

NO. 94381-8

COA No. 48235-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

RICKO FERNANDEZ EASTERLING

PETITIONER

ON APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY
The Honorable William Houser
Superior Court No. 15-1-00127-1

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Ricko Fernandez Easterling, respondent below, asks this court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished Court of Appeals opinion in cause number 48235-5-II, which affirmed the trial court's decision to dismiss certain of the counts against him, but which reversed the dismissal order of other counts. The decision was filed February 14, 2017. Petitioner filed a timely motion to publish the decision.¹ The order denying the motion to publish was filed on March 24, 2017. A copy of the decision is in the Appendix at pages A-1 through A-12.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in dismissing all of the counts against Mr. Easterling when the state failed to produce reports concerning the SANE exam of the two complaining witnesses until after trial had already commenced, and Mr. Easterling had been held in custody for over seven months?

¹ The court called for a response from the state, which agreed that the decision should be published. The court then denied the motion.

IV. STATEMENT OF THE CASE

Mr. Easterling was arrested on the charges in the original information on March 23, 2015. Supp. CP 114-116. He was detained up until the date of the trial court's oral decision to dismiss the information. Supp. CP 117; RP (10/5) 69.

Several times during the course of this prosecution, defense counsel had requested copies of any SANE (sexual assault nurse exam) results that had been conducted on either of the two complaining witnesses in this case. RP (10/5) 54, 63; CP 14, 52 (FOF 4). Despite making no direct inquiry of his own, the prosecutor assured defense counsel and the court that there was no SANE exam for this case. RP (10/5) 54; CP 14, 52, 54 (FOF 5, 15). The investigating officer had told the prosecutor that there was no SANE exam, again apparently without making any inquiry of Harrison Hospital to determine whether or not there had been a SANE report. RP (10/5) 8-9, 16-17; CP 54 (FOF 16). The officer was specifically asked by the prosecutor if the exam had been done. This was several weeks before the date of the hearing, (Oct. 5) on Mr. Easterling's case. RP (10/5) 9, 17. The officer indicated that Harrison Hospital was the only place in Kitsap County that conducted SANE exams and it was a normal part of the investigation protocol to receive reports from such examinations. RP (10/5) 11, 13; CP 54, (FOF 17). The SANE nurses do the exams to assist law enforcement with their investigation. RP (10/5) 19. CP 54, (FOF 21).

The SANE nurse, Jolene Culbertson, testified that for one of the two girls she did both a physical exam and genital exam. She testified that even in a non-acute exam, i.e. one that does not take place shortly after a reported injury, a nurse can sometimes see scarring, but there was no scarring present in this exam. RP (10/5) 32. The condition of the hymen was normal for the girl's age. RP (10/5) 32. Her perineal area had no lesions. Her anal exam showed no tags, lacerations or fissures. Her findings were all perfectly normal. RP (10/5) 32. The nurse concluded there was no sign of acute injury, and no scarring.

The second girl refused to cooperate with a genital exam, so the nurse could draw no conclusions about any alleged injury. RP 10/5 27-28.

The trial judge characterized the results of the exam as "exculpatory."² CP 56; RP (10/5) 64. After considering suggestions from both parties concerning a remedy for the governmental mismanagement, he court orally dismissed all of the counts in the information. RP (10/5) 54-56, 61, 69. A written order was entered on October 26, 2015. CP 51-60. The state filed a timely notice of appeal.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The decision of the Court of Appeal conflicts with this court's decision in *State v. Michielli*, 132 Wn.2d 229, 239-242, 937 P.2d 587 (1997), and the Court of Appeals decisions in *State v.*

² "The report of E[KK] and the inferences from that report are exculpatory. They are exculpatory as to the allegations of Rape of a Child in the First Degree in Counts I, II and III and also exculpatory to the inferences to be drawn from them as to the truthfulness of the reports of communication with a minor for immoral purposes. They are also exculpatory in that the jury could determine that there is a reason to doubt the allegation of E[KK] and, therefore, doubt all of the allegations pending against Mr. Easterling."

Teems, 89 Wn.App. 385, 948 P.2d 1336 (1997), and *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397, (2009) and *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990) and *State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987). Review should be granted pursuant to RAP 13.4 (b)(1) and (b)(2).

The panel decision agreed with the trial court that the failure of the state to produce and disclose the SANE reports for the two girls in this case constituted prosecutorial mismanagement. The panel decision agreed with the trial court that Mr. Easterling was prejudiced by the failure to disclose the evidence, since it put him in the position of waiving either his right to a speedy trial, or his right to have effective assistance of counsel. The panel decision agreed that the trial court had correctly reviewed other potential remedies and rejected them. Slip Op at 7(mismanagement); Slip Op. at 9 (prejudice); Slip Op. at 10 (other remedies). On this basis, the panel upheld the dismissal of the charges which related to E.K.K., one of the two complaining witnesses.

Despite these conclusions, the panel held that the trial court abused its discretion in dismissing the charges involving A.L.K., the sister of E.K.K. and the second complaining witness. The panel reached this conclusion for two erroneous reasons. The first is the flawed premise that a *Brady* violation³ is necessary to support an order dismissing criminal charges under CrR 8.3(b). The second is the panel's conclusion that the trial court erred in finding that the combination of E.K.K.'s normal exam,

³ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963)

and A.K.K.'s refusal to participate in a genital exam was impeaching or exculpatory. This will be discussed further in section B, below.

