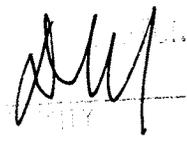


COURT OF APPEALS

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



NO. 40279-3-II

STATE OF WASHINGTON,

Appellant,

vs.

JOSHUA MICHAEL WILSON

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00490-0

REPLY BRIEF OF APPELLANT

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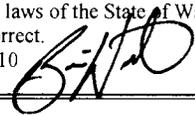
SERVICE	<p>Ms. Jodi Backlund Backlund and Mistry 203 E. Fourth Ave., Suite 404 Olympia, WA 98501</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: August 12, 2010 at Port Angeles, WA </p>
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I. ARGUMENT.

CrR 8.3(b)¹ gives the trial court authority to dismiss a case. Under the express terms of the rule, the trial court must find (1) that the prosecution engaged in arbitrary action or misconduct; and (2) that the defendant's right to a fair trial was materially prejudiced as a result. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Because Mr. Wilson cannot satisfy the first prong of this analysis, this Court need not address the issue of prejudice and should vacate the trial court's dismissal order.

A. THE COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE CHARGES ON THE SOLE BASIS THAT THE STATE WAS UNABLE TO COORDINATE A WITNESS INTERVIEW.

The law is clear. When the State is unable to secure an interview between the defense and a witness, that failure does not amount to prosecutorial misconduct / mismanagement. *Wilson*, 149 Wn.2d at 8-13. Here, the victim did not respond to the State's repeated request that she submit to a defense interview. RP (11/20/2009) at 5; RP (12/18/2009) at 5; RP (12/29/2009) at 8-9; RP (01/05/2010) at 5-6. The victim had a right to

¹ 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.

refuse to participate in said interview.² *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006); *State v. Wilson*, 108 Wn. App. 774, 776, 31 P.3d 43 (2001); *State v. Hofstetter*, 75 Wn. App. 390, 397, 878 P.2d 474, *review denied*, 125 Wn.2d 1012 (1994). Thus, this Court should hold the victim's refusal to submit to the interview is not attributable to the State, and it does not constitute government misconduct / mismanagement that warrants a dismissal of the charges pursuant to CrR 8.3(b). *See Wilson*, 149 Wn.2d at 8-13.

Of course, the prosecution may not discourage a government witness from agreeing to a defense interview. *Zhao*, 157 Wn.2d at 205 (citing ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 3-3.1(d) at 47 (3d ed. 1993); *See also* CrR 4.7(h)(1) (stating prosecutor may not “advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel”). However, the State took steps to facilitate and encourage an interview between the defense and the victim. Over the course of two months, the deputy and her office placed numerous phone calls to the victim and her family in order to coordinate the requested

² Where any witness refuses to submit to an interview, and a deposition cannot be accomplished, a motion to strike the witness is warranted. 32 WAPRAC § 30:3 (2009-10 ed.). Mr. Wilson's attorney requested the incorrect relief when he moved to dismiss with prejudice.

interview. RP (11/20/2009) at 5; RP (12/18/2009) at 5; RP (12/29/2009) at 8-9; RP (01/05/2010) at 5-6. The State's messages impressed upon the victim that the case was in danger of not going forward unless she contacted the deputy and made herself available to the defense. RP (01/05/2010) at 6. The deputy prosecutor even requested a material witness warrant to locate the victim, who apparently had fled the county. RP (01/05/2010) at 6. This Court should hold that the deputy prosecutor acted reasonably and professionally. As such, the deputy prosecutor did not commit governmental misconduct warranting the extraordinary remedy of dismissal. *See Wilson*, 149 Wn.2d at 8-13.

Mr. Wilson essentially argues that the State mismanaged the case against him because it did not do more to locate the victim and make her available. *See* Brief of Respondent at 5-7, 9. However, Mr. Wilson ignores the facts, court rules, and law applicable to this case.

The State actually did more than the law requires. The State's representation / efforts to arrange a defense interview with a key government witness does not impose an obligation on the prosecution to ensure that the interview does in fact take place. *Wilson*, 108 Wn. App. at 775. *See also* CrR 4.7 (no affirmative duty on the prosecution to arrange witness interviews); *Hofstetter*, 75 Wn. App. at 397 (defendant has no absolute right to interview potential witnesses). Here, as stated above, the

State made repeat efforts to assist the defense in locating the victim and scheduling a subsequent interview. The failure to secure an interview was attributable solely to persistent lack of responsiveness by the witness, not the State, of which the defense was well aware.

