

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

STATE OF WASHINGTON,

Respondent/Cross-appellant

v.

SCOTT P. LESHOWITZ

Appellant/Cross-respondent

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Michael J. Sullivan, Judge

AMENDED RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Appellant/Cross Respondent Scott P. Leshowitz assigns error to the court's ruling declaring a mistrial on July 27, 2010, and in setting a new trial date allegedly outside the time for trial as set forth in CrR 3.3.

2. Respondent/Cross-Appellant State of Washington assigns error to the court's order, on the third day of trial, prohibiting a victim advocate from accompanying the victim while the victim was entering or leaving the courtroom.

II. STATE'S RESPONSE TO APPELLANT/CROSS-RESPONDENT'S ASSIGNMENT OF ERROR

The court did not violate CrR 3.3 when it re-set the jury trial 29 days after an "excluded period" that resulted from the Defendant's motion for a continuance. CrR 3.3(b)(5) expressly provides that the time for trial *shall not expire less than 30 days after such an excluded period*. In addition, any order granting a mistrial automatically establishes a new commencement date for purposes of calculating the time for trial, which would have restarted the sixty-day time for trial. CrR 3.3(c)(2)(iii). There is no requirement that the mistrial be granted for good cause. If this were the case, then an erroneous mistrial order would in effect become a dismissal with prejudice. The Defendant never objected to the mistrial below. Appellant incorrectly argues that the Defendant preserved the

issue on appeal by stating that he was not waiving his speedy trial rights. He did in fact waive the issue of whether the mistrial was properly granted by failing to object in a timely fashion and by misleading the court into believing that the mistrial was appropriate. By stating that he was not waiving his rule-based speedy trial rights, he only preserved his right to object to any error in the application of CrR 3.3. The State asked the Court to consider alternatives to a mistrial, such as extending the trial. The Defendant did not argue for any alternatives to granting a mistrial and did not oppose the mistrial. Therefore he cannot raise the issue of whether the mistrial was improperly granted for the first time on appeal. The defendant never objected to the mistrial; therefore the last allowable date for trial was 60 days after the date the mistrial was declared pursuant to CrR 3.3(c)(2)(iii), which provides that an order granting a mistrial is an event that triggers a new commencement date. Because the defendant agreed that the Court had reasonable grounds to declare a mistrial and did not object to the mistrial, counsel failed to preserve the issue on appeal.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the issue of a precipitous declaration of a mistrial on the court's own motion preserved on appeal when the defense counsel indicated to the court that it was "probably on good grounds" in declaring a mistrial and never objected to the court's motion?

2. Did the trial court set the August 25, 2010, trial within the time for trial set forth in CrR 3.3?

3. Did the court abuse its discretion when it ordered that the victim advocate could not escort the complaining witness to and from the courtroom while the jury was seated?

IV. STATEMENT OF THE CASE

1. Procedural history.

The State agrees with some of Appellant's characterizations regarding the procedural history of the case, and disagrees with others.

On February 10, 2010, the Defendant executed a voluntary waiver of his speedy trial rights with a new commencement date of March 19, 2010, and a last allowable date for trial of June 30, 2010. See *Waiver of Speedy Trial* dated February 19, 2010. CP at 212. The court set a jury trial to begin on May 25, 2010. See *Order Setting Dates* dated February 19, 2010, CP at 211. Defendant did not object to these dates even though they were outside of the time for trial. Defendant had only 10 days in which to object, and there is no record in the court file or in the Report of Proceedings that Defendant ever objected to the May 25th trial date.

On May 6, 2010, Defendant filed a motion to continue the jury trial, arguing that he needed the additional time in order to be adequately prepared. See Defendant's Motion to Continue Trial, dated May 6, 2010,

CP at 213-216. On May 7, 2010, the State filed its response to Defendant's motion, objecting to the continuance and arguing that the trial court should deny the motion. *See State's Response to Defendant's Motion for Continuance*, dated May 7, 2010, CP 217-222. On May 7, 2010, the court held a hearing, and ended up granting the Defendant's motion over the State's objections. *See RP 5/7/2010 at 2-23. See also, Order re: Motion For Continuance For Good Cause*, dated May 7, 2010, CP at 224. The court struck the May 25-26 trial dates and re-set the trial to be held July 27, 28, and 29, 2010. *See Order Setting Dates* dated May 7, 2010, CP at 223. Again, the Defendant did not object to these trial dates.

