102760-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 38350-4-III

STATE OF WASHINGTON, Respondent,

v.

FELIPE LUIS, JR., Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Felipe Luis requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on December 28, 2023, concluding that the trial court did not violate his rule-based speedy trial rights when it continued the trial date due to congestion in the state crime laboratory when defense counsel explicitly objected to a continuance but did not explicitly state he wanted to go to trial as scheduled. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Under CrR 3.3 and *State v. Denton*, 23 Wn. App. 2d 437, 516 P.3d 422 (2022), routine backlogs in the Washington State Patrol Crime Laboratory do not constitute good cause to continue a defendant's trial beyond the limits set by the rule.

Where Mr. Luis explicitly objected to continuing the trial date and requested a record of extraordinary circumstances that the State did not make, must the defendant also specifically ask to proceed to trial as scheduled to preserve his rights under the speedy trial rule?

IV. STATEMENT OF THE CASE

Following a trial acquitting him of charges of aggravated murder, Felipe Luis, Jr. was convicted of the lesser offense of first-degree manslaughter. CP 4, 345, 347, 348. Because this petition only implicates the decision to continue his trial beyond the limits established by CrR 3.3, only those facts pertinent to that decision are set forth here.

Mr. Luis agreed to a five-month continuance of his trial due to delays in processing DNA evidence obtained by the State. 1 RP 6. The result of this agreement was a new commencement date of April 10, 2019, and a new trial date of May 6, 2019. CP 6. At a pretrial readiness hearing on April

10, 2019, the State still had not received the DNA evidence. I RP 6. Mr. Luis contended that the DNA evidence was irrelevant in any event, because the crime occurred inside the Yakima County Jail and was captured on video, so the identity of the perpetrators was not in question. I RP 6, 13, IV RP 1740. The following exchange occurred:

> MR. CHEN: Are you saying your client's ready to go to trial right now, Mr. Smith.
>
> MR. SMITH: What I'm saying is that we object to any continuance for the reason and purpose of, number one, obtaining the DNA in the first place, which we already objected to and made our record with regard to that. And we can -- we -- they can continue to object to the facts that the prosecuting attorney, he hasn't identified any reasons or any efforts that he's made in order to obtain the DNA in a timely manner.

I RP 7. When the trial court inquired whether anyone was requesting a continuance, defense counsel stated, "We're not asking for one at this time. We're asking for the DNA. And we're asking for what efforts they've made to get the DNA done in a timely manner." I RP 9-10.

The State then requested a continuance of the trial date on the basis that it wanted the DNA evidence. I RP 10. Concerning the delay in processing, the following exchange occurred:

> THE COURT: And if you don't have certain information, are you looking for some DNA evidence?
>
> MR. CHEN: Yes, Your Honor.
>
> THE COURT: And that's been submitted to the crime lab?
>
> MR. CHEN: That's been submitted to the crime lab. They're still working on it. They're not done yet with testing.
>
> THE COURT: Any forecast as to when it would be complete?
>
> MR. CHEN: I think somewhere -- we're probably looking at probably about June.
>
> THE COURT: Have you had a chance to talk to them yet?
>
> MR. CHEN: I have previously talked to them by e-mail about having it ready for June.
>
> THE COURT: All right. And is the DNA critical to your case?
>
> MR. CHEN: Yes, Your Honor.

> THE COURT: I find there's good cause for a continuance.

I RP 9-10. It then continued the trial date to August 12th, approximately two months beyond the deadline for trial established by the rule. I RP 16.

Mr. Luis challenged the continuance on appeal, arguing that the trial court's decision conflicted with *State v. Denton*, 23 Wn. App. 2d 437, 516 P.3d 422 (2022) because there was no record of extraordinary circumstances justifying the delay but merely routine congestion in the crime lab. *Appellant's Brief* at 3, 40-43. The Court of Appeals rejected his argument, concluding that he "failed to articulate a valid objection to the court's decision to grant the State's continuance motion." *Opinion*, at 16. The Court of Appeals further faulted Mr. Luis because he did not state on the record that he wished to proceed to trial on the date scheduled, May 6, even though he objected to continuing the trial date beyond May 6. *Id.*

Mr. Luis now seeks review of the Court of Appeals' decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with *Denton*.