A review of this court's jurisprudence and that of the Court of Appeals on CrR 8.3 (b) noted above demonstrates that a *Brady* violation is not necessary to establish a CrR 8.3(b) violation. There was no *Brady* violation in *Michelli*. The violation consisted of the addition of new charges four days before the trial which, as in the present case, forced the defendant to choose between prepared counsel or a speedy trial.

The rule violation in *Teems, supra*, also did not involve a *Brady* violation, but late notice to the defendant of the refiling of charges against him, which resulted in prejudice due to the choice of either waiving speedy trial or proceeding without prepared counsel.

The rule violation in *Brooks, supra*, did involve a discovery violation, but the case makes not mention of the due process rule of *Brady* as the basis for its decision. Again, the state's mismanagement of the discovery put the defendant, like Mr. Easterling, in the position of having to waive speedy trial or proceed without a prepared lawyer.

The rule violation in *Sherman, supra*, represented a composite of the late filing problem in *Michelli* and the late provision of discovery in *Brooks*. Again, the defendant, like Mr. Easterling, was confronted with the unconstitutional choice between foregoing his right to a speedy trial, or his right to prepared and effective counsel.

The rule violation in *Sherman, supra*, was also based on discovery violations, but the decision makes no mention of a *Brady* violation as the basis for dismissal.

The collected cases discussed above all demonstrate that while a *Brady* violation may be sufficient to show both government misconduct and resulting prejudice, a *Brady* violation is not necessary to those findings. The panel's decision, which posits the rule that a *Brady* violation was necessary to support the trial court's CrR 8.3(b) dismissal order, is in conflict with all of the Washington cases which have considered the basis for a dismissal for government mismanagement or misconduct. This court should grant review because of this conflict.

B. The court should take review to give guidance to other Washington courts regarding the scope of CrR 8.3(b). The case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(4).

As noted above in Section A, the panel decision significantly narrows the potential applicability of CrR 8.3(b) by requiring that the prosecutorial mismanagement rise to the level of a *Brady* due process violation, a requirement never announced before in Washington case law. This court should take review to correct this incorrect and harmful narrowing of CrR 8.3 (b). This is an issue of public importance.

The panel decision correctly cites *Strikler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct 1936, 144 L Ed. 2d 286 (1999) for the proposition that in order to establish a *Brady* violation, evidence withheld by the state

must be favorable to the accused, either because it is directly exculpatory, or because it is impeaching. Slip Op. at 7. *Strikler* involved a *Brady* claim in Virginia, and the cited language is in the decision discussing the prerequisites for a successful due process claim under *Brady*. However, the panel then goes on to say that such a finding is *necessary* for a dismissal under CrR 8.3 (b), citing *Strikler*, which obviously never discussed our state's court rule. Slip Op at 12. This court should take review to clarify that a *Brady* violation is sufficient but not necessary to establish a basis for dismissal under CrR 8.3(b).

Secondly, this court should take review to correct the panel's incorrect analysis of the *Brady* violation in the case at hand.

The trial court found that E.E.K.'s normal SANE exam was exculpatory regarding the counts involving A.L.K. because it *impeached* A.L.K.'s credibility. The panel disagreed, apparently ignoring that fact that part of A.L.K.'s anticipated testimony was that she had witnessed abuse by Mr. Easterling on her sister. The normal exam which the prosecutor had withheld would have impeached that potential testimony. The panel's decision thus focuses on only one alternative of the *Strikler* criteria for a *Brady* violation, whether the evidence was directly exculpatory, and ignores the other alternative, whether the evidence was impeaching. Moreover, the panel decision completely ignores the fact that because of the state's mismanagement and late provision of the SANE exam evidence, defense counsel had no opportunity to prepare cross-

examination of A.L.K. on why she had refused her own exam. It certainly could be argued that she did so because she knew the findings would disclose no injury, thus impeaching her claim that she too had been abused.

A decision by a trial court to dismiss under CrR 8.3 (b)⁴ due to government misconduct or mismanagement is reviewed by appellate courts under the abuse of discretion standard. *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009); *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *Blackwell*, 120 Wn.2d at 830, 845 P.2d 1017.). A decision is based on untenable grounds “if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990) Even if there is an abuse of discretion, the trial court's CrR 8.3(b) dismissal of the charges should be affirmed if the reviewing court finds that the defendant proved sufficient grounds. *State v. Lewis, supra, State v. Michielli*, 132 Wn.2d 229, 239-242, 937 P.2d 587 (1997). Moreover, it is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, even a different one than the one articulated by the trial court.

⁴ CrR 8.3 (b) provides as follows:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

State v. Norlin, 134 Wn. 2d 570, 582, 951 P.3d 1131 (1998) citing *Sprague v. Sumitomo Forestry Co.*, 104 Wn. 2d 751, 758, 709 P.2d 1200 (1985).

The trial court here applied the correct legal standard, which the panel acknowledges. Slip Op at 11, Appendix-11. The record established clearly that there was government mismanagement or misconduct. Washington case law, such as *Michielli*, clearly established that prejudice is shown when a defendant, as a result of government misconduct or mismanagement is forced to choose between his right to a speedy trial or his right to have prepared counsel. Both prerequisites for dismissal were met. However, the panel seems to be saying that the abuse of discretion it perceived lay in the trial court's conclusion that the normal exam for one sister would potentially impeach the other sister's testimony that the first sister had been molested, and thus affected her credibility as to her own allegations.⁵

The trial court's written decision articulates that the normal exam for E.K.K. could be exculpatory as to the charges involving A.K.K. Appendix A-19. The trial court appeared to be using "exculpatory" here to mean "impeaching", since it discusses the effect on A.K.K.'s credibility. It cannot be argued, therefore, that the trial court's decision rested "on facts unsupported in the record." Moreover, the trial court's decision can be affirmed because A.K.K.'s refusal to submit to her own exam could be

⁵ The trial judges written decision is in the Appendix at A-13 through 22.

used as impeachment on the counts involving her. Although not articulated as such by the trial court's decision, this basis is in the record, and based on the general rule of appellate procedure laid out in *Norlin* and *Sumitomo Forestry*, the trial court can be affirmed on a discretionary decision on any basis in the record.

