NO. 98678-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARSHALL JAY LEWIS,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 51814-7-II
Clallam County Superior Court No. 16-1-00022-2

ANSWER TO PETITION FOR REVIEW

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SERVICE	Thomas M. Kummerow Attorney for Petitioner Washington Appellate Project 1511 Third Ave., Ste. 610 Seattle, WA 98101 Email: wapofficemail@washapp.org, tom@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 24, 2020, Port Angeles, WA _____ **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals unpublished decision affirming the conviction in *State v. Lewis*, No. 51814-7-II (March 3, 2020), a copy of which is attached to the petition for review.[1]

The Court of Appeals, in conformity with well-established principles affirmed the convictions for first degree arson and residential burglary and reversed the convictions for cyberstalking and telephone harassment. *Lewis*, 2020 WL 1033580, at *1.

Presuming, without deciding, that the State's late disclosure of Capt. Barnes' fire investigation report was governmental misconduct, the Court of Appeals held that the trial court did not err in denying Lewis' motion to dismiss because Lewis was not prejudiced by the delayed disclosure. *Id.* Finally, the court held that the trial court did not err by admitting the Verizon Wireless records because they were properly authenticated and Lewis was not prejudiced. *Id.*

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review because the petition fails to present any issue of substantial public interest

[1] *See also State v. Lewis*, 12 Wn.App.2d 1038, 2020 WL 1033580, at *1 (2020).

that should be determined by this Court and the petition fails to establish any other criteria set forth in RAP 13.4(b)?

IV. STATEMENT OF THE CASE

In March 2018, Lewis Marshal was convicted by a jury of Arson in the First Degree for burning down his ex-girlfriend Kasey Cross' home on New Year's Day 2016. Prior to trial, the defense was provided discovery showing that Capt. Justice Barnes was part of the Fire District that responded to the fire scene and that he investigated the fire. CP 205. The State notified the defense that Barnes was a witness for the State when it filed its omnibus application on Feb. 19, 2016. CP 179-180. Barnes is listed as Captain of the County Fire District #1 on the omnibus application. The State also notified the defense that Barnes would be called upon to testify when the State filed a separate witness list on April 1, 2016. CP 186.

Four days prior to the trial scheduled for Jan. 19, 2018, while interviewing Barnes in preparation for trial, the prosecution learned that Barnes had written a report on his fire investigation. CP 171. The deputy prosecutor immediately demanded and obtained the Barnes Report Wed., Jan. 17, 2018 after business hours and provided it to the defense on Thurs., Jan. 18, 2018, four days before the trial set the following Monday, Jan. 22. RP 61; RP 5 (Jan. 19, 2018); CP 214–218 (Barnes Report).

The defense made it clear on multiple occasions that the prosecution was diligent in providing the Barnes Report to the defense. RP 6 (Jan. 19, 2018); RP 61, 62, 63–64, 67. Nevertheless, Lewis demanded that his defense counsel file a

motion to dismiss based on the late discovery rather than proceed to trial. RP 51–52. Defense counsel stated that he would need time in order to prepare the motion and the trial court granted a continuance for this purpose. *Id.* Ultimately, the motion to dismiss was denied and the case proceeded to trial in March 2018.

The two fire investigations: *Lyn Davis' fire investigation report, Jan. 13, 2016 (hereinafter "Davis Report") and Capt. Justice Barnes fire investigation report dated April 11, 2016 (hereinafter "Barnes Report"') and relevant testimony.*

Lyn Davis had been a professional fire investigator for 24 years. RP 615. Davis was also employed in law enforcement for five years in the arson section of the Portland Fire Bureau. RP 615–16. Davis had investigated several thousand fires including about 1500 for law enforcement. RP 616. Davis taught Incendiary Fire Analysis for 20 years at Western Oregon University. RP 617. Davis had also been qualified to testify as an expert about 30 times. RP 618.

Capt. Justice Barnes was a part time volunteer firefighter for 16 years and had been a fire investigator for three years. RP 543. Barnes had 40 hours of fire investigation training. RP 542–43. Barnes had investigated only two or three fires by the time he was involved in investigating the fire in the instant case. RP 543.

Capt. Justice Barnes and Lyn Davis both concluded that the fire had two points of origin. CP 212 (Davis Report), 216 (Barnes Report). Davis concluded in his report that the fire was an arson fire set in two separate locations. CP 212. The State provided the Davis Report to the defense. CP 161, 210. Barnes, with Davis' report in hand, completed his own report three months later on Apr. 11, 2016. CP

214; RP 563, 569. Barnes' report was inconclusive as to the cause of the two fires. CP 217.

