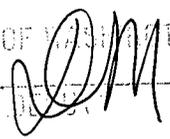


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COURT OF APPEALS
DIVISION II

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No. 41309-4 - II

STATE OF WASHINGTON

BY 

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT P. LESHOWITZ

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY
THE HONORABLE MICHAEL J. SULLIVAN, JUDGE

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in declaring a mistrial, over the objections of the appellant, on the first day of trial, July 27, 2010, thus violating the appellant's time for trial rights per CrR 3.3.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the appellant's speedy trial rights were violated by the trial court's ordering of a mistrial because of the unavailability of two of the state's witnesses and the possibility that the jury venire might be exhausted without the summoning of additional jurors.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The appellant, Scott P. Leshowitz, was charged, on August 13, 2010; by a three count Amended Information (CP 39-44) as follows:

COUNT I

The defendant, **SCOTT P. LESHOWITZ**, in Pacific County, Washington, on or about **December 13, 2009**, did knowingly and without lawful authority, threaten to kill **Kollene Kipp**, immediately or in the near future, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out, to wit: did threaten that he would burn down the house located at 53 Upper Naselle Road, Naselle, Washington, with himself and Kollene Kipp inside, in violation of RCW 9A. 46. 020(1)(a)(i) and (2)(b).; and **furthermore, the defendant did commit the above crime against a family or household member, in violation of RCW 10.99.020.**

COUNT II

The Defendant, **SCOTT P. LESHOWITZ**, in Pacific County, Washington, on or about **December 13, 2009**, with a premeditated intent to cause the death of another person, attempted to cause the death of such person, to wit; **Kollene Kipp**; and committed an act which was a substantial step toward the commission of said crime, to wit; **doused Kollene Kipp with gasoline and threw a lighted match at the victim**, in violation of RCW9A.28.020.

And Furthermore, the crime was aggravated by the following circumstances under RCW 9.94A.535:

- (a) **The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim; and**
- (h) **The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:**
 - (i) **The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;**
 - (ii) **The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.**

OR IN THE ALTERNATIVE

The defendant, **SCOTT P. LESHOWITZ**, in Pacific County, Washington, on or about **December 13, 2009**, with intent to inflict great bodily harm, assaulted another, to wit, **Kollene Kipp**, with a deadly weapon or by any force or means like to produce great bodily harm or death (**to wit, doused Kollene Kipp with gasoline and threw a lighted match at her, then threw two pieces of firewood at her, then punched her and kicked her several times**), in violation of RCW 9A.36.011(1)(a); and furthermore, the defendant did commit the above crime against a family or household member, in violation of RCW 10.99.020.

And Furthermore, the crime was aggravated by the following circumstances under RCW 9.94A.535:

- (a) **The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim; and**

(h)The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present;

- (i) The offense was part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;**
- (ii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.**

COUNT III

The Defendant, **SCOTT P. LESHOWITZ**, in Pacific County, Washington, on or about **December 13, 2009**, did engage in sexual intercourse by forcible compulsion with **Kollene Kipp** and did inflict serious physical injury upon **Kollene Kipp**; in violation of RCW 9A.44.040(1); **and furthermore, the defendant did commit the above crime against a family member or household member, in violation of RCW 10.99.020.**

And Furthermore, the crime was aggravated by the following circumstances under RCW 9.94A.535:

- (a)The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim; and**
- (h)The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:**
 - (i) The offense was part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple**

incidents over a prolonged period of time;

(ii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

[Leshowitz was originally charged by an initial information on December 16, 2009, (CP 6-12) and proceeded to trial on that charge on July 27, 2010 (RP Vol. 1, 7/27/10, pg 2). On July 27, 2010, the court, over Leshowitz's objection, declared a mistrial (RP Vol. 1, 7/27/10, pgs. 48, 52-54).]

Leshowitz was tried on the Amended Information (CP 39-44) commencing August 25, 2010 (RP Vol. 5, 8/31/10, pgs. 204-5). During the course of the trial the court dismissed the aggravating factors charged in paragraphs (h)(i) of Counts II and III (RP Vol. 5, 8/31/10, pgs. 10-11).