While the panel may have disagreed with the *strength* of the potential impeachment that became available to the defense after the late provision of the SANE exam, the discretionary ruling of the trial court was made under the correct legal rule, and was based on facts in the record. It should therefore be affirmed. This court should take review because the scope of CrR 8.3(b) is an issue of public importance that may arise in other situations where the state either deliberately or negligently conceals important and relevant evidence from the defense, and the rights to speedy trial/ prepared counsel are thereby impacted.

VI. CONCLUSION

This Court should grant review of this case to revolve the substantial conflicts between the panel's decision and previous Supreme Court and Court of Appeals decisions dealing with dismissals without *Brady* violations under CrR 8.3(b), pursuant to RAP 13.4 (b)(1) and (b)(2). The court should also grant review to give guidance to trial and appellate courts about the scope of CrR 8.3(b), and to correct the panel's incorrect and harmful narrowing of the rule, pursuant to RAP 13.4 (b)(4). This court should take review to clarify that a *Brady* violation is sufficient

but not necessary to establish a basis for dismissal under CrR 8.3(b). The court should also grant review to clarify the standard of review for a dismissal decision under CrR 8.3 (b) based on the suppression by the government of potentially impeaching evidence, again pursuant to RAP 13.4 (b)(4).

Dated this 13th day of April, 2017

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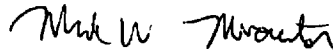
Vancouver, WA 98660

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

STATE OF WASHINGTON,)	
)	
Respondent)	
)	
vs.)	NO. 48235-5-II
RICKO FERNANDEZ EASTERLING)	CERTIFICATE OF
)	SERVICE
)	FOR Petition for Review
Appellant.)	
_____)	

I hereby certify that I caused to be served a copy of: Appellant's Petition for Review on Kellie Pendras, DPA and Ricko Easterling at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the ____ day of April, 2017 with postage fully prepaid. (Easterling by US Mail, Pendras by Email.

DATED this 14th day of April, 2017



Mark W. Muenster

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February 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Appellant,

v.

RICKO FERNANDEZ EASTERLING,

Respondent.

No. 48235-5-II

UNPUBLISHED OPINION

SUTTON, J. — The State appeals the trial court’s order granting Ricko Easterling’s CrR 8.3(b) motion to dismiss for government misconduct based on late disclosure of two child victims’ sexual assault nurse examiner (SANE) exams. The State argues that the trial court abused its discretion by granting Easterling’s motion to dismiss. The trial court did not abuse its discretion in dismissing the charges for one of the victims, but dismissal was not the appropriate remedy for the charges against the other victim. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

The State charged Easterling with five counts of rape of a child in the first degree and two counts of communication with a minor for immoral purposes based on allegations that Easterling had sexually assaulted A.L.K.,¹ who was nine years old at the time, and her sister, E.E.K., who

¹ We refer to the minor witnesses/victims by their initials to protect their privacy.

was ten years old. The charges resulted from a Child Protective Services (CPS) referral based on statements A.L.K. and E.E.K. made to their therapist. After the referral, the Kitsap County Sexual Assault Unit interviewed A.L.K. and E.E.K. A.L.K. disclosed that Easterling had taught her and E.E.K. to play “strip poker” with Uno cards. Clerk’s Papers (CP) 5. Easterling played this game with the girls on at least two occasions and on both occasions A.L.K. and E.E.K. ended up naked. A.L.K. also disclosed that on other occasions, Easterling “had her get on her hands and knees on the bed and pulled down her pants and stuck his hand in her butt (sic) like a tail.” CP at 5. A.L.K. had also seen Easterling put his thumb in E.K.K.’s butt. E.E.K. also made statements about the games of “strip poker.” CP at 4.

On September 30, 2015, Easterling’s jury trial began and the parties gave opening statements. On October 1, 2015, the girls’ mother informed Easterling’s defense counsel that SANE exams had been performed on the girls at Harrison Medical Center. The prosecutor informed the trial court that it did not have a report from any SANE exams for the girls and to his knowledge, SANE exams had not been done. However, by that afternoon, the prosecutor was able to confirm that SANE exams had been performed on the girls. The prosecutor obtained copies of the SANE exams and provided them to Easterling.

Easterling made a CrR 8.3(b)² motion to dismiss the charges based on government mismanagement. The court continued the trial until October 5 to allow the parties to submit briefing on Easterling's motion to dismiss.

At the hearing on Easterling's CrR 8.3(b) motion, the State presented testimony from the lead detective in the case, William Schaibly, and the SANE nurse from Harrison Medical Center, Jolene Culbertson. Schaibly testified that he was never notified that a SANE exam had been done for the girls. Schaibly explained that he never contacted Harrison Medical Center about the SANE exams because normally law enforcement is notified when a SANE exam is done. And Schaibly testified that he informed the prosecutor that a SANE exam had not been done for the girls because he mixed up the current case with another case he was working on.

