

71911-4

71911-4

FILED
April 2, 2015
Court of Appeals
Division I
State of Washington

NO. 71911-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RUVIM A. KHOMYAK,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT..... 3

A. THE TRIAL DATE DID NOT VIOLATE CRR 3.3..... 3

 1. Chronology Of The Case..... 3

 2. Since The Defendant Did Not Seek Dismissal In The Trial Court,
 He Cannot Raise A Time-For-Trial Issue On Appeal..... 5

 3. Because The Defendant Never Objected That His Trial Date
 Was Outside The Limits Of CrR 3.3, He Waived Any Objection To
 That Date. 6

 4. If This Court Needs To Consider The Validity Of An Earlier
 Continuance, It Was Properly Granted Based On The Prosecutor’s
 Unavailability. 9

B. ER 410 DOES NOT COVER STATEMENTS MADE TO A
POLICE OFFICER WHO HAS NO EXPRESS AUTHORITY TO
PLEA BARGAIN..... 11

C. THE EVIDENCE SUPPORTS A REASONABLE INFERENCE
THAT THE DEFENDANT PARTICIPATED IN A RESIDENTIAL
BURGLARY. 12

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979)	14
<u>State v. Barton</u> , 28 Wn. App. 690, 626 P.2d 509, <u>review denied</u> , 95 Wn.2d 1027 (1981).....	5
<u>State v. Chavez-Romero</u> , 170 Wn. App. 568, 285 P.3d 195 (2012), <u>review denied</u> , 176 Wn.2d 1023 (2013).....	8
<u>State v. Nguyen</u> , 68 Wn. App. 906, 847 P.2d 936 (1993).....	9
<u>State v. Nowinski</u> , 124 Wn. App. 617, 102 P.3d 840 (2004).....	12
<u>State v. Pizzuto</u> , 55 Wn. App. 421, 778 P.2d 42, <u>review denied</u> , 113 Wn.2d 1032 (1989).....	11
<u>State v. Rotunno</u> , 95 Wn.2d 931, 631 P.2d 851 (1981).....	13
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	13
<u>State v. Williams</u> , 104 Wn. App. 516, 17 P.3d 648 (2001).....	11

WASHINGTON STATUTES

RCW 9A.08.020(3)(a).....	13
--------------------------	----

COURT RULES

CrR 3.3.....	1, 3, 5, 6, 7, 8, 9
CrR 3.3(b)(3)	9
CrR 3.3(b)(5)	7, 9
CrR 3.3(d)(4)	6, 8
CrR 3.3(f)(2)	8
CrR 3.3(h)(2)	11
CR 6(a).....	7
CrR 8.1	7
ER 410	1, 11, 12
ER 410(a).....	11

OTHER AUTHORITIES

Time-for-Trial Task Force, Final Report sec. I.B.1.	8
--	---

I. ISSUES

(1) Although the defendant objected to some continuances, he never claimed that the trial date was outside the limits of CrR 3.3. He also never moved for dismissal. On appeal, can the defendant argue that the case should have been dismissed because the trial date was outside the limits of CrR 3.3?

(2) If the issue can be raised, did the trial court abuse its discretion in granting a continuance based on the unavailability of the prosecutor, who was scheduled for a different trial on the same date?

(3) The defendant was interviewed by a police detective who had no authority to conduct plea negotiations. During the interview, the defendant asked the officer to hurry up and charge him so that he could plead guilty. Does ER 410 require exclusion of this statement?

(4) A group of people burglarized a residence, after gaining entrance by breaking through a back door. A cigarette with the defendant's DNA was found next to the broken door. When questioned by a detective, the defendant asked the detective to hurry up and charge him so that he could plead guilty. Based on

this evidence, could a reasonable jury find the defendant guilty of residential burglary?

II. STATEMENT OF THE CASE

On the afternoon of June 24, 2013, Carol Williams saw a group of people running towards the home of her neighbor, Patricia Spromberg. Sometime between 5 and 20 minutes later, the people ran away from the house into a nearby car, which then drove away. Ms. Williams observed that one of the people who left the house was carrying a bag. 2 Trial RP 34-41.

On learning of these events, Ms. Spromberg returned home. She found that her back door had been kicked in. Jewelry was missing from her dresser. An antique clock and some antique purses were gone. Someone had taken a box of mementos from her deceased husband. They had also taken a box containing her husband's ashes. 2 Trial RP 91-94.