Davis referenced in his report that "[Barnes] said that the fire appeared suspicious and he has turned over the investigation to the Clallam County Sheriff's Office [CCSO]." CP 210. Then, although Barnes had not yet generated a report, Davis reported, "The fire was investigated by Clallam County Fire District #1. Their Fire Marshal, Justice Barnes, determined that the fires were intentionally set and has turned over the follow-up investigation to the Clallam County Sheriff's Office." CP 211.

At trial, when asked if he wrote in his report (Davis Report) that Barnes determined the fires were intentionally set during trial, Davis stated, "I think what he actually said was he thought it was suspicious and he turned over the investigation . . ." RP 644.

Barnes testified that it is the practice of the fire department, that when they see something they believe is criminal, they call the local law enforcement or county level to take the criminal investigation and then they collaborate on scene. RP 544. Barnes testified that in this case his role shifted into a fire investigator role after he had cause to believe a crime had occurred and law enforcement was contacted. RP 558–59.

Barnes further testified that review of additional materials could have affected his determination that the cause of the fire was undetermined such as if accelerants had been found. RP 565–66. Barnes defined "undetermined" to mean that the cause cannot be proven with an acceptable degree of certainty. Barnes

testified that an "accelerant" "[c]ould be any, could be fuel, like gasoline, diesel, transmission fluid, anything to increase the heat release rate of a fire." RP 566. RP 573. Barnes also testified that the fact there was two origin sources of the fire would be a good clue that the fire was incendiary which means a fire that is intentionally set where it shouldn't be. RP 568. Barnes testified that he found no evidence that the fire was accidental. RP 568.

Barnes testified that he never reviewed any of the reports from the Washington State Patrol Crime Laboratory and was not aware of accelerants being found. RP 564, 573.

Jan. 19, trial date stricken

On Fri., Jan. 19, 2018, the day after the prosecution provided the Barnes Report to the defense, the parties appeared before the court and agreed to strike the trial date. State's Supp. RP (1/19/2018). The defense stated that they needed time to investigate the new evidence. *Id.*

According to his counsel, the Jan. 22 trial date was stricken with Lewis' agreement to allow "Mr. Lewis to make a decision about where we stood relative to a plea negotiations and whether he wished to pursue perhaps either motions to dismiss relative to the discovery matter or just proceed to trial." RP 51.

Feb. 9 motion to continue trial and decision to file motion to dismiss

Lewis had discussed with his attorney about the possibility of entering plea negotiations and had not yet decided whether he wanted to enter plea negotiations, file a motion to dismiss, or go to trial until the hearing on Feb. 9,

2018. RP 51–52. On Feb. 9, 2018, the defense moved to continue the trial beyond the current Feb. 21, 2018 speedy trial date. RP 51–52.

The defense indicated that it planned to file a motion to dismiss due to late discovery from the fire district after Lewis instructed. RP 51. The court found good cause to continue the trial beyond the speedy trial expiration of Feb. 21 to Mar. 26, 2018 because Lewis' counsel expressed his need for time to prepare the motion to dismiss. RP 51–52, 54–55. Lewis objected to the continuance requested by his counsel and stated that he was not waiving any speedy trial. RP 54.

The trial court stated to Lewis that he could either go to trial without the motion to dismiss or allow his counsel time to prepare the requested motion. RP 55. The trial court pointed out that Lewis had made it clear that Lewis "decided [he] wanted the motion to dismiss to be generated before [his] trial date." RP 55. Lewis then asked for assurance that he would get his motion to dismiss although he was not willing to sign the trial continuance order. RP 56.

The defense eventually signed the motion to dismiss about a month later on Mar. 8, 2018 and filed it on Mar. 15, 2018. CP 159.

Other testimony at trial March 2018 relevant to whether Lewis was at the scene of the arson on New Year's Day 2016

Mark Strongman, Washington State Patrol Forensic Scientist, Materials Analysis Section (RP 737) testified that that he detected gasoline in the samples B6371 (a liquid from gas can on back porch), B6404 and B6405 (two pieces of foam rubber from the mattress) collected from the scene by CCSO Deputy Cameron. RP 402–03, 422–25, 750–51, 756.

The gas can found on the back porch was swabbed for DNA (B06370) and tested against a sample of Lewis's DNA (B15488). RP 403, 586–87, 589. Washington State Patrol Forensic Scientist, Ms. Hoffman, a qualified expert in DNA analysis, testified that Lewis was a major contributor to the DNA found on the gas can. RP 579, 589.

Detective Amy Bundy, Clallam County Sheriff's Office, testified that Lewis admitted during his interview with Sgt. Keegan that he did drive to Ms. Cross' residence on New Year's Day 2016, the day of the arson. RP 521.