On Sept 3, 2010, the jury returned the following verdicts:

1. Guilty of the crime of harassment in Count I as a lesser included offense (CP 156). The jury further found that Leshowitz and the victim were members of the same family or household and that Leshowitz's conduct manifested deliberate

cruelty to the victim (CP 166-167);

2. Guilty of the alternative crime of assault in the first degree as charged in Count II. The jury also returned the same special verdicts as to Count II that it did as to Count I (CP 159, 166-167);
3. No verdict was returned on Count III and it was eventually dismissed without prejudice (CP 176).

On October 8, 2010, Leshowitz was sentenced, inter alia, to an exceptional sentence of 179 months on Count II to run concurrently with a 30 day sentence as to Count I (CP 190-204).

Notice of Appeal followed.

B. FACTUAL BACKGROUND

On December 13, 2009, Kollene J. Kipp was living with the appellant Scott Leshowitz in his house in Naselle, Pacific County, Washington. They had met at a computer dating site in 2006 and had lived together in Naselle for approximately two months in 2006. This time they had been cohabiting since April of 2009 (RP Vol. 2, 8/26/10, pgs. 33-38, Vol. 3, pgs. 34-35).

According to Kipp on the night of December 12, 2009, she told Leshowitz she was leaving him. Leshowitz's response was to start slugging Kipp, followed by a threat to burn the house down with them in it. Eventually he got a container of gasoline and threw gas on her. He then began flicking lighted matches at her. This abusive type of conduct continued for several hours and included:

1. Hitting her twice with pieces of firewood on the elbow and leg;
2. Slamming her head against a door five or six times;
3. Slugging her in the back of the head with his fist; and

4. Kicking her seven to eight times while she was on the floor.
(RP Vol. 3, pgs. 37-52).

Leshowitz then ordered her into the shower, taking her clothes off in an effort to wash the gasoline away. After this, Leshowitz insisted on having sex with her. When she refused he started slugging her in the ribs. She then acceded and they had sex in the bedroom. They stayed in bed for 1-2 hours until Kipp persuaded him to allow her to call 911 pretending it was for his benefit because of an overdose of pills he had taken (RP Vol. 3, pgs. 52-59).

The police arrived; Leshowitz was taken to the emergency room and Kipp went to the Ocean Beach Hospital for examination (RP Vol. 3, pgs. 63-84).

Kipp's testimony was supported by the following:

1. Exs. 1-5, 7-9 and 15-23 which were pictures of Kipp's injuries taken at the Ocean Beach Hospital and the Crisis Support Network on December 13, 2009 and December 14, 2009 (RP Vol. 3, pgs. 85-103);

2. The testimony of Dr. Jessup McDonnell (RP Vol. 4, pgs. 23-33), Dr. Kim Smith (RP Vol. 4, pgs. 129-161) and nurse practitioner Karla Reinhart (RP Vol. 4, pgs. 162-167) as to Kipp's injuries; and
3. The testimony of Deputy Sheriff Sean Eastman who responded to the 911 call on December 13, 2009. He testified, among other things, that at the scene he located:
 - (A) A burned match in the living room carpet (Ex 30) which Leshowitz admitted having thrown at Kipp;
 - (B) Kipp's clothing in the shower (Exs. 25-26) in the shower which smelled of gasoline; and
 - (C) A gas container (Ex 32).

He further testified that Leshowitz admitted to him that he had threatened to burn the house down and kill both of them, poured gas on Kipp and had thrown a lighted match at her

thereafter, thrown firewood at Kipp, hit and kicked Kipp and had sex with her (RP Vol. 4, 49-100).

Leshowitz testified in his own defense (RP Vol. 5, Aug 31, 2010, pgs. 11-122). His testimony was basically that he acted in self-defense.

Leshowitz had been involved in a serious motorcycle accident in September of 2005. As a result, in 2009, he still lacked normal use of his left arm and suffered from traumatic brain injury (RP Vol. 5, Aug 31, 2010, pgs. 14-24).