Police recovered a cigarette that was on the ground next to the broken door. There was still ash on the tip. 2 Trial RP 57. DNA on this cigarette had a profile matching that of the defendant, Ruvim Khomyak. A criminalist testified that the probability of selecting an unrelated individual at random from the U.S.

population with a matching profile is 1.5 quintillion (that is, 1.5×10^{18})¹. 2 Trial RP 161-62.

Detective Daniel Rabelos of the Everett Police subsequently interviewed the defendant. He said that he could not remember the events, because he was involved in heavy drug use. He then asked Det. Rabelos if he could “hurry up and charge him so that he could plead guilty.” 2 Trial RP 116-18.

The defendant was charged with residential burglary. 1 CP 117. A jury found him guilty as charged. 1 CP 56.

III. ARGUMENT

A. THE TRIAL DATE DID NOT VIOLATE CrR 3.3.

1. Chronology Of The Case.

November 27, 2013 Defendant arraigned. Trial set for January 10, 2014. 4 CP 150.

January 3, 2014 By agreement of the parties, trial continued to February 28, 2014. 4 CP 148.

February 28, 2013 State seeks continuance to April 4, based on the unavailability of Ms. Spromberg, the owner of the burglarized house. 2 CP 134-39; 2/28 RP 2-4. Defense

¹ Presumably the witness meant that the probability is one divided by 1.5 quintillion.

opposes this continuance. 2/28 RP 4-5. Court expresses doubts about the sufficiency of prosecutor's justification. 2/28 RP 7-9. Prosecutor then asks for shorter continuance, based on his being scheduled for another trial. 2/28 RP 9. Court grants continuance to March 14. 2/28 RP 10. Reason for continuance is "the deputy prosecutor's unavailability due to being in trial on another matter." 4 CP 146. Defense does not express any opposition to this shorter continuance. 2/28 RP 10.

March 13, 2013 State again seeks continuance based on Ms. Spromberg's unavailability. 2 CP 128-33; 3/13 RP 2-5. Defense opposes continuance. 1 CP 125-27; 3/13 RP 5-6. Court refuses to find good cause for continuance. Instead, court postpones trial to April 4. Defense does not object to this postponement. 3/13 RP 9-10. Court enters order stating: "Trial is set to April 4, 2014, within time for trial." 3 CP 143.

April 4, 2014 State seeks continuance to April 11, based on unavailability of Dr. Beverly Himick, the criminalist who conducted the DNA testing. Defense objects to continuance "for the record," but acknowledges that Dr. Himick is a material witness. Court finds good cause for

continuance to April 11. 4/4 RP 2-4 Reason is “unavailability of essential State’s witness Dr. Beverly Himick.” 4 CP 144.

April 11, 2014 Trial continued to April 15, 2014. No written order entered. 3 CP 142. Appellate record does not include transcript of this hearing.

April 15, 2014 Trial commences.

2. Since The Defendant Did Not Seek Dismissal In The Trial Court, He Cannot Raise A Time-For-Trial Issue On Appeal.

The defendant argues that “the trial court violated CrR 3.3,” Brief of Appellant at 14. He did not, however, file any motion for dismissal on this ground. As a result, the issue has not been preserved for review.

With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at the trial court. CrR 3.3 does not create a constitutional right, nor is it jurisdictional. Although the right is to be strictly enforced, it is nonetheless a procedural rule.

State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509, review denied, 95 Wn.2d 1027 (1981) (citations omitted).

“The court’s obligation to dismiss a prosecution for violation of CrR 3.3 is triggered by a motion by the defendant.” Id. Absent such a motion, there is no trial error for an appellate court to review. Id. at 694. Here, the defendant never moved for dismissal, so he

was not entitled to one. The timeliness of the trial is therefore not subject to review.

3. Because The Defendant Never Objected That His Trial Date Was Outside The Limits Of CrR 3.3, He Waived Any Objection To That Date.

The defendant's claims are also not preserved for a second reason. The defendant failed to comply with CrR 3.3(d)(4):

A party who objects to the [trial] 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.

