No. 76545-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

NICHOLAS ZYLSTRA, Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 778-5710
Appellate_division@co.whatcom.wa.us

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant waived his right to challenge the discovery issues asserted at trial under CrR 8.3 when he withdrew the motion and never made another such motion during trial.

2. Whether the trial court abused its discretion when it denied defendant's post-conviction CrR 8.3 motion because he waived his right to pursue the motion post-trial by withdrawing his motion at trial because the court indicated it was inclined to grant him a continuance which he didn't want, and the court found the appropriate remedy would have been a continuance because his speedy trial time had not expired.

3. Whether CrR 8.3 provides the authority for a trial court to dismiss a case post-conviction, particularly where the defendant chose not to pursue the motion at trial when the court could have granted the relief of a continuance.

4. Whether the defendant would have been entitled to dismissal of his conviction pursuant to CrR 8.3 post-conviction where he failed to demonstrate prejudice from the late discovery and was not faced with expiration of speedy trial.

C. FACTS

1. Procedural facts

Appellant Nicholas Zylstra was charged with Manslaughter in the First Degree, in violation of RCW 9A.32.060(1)(a) and (2), a class A

felony, on February 12, 2014, for acts he committed on or about June 16, 2013, along with a firearm enhancement pursuant to RCW 9.94A. 533. CP 1-2. He was tried by a jury, which unable to agree regarding the charge of first degree manslaughter, convicted him of Manslaughter in the Second Degree. CP 203, 204. He was sentenced to a standard range sentence and the firearm enhancement. CP 440-41.

2. Substantive Facts

Regarding Discovery

On September 2, 2015 a hearing was held regarding defense's first motion to compel. At the hearing, defense counsel informed the court that the motion was not a "hostile" one, that he believed the prosecutor had been producing discovery as he was being provided it, but that some deadlines would assist the State in procuring the reports. RP 3. The prosecutor agreed, but noted that some officers were still investigating and producing reports. RP 4. The prosecutor and defense had agreed to some of the items in the motion and some timelines. RP 3-21. Defense counsel requested the substance of plea agreements and negotiations, to which the prosecutor responded there were not any agreements yet with Doug

Quiding or Robert Lee[1]. RP 23-26. The judge denied the request for the substance of the negotiations. RP 28. An order was entered setting forth some time periods certain discover was to be produced and/or completed. CP 15-16. It also required that any agreements or promises made to Lee or Quiding be disclosed. CP 15-16.

Defense counsel then filed a second motion to compel regarding any work Quiding, Lee or Kyle Buck had done for Bellingham Police Department and/or any benefits they had received from the Department. CP 17-21; RP 40-42. The Bellingham Police Department objected to the disclosure or such information, particularly as it related to confidential informants, based on it's not being relevant and being privileged. CP 22-27; RP 43. Defense counsel responded that it was relevant because the state was believing felons over a non-felon, his client, as to who shot the firearm when the victim was shot, and that it had to be because "they" are trying to protect the felons. RP 46. He indicated he needed the documents for impeachment, noting that he believed the prosecutor was handling the matter correctly, that the information was material held by others. RP 46-47. The judge ultimately ruled that the existence of prior agreements was not relevant to the case. RP 64-68. During the hearing, defense counsel

[1] Quiding and Lee, both convicted felons, had been down at the river shooting guns along with Zylstra and Zylstra's girlfriend and were facing unlawful possession of a firearm charges. RP 1450, 1476.

noted he would be gone for over a five week period, to Kenya, and he would need time to prepare when he got back, so the trial date was reset to February 22, 2016. RP 53-57, 69-72.

Over the next ten to eleven months, there were numerous continuances of the trial date, at the request of the defense with no objection by the state, in part due to defense conflicts and unavailability and the defense need to conduct witness interviews. See Appendix A. In September of 2016, the state filed a notice for a hearing for clarification of the judge's decision regarding confidential informants, and the defense filed its third Motion to Compel Discovery regarding its interviews with Det. Francis and Quiding. See App. A.

During the course of those interviews, things apparently had become contentious regarding some of the questions asked, with both Det. Francis and Quiding suspicious of defense counsel's motive in asking some of the questions, resulting in both of them being reluctant or refusing to answer questions about Quiding having been a confidential informant years before while Det. Francis was working on the drug task force. RP 79. Both Det. Francis and Quiding felt that defense counsel had engaged in harassing behavior, by making allegations of wrong-doing to Det. Francis's supervisors and by contacting some Quiding family members who had no involvement in the incident, respectively. RP 80-81. Defense

counsel believed Quiding had received special treatment during the course of the investigation from Det. Francis and was entitled to explore their relationship. RP 85. The judge ordered Det. Francis and Quiding to answer defense counsel's questions and indicated she would make herself available during the interviews if need be. RP 97-102.

Soon thereafter, the parties were back before the court on the state's motion for an in camera review as to some personal information regarding Det. Francis and defense counsel allegations that he had been the subject of internal investigations. RP 116. During the hearing, defense counsel accused the prosecutor's office of routinely withholding information from defense attorneys, and the prosecutor took offense, stating he had no idea what defense counsel was talking about, that he had never heard any other defense counsel say that. RP 115-16. He indicated that the information at issue regarding Det. Francis was personal. RP 116. The judge ultimately ordered the information disclosed to defense counsel. RP 151-53.

At the start of trial on November 28, 2016, counsel for Lee, who hadn't pleaded guilty yet, informed the court that she had concerns about her testifying regarding Lee's plea agreement. RP 164-68, 1467, 1469. Later that day during motions in limine, defense counsel complained that he hadn't received the written plea agreements regarding Lee and Quiding

yet. RP 278-79. Defense counsel also indicated he wanted all the emails between the attorneys regarding the agreements, and the judge ordered they be turned over. RP 287.

During the motions in limine, defense counsel stated they had just received that morning 911 calls they had not seen before and requested that they be excluded because they were in violation of the discovery order. RP 272, 348. The prosecutor[2] informed the judge that they had just received the 911 calls that morning and that defense had had notice of the existence of the 911 calls. RP 349. Defense counsel[3] responded that they didn't want the 911 calls, that they hadn't been interested in them, but the state had not provided the calls to them in violation of discovery. RP 349.

The next day during continuation of the motions in limine hearing, the prosecutor explained why they had not produced the 911 calls earlier. RP 358-59, 367-68. The prosecutor noted that defense had just added four witnesses to their witness list. RP 357, 361. Defense counsel explained those witnesses had been in the CAD[4] log as officers who responded to the incident, but whom they previously had not been aware of because they

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[2] There were two prosecutors who represented the State at trial in this case. This was the second prosecutor, but the state is not making a distinction between the prosecutors as which prosecutor was speaking on behalf of the State is not relevant to the issues.
[3] Similarly, there were two defense counsel who represented Zylstra at trial, and the state is not differentiating between them as it isn't relevant to the issues before this Court.
[4] CAD refers to Computer-Aided Dispatch.

had not been provided the CAD log in discovery. RP 362-65. Defense counsel also informed the court they had just received seven photos that had not been in the 470 previously provided to them, and that they received some police reports at the end of the day before, but they didn't have reports from the officers listed in the CAD log. RP 365. The prosecutor explained that they hadn't been aware there were any other police reports and the ones they just obtained had come from the Ferndale police department, but noted that they didn't have any substantive information in them. RP 366-67.

Defense counsel informed the court defense didn't have a report from Sgt. Crisp, the one who found the 911 recordings, or from Sgt. Moyes, who had been on the scene directing things. RP 370. Counsel asserted that there had been rolling discovery and mismanagement by the state, and "I don't think we're at 8.3, but this perpetual issue of we didn't know about it until yesterday, but we made a strategic decision we're going to use it before we hand them over to defense is the problem." RP 370. Defense counsel also complained they had been told there were no Ferndale CAD logs[5] but they had been provided them the day before, and that was why there were new witnesses on their witness list. RP 371. The

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[5] The transcript refers to "catalogs" but is obviously incorrect.

prosecutor objected to exclusion of the 911 recordings as too severe a remedy, arguing that defense had not shown prejudice. RP 371-72.

After a brief recess, the judge returned and indicated there was a small pool for the jury panel. RP 372-73. Defense counsel inquired whether there would be a larger pool the next day or the following Monday because he didn't think they would be able to seat a jury from the panel that was available. RP 375. He suggested setting the trial over to Monday in order to give the State an opportunity to find Sgt. Moyes' and Sgt. Crisp's reports and to make sure that defense had everything. RP 376. Defense still had not received the emails between the prosecutor and counsel for Lee and Quiding, and counsel suggested bumping the case a week could be beneficial to the management of the case. RP 376. The prosecutor indicated bumping it a week was a problem because they had witnesses flying in from out of state, and the other prosecutor would be flying out. RP 376-77. The judge indicated that if it got bumped a week, the case would continue into January. RP 378. Defense wanted to make sure that Zylstra would have a sufficient panel from which to select jurors. He asked the judge to disregard the second prosecutor's vacation plans, because Zylstra had put his employment on hold for the trial. RP 379.

After further discussions regarding options for proceeding to trial, the judge addressed the discovery issues and her concern regarding the

"rolling discovery," noting however that she believed the prosecutors were handing discovery over once they got it. RP 383. When the judge expressed concern about the recent disclosure of photos, the prosecutor clarified he had previously requested to include Google maps evidence, and the "photos" were the Google map images. RP 384-85. He explained that after the judge had ruled they could use the Google images the day before, a detective had provided him with them, that morning, and he had immediately handed them over to defense counsel. RP 385. The judge found the state in compliance with her ruling regarding the Google images, but she ordered the 911 recordings excluded. RP 386-87.

On Nov. 30th, defense counsel inquired as to the status of the emails between the prosecutor and Lee and Quiding's attorneys. RP 608. The prosecutor indicated that given his concerns about their attorneys testifying, he was removing the attorneys from the state's witness list. RP 608-09. When defense counsel stated he still wanted and was entitled to the emails, the prosecutor indicated he didn't think his thoughts were relevant to Lee and Quiding's bias or interest. RP 611. The judge took it under advisement RP 613.

Later that day, the judge re-addressed the issue of the emails and it was clarified there was a written agreement for Lee to testify, but not for Quiding. RP 688-89. Defense counsel still wanted the emails between

counsel because Quiding had been cooperating from the beginning of the investigation and he guessed that Quiding was cooperating because of some agreement with Det. Francis, and that the information about the plea agreement with Quiding was far less memorialized than Lee's. RP 690-91. The prosecutor indicated he didn't have any knowledge or emails about any agreement between Det. Francis and Quiding. RP 692. The judge ordered the emails between counsel regarding Quiding be disclosed, and the prosecutor said both sets of emails would be ready after lunch. RP 693-94.

Defense counsel then raised the issue that they had just been provided with a police report from Det. Sgt. Crisp and that they were still missing six from the CAD report they had just received. RP 694-95. Det. Francis informed the court he didn't think Ferndale had any more reports and said that Ferndale was double-checking. RP 695-96. As to Sgt. Crisp's report Det. Francis indicated there was no explanation as to why it hadn't been turned in earlier, that Sgt. Crisp had just found it that day when he looked for it[6]. RP 696. The judge expressed frustration at the late police reports despite multiple discovery hearings and stated there was no excuse for them being produced three days into trial. RP 696-97.

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[6] The prosecutor filed an affidavit explaining Sgt. Crisp had forgotten about the report he had written and failed to put into evidence, but that Sgt. Crisp had not been actively involved in the investigation. CP 114-17.

