IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64919-1-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
SAMUEL A. GONZALEZ,	)	UNPUBLISHED
	)	
Respondent.	)	FILED: July 18, 2011
	)	

Cox, J. — Exclusion or suppression of evidence is an extraordinary remedy that should be applied narrowly.[1] We review for abuse of discretion those discovery decisions that are based on claimed violations of CrR 4.7.[2] The factors to be considered in deciding whether to exclude evidence as a sanction for such discovery violations are set forth in State v. Hutchinson.[3]

Here, the trial court excluded Francisco Nava, a State witness, from testifying at trial against Samuel Gonzalez as a sanction for claimed discovery violations by the State without considering the factors identified in Hutchinson. This was error. We reverse and remand for further proceedings.

Shortly after 1:30 a.m. on July 11, 2009, Mount Vernon Police arrived at the home of Janet Ramos to investigate a shooting in which three people were

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[1] State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

[2] Id.

[3] 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998).

injured. Based on evidence at the scene, police believed that someone had fired a single round from a 20 gauge shotgun into the house from outside. Ramos also reported an incident occurring around midnight when a person she knew as "Sammy" came to the door. When told to leave, Sammy turned to a black car parked in the driveway with three or four people inside, and told someone to get the gun. After seeing a person get out of the car and take a gun out of the trunk, Ramos closed and locked the door. The shot followed later, injuring three occupants of the house.

Police arrested sixteen-year-old Samuel Gonzalez, Ramos's next door neighbor, for felony harassment and brandishing a weapon. Gonzalez's parents told police that Gonzalez was at home when the shot was fired. In September 2009, the State charged Gonzalez in juvenile court with felony harassment and riot while armed with a deadly weapon based on these incidents.

On October 29, 2009, Detective Brent Thompson interviewed Francisco Nava, a defendant in another case, about four separate ongoing criminal investigations in Skagit County. Nava claimed that he met with Gonzalez around 3:30 a.m. on July 11, the date of the shooting in this case, at the residence of Alfredo Sanchez. According to Nava, Gonzalez admitted at that time that he knocked on Ramos's door around midnight and that one of his companions pulled a gun out of the trunk of their car. Gonzalez also described how he had later returned alone to the Ramos house and used a 20 gauge shotgun to shoot

twice into the house. Nava reported that Gonzalez said he told his parents to lie and say he was at home all night. Nava claimed that Gonzalez's father came to Sanchez's house later in the morning of July 11 to take Gonzalez to work.

On November 18, 2009, Detective Thompson signed an affidavit attributing Nava's statements regarding Gonzalez to "Confidential Informant #3 (CI 3)." Detective Thompson noted in the affidavit that CI 3 had "a previous felony conviction for a crime of dishonesty." The prosecutor moved for an arrest warrant based on Detective Thompson's affidavit. The prosecutor also filed an information in this case charging Gonzalez with felony harassment, riot while armed with a deadly weapon, three counts of first degree assault, and unlawful possession of a firearm in the second degree. A superior court judge signed an order for issuance of an arrest warrant on November 20, and police arrested Gonzalez on November 24, 2009.

On December 2, Detective Thompson met with Nava for a second interview. The record indicates this interview was prompted by the request of the prosecutor who had learned from Nava's defense attorney that Nava wanted to clarify his earlier statement to Detective Thompson. During the interview, Nava told the detective that he saw Gonzalez on July 10 around 5 p.m. but he had not met him at the Sanchez house after the shooting, as he earlier reported. Instead, Nava stated that Gonzalez described the July 11 incidents to Nava approximately six weeks later while they were lifting weights together at

Gonzalez's house. According to Nava, he had had time to think through everything and make a timeline while in confinement. It is undisputed that these revisions to Nava's earlier statement were not made available to the defense until a transcript of this second interview was provided on January 5, 2010.

At Gonzalez's arraignment hearing on December 3, the trial court set an omnibus hearing for December 31, a trial confirmation for January 21, 2010, and a trial date of January 25, 2010. The order reflects a time for trial expiration date of February 1, 2010.