His testimony was that the physical confrontation between himself and Kipp was started when she shoved him with both hands on his chest causing him to fall down and hit his head. His actions in pouring gas on her, flicking matches in her direction, throwing firewood at her, etc., were all done to stop her from assaulting him. [Kipp had told Dr. Smith that she was 5'4" and weighted 260 lbs at the time (RP Vol. 4, pg 156)] (RP Vol. 5, Aug. 31, 2010, pgs. 30-45).

During the entire episode Leshowitz kept ingesting a whole bottle of pills in an effort to kill himself (RP Vol. 5, Aug 31, 2010, pgs. 47-53).

ARGUMENT ON APPELLANT'S ASSIGNMENTS OF ERROR

The trial court erred in declaring a mistrial, over the objection of the appellant, on the first day of trial, July 27, 2010, thus violating the appellant's time for trial rights per CrR 3.3.

As previously stated, Leshowitz was charged by an initial information (CP 6-12) on December 16, 2009.

At his arraignment on December 18, 2009, the matter was continued to January 22, 2010, for the purpose of obtaining a competency evaluation (RP Vol. 1, 12/18/09, pgs. 2-4).

On January 22, 2010, Leshowitz having been declared competent to stand trial, an arraignment was held and his trial set for March 17-18, 2010 (RP Vol. 1, 1/22/2010, pgs. 2-6).

The matter was continued from time to time, without objection and even once on the motion of the defense, until on May 7, 2010, a final trial date of July 27-29, 2010, was ordered (RP Vol. 1, May 7, 2010, pgs. 3-23).

On Tuesday July 27, 2010, the trial commenced and jury selection began until it was interrupted by the noon hour. At that time the court

became concerned as to the possibility of the jury panel being exhausted before a full jury with one alternate could be seated (RP Vol. 1, July 27 2010, pgs. 2-11).

After the noon hour five new jurors had been summoned and added to the venire (RP Vol. 1, July 27, 2010, pgs. 11-18).

At this point the state raised the issue that it had asked two doctors to appear that afternoon to testify and that they might not be available the following day. A recess was then declared until 2:30 p.m. in order to determine whether the two physicians could return the following day (RP Vol. 1, July 27, 2010, pgs. 19-24).

The doctors were then examined and both of them stated they could not return the next day but could return on Friday (RP Vol. 1, July 27, 2010, pgs. 27-32, 37-42).

At this point the court stated it was inclined to declare a mistrial. A suggestion by the state that the trial start as scheduled and be continued until the following week was rejected by the court because of other trials set for that time (RP Vol. 1, July 27, 2010, pgs. 43-46).

At this point the state reraised the issue of whether there was sufficient jurors anyway and stated, in its opinion, that the

- - - substantial doubt at this point whether we have enough jurors and that that is - - - that alone, plus the other scheduling difficulties would be enough to warrant a mistrial.

(RP Vol. 1, July 27, 2010, pg. 47).

This was enough to convince the court and a mistrial was declared even in the face of the defense objection that

- - - in no way is Mr. Leshowitz waiving or giving up his right to a speedy trial as those rules exist.

(RP Vol. 1, July 27, 2010, pgs. 48-54).

The trial court's decision was not reduced to a formal order supported by findings of fact and conclusions of law.

On July 30, 2010, the trial was reset for August 25, 2010, again over defense objection (RP Vol. 2, July 30, 2010, pgs. 2-12).

CrR 3.3(h) provides, in part,

A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.

The standard of review for an alleged violation of the speedy trial

rule is de novo State v. Carlyle, 84 Wa. App. 33, 35-36, 925 P2d. 635 (1966); State v. Kenyon, 167 Wn. 2d 130, 135, 216 P.3d. 1024 ((2009).

CrR 3.3(b)(1)(5) and (c)(1) provides that a defendant who is detained in jail shall be brought to trial within the longer of 60 days after the date of arraignment or within the allowable time limit after an excluded period.

Here, as previously stated, the agreed upon trial date of July 27, 2010, was arrived at on May 7, 2010. Had the trial been conducted as scheduled appellant would have no legitimate complaint. However the mistrial was declared and, under an Amended Information, the new trial did not commence until August 25, 2010.

