No. 98469-7

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Fernando A. Celaya,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 52063-0-II

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Table of Contents

Table of Authorities

Cases

Other Authority

Introduction

Celaya's right to a speedy trial was violated. On the day of trial, prosecutors misled the trial court about why the State waited to amend charges. The State said it needed to secure a witness's testimony to add the charge of Witness Tampering, supposedly because that witness would testify that a threat had been conveyed. But at trial, in closing argument, and in the jury instructions, the State correctly noted that the witness was unnecessary, because the alleged threat need not be conveyed to the victim to convict.

The State's late amendment placed Celaya in a situation where he had to choose between being unprepared for trial or sacrificing his speedy trial rights. The trial court relied on the State's misrepresentation in granting the amendment. Where, as here, the State has all the information it needs to file amended charges for months and months but waits to amend until the day of trial, and that amendment forces the defendant to choose between his speedy trial rights and his right to prepare a defense, the convictions must be reversed with instructions to dismiss all changes.

The court of appeals ignored this long-settled rule and instead ruled that the constitutional violation could not be reviewed. But the court of appeals' analysis was flawed by a mistake of law. This Court should grant review to vindicate Celaya's rights and to correct the court of appeals' mistake.

The court of appeals' decision conflicts with *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997), and many cases in the *Michielli*

line. In *Michielli*, as here, the State knew all the facts underlying the late amendment well before trial. 132 Wn.2d at 243. Just as in *Michielli*, here the "State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." 132 Wn.2d at 145.

The court of appeals did not review the merits under RAP 2.5 because it found that the speedy trial violation did not prejudice Celaya, slip op. at 9-10, but *Michielli* explains that Celaya "was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days [here, on the day of] the scheduled trial." 132 Wn.2d at 244. *Michielli* compels a finding of prejudice, but the court of appeals failed to follow that precedent.

This Court should grant review, reverse the court of appeals, and remand with instructions to dismiss all charges against Celaya.

Identity of Petitioner

Fernando Andres Celaya, appellant below, ask this Court to accept review of the Court of Appeal's decision terminating review.

Citation to the court of appeals decision

The unpublished court of appeals decision was filed on April 7, 2020. The decision is attached as an appendix to this Petition.

Issues presented for review

1. Did the court of appeals err in not finding prejudice where government misconduct forced Celaya to choose between his speedy trial rights and asking for a continuance to prepare a prepare a proper defense?

2. The prosecutor told the trial court, incorrectly, that the State had to wait until the day of trial to amend to add a Tampering with a Witness charge because it was not "going to be able to prove that witness tampering" without a witness who could testify that the message was conveyed. In closing, the State told the jury, correctly, that a threat need not be communicated to convict on a charge of Tampering with a Witness.

a. Did the State commit misconduct by amending the charges on the day of trial when its proffered reason for delay was legally incorrect?

b. Did the trial court violate Celaya's right to a speedy trial by allowing the amendment on the day of trial, when that day of trial was more than two months after the court had continued the trial over Celaya's objection, and was more than seven months after the original trial date?

c. Where the State knew for months that it could bring charges, did trial court violate Celaya's right to prepare an adequate defense by allowing amendment on the day of trial and forcing Celaya to choose between his speedy trial right and the right to present a defense?

d. Where a defendant is forced to choose between his speedy trial right and the right to present a defense, does that forced choice between constitutional rights show prejudice under *Michielli* and *Salgado-Mendoza*?

Statement of the case

Celaya was arrested in mid-June 2017 and charged with Felony Harassment and Assault 2. CP 3.

A. Pretrial proceedings

Beginning in July 2017, the trial date was continued several times, and trial did not begin until April 17, 2018.

The first continuance, on July 18, 2017, was on a joint motion; the new trial date was October 2. CP 7.

On August 18, 2017, the State submitted its list of witnesses. It included the alleged victim, Kaleena Jeffries. CP 8. It also include Brien Pace, the witness the State would rely on in seeking to amend charges on the day of trial on February 8, 2018. CP 8. That August list also included Torvald Pearson, who would testify at trial to authenticate the recording of the allegedly threatening call. CP 9. Indeed, Pearson testified that he had made the CD of the call that would become an exhibit at trial on August 11, 2017. RP 4/24 at 132.

In September, the case was continued again, on a joint motion, with a new jury trial date of November 14. CP 12. Speedy trial was to expire December 14, 2017. CP 12. On November 13, 2017, the defense moved for a continuance because counsel had been unable to interview the alleged victim. CP 24. The State had not provided other discovery. CP 24. The new trial date was set for December 12, and speedy trial was to expire January 11, 2018. CP 24.