Culbertson testified that, as a SANE nurse who worked for Harrison Medical Center, her duty is to her patients. Patients who undergo SANE exams have the same privacy interests as any other patient who comes to the Medical Center. SANE exams cannot be released unless a patient signs a consent form. In sexual assault cases, it is the SANE nurses' responsibility to perform "medical examinations to make sure that kids are okay." Report of Proceedings (RP) (Oct. 5, 2015) at 36.

² CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Culbertson also testified that E.E.K. agreed to a genital exam, which was normal, and she was “pleasant and talkative.” RP (Oct. 5, 2015) at 30. A.L.K. declined a genital exam, and was “tearful and anxious.” RP (Oct. 5, 2015) at 28. Culbertson testified that based on the exams, she was not able to make any findings or conclusions regarding whether a sexual assault had occurred regarding either girl. Culbertson explained,

[A normal exam] doesn’t mean that nothing happened. It means that, you know, there are usually three choices: Maybe nothing happened, and there is nothing that you would see, maybe something happened and it has healed without scar formation, or something happened and there was no injury.

RP (Oct. 5, 2015) at 33-34.

After the hearing, the trial court granted Easterling’s CrR 8.3(b) motion to dismiss and entered written findings of fact and conclusions of law. The trial court found that Easterling was in custody and his time for trial under CrR 3.3(b)(1)³ would expire on October 8, 2015. And the trial court found that Easterling had requested copies of a SANE exam on multiple occasions, but that the State “consistently represented that no SANE exam occurred and there were no reports of any SANE exam,” and that neither law enforcement nor the State contacted the SANE department at Harrison Medical Center to determine whether SANE exams had been done. CP at 52. The trial court found that, although SANE is not a department of the Kitsap County Prosecutor’s Office, that here the SANE department “acted on the government’s behalf in this case, as well as it acts on the government’s behalf in a general sense.” CP at 55.

³ CrR 3.3(b)(1) requires that a defendant detained in jail be brought to trial within 60 days of the specified commencement date under CrR 3.3(c) or within 30 days following an excluded period under CrR 3.3(e).

The trial court concluded that the SANE exams were exculpatory because:

The exam report for EEK was normal. There are inferences to be drawn from that normal report that include the inference that there was no abusive action on the part of Mr. Easterling. The jury could conclude that the report of EEK is inconsistent with the rendition of facts that was expected to be presented that she was raped by Mr. Easterling by having him put his finger and penis in her anus. That inference will cast doubt on the communicating with a minor charge that applies to the alleged conduct towards EEK. It also impacts the veracity of the remaining charges regarding ALK. If the jury concludes that EEK was not truthful, the inference concerning any testimony she might give concerning the allegations against Mr. Easterling concerning ALK, or testimony of ALK concerning the allegations against Mr. Easterling concerning EEK could be exculpatory as to those charges in which ALK is the alleged victim.

CP at 57. Because the SANE exams were exculpatory, the trial court also ruled that the State had failed to fulfill its responsibility under *Brady*.⁴ Therefore, the State's "misconduct was not evil or dishonest, but was mismanagement of the case." CP at 57.

The trial court also found that Easterling established "clear prejudice" because:

The late disclosure of the SANE reports placed the Defendant with a choice of whether to cling to the right to speedy trial and proceed with trial without the benefit of his counsel having explored the possible transcripts of the testimony of Ms. Culbertson and the possibility of an expert witness to consult and/or testify at trial; or forfeit that right and cling to the right to effective assistance of counsel while remaining in custody for a period well beyond the CrR 3.3 right to trial deadline of October 8, 2015.

CP at 58. The trial court considered alternative remedies to dismissal, such as recessing the case to allow Easterling time to prepare, dismissing only some of the charges, or declaring a mistrial. The trial court concluded that an extended recess was logistically impracticable and would require the jury to put their lives on hold for an extended period of time. The trial court rejected the idea of dismissing only some of the charges because the exculpatory nature of the SANE exams cast

⁴ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

doubt on all of the charges. And, the trial court concluded that a mistrial would simply “replace the issue of a *Brady* due process violation with the issue of violation of speedy trial rules.” CP at 59.

The State appeals the trial court’s order granting Easterling’s motion to dismiss under CrR 8.3(b) and dismissing all charges regarding both A.L.K. and E.E.K. with prejudice.

ANALYSIS

The State argues that the trial court erred by granting Easterling’s CrR 8.3(b) motion to dismiss. We disagree.

The trial court’s order dismissing all the charges against Easterling is based on the trial court’s belief that the charges against A.L.K. are indivisible from the charges against E.E.K. But here, the charges against A.L.K. are distinct from the charges against E.E.K. and can proceed without any reference to E.E.K. or the allegations related to her. When the charges are reviewed separately, the trial court properly granted Easterling’s motion to dismiss the charges related to E.E.K., but there was no exculpatory evidence to justify dismissing the charges related to A.L.K. Accordingly, we affirm in part and reverse in part.

I. STANDARD OF REVIEW

We review a trial court’s decision on a CrR 8.3(b) motion to dismiss for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Michielli*, 132 Wn.2d 240. CrR 8.3(b) states,

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

To grant a CrR 8.3(b) motion to dismiss, the trial court must find (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Dismissal based on misconduct is an extraordinary remedy reserved for egregious cases. *State v. Wilson*, 149 Wn.2d 1, 9, 12, 65 P.3d 657 (2003). The trial court should order dismissal only "as a last resort." *Wilson*, 149 Wn.2d at 12.