Defense counsel interjected that the remedy was "8.3," because of the evidence of mismanagement, particularly on the heels of the late disclosure of the 911 recordings. RP 697. Counsel argued the court should not excuse the late discovery and that the case should be dismissed due to the state's mismanagement, reminding the court that defense still needed to do interviews of the officers who appeared on the CAD log. RP 698. The prosecutor responded the reports didn't have a lot of substance, that Sgt. Crisp's report was brief and was an overview, and that the Ferndale report also didn't say much. RP 699. The judge indicated she was not going to rule on the motion to dismiss right then, that they would proceed with seating the jury, and she was contemplating setting aside time on Friday[7] to hear argument, ideally with briefing. RP 699-700. Defense then asked for and received an order compelling the reports of Officers Healey, Vanderyacht and Deyoung[8], and the second Ferndale CAD log, if it existed. RP 700. The prosecutor argued that materiality is critical for an 8.3 motion, and while he understood the judge's frustration, a continuance would be more appropriate than a dismissal. RP 702-03.

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[7] The Superior Court does not hold trial on Fridays.

[8] Deyoung was a Sheriff's deputy and Vanderyacht and Healy were Ferndale officers. The prosecutor later filed an affidavit indicating that Officers Healy and Vanderyacht had not written reports. CP 114-17, 120-21. Officer Healy was interviewed by defense counsel on Dec. 3rd during trial. CP 124-37.

Later that day, the judge indicated she had received copies of the reports[9] that had been handed over that day, and the prosecutor indicated he had just handed over Deyoung's, which apparently had had the wrong date on it[10]. RP 748. He indicated that defense had also specifically inquired about reports for Chief Eagle and Officer Rossmiller, and while they didn't believe either had done reports, they were following up, and Ferndale had told them there were no more reports. RP 748-49. When the prosecutor offered to put on testimony from a detective to explain why discovery had been so difficult to obtain in the case, the judge indicated that simple mismanagement would be enough under the rule. RP 750.

The judge identified four officers who were not on prior witness lists, Dep. Scott, Lt. Hester, Sgt. Crisp and Sgt. Moyes. RP 751. She reviewed the reports she had just been given in light of the issue raised by defense that there had been reports of others firing at the same time, and it appeared that although those individuals might have been in same area, they were using a different caliber gun. RP 751. After expressing her great concern and frustration, the judge indicated she didn't see anything

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[9] It appears the reports the judge reviewed were Sgt. Crisp's and Sgt. Davis's. CP 221. (There was a portion of proceedings that wasn't transcribed, but defense counsel attached a defense transcription of the missing few minutes. CP 221-23. It reflects that defense was provided Sgt. Davis's report the day before and that they had received the CAD log.)

[10] The prosecutor filed an affidavit detailing why it had been hard to locate Deyoung's report and that it was actually a report that was associated with a different event number and related to a different address, Paradise Road. CP 114-17.

in the reports that she would conclude was material and thus required dismissal. RP 752. She indicated she didn't see any attempt to mislead the defense, despite defense counsel having raised concerns about that in prior hearings. RP 752. She indicated that she was "reluctant to dismiss the jury and continue the case," but felt that was her only option at that point. RP 753. Defense counsel interjected that they did not want a continuance, that would be extreme prejudice to them. RP 753. The judge indicated she understood defense wanted a dismissal, and that she expected there would be more motions to dismiss after defense indicated there would be more. RP 753.

Defense counsel then offered they might be ready to proceed if the State could comply by the next day. RP 754. Defense counsel further indicated they had a plan to get in contact with the people they needed to interview, so they could be prepared to go forward. RP 755. Defense counsel indicated they might be able to develop materiality once they had done the interviews. RP 756. The judge indicated she was not ruling on the motion to dismiss, noting defense might be able to develop something more, but at that point her concerns were allayed based on what she had before her. RP 757. Defense counsel indicated he was *withdrawing the motion to dismiss* based on CrR 8.3 at that point. RP 758-59. (emphasis added). The judge warned the prosecutor that if there were any other

discovery issues, she would not be happy about it, and she would entertain a renewed motion to dismiss. RP 761-62.

The court proceeded to opening statements that day. RP 784-810. At the end of the day, defense counsel asked the judge to consider whether Det. Francis was qualified to take the stand because he had lied to the judge the day before, and informed the court he would be asking for a lot of latitude regarding cross examination, including that Det. Francis had lied to the judge and that it took a court order to get him to answer questions truthfully. RP 1002. The prosecutor objected to the allegation and stated that Det. Francis didn't lie, to which defense counsel indicated he didn't call Det. Francis a liar. RP 1003-004. When the judge told defense counsel she didn't use the word lie, counsel indicated he would retract that, that he had thought the judge had used that word. He informed the court that it was likely defense would have another CrR 8.3 motion Monday morning. RP 1004-006.

Later during testimony of the state's firearm expert, defense counsel claimed the expert had violated the motion in limine regarding the scope of his permissible testimony, but instead of having the court rule on a motion for a mistrial, he was going to add it to his CrR 8.3 motion because of the cumulative effect of the state not adhering to the court's orders. RP 1165. The judge noted that he had made his record. Later

during trial defense counsel again referenced a CrR 8.3 motion, and informed the court they had done five interviews, but that they needed time to put together their CrR 8.3 motion, and was thinking about asking for a half day off to prepare it. RP 1259-262.

Later again during trial, defense counsel informed the court that he had just found out the statute of limitations on Quiding being charged with manslaughter had run the week before Quiding entered his plea to unlawful possession of a firearm, and that seemed pretty intentional to him. Counsel stated Quiding's attorney had told him they waited until the statute of limitations had run. RP 1401. Counsel requested a dismissal alleging that the prosecutor had removed the impeachment by scheduling the deal to occur after the statute of limitations had run and withheld that information. RP 1401-03. The prosecutor denied the allegations that there had been a plan to wait until the statute of limitations had run, that he had not planned to charge Quiding with the offense based on the evidence they had, and explained why it had taken so long for Quiding to enter a plea. He stated: "any sort of negotiations based on statute of limitations is absolutely ridiculous and false," alleging that this was another of defense counsel's conspiracy theories. RP 1403-05. The judge later heard from Quiding's attorney who denied that he had said yes when defense counsel had asked him if he was aware the statute of limitations had run. RP 1405,

1593-94. He informed the judge there had not been any talk about the statute of limitations passing during the plea negotiations. RP 1594-95. The judge cautioned both counsel regarding the tone they were taking with one another, but stated she understood the prosecutor's being offended by the representation that defense counsel had made to the court. RP 1596-98.

Regarding the Charged Offense

Alyssa Smith died from a gunshot wound that hit her while her family was having a barbecue in the backyard of the Smith family home on Father's Day. RP 874, 888, 1042. The bullet was a .30 caliber that came from an AK 47 rifle and matched the AK 47 rifle that Zylstra and others shot from the sandbar on the Nooksack River located near the Smith family home. RP 868, 1051, 1055-56, 1146, 1159-61, 1164; Ex. 4, 5, 16. The AK 47 belonged to Zylstra. RP 995.

The sandbar was approximately 800 yards, less than a half mile, from where Alyssa was hit with the bullet. RP 849-50, 1322. The riverbank on the opposite side of the river from where they were shooting was less than 12 feet high, and there was about a six yard elevation gain from the river to where Alyssa fell. RP 850, 1331. There was a fresh bullet strike on a tree on the opposite side of the river. RP 1324-25. The trajectory from where the shooting occurred on the river to that tree and beyond extended to where Alyssa fell. RP 1325-28; Ex. 1, 49.

While Jeff Smith was putting steaks on the grill, he heard shots in the distance in rapid succession, pop – pop - pop, and then heard three bullets fly by overhead. RP 876, 886, 941, 967. This had never happened before, although it wasn't uncommon to hear shooting in the distance. RP 878, 965. David Pierce, Alyssa's boyfriend, Alyssa, and Danil Semonv, Alyssa's sister Jennifer's fiancé, also heard the rapid fire of shots. RP 900-01, 940. Jeff[11] yelled to his wife Laurie to call 911, and then the shooting stopped, so Alyssa, David and Danil went to the fence at the property line to see if they could see from which direction the shooting was coming. RP 874-75, 877-78, 944; Ex. 11, 12. Once at the property line, they called out and tried to make some noise so that whoever was shooting would know they were there. RP 882-83, 946. While they were at the property line, they heard some more rapid fire shots, and Jeff started running back to the house. RP 886-87, 906, 946, 970, 974. As he got closer to the house, Alyssa, who had also been heading back towards the house, screamed, "I've been hit!" RP 888, 906, 948, 970, 972. Jeff and David, who also heard Alyssa's blood-curdling scream, ran to her and started to give her CPR and to compress the wound as she went into shock and stopped

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[11] The State is using first names for clarity.

breathing. RP 888, 906, 948-49, 949-50, 972. Alyssa was revived and the police or EMS were there within five minutes. RP 888-89, 907.

Jeff didn't remember if there were any more shots after Alyssa was hit, and David didn't hear any more shots after Alyssa was hit. RP 889, 907, 936. Danil remembered hearing some shots in the distance after Alyssa was hit, but didn't recall if those were fast and repetitive as the ones were when Alyssa was hit. RP 950-51. Jennifer also heard rapid firing right before Alyssa was struck and heard some more rapid fire shots immediately afterwards, and a bit later some random, spread-out "pop" shots that sounded different than the firing that occurred when Alyssa was hit. RP 970, 972-74.

Officers responded to the Lattimore Road area where it appeared the shots were coming from. RP 978. Zylstra, Zylstra's girlfriend Tanya Shinpaugh, Doug Quiding, Robert Lee, and Kyle Buck were walking across a field near Quiding's home when they encountered the officers, having just come up from the Nooksack River where they had been shooting guns. RP 979-81. They had with them an AK 47, a .17 caliber rifle, a .9mm handgun and a revolver. RP 981. Zylstra was carrying the .17 caliber rifle and a soft cooler that had the .9mm on top, in which was extra ammunition and an empty beer can with holes in it. RP 981-82, ---. The officer told them they someone had been shot and that the area they

were was the general area from which shots had been reported coming. RP 982. Zylstra said they had been target shooting and showed the officer where they had been shooting, on a sandbar along the river. RP 983-84, Ex. 19, 20, 21.

Quiding, Lee, Buck, Shinpaugh and Zylstra were all briefly interviewed the night of the incident. RP 1112. That day Zylstra said that Shinpaugh, Quiding, Buck and someone else were with him shooting at the river. RP 1293, 1295. He said the guns they had were all his. RP 1295. He said they had been shooting at some cans and a toy[12], that there was an excavator in the field across the river, but he didn't think anyone had shot at it because no one wanted to damage it. RP 1295, 1300. He said he had shot at the bank across the river, and that they had been shooting in the direction of the wood pylons[13]. RP 1296, 1299. He didn't really know the order they shot, that they were just taking turns shooting. RP 1299. He said that he shot into the water to get rid of the last round, referring to the ".17 caliber AK[14]."

Zylstra was interviewed again two days later and admitted he had shot the AK 47, and said that he shot it first with Quiding maybe next,

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[12] It was a plastic starfish.
[13] The transcript sometimes uses the word "pilings" and sometimes "pylons."
[14] This is what the officer wrote in his report but the .17 caliber rifle was not an AK and the AK was the AK 47. RP 1287-88, 1302.

Buck and then Lee, or Lee and then Buck. Ex. 36; RP 1173-74, 1178-80, 1189-90. He didn't think his girlfriend Shinpaugh had shot the AK 47. Ex. 36; RP 1174. He said they heard sirens toward the end of their shooting, and that no one shot after they heard the sirens. Ex. 36; RP 1178. He said no one was using an odd shooting technique. Ex. 36; RP 1182. He said no one shot in the direction of the wood pylons, although there had been talk about them. Ex. 36, RP 1182, 1185-86, 1196. They all knew there were houses were on the opposite side of the river. Ex. 36, RP 1186-87. He thought everyone had been shooting safely that day. Ex. 36; RP 1185, 1191, 1194.

