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No. 70904-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAN NORD,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. By creating an artificial conflict on the day of trial to obtain a continuance, the State committed misconduct that prejudiced the defendant's right to a speedy trial, justifying dismissal of the charges under CrR 8.3(b).

On June 17, 2013, the day of trial, the prosecutor declared the State ready after completion of the CrR 3.5 hearing. 1RP 45-46. After returning from lunch, the prosecutor stated he actually was not ready and announced that he had decided that he might call Kayly West at trial and would issue a subpoena for her. 1RP 49-51. The State had known about West since January 2013. See 1RP 15. This created a conflict for Alan Nord's counsel because West was represented by the same public defender's office in a different case. Based on this foreseeable and artificial conflict, the State forced a continuance to an unknown date. The result was a delayed and untimely trial that did not happen until August 5, 2013.

Dismissal under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct and prejudice affecting the defendant's right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). But for the State's misconduct, Nord's trial would have been timely. Because the requirements of CrR 8.3(b) were met, the trial court

erred in denying Nord's motion to dismiss. Accordingly, this Court should reverse.

The State complains that the defendant did not lodge a clear objection immediately following the State's misconduct. Br. of Resp't at 13. But whether the State called West was out of the defendant's control. Further, Nord himself expressed frustration at the State's conduct and noted that the State was not acting in a timely manner. 1RP 58. Regardless, any lack of a clear objection does not transform the government's misconduct into acceptable conduct.

The State implies that Nord had some kind of duty to provide a summary of what his witnesses might testify to and that therefore the prosecutor's action was not misconduct. Br. of Resp't at 13, 24. The State cites no authority in support of this proposition. Even assuming there was such a duty, the State should have anticipated the situation long before the day of trial. West was known about since the beginning.

The State maintains that rather than a ploy, the prosecutor innocently decided that he might need to call West at trial in rebuttal. Br. of Resp't at 13-14. The prosecutor purportedly came to this revelation after hearing testimony from his own witnesses at the CrR 3.5 hearing. Yet the prosecutor announced he was ready immediately after that hearing. Only after returning from lunch did the prosecutor have a change

of heart, confessing he was not truly prepared. Thus, in creating the conflict which caused the delay, the record "suggests less than honorable motives." Michielli, 132 Wn.2d at 244.

Even if there was no ill intent, this was "simple mismanagement," which qualifies as misconduct under CrR 8.3(b). State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). The purpose of a CrR 3.5 is not discovery. The purpose of CrR 3.5 is to provide a uniform procedure for determining the admissibly statements made by the defendant. State v. Myers, 86 Wn.2d 419, 425, 545 P.2d 538 (1976).

In support of its argument that there was no mismangment, the State relies on State v. Ramos, 83 Wn. App. 622, 922 P.2d 193 (1996). Ramos is not like this case. There, the trial court determined that the State had violated discovery rules and mismanaged the case. Id. at 628. Shortly before trial, the State secured the agreement of a co-defendant to testify against the defendant. Id. at 625. The State then learned the co-defendant's true name, which purportedly created a conflict for defense counsel. Id. The trial court ruled it was mismanagement to not learn the person's true name earlier. Id. at 627-28. Because the record did not support the court's finding, this Court held there was no discovery violation and therefore no mismanagement. Id. at 634-36.

In contrast, here the State did not gain new information on the eve of trial. The State knew that West was a potential witness from the beginning. The prosecutor also knew that calling her would create a conflict and delay the trial. If not a ploy to delay trial, deciding to possibly call West on the day of trial and obtaining a continuance was simple mismanagement.

Compounding the mismanagement, the State did not propose a new trial date and the court continued the case to an unspecified date. By taking this action, the State accepted the risk that trial would not actually happen by the expiration date of July 17, 2013.

The State argues that the only reason trial did not occur within the 30 day time period after June 17 was because defense counsel was unavailable on July 15. Br. of Resp't at 18. This is a red herring. Defense counsel's unavailability was not elicited until the hearing on June 27, ten days after the State obtained a continuance to an unknown date. The State failed to ensure that trial could be set within 30 days. By failing to insist that the court set a new trial date, rather than a continuance to an unknown date, the State further mismanaged the case.

Redd does not support the State's argument that there was no mismanagement. State v. Redd, 51 Wn. App. 597, 754 P.2d 1041 (1988). There, the defendant argued the State misused the appellate process by

seeking and obtaining discretionary review after pretrial motions. Id. at 609. Because the State had the right to petition for discretionary review, there was no misconduct. Id. Redd is not analogous to this case because the State acted properly in that case.