In *Denton*, the Court of Appeals acknowledged that routine backlogs in the state crime lab do not establish good cause for a continuance without a detailed showing of the nature of the backlog, the steps the prosecution has taken to get around it, and a reasonable time frame to bring the case to trial. 23 Wn. App. 2d at 450. Thus, in that case, where multiple continuance requests were based only on lab delays that were routine and expected were not sufficient grounds for granting continuances and the case had to be dismissed with prejudice. *Id.* at 457-58.

Denton relied on *State v. Wake*, 56 Wn. App. 472, 473, 783 P.2d 1131 (1989), in which an unsubpoenaed crime lab witness's unavailability provided the basis for the continuance. The *Wake* court adopted the policy reasoning of this Court from *State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978) that continuances based on congestion eliminate the inducement to remedy the congestion in the first place, stating:

> The rationale of *Mack* is equally applicable to the use of expert witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints. As noted by the court here, the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.

56 Wn. App. at 475.

In the present case, Mr. Luis clearly and explicitly objected to the State's request to continue the trial and repeatedly asked for the State to make the record required by

Denton. Absent a record establishing the delays are extraordinary and not merely routine, it is an abuse of discretion for the trial court to grant the continuance. *See Denton*, 23 Wn. App. 2d at 458. Consequently, the Court of Appeals' decision is in direct conflict with *Denton*. Moreover, the Court of Appeals' injection of a new requirement to explicitly state that the defendant wishes to proceed to trial on the date already scheduled and for which a continuance is opposed is unsupported by CrR 3.3 or any case law interpreting it.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(2) and this Court should rule that the trial court abused its discretion in granting the continuance of Mr. Luis's trial date beyond the limits established by CrR 3.3, requiring dismissal of the case with prejudice.

This document contains 1,294 words, excluding any parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 29 day of January, 2024.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest pursuant to prior agreement of the parties by e-mail through the Court of Appeals' electronic filing portal to the following:

Yakima County Prosecuting Attorney
Jill.Reuter@co.yakima.wa.us
appeals@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29 day of January, 2024 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 38350-4-III (filed 12/28/2023)

APPENDIX A

FILED
DECEMBER 28, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. FELIPE LUIS JR. Appellant.	)	No. 38350-4-III UNPUBLISHED OPINION

PENNELL, J. — Felipe Luis Jr. appeals his judgment and sentence, imposed as a result of his conviction for first degree manslaughter. Finding no error, we affirm.

FACTS

On December 9, 2018, Felipe Luis Jr. was housed in the Yakima County jail's Norteño gang unit, along with Julian Gonzales, Deryk Donato, and Jacob Ozuna. At around 11:30 p.m., a corrections officer looked into the unit and saw an inmate on the ground, surrounded by other inmates. After calling for backup, several officers and medical staff entered the unit and found Mr. Ozuna on the floor unconscious, but still alive, and with extreme blunt force injuries. Officers observed pools of blood, as well as blood streaked on the walls, floor, and stairway, and on the hands of Mr. Luis, Mr. Donato, and Mr. Gonzales. Mr. Ozuna was transported to the hospital where he died shortly after.

Description of the incident

The attack on Mr. Ozuna was captured by nonaudio surveillance cameras. Video footage revealed Mr. Ozuna on the second floor of the unit talking to another inmate. Mr. Luis, Mr. Donato, and Mr. Gonzales were downstairs and can be seen talking and shaking hands. Mr. Luis and the two other men then went upstairs, approached Mr. Ozuna from behind, and initiated an attack. For 12 minutes, the three men continuously punched, kicked, and stomped on Mr. Ozuna. When Mr. Ozuna tried to get away, he was cornered and taken to the ground. When Mr. Ozuna appeared to lose consciousness, the beating did not stop; the three assailants kept punching and kicking Mr. Ozuna's body, including his face. Mr. Luis, Mr. Donato, and Mr. Gonzales briefly took a break to drag Mr. Ozuna along the hallway to the top of the stairs. When Mr. Ozuna started to move again, the beating resumed until Mr. Ozuna became nonresponsive. The three men then dragged Mr. Ozuna by his feet down the stairs of the unit, causing him to hit his head on each individual stair. Once at the bottom of the stairs, Mr. Ozuna appeared to move his arm. In response, Mr. Luis and his companions repeatedly kicked Mr. Ozuna in the face until he stopped moving.

