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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SERGIO MIGUEL CAREAGA, *Appellant*.

No. 1 CA-CR 16-0650
FILED 5-8-2018

Appeal from the Superior Court in Maricopa County
No. CR2013-440527-001
The Honorable Jerry Bernstein, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence H. Blieden
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kenton D. Jones and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 Sergio Miguel Careaga asserts that the trial court abused its discretion by not precluding ballistics and trace reports from evidence as a sanction for a discovery violation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2013, Careaga arrived at a house party around 9:00 p.m. and placed a gun he had brought with him in a bedroom closet. Careaga and most of the guests soon went to a nearby bar and left only after “[e]veryone was pretty much drunk.” After returning to the house, one of the guests saw Careaga take his gun out of the bedroom. The guest took the gun away from Careaga because he thought Careaga was attempting to steal a pellet gun from the house. The guest then went to the living room without Careaga and showed the gun to another guest. That guest, attempting to show that the gun was not a pellet gun, shot a bullet into the floor. Careaga ran into the living room from the hallway and took his gun back while yelling and “flaring the gun.” He then went outside, fired multiple gunshots, and left the property.

¶3 Careaga went to a nearby trailer park and fired the gun several more times. After officers arrived at the trailer park, Careaga fired multiple gunshots at one of the officers. During a “grid search” of the trailer park, the officers found Careaga hiding underneath a trailer. Careaga no longer had the gun, but he had two .40 caliber bullets in his pants pocket. A resident and the officer who was shot at identified Careaga as the shooter. Numerous .40 caliber shell casings were found at the trailer park and in the party house’s backyard; one from each location was sent to the Department of Public Safety for ballistics analysis. Careaga was arrested and charged with disorderly conduct, a class 6 dangerous felony; three counts of aggravated assault, class 3 dangerous felonies; aggravated assault, a class 2 dangerous felony; and unlawful discharge of firearm, a class 6 dangerous felony.

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¶4 In September, a teenager living at the trailer park found a gun hidden between concrete blocks. The teenager’s family informed the police about the gun, and the police identified the gun as a .40 caliber handgun. The State initiated a firearms trace on the gun.

¶5 In October, Careaga requested that the State provide him “[p]hotos, CAD reports, 9-1-1 calls, toxicology reports, any labs, any recorded interviews and any ballistics.” The court declined to “make any orders,” but it requested that the State provide those materials to Careaga or give an update on when they would be delivered. At a status conference in November, Careaga noted that he received discovery materials but did not know if the disclosure was “complete.” The court stated that if something was missing, Careaga should move to compel its disclosure. Careaga stated that he did not anticipate going forward with the January 7, 2014 trial date because he still had “hundreds of pages, and many, many CDs” to review. Nonetheless, the court reaffirmed the trial date. In December, the court granted Careaga’s motion to continue trial to March 12 because both he and the State had trial conflicts, and Careaga was trying to arrange a settlement conference sometime in January.

¶6 In February, Careaga moved to suppress the gun found in the concrete blocks, claiming that no “nexus” existed between the crimes and the gun found several weeks later. On March 5, Careaga requested a continuance to explore “a possible non-trial resolution” of the case; the court granted the request and moved the trial to April 1, and April 29 became Careaga’s new last day under Arizona Rule of Criminal Procedure (“ARCP”) 8. On March 6, the State disclosed the firearms trace summary that was completed on October 11, 2013, which showed that Careaga’s brother had purchased the gun. On March 12, Careaga requested oral argument on the motion to suppress the gun. That same day, the State received a ballistics report dated January 31, 2014, which showed that the ejected shell casings found in the backyard and trailer park had been fired from the gun; the State immediately disclosed the report to Careaga.

¶7 On March 26, Careaga claimed that the State’s March disclosures were late and moved for discovery sanctions, which included dismissing the case or precluding the disclosed materials. On April 1, the court held a hearing on Careaga’s motion for discovery sanctions.¹ The court noted that trial was scheduled to begin in one week, Careaga’s last day was at the end of the month, and the plea offer was still open. The court

¹ The court reset the trial date to April 8 at an earlier court proceeding and reaffirmed Careaga’s last day as April 29.

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asked Careaga how he would be prejudiced if the court gave him more time to assess the disclosure, as a remedy and not as a sanction, especially with the plea offer still open. Careaga responded that he had been prejudiced by being incarcerated longer and by the State's strengthened case. The State argued that Careaga had not suffered actual prejudice because the disclosed evidence did not adversely or materially affect Careaga's ability to defend his case. While the court noted that the disclosures were late, it informed Careaga that the State's gathering more evidence to use against him was not considered prejudice. Thus, the court determined that the proper remedy was a continuance for 30 days from March 12, the date of the last late disclosure, if Careaga needed such time to prepare for trial. Careaga moved for a continuance a few days later, and the court continued the trial to April 23.

¶8 On April 17, Careaga asked the court to clarify its ruling on the motion for discovery sanctions. The court stated that it denied preclusion and granted a continuance based on the discovery issues. The court also denied Careaga's motion to suppress the gun. Careaga requested a 60-day continuance even though the State was ready for trial and asserted that all current evidence had been disclosed. The court continued the trial to July 22.