On December 1, 2017, the trial court granted a continuance because "officer Bradley (3.5) is unavailable for training 12-11-12-15 and officer Robillard is on vacation [until December 24]" and the prosecutor planned a vacation until January 6. CP 27. The defendant objected to the continuance. CP 27. In all caps on the bottom of the order, the trial court stamped "NO MORE CONTINUANCES." CP 27. The new trial date was January 17, 2018, and speedy trial was set to expire February 16, 2018. CP 27.

The parties appeared in court again on January 5 for a trial readiness hearing. The State indicated that it would amend to add one count of Assault 4, and defense had no objection to adding the misdemeanor charge. CP 28. There was no plea offer. CP 28. Trial was scheduled for January 24. CP 30. The State told the Court all subpoenas had been served. CP 29. The speedy trial deadline was pushed out to February 23, over Celaya's objection. CP33. The State and defense both estimated a trial length of 3-4 days. CP 31.

On the eve of trial, January 23, defense counsel spent "all night preparing for trial" expecting trial the next day. RP 2/8 at 7. On January 24, however, the State moved to continue the trial, stating that counsel was "out on another trial." CP 35. A new trial date of February 8 was

assigned. On the bottom of the order, the court again stamped in all caps "NO MORE CONTINUANCES." CP 35. On February 8, 2018, the case would be 232 days old, having been continued 6 times. CP 63.

On the trial date, February 8, 2018, the State presented an amended information. The defense objected to amending information on day of trial. RP 2/8 at 4. Defense counsel argued that "the State [was] trying to substantially change the course of the facts of this case based upon the amendment of the Information." RP 2/8 at 4. The defense noted that the alleged phone calls occurred in June 2017. RP 2/8 at 4-5.

The State sought to add not just the Assault 4 charge that it indicated it would add on January 5, but also a misdemeanor count of Violation of a No Contact Order (domestic violence related) and a felony count of Tampering with a Witness (domestic violence related). RP 2/8 at 4. The State made no attempt to argue that the late amendment to add the VNCO charge was related to any need to find witnesses or additional information.

Defense counsel "strenuously object[ed] to the amending of the Information" because the allegations "substantially change[d]" the case and would "bring great difficulty in the defense that we had anticipated putting forth." RP 2/8 at 8. While the State had apparently sent the

Amended Information earlier that week, RP 2/8 at 8, defense counsel explained that he could not "prepare for this trial effectively." RP 2/8 at 8.

In addition to the new charges, defense counsel objected to late disclosure of a motion to use Celaya's criminal history and a host of new motions in limine. RP 2/8 at 9.

The State said it sent a draft amended complaint to defense counsel on January 30. RP 2/8 at 11. Defense counsel responded that the State had never told counsel orally about the amendment, RP 2/8 at 7, and then explained that the first he had seen the email containing the amended complaint draft was on Sunday, February 4, RP 2/8 at 7, and he first had a chance to review it on Monday, February 5. RP 2/8 at 8. Defense counsel had pinkeye, and then his son had surgery, keeping him out of the office Tuesday-Friday, January 30 to February 2, and got back to the office on February 5. RP 4/8 at 7-8.

Neither side mentioned that Pace had been served with a subpoena to testify in this matter on August 21, September 21, November 15, December 6, and January 24, 2019.

The State told the trial court that "The reason why the State couldn't add charges before is we didn't know whether or not we could

secure the cooperation of Mr. Pace," and that is an "essential element to the Witness Tampering to know whether or not it was actually conveyed to Ms. Jeffries." RP 2/8 at 11.

The trial court found no prosecutorial misconduct. The court granted the motion to amend and accepted the Amended Information for filing. RP 2/8 at 35.

In response to the trial court granting the motion to amend the charges, Celaya requested a continuance to allow time to prepare to defend against the new charges, which the court granted. CP 65. As the State noted, defense counsel made "a fairly thorough record that he is not going to be able to proceed effectively on the new charges." RP 2/8 at 39. Defense counsel asked for 18 days to prepare to defend against the new charges. RP 2/8 at 39.

B. Trial proceedings

After several more delays, trial began on April 17, 2018. Although the State obtained a continuance in December based on the need for a 3.5 hearing, the State now admitted there were no statements subject to 3.5. RP at 4/17 111.

On April 23, 2018, the State called Brien Pace. CP 352. Pace was the witness the State relied on to justify amending the complaint on the day of trial on February 8, 2018. RP 2/18 at 24-7.

Regarding the alleged incident of Celaya assaulting Jeffries, Pace testified as follows:

> Q. Did you tell them [the police who came to the house] whether or not you had seen anything regarding the incident?
>
> A. No. I told them I didn't see anything, because I didn't.

RP 4/23 at 153.

Regarding the witness tampering charge, Pace testified that "I just told [Jeffries] that I wanted to know if he could get the charges dropped and get out of there. That was it. You guys got it on tape." 4/23 at 153.