The State's argument that Nord may not raise this issue under CrR 3.3(d)(3) is misplaced. Nord raised a CrR 8.3(b) violation. CrR 3.3 is only relied on to establish prejudice. See Michielli, 132 Wn.2d at 240-46. Thus, that Nord did not later move to set his trial date within the time for trial period in accordance with CrR 3.3(d)(3) misses the point. The cases cited by the State either did not involve CrR 8.3(b) or were not decided under that rule. Br. of Resp't at 20-21.[1] Here, State mismanagement resulted in the trial occurring past the time for trial deadline. This constitutes prejudice. Michielli, 132 Wn.2d at 244 (1997) (misconduct in adding charges three business days before trial, which forced the defendant to waive his right to a speedy trial and seek a continuance, was prejudicial).

The State alternatively argues that Nord's trial was timely because pretrial motions were heard on June 17, 2013. Br. of Resp't at 25-26.

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[1] Citing State v. Carson, 128 Wn.2d 805, 912 P.2d 106 (1996); State v. MacNeven, 173 Wn. App. 265, 293 P.3d 1241 (2013); State v. Chavez-Romero, 170 Wn. App. 568, 285 P.3d 195 (2012); State v. Farnsworth, 133 Wn. App. 1, 130 P.3d 389 (2006); State v. Malone, 72 Wn. App. 429, 864 P.2d 990 (1994).

This is an absurd interpretation of the criminal rules. While there is authority that trial commences under CrR 3.3 when the court hears and disposes of preliminary motions, it cannot seriously be contended that Nord was actually in trial from June 17 to August 7, 2013. What the rule reasonably means is that when pretrial matters start on or before the expiration date, trial is still timely when the case continues past the expiration date and the actual trial will shortly commence. See State v. Carson, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996); State v. Mathews, 38 Wn. App. 180, 182-83, 685 P.2d 605 (1984). This is not what happened here. After the CrR 3.5 hearing on June 17, other pretrial matters, such as jury selection, did not start until August. The State's interpretation would make CrR 3.3 all but meaningless. The State's action in seeking multiple continuances also belies this interpretation.

2. Admission of the extrinsic evidence prejudiced the defendant, requiring reversal of the convictions.

a. Items inside the backpack, including a cell phone, were extrinsic evidence.

Submitting evidence to the jury that has not been admitted at trial is error. In re Pers. Restraint Petition of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012); State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). It is extrinsic evidence. See Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990) ("extrinsic evidence is

defined as information that is outside all the evidence admitted at trial."). A jury's consideration of extrinsic evidence is improper. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994).

Unbeknownst to defense counsel or the court, the backpack that was admitted into evidence contained a litany of items inside, including a cell phone. See Ex. 5; 2RP 323; CP 55. After the jury submitted its question about the cell phone, the prosecutor admitted that he knew the backpack had items inside, including a laptop computer.[2] 2RP 323.

Contrary to the State's argument, the record shows that before the jury asked about the cell phone, both the court and defense counsel were unaware that items remained inside the backpack. See 2RP 323-25. Still, the State maintains that these items were properly before the jury because the backpack was admitted with the items inside. Br. of Resp't at 27-31. The State cites no authority in support of its position that a party can offer a container as an exhibit without disclosing that there are items inside and what those items are. The State provides no explanation for why some items from the backpack were admitted (a knife, book safe, bag of

[2] Additionally, the backpack contained a USB flash-drive, a micro-SD card, a stick of men's deodorant, a large long-sleeved shirt, a laptop power adapter, various cables, a two-pronged USB charging adapter, micro-SD card adaptors, a vehicle registration certificate, portable tool adaptors, socks, lighters, a penny, a triple AAA battery, and lip balm. See Ex. 5.

methamphetamine, and digital scale) separately while keeping others inside.

Based on a single answer from a detective, the State argues that defense counsel had actual notice that the admitted backpack still had items inside. Br. of Resp't at 29. On cross-examination, using the past tense, counsel asked, "Was there anything else in the backpack?" 2RP 258. The detective only answered that there might be a pair of socks or handkerchief inside. 2RP 258. While the officer used the present tense in answering the question, it was not obvious that the officer was testifying that there were still items inside backpack. Regardless, the officer only testified about a pair of socks or possibly a handkerchief being found in the backpack. 2RP 258. He did not testify about other items. Defense counsel did not have a duty to ensure the backpack was free of undisclosed items before it was submitted to the jury. See State v. Rinkes, 70 Wn.2d 854, 863, 425 P.2d 658 (1967) (disagreeing with State that "defense counsel had a duty to check the exhibits before they went to the jury . . . .").

The State contends that the jury is entitled to review evidence that was admitted and submitted to them. Br. of Resp't at 31. While this is true, it assumes that evidence was properly admitted. Here, the jury did more than examine the backpack. The jury considered items that were left

inside the backpack that were not admitted. The State's citation to State v. Everson, 166 Wash. 534, 7 P.2d 603 (1932) is misplaced. There, the jury used a magnifying glass (not admitted into evidence) to examine a walking stick that was admitted into evidence. Everson, 166 Wash. at 535. Because this was merely a more critical examination of the evidence, there was no error. Id. at 536-37. Neither a walking stick nor a magnifying glass is analogous to a backpack full of items that were not admitted. The jury did not perform an experiment on the backpack or merely examine the backpack itself more critically. They considered the distinct items inside, which were not admitted.

b. Admission of extrinsic evidence is presumed to be prejudicial and the State bears the burden to prove otherwise.