¶9 In June, Careaga requested another 60-day continuance because he had yet to interview anyone and wanted time to prepare pretrial motions. The court noted that Careaga should have already conducted interviews to prepare for trial and had put the court "in a hard spot." It subsequently denied the request and reaffirmed the July 22 trial date. Later in June, Careaga moved for sanctions for discovery violations again. The State responded in July, and the next day the court granted Careaga's new motion to continue the trial to August 26 to provide him time to reply to the State's response. In August, Careaga requested to continue the trial to October 14, which the court granted. In September, the court held a hearing on Careaga's second motion for discovery sanctions. It took the matter under advisement and also granted Careaga's request to continue the trial to December 2. In October, the court denied Careaga's second motion for sanctions.

¶10 From November 2014 through August 2015, Careaga requested and received five more continuances to conduct interviews. As of April 22, 2015, Careaga had not conducted any interviews. Careaga's last continuance extended the trial date to September 16. The trial was then continued to October 1 due to the lack of judicial officers to try the case.

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¶11 At trial, the court granted a directed verdict of acquittal on one of the class 3 aggravated assault counts. The jury found Careaga guilty on the remaining counts and found them to be dangerous offenses. The court sentenced Careaga to presumptive terms of 2.25, 7.5, and 10.5 years' imprisonment for disorderly conduct, class 3 aggravated assault, and class 2 aggravated assault, respectively. It also sentenced him to the mitigated term of 1.5 years' imprisonment for unlawful discharge of a firearm and the aggravated term of 9.5 years' imprisonment for another class 3 aggravated assault. The court ordered Careaga to serve all sentences concurrently. Careaga timely appealed.

DISCUSSION

¶12 Careaga argues that the late disclosure of the ballistics and trace reports forced him to choose between waiving his right to a speedy trial or waiving his right to effective assistance of counsel and that the trial court should have precluded the reports from being presented as evidence at trial. We review a trial court's choice and imposition of a sanction for a discovery violation for an abuse of discretion. *State v. Naranjo*, 234 Ariz. 233, 242 ¶ 29 (2014). Because Careaga did not suffer any prejudice from the State's late disclosure, we find that the trial court did not abuse its discretion by granting a continuance rather than precluding the reports.

¶13 If a defendant requests any completed written reports, statements, or examination notes made by an expert related to the case, ARCP 15.1(e)(1)(C)² requires the State to disclose that information no later than 30 days after receiving the defendant's request. Additionally, the parties have a continuing duty to disclose information under ARCP 15.6(a), and ARCP 15.6(b) provides that "[a]ny party that determines additional disclosure may be forthcoming within 30 days of trial shall immediately notify both the court and the other parties of the circumstances and when the disclosure will be available." Under ARCP 15.7(a), a party may move for sanctions when an opposing party fails to make a required disclosure. An order imposing sanctions must consider "the significance of the information not timely disclosed, the impact of the sanction on the party and the victim and the stage of the proceedings at which the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a). Sanctions available to a trial court include but are not limited to precluding evidence or granting a continuance. Ariz. R. Crim. P. 15.7(a)(1), (3). Preclusion is a sanction of last resort, however, and it should "be imposed only if other less stringent

² The motions for discovery sanctions were argued in 2014, and thus, we cite to the rules at that time.

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sanctions are not applicable.” *State v. Moody*, 208 Ariz. 424, 454 ¶ 114 (2004). Additionally, to find an abuse of discretion for a trial court’s decision to not preclude evidence, the defendant must demonstrate that he suffered prejudice by the late disclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448 (1985).

¶14 Here, Careaga has failed to demonstrate that the State’s late disclosure prejudiced him. He claimed in the trial court that he was prejudiced by continued incarceration and strengthening of the State’s case. Those claims, however, are not recognized as prejudice for purposes of a discovery violation. *See id.* at 448 (“[P]rejudice relates to the issue of surprise or delay under the discovery rules.”); *see also State v. Dodds*, 112 Ariz. 100, 102 (1975) (stating that the purpose of ARCP 15 is to avoid unnecessary delay and surprise at trial). The record shows that the State disclosed the reports to Careaga several weeks before the April 1 trial date. Also, a plea offer was currently open and Careaga still had the ability to accept or decline the offer based on the recently disclosed reports. Furthermore, Careaga was not prepared to go to trial at that time because he had not interviewed a single witness. In fact, Careaga had not interviewed anyone as of April 2015, more than one year after the late disclosure. With more than a year following the disclosure to prepare a defense, Careaga suffered no prejudice and the court did not abuse its discretion by declining to preclude the reports.

¶15 Careaga relies on *Jimenez v. Chavez*, 234 Ariz. 448 (App. 2014) for the assertion that the continuances improperly forced him to choose between his speedy trial rights and his right to effective assistance of counsel. *Jimenez* is distinguishable from this case, however. In *Jimenez*, the State disclosed inculpatory DNA evidence on the eve of trial, thereby violating ARCP 15.6. *Id.* at 451–52 ¶ 16. The defendant was otherwise prepared for trial, and the continuance delayed the trial beyond the defendant’s last day under ARCP 8. *Id.* at 450 ¶¶ 4–6. Subsequently, the appellate court held that granting a continuance was an improper sanction for the State’s late disclosure because the continuance delayed the trial beyond the defendant’s last day. *Id.* at 453 ¶ 23. Here, the evidence was disclosed several weeks before trial rather than on the eve of trial. Also, the new trial date was set for April 8 and later for April 23; both dates were within Careaga’s last day, which was April 29 when the trial was set for April 1. Thus, the continuance did not force Careaga to choose between a speedy trial and effective assistance of counsel. Furthermore, Careaga was not prepared for trial. He requested numerous continuances after the late disclosure and had not interviewed a single witness more than a year after the disclosure. As such, his argument fails.

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CONCLUSION

¶16 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
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