On April 24, 2018, the State called Torvald Pearson. CP 353. Pearson testified how jail calls were recorded and that Celaya had an individual PIN assigned to him that allowed the jail to track which calls he made. RP 4/24 at 126-27. He testified that on August 11, 2017, he made what would become Exhibit 14 at trial, a CD of the phone call containing the alleged witness tampering. RP 4/24 at 132. In ruling on the admissibility of the exhibit, the trial court noted that not only did the call come from Celaya's pin, but that Celaya identified himself on the call.

RP 4/24 at 142. Pearson also testified that if an inmate tried to swap a PIN and another inmate tried to use the PIN from outside his unit, it would not work. RP 4/24 at 147.

On April 25, 2018, the parties closed. CP 354.

On April 26, 2018, the jury began deliberations and reached a verdict. CP 354-55. The jury found Celaya not guilty of Assault in the Second Degree, CP 340, guilty of felony harassment, guilty of two counts of Assault 4, guilty of a violating a no contact order, guilty of tampering with a witness, and found by special verdict that Celaya and Jeffries were members of the same household for each count. CP 333-346.

Where the State had estimated a 3-4 trial prior to amending the charges, the trial proceedings took seven court days, plus sentencing.

C. Sentencing

Sentencing occurred on June 19, 2018. CP 408. Celaya received an exceptional sentence, with an upward departure for the Witness Tampering charge resulting in an additional 24 months in prison.

An order of indigency was entered on June 19, 2018. CP 414-15.

A notice of appeal was timely filed on June 19, 2018. CP 410.

Findings of Fact and Conclusions of Law regarding the exceptional sentence were filed on August 7, 2018. Supplemental CP.

The court of appeals affirmed the sentence on April 7, 2020, in an unpublished opinion. Appendix.

GROUNDS FOR REVIEW

The court of appeals should have reviewed Celaya's claim because it is a manifest error affecting a constitutional right and Celaya showed prejudice.

A. By conflating prejudice in pretrial proceedings with prejudice during trial, the Court of Appeals' decision conflicts with precedent on a significant issue of constitutional law

The speedy trial violation alleged by Celaya is an important constitutional issue, and the court of appeals' decision erodes that right and conflicts with this Court's precedent. RAP 13.4(b)(1),(3).

A speedy trial violation is an error of constitutional dimension. The right to a speedy trial "'is as fundamental as any of the rights secured by the Sixth Amendment.'" *Barker v. Wingo*, 407 U.S. 514, 515 n. 2 (1972) (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967)). If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *Id.* at 522.

The court of appeals' decision conflicts with *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997). RAP 13.4(b)(1).

B. Celaya's Constitutional Right to a Speedy Trial was Violated

After about sixth months of waiting and continuances, Celaya began objecting to continuances in November 2017. He was incarcerated

the entire time he waited for trial. The continuances from November forward allowed the State to add additional charges—charges that the State could have brought in August, when it prepared as exhibit the call that was the basis for the Witness Tampering charge. RP 4/24 at 132. This Witness Tampering charge resulted in additional time in prison. RP 6/19 at 29 (court specifying an additional 24 months imprisonment for the Witness Tampering charge). By amending on the day of trial, the State forced Celaya to choose between a speedy trial and the right to prepare a defense. The amended charges made the case more complicated to defend: from an estimated 3-4 trial days prior to amendment, CP 30, to 7 days of trial after amendment. Celaya's trial was illegally delayed and that delay prejudiced him.

Celaya's right to a speedy trial was violated as a result of governmental misconduct. The government'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).

On the trial date, February 8, 2018, the State presented an amended information. The defense objected to amending information on day of trial. RP 2/8 at 4.

The State engaged in misconduct because there was no reason that the charges could not have been added earlier. The State had the recording of the call burned onto a CD that was used at trial in August 2017. RP 4/24 at 132. It is reasonable to assume that the State had listened to the recording prior to asking to have it made into an exhibit. This recording

was all evidence the State needed, and all the evidence it relied on, for the Witness Tampering charge. CP 326; RP 4/25 at 244; 248.

The newly added charges, including a felony charge, forced Celaya into a position where he had to choose between exercising his speedy trial rights and his right to have a prepared defense.

The State doubled the complexity of the trial, from a "3-4" day trial to a 7-day trial. After the trial court allowed the amendment, defense counsel asked for over two weeks to prepare to defend the new charges. RP 2/8 at 39. Given the difficulty the State claimed it had contacting Pace for an interview, it was reasonable for the defense to anticipate needing significant time to interview the witness and do other trial preparation. The time defense counsel needed was significantly longer than the 6 business days prior to trial that the State sent a draft amended complaint. In the end, defense counsel only saw the amended complaint, at the earliest, on Sunday February 4. RP 2/8 at 7. Defense counsel stated he first reviewed the amended charges on Monday, February 5. RP 2/8 at 8.