II. CHARGES RELATED TO E.E.K.

A. GOVERNMENT MISMANAGEMENT—*BRADY* VIOLATION

The governmental misconduct at issue need not be evil or dishonest, simple mismanagement is sufficient to support dismissal under CrR 8.3(b). *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Here, the trial court determined that the State mismanaged the case by failing to disclose exculpatory evidence as required by *Brady*. *Brady* imposes a duty on the State to disclose material evidence favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The State has a duty to learn of any favorable evidence "known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The State argues that there was not government mismanagement because it disclosed all the evidence in its possession and relied on statements from the lead detective that the SANE exams had not been done. But, government mismanagement does not require bad faith or misconduct; simple mismanagement is sufficient. *Blackwell*, 120 Wn.2d at 831. Here, the defense made multiple inquiries about the SANE exams and the State made no effort to contact the SANE department and verify whether SANE exams had been performed. When the defense notified the State that the SANE exams had been performed on the girls, the State was able to obtain copies of the SANE exams within the same day. The trial court correctly determined that there was no evil intent or dishonesty behind the State's actions. However, given the ease with which the State could have verified and obtained the SANE exams, the trial court did not abuse its discretion by concluding that the State's failure to even attempt to contact the SANE department was governmental mismanagement.

B. EXCULPATORY EVIDENCE

In addition to establishing governmental mismanagement, the evidence that the State failed to disclose must be material either because it is exculpatory or impeaching. *Strickler*, 527 U.S. at 281-82. The State argues that the evidence was not exculpatory because the SANE exams did not prove or disprove whether the alleged abuse occurred. The State argues that E.E.K.'s exam was not exculpatory because Culbertson testified that a normal genital exam could mean that no abuse occurred, or it could mean that abuse occurred but left no injury. But, because we review the trial court's order for abuse of discretion, and the trial court clearly laid out its reasons for concluding that the evidence was exculpatory as to E.E.K, we hold that the trial court did not abuse its discretion in ruling that the evidence was exculpatory as to this victim.

Here, the trial court concluded that E.E.K.'s SANE exam was exculpatory because the lack of injury cast doubt on the claim that Easterling anally penetrated her. And because the evidence cast doubt on the claim of penetration, it subsequently cast doubt on the credibility of E.E.K.'s statement. The trial court engaged in a clear and reasonable analysis when concluding that E.E.K.'s SANE exam was exculpatory and it did not abuse its discretion. And the trial court did not abuse its discretion in concluding that the governmental mismanagement resulted in the failure to disclose exculpatory evidence as to E.E.K. Therefore, the first element required for dismissal under CrR 8.3(b), arbitrary action or governmental misconduct, is satisfied.

C. PREJUDICE

The second element required for dismissal under CrR 8.3(b) is prejudice to the defendant. *Rohrich*, 149 Wn.2d at 654. The State argues that the trial court erred by concluding that there was prejudice because (1) Easterling was not prejudiced by the evidence itself and (2) there were less severe remedies. We disagree.

1. Prejudice to Easterling's Right to a Fair Trial

Our Supreme Court has clearly recognized that "to force a defendant to choose between the right to a speedy trial and the right to adequately prepared counsel because an interview has not occurred by the speedy trial expiration does materially affect a defendant's right to a fair trial such that prejudice results." *Wilson*, 149 Wn.2d at 13. Here, Easterling's time for trial period under CrR 3.3 would have expired only seven days after the State provided the SANE exams, and only three days after the actual hearing on Easterling's CrR 8.3(b) motion to dismiss. And, the trial court concluded that, to be adequately prepared, Easterling's defense counsel would have to interview and retain an expert witness and review Culbertson's prior testimony in related cases.

The trial court did not abuse its discretion in concluding that the disclosure of E.E.K.'s SANE exam required Easterling's defense counsel to do a relatively extensive amount of additional work in order to prepare. And, the trial court did not abuse its discretion in concluding that the defense attorney would not be able to be adequately prepared within the three days before Easterling's time for trial would expire. Because Easterling was clearly in a position of being required to choose between his time for trial right and his right to prepare counsel, he was prejudiced by the State's late disclosure of E.E.K.'s SANE exam. The trial court did not abuse its discretion in concluding that the late disclosure of E.E.K.'s SANE exam resulted in prejudice to Easterling's right to a fair trial.

2. Lesser Remedies

The State also argues that the trial court abused its discretion by failing to consider lesser remedies. Dismissing charges under CrR 8.3(b) is an "extraordinary remedy." *Wilson*, 149 Wn.2d at 9. Dismissal under CrR 8.3(b) is limited to those "truly egregious cases of mismanagement or misconduct." *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). The trial court should resort to dismissal under CrR 8.3(b) "only as a last resort." *Wilson*, 149 Wn.2d at 12.

Here, the State proposed two lesser, alternative remedies to dismissal of the charges related to E.E.K.: (1) recessing the trial to allow Easterling's defense counsel time to prepare, or (2) declaring a mistrial. In its order, the trial court very clearly set out why it believed these choices were either impracticable or inappropriate. The trial court explicitly considered recessing the trial and declaring a mistrial. And, its reasons for rejecting these lesser remedies were sound and well-

reasoned. Accordingly, the trial court properly considered less severe remedies as to the charges related to E.E.K.

Because both requirements for dismissal under CrR 8.3(b)—arbitrary action or governmental misconduct and prejudice—are satisfied as to the charges related to E.E.K., the trial court did not abuse its discretion by granting Easterling’s CrR 8.3(b) motion to dismiss those charges. We affirm the portion of the trial court’s dismissing the charges related to E.E.K.