At the December 31, 2009, omnibus hearing, defense counsel requested CI 3's statement and all discovery related to CI 3. In the omnibus order, the State agreed to provide names, addresses, and statements for prosecution witnesses and further agreed to make efforts to arrange interviews as requested. The order also directs the parties to exchange witness lists within one week of the date of the order.

Following the omnibus hearing, defense counsel moved that same day to suppress all evidence relating to CI 3 and all other discovery known to the State but not provided to the defense by the omnibus hearing. Counsel relied on CrR 4.7(a)(1). In particular, defense counsel stated that the prosecution failed to disclose any and all statements made by CI 3, or the criminal record or identity of CI 3, despite the fact that it appeared that the State intended to call CI 3 as a witness at trial and had not obtained a protection order. On January 4, 2010,

defense counsel supplemented the motion to suppress, seeking sanctions for the State's allegedly willful refusal to provide information about CI 3. Counsel specifically requested suppression or exclusion of all non-disclosed evidence or dismissal of the charges. On January 5, defense counsel moved to compel the State to disclose the names, statements, and criminal histories of all three confidential informants mentioned in Detective Thompson's probable cause affidavit.

On January 5, the State disclosed Nava's identity as CI 3, and provided defense counsel with copies of his November 18, 2009, plea agreement and his December 10, 2009, guilty plea statement and adjudication and disposition order. The State also provided written transcripts of Detective Thompson's October 29 and December 2 interviews with Nava. This latter transcript contained Nava's revisions to his prior statement.

At a hearing on January 15, 2010, the trial court ruled that Nava would not be allowed to testify and his statements would be excluded from trial. On January 27, the trial court denied the State's motion for reconsideration. The trial court also signed an order dismissing without prejudice four of the six charges based on the State's representation that it was unable to proceed to trial without Nava's testimony. At the time of this dismissal, the trial date had been extended to February 1, the trial expiration date.

The State appeals.

EXCLUSION OF EVIDENCE

The State contends the trial court abused its discretion by excluding the testimony of Nava as a discovery sanction without considering any of the factors identified in Hutchinson.[4] We agree.

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court.[5] A trial court abuses its discretion when its decision is manifestly unreasonable, or when it exercises its discretion on untenable grounds or for untenable reasons.[6]

CrR 4.7(a)(1) requires the prosecutor to provide discovery "no later than the omnibus hearing." If a party fails to comply with a discovery rule, CrR 4.7(h)(7)(i) provides that "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."

A failure to produce evidence or identify witnesses in a timely manner is "appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence."[7] "Exclusion or

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[4] 135 Wn.2d 863.

[5] Id. at 882.

[6] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

suppression of evidence is an extraordinary remedy and should be applied narrowly."[8]

In Hutchinson, our supreme court held that trial courts deciding whether to impose the sanction of excluding evidence for a discovery violation must consider: (1) the effectiveness of less severe sanctions; (2) the impact on the evidence at trial and the outcome of the case; (3) the extent to which the opposing party will be surprised or prejudiced by the evidence; and (4) whether the violation was willful or in bad faith.[9]

Here, the court's order, entered on January 27, 2010, memorializes its oral ruling of January 15, in which it granted Gonzalez's motion to exclude the testimony of Nava at the February 1, 2010, trial. Neither this order nor the colloquy between the court and counsel at the January 15 and 27 hearings indicates any consideration of the factors stated in Hutchinson.

At the January 15 hearing, the trial court expressed its "very, very large concern" regarding the State's failure to notify the court and defense counsel of the changes in Nava's statement, stating:

> Anytime a court is asked to sign a warrant for arrest, search warrant, or any other information, part of that process determining probable cause is to analyze credibility. The Court has to be fully aware of any and all statements made, not just the ones that are

[7] Hutchinson, 135 Wn.2d at 881.
[8] Id. at 882.
[9] Id. at 882-83.