Quiding and Lee were interviewed the same day as Zylstra, and Buck the following day. They were all very upset during their interviews. RP 1199-1206. During the course of those interviews, all of them stated that Zylstra had been firing the AK 47 from his hip, which a Sheriff's detective knew as "bump firing." RP 1209-10. "Bump firing" is a technique in which the gun is held loosely at the hip and thumb is locked into a pant loop, and then the shooter pulls the trigger as fast as s/he can. The action on the guns goes faster because the gun is locked into place with the thumb. RP 1211, 1560, 1580. The biggest concern with shooting from the hip is that the shooter is not using the sights, and therefore doesn't really know where the bullets are going. RP 1157, 1564, 1581.

The recoil that occurs with bump firing causes the barrel to go up, known as muzzle rise. RP 1581-82, 1163. Bump firing causes an automatic fire effect that sounds like a machine gun, like bursts of fire. RP 1162-63, 1585. It would only have taken a one to three degree muzzle rise for the bullet to clear the river bank and travel the distance it did. RP 1164.

Quiding, Lee and Buck all testified that Zylstra fired the AK 47 in rapid fire from his hip and was the only who used this bump fire technique. RP 1350-52, 1459-60, 1464-65. Quiding and Lee heard Tanya say something about hearing someone yelling or screaming towards the end of their shooting. At that time Zylstra was the one holding the AK 47. RP 1352-53, 1461-63. They all heard sirens in the distance after they were getting ready to go back to the house, and no one shot after the sirens were heard. RP 1353, 1462. Quiding and Lee testified no one shot after Tanya's remark about hearing yelling. RP 1354, 1462. Quiding testified they shot at cans, starfish, water and maybe the pylons. RP 1361.

Shinpaugh testified she thought all four guys shot the AK 47, but she didn't remember in what order, and she couldn't say for sure that Quiding shot the AK 47 because she didn't see him shooting it. RP 1418, 1432. She said that she hadn't been watching any of them shooting the AK 47, including Zylstra, and she didn't watch Zylstra when he shot. RP 1419. She denied hearing any yelling and didn't recall saying that she had

while they were down at the river, but she had heard the sirens. RP 1426-27. She heard the sirens a little bit before they stopped shooting. RP 1427. She said some of them shot the .9mm after they heard the sirens. RP 1427. She testified she didn't see anyone shoot from the hip that day. RP 1435.

Lee, Quiding's stepson at the time, disliked Quiding, but went to Quiding's house that day because his mother hadn't seen Lee's daughter in a while. RP 1448-51. Lee and Buck testified that Zylstra shot the AK 47 first and last, and that Lee and Buck shot it in between. RP 1454 – 58, 1501-09. They said that Zylstra shot the AK 47 in a normal fashion initially, but the second time he fired it, he shot from his hip in a rapid fashion towards the starfish. RP 1459-60, 1501-03, 1509-12.

Buck knew Quiding because Quiding was his ex-girlfriend's stepfather. RP 1429. Buck testified he turned around when he heard Zylstra's rapid firing the second time Zylstra had the AK 47. RP 1510. Zylstra was shooting from the waist, aiming only in the general direction of the targets. RP 1510-11. Zylstra shot quite a few rounds and stopped briefly and said something about being able to feel the shockwave on his face and then continued shooting. RP 1511-12. Shinpaugh said something about hearing screaming, and they asked like what, and Zylstra said it was probably a bird. RP 1512-14. Zylstra fired a few more rounds and then they heard sirens. RP 1514. Zylstra fired a few more quick rounds and

then they decided to stop because of the sirens sounding so close. RP 1515. Zylstra had the AK 47 both when Shinpaugh said something about screaming and when they heard the sirens. RP 1514. Buck said he saw some of Zylstra's shots hit the opposite bank. RP 1522. He said Quiding did not shoot the AK 47. RP 1524.

While walking on the way back to Quiding's house, Zylstra shot the .9mm gun towards a tree. RP 1354-55, 1421-22.

Defense had laid out its theory of the case in opening: "This case is about the truth is out there, but we'll never know." He stated that shooting still continued after law enforcement got involved, and law enforcement didn't know who pulled the trigger, they had just picked someone. RP 808. He reiterated, "This trial is about who pulled the trigger." RP 809. He asserted it wasn't Zylstra and the jury needed to decide who pulled the trigger. RP 809.

Defense presented evidence that Quiding told Dep. Harris the day of the incident that he had shot the AK 47 and showed him the direction that Zylstra shot in rapid succession, which was not towards Gadwa Road. RP 1657-60. After interviewing Dep. Healy and before the end of their case, defense chose not to call Dep. Healy to the stand and instead requested a missing witness instruction related to him, which the judge denied. RP 1708-11; CP 124-37. Defense also presented evidence that

Buck had told an officer the day of the incident the order in which people shot and who shot what and that Buck had said that Quiding had shot both rifles that day. RP 1528-30, 1758-62.

Defense counsel requested and received an instruction on the defense theory of the case: "It is a defense to manslaughter in the first and second degree that the bullet that caused Alyssa Smith's death was not fired by the Defendant." CP 166; RP 1772-77. In closing, they argued that the case was about who pulled the trigger and that it couldn't be known who did. RP 1864. He argued that the jury had to determine if Zylstra pulled the fatal trigger and that it was a defense to manslaughter that the bullet that killed Alyssa had not been fired by Zylstra. RP 1868. In addition to arguing that everyone stated on the day of the incident that Quiding had shot the AK 47, he also argued that they couldn't know whether shots were fired after Alyssa was hit or not because the testimony conflicted and that none of the witnesses agreed as to who shot last. RP 1874- 77. He again pointed the finger towards Quiding as possibly the one who fired the fatal bullet. RP 1878-81. He ended with argument that the truth was out there but the jury wouldn't know it and that the State had failed to show that Zylstra had fired the fatal shot. RP 1881-82.

D. ARGUMENT

1. Zylstra waived his right to challenge the discovery issues asserted during trial under CrR 8.3 when he withdrew the motion and never made another such motion during trial.

Zylstra argues that the trial court erred in denying the "multiple motions to dismiss" the case for government mismanagement, pursuant to CrR 8.3. Appellant's brief at 2. However, he only presents argument regarding the post-conviction CrR 8.3 motion to dismiss. To the extent that he may be arguing the judge abused her discretion in addressing the defense mid-trial motion to dismiss, there was no court ruling because defense withdrew its motion and never presented it again despite indicating a number of times during trial that he would.

A defendant who affirmatively withdraws a motion waives or abandons their constitutional right regarding the substance of that motion. State v. Valladares, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983); *see also,* In re Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014) ("Once a constitutional challenge has been affirmatively withdrawn or abandoned, the challenge will not be considered on appeal.").

At the time defense initially, orally raised the CrR 8.3 motion at the beginning of trial before the jury was seated, the defense argued the judge should dismiss the case because of the failure to provide the 911 calls, which the judge had already ordered suppressed, and the late and/or

"missing" police reports. The court deferred ruling on the motion, and later, after reviewing the reports she had received that day, she concluded the reports didn't appear to include anything that was material since although they related to reports of the firing of guns that may have been in same area, it was clear the guns used were of a different caliber. Therefore dismissal didn't appear to be appropriate though she was inclined to continue the case. However, defense interjected they didn't want a continuance, that they had a plan so they could proceed and they might be able to develop the materiality of the discovery once they had completed interviews. Defense counsel then indicated he was withdrawing his motion to dismiss.

At the end of that day, defense counsel informed the court to expect another CrR 8.3 motion on Monday. Defense counsel mentioned at filing a CrR 8.3 motion at least three more times during trial. Defense counsel never filed a CrR 8.3 motion during trial and did not renew his CrR 8.3 motion to dismiss for discovery violations.

Zylstra waived his right to assert any error regarding the trial court's "decision," regarding his trial CrR 8.3 motion to dismiss because he withdrew the motion. The judge did not rule on his motion, instead she articulated her preliminary thoughts as to how she thought she might rule, but defense counsel never renewed the motion, even though the judge

indicated she would entertain such a motion. Zylstra waived the right to challenge any decision regarding his oral CrR 8.3 motion at trial by withdrawing it.

2. Zylstra waived the ability to assert a CrR 8.3 motion post-conviction by failing to bring it during trial and those rule doed not provide the authority to dismiss a case post-conviction.

Zylstra asserts that the trial court abused its discretion in denying the post-conviction CrR 8.3 motion because defense was not required to prove prejudice. However, while the trial court addressed the issue of prejudice in her thorough ruling on that motion, the court concluded that Zylstra had waived his ability to seek a remedy under CrR 8.3 because he failed to make the motion at trial, at which time the court would have given defense a continuance, the remedy the court felt was the appropriate relief. The trial court did not abuse its discretion when it denied Zylstra's CrR 8.3 motion post-trial because he waived it by failing to bring it in a timely manner when the court could have addressed it and provided suitable relief.

After Zylstra was found guilty of second degree manslaughter defense filed separate motions to dismiss under CrR 4.7 motion and CrR 8.3. Zylstra does not argue CrR 4.7 on appeal. His CrR 8.3 motion did seek to incorporate his CrR 4.7 motion via a cumulative error argument.

The purpose of CrR 4.7 is to prevent a defendant from being prejudiced by surprise, misconduct and or arbitrary action by the government." State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). However, if a continuance is an available remedy and defense does not move for one, a prosecutor's failure to comply with the discovery rules is not prejudicial error under CrR 4.7. State v. Brush, 32 Wn. App. 445, 456, 648 P.2d 897 (1982), *rev. den.*, 98 Wn.2d 1017 (1993).

CrR 8.3 provides for relief from government misconduct or mismanagement in limited circumstances:

> On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal *prosecution* due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b) (emphasis added). The rule does not speak of dismissing convictions. Post-conviction remedies are set forth in title seven of the rules, and include specifically, e.g., motions to arrest judgment or motions for new trial[15], but not motions to dismiss.[16] A defendant waives the

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[15] Zylstra however did not want to seek a new trial, but dismissal after he was convicted. While Zylstra did file a motion for a new trial under CrR 7.5, he waited until after his motion to dismiss was heard to file it, and the court concluded it was untimely. CP 384..

[16] The only case the State has found in which a motion to dismiss under CrR 8.3 was addressed post-trial is State v. Barry, 184 Wn. App. 790, 339 P.3d 200 (2014). The defendant in that case made the motion pre-trial, it was the judge who decided to not hear the motion until after trial. Id. at 795-96. The case did not address the procedural timing of the motion.

ability to assert an issue by failing to raise it in a timely manner. *See,* Valladares, In re Cross, *supra.*

Zylstra chose to withdraw his initial motion to dismiss because the judge intimated that she would grant a continuance, and Zylstra didn't want a continuance. He also chose not to file another motion to dismiss during the trial although he alluded numerous times that he would do so. The court found that the defense had withdrawn its motion at trial and waived the ability to pursue its CrR 4.7 and CrR 8.3 motions: "As a result of this [failure to assert the motions during trial], the Court finds that Mr. Zylstra waived the right to make this motion." RP 1978; CP 371. In her written ruling she concluded: "Unfortunately, the defense failed to avail itself of the appropriate remedy during trial and, therefore, the Court concludes it cannot provide the relief the defense now seeks." As noted by the judge in her order denying the defense motion to dismiss:

> The defendant is entitled to have defense counsel that has thoroughly prepared and investigated the case. Had defense counsel elected to take a continuance, Zylstra's counsel would have had time to review the late produced material. The choice not to take the continuance may have been a strategic one, but that does not entitle Zylstra to now obtain a dismissal when alternative remedies were not taken. To do so would create an incentive for defendants to withhold objections and refuse remedies provided under the law and "lie in wait" to later seek dismissal. Such a result is obviously not contemplated by the concepts of preservation of error and timely objections. The requirement that parties must see (sic) objections at the time they arise and then object and preserve those objections exists to ensure that the Court

> and the opposing parties have the opportunity to respond and, if necessary, cure the error.

CP 382 n 5.

Zylstra waived the ability to assert a motion to dismiss under CrR 8.3 based on discovery violations because he waited to assert it at a time when the judge could not grant the relief that she felt was appropriate regarding the discovery violations.