During the attack, another inmate, Lindsey Albright, took items from Mr. Ozuna's cell and brought them back to his own cell. When officers later asked for the items,

Mr. Albright handed them, among other things, a document listing the "14 bonds" of the Norteño gang. 1 Rep. of Proc. (RP) (Nov. 12, 2020) at 125-26.

Mr. Ozuna's autopsy revealed swelling around his head and face, bleeding in his nose and mouth, minor injuries to his hand and wrist, bruising on his neck, bruising on his chest, bruising and abrasions on his upper extremities, bruising on his right abdomen and pelvic areas, broken ribs, a liter of blood in his chest cavity, a bruise to his heart lining, contusions to his lungs, a hemorrhage near his kidneys, a one and one-half inch laceration on his scalp, and bruising and impact injuries on his skull. Although he had no skull fractures or major vessels torn, the beating caused Mr. Ozuna's brain to move around inside his skull and swell to the point where it cut off its own blood supply. Mr. Ozuna's official cause of death was rapid swelling of the brain resulting in respiratory failure. His official manner of death was homicide.

Charges

Mr. Luis, Mr. Donato, and Mr. Gonzales were each charged with Mr. Ozuna's murder. Their cases were joined for trial until the court granted a motion to sever.

The information filed against Mr. Luis charged two offenses. Count 1 charged aggravated first degree murder. One of the alleged aggravating circumstances was a gang aggravator under RCW 10.95.020(6). This aggravator alleged the murder was "committed

to obtain or maintain [Mr. Luis's] membership or to advance [his] position in the hierarchy of an organization, association, or identifiable group." Clerk's Papers (CP) at 4. Count 2 charged Mr. Luis with unaggravated first degree murder.[1] This charge carried a gang enhancement that alleged the murder was committed "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for [any] criminal street gang as defined [by] RCW 9.94A.030, its reputation, influence, or membership." *Id.* at 5.

April 10, 2019 motion to continue

Mr. Luis was arraigned on January 2, 2019. On January 31, 2019, Mr. Luis appeared in court and waived his right to a speedy trial. Although there is no transcript of the January 31 hearing in the record on review, the parties agree the purpose of the continuance was to perform DNA testing.[2] Mr. Luis signed a speedy trial waiver, agreeing to a trial date of May 6, 2019, with a readiness hearing set for April 10, 2019.

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[1] Aggravated first degree murder is punished by a maximum penalty of life imprisonment without the possibility of parole. RCW 10.95.030. Unaggravated first degree murder is punished by a maximum penalty of life imprisonment. RCW 9A.32.030(2); RCW 9A.20.021(1)(a). An enhancement, if found by a jury, would allow the court to impose a sentence above the standard range. RCW 9.94A.535(3).

[2] According to the State, a recording for the January 31, 2019, hearing is not attainable. Br. of Resp't at 7 n.3.

The parties appeared as scheduled on April 10. At the beginning of the hearing, counsel for the State explained the Washington State Patrol Crime Laboratory was not done with its DNA analysis and the process would not likely be complete until June. The defense voiced concern that the State had not identified what efforts had been made to obtain the DNA testing in a timely manner. The State's attorney did not provide an explanation, but stated that if Mr. Luis "wants to go to trial . . . we can go to trial" so long as defense counsel represented he was ready. 1 RP (Apr. 10, 2019) at 9. Mr. Luis's attorney did not say he was ready for trial, but he also did not specifically ask for a continuance. Rather, defense counsel said, "We're not asking for [a continuance] at this time. We're asking for the DNA [analysis]. And we're asking for what efforts they've made to get the DNA [testing] done in a timely manner." *Id.* at 9-10. Given defense counsel's statements, the prosecutor asked for a continuance to allow for the completion of DNA testing. The court then found good cause for a continuance. The court asked defense counsel if there would be any prejudice to Mr. Luis by the continuance. Defense counsel stated, "No." *Id.* at 11. The court then continued the trial date to August 12, 2019.[3]