> hand picked. And by not representing the change it, in fact, becomes a misrepresentation of the information in that affidavit.
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> So I realize the affidavit was crafted prior to the second interview, but as soon as . . . the second interview occurred the affidavit should have been immediately resubmitted.[10]

The trial court continued, "I take these discovery requirements very, very seriously," and "this message needs to be heard loud and clear that when information changes, and if that information has been relied on by the Court or anyone else, the immediate revealing of that change has to occur or all credibility in the system is under question."[11] On January 27, 2010, the trial court entered an order excluding Nava's statements and testimony based on written findings of fact and conclusions of law focusing on the effect of the change in Nava's statements on the existence of probable cause. The order includes the conclusion: "Law enforcement and/or the Prosecution had the duty to disclose the statement of Francisco Nava on December 2, 2009 and because they didn't until January 5, 2010, that is a discovery violation and/or a *Brady* violation."[12]

We assume without deciding that the trial court was correct in deciding the State violated its obligation under CrR 4.7 to promptly provide discovery of Nava's revised statement of December 2. Thus, the issue that we decide is whether exclusion of the testimony of Nava was the proper remedy under the

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[10] Report of Proceedings (January 15, 2010) at 14-15.

[11] Id. at 18-19.

[12] Clerk's Papers at 77-78.

circumstances. Based on the Hutchinson factors, we conclude that remedy was improper.

Effectiveness of Lesser Sanctions

By January 15, the State had disclosed all the requested information, such that an order compelling discovery was not a necessary remedy. But the trial court could have granted a continuance within the time for the February 1 trial if necessary to allow Gonzalez additional time to interview and prepare to cross-examine Nava. There is nothing in this record to show that this lesser sanction would have been ineffective.

Impact of Witness Preclusion on Evidence at Trial and Outcome of Case

Nava's testimony was central to the State's case on four of the six charges. It is undisputed that precluding his testimony at trial precluded further prosecution of these serious charges, which were dismissed.

Surprise or Prejudice to Nonviolating Party

Gonzalez fails to identify any prejudice or surprise he would suffer if the State had been allowed to call Nava as a witness at trial despite the late production of his statements in discovery. Gonzalez was aware that CI 3 had a felony conviction for a crime of dishonesty and that the State intended to call CI 3 to testify that Gonzalez admitted committing the crimes. Gonzalez does not

claim that the prosecutor's delayed revelation of the December 2 interview prevented him from taking advantage of its significant impeachment value at trial. And defense counsel did not claim at the January 15 hearing that she was unable to prepare for trial in the time remaining before the February 1 trial date because of the State's failure to provide discovery until January 5. On this record, any such claim would not have been persuasive.

Willful Violation or Bad Faith

The trial court did not find that the State violated CrR 4.7(a)(1) willfully or in bad faith. It is unclear from this record whether there could be either finding.

The circumstances here did not call for the exceptional remedy of exclusion of Nava, the State's key witness for four of the six charges. The State completed providing discovery well before the expiration of time for trial on February 1. There was neither a willful nor bad faith finding by the court respecting the State's providing discovery. The defendant did not claim to be surprised or to face undue prejudice based on the late discovery if Nava testified.

Citing RAP 2.5(a) and case authority, Gonzalez contends that the State waived the argument that the trial court should have applied the Hutchinson factors to decide whether to exclude Nava's testimony at trial. We note that the State did cite this case in its motion for reconsideration, urging the court to apply

the principles of the case "to suppression of State's evidence."[13] This was sufficient to preserve the issue for review, although the State did not fully develop that point during oral argument to the trial court.

Brady Violation

Contrary to the trial court's written conclusion regarding a supposed violation of Brady v. Maryland,[14] Gonzalez fails to make any showing that the State's delay in disclosure prevented him from taking advantage of the evidence at trial, as required to establish a due process violation under Brady.[15] We hold that there was no Brady violation to warrant the sanctions here.

We reverse and remand for further proceedings.

Cox, J.

WE CONCUR:

[13] Clerk's Papers at 59.

[14] 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (State must disclose material evidence that is favorable to the defendant.).

[15] Boss v. Pierce, 263 F.3d 734, 740 (7th Cir. 2001) (Evidence is suppressed in violation of Brady only if prosecution failed to disclosed evidence it was aware of "before it was too late for the defendant to make use of the evidence.").