On July 27, 2010, the court commenced jury selection, but ended up declaring a mistrial when it concluded that there was a high probability that there would not be enough jurors even with the addition of some jurors that were called in during the lunch hour; and citing scheduling difficulties as well. *RP 7/27/2010 at 48-57.*

The State disputes Appellant's suggestion that the State encouraged the court to declare a mistrial on July 27, 2010, and disputes that the Defendant objected to the mistrial. *See e.g., Appellant's Opening Brief at 14.* The State's comments, quoted by Appellant at 14, came in response to the Court's invitation to the parties to put on the record any proposed findings relevant to the Court's ruling declaring a mistrial. The State's

comments in no way "convinced the court" that it should declare a mistrial. On the contrary, the State was the only party that argued that the court should consider alternatives to declaring a mistrial such as extending the trial, for example. RP 7/27/2010 at 45:

MR. BUSTAMANTE: "Well, your Honor, I'm just wondering why we can't just start the trial today and then continue it to next week. In other words, have the jury come back next week to finish it up."¹

The Defendant, on the other hand, never argued that the court should consider alternatives. The court announced that it was inclined to declare a mistrial at RP 7/27/2010 at 43 and again at 44. Defense counsel was given at least three opportunities to object. The first at RP 7/27/2010 at 44, where the court stated: "Now, I want to hear from you, Mr. Hatch, first and then I'll go back to Mr. Bustamante and then I'll—we'll go from there."

The second opportunity came at 7/27/2010 at 48, where the court stated, "[a]ny further comments, Mr. Hatch, and then I'll make my decision."

The third opportunity came at RP 7/27/2010 at 52, where the court again addressed defense counsel and asked if he had anything he wanted to say before he had the jury come in. On none of the three occasions did

¹ The Appellant actually acknowledge this. *See* Appellant's Opening Brief at 13.

defense counsel object to the mistrial. Instead, the Defendant agreed that the court was "probably on good grounds here." RP 7/27/2010 at 48.

After the mistrial was granted, the court met on July 30, 2010 to set a new trial dates. See RP 7/30/2010 at 2-12. In order to ensure that Mr. Leshowitz's time for trial was not violated, and with an abundance of caution, the State asked the court to set a new trial within 30 days, which the court did. *Id.* At the July 30th hearing the defense counsel objected to any new trial setting, arguing that Mr. Leshowitz's "time for speedy trial has expired". RP 7/30/2010 at 5. When asked when he thought the Defendant's speedy trial rights expired, defense counsel did not actually say. Instead, he stated:

"Your Honor, he never waived his speedy trial rights before, ever. The Court granted a good cause continuance on my motion to be adequately prepared due to the nature of the charges and the number and the—all of the aggravating factors and so that's why the Court granted the original continuance request." RP 7/30/2010 at 6.

The new trial began on August 25, 2010, exactly 29 days after the July 27th mistrial.

2. Court's order regarding the victim advocate.

On the third day of trial, the court expressed concern that a victim advocate was immediately leaving the courtroom every time the victim

left, "like she's some sort of a support person," and that, in the court's opinion, it didn't look right. See RP 8/30/2010 at 133-34:

THE COURT: Please be seated. I have one comment to make before we take the break. This is sort of a criticism but it's not meant to be negative. It's just meant to try to keep everything as neutral and impartial as possible.

When any witness that is here finishes testifying or when they enter the courtroom -- for instance, I notice -- I believe the lady in the front row is a Crisis Support Network person. She isn't? Okay, well, then I -- I'll take that back. But I need to instruct her that I don't want her walking out with the witness like she's some sort of a support person. It just -- to me it doesn't look right, and I don't know if Counsel care or not but to me, I care. Ms. Camenzind, excuse me, I just assumed Crisis Support because she goes out every time the person -- she just goes out right away like -- like a shadow.

