IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER M. JOHNSTON, Appellant.	No. 39999-7-II UNPUBLISHED OPINION

Armstrong, P.J. — Christopher Michael Johnston appeals his conviction of first degree robbery, arguing that several continuances violated his right to a speedy trial under CrR 3.3, that the trial court erred in admitting gang-related evidence under ER 404(b), and that his counsel ineffectively represented him. We affirm.

Facts

Early one evening, Christopher Fagot was walking through a Spanaway park when someone from a group of people called him over. Johnston was among them and asked if Fagot wanted to buy some "weed." 2 Report of Proceedings (RP) at 29-31. When Fagot declined, Johnston asked what "hood" he was from; Fagot replied that he was not in a gang. 2 RP at 30-31.

Marcus Reed, another group member, asked Fagot if he had any money. When Fagot said he did not, Reed replied, "I'm going to be straight up. This is a pocket check." 2 RP at 30. Reed then pulled out a knife, and Johnston said, "Show respect to him and just give him your money." 2 RP at 32-33. Fagot emptied his pockets and gave Reed a $5 bill.

Fagot walked home and called 911, providing a description of a possible suspect and a car

that had been near the group. Responding to the call, Deputy Matthew Hirschi went to the park and saw the car and a group of people. Reed, who matched Fagot's description of one of the suspects, was in the group.

Later, Deputy Hirschi brought Fagot back to the park. The group of people was lined up, with the patrol vehicle's spotlight on them. Fagot pointed to Reed and Johnston as the two people who had robbed him.

The State charged Johnston with first degree robbery while armed with a deadly weapon. Johnston was arraigned on June 4, 2009, and detained in jail thereafter. On his initial trial date of July 28, 2009, the court continued his trial to September 1 at both parties' request because several witnesses remained to be interviewed. The speedy trial expiration date was reset to October 1, 2009. On September 1, defense counsel said that although both sides were ready, there were no courtrooms available, and counsel was not available the next day. The trial court continued the trial to September 8 but did not reset the expiration date.

On September 8, the court informed Johnston that there were no courtrooms available and suggested setting the trial date over two days without resetting the expiration date. Johnston did not object. On September 10, the court reported that no courtrooms were available, and defense counsel requested a continuance to September 28 because of his scheduling conflicts over the next two weeks. When Johnston objected, the court stated that it had two lists showing all of the courtroom assignments. The court continued the trial date to September 28 and reset the expiration date to October 28.

On September 28, both the State and defense counsel requested a continuance to October

12 because both attorneys were in trial. The court found good cause to grant that continuance and reset the expiration date to November 11. On October 12, the court reported that no courtrooms were available and set the case over one day without resetting the expiration date. On October 13, the court again set the trial date over one day because of courtroom unavailability without resetting the expiration date. The court attached a copy of the department status list to its order and added that there was no funding for pro tempore judges.

On Wednesday, October 14, there were no courtrooms open, and defense counsel asked the court to continue the trial to Monday because of his scheduling conflict the next day. The State agreed to a continuance to October 19, and the court reviewed and attached a department status list to its order. The expiration date of November 11 remained.

On October 19, the State requested a 30-day continuance because the prosecuting attorney was in trial all week. The defense objected, but the trial court continued the trial to October 26, with a speedy trial deadline of November 25. Johnston's trial began on October 26.

During Fagot's testimony, the State asked what he thought Johnston meant by asking what "hood" he was from. Fagot replied that he thought Johnston was asking if he was in a gang. On cross examination, defense counsel asked Fagot to read his police statement aloud; that statement referred to Johnston's question about the "hood." 2 RP at 49.

Defense witness Reed admitted he was with Johnston at the park and that he asked Fagot for money, but he said that Johnston never spoke to Fagot or received any of his money.[1] When the State asked on cross examination whether anyone had questioned Fagot about being in a

[1] Reed also was charged with first degree robbery but pleaded guilty to second degree robbery before testifying on Johnston's behalf.

gang, Reed said they could have.

During closing argument, the State explained what the "hood" statement meant to Fagot and added that Johnston might have thought Fagot's red clothing was gang related. Defense counsel responded that the State's reference to Fagot's clothing as a sign of gang affiliation was a red herring and irrelevant. On rebuttal, the State said it was not suggesting that the robbery was gang related but was explaining that Johnston's "hood" statement might have been an attempt to determine whether it was safe to rob Fagot.

The jury convicted Johnston of first degree robbery but did not find that he was armed with a deadly weapon.

Analysis

I. Speedy Trial Under CrR 3.3

Johnston argues first that the trial court's continuances of his trial date violated his right to a speedy trial, as guaranteed by CrR 3.3.

We review an alleged violation of the speedy trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). The decision to grant or deny a continuance rests within the sound discretion of the trial court, which we review for an abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

CrR 3.3(b)(1)(i) requires trial within 60 days when the defendant is in custody. *State v. Saunders*, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009). Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial, but CrR 3.3(e) excludes the time allowed for valid continuances from the speedy trial period. *Saunders*,

153 Wn. App. at 217. When a period of time is excluded under CrR 3.3(e), the speedy trial period extends to at least 30 days after the end of the excluded period. CrR 3.3(b)(5).

A court can grant a continuance on motion of the court or party where the administration of justice requires and the defendant will not be prejudiced. CrR 3.3(f), (2). Allowing counsel time to prepare for trial is a valid basis for continuance; the trial court can also consider scheduling conflicts in granting continuances. *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Moving for a continuance by or on behalf of a party waives that party's objection to the requested delay. CrR 3.3(f)(2).