Defense counsel "strenuously object[ed] to the amending of the Information" because the allegations "substantially change[d]" the case and would "bring great difficulty in the defense that we had anticipated putting forth." RP 2/8 at 8. The State conceded that defense counsel made "a fairly thorough record that he is not going to be able to proceed effectively on the new charges." RP 2/8 at 39.

The State defended its actions, telling the trial court that "I'm not going to be able to prove that witness tampering without Brian Pace and

without—because he is the one that conveys the message from that call to the alleged victim." RP 2/8 at 23. But the To Convict Instruction properly stated the law, and did not require that any message be conveyed. CP 326 Instruction 31.

And in closing, the State told the jury that Jeffries' and Torvald's testimony was sufficient to convict:

> So now let's talk about the second set of crimes: Violation of a No-Contact Order and Tampering. We know that these happened because of Ms. Jeffries' testimony and because of call logs that you heard.

RP 4/25 at 244.

The State further told the jury in closing that the threat did not need to be communicated to Jeffries:

> He just has to attempt. . . . I'll point out that we don't even have to show that Mr. Pace relayed that message . . .

RP 4/25 at 248.

The State knew that it could bring the Witness Tampering change in August, because it was then that Pearson prepared his exhibit. The State should have known in August that it did not need Pace to testify.

The State here failed to learn the nature of the evidence and examine the elements of the charges, and asked for continuances and late amendments to charges based on that ignorance. That is mismanagement that amounts to misconduct.

C. The Speedy Trial delay was manifest constitutional error here

The court of appeals refused to review the claim because it found there was no manifest constitutional error. Slip op. at 1-2. Specifically, it ignored the ruling in *Michielli* and other cases holding that being forced to choose between a speedy trial and the right to an adequate defense was itself prejudice. In failing to apply this rule, the court of appeals erred.

While trial counsel objected to the continuance, he did not move for dismissal. On this basis, the court of appeals avoided the merits. This was error, because Celaya showed both a constitutional error and prejudice, and thus satisfied RAP 2.5.

A party may raise a claim of error for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To meet this standard, the petitioner must show that the error is "truly of constitutional dimension" and that it is "manifest." *O'Hara*, 167 Wn.2d at 98. "Manifest" under RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

To determine whether an error raised for the first time on appeal is of constitutional dimension, the court of appeals considers whether the error "implicates a constitutional interest as compared to another form of trial error." *O'Hara*, 167 Wn.2d at 98.

The right to a speedy trial is a fundamental constitutional protection, and unless "a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively

preserved." *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009) (internal punctuation and citation omitted).

A "manifest" error must cause prejudice. In other words, Celaya must "show how the alleged error actually affected [his] rights at trial." *Kirkman*, 159 Wn.2d at 926-27.

The cases hold that Celaya did show prejudice. Thus Celaya "was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial." *Michielli*, 132 Wn.2d at 244.

The holding in *Michielli* was recently reaffirmed by this Court: "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." *State v. Salgado-Mendoza*, 189 Wn.2d 420, 432, 436, 403 P.3d 45 (2017).

Rather than apply this prejudice test—that a defendant shows prejudice when he is forced to choose between the constitutional right to a speedy trial and a constitutional right to an adequate defense—the court of appeals required that Celaya show an additional prejudice. The court of appeals held that because, for instance, Celaya could "not point to any practical or identifiable consequences" **at trial**, Celaya was not prejudiced **before trial** by his forced waiver of his speedy trial rights. But *Michielli* holds that the forcing a defendant to choose between constitutional protections—where that choice is the result of government misconduct—is itself prejudice. And in the context of *Michielli*, this prejudice is that

additional charges are added—here, charges that resulted in an extra 24 months of prison. Two years of additional incarceration is prejudicial to Celaya's interests.

Put another way, if the State had not violated Celaya's right to a speedy trial through late amendment, trial would have proceeded without a charge that resulted in additional 24 months of confinement. The amended charge was not part of the same situation that led to the domestic violence charges, but arose later. Amending to add that charge as speedy trial was expiring—a delay caused by government mismanagement—forced Celaya into a choice *Michielli* holds is prejudicial.

Through its misconduct, the State may not force a defendant to choose between constitutional protections. But Celaya was forced to choose between constitutional protections, and this Court's cases make clear that having to choose between rights because of government misconduct is prejudice.

Conclusion

The Court should grant the Petition.