And so Mr. Bustamante, if you'd please instruct her -- and if you don't feel comfortable to do that, Mr. Bustamante, I'll be glad to instruct her to just sit there and wait until -- just wait until she leaves and until I dismiss the jury and then she can go out there. But I just don't -- it just doesn't look right. And she sits right in the front row, which is fine and she's sitting which is fine. But I'm not arguing about it. I'm just saying that's what I want to happen. I don't care who it is.

The prosecutor immediately objected:

MR. BUSTAMANTE: Your Honor, two things. First of all, I'm not really sure who the person is that you're talking about.

THE COURT: Understood.

MR. BUSTAMANTE: Also, for the record, I

would like to just make an objection that statutes say that a victim in this type of case has a right to be accompanied by an advocate when she comes to testify and I think accompanied would include being escorted inside the courtroom and being escorted outside.

THE COURT: Well, that may be. My ruling stands. I want it enforced. Thank you.

V. ARGUMENT

A. The court set the August 25th trial date within the time for trial pursuant to CrR 3.3.

1. For purposes of calculating the time for trial, the period of time between the May 25th trial date and the July 27th trial date is an "excluded period."

CrR 3.3(e)(3) provides :

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

.....

(3) Continuances. Delay granted by the court pursuant to section (f).

Section (f) provides:

"On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay."

Because defense counsel filed a motion to continue the trial from May 25 to July 27, and because the court granted that motion for good cause, the

resulting delay caused by the court's decision to grant the defendant's motion is an "excluded period" as defined in CrR 3.3(f). Appellant may not object to the requested delay, since the Defendant himself brought the motion for continuance.

CrR 3.3(b)(5) provides that, if any period of time is excluded pursuant to section (e), the allowable time for trial *shall not expire* earlier than 30 days after the end of that excluded period. Thus CrR 3.3(b)(5) is an absolute bar to Appellant's claim that his time for trial was violated, since the court set the new trial 29 days after the "excluded period" resulting from Defendant's own motion for continuance.

2. The order granting a mistrial established a new commencement date.

Any order granting a mistrial automatically establishes a new commencement date for purposes of calculating the time for trial, which would have restarted the sixty-day time for trial. CrR 3.3(c)(2)(iii). So in effect, the last date that the court could have set the trial would have been September 26th. The court was well within the time for trial. Moreover, there is no requirement that the mistrial be granted for good cause when the court orders a mistrial on its own motion. If this were the case, then an erroneous mistrial order would in effect become a dismissal with prejudice. For a contrasting scenario, see *Arizona v. Washington*, 434

U.S. 497, 505, 98 S.Ct. 824 (1978) (holding that "the prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant"), *mentioned* in Justice Sanders' dissenting opinion in *State v. Daniels*, 165 Wn.2d 627 (2009) (citing *Brazzel v. Washington*, 491 F.3d 976, 982 (9th Cir.2007)).²

The instant case is distinguished from *Washington v. Arizona* insofar as here the State never asked the court to declare a mistrial and the Defendant never objected to the mistrial. Instead, the Defendant went so far as to support the court in its decision by saying that the court was "on good grounds" in granting a mistrial. RP 7/27/2010 at 48. The defense counsel only objected *after the fact* (i.e., on July 30th—three days *after* the court had declared the mistrial) stating that he believed the August 25th trial date was outside the time for trial. Because the Defendant never made a timely objection to the court's decision to declare a mistrial, and in fact opined that the court was "probably on good grounds" to declare a mistrial, the Appellant may not argue for the first time on appeal that the mistrial was improperly granted. This issue was not preserved on appeal. Therefore CrR 3.33.3(c)(2)(iii) governs, and the mistrial properly resulted

² *Arizona v. Washington* dealt with a situation in which the prosecutor moved for a mistrial after the defense counsel had made an improper opening remark. The Supreme Court held that the attendant circumstances supported a finding of "manifest necessity" even though the trial court never expressly made findings of manifest necessity. *Id* at 515-517.

in a new commencement date. The August 25th trial date was well within the 60-day time for trial.

