

NO. 41802-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY SCOTT ASHBORN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 10-1-04314-6

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to dismiss for violation of his right to a speedy trial when his trial began within the appropriate time for trial?

B. STATEMENT OF THE CASE.

1. Procedure

On April 13, 2010, the State charged JEFFREY SCOTT ASHBORN, hereinafter "defendant," with one count of assault in the second degree, felony harassment, and interfering with the reporting of domestic violence, all alleged to be acts of domestic violence, under Pierce County Superior Court Cause No. 10-1-01600-9. CP¹ 264-65. On July 21, 2010, the State moved for dismissal of the charges as the victim, Rita Rose, could not be located and served with a subpoena. CP 266-68.

On October 11, 2010, the State charged defendant with one count of assault in the second degree, alleged to be an act of domestic violence,

¹ Citations to Clerk's Papers will be to "CP." The verbatim report of proceedings is generally consecutively numbered, with the exception of the December 13 and 22 dates. Those two transcripts will be cited as "RP" followed by the date of the transcript and page number. For example, page four of the December 13 transcript will be cited as RP (12/13/10) 4. The remainder of the transcript will be cited as "RP" followed by the page number.

one count of unlawful possession of a controlled substance, less than forty grams of marijuana, one count of unlawful use of drug paraphernalia, and one count of driving while in suspended status in the third degree. CP 1-3.

On December 2, 2010, the State filed an amended information which included all of the charges that had been dismissed in July. CP 8-11. On December 22, 2010, the State filed a second amended information, to include an additional count of felony harassment. CP 21-24. Defendant was ultimately charged with two counts of assault in the second degree (Counts I and V), two counts of felony harassment (Counts VI and VIII), one count of unlawful possession of forty grams or less of marijuana (Count II), unlawful use of drug paraphernalia (Count III), driving while in suspended or revoked status in the third degree (Count IV), and interfering with the reporting of domestic violence (Count VII). CP 21-24. The assaults were alleged to have been committed while defendant was armed with a deadly weapon. CP 21-24.

The parties agreed that 24 days of speedy trial remained on the counts which had been originally dismissed. RP (12/13/10) 3-4. The court set the trial for December 22, 2010. RP (12/13/10) 8. The court was aware that there would be no jurors present for voir dire, but determined that all preliminary matters could be addressed. RP (12/13/10) 8.

On December 22, 2010, the Honorable Rosanne Buckner called the case for trial. RP (12/22/10) 2-6. At that time, defense counsel admitted that she was currently in another trial, but expected to be finished later that

afternoon. RP (12/13/10) 2. Defendant was rearraigned on the second amended information, which had added Count VIII. RP (12/22/10) 3-5. Defendant then made a motion to exclude witnesses, which was granted by the court. RP (12/22/10) 5. The court recessed until Monday, January 3, 2011. RP (12/13/10) 6.

On January 3, 2011, the court heard testimony regarding a CrR 3.5 motion to suppress defendant's statements to law enforcement. RP 3-26. The court found that the statements defendant made to the officers for both incident dates were admissible. RP 29.

After the CrR 3.5 hearing, defendant moved to dismiss the case for violation of speedy trial. RP 30-33. The court held that trial had commenced on December 22. RP 53. The court considered that defendant had been rearraigned on that day and that she had heard a motion to excluded witnesses. RP 53. The court also noted that a CrR 3.5 hearing was necessary, but that the officers were not present to testify. RP 53-54. Based on the time it took on January 3 to hear the remainder of the pretrial motions, including the 3.5 hearing, the court concluded that jury selection would not have begun prior to the Christmas holiday. RP 54. The court stated that if defendant had requested that the court call a jury for the week of December 27, that request would have been accommodated. RP 54. The court held the recess to January 3 did not prejudice defendant. RP 54.

Defendant was arraigned on the third amended information, adding a deadly weapon enhancement to Count VIII. RP 54-58.

On January 11, 2011, the jury found defendant guilty of the lesser included crime of assault in the fourth degree on Counts I and V. CP 166, 172. The jury found defendant guilty on Counts II, IV, and VII. CP 167, 169, 174. The jury found defendant not guilty on Counts III, VI, and VIII. CP 168, 173, 175. The jury also found that Counts I, V, and VII were acts of domestic violence. CP 176, 177, 179.

