

FILED
Court of Appeals
Division III
State of Washington
8/10/2018 10:49 AM
35726-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS FUENTES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court manifestly abuse its discretion when it denied the defendant's CrR 8.3(b) motion to dismiss the case for the late disclosure of a witness, but granted the defendant's alternative request for relief for a short continuance to interview that witness?

2. Did the trial court manifestly abuse its discretion when it denied the defendant's CrR 8.3(b) motion to dismiss the case for the late disclosure of a witness if the defendant has not argued or alleged any actual prejudice from the State's late disclosure of a witness?

II. STATEMENT OF THE CASE

Procedural history.

The defendant was charged by information with attempted first degree robbery and second degree assault, which involved the same victim, Henry George. CP 1-2. The matter proceeded to a jury trial. At the conclusion of the State's case-in-chief, the trial court dismissed the attempted first degree robbery for insufficient evidence. RP 198-99. Ultimately, the defendant was convicted of the second-degree assault. RP 343; CP 47. With an offender score of "9 plus," the defendant was sentenced to a standard range sentence of 72 months. CP 55, 57.

Substantive facts.

Henry George was employed at the Food Mart in Spokane on March 14, 2017. RP 117-18. On that date, Mr. George was working by himself at the store. RP 119-20. Near closing around 9:00 p.m., the defendant entered the store and grabbed two beers from the cooler, hiding one of the beers under his leather jacket. RP 120-21, 125.

When the defendant approached the counter, Mr. George confronted him, stating he knew the defendant “stole” the can of beer. RP 121. A verbal exchange started between the two men, and the defendant quickly moved behind the counter and charged Mr. George, which caused Mr. George to fall to the floor. RP 121-23. The defendant contemporaneously struck Mr. George and grabbed Mr. George’s hair. RP 123. Mr. George’s finger was fractured during the altercation. RP 123, 130-32. There was a dispute among the defendant and Mr. George whether the defendant had paid for the beer. RP 136. A customer subsequently entered the store and the defendant fled the scene. RP 123-24.

Bruce Rhimer was at the Food Mart getting gas at the time of the altercation. RP 147-48. From the outside, he observed the defendant appear to conceal a beer while inside the store and then approached the store counter. RP 148, 151. A short time later, he observed Mr. George approach the store entrance and several of his fingers appeared to be “bent back.”

RP 150. Mr. George remarked that Mr. Fuentes had “broke my fingers.”

RP 150. Mr. Rhimer drove to a nearby Chevron gas station and called 911.

RP 151.

III. ARGUMENT

THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT DENIED DEFENSE COUNSEL’S CrR 8.3(B) MOTION TO DISMISS OR SUPPRESS THE LATE DISCLOSURE OF A STATE WITNESS AND CONTINUED THE CASE FOR ONE WEEK TO ALLOW THE DEFENSE TO INTERVIEW THE WITNESS, PER HIS ALTERNATIVE REQUEST.

The defendant argues the trial court manifestly abused its discretion when it denied the defendant’s motion to dismiss the charges under CrR 8.3(b), for late disclosure of a witness.

The case was originally set for trial on May 22, 2017. CP 90 (Sub. No. 14).¹ The defense moved for and was granted several more continuances of the trial date. CP 91-92, 96 (Sub. Nos. 20, 25, 28).

On July 17, 2017, the matter was set for trial and the parties appeared before the Honorable Annette Plese on several defense motions. RP (7/17/17) 1-11. The defense moved the court, in part, for a dismissal under CrR 8.3(b), asserting there was a late disclosure of a witness,

¹ A supplemental designation is being filed contemporaneously with this brief.

Mr. Rhimer, for trial. In the alternative, the defense requested a short continuance of the trial date to interview Mr. Rhimer. RP (7/17/17) 7.

A week earlier, after interviewing Mr. Rhimer, the deputy prosecutor immediately disclosed Mr. Rhimer's information to the defense attorney, including contact information, by email.² RP (7/17/17) 3, 5. Mr. Rhimer's name had been mentioned on a 911 call placed after the event and on the computer aided dispatch (CAD) report, and Mr. Rhimer was reportedly observed on a store surveillance tape which recorded the incident. However, he did not appear in the police reports. RP (7/17/17) 3, 5. The deputy prosecutor reported that the 911 call, the CAD report, and the store surveillance tape had been disclosed in discovery to the defense in March 2017. RP (7/17/17) 4, 5. Defense counsel acknowledged Mr. Rhimer's name was on the 911 tape and he was previously listed in the CAD report. RP (7/17/17) 3, 6. The deputy prosecutor remarked that he was

² CrR 4.7(a)(1) requires the prosecution to disclose "material and information within the prosecuting attorney's possession or control no later than the omnibus hearing." The required material and information include, in pertinent part:

- (i) the names and addresses of persons whom the prosecuting attorney 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;

A trial court may impose sanctions that include a continuance, dismissal, or any other order that the court deems just. CrR 4.7(h)(7).

unable to contact Mr. Rhimer and verify his information until the week before the trial date of July 17, 2017. RP (7/17/17) 5.