More importantly, defense counsel has an independent responsibility to interview witnesses. The State's representation / efforts to arrange a defense interview with a witness does not relieve counsel of his own responsibility to ensure that said interview occurs. *Wilson*, 108 Wn. App. at 775. "Interviewing witnesses is an essential part of a reasonable investigation." *Zhao*, 157 Wn.2d at 205. The discovery rules provide the defense with tools to facilitate said interviews. CrR 4.6 permits the defense to compel a deposition "if a witness refuses to discuss the case with either counsel and that his [or her] testimony is material and that it is necessary to take his [or her] deposition in order to prevent a failure of justice[.]" Additionally, CrR 4.10 authorizes the defense to obtain a material witness warrant to compel the witness's attendance at a deposition. Mr. Wilson never moved the trial court to order a deposition or a material witness warrant. Instead, Mr. Wilson faults the State for not requesting a material witness warrant prior to January 5. This Court should reject Mr. Wilson's efforts to attribute his own lack of diligence to the State.

Mr. Wilson cannot establish that the State committed arbitrary action, government misconduct, or mismanagement when it failed to secure a defense interview with the victim. Because Mr. Wilson cannot establish arbitrary action or government misconduct / mismanagement, the trial court erred when it dismissed the charges against him. This Court should so hold.

B. THE STATE TIMELY PROVIDED THE DISCOVERY IT POSSESSED.

Mr. Wilson argues that an additional ground supports a dismissal in the present case – *i.e.* that the deputy prosecutor failed to provide certain discovery in a timely fashion. *See* Brief of Respondent at 10-12. Mr. Wilson correctly notes the case schedule required the State to provide the defense with access to the discovery it possessed and intended to use at trial. *See* Order Setting Case Schedule, Supp. CP. However, there is nothing in the record to show that the State violated this order. This Court should reject Mr. Wilson’s argument.

In Washington, full disclosure of the State’s evidence is the rule. *State v. Norris*, -- Wn. App. --, -- P.3d --, 2010 WL 2902587 at 9. “The State must disclose ‘any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the defendant’

that it has *in its possession* by the date of the omnibus hearing.” *Norris*, 2010 WL 2902587 at 9 (citing CrR 4.7(a)(1)(v) (emphasis added). The State has a continuing duty to provide the defense with discoverable materials. CrR 4.7(h)(2).

Here, the trial court’s scheduling order required the State to provide the defense with access to the discovery in its possession no later than December 4, 2009. *See* Order Setting Case Schedule, Supp. CP. At the December 29 hearing, the State informed the trial court that it had provided the defense with all the discovery it possessed. RP (12/29/2009) at 8. The defense did not contest this representation. RP (12/29/2009) at 8.

The State did not provide photographic evidence of the victim’s injuries, or any medical reports, before December 29 because that discovery was not in its possession. RP (12/29/2009) at 8, 13. The State assured counsel and the court that it would provide (1) the requested photographs once it received the evidence from law enforcement, and (2) the medical reports as soon as the victim resurfaced and provided the requisite consent to release said records. RP (12/29/2009) at 8, 13. At the January 5 hearing, Mr. Wilson’s attorney did not raise any further discovery concerns. RP (01/05/2010) at 4-10. As such, this Court should conclude that the State timely satisfied its discovery obligations.

The record does not show that the State withheld any discovery in its possession from the defense. As such, and again, Mr. Wilson cannot show that the State committed government misconduct / mismanagement to support a dismissal order pursuant to CrR 8.3(b). This Court should reject Mr. Wilson’s argument and vacate the dismissal order.

C. REMAND FOR ENTRY OF FINDINGS AND CONCLUSIONS IS NOT REQUIRED.

Mr. Wilson submits that this Court should remand the case to the trial court so that it may have an opportunity to clarify its written order. *See* Brief of Respondent at 13. According to Mr. Wilson, the trial court “implicitly” considered the issues of prejudice and intermediate remedial steps. *See* Brief of Respondent at 13 (citing RP (01/05/2010) at 4-8). This Court should reject Mr. Wilson’s proffered remedy.

In the interest of judicial economy, this Court may decide legal issues raised on appeal in the absence of written findings and conclusions, as long as the court’s oral ruling and other records available on appeal allow the appellate court to discern the trial court’s factual findings and the rationale for its rulings. *See State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994).

Here, the trial court dismissed with prejudice the charges against Mr. Wilson because the State had not coordinated a defense interview with

the complaining witness. CP 06, RP (01/05/2010) at 4-8. The trial court did not find, expressly or implicitly, that the prosecution engaged in arbitrary action or government misconduct / mismanagement. In fact, the trial court expressly found that the deputy prosecutor had acted in good faith to secure the victim for a defense interview. CP 06; RP (01/05/2010) at 7, 9. Thus, CrR 8.3(b) cannot sustain the dismissal order. Because CrR 8.3(b) does not support the trial court's dismissal order, this Court need not remand for entry of additional findings of fact or conclusions of law.

II. CONCLUSION.

The State respectfully requests that this Court vacate the trial court's dismissal order and remand for further proceedings.

DATED this August 12, 2010

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