76545-1

No. 76545-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ZYLSTRA,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

A. ARGUMENT IN REPLY

The conviction should be reversed and the charge dismissed for government mismanagement.

The State does not contest the trial court's finding that it "failed in its discovery obligations in a myriad of ways." CP 378. The court also found the violations were material, CP 380, but the State avers no meaningful remedy should be applied because Mr. Zylstra "waived" the issue and cannot show prejudice. Br. of Respondent at 25-45.

The State is wrong. Mr. Zylstra moved to dismiss twice in the trial court after 14 continuances, two orders compelling disclosure, and a suppression order failed to stem the violations. The late-disclosed information supported Mr. Zylstra's defense that someone else was shooting at the time the victim was hit. This Court should order a meaningful remedy by reversing and remanding for dismissal of the charge.

1. The State does not dispute that it committed myriad discovery violations.

The State cannot and does not dispute the trial court's finding that the mismanagement in this case was "extraordinary[.]" CP 378. The State charged Mr. Zylstra in February of 2014, but trial did not begin until the end of November, 2016. The court granted 14

continuances, and "[d]uring several of the status hearings on Motions to Continue the trial dates, [defense counsel] noted that discovery was ongoing and that receiving materials from the State had been difficult." CP 368.

Receiving materials from the State had been so difficult, in fact, that defense counsel filed multiple motions to compel discovery. CP 208, 368. The court was required to hold hearings on three such motions because the State failed to provide the requested materials. CP 368-69. In the fall of 2015 – a year and a half after the charge was filed – the court entered an order compelling the prosecution to provide certain discovery by certain dates. CP 368-69.

The State still did not comply. Over a year later – and two and a half years after the charge – Mr. Zylstra informed the court that he still had not received some of the materials ordered disclosed in the fall of 2015. The court entered another order compelling disclosure. CP 369.

On the second day of trial, November 29, 2016, the State provided the recordings of 911 calls the defense thought had been destroyed three years earlier. CP 370. The court ordered suppression as a remedy for the mismanagement. CP 370.

But the surprises were not over. That same day, the State disclosed the existence and identities of three additional police officers who responded to the scene over three years earlier. Sergeant Davis filed a report noting that he, Officer Healy, and Officer Vanderyacht all responded to the scene. CP 372, 377. The defense did not receive that report until the first day of trial. CP 372. The prosecution promised nothing else was missing. CP 370.

The next day, November 30, 2016, the State gave the defense another police report that had not been disclosed previously, a report by Sergeant Crisp. RP 694; CP 377. The judge was "speechless," RP 696, and later found, "[t]here 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." CP 383.

The State does not dispute these findings of extraordinary mismanagement. It argues only that this court should not apply a remedy, relying on alleged waiver and lack of prejudice. The State is wrong, as explained below.

2. Mr. Zylstra did not waive the issue; he moved to dismiss twice based on the egregious mismanagement.

The State first argues Mr. Zylstra waived the issue. Br. of Respondent at 25-31. This argument is unavailing, as Mr. Zylstra twice moved to dismiss in the trial court: once on November 30, 2016, and once on January 4, 2017. On November 30, he stated:

> MR. BUTLER: **The remedy, Your Honor, is 8.3**. And that is to say, you know what? No fault of maybe any particular person, but this has been litigated so many times over the last two years that this is clear evidence of mismanagement. I mean to have a detective sergeant or sergeant detective find a report 30 something months after; to have Ferndale be trickling in reports. This is information that we would have integrated into a strategy. Going back to what ruling you already made, the 911 tapes, just as an example.
> …
> [Y]es, we knew -- you know, we anticipate officers write reports. We thought we had everything because we were told we had everything pursuant to the year ago's order. "Forty-five days before trial you must have" now we're in trial a year later, and we're still getting reports. I don't know how it can be excused, especially under the case law where if one knows they all know. **I think this case should be dismissed based on mismanagement and put everybody out of their misery on this**.

RP 697-98 (emphases added).