Prior to moving to admit Verizon phone records to show Lewis was present near Cross' home the day of the arson, the State called Joseph Ninete, Senior Analyst from Verizon. Ninete testified that he held his position with Verizon for five years and he testified to his extensive knowledge of how records are produced at Verizon. RP 649–59. Ninete was shown an exhibit 90 and asked if he recognized it. RP 659. Ninete explained that he did recognize it and identified it as subscriber information for a particular phone number. RP 659. Ninete testified that the format of the information contained in it was the general format Verizon uses when providing a response to legal process. RP 660. Ninete was able to tell it was a Verizon business records because of the format, the search value, account number, last name, first name, middle name, business name as that is exactly what Verizon would provide. RP 662.

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V. ARGUMENT

A. THE PETITIONER HAS NOT ESTABLISHED ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(b).

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only:
>
> If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or
>
> If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The denial of Lewis' motion to dismiss is not an issue of public importance this Court should review because the standard of review for alleged discovery violations is the same regardless of how close to trial they may occur, the State acted with due diligence, there was no prejudice to Lewis' right to a fair trial, and there was good cause for a continuance.

Lewis argues that this case is different from prior cases dealing with discovery issues and is of substantial public importance because the Barnes report was only disclosed and provided to the defense four days before trial.

The rule on review of alleged discovery violations is the same regardless of how close to trial discovery is revealed and provided to the defense. *See State v. Smith*, 67 Wn. App. 847, 853, 841 P.2d 65 (1992) (disclosure of a new lab report the day of trial resulting in continuance did not justify a dismissal); *State v.*

Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986) (holding that continuance pursuant to former CrR 3.3(h)(2) (currently CrR 3.3(f)(2)) was proper where State released list of six additional witnesses two days before trial creating a conflict between one defendant's CrR 3.3 right to a speedy trial and another defendant's right to adequately prepared counsel).

Therefore, review of this issue would not provide any needed guidance where there is already well established precedent. Further, the trial court's denial of Lewis' motion to dismiss was proper because the State acted with due diligence, the Barnes report was available to the defense long before the trial upon exercising reasonable diligence, and there was no prejudice to Lewis' right to a fair trial.

A trial court has "wide latitude in imposing sanctions for discovery Violations" and a trial court's denial of a motion to dismiss due to a discovery violations are reviewed for manifest abuse of discretion. *State v. Farnsworth*, 133 Wn. App. 1, 13, 130 P.3d 389 (2006) (citing *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P .2d 799 (1992); *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001)). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26,482 P.2d 775 (1971)).

It is well established that dismissal due to a discovery violation is an extraordinary remedy and is only available for situations where the violation was

some arbitrary action or governmental misconduct or mismanagement that results in prejudice to a defendant's right to a fair trial. *Farnsworth*, 133 Wn. App. at 13 (citing *Woods*, 143 Wn.2d at 582); *Blackwell*, 120 Wn.2d at 830 (citing *State v. Lewis*, 115 Wn.2d 294, 298, 797 P.2d 1141 (1990)).

"Thus, before a trial court exercises its discretion to dismiss, a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights." *Farnsworth*, 133 Wn. App. at 14 (quoting *Woods*, 143 Wn.2d at 583). The Washington Supreme Court further clarified in *Woods* that "it was incumbent on Woods to show by a preponderance of the evidence that the State's lack of due diligence forced him into choosing between salvaging one constitutional right at the expense of another constitutional right." *State v. Woods*, 143 Wn.2d 561, 583–84, 23 P.3d 1046 (2001).

Here, defense counsel noted on multiple occasions that the prosecution acted with diligence. *See Lewis*, 2020 WL 1033580, at *3 ("The State then "promptly provided [it] to the defense." CP at 108.); RP 61, 62, 63–64, 67.

Well in advance of trial, Capt. Barnes was listed as a State's witness for the Clallam County Fire Dept. and his report was referenced in Lynn Davis' insurance report which was provided to the defense and thus Barnes' report could have been discovered by the defense with reasonable diligence.

Further, the Barnes' report arguably did not contain or inject any material facts into the trial. Barnes' report was inconsistent with fire investigator Lynn Davis' report only in that Barnes' report was inconclusive as to the cause of the fire. Barnes' report did not provide exculpatory evidence as it did not rule out arson and was subject to revision as more evidence surfaced. *See Lewis*, 2020 WL 1033580, at *6 ("Barnes admitted that had he reviewed additional materials in making his determination, that his earlier conclusion—that the cause of the fire was undetermined—may have been affected."). Barnes never reviewed reports by Washington State Patrol Crime Laboratory and was not aware that accelerants were found.