Respectfully submitted on April 27, 2020

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Certificate of Service

On April 27, 2020, I served all parties by electronic service, and served a paper copy by U.S. mail to

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

Dated April 27, 2020 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

Appendix

Filed
Washington State
Court of Appeals
Division Two

April 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FERNANDO ANDRES CELAYA, Appellant.	No. 52063-0-II UNPUBLISHED OPINION

CRUSER, J. — Fernando A. Celaya appeals his two fourth degree assault convictions and his convictions of felony harassment, witness tampering, and violation of a no-contact order. Celaya argues that his convictions should be dismissed because the State committed governmental misconduct that caused a violation of Celaya's constitutional right to a speedy trial. In his statement of additional grounds (SAG), Celaya argues that he received ineffective assistance of counsel and his convictions should be reversed under the cumulative error doctrine.

We decline to review Celaya's claim of governmental misconduct because Celaya did not move to dismiss his case under CrR 8.3(b) in the trial court and thereby waived this claim on appeal. We also decline, under RAP 2.5(a)(3), to review Celaya's claim that his constitutional right to a speedy trial was violated because Celaya fails to show that the alleged violation is a

manifest constitutional error. Finally, we hold that the issues raised in Celaya's SAG do not warrant reversal. Accordingly, we affirm.

FACTS

Celaya and Kaleena Jeffries were in a romantic relationship for about two years. Celaya and Jeffries lived with Celaya's friend, Brien Pace. On June 19, 2017, Celaya and Jeffries got into an argument when Celaya accused Jeffries of cheating on him. The argument lasted on and off for two days. During this time, their argument became physical. Celaya bit Jeffries, pulled her by her hair, threw her to the ground, and threatened to kill her if she left him. When Celaya put his hand on Jeffries's mouth and nose so she couldn't breathe, Jeffries bit and scratched Celaya. Eventually, Jeffries called the police from the bathroom. The police arrived and arrested Celaya.

On June 21, 2017, the State charged Celaya with second degree assault[1] and felony harassment.[2] The State alleged that the crimes were domestic violence offenses as defined in former RCW 10.99.020 (2004). On the same day, the trial court entered a domestic violence no-contact order that prohibited Celaya from direct or third party contact with Jeffries.

Celaya called Pace on June 22, 2017 from jail. On two occasions during the call, Celaya asked Pace to convince Jeffries to drop the charges against him. Celaya then told Pace that if Jeffries was not willing to drop the charges, Pace should kick her out of his house. Shortly after the court entered the no-contact order, Celaya also called Jeffries's cell phone 197 times. Jeffries did not answer any of these calls.

[1] RCW 9A.36.021.

[2] RCW 9A.46.020(1)(a)(i), (2)(b).

On July 18, the parties agreed to continue the trial from August 8 to October 2, 2017. The parties also agreed to a continuance on September 19 in order for the defense to obtain records from the State and schedule interviews. The court continued the trial to November 14.

Celaya moved for a continuance on November 13 because he "was only recently able to interview [the] alleged victim and still in the process of obtaining discovery." Clerk's Papers (CP) at 24. The court granted the continuance and set the trial for December 12. The State moved for a continuance on December 1 because two law enforcement officers were unavailable during the trial dates. The court continued the trial to January 17, 2018.

The trial court held a trial readiness hearing on January 5. At the hearing, the court entered a trial readiness status hearing order, which stated that an amended information would be filed on the morning of trial to add one count of fourth degree assault. Also at the hearing, the State moved for a continuance because two witnesses were unavailable on the dates scheduled for trial. Celaya objected to the continuance. The court granted the State's motion and continued the trial date to January 24. The expiration of the time for trial period was February 23, 2018.

The State again moved for a continuance on January 24 because the prosecutor assigned to Celaya's case was "assigned out on another trial." *Id.* at 35. Celaya objected to the continuance. The court granted the State's motion and continued the trial to February 8.

On February 8, the State moved to amend the information to add a count of fourth degree assault,[3] a count of violation of a no-contact order,[4] and a count of witness tampering.[5] The State alleged that the crimes were domestic violence offenses as defined in former RCW 10.99.020.

Celaya objected to the addition of the violation of a no-contact order and witness tampering charges.[6] Defense counsel asserted that he could not effectively prepare a defense for these charges because he did not receive notice of the State's intent to charge Celaya with the violation of a no-contact order and witness tampering until February 4. The State had sent an e-mail informing defense counsel with the charges on January 30, but defense counsel was out of the office the week before due to an illness and child care issues.

Defense counsel stated that the "allegations substantially change . . . and will bring great difficulty in the defense that we had anticipated putting forth." Verbatim Report of Proceedings (VRP) (Feb. 8, 2018) at 8. He also expressed concern that proceeding with trial that day on the amended information would be unfair and prejudicial to Celaya and requested that the trial court proceed with trial on the charges set forth in the first information.

[3] Former RCW 9A.36.041(1), (2) (1987).

[4] Former RCW 26.50.110(1) (2015).

[5] RCW 9A.72.120(1)(a).

[6] Celaya did not object to amending the information to add a count of fourth degree assault at the trial court level and does not assign error to the amendment on appeal.