On appeal, Johnston does not complain about the continuance granted on July 28 because of both parties' need for further investigation, the continuance granted on September 28 because of both parties' scheduling difficulties, or the continuance granted on October 19 because of the State's scheduling conflicts. Indeed, Johnston waived any objections to the first two continuances by defense counsel's participation therein. CrR 3.3(f)(2); *see also State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (continuance may be granted over defendant's personal objection). The third continuance, based on the deputy prosecutor's schedule, does not demonstrate an abuse of discretion. *See Flinn*, 154 Wn.2d at 200 (scheduling conflicts may be valid reason for continuance). Before resetting the speedy trial period, the trial court observed that this was not a case where the deputy prosecutor was continually in trial and had made no effort to find a replacement. Moreover, despite the 30-day continuance granted, Johnston's trial began a week later and well before the speedy trial period expired.

Johnston's complaint here is with the continuances granted because of courtroom

unavailability. He cites *Kenyon* in arguing that continuing a trial past the speedy trial date due to courtroom congestion is improper unless the court records details of that congestion, "'such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms.'" *Kenyon*, 167 Wn.2d at 137 (quoting *Flinn*, 154 Wn.2d at 200).

At issue here are the continuances granted on September 1, September 8, September 10, October 12, October 13, and October 14. The September 10 continuance is something of a hybrid, as it was caused by both courtroom unavailability and counsel's scheduling conflicts. The record shows, however, that the court continued the trial for two weeks, instead of a few days, because of counsel's schedule. Consequently, we do not address this continuance as one justified solely by courtroom congestion.

None of the remaining continuances reset the speedy trial expiration date; instead, they shortened the available time for trial. This case therefore bears a fundamental distinction from those in which the speedy trial period was extended due to courtroom congestion. *See*, *e.g.*, *Kenyon*, 167 Wn.2d at 131-32 (dismissal required where trial court continued trial past speedy trial date due to unavailability of judge); *Flinn*, 154 Wn.2d at 200 (court congestion is not valid reason for continuance past time for trial period). Here, trial began well before Johnston's speedy trial period expired, despite the administrative delays, and his current argument that these continuances violated his right to a speedy trial is simply incorrect. Because the trial court did not exclude the continuances based on courtroom unavailability from the speedy trial period, it did not violate CrR 3.3.

II. ER 404(b) Evidence

Johnston argues here that the trial court erred in admitting gang-related evidence and argument under ER 404(b). This rule prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." ER 404(b). Such evidence may be admissible for another purpose, however, such as proof of motive, plan, or identity. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *see State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995) (evidence of defendant's gang affiliation was admissible to show his premeditation, motive, and intent). ER 404(b) is designed to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person likely to commit the crime charged. *Foxhoven*, 161 Wn.2d at 175. If evidence is admitted under ER 404(b), the court must give the jury a limiting instruction. *Foxhoven*, 161 Wn.2d at 175.

But Johnston did not object to the gang references made during his trial on any basis, let alone on ER 404(b) grounds. A failure to challenge the admission of evidence at trial precludes a defendant from raising the claimed error on appeal. *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Had Johnston framed his complaint about the State's closing argument as prosecutorial misconduct, we still would not reach the issue because of the lack of an objection. *See State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978) (absent proper objection and request for curative instruction, issue of prosecutorial misconduct during closing argument is waived unless the comment was so flagrant or ill intentioned that the prejudice could not have been cured by an instruction). Johnston waived the claimed error.

III. Ineffective Assistance of Counsel

Finally, Johnston faults his counsel for failing to object to the continuances that violated his right to a speedy trial, failing to object to the introduction of ER 404(b) evidence, and failing to request a limiting instruction that would restrict the jury's use of that evidence.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail, a defendant must show both deficient performance and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A defendant shows prejudice if he demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant also can establish prejudice by showing that if counsel had made the objections or arguments at issue, they likely would have succeeded. *McFarland*, 127 Wn.2d at 337 n.4.

As previously discussed, Johnston does not show that additional objections to the court's continuances of his trial date would have resulted in the dismissal of his case. Defense counsel sought three of the continuances that reset the speedy trial period and objected unsuccessfully to the last, but Johnston's trial was held within the speedy trial period established before that final continuance was granted. These were the only continuances that extended the speedy trial period, and Johnston cannot demonstrate that counsel was ineffective for failing to preserve his speedy trial rights.

With regard to the gang-related testimony and argument, Johnston does not show that any objection on ER 404(b) grounds would have been successful. The testimony in question was

aimed at showing that Johnston thought Fagot, the victim, might be a gang member. It had nothing to do with Johnston's possible gang membership and did not incriminate him. This testimony, in turn, was appropriately mentioned during closing argument. *See State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008) (prosecutor has wide latitude to draw reasonable inferences from the evidence during closing argument). When the State attempted to draw an inference from Fagot's red clothing, defense counsel responded that the State's point was irrelevant, and the State conceded as much on rebuttal. We see no deficient performance in defense counsel's handling of this evidence and argument.

Johnston also fails to show any deficiency in counsel's failure to request a limiting instruction governing the jury's use of the "gang" evidence. There was no reason for the defense to limit the use of this evidence. If it harmed anyone, it harmed Fagot rather than Johnston. Johnston's claim of ineffective assistance of counsel fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Quinn-Brintnall, J.

Johanson, J.