The State argued in its response to the defense motions to dismiss that the rules relied upon by defense, CrR 4.7 and CrR 8.3, did not provide the authority to grant the remedy of dismissal sought by Zylstra. CP 251-252. The judge did not reach this argument in her decision, but noted:

> The Court has found no cases in Washington that analyze the bringing of CrR 4.7 or 8.3 motions following trial and conviction. It's not clear that either motion can be properly brought post-conviction, although the Court notes that CrR 4.7 motions may be brought "during the course of proceedings." The Court need not decide this issue; it does, however, note that nothing prevented the defense from making either motion during the course of the trial, prior to it being submitted to the jury, and it chose not to do so. Whether the defense chose not to do so for strategic reasons or as a result of a misreading of the rules, the fact remains that a 4.7 motion during trial would have been likely to result in the Court granting the defense a continuance and additional time to prepare *because that would have been the appropriate remedy.*

CP 382 (emphasis in the original).

Defense should have brought his CrR 4.7 and CrR 8.3 motions to dismiss during trial. Zylstra waived the right to bring them by choosing

not to do so. CrR 4.7 and CrR 8.3 do not provide the relief of dismissal post-conviction for discovery violations because to permit them post-conviction would remove from the court the ability to impose other sanctions or relief the court might find to be appropriate.

3. Zylstra was not entitled to dismissal under CrR 8.3 post-conviction because he failed to demonstrate actual prejudice from the late discovery.

Given that Zylstra asserts that the judge ruled on the merits of his post-conviction motion, the State addresses the merits here.

a. Zylstra cannot assert that he was prejudiced because he faced a choice between speedy trial and right to adequately prepared defense counsel where he never argued below that was the prejudice to him.

On appeal Zylstra asserts that he was prejudiced because he had previously been forced to make the "Hobson's choice" between waiving his right to speedy trial and right to prepared counsel. This was not the basis for his motion below, and he cannot assert an argument on appeal different than the one he asserted below. In fact, he specifically asserted he was not making a speedy trial argument. This Court should decline to review this "Hobson's choice" argument.

A defendant may not generally raise an argument on appeal that was not presented to the trial court. State v. Lazcano, 188 Wn. App. 338, 355, 354 P.3d 233 (2015), *rev. den.* 185 Wn.2d 1008 (2016); *see also*,

State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (assertion on appeal that admission of evidence that defendant possessed a loaded gun and knives violated ER 404(b) was not preserved because objection below had been based on ER 401).

Defense never asserted that Zylstra felt that he was faced with the Hobson's choice of choosing between his speedy trial rights and prepared counsel. CP 210-250. At argument on the post-conviction motions, defense counsel acknowledged that "we weren't considering it to be a speedy trial issue; we were considering it to being – the Court has ordered the State, on numerous occasions, to perform and the State has not honored the Court's orders. That was the issue." RP 1961. The judge noted in her decision denying his post-conviction motion to dismiss that speedy trial had not run at the time of trial and there was about 30 days left. CP 372, 381.

As a basis for asserting this "Hobson's choice" argument, Zylstra cites to the court's decision on his motion to dismiss at CP 368. On that page the court references Zylstra's waiver of speedy trial entered on September 25, 2014, seven months after Zylstra had been arraigned. Zylstra filed that waiver of speedy trial, which waived until February 15, 2015, in order to facilitate trial preparation. Supp CP __, Sub Nom 20, 21, 22. No issues regarding discovery had been brought to the attention of the

court at that point. App. A. It is not uncommon in a homicide trial for defense to require many months beyond the initial speedy trial time period to investigate and prepare for trial. Zylstra didn't file his first motion to compel until July of 2015, and even then defense didn't consider it a "hostile" motion to compel, but one that would facilitate the prosecution obtaining "some information." RP 3-4.

There is no question, and Zylstra does not argue on appeal, that his speedy trial time had not run. Zylstra cannot rely upon his initial waiver of speedy trial as a basis for asserting that he faced a "Hobson's choice." After Zylstra's non-hostile motion to compel, there was about a year of continuances without any motions to compel, not including the one regarding the Bellingham Police Department records regarding confidential informants[17]. App. A. Most of those continuances were at the request of defense, with no objection from the state, and some of them were due to defense counsel unavailability or need to interview witnesses. The discovery issues that arose at the beginning of trial before the jury was impaneled did not present Zylstra with the Hobson's choice between his right to speedy trial and his right to adequately prepared defense

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[17] The second motion to compel related to Bellingham Police Office records regarding confidential informants, to which Counsel for the Bellingham Police Department objected and responded, and which the judge ultimately denied at the beginning of November 2015. App A.; CP 17-27; RP 64.

counsel. He knew this and specifically did not assert this at his post-conviction motion. He cannot now raise it on appeal.

b. Zylstra failed to demonstrate prejudice to the presentation of his defense from the late discovery and therefore was not entitled to dismissal of his conviction.

Zylstra also asserts that the trial court abused its discretion in denying his CrR 8.3 motion to dismiss because the State's mismanagement compromised his counsel's ability to be adequately prepared for trial. While the court noted that caselaw required that defense demonstrate prejudice and that *if* he had been up against the running of speedy trial *when he had made the motion at trial*, dismissal might have been the appropriate remedy, the court's order was based on Zylstra failing to have pursued a CrR 8.3 motion *at trial*. Even if the trial court had based its decision on the merits of Zylstra CrR 8.3 motion, Zylstra failed to demonstrate actual prejudice from the discovery violations.

A trial court's decision on a CrR 8.3 motion may be overturned on appeal only if there has been a manifest abuse of the court's discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Abuse of discretion exists only when the trial court's decision was manifestly unreasonable or was exercised on untenable. State v. Salgado-Mendoza,

189 Wn.2d 420, 427, 403 P.3d 45 (2017). "A reviewing court may not find abuse of discretion simply because it would have decided the case differently – it must be convinced that "no reasonable person would take the view adopted by the trial court." Id. The trial court is in the best position to assess whether a defendant's right to fair trial is impermissibly prejudiced by a discovery violation. Id. at 439.

In order to dismiss under CrR 8.3(b), the defendant must demonstrate arbitrary action or governmental misconduct and prejudice. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). It is the defendant's obligation to show misconduct and prejudice by a preponderance of the evidence. Salgado-Mendoza, 189 Wn.2d at 431. Simple mismanagement is sufficient to demonstrate government misconduct. Id. Dismissal is an extraordinary remedy only available when the government conduct actually prejudiced the rights of the accused, materially affecting his or her right to a fair trial. Blackwell, 120 Wn.2d at 830; *accord*, Salgado-Mendoza, 189 Wn.2d at 436. Dismissal should only be granted under CrR 4.7 or CrR 8.3 "as a last resort." State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010). Dismissal should be limited to cases of egregious mismanagement or misconduct. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

A risk of prejudice is insufficient to demonstrate actual prejudice. Salgado-Mendoza, 189 Wn.2d at 436; *see also*, State v. Rohrich, 149 Wn.2d 647, 657-58, 71 P.3d 638 (2003) (showing of speculative prejudice insufficient to warrant dismissal under CrR 8.3). Actual prejudice may in some circumstances be shown by the interjection of new facts shortly before trial that forces the defendant to choose between his speedy trial right and right to adequately prepared counsel. Id. at 432; *see also,* State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (defendant must prove by preponderance of evidence that the interjection of new material facts compelled him/her to choose between right to speedy trial and right to adequately prepared defense by state's failure to act with due diligence). There is, however, no per se right to dismissal on a showing that the defendant faces a choice between his speedy trial right and his right to an adequate defense. State v. Smith, 67 Wn. App. 847, 853, 841 P.2d 65 (1992), *rev. den.* 121 Wn.2d 1019 (1993); *see also*, State v. Cannon, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996) (defendant not entitled to dismissal of case for alleged discovery violations where defendant failed to show that new facts regarding FBI and WSP lab procedures caused him to choose between speedy trial and adequate defense rights even though lab reports were provided to defense beyond the initial time for trial period); State v. Hoffman, 115 Wn. App. 91, 105-06, 60 P.3d 1261 (2003),

rev'd on other grounds, 150 Wn.2d 536, 78 P.3d 1289 (2003) (showing of delay beyond speedy trial was not inherently prejudicial under CrR 4.7 or CrR8.3 because dismissal must be considered on case-by case basis and it's the defense burden to establish prejudice, even though the state had failed to produce the victim for a defense interview within five days before trial date).

A defendant must show misconduct and actual prejudice even if the State has failed to comply with its discovery obligations under CrR 4.7. Salgado-Mendoza, 189 Wn.2d at 428-29. Courts are encouraged to use the least severe sanction that addresses the prejudice to the defendant when addressing discovery violations. Id. at 431; *see also*, State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (trial judge should have considered and employed "intermediate remedial step" instead of dismissing the case for discovery violation). Defendant must make a specific showing of how late disclosure of discovery actually, *materially* affected his right to a fair trial. Salgado-Mendoza, 189 Wn.2d at 432. (emphasis added). A prosecutor's noncompliance with its discovery obligations is not prejudicial if a continuance was an available remedy and the defendant did not request one. State v. Krenik, 156 Wn. App. 314, 321, 231 P.3d 252 (2010) (quoting State v. Brush, 32 Wn. App. 445, 456, 648 P.2d 897 (1982).

Here, Zylstra filed two post-conviction motions to dismiss, one based on CrR 4.7 and the other on CrR 8.3. The bulk of the CrR 8.3 motion alleged prosecutorial misconduct in opening and closing, although defense requested that if the court declined to dismiss on the basis of prosecutorial misconduct that it consider as well the discovery violation allegations in its CrR 4.7 motion. CP 224-50. In its decision the court found that its curative instructions at trial adequately addressed the statements of the prosecutor. CP 373 n.2. Below and on appeal Zylstra asserts that he proved prejudice warranting the extraordinary remedy of dismissal because the defense learned too late that one of the responding officers and a 911 caller *could have* supported the "minority theory" that shots continued after Alyssa was hit and that the last shooter was not necessarily the one who fired the bullet.[18] This speculation is insufficient to demonstrate actual prejudice. As is implicitly acknowledged, there had been testimony from a couple of witnesses that shots continued to be heard after Alyssa was hit, however, those were not rapid fire shots[19]. The

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[18] This argument was actually set forth in the CrR 4.7 motion to dismiss. The CrR 8.3 motion only argued that the late disclosure and interview of Off. Healy was the "most troubling," that the interview would have altered the defense theme, theory and strategy of the case." CP 229-30. Except for Officer Healy's interview, defense was aware of and argued the rest of the late disclosure discovery on Nov. 30th in his oral motion to dismiss at trial.

[19] Alyssa's sister did hear rapid fire shots immediately after Alyssa was hit, but then heard non-rapid fire shots as well.

complaint that shots had been fired out at Paradise Road[20] was determined to involve handguns and no long-gun ammunition, which meant that they would have been incapable of reaching the Gadwa residence, and the shooting had occurred in a different direction. CP 344, 359; RP 1149-50. This information did not provide the basis for an alternative shooter theory and therefore was not prejudicial. Contrary to defense claim, the State's case was not predicated solely upon the timing or order of shooting, with Zylstra being the last one to fire, but centered on Zylstra having been the only one to have engaged in rapid fire shooting using the bump-fire technique. RP 1807, 1809, 1816-18. Defense's theory was that no one could know who shot the fatal shot and included that the testimony conflicted regarding whether there were shots after Alyssa was hit. Defense was aware of Officer Healy's information before the State rested and certainly could have called him to testify. He chose, however, to request a missing witness instruction regarding the officer rather than subpoena him.[21] Defense failed to demonstrate *actual* prejudice from the

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[20] The fact that the investigation occurred at a different address resulted in the officers' reports being given a different event number and thus were not associated with the Gadwa Road incident event number. CP 272-73. Defense counsel at argument corrected his briefing to indicate that defense had been aware back in February of 2014 of the existence of DeYoung's report. RP 1940.