In response, the State claimed that the "State is not in charge when the defendant commits new crimes." *Id.* at 11. The State explained that it did not add the charges earlier because the State "didn't know whether or not [it] could secure the cooperation of Mr. Pace, and that is an essential element to the Witness Tampering to know whether or not it was actually conveyed to Ms. Jeffries." *Id*. The State further explained that it was unable to contact Pace to confirm his cooperation until January 30, 2018.

The court granted the State's motion to amend the information and arraigned Celaya on the additional charges. After a short recess, Celaya moved for a continuance based on the court's grant of the amended information. The court granted Celaya's motion and entered an order continuing trial to February 27. The expiration of the time for trial period was reset to March 29, 2018.

Celaya moved for a continuance on February 27 because defense counsel was in trial and scheduled to be on vacation for two different time periods in March. The trial court continued the trial to March 19. The expiration of the time for trial period was reset to April 18, 2018.

On March 19, the court continued the trial to the following day because no courtrooms were available. Celaya objected to the continuance. At the hearing, defense counsel indicated that he intended to bring a CrR 8.3(b) motion because he believed the prosecutor mismanaged the case, but stated that it was "not procedurally appropriate" to discuss the merits at that time because counsel had not filed a declaration. VRP (Mar. 19, 2018) at 3.

No courtrooms were available on March 20. The trial was continued to the following day over Celaya's objection. At the hearing, Celaya's counsel clarified that he was not certain he would bring a CrR 8.3 motion. Counsel stated that he "would be looking at these issues" and

would only move to dismiss under CrR 8.3 by filing a declaration "if [he] felt it appropriate." 2 VRP (Mar. 20, 2018) at 14. Defense counsel never brought such motion.

No courtrooms were available on March 21, and the court again continued the case. Celaya moved to continue the trial to April 12 to accommodate defense counsel's vacation and judicial conferencing. The court granted the motion and set the trial date for April 12.

The State moved for a continuance on April 4 due to witness availability issues of four officers. Celaya did not object. The court granted the State's motion and continued the trial to April 17.

The case proceeded to trial on April 17. Jeffries and Pace testified for the State.

Jeffries testified to the details of the assault. The prosecutor asked Jeffries if there were any parts of the assault that she did not remember. Jeffries stated that as the prosecutor asked her questions, she recalled. She continued by stating, "I have had no reason to remember this event. I do not want to remember this event, so putting it out of my head has been all I've been doing. Forgetting is the goal." 2 VRP (Apr. 18, 2018) at 103. Jeffries testified that she did not remember what time she used drugs before the incident, what day of the week the incident occurred, or at what time she called the police. Jeffries also testified to other incidences where Celaya became violent towards her, but she could not remember the dates of the incidences. Pace stated that he could not remember whether Celaya and Jeffries argued on the day in question.

Celaya did not present any evidence. The jury found Celaya not guilty of second degree assault, but guilty of the lesser included offense of fourth degree assault. The jury also found Celaya guilty of fourth degree assault, felony harassment, violation of a no-contact order, and tampering with a witness. The jury entered special verdicts on all five counts and found for all five counts that the crimes were crimes of domestic violence. Celaya appeals.

DISCUSSION

I. CrR 8.3(b)

Celaya argues that his convictions should be dismissed because the State committed governmental misconduct under CrR 8.3(b) that caused the trial court to violate Celaya's constitutional right to a speedy trial. We disagree.

Celaya raises a violation of his constitutional right to a speedy trial in the context of CrR 8.3(b) by contending that his constitutional rights were violated *as a result of* government misconduct. CrR 8.3(b) permits the trial court to dismiss a criminal prosecution under certain circumstances:

> 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.

Celaya did not move to dismiss his charges under CrR 8.3(b) below. Although Celaya's counsel alluded to governmental misconduct under CrR 8.3(b) at the March 19 hearing, counsel stated that "it's not procedurally appropriate" to discuss the merits because counsel had not filed a declaration. VRP (Mar. 19, 2018) at 3. At a hearing the following day, Celaya's counsel clarified that he was not certain he would move to dismiss on the basis of CrR 8.3(b), but that he would be "looking at these issues" and would move to dismiss "if [he] felt it appropriate." 2 VRP (Mar. 20,

2018) at 14. Celaya's counsel took no further action and did not file a motion to dismiss under CrR 8.3(b).

Because Celaya abandoned the CrR 8.3(b) issue below, Celaya waived CrR 8.3(b) as a basis for review on appeal. Waiver is "'an intentional relinquishment or abandonment of a known right or privilege.'" *State v. Harris*, 154 Wn. App. 87, 95, 224 P.3d 830 (2010) (internal quotation marks omitted) (quoting *State v. Riley*, 19 Wn. App. 289, 294, 576 P.2d 1311 (1978)). Even when an error is a manifest constitutional error, "it can still be waived if the issue is deliberately not litigated" at the trial court level. *State v. Hayes*, 165 Wn. App. 507, 515, 265 P.3d 982 (2011); *see also State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994).