"[T]he long standing rule that 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" Pete, 152 Wn.2d at 555 n.4 (quoting Rinkes, 70 Wn.2d at 862. The State bears the burden to overcome the presumption of prejudice. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). Any doubt on whether the extrinsic evidence prejudiced the defendant must be resolved in the defendant's favor. State v. Smith, 55 Wn.2d 482, 484, 348 P.2d 417 (1960); State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d

1347 (1989). The State does not contest these propositions. Br. of Resp't at 27.

The jury had access to the extrinsic evidence inside the backpack. Among the items, this included a cell phone (a "smart" phone), a laptop computer,[3] a USB flash drive, a micro-SD card, a stick of men's deodorant, and a large sized shirt. See Ex. 5; 2RP 323; CP 55. The jurors expressed interest in the cell phone, asking the court if they could consider it as evidence. CP 55. Thus, the cell phone may have linked Nord to the backpack. Similarly, the other electronic items had the capacity to link Nord to the backpack. Additionally, the large sized shirt and men's deodorant were circumstantial evidence that the jury could have used to link Nord to the backpack because Nord was a large man. 2RP 125, 286. Thus, there are reasonable grounds to believe Nord may have been prejudiced by the extrinsic evidence.

Nevertheless, the State argues that whether Nord was prejudiced is speculative. Br. of Resp't at 32. The State's argument shirks its obligation and does not apply the correct standards of review which

[3] The testimony at trial established that police found a laptop in the backpack. According to the prosecutor, this laptop was in the backpack when it was sent to the jury. 2RP 323. However, when appellate counsel examined the backpack, there was no laptop inside. While counsel has consulted with Whatcom County Superior Clerk's Office, he has been unable to determine what happened to the laptop.

presume prejudice and resolve doubts in the defendant's favor. Contrary to the State's argument, a cell phone is not innocuous. As the United States Supreme Court recently recognized, the modern cell phone "has immense storage capacity." Riley v. California, __ U.S. __, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014). Many cell phones (like the one here) "are in fact minicomputers that also happen to have the capacity to be used as a telephone." Id. A search of a cell phone generally exposes "far *more* than the most exhaustive search of a house." Id. at 2491.

The State emphasizes that the jury returned a verdict before the court answered its question on the phone. The State speculates that jurors would not have asked if they thought the phone could be used as evidence. But the jury may have merely been seeking confirmation or clarification. Regardless, the jury was exposed to the extrinsic evidence. Even if the jury had been instructed to disregard the evidence, this would have been insufficient. Pete, 152 Wn.2d at 555 (bailiff's instruction to jurors to not consider extrinsic evidence did not cure error; instruction from the court would have also been insufficient).

The State objects to Nord informing this Court that a cell phone can be turned on months later if the phone was turned off when the battery was sufficiently charged. Br. of Resp't at 33, n. 11. The State does not actually express disagreement. And unless the phone was capable of

being turned on, it is unlikely that the jurors would have asked the question. The jury did not ask, "can we turn on the phone?" The jury asked whether it could use the cell phone as evidence, implying it had evidentiary value. CP 55. Regardless, Nord does not have the burden to prove whether the phone could have been turned on.

The evidence against Nord was circumstantial and weak. The car where the backpack was found was not registered in Nord's name. 2RP 266. There were two other people in the car with Nord, a woman and a man. 2RP 234. The drugs or the backpack might have belonged to either one. That the passengers did not retrieve the backpack does establish that it was Nord's. If the backpack was one of the passenger's, the person would have likely left it behind because it had contraband. In any event, the standard is whether there is a reasonable ground to believe that Nord may have been prejudiced by the extrinsic evidence. Because the items had the capacity to link Nord to the backpack (and therefore the drugs), the State fails to meet its burden to prove that Nord was not prejudiced. As in other cases, this Court should reverse. See, e.g., Pete, 152 Wn.2d 554-55; Rinkes, 70 Wn.2d at 862-63; Smith, 55 Wn.2d at 484-85; State v. Boggs, 33 Wn.2d 921, 925-26, 937, 207 P.2d 743 (1949) (overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980)).

3. The information alleging the charge of resisting arrest was deficient.

The State properly concedes that the information charging resisting arrest did not include all the essential elements of the offense. Br. of Resp't at 35-38. This Court should accept the State's concession and reverse the conviction for resisting arrest.

B. CONCLUSION

Through its mismanagement, the State deprived Nord of his right to a speedy resolution. The convictions should be reversed and dismissed with prejudice. Alternatively, the convictions should be reversed and remanded for a new trial because Nord was prejudiced by the jury's consideration of extrinsic evidence.

DATED this 6th day of November, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70904-6-I
	)	
ALAN NORD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	ALAN NORD 883130 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2014.

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