On January 21, 2011, the court sentenced defendant to 365 days in custody on Counts I and V, and to 90 days on counts II, IV, and VII. CP 236-242. The court suspended a portion of each sentence and imposed two years of probation with standard conditions, including requiring a substance abuse evaluation and domestic violence evaluation. CP 236-242.

Defendant filed a timely notice of appeal. CP 255-257.

2. Facts

On April 12, 2010, defendant was living in a motel room in Fife, Washington, with his girlfriend, Rita Rose, and another friend, Phillip Lockwood. RP 89. The three of them were watching television and drinking beer, when Ms. Rose decided to check with other residents in the motel to see if she could find additional beer. 90-92. When she returned to her room, Mr. Lockwood was gone and defendant started yelling at her about her ex-boyfriend. RP 92. When Ms. Rose explained that she had

been looking for beer, defendant called her a liar and threw her onto the bed. RP 93. Ms. Rose attempted to grab the telephone next to the bed to call for help, but defendant disconnected it. RP 93, 104. As the struggle continued, defendant pinned Ms. Rose's wrists to the bed with his knees while he straddled her. RP 93. Defendant held his arm across Ms. Rose's throat, causing her to lose consciousness briefly. RP 93.

After the struggle, defendant reconnected the telephone. RP 107. Ms. Rose grabbed the handset and called 911. RP 107. She was able to give the operator her room number before defendant grabbed the handset away from her. RP 107. Ms. Rose then ran outside to another resident's room. RP 107.

When the police arrived, they contacted defendant as he was attempting to leave the scene by car. RP 110, 197. Fife Police Officer Aaron Gardner contacted defendant, who told him that he and Ms. Rose had been arguing over which television show to watch. RP 378. Officer Gardner saw no injuries on defendant, but did see a red abrasion on the side of Ms. Rose's neck. RP 199, 201.

Ms. Rose was treated at Saint Francis Hospital. RP 222. Ms. Rose had an abrasion on her neck and contusions on both wrists. RP 224. The mark on Ms. Rose's neck was consistent with marks created by strangulation. RP 226.

Ms. Rose and defendant resumed their relationship in July, 2010. RP 114. On October 8, 2010, they were renting a mobile home in

Lakewood, Washington from their friend, Steve Craig, while Mr. Craig was away. RP 115. Defendant and Ms. Rose had been drinking beer all that day. RP 116. They had argued earlier that day, but they had mellowed as evening approached. RP 116-18. Eventually, they argued again. RP 118.

Defendant hit Ms. Rose and pinned her face down on the bed. RP 119. Defendant punched Ms. Rose several times; in the face, both sides of her head, her back, and her arms. RP 119. Defendant also stomped on Ms. Rose's bare foot with his boots on. RP 119, 125. During the fight, defendant grabbed a kitchen knife and held it to Ms. Rose's neck. RP 124. Defendant threatened to kill Ms. Rose, and she believed him. RP 125, 127.

After the argument died down, Ms. Rose went to bed. RP 128. Defendant acted like nothing had happened. RP 128. Defendant told Ms. Rose that he wanted to have people over that evening, but Ms. Rose indicated that she did not want anyone to see how she looked after the assault. RP 129. Defendant told her to put make up on to cover the marks. RP 129. Defendant eventually left to visit friends. RP 128.

After defendant left, Ms. Rose called a girl friend to talk about the assault. RP 128-29. Her friend encouraged her to call the police and report the incident. RP 129. Ms. Rose called 911. RP 129.

Lakewood Police Officer Arron Grant responded to the 911 call. RP 248, 250. When he arrived, he observed that Ms. Rose had bruises on

her arms and face, and a small “stab-type” wound on her right hand. RP 250. Officer Grant believed that Ms. Rose’s injuries were consistent with the information she had given him about the incident. RP 262.

Officer Grant waited in the area until defendant returned. RP 252-54. When he saw defendant drive by, Officer Grant activated his siren and lights, but defendant did not pull over right away. RP 254-55. Defendant did not stop until he reached his own driveway and pulled up under the car port. RP 257. Because of defendant’s failure to stop, Officer Grant conducted a “high-risk” traffic stop which involved ordering defendant out of his car at gunpoint. RP 259.