Celaya's counsel's statements to the trial court show that he clearly recognized the existence of the issue of governmental misconduct but nevertheless decided to not bring a CrR 8.3(b) motion. We conclude that by declining to move to dismiss his charges pursuant to CrR 8.3(b) in the trial court, Celaya has waived his claim of governmental misconduct on appeal. Thus, we decline to review Celaya's claim.

II. CONSTITUTIONAL SPEEDY TRIAL RIGHT

Celaya next argues that his constitutional right to a speedy trial was violated, which he contends should be reviewed for the first time on appeal as a manifest constitutional error. We conclude that Celaya does not make the requisite showing under RAP 2.5(a)(3) and, therefore, decline to review his claim of error.

We generally will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An exception to this rule exists for manifest constitutional errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); *O'Hara*, 167 Wn.2d at 98. To obtain review, an appellant must show that (1) the error is of constitutional magnitude and (2) the error is manifest. *State v. Lee*, 188 Wn.2d 473, 497, 396 P.3d 316 (2017).

Although Celaya raises a constitutional claim because the right to a speedy trial is guaranteed by the federal Sixth Amendment and article I, section 22 of the Washington Constitution, Celaya must also demonstrate that the alleged error is manifest. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). To do so, Celaya must show that the error "'had practical and identifiable consequences'" at his trial. *O'Hara*, 167 Wn.2d at 99 (internal quotation marks omitted) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Stated another way, Celaya must prove that he suffered prejudice at trial. *Lee*, 188 Wn.2d at 500.

Celaya argues that the delay in trial caused him prejudice because witness memories had faded. "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade." *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). However, witnesses' fading memories may work to the defendant's advantage when the witnesses support the prosecution. *Id.* As the State carries the burden of proof, fading memories may weaken the prosecution's case; therefore, "deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Id.*

Celaya points to the fading memories of two State witnesses, Jeffries and Pace. Specifically, he points to Jeffries's testimony where she claims to not remember parts of the assault and Pace's testimony where he claims to not remember whether Celaya and Jeffries argued on the

day of the incident. However, as the only victim and the sole witness to the incident, Jeffries's forgetfulness could weaken only the State's case and benefit Celaya's defense. With regard to Pace's testimony, Celaya does not point to any practical or identifiable consequences that resulted from Pace's inability to remember whether Celaya and Jeffries were arguing on the day of the incident. Therefore, Celaya fails to show how Jeffries's and Pace's forgetfulness caused him prejudice that affected his right to a fair trial.

Because Celaya fails to show manifest constitutional error that affected his right to a fair trial, we decline to consider the alleged error.[7]

II. STATEMENT OF ADDITIONAL GROUNDS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Celaya argues that he received ineffective assistance of counsel when (1) his counsel failed to investigate his background, (2) his counsel did not effectively cross-examine Jeffries, and (3) his counsel failed to enforce his speedy sentencing rights. We disagree and hold that the errors Celaya raises do not constitute ineffective assistance of counsel.

[7] Even assuming Celaya's alleged speedy trial violation was a manifest constitutional error and we considered the merits of his claim, Celaya's claim fails at the outset. When analyzing alleged violations of the constitutional right to a speedy trial, we use the balancing test set forth in *Barker*. *State v. Iniguez*, 167 Wn.2d 273, 283, 217 P.3d 768 (2009) (citing *Barker*, 407 U.S. at 530). However, in order to trigger the *Barker* analysis, the appellant must first show "that the length of delay crossed a line from ordinary to presumptively prejudicial." *Id*. Celaya does not satisfy the threshold burden of demonstrating that the delay was "presumptively prejudicial." *Id*. When the appellant fails to satisfy this threshold determination, "there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. Thus, without a manifest constitutional error or a showing of presumptive prejudice, Celaya cannot raise nor prevail on a speedy trial violation issue raised for the first time on appeal.

The right to counsel includes the right to effective assistance of counsel. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). To show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We do not address both prongs of the test when the defendant's showing on one prong is insufficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

To show deficient performance, Celaya must show that defense counsel's performance fell "'below an objective standard of reasonableness.'" *Id.* (quoting *Strickland*, 466 U.S. 688). Performance is not deficient when "'counsel's conduct can be characterized as legitimate trial strategy or tactics.'" *Id.* (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)).

1. FAILURE TO INVESTIGATE

Celaya argues that he received ineffective assistance because his counsel did not thoroughly investigate his background. Celaya contends that any investigative measures would have been "beneficial for [his] defense of the charges." SAG at 10.

Defense counsel has a duty to conduct a reasonable investigation. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). A defendant seeking relief under a failure to investigate theory "must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).