The State acknowledges, as it must, that Mr. Zylstra made the above motion. But it claims Mr. Zylstra waived the issue by later

"withdrawing" it. This is incorrect. The court had *already denied* Mr. Zylstra's motion to dismiss, thereby preserving the issue. RP 752. Mr. Zylstra later "withdrew" the motion only because he did not want (and had never requested) the alternative remedy the court proposed: another continuance. RP 753, 758-59. If Mr. Zylstra were now arguing that the court should have continued the case, *that* argument would be foreclosed because it was waived in the trial court. *See* RP 753. But Mr. Zylstra made clear he was moving to dismiss, and the court made clear it was denying that motion. RP 752-53. The issue is preserved.

After the court denied the motion to dismiss and Mr. Zylstra rejected the offer of a continuance, the court stated:

> I understand the problem with a continuance; you have a right to make the motion to dismiss. I'm not – I guess what I'm trying to – I'm not ruling on it and intending to prevent you from making a more detailed motion if there's something beyond what I'm seeing here.

RP 756-57. In response, Mr. Zylstra indicated he would review the latest rolling discovery in an effort to ascertain its materiality. RP 757-58. He reiterated how difficult it had been to handle the repeated discovery violations and incorporate late-provided information into his strategy over the course of the case. RP 758. But he did not want a continuance, so he said, "I'll withdraw the motion to dismiss at this

point, but if we continue to get reports, we do get to raise it in an ongoing manner." RP 758-59.

The above exchange does not "waive" the issue. As noted, Mr. Zylstra had already made a motion to dismiss and the court had already denied it. RP 697-98, 752-53. When the court later claimed it was "not ruling" on the motion, and Mr. Zylstra claimed to "withdraw" it, the context shows that the court and counsel simply meant that the motion could be *renewed* later. Stated differently, the record demonstrates that Mr. Zylstra made the motion to dismiss and the court declined to grant the motion. The issue was preserved.

The cases the State cites are inapposite. *Valladeres* addressed a search and seizure issue raised for the first time on appeal. There:

> [T]rial counsel made an "Omnibus Application" for suppression of physical evidence in the State's possession based on an alleged illegal search. This would have included the warrantless searches of Valladares' briefcase and suitcase following his arrest. At the "Omnibus Hearing", however, Valladares' lawyer affirmatively withdrew the motion to suppress the physical evidence

State v. Valladares, 99 Wn.2d 663, 666, 664 P.2d 508 (1983). In other words, the defendant never actually moved to suppress the evidence, and there was no suppression hearing. Here, Mr. Zylstra actually

moved to dismiss the charge, and the court reviewed the relevant materials and denied the motion.

In *Cross*, "defense counsel conceded that Cross's tape-recorded statements to Detective Doyon were admissible." *In re Cross*, 180 Wn.2d 664, 680, 327 P.3d 660 (2014). Here, Mr. Zylstra never conceded that the State did not commit numerous, prejudicial discovery violations. He simply indicated that he did not want yet another continuance as a remedy for those violations; he sought dismissal only. When the court denied the motion and offered a continuance instead, Mr. Zylstra declined. He stated he would review the latest untimely discovery and then renew the motion to dismiss.

Mr. Zylstra renewed the motion to dismiss on January 4, 2017, with supplemental authorities filed January 10 and 17. CP 206-50, 275-92, 361-63. The court held a hearing on the motion on January 10, and issued a thorough written ruling denying the motion on January 30. CP 366-83; RP 1931-66.

The State avers that this motion was filed too late because it was made post-trial. Br. of Respondent at 27. The trial court similarly concluded that Mr. Zylstra waived the issue by not renewing his motion

to dismiss earlier, because if he had done so during trial, the court could have (and would have) granted a continuance. CP 382-83.

But again, Mr. Zylstra did not seek a continuance. He had already accepted 14 continuances, two or three orders compelling production, and an order suppressing evidence. The only remaining remedy acceptable to him was dismissal, and this remedy was as available post-trial as during trial. RP 1934. Thus, the fact that he named the motion a "motion to dismiss" rather than a "motion for arrest of judgment" is immaterial. *See* Br. of Respondent at 28 (acknowledging that a litigant may file a "motion to arrest judgment" after trial). The trial court could have vacated the conviction and dismissed the charge, but it declined to do so. Mr. Zylstra preserved the issue by raising it both in November and in January.