Here, there were five postponements of the time for trial. The defendant objected to three of these. He did not, however, ever claim that the new trial date was outside the limits allowed by CrR 3.3 Nor did he ever move for an earlier trial date. As a result, he lost the right to object that the ultimate trial date was outside the time limits prescribed by that rule.

The importance of CrR 3.3(d)(4) is illustrated by the trial court's actions on March 13. At that time, the court had full discretion to set any trial date up to March 31. This resulted from the earlier agreed continuance to February 28. 4 CP 148. Under the

"buffer period" of CrR 3.3(b)(5), the allowable time for trial expired 30 days after that date. Because the 30th day (March 30) was a Sunday, this period was automatically extended to March 31, the next judicial day. CrR 8.1; CR 6(a).

At the hearing on March 13, the court refused to find good cause for a continuance. 3/13 RP 8-9. Instead, the court exercised its discretion to re-set the trial within a date allowed by CrR 3.3. In doing so, the court set a trial date of April 4. Defense counsel's only response to that decision was "I would be prepared on that date as well." 3/13 RP 10.

Under the defendant's argument on appeal, this date was four days past the expiration date under CrR 3.3. No one, however, explained this to the trial court. Had this objection been raised, the court could have exercised its discretion to set trial a week earlier, thereby avoiding the issue.

Timely objections are required so that, if possible, the trial court will have an opportunity to fix the error and still satisfy the speedy trial requirements. A defendant's objections must be specific enough to alert the trial court to the type of error involved.

State v. Chavez-Romero, 170 Wn. App. 568, 581 ¶ 37, 285 P.3d 195 (2012), review denied, 176 Wn.2d 1023 (2013) (citation omitted).

Although the defendant objected to the continuance, that is not enough to satisfy the requirements of CrR 3.3(d)(4). The time-for-trial rule is designed to give trial courts flexibility in determining the date for trial, within the limits allowed by the rule. See Time-for-Trial Task Force, Final Report, sec. I.B.1. (available at www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=overview). Under some circumstances, a court can refuse to find good cause for a continuance and still postpone the trial date, without violating CrR 3.3. Accordingly, if the defendant believes that the trial date violates that rule, he must raise that argument with the court. Otherwise, he waives any objection to the new trial date.

Because the defendant raised no objection that the April 4 trial date was outside the limits of CrR 3.3, he waived any objection to that trial date. As a result, under CrR 3.3(d)(4) that date became the last allowable date for trial. The court could therefore properly grant a further continuance under CrR 3.3(f)(2). On April 4, the court did grant a continuance until April 11. That continuance was based on the unavailability of a different witness. 4 CP 144. The unavailability of a material witness can be a valid reason for a continuance. State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936

(1993). The defendant has provided no explanation of why this continuance was improper.

Because the case was properly continued to April 11, the April 15 trial date fell within the "buffer period" of CrR 3.3(b)(5). The trial was therefore timely. Furthermore, the defendant never objected that either the April 11 or the April 15 trial date was outside the time limit of CrR 3.3. Under CrR 3.3(b)(3), the trial was timely for this reason as well.

4. If This Court Needs To Consider The Validity Of An Earlier Continuance, It Was Properly Granted Based On The Prosecutor's Unavailability.

Because the April 4 continuance rendered the trial timely, the court need not determine whether the February 28 continuance was also proper. If the court reaches that issue, however, it should determine that the trial court's action was proper.

The defendant raises the following issue:

Was CrR 3.3 violated by the court's orders of continuances, granted on the ground that the complaining civilian witness was a "snowbird" living her winters at her California residence, for whom travel to Washington for trial before April would be merely inconvenient?

Brief of Appellant at 2. The defendant's argument is directed to this issue. Brief of Appellant at 17-19. The problem is that this was *not* the court's reason for granting the continuance. Rather, the

February 28 continuance was granted because of “the deputy prosecutor’s unavailability due to being in trial on another matter.” 4 CP 146.

The defendant’s brief provides barely any argument relating to the trial court’s actual reason for granting the continuance. He does claim that “[t]he record shows that the schedule had always been that Mr. Khomyak’s trial was to be held in the early part of the week, and that the prosecutor’s second trial with [a different defense attorney] would then begin.” Brief of Appellant at 17. This claim is not, however, supported by any citation to the record.