Celaya does not identify what information would have been beneficial to his defense, and the record on appeal is scarce of any information regarding Celaya's background. Without more information, we are not in a position to analyze this claim. As this matter is beyond the record, we do not address it on appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). If additional evidence exists supporting this claim, then Celaya may produce that evidence in a personal restraint petition. *Id*.

2. TRIAL STRATEGY

Celaya argued that his counsel was deficient by withholding damaging impeachment evidence when his counsel cross-examined Jeffries. Celaya refers to messages Jeffries sent to an individual named Guam Steve. Celaya argues that his counsel's decision to not raise this evidence caused him prejudice.

Jeffries and Steve were in a brief romantic relationship while Celaya was in custody awaiting trial. The messages contained a series of alleged threats towards Jeffries. The messages also contained a message from Jeffries where she threatens to shoot Steve and then lie to the police about it. The messages were unrelated to Celaya's case.

The State moved to exclude messages between Jeffries and Steve. Defense counsel argued that the messages should be admitted at trial as impeachment evidence because the messages demonstrated bias. The court ruled that unless the messages became relevant from the rebuttal testimony, they were too attenuated. Defense counsel did not question Jeffries about the messages.

There is a strong presumption of effective assistance of counsel, and Celaya bears the burden of demonstrating the absence of a legitimate strategic or tactical reason for the challenged conduct. *Grier*, 171 Wn.2d at 33. Here, defense counsel's reasoning for not attempting to impeach Jeffries with the messages is not contained in the record on appeal. A reviewing court will not consider matters outside the record on direct appeal. *Linville*, 191 Wn.2d at 525. Moreover, the messages had no relevance to Celaya's case and it was unlikely that the court would have permitted the admission of the messages to impeach Jeffries due to its limited ruling. Thus, Celaya has failed to show that his counsel lacked a legitimate tactical reason for not using the messages to impeach Jeffries.

Accordingly, we reject his claim.

3. SPEEDY SENTENCING RIGHTS

Celaya argues that he received ineffective assistance of counsel when his counsel failed to enforce his speedy sentencing rights. We disagree. The jury found Celaya guilty on April 26, 2018, and the court sentenced Celaya on June 19, 2018.

The constitutional right to a speedy trial encompasses a right to speedy sentencing. *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994). RCW 9.94A.500 embodies this right and establishes a specific time period for sentencing. Under RCW 9.94A.500(1), a sentencing hearing must occur within 40 court days after the conviction unless a party or the court moves for an extension for good cause.

Celaya points to the delay of 54 calendar days between his conviction and sentencing.[8] However, RCW 9.94A.500(1) mandates a sentencing hearing to occur within 40 *court* days of the conviction. Here, only 37 court days elapsed between Celaya's conviction and the sentencing hearing. Because the court sentenced Celaya within the time period set forth under RCW 9.94A.500, we find no violation of his speedy sentencing rights. Therefore, we hold that Celaya's counsel was not deficient because his speedy sentencing rights were not violated.

B. CUMULATIVE ERROR DOCTRINE

Celaya appears to argue that his counsel's ineffective assistance coupled with the violation of his right to a speedy trial constituted cumulative error that requires reversal.[9] We disagree.

Cumulative error may warrant reversal when several errors occurred at the trial court level to deny the defendant's right to a fair trial, even though each error standing alone would be considered harmless. *State v. Clark*, 187 Wn.2d 641, 655, 389 P.3d 462 (2017). Without error, the cumulative error doctrine does not apply. *Id.*

Because, as we hold above, Celaya was not deprived of effective assistance of counsel and he fails to demonstrate that review of his speedy trial claim is warranted under RAP 2.5(a), Celaya fails to establish any error. Without error, there can be no cumulative error.

[8] Celaya also refers to RCW 9.94A.110, however RCW 9.94A.110 was recodified as RCW 9.94A.500 by *Laws of 2001*, ch. 10, § 6.

[9] It is not clear whether Celaya includes his claim of an alleged speedy trial violation as part of his ineffective assistance of counsel claim or whether it is a freestanding claim that, when combined with his ineffective assistance of counsel claim, constitutes cumulative error. Because we find no error and thus find no cumulative error, it is unnecessary for us to resolve this confusion.

CONCLUSION

We hold that Celaya waived his CrR 8.3(b) claim, and therefore, we decline to review this issue for the first time on appeal. We also decline to review Celaya's claim that his constitutional right to a speedy trial was violated because he has not demonstrated this is a manifest error affecting a constitutional right under RAP 2.5(a)(3). We further hold that the issues Celaya raises in his SAG do not warrant reversal. Accordingly, we affirm.

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.

CRUSER, J.

We concur:

WORSWICK, J.

LEE, A.C.J.

LAW OFFICE OF HARRY WILLIAMS LLC

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