When Officer Grant contacted defendant, defendant told him that Ms. Rose’s injuries came from a “punching game,” and from giving each other “charley horses.” RP 370. Defendant told Officer Grant that Ms. Rose was upset because defendant had gone out with friends the night before. RP 370. Officer Grant saw no injuries on defendant. RP 262.

Lakewood Police Officer Kenneth Devaney arrested defendant and found a small amount of green vegetable matter and a glass pipe with burnt residue inside in defendant’s pocket. RP 282-83, 287, 293-94.

Defendant stipulated that the green vegetable matter was marijuana and that he had been driving on a suspended license. RP 296-97.

Richard Pleasant, a friend of defendant’s, testified that defendant was at his house on October 9, 2010. RP 303-04. He testified that he had never seen defendant smoke marijuana. RP 306. He also testified that he

had no information as to what happened between defendant and Ms. Rose the night before. RP 306.

Defendant testified on his own behalf. RP 308. According to defendant, on April 12, he was watching television with Ms. Rose and Mr. Lockwood when Ms. Rose became belligerent with Mr. Lockwood. RP 310. Defendant claimed that Ms. Rose left the motel room to “bum” beer off of other residents and when she came back, she grabbed his truck keys and immediately left the room. RP 311. Defendant claimed he followed her because he did not want her driving while intoxicated. RP 311. Defendant grabbed the keys from Ms. Rose and went back to their room. RP 311. Defendant claimed he ended their relationship at that point because she had been causing problems in his life. RP 311. Defendant told Ms. Rose to call her ex-boyfriend to come pick her up. RP 311.

According to defendant, Ms. Rose agreed to call her ex-boyfriend, but stated that she would have him come to kill defendant. RP 312. Defendant claimed he unplugged the telephone to keep Ms. Rose from calling her ex-boyfriend. RP 312. Defendant said that Ms. Rose attacked him at that point and that he grabbed her wrists to keep her from hitting him. RP 312. According to defendant, Ms. Rose was “kicking [his] butt.” RP 333. Defendant admitted that he pinned Ms. Rose to the bed, but he said it was only until she calmed down. RP 312. Once Ms. Rose had calmed, defendant plugged the telephone back in. RP 313.

Defendant testified that Ms. Rose grabbed at the telephone again, but he believed she was calling her ex-boyfriend for a ride. RP 313. When he heard Ms. Rose say “domestic violence,” he was shocked. RP 313. According to defendant, Ms. Rose set the telephone down and walked out of the room. RP 313. Defendant picked up the handset, but since he did not hear anything, he hung up. RP 313-14. According to defendant, he had had enough by that point and decided to leave. RP 314.

Defendant testified that he never choked Ms. Rose, never threatened to kill her, and never interfered with her ability to call 911. RP 315.

Defendant then testified that on October 8, he and Ms. Rose had an “unpleasant” conversation about ending their relationship, but they never physically fought. RP 321, 335-36. According to defendant, Ms. Rose bruises easily and the marks Officer Grant observed were from a friendly and playful altercation from a few days before. RP 322-23. Defendant testified that he never threatened to kill Ms. Rose and never held a knife to her throat. RP 343.

Defendant testified that he did not pull over right away because he knew he was driving on a suspended license. RP 321. He admitted that he had marijuana in his pocket, but denied using the pipe. RP 339-40.

C. ARGUMENT.

I. THE TRIAL COURT PROPERLY DENIED
DEFENDANT'S MOTION TO DISMISS WHERE HIS
TIME FOR TRIAL RIGHTS WERE NOT VIOLATED.

For speedy trial purposes, a trial commences when the case is assigned or called for trial and the trial court hears and disposes of preliminary motions. *State v. Andrews*, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993); *State v. Redd*, 51 Wn. App. 597, 608, 754 P.2d 1041, *review denied*, 111 Wn.2d 1007 (1988); *State v. Mathews*, 38 Wn. App. 180, 183, 685 P.2d 605, *review denied*, 102 Wn.2d 1016 (1984). Disposition of preliminary motions is a customary and practical phase of a trial. *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996).