[21] Off. Healy did not write a report and his statements during the defense interview were contradicted by Sgt. Davis who was with Off. Healy when they attended to Alyssa and when they tried to determine where the shots came from. Sgt. Davis wrote his report back in 2013, although it was not produced until right before trial. CP 273, 298-300.

late discovery of Officer Healy. Defense received the 911 calls on the first day of trial (before the jury was seated) and could have had the one recording it claims would have supported the "minority theory" introduced during the presentation of its case. CP 208.

Zylstra asserts that the trial court abused its discretion based on the cases of Dailey, Martinez and Sherman. All of those cases are distinguishable in that none of those motions occurred post-conviction, after defense waived their right to pursue their motion at trial. In Dailey, the defendant and a co-defendant were both charged with negligent homicide two and a half years after the incident. State v. Dailey, 93 Wn.2d 454, 455, 610 P.2d 357 (1980). Defense moved for a bill of particulars to determine which of the two were being charged as the driver. Id. A month later the state stated Dailey would be charged as the driver and had no explanation as to why it had not produced lab reports it had been ordered to produce a month before. Id. Then a couple days before trial, the State dismissed the charge against the co-defendant and filed a new witness list that had 16 witnesses on it instead of the original five that had been listed. Upon a renewed motion to dismiss before trial, the court ordered that the state could go forward to trial with the original five witnesses or it would dismiss the case. Id at 356. The state stated it could not go to trial with just the original witnesses. On appeal, in upholding the dismissal the court

referenced the late discovery, the list of witnesses provided one court day before trial and the extremely late dismissal of charges against the co-defendant. Actual prejudice was clearly met because the state indicated it could not go forward at trial without those additional witnesses.

Here, defense failed to demonstrate actual prejudice that materially affected his right to a fair trial. None of the late information would have resulted in different outcome because, but for one piece of Off. Healy's information, none of it was significant or contrary to information that was testified to at trial, and defense had an opportunity to call Officer Healy and chose not to.

Martinez is also distinguishable on its facts. In that case the prosecutor provided exculpatory information mid-trial, information that he had possessed before trial but did not disclose. State v. Martinez, 121 Wn. App. 21, 24-29, 86 P.3d 1210 (2204). After there was a hung jury and the state refiled charges, the trial court dismissed the case on a defense motion based on CrR 8.3 and double jeopardy grounds. On review the court held that the prosecutor's withholding of exculpatory evidence was egregious misconduct warranting dismissal. Id. The prosecutor had been aware of the exculpatory information for two to six months before he provided it to defense counsel, and only did so by showing it to him in court shortly before the state rested. Id. at 26-27, 32. The court found that the potential

exculpatory value of the information was known to the prosecutor for at least three months before trial, and the state's explanation for the prosecutor not having been aware of its exculpatory value until trial was "ludicrous." Id. at 32-33. The court determined that the prosecutor's withholding of exculpatory information until the middle of trial was "so repugnant to principles of fundamental fairness" that it violated constitutional due process. Id. at 35.

Here, the prosecutor found out about the information regarding Officer Healy the same time defense counsel did. There was no purposeful withholding of exculpatory evidence by the state. Officer Healy's information was largely consistent with the State's theory of the case and certainly did not rise to the level of the evidence the prosecutor failed to provide in Martinez for at least two – three months while knowing its exculpatory value. As the judge here found, a continuance would have been the appropriate remedy for the nature of the late discovery at issue.

In Sherman, the trial court the defendant's due process rights had been violated by

> the State's failure to provide discovery, its filing of a motion to reconsider a discovery order after the date trial was to have commenced, its filing of an amended information after the scheduled trial date, and its attempt to expand the State's witness list on the day of trial.

State v. Sherman, 59 Wn. App. 763, 766, 801 P.2d 274 (1990). In that case speedy trial ran the day the case was dismissed, and the defendant *was* presented with the "Hobson's choice" between her speedy trial right and right to adequately prepared defense counsel. Id. at 769-70.

Here, Zylstra was not presented with a "Hobson's choice." He still had about 30 days left of speedy trial when he withdrew his motion to dismiss at trial. At the time of trial, before the jury was impaneled, the judge would have granted defense a continuance except defense withdrew its motion and indicated it could proceed. The judge here complied with the requirement announced in Wilson that the extraordinary remedy of dismissal is not appropriate for discovery violations, and trial courts should take "intermediate remedial steps," unless and until speedy trial expiration becomes an issue. Wilson, 149 Wn.2d at 12. Moreover, in the most recent case involving CrR 8.3 and discovery issues, the Washington Supreme Court reiterated that a showing of *risk* of prejudice is insufficient to meet the actual prejudice showing under the comparable CrRLJ 8.3. Salgado-Mandoza, 189 Wn.2d at 436-37.

The case of State v. Barry, 184 Wn. App. 790, 339 P.3d 200 (2014) is instructive. In that case, a felony malicious mischief case, two months before trial the defense requested discovery including the

defendant's recorded statements. Id. at 795. A second recording was not provided to the defense until a few days before trial due to the state's mistake. Id. The state did not disclose its witness list and the criminal convictions of its witnesses until the day before trial. Id. The morning of trial the defendant moved under CrR 4.7 and CrR 8.3 for dismissal because of the discovery violations, asserting that he was being forced to choose between his speedy trial rights and an adequately prepared defense counsel, despite the fact that there were eight days of speedy trial left. Id. at 795-96. The defense did not seek a continuance. On appeal, the defendant asserted that the recording of his confession was key evidence, but the court found no prejudice from the recording because defense was provided with a summary of the confession and there were no material discrepancies between the summary and the recording. Id. at 797-98. As to the expert witnesses listed on the witness list the day before trial, the defense had been given one of the witness's business cards and an estimate of damage a couple months before trial and had disclosed the name of the other expert when it had learned that defense intended to contest the value of damage caused. Id. at 798-99. Although defendant argued that the late disclosure of the witnesses' criminal convictions affected his ability to cross-examine them adequately, he had not used any prior convictions at trial despite his knowledge of them and did not

provide any specifics as to why his ability to cross-examine the witnesses had been hampered on appeal. Id. at 799. On appeal the court upheld the trial court's denial because the defendant had not been surprised by the content of his confession, he had been on notice that the state would have to prove the amount of damages and he had made no showing as to how he would have prepared differently had he known of the criminal convictions before trial. Despite the discovery violations, the court concluded the defendant had failed to prove prejudice and noted that eight days of speedy trial had remained and he had failed to request a continuance. Id . at 799.

Similarly here, had the trial court denied the post-conviction motion to dismiss on the merits, it would not have been an abuse of discretion because Zylstra failed to demonstrate prejudice that actually, materially affected his right to a fair trial. He did not face a Hobson's choice because his speedy trial time had not expired at the time he made his CrR 8.3 motion to dismiss at trial, and had he not withdrawn that motion, a ruling that a continuance was the appropriate remedy would not have been an abuse of discretion.

E. CONCLUSION

The State respectfully requests this Court deny Appellant's appeal and affirm his conviction for Manslaughter in the Second Degree.

Respectfully submitted this 2nd day of March, 2018.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. #91075
Whatcom County Prosecuting Attorney
311 Grand Avenue, 2nd Floor
Bellingham, WA 98225-4079
(360) 778-5710

APPENDIX

A

TIMELINE RE CONTINUANCES AND DISCOVERY

2/21/14: Zylstra arraigned; trial date set 4/30/2014. Supp CP __, Sub Nom. 9

3/5/14: Defense counsel files "Request for Disclosure of Exculpatory Evidence" seeking "All complaints, reprimands and or allegations made by anyone at any time regarding the performance" of all law enforcement officers who responded to or were part of the events, as well as identification of experts and results of tests and labs. CP 520-521.

4/30/14: Trial date continued to 7/21/201 by agreement of parties Supp CP __; Sub Nom 12, 13.

7/9/14: Trial date continued to 10/6/14 by agreement of parties. Supp CP __; Sub Nom. 14, 15.

9/24/14: Trial date continued to 1/26/15 by agreement of parties, and Zylstra signs waiver of speedy trial to February 15, 2015 in order to facilitate trial preparation. Supp CP __, Sub Nom. 20, 21, 22.

1/14/15: Trial date continued to 4/6/15 on agreement of parties and for good cause due to on-going discovery from a "third party vendor". Supp CP __, Sub Nom. 24, 25

3/31/15: Trial date continued to 5/26/15 by agreement of parties. Supp CP __, Sub Nom. 27

4/2/15: Defense counsel files notice of unavailability from 4/22/15 – 5/5/15. Supp CP __, Sub Nom. 28.

5/13/15: Trial date continued to 8/17/15 by agreement of parties. Supp CP __; Sub Nom. 29, 31

5/15/15: Defense Counsel files 'Notice of Issue" re Motion to Compel Discovery but does not file the motion. Supp CP __; Sub Nom. 30

7/27/15: Defense files Motion to Compel under CrR 4.7. CP 6-8.

7/30/15: Defenses identical Motion to Compel under CrR 4.7. CP 9-11.

8/11/15: Trial date continued to 11/2/15 by agreement of parties. Supp CP__, Sub Nom. 41

8/31/15: State files Response to Motion to Compel. CP 12-14.

9/3/15: Court enters Order re discovery. CP 15-16.

9/15/15: Defense files 2nd Motion to Compel re CrR 4.7 requesting "any and all records related to all of the States witnesses" from all law enforcement agencies. CP 17-21.

10/16/15: Bellingham Police Department files Objection to Motion to Compel as to request for police records regarding confidential informants. CP 22-27.

11/2/15: Court denies defense 2nd motion to compel and trial is reset for 2/22/16 at defense request with no objection by state. Supp CP __, Sub Nom. 61, 64.

11/3/15: Defense counsel files Notice of Unavailability for dates 12/10/15 – 1/13/16. Supp CP __, Sub Nom. 62

2/17/16: Trial date continued to 5/16/16 at defense request with no objection by state, Supp CP __, Sub Nom. 66, 67 ??

5/12/16: Trial date continued to 7/11/16 at defense request with no objection by state. Supp CP __, Sub Nom. 69

6/27/16: Defense counsel files motion for continuance indicating he had just finished a 2 week trial and needed more time to the 26 witnesses identified by the State, 5 of which had been interviewed and 11 of which ware law enforcement, and that 2 witnesses were "unavailable" given felony charges that were pending related to the same date as the incident. Supp CP __, Sub Nom. 70.

6/30/16: trial date continued to 9/6/16 at request of defense with no objection by state. Supp CP __, Sub Nom. 74, 76

7/12/16: Defense counsel file notices of unavailability for dates 7/15/16-7/29/16 and 7/28/16 – 8/9/16. Supp CP __, Sub Nom. 77, 78.

8/15/16: Defense files Notice of Hearing regarding a Motion to Continue. Supp CP __, Sub Nom. 79.

8/18/16: Trial date continued to 10/10/16 at defense request with no objection by state. Supp CP __, Sub Nom. 80

9/20/16: State files notice for hearing for Clarification on Judge's Decision regarding Confidential Informant. Supp CP __, Sub Nom. 83.

9/28/16: Defense files 3rd Motion to Compel Discovery. CP 522-559.

10/5/16: Trial date continued to 11/28/16 at defense request with no objection from the state, after defense files two notices regarding motions to continue. Supp CP __, Sub Nom. 84, 88, 89, 95.

10/25/16: Order entered Denying State's Request for Protective Order and Order to Seal. Supp CP ___, Sub Nom. 107.

11/8/16: Defense files Notice of Unavailability for dates 11/14/16-11/21/16. Supp CP __, Sub Nom. 115.