III. CHARGES RELATED TO A.L.K.

The trial court appeared to grant the motion to dismiss the charges against A.L.K. based on its view that the charges related to E.E.K. were indivisible from the charges related to A.L.K. This was in large part because A.L.K.’s statements regarding Easterling’s abuse included statements regarding Easterling’s conduct with E.E.K. as well. Based on A.L.K.’s statements, the trial court found that E.E.K.’s SANE exam was exculpatory as to the charges related to A.L.K. because it impeached A.L.K.’s credibility. We disagree. Here, there is no exculpatory evidence as to the charges related to A.L.K. to support granting a motion to dismiss. Accordingly, the trial court abused its discretion by granting the motion to dismiss as to the charges related to A.L.K.

First, A.L.K.’s SANE exam was not exculpatory regarding the charges involving her. She refused a physical exam, so unlike for E.E.K, there was no physical evidence arising from the exam that was relevant to the charges involving A.L.K. And the trial court did not make a finding that A.L.K.’s denial of the genital exam was exculpatory or impeaching.

Second, E.E.K.’s negative SANE exam is not exculpatory as to the charges related to A.L.K. The charges related to A.L.K. can proceed without any reference to Easterling’s alleged

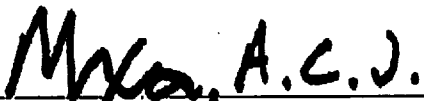
acts with E.E.K. Therefore, E.E.K.'s SANE exam would not be relevant to the charges related to A.L.K. and it cannot be exculpatory or impeaching.

In order to dismiss charges under CrR 8.3(b), the evidence that was improperly disclosed must be exculpatory or impeaching. *Strickler*, 527 U.S. at 281-82. There was no exculpatory or impeaching evidence as to the charges related to A.L.K. Therefore, dismissal under CrR 8.3(b) was improper and the trial court abused its discretion. Accordingly, we reverse the portion of the trial court's order dismissing the charges related to A.L.K and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


MAXA, A.C.J.


WORSWICK, J.

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DAVID W. PETERSON

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KITSAP COUNTY

STATE OF WASHINGTON,

Plaintiff,

and

RICKO FERNANDEZ EASTERLING,

Defendant.

NO. 15-1-00127-1

MEMORANDUM AND FINDINGS
AND ORDER
RE: DEFENDANT'S MOTION TO
DISMISS PER BRADY AND CrR
8.3(b)

This matter comes before the court on the Defendant's Motion to Dismiss pursuant to Superior Court Criminal Rule 8.3(b), Criminal Rule 4.7(d) and *Brady v. Maryland*, 373 U.S. 83 (1963).

FINDINGS

1. Mr. Easterling was arrested in March 2015. He has been held in custody since his arrest on this matter.

2. Several pretrial hearings have been conducted in this case including an omnibus hearing and a hearing on child hearsay.

3. At the time the September 28, 2015 trial was set, the court determined the time for trial deadline to be October 8, 2015 under the time for trial rule CrR 3.3.

MEMORANDUM AND FINDINGS AND ORDER
RE: DEFENDANT'S MOTION TO DISMISS PER
BRADY AND CRR 8.3(B)

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

A-13

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1 4. Both parties agreed that Defense attorneys have requested copies of any SANE (sexual
2 assault nurse exam) exam that existed concerning this case on multiple occasions, including on
3 September 22, 2015, in open court during a pretrial hearing.
4

5 5. The state consistently represented that no SANE exam occurred and there were no
6 reports of any SANE exam.

7 6. This case was called for trial on September 28, 2015. The parties reported they were
8 ready for trial. Mr. Easterling faced seven charges: five counts of Rape of a Child in the First
9 Degree, and two counts of Communicating with a Minor for Immoral Purposes (gross
10 misdemeanor). Minor EEK was the alleged victim of three counts of Rape of a Child in the First
11 Degree and minor ALK was the alleged victim of two counts of Rape of a Child in the First
12 Degree. The court heard and ruled on pre-trial motions.
13

14 7. The parties participated in jury selection and did agree on a 12 person jury with two
15 alternates. The jury was empaneled and sworn to try the case on September 30, 2015. Each
16 party presented their opening statements on September 30, 2015.
17

18 8. Trial was scheduled to continue on October 1, 2015 with the presentation of evidence.
19 Prior to calling the first witness, Mr. Drury, counsel for Mr. Easterling, brought an issue to the
20 court concerning the information that a SANE did occur examining one or both of the alleged
21 victims. Mr. Drury reported that he did not have a copy of the report from that examination.
22

23 9. The State, represented by Mr. John Purves, reported that the State did not have a
24 report, but inquiry to the SANE department of the Harrison Medical Center was being made on
25 that date. Following a recess Mr. Purves reported that a SANE exam did occur and the State was
26 attempting to obtain reports of the exam.
27
28

1 10. On October 1, copies of two SANE exam reports were obtained by the State and
2 immediately turned over to Mr. Drury. Each of the alleged victims had been seen by the SANE
3 nurse. The report concerning ALK shows that she did not allow an examination of her genital
4 area. The report of EEK shows that she did allow an examination of her genital area with normal
5 findings.
6