Unless the delay occasioned by the mistrial could be considered an excluded period under CrR 3.3(g) there appears to be not justifiable reason for the conduct of the second trial.

An examination of CrR 3.3(g) reveals only two possible periods that could reasonably be excluded in this matter.

CrR 3.3(g)(3) allows an excluded period for a continuance granted

pursuant to CrR 3.3(f).

CrR 3.3(f) states that continuances or other delays (emphasis supplied) may be granted upon either (1) a written agreement or (2) motion by the Court or a Party. There was no written agreement here. The mistrial was ordered by the court without a motion for the same being made by either party although the State certainly encouraged it.

CrR 3.3(f)(2) speaks only of a continuance of a trial date. It does not mention "other delays". Further it requires that the court state on the record or in writing the reasons for the continuance (emphasis supplied). No written order was ever entered.

The court did state that there were two reasons it was considering for the mistrial. One was the shortage of jurors and the other was the unavailability of two state's witnesses. They will be examined in turn.

First of all the contention that there were not enough jurors was never established. All that was involved was an educated guess by the court, aided by counsel, that they might exhaust the venire before a jury could be fully impaneled. The obvious solution to this problem lies in the

language of RCW 2.36.130 which states,

If for any reason the jurors drawn for service upon a jury for any term shall not be sufficient - - - the judge - - - may direct the random selection and summoning from the master jury list such additional names as they may consider necessary.

This was the procedure apparently followed during the noon hour recess of July 27, 2010, when 5 additional jurors were summoned. There was no need to declare a mistrial. Additional summoning should have been utilized.

CrR 3.3(g)(8) contemplates a trial delay under unavoidable or unforeseen circumstances beyond the control of the court or of the parties.

Appellant urges that witness unavailability is not such a circumstance.

Witness scheduling is a phenomena known to all trial attorneys. The state had known of the trial date ever since May 7, 2010. The state had witnesses to call other than the physicians in question. Certainly this problem could have been addressed and solved during the 10 plus weeks between the date the trial was set and the day of trial.

Moreover the state's position seems to be that it was entirely

reasonable to expect to pick a jury on felony harassment, attempted murder and rape charges, have opening statements and present the testimony of two expert witnesses in toto all on the same day. With all due respect this type of mismanagement should not be rewarded by deeming it an unavoidable or unforeseen circumstance.

Finally CrR 3.3(f)(2) requires findings that the delay was required

----in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.

No such findings were made.

In State v. Kenyon, 167 Wn. 2d 130, 135, 216 P3d. 1024 (2009)

the issue was

- - - whether the speedy trial rule, CrR 3.3, which allows for unavoidable or unforeseen circumstances, permits a trial court to continue a criminal trial past the speedy trial deadline because of the unavailability of a judge to preside over the trial. We must also decide whether the trial court must make a careful record of the unavailability of courtrooms and - - -

In determining that the speedy trial rule had been violated, the court stated;

¶29 Simply because the rule now allows “unavoidable or unforeseen circumstances” to be excluded in computing the time for trial does not mean judges no longer have to

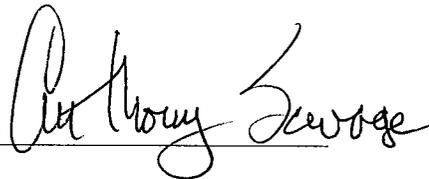
to “state on the record or in writing by the reasons for the continuance’ when made in a motion by the court or by a party. CrR 3.3(f)(2). Here, the trial court should have documented the availability of pro tempore judges and unoccupied courtrooms. The failure to do so violated Kenyon’s right to a speedy trial.

In accord, State v. Saunders, 153 WSn. App. 209, 219-220, 220 P.3d. 1238 (2009).

CONCLUSION

The appellant's speedy trial rights were violated by the ordering of the mistrial. The trial court should be reversed and the charges against Leshowitz dismissed with prejudice.

Respectfully submitted,

A handwritten signature in black ink, reading "Anthony Savage", written over a horizontal line.

ANTHONY SAVAGE, WSBA #2208