APPENDIX

B

SCANNED 18

FILED IN OPEN COURT
1-30 2017
WHATCOM COUNTY CLERK
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON **Plaintiff,** **v.** **NICHOLAS ADAM ZYLSTRA** **Defendant.**	**No. 14-1-00192-7** **DECISION AND ORDER DENYING THE DEFENDANT'S *MOTIONS TO DISMISS* UNDER CrR 4.7 and 8.3**

Dkt. 179

Defendant, Nicholas A. Zylstra, has filed two *M*[illegible] y trial resulting in his conviction for Manslaughter in the 2nd de[illegible]obert Butler and Emily Beschen. The State of Washington oppo[illegible]esented by Deputy Prosecuting Attorneys Eric Richey and Eric Sigmai[illegible]ading the Motion and Memoranda in support of and opposition to the Motions, hearing argument and otherwise being fully advised, the Court issues the following:

DECISION

This case centers on the tragic death of Alyssa Smith, who, it is undisputed, was killed by a stray bullet on June 16, 2013. On the day of the shooting, five people, Nicholas Zylstra, Zylstra's girlfriend Tanya Shinpaugh, Douglas Quiding, Mr. Quiding's stepson Robert Lee, and Lee's friend, Kyle Buck were shooting several guns owned by Zylstra at the Nooksack River near Mr. Quiding's home on Lattimore Road in Whatcom County. Around 4 p.m., Ms. Smith and her family were at the family home, about a half a mile away, across the river on Gadwa

Road, preparing for a Father's Day barbeque, when bullets began flying above their heads, hitting trees and the house. Smith's father, Jeff Smith, her boyfriend David Pierce, her sister's fiancé, Daniel Semenov, and Ms. Smith walked on their property in the direction of the shots. Mr. Smith began yelling, "Stop!" Mr. Pierce testified he thought the shots were coming from behind an excavator in the distance nearby the river and he thought they were being targeted. Ms. Smith went back towards the house to retrieve binoculars. As she approached the house, she was hit by a bullet that pierced her lung and traveled into her heart. Several 911 calls were made from the residence, initially to report that shots were being fired and then to report Ms. Smith's shooting. Ms. Smith was attended to first by her father, who performed CPR, and then by first responders, who included Ferndale officer Sergeant Davis and Officer Healy. When paramedics arrived, Ms. Smith was transported to the local Bellingham hospital, where she later died from her injuries.

While Ms. Smith was being attended to at the Gadwa Road residence, Whatcom County Sheriff's officers on the other side of the river were attempting the locate the source of the shots. Some officers went to a Paradise Road address and others went to the Lattimore road residence. Deputy Steve Harris arrived at Lattimore road first and began walking towards the residence with his rifle drawn. He testified that he saw a group of individuals walking toward him with several firearms. He raised his rifle and instructed them to drop the weapons, which they did. Zylstra and Quiding were later identified by Deputy Harris as the individuals carrying the firearms. At this time, none of the five knew anyone had been shot, although they testified that they had heard sirens while they were down at the river. Zylstra admitted the firearms were his; he told the officers that they had been down at the river target shooting for about thirty minutes and were returning to the house for the evening. The Whatcom County Sheriff's Department and the Ferndale Police Department carried out a multi-agency investigation, although the Sheriff's Department was responsible for the investigation and did the bulk of it.

Detective Erik Francis soon arrived at the Lattimore residence, after learning that Douglas Quiding was one of the individuals suspected of firing firearms at the river that may have resulted in the shooting of Ms. Smith. Detective Francis had a pre-existing professional relationship with Quiding as a result of Quiding's work as a confidential informant years ago and thus Det. Francis decided that it would be best that he interview Quiding. Quiding testified during trial that he had known Detective Francis from prior investigations in which Quiding had

been a suspect, but that he hadn't spoken to Detective Francis for some time. Detective Steven Roff went to the hospital, where he interviewed various witnesses who had been at the Smith residence. All of Zylstra's firearms were taken into evidence. Ultimately, the state crime laboratory concluded that Ms. Smith had been struck by a bullet fired from the Saiga rifle, commonly referred to as an AK-47. Each of the individuals who were down at the river gave statements about who fired the AK-47.

Over the course of the next eight months, police conducted an investigation that resulted in the State charging Zylstra with Manslaughter in the First Degree with an aggravating circumstance of committing the crime with a firearm. On June 18, 2013, Douglas Quiding and Robert Lee were each charged with three counts of Unlawful Possession of a Firearm.

Zylstra was charged on February 12, 2014, arraigned on February 13, 2014 and released on bond on February 24, 2014. He remained out of custody while the case was prepared for trial. Zylstra's attorney, Robert Butler, entered a Notice of Appearance and Demand for Discovery on February 20, 2014. On March 5, 2014, Mr. Butler filed *Defendant's Request to the State of Washington for Disclosure of Exculpatory Evidence,* in which he seeks "that the State of Washington produce any evidence within its control or by which, by the exercise of reasonable diligence may be obtained, that is favorable to or exculpates defendant in any way, that tends to establish a defense in whole or in part to the allegations in the Information." Trial began on November 28, 2016, more than two and a half years after the State filed the original charge. Between the date of filing and the commencement of trial, the Court continued the trial date 14 times; each of those orders indicate agreement by the parties, although both parties (as well as the Court) expressed frustration at the number of continuances at various status hearings. Zylstra filed a *Waiver of Speedy Trial* on September 25, 2014. From June 2015 to the date of trial, Zylstra filed multiple Notes for Hearing on Motions to Compel Discovery, the vast majority of which were struck by Zylstra prior to the hearings. During several of the status hearings on Motions to Continue the trial dates, Mr. Butler noted that discovery was ongoing and that receiving materials from the State had been difficult.

This Court held a hearing on September 2, 2015 on the Defense's *Motion to Compel*, which resulted in an *Order Compelling Prosecutor to Provide Defendant Certain Items on Specific Dates*. That order included that the State "disclose all photos and/or drawings that may be used in trial as exhibits" no later than 45 days before trial, "provide the content of any

agreements or promises made to Robert Lee and/or Douglas Quiding including their respective attorneys," and "disclose if any lay witness being called to testify has previously provided testimony for the State with a promise or agreement from the State related to their own criminal liability" no later than 30 days before trial. On October 21, 2015, this Court held a hearing on another *Motion to Compel Discovery.* Mr. Butler sought an order from the Court compelling the State to provide the defense with information regarding Douglas Quiding's activities as a Confidential Informant (during which time he worked with Detective Erik Francis) to which the State and the City of Bellingham objected strenuously. On November 2, 2015, the Court denied the Defendant's *Motion to Compel.*

On October 5, 2016 the Court heard another defense *Motion to Compel* during which Mr. Butler sought and obtained an *Order Compelling Whatcom County Sheriff's Office Detective Francis and Witness Doug Quiding to Truthfully Answer Defense Questions.* Prior to that hearing, this Court had been provided with transcripts of defense interviews with both Douglas Quiding and Detective Francis, both of whom refused to answer questions about the nature of Quiding's work as a Confidential Informant. In the Court's order, the Court ordered that "Whatcom County Prosecutor's Office shall follow the rules of discovery and shall not impede defense investigations in accordance with CrR 4.7." The Court stated it would be available during defense interviews in case of further interview issues and objections. On October 13, 2016, the Court held a hearing on a Motion by the State for an *in camera* review under CrR 4.7 (h)(6). The State submitted an affidavit of Detective Francis. On October 14, 2016 the Court declined to issue a protective order for Detective Francis's declaration, found that the declaration was discoverable and ordered that a copy be provided to the defense. This Court issued a written order to that effect on October 25, 2016.

Trial began on November 28, 2016 with a CrR 3.5 hearing, following *Motions in Limine.* During these motions, Mr. Butler informed the Court that he had not received everything related to the agreements between the State and witnesses Lee and Quiding regarding their testimony and any promises the State may have made to them, as ordered by the Court on September 3, 2015. The Court ordered that the State turn over all emails between the State and Lee and Quiding's attorneys, Todd Anderson and Angela Anderson respectively, regarding agreements or promises related to their cases and their promise to testify. Mr. Butler later clarified that he had received a detailed cooperative agreement between the State and Mr. Lee, but with regard to Mr.

Quiding, had only received a boilerplate form that had not been filled out by the State and Quiding's attorney, Todd Anderson, nor had it been signed. Although it appeared there was not a signed cooperative agreement between the State and Quiding, the State represented to the Court that an agreement existed and that Quiding would testify as a witness for the State. As a result, the Court ordered any emails regarding that agreement be provided to the defense, since the absence of a written, signed cooperative agreement seemed to leave the nature and details of the agreement in question.

On the second day of trial, prior to start of voir dire, Mr. Butler's associate, attorney Emily Beschen, informed the Court that the defense had just been provided copies of 911 calls from the day of the shooting and asked that the Court exclude the 911 calls under CrR 4.7(7)(i). Prosecutor Eric Sigmar argued that the defense "had not asked" for 911 calls specifically and argued against exclusion. Defense further noted that, as a general rule, 911 calls are destroyed by the County on a routine basis 90 days after the event and since charges were not filed for eight months following the event, there was no reason to expect the 911 calls would be available. At that stage of the trial, the defense indicated it "did not want the 911 calls." The State informed the Court that it had made a "strategic" decision to use the 911 tapes during trial in the week or two prior to trial; however, Mr. Sigmar stated that the calls had only been located in the day or two prior to trial, when the State became aware that the 911 calls had not been destroyed and were available. The Court excluded the 911 calls, specifically noting that the State had a duty to provide discovery to the defense in a timely fashion and in accordance with the Court's written and oral discovery orders.

The next day, November 30th, after voir dire had begun, the defense informed the Court that the State had just provided the defense with new police reports, as well as Computer Aided Dispatch (CAD) logs, from the day of the shooting. This information came to the Court after the State had informed the Court that it was certain no other police reports were available and that all police reports had been provided to the defense. The State agreed that it had made that representation in court, but needed to correct the record as Detective Francis had contacted officers who had been on the scene and had, in fact, written a report. The defense had not seen the reports before and moved for dismissal under CrR 8.3(b). The Court reviewed the reports and declined to dismiss under CrR 8.3, but admonished the State regarding the repeated, ongoing late production of discovery; the Court offered the defense the opportunity to continue the case

so that it had time to review the new discovery, a remedy made available to the defense under the Court's reading of CrR 4.7. The defense declined to do so and withdrew its 8.3 motion, but stated that if there were ongoing discovery violations, it reserved the right to make additional motions under CrR 4.7 and 8.3. The State moved for a continuance, stating it "would like more time to prepare for trial" as evidence by the late discovery. The Court denied that motion, noting that the State had had almost three years to prepare the case for trial and that, while discovery was voluminous in this case, the fact that the State had failed to provide this (and other discovery) to the defense did not entitle the State to a continuance. At this time, prior to the jury having been chosen and sworn, the defendant had about 30 more days left in his speedy trial period.

On December 1st, after the jury had been chosen and sworn, the State provided the defense with additional "Google earth" photographs that it intended to use during trial. Defense objected and sought exclusion. Given that the photographs were somewhat cumulative and showed only the layout of the area of the shooting, the Court allowed the State to use the photographs.

On December 5, Deputy Prosecutor Eric Richey filed an Affidavit Regarding Discovery in which he laid out a timeline of events explaining the reasons for the late production of discovery. The affidavit covers the following: reports from Deputy DeYoung, an officer who had been at both the Gadwa and Lattimore road locations, 911 calls, a report from Sgt. Crisp, and a police report from Ferndale police officer Officer Davis. Mr. Richey stated that, in each instance, the late discovery was immaterial to the charge against Zylstra[1]. He attributed the failure to provide this discovery to the complexity of the investigation, the involvement of several law enforcement agencies, and the interaction between computer systems.

Prior to the testimony of Douglas Quiding, Mr. Butler informed the Court that he had had a conversation with Quiding's attorney, Todd Anderson, regarding an agreement Quiding had with the State and Mr. Butler argued that this information was new and material. The Court ordered Mr. Anderson to appear in Court. When he did so, he indicated that the agreement Quiding had with the State required him to testify truthfully during the Zylstra trial and, in agreeing to do so, the State would dismiss two of the Unlawful Possession of a Firearm charges.

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[1] The Court notes here that the State conceded that some of the late provided discovery was material, during oral argument on these motions.