In fact, the record does *not* show this. Rather, the prosecutor advised the court: “I’m scheduled to be sent out to trial this coming week in a trial with [the other defense attorney], so I wouldn’t be available just for my own schedule to try this case next week.” 2/28 RP 9. Defense counsel did not contradict this claim. Nor did she raise any objection to granting a continuance on this basis. 2/28 RP 10. The unavailability of a prosecutor due to a conflicting trial can be a proper basis for a continuance under CrR 3.3(h)(2). State v. Williams, 104 Wn. App. 516, 524, 17 P.3d 648 (2001). The trial court did not abuse its discretion in granting a continuance for this reason.

B. ER 410 DOES NOT COVER STATEMENTS MADE TO A POLICE OFFICER WHO HAS NO EXPRESS AUTHORITY TO PLEA BARGAIN.

The defendant claims that his statements to a police officer should have been excluded under ER 410(a):

[E]vidence ... of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The defendant's argument is foreclosed by State v. Pizzuto, 55 Wn. App. 421, 778 P.2d 42, review denied, 113 Wn.2d 1032 (1989). That case establishes a "bright line rule" that "application of ER 410 is limited to plea negotiations with prosecuting attorneys, or with their agents who possess express authority to plea bargain." Id. at 434. ER 410 does not require exclusion of statements made by a suspect to law enforcement officers who have no authority to plea bargain. Id. at 437.

Here, the statements were made to a police detective. At the time they were made, the defendant was in jail on other charges. 2/7 RP 9-15. Nothing in the record indicates that the detective had been in contact with the prosecutor with regard to this case. Since the detective had no express authority to plea bargain, the defendant's statements to him are not covered by ER 410.

The defendant's brief does not mention Pizzuto. He does, however, discuss a later case that distinguished Pizzuto: State v. Nowinski, 124 Wn. App. 617, 102 P.3d 840 (2004). There, however, the defendant was interviewed by police while a deputy prosecutor was present. Id. at 620. Because a prosecutor was present, ER 410 was applicable. Id. at 629. Nowinski specifically followed the rule set out in Pizzuto. Id. at 62.

In the present case, in contrast, no prosecutor was present during the police interview. The officer who conducted the interview had no authority to conduct plea negotiations. This being so, ER 410 is inapplicable. The statements were properly admitted.

C. THE EVIDENCE SUPPORTS A REASONABLE INFERENCE THAT THE DEFENDANT PARTICIPATED IN A RESIDENTIAL BURGLARY.

Finally, the defendant claims that the evidence was insufficient to support a conviction.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)

(citations omitted).

In the present case, the State proceeded on a theory of accomplice liability.

A person is an accomplice of another person in the commission of a crime if:

With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it...

RCW 9A.08.020(3)(a). Under this statute, a person's presence at the commission of a crime is not sufficient to establish accomplice liability. It is, however, sufficient if the person is ready to assist in the commission of the crime. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 851 (1981).

The defendant cites In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979). There, the defendant was with a group of friends who were on a road. Some of the people in the group pulled a rope across the road, thereby possibly endangering motorists. The Supreme Court held that the defendant's mere presence was not

sufficient to support his conviction as an accomplice to reckless endangerment.

In Wilson, the defendant was on a public road. There are many legitimate reasons why he might have been there. Here, in contrast, the defendant's cigarette was found next to the back door of a private residence, which had been kicked in. 2 RP 57, 91. There was no reason for him to be there, except for the purpose of aiding his companions in committing the burglary.

This inference is reinforced by the defendant's statement to the detective. The defendant asked the detective to hurry up and charge him so that he could plead guilty. 2 RP 118. The jury could infer that the defendant wanted to plead guilty because he knew that he was guilty. Considering all of the evidence together, it establishes that the defendant was participant in the burglary. The evidence is sufficient to support a conviction.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on April 2, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

RUVIM A. KHOMYAK,

Appellant.

No. 71911-4-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

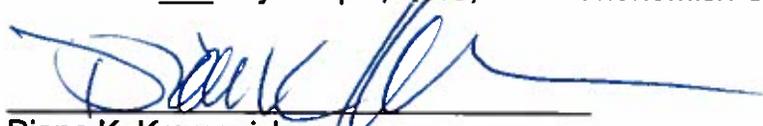
AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 2nd day of April, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Washington Appellate Project, oliver@washapp.org; wapofficemail@washapp.org; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of April, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office