3. Mr. Zylstra was prejudiced, and dismissal was the only appropriate remedy because the State continued to commit material violations following numerous continuances, orders compelling production, and suppression of the 911 calls.

Mr. Zylstra was prejudiced by the egregious mismanagement, because the late-disclosed evidence supported his defense that the fatal shot was *not* fired by the person who last shot the gun. CP 380-81. Furthermore, Officer Healy's description of events raised the

possibility that the fatal shot was fired by a different gun altogether. RP 1936-38.

The 911 call recordings, cad logs, and Sgt. Davis's report were available in 2013 but not produced until trial started. CP 208-09, 370, 377-81; RP 355-76. The cad logs and Sgt. Davis's report revealed that Officer Healy responded to the scene the day of the shooting. The State did not make Officers Healy and Davis available for interviews until the Saturday halfway through trial. CP 125-37, 209; RP 1943-44.

Officer Healy stated that while he and Sgt. Davis were attending to the victim, he heard another "round go through the trees" and they "transitioned to the front of the house for protection." CP 127; *see* also CP 132 (Healy confirms he was applying pressure to the victim's wound when he heard bullets go over his head). They moved to the front of the house because it was "away from the river." CP 127.

After the victim was taken to the hospital, Healy and Davis went to investigate the source of the shots. They crossed the river to Lattimore Road and "saw them shooting across the river with rifles." CP 130. They alerted others to the location, and as a result, "sheriffs went around the back side and contacted them." CP 130. Officer Healy and Sgt. Davis later went to investigate the people shooting at Paradise

Road, but "they were shooting in a completely different direction, and they were only shooting pistols." CP 128.

The disclosure of Officer Healy halfway through trial and more than two and a half years after charging was prejudicial. His description of events indicated that people were still firing shots across the river from Lattimore Road well after the victim was hit. CP 127-30, 380-81.

The late disclosure of the 911 calls compounded the prejudice, because one of those calls supported Officer Healy's recollection of the events. RP 1957. Because the State disclosed the recordings so late, the defense did not have time to review all of the calls during trial. RP 1957.[1]

The court recognized the discovery violations were material. CP 380-81. The only dispute is whether dismissal was the appropriate remedy. The court believed the appropriate remedy would have been another continuance, but Mr. Zylstra respectfully disagrees. Another

[1] As Mr. Zylstra explained, he was afraid to put Officer Healy on the stand after learning about his perceptions midway through trial, because the State was surprising the defense with new disclosures regularly. In light of the State's extraordinary mismanagement, Mr. Zylstra could not take the risk that the prosecution would disclose new evidence undercutting Officer Healy's testimony if the defense called Officer Healy. RP 1958.

continuance would have been an insufficient remedy following over two and a half years of repeated, material discovery violations.

The State "failed in its discovery obligations in a myriad of ways." CP 378. Prior to the extremely late disclosure of the cad logs, Sgt. Davis's report, and the existence of responding officers Healy and Vanderyacht, the court had *already* granted 14 continuances – many of them necessary for the defense to be able to address the State's "rolling discovery" problems. CP 368; RP 370, 376, 383. The court had also already granted multiple motions to compel production, and had granted a motion to suppress the 911call recordings as a remedy for their late disclosure. RP 387.

Another continuance would only have harmed *Mr. Zylstra*, and sent the message that the State can engage in continual, extraordinary mismanagement with impunity. After all, even after other remedies had been applied, the state *still* failed in its most basic obligations, and revealed the names of three officers who responded to the scene after trial had already started. Orders compelling disclosure, suppressing late-provided evidence, and continuing the case had failed to deter the state from grossly mismanaging the case. Thus, the only remaining

remedy was dismissal. This is the only remedy that furthers justice, and it is the remedy this Court should apply on appeal.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Zylstra asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice.

Respectfully submitted this 22nd day of March, 2018.

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	)	
v.	)	NO. 76545-1-I
	)	
NICHOLAS ZYLSTRA,	)	
	)	
APPELLANT.	)	

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