7 11. Mr. Drury moved to dismiss the case based upon CrR 8.3(b), 4.7(d) and *Brady v.*
8 *Maryland*. He argued that to adequately represent his client, he would need to explore whether
9 an expert witness regarding the SANE reports would be helpful to the defense. In addition, he
10 reported that he received information, though he had not verified that information, that there are
11 transcripts of testimony of Ms. Culbertson¹ which may be useful in either direct or cross-
12 examination. He would need to investigate the existence of the transcripts and obtain them to
13 adequately represent his client. The needs to investigate and obtain the services of an expert
14 would require a period of time that would necessarily impact Mr. Easterling's rights to timely
15 trial under the court rule.
16
17

18 12. A briefing schedule was established for the issue and the motion was set for hearing
19 on October 5, 2015. An evidentiary hearing was conducted on October 5, 2015.
20

21 13. Upon the request of the Defendant, throughout the pendency of the case, for any
22 SANE report; the Prosecutor's Office did not make inquiry to the SANE department of Harrison
23 Medical Center to determine if a SANE exam occurred or not.
24
25

26 ¹ Witness Culbertson is the department head of the SANE department of The Harrison Medical
27 Center.
28

1 14. Law enforcement did not make inquiry to the SANE department of Harrison Medical
2 Center to determine if a SANE exam occurred or not.

3 15. The Prosecutor's Office did not make any request for copies of SANE reports from
4 Harrison Medical Center.
5

6 16. The investigating officer reported to the prosecutor's office that no SANE exam
7 occurred in this case. The investigating officer confused this case with another case and, in fact,
8 he made no inquiry to the SANE department of the Harrison Medical Center concerning this
9 case.
10

11 17. The SANE department of the Harrison Medical Center is the only provider of SANE
12 exams in Kitsap County.

13 18. It is not a department of the Prosecutor's Office of Kitsap County, nor of any other
14 State agency.
15

16 19. Harrison Medical Center, by and through the SANE department of that institution has
17 agreed to be part of the SAIVS² protocol which establishes the investigative protocols for sex
18 crime in Kitsap County.

19 20. Ms. Culbertson, the State's witness and employee of Harrison Medical, was involved
20 in drafting the SAIVS protocol.
21

22 21. The SANE department of the Harrison Medical Center works closely with the Kitsap
23 County Prosecutor's Office in the examination of sexual assault victims, checking for evidence,
24 collecting evidence, providing reports of exams and testifying on behalf of the State in sex crime
25 prosecutions.
26

27 ² Kitsap County Special Assault Investigation (SAIVS) Protocol
28

1 22. The SANE department of the Harrison Medical Center acted on the government's
2 behalf in this case, as well as it acts on the government's behalf in a general sense.

3 23. The SAIVS protocol provides that the SANE examiner obtain a release of
4 information at the time of the exam, to allow for the release of the reports of the examination to
5 law enforcement, among others.
6

7 24. In this particular case, a release of information was obtained for the release of the
8 records for both of the alleged victims.

9 25. The provisions of the SAIVS protocol direct the SANE department of Harrison
10 Medical Center to release charts or other SANE exam reports to law enforcement, Child
11 Protective Services, among others.
12

13 26. The reports in this case were not released as outlined in the SAIVS protocols.
14

15 DISCUSSION

16
17 "CrR 8.3 (b) On Motion of Court. The court, in the furtherance of justice, after notice and
18 hearing, may dismiss any criminal prosecution due to arbitrary action or governmental
19 misconduct when there has been prejudice to the rights of the accused which materially affect the
20 accused's right to a fair trial. The court shall set forth its reasons in a written order."

21 There are two necessary elements that must be found by the court before the court is
22 justified in dismissing charges under CrR 8.3 (b). The first is that the defendant must show
23 arbitrary action or government misconduct. The government misconduct need not be of an evil
24 or dishonest nature; simple mismanagement is sufficient for a dismissal under the authority of
25 CrR 8.3 (b).
26
27
28

1 Absent a showing of an arbitrary action or governmental misconduct, a trial court may
2 not dismiss a charge under CrR 8.3(b).

3 The second necessary element the defendant must show before a trial court may dismiss
4 criminal charges under CrR 8.3(b) is prejudice to the defendant affecting the defendant's right to
5 a fair trial. This prejudice includes the defendant's right to a speedy trial and the right to be
6 represented by counsel who has a sufficient opportunity to adequately prepare a material part of
7 his or her defense.
8

9 GOVERNMENTAL MISCONDUCT

10 The Due Process Clause of the United States Constitution requires that exculpatory
11 material in the possession of the State be disclosed to the defendant.³ This includes the
12 responsibility to search for exculpatory evidence possessed by "[O]thers acting on the
13 government's behalf in the case, including police."⁴ CrR 4.7 also requires the State to provide
14 "any reports or statements of experts made in connection with the particular case, including
15 results of physical or mental examinations and scientific tests, experiments, or comparisons"⁵;
16

17 The SANE department of Harrison Medical Center was working on the government's
18 behalf and was an investigative partner in the SAIVS protocols. The SANE reports in question
19 here are exculpatory. The exam report for EEK was normal. There are inferences to be drawn
20 from that normal report that include the inference that there was no abusive action on the part of
21 Mr. Easterling. The jury could conclude that the report of EEK is inconsistent with the rendition
22 of facts that was expected to be presented that she was raped by Mr. Easterling by having him
23
24

25
26 ³ *Brady v. Maryland*, 373 U.S. 83 (1963).