There was good cause for the continuance and Lewis, by insisting that his counsel pursue a motion to dismiss before proceeding to trial, waived objection to the continuance. Further, there was no prejudice to Lewis' right to a fair trial arising from the continuance because the Barnes report was provided to the defense and available to use at trial as he saw fit. Finally, the defense has not shown that Lewis had to give up or waive his constitutional right to a speedy trial. *See Woods*, 143 Wn.2d at 583–84.

Therefore, review of the issues presented in this case would not serve a substantial public interest.

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2. The trial court properly admitted the Verizon phone records used to establish Lewis may have gone to Ms. Cross' residence the day of the arson and there was no prejudice because there was other evidence of Lewis' presence including his admission that he went to Ms. Cross' residence on New Year's Day.

"The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion." *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing *State v. Rivers*, 129 Wn.2d 697, 709–10, 921 P.2d 495 (1996)).

"A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court." *Demery*, at 758 (citing *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970)). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *Id.* (citing Sutherland at 22).

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746–47, 87 P.3d 774 (2004). ER 901 sets forth a number of ways that evidence may comply with the rule. *Id.* For example, the rule allows documents to be admitted based on the testimony of witnesses with knowledge, or based on distinctive characteristics surrounding the document guaranteeing authenticity. *Id.*

Lewis claims that the trial court erred in admitting the Verizon phone records because they were not properly authenticated.

Here, the State needed only evidence showing that the Verizon phone records are more likely than not to be what they are purported to be. Joseph Ninete, Senior Analyst from Verizon for five years, testified to his extensive knowledge of how records are produced at Verizon. RP 649–59. Ninete recognized exhibit 90 and identified it as subscriber information for a particular phone number. RP 659. Ninete testified that the format of the information contained in it was the general format Verizon uses when providing a response to legal process. RP 660. Ninete was able to tell it was a Verizon business records because of the format, the search value, account number, last name, first name, middle name, business name as that is exactly what Verizon would provide. RP 662.

It would be reasonable to conclude that the documents are what they were purported to be because Ninete was acutely familiar with such documents, was qualified to interpret the information on the documents, and he recognized the information immediately and testified how he recognized it and also how and when such records are created.

Therefore, the court did not abuse its discretion in admitting the phone records. Lewis also suggests that the phone records were the only evidence that Lewis may have gone to Ms. Cross' residence. This is not accurate.

The Verizon phone records merely corroborated Lewis' admission to Sgt. Keegan that he did drive to the victim's home on New Year's Day 2016. RP 521. This statement was admitted in the State's case-in-chief as a party admission. RP 521. Additionally, Lewis' DNA was found on a gas can found on the back porch

of the residence and photographed by Sgt. Keegan. RP 703. "Cross's mother testified that she was at the house New Year's Eve around 3:00 pm, and that there was no gas can on the back porch and the front door was in fine condition when she left." *Lewis*, 2020 WL 1033580, at *5. Finally, surveillance was admitted in evidence showing Lewis crossed the ferry to Kingston New Year's Day 2016. RP 795–809.

The Verizon records were sufficiently authenticated by the record custodian's testimony establishing the records are what they were purported to be. Thus, there is no manifest abuse of discretion by their admission in evidence. Moreover, the admission of the Verizon records was not prejudicial because other evidence established Lewis went to Ms. Cross's residence the day of the arson.

Therefore, the admission of the Verizon phone records does not present an issue of substantial public interest which this Court should review.

VI. CONCLUSION

State v. Smith and *State v. Guloy* already provide guidance on the standard of review for alleged discovery violations regardless of how late discovery is provided prior to trial. *Smith*, 67 Wn. App. at 853 (disclosure of a new lab report the day of trial); *Guloy*, 104 Wn.2d at 428 (State released list of six additional witnesses two days before trial).

Further, the Verizon phone records were properly authenticated because trial court had sufficient testimony by a Verizon records custodian establishing that the Verizon records are what they were purported to be. Moreover, there was no prejudice from the admission of the records because other evidence, including

Lewis's admission, established that Lewis was present at Ms. Cross's residence on New Year's Day 2016.

Therefore, review of the Court of Appeals decision is not warranted under RAP 13.4(b)(3) because Lewis has not established that this case raises an issue of substantial public interest that should be decided by this Court.

For the foregoing reasons, the State respectfully requests that the Court deny Lewis's Petition for Review.

DATED July 24, 2020.

Respectfully submitted,
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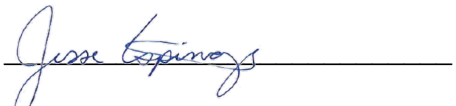
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Thomas M. Kummerow on July 24, 2020.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

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