,

I certainly do not intend to offer those [defendant's statement to officer] in my case in chief." She went on to say, however, "[i]f the defendant testifies, that might change. (Italics ours)."

Id. at 125.

In the cross-examination of Thompson, the prosecutor questioned him about the inconsistent statements he had made to the officer. *Id.* at 125. The trial court held a CrR 3.5 hearing, midtrial, and determined the statements were admissible. *Id.*

On review, the Court articulated the two circumstances that establish a waiver. First, if the party fails to apprise the other side of an issue at the omnibus hearing, it may be a waiver. Second, if the State affirmatively stipulates that it will, at trial, seek or decline to introduce certain evidence or review certain issues. CrR 4.5(d)(g). In that case, according to the rule, the State is bound by that stipulation unless modified or set aside by the court in the "interests of justice." *Id.* at 127.

The *Thompson* Court rested its opinion on the fact that the prosecutor told the trial court that it *reserved the right* to bring Thompson's statement in *if* Thompson elected to take the

stand. “This clarification occurred in *advance of trial*, thus affording Thompson the opportunity to move, in limine, to preclude the State from bringing this statement out through questioning in cross-examination. Thompson made no such motion.” *Id.* at 127. (italics added).

Here, the state made no clarification or reservation that it intended to use the statements if the defendant testified. Rather, the state declined a CrR 3.5 and reported to the court there were no custodial statements. Moreover, the state’s attorney was aware the defendant intended to testify, but made no correction of its earlier declaration there were not statements or that it intended to bring them in. RP 48. The defense reasonably relied on the prosecutor’s assertions and made no motion in limine to prevent the statements from being used in cross-examination.

The state may have intended to wait to see if Mr. McConville’s testimony was inconsistent with the custodial statements, but under the rules, it was required to inform the defense and not take them by unfair surprise. See *State v. Wilson*, 28 Wn. App. 821, 902, 626 P.2d 998 (1981)(overruled on

other grounds recognized in *Sturgeon v. Celotex Corp.*, 52 Wn.App. 609, 762 P.2d 1156 (1988).

By its (1) decline of a CrR 3.5 hearing before trial, (2) affirmative representation that there were no custodial statements, and (3) failure to reserve the right to impeach with the custodial statements after being made aware the defendant was going to testify, the state waived its right to use the statements at trial.

A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is based on untenable or unreasonable grounds if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, the court's ruling was an abuse of discretion. Under CrR 4.5, *Thompson*, and the state's representations to the court and defense, the state waived its right to the use of impeaching statements on cross-examination.

Mr. McConville did not waive his right to raise this issue to this Court when he elected to bring out the impeaching statements in his testimony. RP 265. A defense lawyer who introduces preemptive testimony only after losing a motion to exclude it cannot be said to introduce the evidence voluntarily. Introduction of evidence under these circumstances is not voluntary. “A party is entitled to try to minimize the adverse effect of a decision by raising the damaging testimony first.” *Garcia v. Providence Medical Center*, 60 Wn.App. 635, 641, 806 P.2d 766 (1991).

B. The Trial Court Erred When It Denied The Defendant’s Motion To Exclude Statements Because Of The State’s Failure To Meet The Discovery Requirements of CrR 4.7.

Criminal Rule 4.7 reflects the guarantee of a fair trial by imposing a duty on the State to disclose material and information within the prosecuting attorney’s possession or control no later than the omnibus hearing, and to *include any written or recorded statements* and the substance of any oral statements made by

the defendant. CrR 4.7(a)(1)(ii). There is a continuing obligation to provide discovery. CrR 4.7(h)(2).

The purpose of the disclosure is to prevent unfair surprise, trial disruption, and unnecessary continuances⁵. *Wilson*, 29 Wn.App. at 902.

To meet the purpose of CrR 4.7, and the requirements of due process, it is the policy of Washington State to construe the rules of criminal discovery liberally. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Thus, the prosecutor is not only required to produce material and information within its possession and control but is also obligated to produce material and information within the *knowledge*, possession or control of members of the prosecuting attorney's staff. CrR 4.7(a)(4). If the defendant requests and designates material or information in the knowledge, possession or control of other persons which would be discoverable if held by the prosecuting attorney, the

⁵ CrR 4.7 does not apply only to the state's case in chief but also includes rebuttal evidence. *State v. Linden*, 89 Wn.App. 184, 947 P.2d 1284 (1997), *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992).

prosecuting attorney *shall* attempt to cause such material or information to be made available to the defendant. CrR 4.7(d).