[3] During the hearing Mr. Luis astutely asked, "What is the DNA [testing] for when there's a video?" *Id.* at 13. The trial court responded by advising Mr. Luis to confer with his counsel.

At a June 19, 2019, readiness hearing, the court was informed the DNA analysis had been received.

Brady[4] *motion*

On April 13, 2021, Mr. Luis filed a *Brady* motion for discovery. Mr. Luis specifically asked for any exculpatory or impeaching evidence related to Mr. Ozuna and his purported murder of Dario Alvarado. The State affirmed it had complied with the *Brady* requirements.

Motion in limine and Knapstad[5] *motion*

In a motion in limine, the State moved to admit gang association evidence to establish its theory for motive. The State asserted Mr. Ozuna's killing was gang related. Evidence revealed Mr. Ozuna had been in custody for the alleged murder of Dario Alvarado on May 10, 2018. The State claimed both Mr. Ozuna and Mr. Alvarado were members of the Norteño gang. Expert testimony regarding the Norteños revealed they had a "constitution" called the "14 bonds." 1 RP (Nov. 12, 2020) at 233. Norteño members must abide by the 14 bonds or risk being punished. The State theorized Mr. Ozuna had broken one of the bonds by killing Mr. Alvarado, a fellow Norteño, and thus needed to

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[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).
[5] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

be disciplined. Testimony revealed Mr. Luis and his codefendants are also Norteño gang members, who, the State claimed, were ordered to carry out the discipline. According to the State's evidence, if a Norteño receives no repercussions for violating a bond, one could assume the bond was approved.

Mr. Luis objected to the State's motion, arguing the evidence failed to establish a nexus between Mr. Luis's gang affiliation and the crime, and was prejudicial. Mr. Luis also joined his codefendants in filing a *Knapstad* motion to dismiss count 1, the aggravated murder charge, claiming the police testimony and gang expert testimony provided insufficient evidence, standing alone, to support an aggravating factor.

The trial court held a consolidated hearing on the two motions, ultimately denying Mr. Luis's motion to dismiss count 1 and granting the State's motion to admit gang evidence.

Trial

The case proceeded to a jury trial. The jury viewed the surveillance videos along with photographs depicting the scene and of Mr. Ozuna's injuries. The jury also heard testimony from various law enforcement officers about gang membership and the State's theory that Mr. Ozuna was killed for gang-related reasons. This testimony was consistent with what had been set forth in the motion in limine.

In the defense case, Mr. Luis presented testimony from employees of the Yakima County Department of Corrections who admitted Mr. Alvarado into custody in 2018. According to the witnesses, Mr. Alvarado identified himself as a "drop" during the intake process. 4 RP (Jun. 4, 2021) at 1762-63, 1768; Ex. 87. This meant he was no longer affiliated with a gang and should not be housed in a gang area. *Id.* Mr. Alvarado's intake paperwork noted he had not been affiliated with a gang for approximately 10 years. Ex. 87.

Jury instructions, conviction and sentencing

The court granted a defense request for a jury instruction on manslaughter in the first degree, but denied an instruction based on manslaughter in the second degree, finding it was factually unwarranted. The jury convicted Mr. Luis of first degree manslaughter. It did not return a verdict on the gang enhancement.

Sentencing

The defense filed a motion requesting an exceptional sentence below the standard guideline range based largely on Mr. Luis's youth. The court recognized it had discretion to grant the motion, but declined to do so.