He agreed, as did the State, that this agreement was never put in the form of a Cooperative Agreement, but that the agreement was in Quiding's guilty plea statement on the Unlawful Possession charge. Mr. Butler believed that the agreement included a decision that Quiding enter a plea to the UPF charge three years nearly to the day of the shooting in order to avoid the possibility of a manslaughter charge being filed in this case against him. In short, Mr. Butler argued that the agreement included an agreement to enter the guilty plea at or near the running of the statute of limitations for manslaughter to ensure Quiding could not be charged with manslaughter in this case. Mr. Anderson denied that this was part of the negotiations. On December 6, 2016, Mr. Richey filed another Affidavit Regarding Discovery, stating that continuing the case against Quiding for nearly three years had nothing to do with the running of the statute of limitations, but rather occurred due to the complexity of the Zylstra case and the ongoing nature of the investigation that required Quiding's ongoing cooperation.

Following the defense's review of the late provided police reports, Mr. Butler informed the Court that it would be conducting interviews of other officers who were on the Gadwa and Lattimore scenes. Sergeant Davis filed a report in which he identified himself, Officer Healy and Officer Vanderyacht of the Ferndale Police Department as being on the scene. That report was not provided to the defense until November 30th, as noted above. The interviews of Officer Healy and Sergeant Davis occurred on Saturday, December 3, and Officer Vanderyacht on Monday, December 5, one week into trial. Mr. Richey filed another Affidavit on December 7, 2016 stating that "he has learned the reasons why reports were not provided to the defense prior to trial." The affidavit did not clearly state the reasons why the reports were provided later, but noted that Sgt. Davis' report and recollection contradicted Officer Healy's recollection of the events.

On December 7, 2016, Mr. Richey filed another Affidavit Regarding Discovery in which he explained that Mr. Butler had requested any recordings of jail phone calls from witnesses Lee and Quiding. The affidavit set out the procedure Detective Allgire went through to obtain those calls, noting that because the jail calls had been requested more than three years after the calls were recorded, that Detective Allgire had to go through multiple steps to obtain the recordings. The Court does not know the content of those recordings.

The State rested its case on December 7th. The defense called one witness on December 8th. The next witness, Officer Slayton, had just been released from the hospital following

surgery and the Court determined it would not be reasonable for him to testify by telephone, as the defense requested. The Court released the jury for the weekend, with trial resuming on December 12, 2016. The defense rested the morning of December 12th. The State made its closing argument the afternoon of December 12th and the defense made its closing on December 13th. The Court sent the jury out to deliberations at midday on December 13th. The jury deliberated until December 19th, when it returned its verdict, finding Zylstra guilty of the lesser-included offense of Manslaughter in the 2nd degree, with a special verdict finding that Zylstra committed the crime while armed with a firearm.

The defense has filed two *Motions to Dismiss*, one under CrR 4.7(h)(7)(i) and one under CrR 8.3. The defense argues that the repeated, ongoing discovery violations entitle Zylstra to a dismissal. CrR 4.7(h)(7)(i) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

The defense further argues that the combination of discovery violations, as well as statements by the State during both opening statements and closing arguments[2], entitle Zylstra to a dismissal under CrR 8.3, which states:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

In order to succeed in such a motion, the defense must make "a showing of arbitrary action or governmental misconduct," but that "'governmental misconduct' need not be of an evil or dishonest nature, simple mismanagement is enough." *State v. Dailey,* 93 Wash.2d 454, 459 (1980)(citations omitted). However, "[d]ismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially

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[2] The Court notes here the errors assigned by the defense in its 8.3 motion regarding the statements by the State during opening and closing arguments. In both instances, the defense objected and the Court issued curative instructions to the jury at the time of the objection. The Court concluded then, and concludes now, that those curative instructions were sufficient to remind the jury of its obligations to follow the Court's instructions, both those issued verbally during trial and those contained in its written instructions.

affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." *State v. Baker,* 78 Wash.2d 327, 332-333 (1970). The Washington Supreme Court has also held that "if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights." *State v. Price,* 94 Wash.2d 810, 814 (1980). In *State v. Krenik,* the Court of Appeals, Division 1, held "actual prejudice can be shown if the State's belated interjection of new facts into a case forces the defendant to choose between the right to a speedy trial and the right to prepare an adequate defense." *Krenik,* 156 Wash.App. 314, 320 (Div. 1 2010). However, "a continuance can be an appropriate remedy." *Id.* at 321.

In order to assess whether the defense has made a showing under either of the rules under which it moves for dismissal, it is necessary for this Court to review some of the testimony and the State's case. In order to prove beyond a reasonable doubt that Zylstra fired the fatal shot that struck Ms. Smith, the State had to prove that 1) Zylstra fired the AK-47 and that 2) he fired it at the time Ms. Smith was struck and that 3) he fired the bullet that hit her. It is undisputed that this is a tragic event, and that none of individuals firing guns at the river intended to hit anyone. It is also undisputed that there were five different firearms owned by Zylstra, that all five of the individuals at the river, Zylstra, Quiding, Shinpaugh, Lee, and Buck fired at least one of those guns, and that they all shot toward a small plastic starfish target or into the water and that they all relied on the berm across the river to stop any bullets they fired. There was no backstop other than the berm on the other side of the river. No one in the Zylstra party had an exact memory of the time they left the Quiding residence to walk to the riverbank, nor did they have an exact time for when they began and ended shooting. The witnesses who were present at the Smith residence had a general sense of when they began hearing shots fired. Smith, Pierce, and Semenov all testified to hearing rapid fire shooting, like that of an automatic weapon. They also testified that the shots were not initially rapid, but then became rapid. The testimony as to whether or not they heard shots being fired after Ms. Smith had been struck varied. Some said there were no more shots, but others at the Smith residence testified that there had been more

shots fired. Ms. Smith's sister testified that she could still hear shots hitting the house, even after her sister had been hit.

The State presented the testimony of Lee, Quiding, Buck, and Shinpaugh, both to lay out a time frame for who was firing the AK-47 at what time and to identify who had shot the AK-47. When Detectives Francis and Roff initially spoke to Lee at the Whatcom County jail,[3] Lee told the detectives in a recorded statement that he, Quiding, Buck, and Zylstra had all fired the AK-47. When Detective Francis told Lee that other witnesses at the river had stated Quiding had not fired the AK-47 that day, Lee said that he might be wrong and that maybe only he and Zylstra had fired the AK-47. When Lee testified, he testified that he fired one or two rounds from the AK-47, that Buck had done the same, and that Zylstra had fired the rest. Quiding testified that he had never fired the AK-47 that day and that, in fact, he had never touched the AK-47, although Deputy Harris testified that Quiding was holding the AK-47 when he first came upon them at Lattimore road. All agreed that Shinpaugh never fired the AK-47.

In a recorded interview that was admitted into evidence following a CrR 3.5 hearing, Zylstra told Detectives Francis and Roff that he, Lee, Quiding, and Buck had all fired the AK-47 and that they had done so safely. He was unsure about the timing of when they left the Lattimore road residence, but stated he thought they were shooting at the river for 20 to 30 minutes. He acknowledged firing the AK-47, as well as purchasing all of the ammunition that was fired that day.

When Mr. Smith and Mr. Pierce testified, they testified that multiple bullets came flying through the trees toward the house in rapid succession. Mr. Pierce said it sounded like automatic weapon fire. Mr. Smith stated that there was often shooting in the area, but that this was the first time bullets were fired at the house. Both testified that they could hear bullets "zing" past them, hitting trees and the Smith house. Lee, Quiding and Buck all testified that the AK-47 shots were discharged in rapid succession. Quiding testified that Zylstra was firing the AK-47 from his hip.

In a video admitted into evidence and played for the jury, Quiding demonstrates Zylstra firing a replica of an AK-47 from his hip. In the video, he states he had been told by detectives that the style of firing he demonstrated was called "bump firing." Detective Allgire, a firearms

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[3] Lee and Quiding were arrested at the Quiding residence on Lattimore road following the initial investigation for Unlawful Possession of a Firearm. Both Lee and Quiding had prior felony convictions and could not lawfully possess firearms.

expert, testified that bump firing allows the AK-47 to behave like an automatic weapon, discharging bullets in rapid succession. Detective Allgire showed the jury how the weapon would be held and the State showed the jury a video of Detective Allgire bump firing the AK-47 at a target. In his testimony to the jury, Quiding denied ever firing the AK-47. He stated the gun was new to Zylstra and that he wanted Zylstra to have the most time with it that afternoon. Quiding testified that Lee had fired the AK-47 and that he had fired above the target, in the direction of Gadwa road at least once. In Lee's recorded statement, he initially indicated that Quiding had fired the AK-47, but later in that statement, he suggested he might not be right about that, and during his testimony during trial, Lee stated that Quiding had not fired the AK-47 and that only Lee, Buck, and Zylstra had fired it.

Buck testified that he only saw Lee and Zylstra fire the AK-47. However, in a written statement taken on or about the day of the shooting, Buck stated that he, Lee, Quiding, and Zylstra had all fired the AK-47. On the stand, he testified that that was an error and that he had never said that, despite having signed a Voluntary Statement form, which Detective Harris testified he reviewed at length with Buck before Buck signed it.

Following the testimony of Lee, Buck, and several witnesses, Mr. Butler asked each of them on cross-examination, "Do you know who fired the shot that killed Ms. Smith?" They all answered "No." While they testified as to their recollection of the events of the afternoon, neither Lee, Buck, Quiding, or Shinpaugh could say what time each person shot the AK-47. While Buck and Lee testified that Shinpaugh said, "I heard a scream" at one point, Shinpaugh denied hearing a scream or saying she heard one. They all testified that they could hear a lot of sirens, but did not know why or where they were coming from and they testified that they ended shooting when they started hearing many sirens close by.

In order to prove beyond a reasonable doubt that Zylstra fired the fatal shot, the State had to show the jury that the testimony showed that Zylstra was firing when Ms. Smith was hit. Given that the testimony varied regarding who shot the AK-47 and when, the timeframe of the gunfire was critical. The State attempted to lay out the timing of the shooting and the time frame when the AK-47 was shot and by whom. Based upon the jury's verdict, they did so.

A defendant is entitled to a fair trial; that is one of the fundamental bases upon which our legal system runs. The defendant's right to disclosure of evidence under the criminal rules "relates only to evidence which is favorable to the defendant and material to guilt." *State v.*

Blackwell, 120 Wash.2d 822, 828 (1993). In particular, CrR 4.7(3) states that "the prosecuting attorney shall disclose to the defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." The Washington Supreme Court has held that "[t]he purpose behind discovery disclosure is to protect against surprise that might prejudice the defense . . . if the State fails to disclose such evidence or comply with a discovery order, a defendant's right to a fair trial may be violated." *State v. Barry,* 184 Wash.App. 790, 796 (Div. 3) citing *State v. Blackwell.* The Washington Supreme Court has further held that "simple mismanagement is sufficient" to warrant dismissal.

Zylstra points to 8 pieces of discovery that were not disclosed until-or well into-trial. As the Court has pointed out, the defense sought all discovery within a week or two of the initial filing of the charges, over two and half years ago. Since then, the Court held hearings on discovery issues and issued subsequent orders. Despite those orders, the State informed the defense and the Court of the following items it had not provided to the defense until the eve of, or days into, the trial itself:

1) the 911 recordings;
2) 2 CAD logs showing the response of officers to the Gadwa and Lattimore scenes;
3) Ferndale Sergeant Kevin Davis's report, in which he identifies himself and other officers as first on the scene at the Smith residence on Gadwa road;
4) 7 Google Earth pictures;
5) Detective Sergeant Crisp's follow up report;
6) Officer DeYoung's report, in which she identifies discussions with other individuals on Paradise road who were shooting around the same time of the incident (but who were excluded as suspects almost immediately);
7) Disclosure of Ferndale Officer Healy, who was first on the scene at the Smith residence along with Sgt. Davis; and
8) Knowledge that Detectives Francis and Roff had of a drawing Zylstra made for the detectives during his interview and which the detectives later destroyed.