In this case, the prosecutor's office knew about the audio/videotape of McConville's conversation with Detective Corning. The prosecutor's office knew the defense requested a copy of the tape. The state did not produce the tape as required under the rules. The trial court found there was a violation of the discovery obligations of the state. RP 243-244.

A trial court has wide latitude when imposing sanctions for discovery violations. *Dunivin*, 65 Wn.App. at 731. If at any time during the proceedings it is brought to the court's attention that a party has failed to comply with an applicable discovery rule, the court may apply a remedy. It may order the party to permit discovery of the material and information not previously disclosed, grant a continuance, dismiss the action or enter another order *as it deems just under the circumstances*. (Italics added). CrR 4.7(7)(i); *State v. Salgado-Mendoza*, 189 Wn. 2d 420, 429, 403 P.3d 45 (2017).

The trial court's power to sanction under CrR 4.7 is discretionary, and the decision is reviewable only for manifest

abuse of discretion. A manifest abuse of discretion arises when “the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017).

Exclusion or suppression of evidence for a discovery violation is an extraordinary remedy and is narrowly applied. *State v. Vance*, 184 Wn.App. 902, 911, 339 P.3d 245 (2014). The factors to be considered in determining whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of the witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the other party will be surprised or prejudiced by the witness’s testimony; and (4) whether the violation was willful or in bad faith. *State v. Hutchinson*, 135 Wn.2d 863, 883, 959 P.2d 1061 (1998).

In this case, the facts weigh in favor of suppression. The failure of coordination between the prosecutor's office and the sheriff's department had resulted in other instances of late production of discovery. The prosecutor's office was aware of the problem but had apparently not taken steps to remedy it. In this

case, the court reserved the right to impose some type of sanction, but there is nothing in this record indicating it imposed one.

The second factor, preclusion of the evidence could very likely have affected the outcome of the trial. The evidence of the inconsistent statements to police was used to brand Mr. McConville as not credible to the jury.

The third factor, whether the defense was surprised or prejudiced by the evidence is significant. The defense was very surprised by the fact that after the state had explained there were no custodial statements, and declined the CrR 3.5 hearing, the prosecutor waited until after the defendant had testified to assert the need for the hearing. The defense was equally surprised by the fact the state had never turned over the audio/videotape. The defense was put in a position of altering the trial strategy and introducing the prejudicial evidence to the jury. Mr. McConville did not understand the practicalities of the 3.5 hearing, was not able to view the videotape, and there was not the time for him to discuss or weigh in on the change of

strategy. He was unfairly disadvantaged by the late production of evidence.

The final factor, whether the violation was willful or in bad faith, also weighs in favor of suppression. The lack of or late production of evidence was described as an ongoing problem. Defense counsel specifically asked for the videotape at the initial omnibus hearing and the prosecutor agreed to look into the matter. The videotape was not produced until the evening before the final day of trial, and only after the defense counsel requested it again.

The trial court erred when it denied the motion to suppress the evidence in this matter.

C. This Matter Should Be Remanded To The Trial Court For Correction Of A Scrivener's Error On The Judgment and Sentence.

CrR 7.8 provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or the motion of any party. Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re*

Pers. Restraint of Mayer, 128 Wn.App. 694, 701, 117 P.3d 353 (2005).

The error in Mr. McConville's judgment and sentence should be corrected. At sentencing, the court imposed concurrent sentences for the two convictions. The court overlooked the filling out the section under 4.1 (CP 174) which lists the actual number of months of total confinement. The total number should be 84 months, with the 364 days on count 2 served concurrently.

The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn.App. 630, 646, 241 P.3d 1280 (2010).

IV. CONCLUSION

Mr. McConville's convictions should be reversed. In the alternative, this Court should remand with instructions for correction of the judgment and sentence.

Respectfully submitted this 29th day of March 2018.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for David McConville, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on March 29, 2018, to:

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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Klickitat County Prosecuting Attorney (at davidq@klickitatcounty.org).

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