The court reasoned Mr. Luis was "more sophisticated than most 19-year olds." RP (Jul. 15, 2021) at 42-43. Given the prolonged nature of the attack, the court found

Mr. Luis had not acted impetuously or without recognizing the consequences of his actions. The court did not find Mr. Luis's actions were unduly influenced by his associates at the jail or by his difficult childhood. And the court noted Mr. Luis had already gone through the juvenile court system with no discernable progress toward rehabilitation.

The court imposed the maximum of the standard range of 147 months. Mr. Luis timely appeals.

ANALYSIS

Gang evidence

Mr. Luis contends the trial court improperly allowed the State to present gang evidence under ER 404(b). According to Mr. Luis, the claim that Mr. Ozuna's murder was gang related was entirely speculative. Furthermore, he argues the State's theory that Mr. Ozuna was killed as punishment for killing another gang member was undercut by evidence that Mr. Alvarado was actually a dropout. We review a trial court's ER 404(b) decision for abuse of discretion. *State v. Embry*, 171 Wn. App. 714, 731, 287 P.3d 648 (2012). Even if a trial court abuses its discretion, reversal is unwarranted if the error was harmless. *State v. Scott*, 151 Wn. App. 520, 529, 213 P.3d 71 (2009).

We are not particularly swayed by the substance of Mr. Luis's ER 404(b) claim. Although the evidence supporting the State's theory of the case was circumstantial, it was significant. The State's evidence raised a reasonable inference that Mr. Ozuna was killed in an orchestrated manner in accordance with the Norteño code of conduct. While the defense produced some evidence that Mr. Alvarado had dropped out of the Norteño gang, the evidence was not so strong that it eviscerated the State's theory. Thus, we are inclined to agree with the trial court that the State was entitled to present its gang evidence under ER 404(b).[6]

But regardless of any ER 404(b) error, Mr. Luis cannot get past the State's claim of harmless error. "Evidentiary error can be harmless if, within reasonable probability, it did not materially affect the verdict." *Scott*, 151 Wn. App. at 529 (citing *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)). Mr. Luis was acquitted of aggravated first degree murder, which was predicated on a gang allegation. And the jury did not issue a gang enhancement. Thus, there is no direct basis for concluding the gang evidence negatively impacted Mr. Luis's case.

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[6] A more thorough discussion of the ER 404(b) analysis is set forth in our decision in the companion case of *State v. Donato*, No. 38621-0-III (Wash. Ct. App. Dec. 28, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/386210_unp.pdf.

Mr. Luis argues the ER 404(b) evidence was harmful because it portrayed him in a negative light. We are unpersuaded. For one thing, the jury necessarily knew Mr. Luis was in jail at the time of the offense; thus, it was unavoidable he would not be perceived as someone free from any criminal association. But more importantly, the video evidence documented Mr. Luis's participation in a brutal, intentional beating that was prolonged and cruel. Given the strength of the video evidence, it is not reasonably probable the State's gang evidence impacted the jury's manslaughter verdict.

Brady

Mr. Luis contends the state violated its *Brady* obligation to disclose exculpatory evidence when it failed to produce the jail records establishing Mr. Alvarado's gang drop out status. Our review is de novo. *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). Relief under *Brady* requires a showing of prejudice. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012). In this context, prejudice turns on whether it is reasonably probable that, with proper disclosure, the result of the proceeding would have been different. *In re Pers. Restraint of Mulamba*, 199 Wn.2d 488, 498, 508 P.3d 645 (2022).

Mr. Luis's *Brady* claim fails for lack of prejudice. Regardless of whether the State should have produced information about Mr. Alvarado before trial, there is not a

reasonable probability that early disclosure would have yielded a different result. Mr. Luis had the information about Mr. Alvarado at trial and was able to use it in his case-in-chief. Perhaps based on Mr. Luis's presentation of Mr. Alvarado's gang drop status, the jury did not return any gang related verdicts.

