

FILED
Court of Appeals
Division III
State of Washington
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No. 35726-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANDRES FUENTES III

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In an attempt to get his money back from a convenience store clerk who refused to return it, Nicholas Fuentes went behind the counter, and a scuffle ensued. The only eyewitness to the scuffle was not listed as a witness for trial until two days prior to trial. The trial court's denial of Mr. Fuentes's motion to dismiss for governmental mismanagement denied him a fair trial. This Court should reverse Mr. Fuentes's second degree assault conviction and remand for dismissal of the charge.

B. ASSIGNMENT OF ERROR

The trial court erred in failing to dismiss the charge against Mr. Fuentes, pursuant to CrR 8.3(b) for governmental misconduct.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

CrR 8.3(b) authorizes the trial court to dismiss an action where there has been governmental misconduct. Simple mismanagement by the State is sufficient to constitute governmental misconduct. Mr. Fuentes unsuccessfully moved for dismissal under CRrR 8.3 after the State gave notice on the eve of trial it intended to call the only eyewitness to the alleged scuffle. Is Mr. Fuentes entitled to reversal of

his conviction when the court's denial of the CrR 8.3 motion prejudiced him, denying him a fair trial?

D. STATEMENT OF THE CASE

Nicholas Fuentes was charged with attempted first degree robbery and second degree assault arising out of a confrontation in a convenience store. CP 1-5. On the day assigned for the trial to start, Mr. Fuentes moved to dismiss the matter under CR 8.3(b) because the State had notified the defense that it intended to call Bruce Rhymer, a witness not previously listed by the State, who would testify he observed the confrontation between Mr. Fuentes and the convenience store clerk. 7/17/2107RP 2-3. In the alternative, defense counsel moved for a one week continuance to interview the witness, to which Mr. Fuentes objected. 7/17/207RP 3.

The State conceded it had only notified defense counsel on the eve of trial, but nevertheless objected to the motion and indicated it was ready for trial. 7/17/2017RP 3-5. The trial court denied the motion to dismiss, refusing to find the State's mismanagement "egregious." 7/17/2017RP 7. The court did agree to grant a short continuance. *Id.*

At the conclusion of the State's evidence at trial, the court granted Mr. Fuentes's motion to dismiss the attempted robbery count

for insufficient evidence. CP 56; RP 199.¹ The jury subsequently convicted Mr. Fuentes of the remaining count of second degree assault. CP 47.

E. ARGUMENT

The State’s mismanagement prejudiced Mr. Fuentes requiring dismissal.

1. *Simple mismanagement by the State constitutes governmental misconduct.*

The right to a fair trial is recognized as a right guaranteed by the right to due process under the Fifth and Fourteenth Amendments. *See, e.g., Cone v. Bell*, 556 U.S. 449, 551 129 S.Ct. 1769, 173 L.Ed.2d 701(2009) (“The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment,”)

“If a party fails to comply with the rules of discovery, trial courts have broad authority to compel disclosure, impose sanctions, or both.” *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct; the governmental misconduct need not be of an evil or dishonest nature, *simple mismanagement is enough. State v.*

¹ The two volumes of trial transcripts are consecutively paginated and will be referred to as “RP.” The remaining volume will be referred to by its date.

Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). Further, violations of obligations under the discovery rules can support a finding of governmental misconduct. *Id.*, at 375-76. Where governmental misconduct is shown, dismissal is the appropriate remedy. *State v. Michielli*, 132 Wn.2d 229, 243, 937 P.2d 587 (1997).

The moving party under CrR 8.3 bears the burden of showing misconduct by a preponderance of the evidence. *Salgado-Mendoza*, 189 Wn.2d at 431. The trial court's ruling on a CrR 8.3(b) motion is reviewed for an abuse of discretion. *Michielli*, 132 Wn.2d at 240. A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A decision is "manifestly unreasonable" or "based on untenable grounds" if it results from applying the wrong legal standard or is unsupported by the record. *Id.*

2. *The State's failure to disclose Mr. Rhymer as a witness until the eve of trial constituted governmental misconduct.*

CrR 4.7(a)(1)(i) requires that the State to disclose "the names and addresses of persons whom the prosecuting authority intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such

witnesses[.]” CrR4.7(h)(2) imposes a continuing obligation on the prosecutor. *Salgado-Mendoza*, 189 Wn.2d at 430.

In *Salgado-Mendoza*, the State did not reveal the toxicologist’s name in a DUI case until the morning of trial, the day he was to testify. The Supreme Court ruled that this constituted mismanagement by the State under CrR 8.3. 189 Wn.2d at 435.

Here, the trial court refused to dismiss because the State’s conduct was not egregious. 7/17/2017RP 7. But in so ruling, the court utilized the wrong standard and ignored the plain fact that simple mismanagement is sufficient under CrR 8.3; there is no “need to prove bad faith on the part of the prosecutor.” *Salgado-Mendoza*, 189 Wn.2d at 432, 434-35. The State’s conduct here was mismanagement constituting governmental misconduct under CrR 8.3(b), particularly where the prosecutor did not interview the witness until mere days before trial despite the fact the Information was filed five months prior. CP 8; RP 5.

3. *The State’s late disclosure of the witness resulted in prejudice to Mr. Fuentes.*

CrR 8.3(b) requires that governmental misconduct “materially affect[ed]” the defendant’s right to a fair trial, typically referred to as “actual prejudice.” *Salgado-Mendoza*, 189 Wn.2d at 436. Actual

prejudice may result where the late disclosure compels the defendant to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel. *Id.*

The Court in *Salgado-Mendoza* suggested the late disclosure of a key witness presenting unique testimony—such as an investigating officer – would likely prejudice the defense. *Salgado-Mendoza*, 189 Wn.2d at 437.

In *Salgado-Mendoza*, the State failed to state which of nine toxicologists would testify at trial in a DUI case until the morning of trial. 189 Wn.2d at 425. While finding governmental misconduct based upon mismanagement, the Supreme Court affirmed the district court’s conclusion that the defendant suffered no prejudice. *Id.* at 436. However, important in this ruling was the fact “that any state toxicologist in [the defendant’s] case would give similar substantive testimony[.]” *Id.* at 437. Also important to the Supreme Court’s conclusion was the fact the district court had specifically addressed the prejudice aspect of the defendant’s CrR 8.3(b) motion to dismiss. *Id.* at 439.

Here, the trial court incorrectly ruled the State’s actions had to be “egregious” in order to constitute misconduct. Besides being wrong

on this fact, the trial court never addressed on the prejudice prong of CrR 8.3(b). Further, unlike the testimony of a toxicologist, Mr. Rhymer's testimony here constituted the corroboration of the convenience store clerk's actions as observed from outside the store. This was unique testimony since the witness was the only witness who witnessed the scuffle. Further, the witness's testimony went to the only remaining count before the jury; the assault count for which Mr. Fuentes was found guilty.

The State's mismanagement of its case prejudiced Mr. Fuentes. Under CrR 8.3(b), he was entitled to dismissal of the matter due to this mismanagement. The trial court erred in failing to dismiss, resulting in a violation of Mr. Fuentes's right to a fair trial.

F. CONCLUSION

For the reasons stated, Mr. Fuentes asks this Court to reverse his conviction and remand for dismissal of the charge.

DATED this 1st day of June 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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