3. CrR 3.3(d) does not cause July 27th to become the last allowable date for trial.

CrR 3.3(d) deals with the question of when a party loses the right to object to a trial setting. CrR 3.3(d)(2) provides as follows:

Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

CrR 3.3(d)(3) provides:

Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(4) provides:

Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

It should be noted that, under the language of subsection (d)(4), specifically, the sentence that reads, ""If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial," it would appear at first glance that Mr. Leshowitz's last day for trial should have been July 27th. However, the fact that Leshowitz moved for a continuance that was subsequently granted by the court, resulting in a delay of the trial, invokes the 30-day grace period set forth in subsection (b)(5). Thus the "last allowable date for trial" described in subsection (d)(4) is effectively trumped by the 30-day grace period of subsection (b)(5) mentioned above. And of course, the resetting of the commencement date pursuant to subsection (c)(2) also applies since the court entered an order granting a mistrial.

In conclusion, the court did not set the August 25th trial date outside of the time for trial. The August 25th trial date was well within the time for trial.

B. The court abused its discretion in prohibiting the victim advocate from entering and leaving the courtroom with the victim.

Although the court has considerable discretion in controlling the courtroom, a court abuses its discretion when a decision is based on

untenable grounds or for untenable reasons. *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004).

The Crime Victims' Bill of Rights, codified as RCW 10.69.030, provides that, with respect to victims of violent and sex crimes, that such victims are entitled to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any judicial proceedings related to criminal acts committed against the victim. RCW 10.69.030(10). This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. *Id.* The role of the crime victim advocate is to provide emotional support to the crime victim. *Id.*

The court's order was based on untenable grounds. The court's concern the victim advocate would "look like she was some sort of support person," if she were permitted to escort the victim to and from the courtroom, is precisely what the legislature intended when it passed the Crime Victim's Bill of Rights. The Victim Advocate is supposed to be a support person. That is the whole purpose of the statute.

A case is moot when a court can no longer provide effective relief. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). Generally, an appellate court will dismiss an appeal if the question presented is moot and

it can no longer provide effective relief; the exception is when the issue is capable of evading review and has substantial public importance. *DeFunis v. Odegaard*, 84 Wn.2d 617, 627-28, 529 P.2d 438 (1974).

Although this issue may be moot, the Court should find that this is an issue of continuing public concern, capable of repetition, though evading review, and should rule that a trial court may not unreasonably restrict a crime victim's ability to accompany the victim to and from the courtroom when said victim is called to testify.

VI. CONCLUSION

The court did not violate Mr. Leshowitz's time for trial. The failure of defense counsel to timely object to the mistrial, at the time when the court was considering its *sua sponte* motion, operates as a waiver barring the Appellant from raising the issue for the first time on appeal. Because defense counsel actually supported the court's decision to grant a mistrial, Mr. Leshowitz may not now complain that the mistrial was improperly granted. Therefore, CrR 3.3(c)(2)(iii) governs, and a new commencement date was automatically created at the time the court declared a mistrial. The court had sixty days from July 27, 2010, to set the new trial date. Since the new trial date was only 29 days after July 27th, Mr. Leshowitz's time for trial was not violated.

Furthermore, CrR 3.3(b)(5) expressly provides that the time for trial *shall not expire less than 30 days after an "excluded period."* The delay in the trial resulting from Defendant's May 6th motion for continuance qualifies as an "excluded period." Once again, because the new trial date was set only 29 days after the "excluded period," the time for trial did not expire. Mr. Leshowitz's conviction should be affirmed.

DATED this 12th day of August, 2011.

Respectfully submitted,
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Appendix A
Certificate of Service

CERTIFICATE OF SERVICE

11 AUG 15 AM 9:25

I, David Bustamante, do solemnly declare and affirm under penalty of perjury under the laws of the State of Washington

BY David Bustamante
DEPUTY

that I served the subjoined Amended Respondent/Cross-appellant's Opening Brief on the Appellate Counsel for SCOTT P. LESHOWITZ, Defendant/Appellant/Cross-respondent, this 12th day of August, 2011, by mailing a copy to Anthony Savage, 615 Second Avenue, Suite 340, Seattle, WA 98104-2200. I also served the same on the Defendant/Appellant/Cross-Respondent this 12th day of August, 2011, by mailing a copy to SCOTT P. LESHOWITZ, #961450, Airway Heights Corrections Center, 11919 W. Sprague Avenue, P.O. Box 1899, Airway Heights, WA 99001-1899.

Signed at South Bend, Washington, this 12th day of August, 2011.

BY: David Bustamante
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