27 ⁴ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)

28 ⁵ CrR 4.7(1)(iv)

1 put his finger and penis in her anus. That inference will cast doubt on the communicating with a
 2 minor charge that applies to the alleged conduct towards EEK. It also impacts the veracity of the
 3 remaining charges regarding ALK. If the jury concludes that EEK was not truthful, the inference
 4 concerning any testimony she might give concerning the allegations against Mr. Easterling
 5 concerning ALK, or testimony of ALK concerning the allegations against Mr. Easterling
 6 concerning EEK could be exculpatory as to those charges in which ALK is the alleged victim.

7
 8 Though the Defense, on several occasions, including a request on the record in court on
 9 September 22, 2015, requested any SANE exam reports for the victims in this case, the State did
 10 not search for exculpatory evidence in the possession of the SANE department of Harrison
 11 Medical Center. The State relied on the detective in charge of the investigation who mistakenly
 12 advised that there were no SANE reports. The evidence is clear that neither the prosecutor nor
 13 the detective inquired as to whether any SANE report existed until the morning of October 1,
 14 2015. There is a failure of the State to meet its responsibility under the *Brady* case. The
 15 Defendant has shown government misconduct in this case. The government misconduct was not
 16 evil or dishonest, but was mismanagement of the case.

17 PREJUDICE TO THE DEFENDANT

18
 19 The second necessary element a defendant must show before a trial court can dismiss
 20 charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. *See State v.*
 21 *Cannon*, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996). Such prejudice includes the right to a
 22 speedy trial and the "right to be represented by counsel who has had sufficient opportunity to
 23 adequately prepare a material part of his defense...." *State v. Price*, 94 Wash.2d 810, 814, 620
 24 P.2d 994 (1980).
 25
 26
 27
 28

1 The right to trial deadline in this case, under the court rule CrR 3.3, was October 8, 2015.
2 Trial in this matter started on September 28, with the jury being selected and sworn on
3 September 30. Opening statements occurred on September 30, 2015. The issue concerning the
4 SANE reports arose on October 1, 2015 just before the State called the first witness.
5

6 The late disclosure of the SANE reports placed the Defendant with a choice of whether to
7 cling to the right to speedy trial and proceed with trial without the benefit of his counsel having
8 explored the possible transcripts of the testimony of Ms. Culbertson and the possibility of an
9 expert witness to consult and/or testify at trial; or forfeit that right and cling to the right to
10 effective assistance of counsel while remaining in custody for a period well beyond the CrR 3.3
11 right to trial deadline of October 8, 2015. Clear prejudice is shown.
12

13 REMEDY

14 The appellate courts have instructed trial courts to explore remedies short of dismissal in
15 cases such as this. Several potential remedies were mentioned and discussed during the
16 arguments in this case. The court could recess the case for a period of time to allow Mr. Drury to
17 explore the issues regarding the SANE exam reports and recalling the jury to service following
18 that extended recess. This option is fraught with complications. The recess would need to be
19 long enough to consult with an expert, hire the expert, and schedule the expert to testify. The
20 logistics of this process would require weeks of time. During that time our jury would be
21 subjected to exposure to information on the procedural aspects of the case that they would not
22 otherwise be privy to in the normal course of a trial. While we presume the jury will follow the
23 instructions of the court, the longer the recess, the more there is risk of improper exposure to
24 inappropriate information. It would also put the jury's lives on hold pending the completion of
25
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1 their jury duty. During the selection process, a time frame of the trial was given to them by the
 2 court. Such a recess would far exceed the expected time commitment for the jury. A recess
 3 allowing Mr. Drury to explore the issues of this case is not plausible.
 4

5 The court also has the option of dismissing a portion of the charges, rather than all of the
 6 charges. However, as stated above, the late disclosures of the SANE reports create inferences on
 7 all of the charges. This court would be making arbitrary choices as to which charge to keep and
 8 which charge to dismiss. That would be inappropriate. The violations here cover all charges.
 9

10 A mistrial, which would dismiss this jury and allow for the selection of another, would
 11 allow for time for the defense to prepare the case for the defendant with the SANE reports
 12 disclosed. This option would replace the issue of a *Brady* due process violation with the issue of
 13 violation of speedy trial rules. In effect, the defendant would be forced to choose which right he
 14 would like to forfeit and which right he would like to assert.
 15

16 CONCLUSIONS

- 17 1. Jeopardy attached to the charges in this case upon the jury being sworn to try the case;
 18 and
 19 2. The failed to provide exculpatory evidence in a timely manner per their responsibility
 20 as set out in CrR 4.7 and *Brady v. Maryland*; and
 21 3. The failure to provide the exculpatory evidence by the State is prejudicial to the
 22 defendant; and
 23 4. The failure to provide exculpatory evidence by the state was mismanagement of the
 24 case and a basis under CrR 8.3(b) for the court to dismiss the case against Mr. Easterling; and
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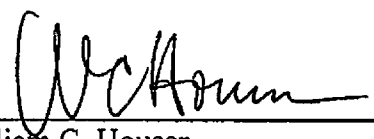
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5. Under the circumstances of this case, the appropriate remedy for the failure to provide exculpatory evidence in a timely manner, and the mismanagement of the case is the dismissal of the case against Mr. Easterling; and

6. The dismissal of the case terminates jeopardy.

THEREFORE IT IS HEREBY ORDERED that the charges in this case are hereby dismissed with prejudice.

These written findings are dated this 23rd day of October, 2015.



William C. Houser
Superior Court Judge

MARK MUENSTER LAW OFFICE
April 14, 2017 - 10:48 AM
Transmittal Letter

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Court of Appeals Case Number: 48235-5

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Affidavit

Letter

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Response to Personal Restraint Petition

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Petition for Review (PRV)

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