The trial court denied the motion, holding the circumstances of the late disclosure were not egregious; however, the court did grant defendant's alternative request for a short continuance for the defense to interview Mr. Rhimer. The court suggested continuing the case for one week to July 24, 2017, which the defendant apparently told his lawyer he agreed to, but otherwise noted an objection on the order continuing the trial date to July 24, 2017. RP (7/17/17) 8; CP 8, 93-94 (Sub. No. 26), 95 (Sub. No. 27). After further discussion with the parties, the court continued the trial to July 24, 2017. CP 8; RP (7/17/17) 9-10.

Subsequently, on July 28, 2017, the trial court signed an order and granted another continuance of the trial date to August 21, 2017, due to "defense counsel out of the office; no judge available this week." CP 102 (Sub. No. 31). Mr. Fuentes's signature is on the order approving of the agreed continuance.³ *Id.* Trial commenced on August 21, 2017.

Standard of review.

An appellate court reviews a trial court's decision to dismiss under CrR 8.3 for a manifest abuse of discretion. *State v. Moen*, 150 Wn.2d 221,

³ The record is silent as to why the trial did not commence on July 24, 2014, as previously ordered by the court.

226, 76 P.3d 721 (2003); *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An abuse of discretion exists when the trial court's decision is exercised on untenable grounds or for untenable reasons, or is manifestly unreasonable. *Id.* at 240. A discretionary decision is "manifestly unreasonable" or "based on untenable grounds" if it results from applying the wrong legal standard or is unsupported by the record. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A reviewing court may not find abuse of discretion simply because it would have decided the case differently; i.e., it must be convinced that "no reasonable person would take the view adopted by the trial court." *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000) (internal emphasis omitted).

Dismissal is proper under CrR 8.3(b) when a defendant shows (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 239-40. The State's misconduct need not be evil or dishonest; simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017(1993). However, dismissal under CrR 8.3(b) is an *extraordinary remedy* "to which a trial court should turn only as a last resort." *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). In that regard, a trial court abuses its discretion when it ignores intermediate remedial steps before ordering a dismissal

under CrR 8.3(b). *Id.* at 12; *State v. Koerber*, 85 Wn. App. 1, 3, 931 P.2d 904 (1996).

In the present case, the trial court did not manifestly abuse its discretion. The court granted an intermediate remedial step when it ordered a one week continuance to accommodate the witness interview. The defense requested either a dismissal or, in the alternative, a continuance to accommodate the interview. RP (7/17/17) 3. There is no speedy trial violation apparent on the record before the court nor did the defendant argue a speedy trial violation in the lower court or on appeal.⁴ Under CrR 3.3(f)(2), the court can continue the trial date to a specified date “in the administration of justice” and a finding the defendant will not be prejudiced in the presentation of his or her defense. Here, the court permitted a one week continuance to allow defense counsel to interview Mr. Rhimer. Surely, defense counsel raised no argument with respect to any prejudice to the defendant before or during trial; rather, the court granted the defendant’s alternative prayer for relief when it granted the continuance to interview the witness.

Finally, for alleged misconduct to create prejudice, the acts must materially affect the defendant’s right to a fair trial. The defendant has the

⁴ On a “Criminal Trial Management Joint Report,” dated July 17, 2017, the parties agreed the speedy trial date was August 8, 2017. CP 97-101 (Sub. No. 30).

burden of demonstrating prejudice. *See, e.g., Michielli*, 132 Wn.2d at 240. The mere possibility of prejudice is insufficient. As our high court has stated: “[d]ismissal under CrR 8.3(b) ... requires a showing of not merely speculative prejudice but actual prejudice to the defendant’s right to a fair trial.” *State v. Rohrich*, 149 Wn.2d 647, 649, 658, 71 P.3d 638 (2003).

The defendant has not alleged or argued any actual, resulting prejudice in the lower court or on appeal, nor could he. In that regard, late disclosure of material facts can support a finding of actual prejudice. *See State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). In a dismissal context, a defendant is prejudiced when delayed disclosure interjects “new facts” shortly before litigation, forcing him to choose between his right to a speedy trial and to be represented by an adequately prepared attorney. *Id.*

However, that scenario is not present in this case because the defense acknowledged it had previously received Mr. Rhimer’s information, including his call to 911 placed at the time of the event and the CAD report, each of which were disclosed several months before the motion to dismiss, but at the time of hearing, the defense had not had the opportunity interview the witness. Importantly, defense counsel never argued that the defense was prejudiced by the late disclosure at the time of the hearing and there was no argument referencing a “speedy trial” violation.

The fact that the case was continued to August 21, 2017, (because of defense counsel's unavailability and the lack of a trial judge), beyond the July 24, 2017 trial date, with the approval of the defendant, further absolves any actual or perceived prejudice to the defendant's right to a fair trial. The defendant's argument has no merit.

IV. CONCLUSION

For the reasons stated herein, this Court should affirm the judgment and sentence.

Dated this 10 day of August, 2018.

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August 10, 2018 - 10:49 AM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Nicholas Andres Fuentes, III
Superior Court Case Number: 17-1-01016-3

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