Mr. Luis recognizes that he had the Alvarado information at trial and that the jury did not issue a gang-related verdict; nevertheless, he insists there was prejudice because earlier disclosure would have prevented the trial court from allowing the presentation of gang evidence at trial. We reject Mr. Luis's analysis. Even if the information regarding Mr. Alvarado would have changed the trial court's decision to admit gang evidence,[7] the introduction of the gang evidence did not prejudice the outcome of Mr. Luis's case.

Lesser-included offense jury instruction

Mr. Luis challenges the trial court's refusal to instruct the theory on second degree manslaughter. A defendant is entitled to a lesser-included offense jury instruction when

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[7] This proposition is dubious. We disagree with Mr. Luis's argument that the information about Mr. Alvarado was "thoroughly impeaching." Am. Appellant's Br. at 32-33. Mr. Alvarado's purported claim during 2018 that he had not been involved with gangs for 10 years was impeached by evidence demonstrating his gang involvement in 2011, 2014, and 2015. *See* 4 RP (Jun. 2, 2021) at 1523-28, 1535-46, 1552-53. Additionally, at the time Mr. Alvarado was booked into jail in April 2018, his listed property included red shoes and a red shirt. 4 RP (Jun. 4, 2021) 1783. Red is a color association with the Norteños. 3 RP (Jun. 2, 2021) 1453, 4 RP (Jun. 4, 2021) 1783. There was no evidence at trial indicating Norteños members viewed Mr. Alvarado as a dropout.

two prongs are met: (1) under the legal prong, each element of the lesser offense must be a necessary element of the charged offense, *see* RCW 10.61.006, and (2) under the factual prong, the evidence must support an inference that only the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The parties agree that, under the legal prong of the analysis, second degree manslaughter is a lesser-included offense of the charged crimes of aggravated first degree premeditated murder and first degree premeditated murder.

The disagreement pertains to the factual prong. The factual prong is satisfied if the facts of the case "raise a possible inference that the defendant committed the lesser offense but did not commit the charged offense." *State v. Henderson*, 180 Wn. App. 138, 144, 321 P.3d 298 (2014), *aff'd*, 182 Wn.2d 734, 344 P.3d 1207 (2015). If viewing the evidence in the light most favorable to the defense, "'the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.'" *Id.* (quoting *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997)). We review a trial court's decision regarding whether to issue a lesser-included instruction under the factual prong for abuse of discretion. *Id.*

The difference between the charged crimes of premeditated murder and the lesser-included offense of second degree manslaughter pertains to the defendant's mental state. Premeditated murder requires proof of intent to kill. RCW 9A.32.030(1)(a); *see also* RCW 10.95.020(6). In contrast, second degree manslaughter requires only that the defendant acted with criminal negligence. RCW 9A.32.070(1). In this context, a person acts with criminal negligence when they "fail[] to be aware of a substantial risk that a *homicide* may occur." *Henderson*, 180 Wn. App. at 149.[8]

The video evidence dooms Mr. Luis's theory of criminal negligence. The video shows the attack against Mr. Ozuna was deliberate, lengthy, and brutal. Mr. Luis and his associates repeatedly punched and kicked Mr. Ozuna to the point where Mr. Ozuna became unconscious. When Mr. Ozuna showed any sign of movement, the assault resumed until Mr. Ozuna was completely nonresponsive. Given the egregious circumstances documented in the video, no rational jury could find Mr. Luis failed to be aware of a substantial risk Mr. Ozuna would die from the attack. *See Henderson*, 180 Wn. App. at 149. Rather, the jury "must necessarily" have at least found "a conscious disregard of a substantial risk of homicide," consistent with the conviction for first degree

[8] In contrast, first degree manslaughter requires a mental state of recklessness. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

manslaughter. *Id.* The trial court did not abuse its discretion in refusing to give the lesser-included instruction for second degree manslaughter.

Trial continuance

Mr. Luis argues the trial court violated his speedy trial rights under CrR 3.3 when it granted a continuance in order to allow the State time to complete DNA testing. Under the speedy trial rule, the time for trial may be extended based on a party's motion for continuance. CrR 3.3(f)(2). We review a trial court's decision on whether to grant a continuance for abuse of discretion. *State v. Denton*, 23 Wn. App. 2d 437, 449, 516 P.3d 422 (2022). A trial court abuses its discretion if it continues a trial over the defendant's objection based on general concerns of congestion or backlogs. *Id.* at 451-52.[9] Violation of the speedy trial rule requires dismissal with prejudice. CrR 3.3(h).