In *Carson*, on the date set for trial defense counsel appeared before the court and moved for a continuance. 128 Wn.2d at 820. The trial court denied the motion. *Id.* The Court concluded the trial commenced on the date the court denied the motion for continuance. *Id.*

In *Andrews*, the court addressed whether a preliminary motion to exclude witnesses is merely a proforma, perfunctory motion, insufficient to toll the running of the speedy trial period. 66 Wn. App. at 810. The court refused to entertain a limit to only certain kinds of pretrial motions and determined that a motion to excluded witnesses was, in fact, a pretrial motion that tolled the running of the speedy trial period. *Id.* at 810-11. To

decide otherwise, would put the appellate courts in the position of having to decide what kinds of motions were “substantive” or “important” and which are “pro forma.” *Id.* at 811. In the absence of prejudice to the defendant, the court reasoned, there is no reason to draw distinctions between pretrial motions. *Id.* The court did note, however, that if the State used CrR 3.3(a) to justify an undue delay of the remainder of the trial, a different result might have occurred. *Id.* The court concluded that it was not by design of the State that resulted in the trial not proceeding immediately after the first preliminary motion, but a lack of resources available in the trial court. *Id.*

Here, trial commenced on December 22, 2010, the date the court called the case for trial and heard a preliminary a motion, the motion to exclude witnesses. As in *Andrews*, it was not by design of the State that the trial could not proceed immediately after the preliminary motion was heard. The court noted that jurors could have been called on December 22, but that with the preliminary motions it was unlikely that they would have been picking a jury before the Christmas holiday. RP 54. The court also noted that it could have called a jury for the week of December 27, but the parties had agreed to recess until January 3. RP 54. The court also indicated that the unavailability of the attorneys could have resulted in more substantial continuance, if the case had not been recessed until

January 3. RP 54. Finally, the court found the fact that they did not have jurors waiting on December 22 did not prejudice defendant. RP 54.

The fact that there were no potential jurors present did not preclude a court from handling pretrial matters, which it did. The court could not consider additional pretrial motions as defense counsel was currently in another trial² and witnesses were not present. *See* RP (12/11/10) 2; RP 50-51, 53-54. As defendant's counsel was unavailable to argue additional motions on December 22, defendant was not prejudiced by the court's twelve-day recess of his trial.

A motion to exclude witnesses is not a pro forma, perfunctory motion, but a customary and practical phase of a trial. Defendant's trial began on December 22, 2010, well within the allowed time for trial.

Even if the court finds that the December motion did not start the trial, defendant's time for trial was not violated. "If any period of time is excluded pursuant to subsection (e) [of CrR 3.3], the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). The time between the dismissal of a charge and

² Counsel had stated she was ready to proceed to trial but noted that she was currently in another trial that she expected to have completed by the end of the day. RP (12/22/10) 2-3. On January 3, 2011, counsel admitted that she did not complete that trial until December 27. RP 50-51. The trial court would have been well within its authority to grant a continuance based on counsel's unavailability, which would have set defendant's time for trial out an additional 30 days. *See* RP 51-52.

the refilling of the same or related charge is an excluded period under CrR

3.3(e)(4). Time is computed under the provisions of CR 6. CrR 8.1.

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which the event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday.

CR 6(a).

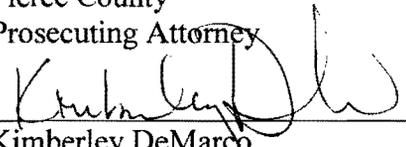
Here, the parties agreed that there were 24 days of time for trial at the time the charges had been dismissed. RP (12/13/10) 3. The State refiled the dismissed charges on December 2, 2010. CP 8-11; RP 31. As the time between dismissal and refilling of charges is an excluded period under CrR 3.3(e), the time for trial was increased to 30 days pursuant to CrR 3.3(b)(5). *See also* RP 31. 30 days from December 2, 2010 was January 1, 2011, a Saturday. RP 31; *see also* RP (12/11/10) 2 (January 3 was a Monday). The following day that was not a Saturday, Sunday or legal holiday was January 3, 2011; the day the court held the CrR 3.5 hearing. RP 3-29. Even assuming the motion to exclude witnesses was a “pro forma” motion, trial commenced by January 3, 2011 which was the last day of time for trial.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court affirm defendant's convictions.

DATED: February 16, 2012

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Certificate of Service:

The undersigned certifies that on this day she delivered by e U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-16-12 Maureen Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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