The Prosecuting Attorney's office conceded during trial that it had not provided this discovery to the defense in a timely manner. In addition to the Affidavits filed by Deputy Prosecutor Richey, the State attempted to explain its failures on the record. In part, they stated that the complexity

and size of the investigation meant that discovery disclosures were difficult, that they had asked, repeatedly, for police reports and other information held by the Whatcom County Sheriff's Office and the Ferndale Police Department, and that they had complied with the substance of CrR 4.7 and the discovery orders of this Court.

It is clear to this Court that the Prosecuting Attorney's office failed in its discovery obligations in a myriad of ways. Prosecutor Richey told the Court that he had "asked and asked" the police agencies involved to provide discovery to him and to the defense and that the State had provided thousands of pages of discovery to the defense. The State appears to argue that it did as much as it could to ensure it complied with its obligations and that it did not have control over the manner in which the Sheriff's office managed police reports and other discovery germane to the case.

While the Court recognizes the complexity and voluminous nature of the discovery in this case, the fact that discovery is hard is not an excuse for failing to execute the State's obligations[4]. Each of the eight discovery items at issue in this motion fall within CrR 4.7(1)(i) – (vi) and at least two fall under 4.7(3). The discovery items at issue were all within the control of the investigating authorities. In fact, to argue that the State tried and couldn't produce those items is undercut by the very fact that *the State ultimately provided them during trial.* If the Court and the defense cannot rely upon the State to provide complete discovery by the deadlines set by the Court in both rules and written and oral orders, the Court cannot ensure that the defendant is assured his right to due process and a fair trial, the underlying reason for the existence of the discovery rules in the first place. The State's late production of the eight items that are the subject of this motion violated both the Criminal Rules as well as this Court's own orders.

The various excuses for the late production do not excuse the lateness of the production; in fact, they show the apparent extraordinary inefficiencies in the organization of the material in this case by multiple individuals in the police department, as well as poor communication between the State and the police. In almost every instance during trial, the production of the late discovery was followed by the defense not only noting that this was the first they had heard of

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[4] The voluminous nature of discovery is rarely an excuse for failing to provide it. In fact, the Court notes that discovery management during civil trials comprises quite a bit of its time and that discovery during civil cases is often multiple times as large as that in this case. The fact that it's hard to do does not mean it cannot be done or can only be done poorly.

the items (or the individuals named in some of the items, such as Officer Healy in Sgt. Davis's report from the day of the incident), but also expressing frustration that they had repeatedly asked whether what they had received constituted "all" of the discovery. The State's statements in Deputy Prosecutor Richey's affidavits that each of the officers who discovered the material "did the right thing" by turning over the material to the State fail to persuade this Court that the letter and spirit of the discovery rules have been upheld. It's not the "right thing" when the material is handed to the defense in the middle of trial. It is required by the rules.

The fact that the discovery rules were violated to the degree found here leads this Court to conclude that the government mismanaged the discovery in this case. However, that conclusion does not end the inquiry required by the case law. In order to conclude that Zylstra's rights to due process and a fair trial were violated to such a degree that dismissal is warranted, the defense must show that the late discovery was material to their case. In *Dailey,* the Washington Supreme Court upheld a trial court dismissal of a charge of negligent homicide, where that dismissal resulted from discovery violations. In that case, the defendant was charged with negligent homicide following a vehicle accident. The State filed charges against Dailey two and a half years after the accident, in August of 1977. Dailey sought discovery at his omnibus hearing on September 23, 1977. The Court ordered several items be given to the defense. At a hearing about a month later, the court learned that the discovery had not been provided to the defense and the defense made a motion to dismiss. The motion was continued at the State's request and the material was provided to the defense at the end of October, 1977. The court denied the motion to dismiss on November 3, 1977. On the Friday before the Monday start of trial (set for November 7, 1977), the State provided the defense a supplemental list of witnesses. Again, the defense moved to dismiss on the basis of the late production of the witness list. The court denied the motion, but offered the defense a continuance, which the defense refused. Instead, the defense suggested proceeding to trial with the witnesses listed on the original witness list provided by the State. The State stated it could not try the case with those witnesses alone; the trial court dismissed. *Dailey*, 93 Wash.2d at 456.

In the Supreme Court's opinion upholding the dismissal, the Supreme Court specifically noted the trial court's discussion of the reasons underlying the dismissal:

> The trial court's oral opinion establishes that its decision to dismiss was based on the numerous incidents of prosecutorial mismanagement that occurred throughout the proceedings. The court commented:

> Based on the whole record, the affidavits and materials provided by Mr. Rothschild (defendant's attorney) when the motion was originally heard, together with this late list of witnesses furnished Friday afternoon . . . I think the whole thing has become a farce.
>
> So, I think simply, there's got to be a denial of due process in the way this whole thing has been handled, and I'll issue an order dismissing it.
>
> In its subsequent written order dismissing the information, the court stated:
>
> and the court being convinced that as a result of the actions of the... (State), that the defendant can not be given a trial consistent with the dictates of due process and the basic notions of fair play, and that the only remedy consistent with due process is to dismiss the cause(.)
>
> Additionally, in its written order denying the State's motion for reconsideration, the court reiterated:
>
> Upon going over the entire record, I am still of the opinion that the State has disregarded the fundamental constitutional guidelines as well as the criminal court rules . . . and, I might add, even the order of this Court.

Dailey, 93 Wash.2d at 458. The Supreme Court further found that "in the instant case, the State violated applicable court rules and specific trial court orders throughout the course of the proceedings CrR 4.7(a) (1) requires the prosecuting attorney to disclose to the defendant numerous items of information no later than the omnibus hearing. Most of the information included in the September 23 omnibus order fell within CrR 4.7(a)(1) (i)-(vi), the discovery rules, yet the State did not comply with the order until October 29, 1977, over one month later."

This Court notes here that the *Dailey* court upheld the trial court's dismissal under CrR 8.3, even though less than three months had passed from the original filing of charges and the trial date. In this case, 35 months passed from the filing of the charges against Zylstra to the day of trial. It's difficult to imagine that the State needed more time than that to provide discovery to the defense.

This Court further finds that the specific details of the eight discovery items noted in this motion were material to Zylstra's defense. As the defense notes in its motion, "materiality" is defined as a 'reasonable probability of a different result." The U.S. Supreme Court held in *U.S. v. Bagley,* 473 U.S. 667 (1985) that "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Bagley,* 473 U.S. at 678. In this case, as the Court has exhaustively reviewed, the critical question at trial

was timing of the shots fired on the Lattimore road side of the river, who fired them, and how they coincided with the bullet that hit Ms. Smith resulting in her death.

The 911 calls, of which there were several, some made from the Smith residence prior to the shooting of Ms. Smith and some following, and the CAD logs would have provided the defense the ability to further explore or challenge the time frame argued by the State. In addition to that, Sgt. Davis's police report identified Officer Healy as one of the first officers on the scene at the Smith residence. Mr. Butler interviewed Officer Healy midway through the trial after learning he had been at the Smith residence. In the transcripts of that interview provided to this Court by the defense, Officer Healy stated that he and Sgt. Davis arrived at the residence first, before paramedics. He stated that he and Sgt. Davis moved Ms. Smith from the back of the house to the front because he could hear bullets flying overhead. He further stated that after paramedics arrived and took over the care of Ms. Smith, that he and Sgt. Davis drove in his police vehicle to the river on the Smith residence/Gadwa road side. From there, he stated that they could see four or five people down at the river shooting and that he directed Deputy Harris to the Lattimore road location. Mr. Butler interviewed Sgt. Davis, who did not recollect the events as Officer Healy did.

However, as the Court has noted throughout, the question of whether the State violated the discovery rules and that such discovery violations were material is not the sole inquiry. The defendant cannot be required to choose between his right to a speedy trial and his right to have adequate time to prepare a defense. In this case, however, Zylstra was not up against the expiration of his speedy trial rights. Indeed, during oral argument on this motion, defense counsel noted that when this Court offered the defense a continuance when it made its 8.3 motion prior to the jury being sworn, the defense withdrew that motion because "the Court tipped its hand" as to what it considered the appropriate remedy. Indeed, based upon its analysis of the state of the law at the time of trial, the Court considered the appropriate remedy to be a continuance, given both that the jury had not yet been sworn and the defendant's speedy trial time had not yet run. The defense withdrew its dismissal motion, stating that it was "ready to go" to trial and that the defendant had gone to great lengths to ensure his availability on the date set for trial. The defense stated that moving the trial to a later date in January, as the Court suggested might be the remedy, would wreak havoc in the defendant's life and that his life had effectively been on hold during the years from the time of filing the information to the date of

trial.

While all of those considerations regarding the defense's assessment of whether or not to request a continuance are reasonable ones, they are not the same as assessing whether the defendant's appropriate remedy would be a continuance in order to ensure the preservation of his rights to trial[5]. The fact that the defense did not like its remedy doesn't change the fact that there was one. In *State v. Brush,* 32 Wash.App. 445, 456 (Div. 3 1982), the Court of Appeals, faced with a similar issue, held "The appropriate remedy would have been to object and request a continuance or a delay of the trial . . . Because the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor's noncompliance with the discovery rule was not prejudicial error."

At multiple points during the trial, the defense suggested it would be making motions under CrR 4.7 and/or 8.3. The defense suggested it would request time during trial to prepare such motions, which the Court indicated it would likely grant. No such request came; indeed, the defense made no motions following the prosecution resting its case. The Court has found no cases in Washington that analyze the bringing of CrR 4.7 or 8.3 motions following trial and conviction. It's not clear that either motion can be properly brought post-conviction, although the Court notes that CrR 4.7 motions may be brought "during the course of proceedings." The State objects to the motions being brought at this stage of the case, arguing that this Court is divested of its authority to act under either of these rules post-conviction. The Court need not decide this issue; it does, however, note that nothing prevented the defense from making either motion during the course of the trial, prior to it being submitted to the jury, and it chose not to do so. Whether the defense chose not to do so for strategic reasons or as a result of a misreading of the rules, the fact remains that a 4.7 motion during trial would have been likely to result in the Court granting the defense a continuance and additional time to prepare *because that would have been the appropriate remedy.* Had the defendant been up against the running of speedy trial,

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[5] The defendant is entitled to have defense counsel that has thoroughly prepared and investigated the case. Had defense counsel elected to take a continuance, Zylstra's counsel would have had time to review the late produced material. The choice not to take the continuance may have been a strategic one, but that does not entitle Zylstra to now obtain a dismissal when alternative remedies were not taken. To do so would create an incentive for defendants to withhold objections and refuse remedies provided under the law and "lie in wait" to later seek dismissal. Such a result is obviously not contemplated by the concepts of preservation of error and timely objections. The requirement that parties must see objections at the time they arise and then object and preserve those objections exists to ensure that the Court and the opposing parties have the opportunity to respond and, if necessary, cure the error.

dismissal may well have been the appropriate remedy. He wasn't.

Thus, the Court must deny the defendant's CrR 4.7 and 8.3 *Motions to Dismiss*. In doing so, this Court in no way excuses the State's handling of this case. There is no excuse for the repeated discovery failures on the part of the State, regardless of whether the failure is the failure of the police or the Prosecutor's office. Unfortunately, the defense failed to avail itself of the appropriate remedy during trial and, therefore, the Court concludes it cannot provide the relief the defense now seeks.

THEREFORE, THE MOTIONS TO DISMISS UNDER CrR 4.7 AND 8.3 ARE DENIED.

IT IS SO ORDERED.

Dated this 30th day of January, 2017,

Judge Raquel Montoya-Lewis
Whatcom County Superior Court

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

March 02, 2018 - 12:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	State of Washington, Respondent v. Nicholas Adam Zylstra, Appellant
Superior Court Case Number:	14-1-00192-7

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