While founded on the constitutional right to a speedy trial, the time for trial rule set by CrR 3.3 "is not of constitutional magnitude." *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980), *abrogated on other grounds by State v. Walker*, 199 Wn.2d 796,

[9] Congestion or backlogs in the courts, prosecuting attorney's office, or crime labs will justify a continuance over the defendant's objection only in exceptional circumstances. *Id.* at 450. If the State believes exceptional circumstances justify a continuance over the defendant's objection it must specify the nature of the exceptional circumstances, what steps have been taken to address the congestion or backlog, and "a reasonable time frame within which the case can be brought to trial." *Id.*

805-06, 513 P.3d 111 (2022). Thus, error preservation is critical. *See* RAP 2.5(a). In order to preserve a rule-based speedy trial argument for appeal, a defendant must assert a timely objection. *State v. MacNeven*, 173 Wn. App. 265, 268-69, 293 P.3d 1241 (2013). Preserving a speedy trial objection allows the court to address speedy trial problems by "by resetting the trial date within the timely trial period or by determining whether there was good cause for a continuance." *Id.* at 269. When a defendant objects to the basis for a continuance, not merely the date set, a written objection is not required under CrR 3.3(d)(3). *Denton*, 23 Wn. App. 2d at 460 n.10. Nevertheless, an objection is still required. *Id.*

Here, Mr. Luis failed to articulate a valid objection to the court's decision to grant the State's continuance motion. Mr. Luis was given the opportunity to proceed to trial as scheduled on May 6, 2019, without the DNA evidence. Yet he did not seize it. He instead asserted he wanted the DNA evidence. Although Mr. Luis's attorney said he was not asking for a continuance and he expressed dissatisfaction with the State's failure to explain the delay with the crime lab, nothing in the record could be construed as indicating Mr. Luis wished to proceed to trial on May 6.

This case contrasts with *Denton* where the defendant stated he objected to the State's continuance and wanted to go to trial without the DNA evidence that formed

the basis for the State's continuance request. *Denton*, 23 Wn. App. 2d at 444. Although Mr. Luis did personally question the need for DNA evidence during his April 10 hearing, he never asserted that he wished to go to trial in May or that he wanted to go to trial without the DNA evidence. Furthermore, when it comes to a speedy trial objection, a defendant is bound by the representations of their attorney. *Id.* at 448-49.

Based on the unique circumstances of this case, the trial court did not abuse its discretion in finding good cause for a continuance.

Sentencing

Mr. Luis challenges his standard range sentence, arguing the trial court failed to meaningfully consider an exceptional sentence downward based on the mitigating circumstances of youth. We disagree.

Appeals of standard range sentences are generally prohibited. RCW 9.94A.585(1). When a defendant challenges the denial of an exceptional sentence downward, appellate review turns on proof of legal error, such as a categorical refusal to exercise discretion or the mistaken belief of a lack of discretion to impose a nonguideline sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

We discern no legal error in the trial court's denial of Mr. Luis's request for an

exceptional sentence downward. The court recognized its authority to impose an exceptional sentence based on Mr. Luis's youth. *See State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015).[10] It carefully reviewed Mr. Luis's individual circumstances and concluded Mr. Luis's culpability was not mitigated by his young age or immaturity. Mr. Luis has not shown any legal error warranting review of the trial court's standard range sentence.

CONCLUSION

The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Staab, J.

Cooney, J.

[10] Because Mr. Luis was not a juvenile at the time of his offense, the court was not *required* to consider the mitigating qualities of youth as set forth in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

BURKHART & BURKHART, PLLC

January 29, 2024 - 11:01 AM

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Appellate Court Case Title:	State of Washington v. Felipe Luis, Jr.
Superior Court Case Number:	18-1-02331-4

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