IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29459-5-III
Respondent,	)	
v.	)	
BOBBY RAY ZAPIEN,	)	
Appellant.	)	UNPUBLISHED OPINION

Sweeney, J. — This appeal follows a conviction for first degree premeditated murder while armed with a firearm. The defendant makes a number of assignments of error including that he was denied his constitutional right to a speedy trial and that he was denied his right to adequately confront and examine a confidential informant. We conclude that he was not denied his right to a speedy trial, largely because he can show no prejudice from the lengthy delay (about nine months). And we can find nothing in this record that would support his assertion that the confidential informant agreed to any promise in exchange for his testimony. We then affirm the conviction but remand for

reconsideration of the sentence.

FACTS

Bobby Ray Zapien shot and killed Luis Gonzalez on January 15, 2010. Police investigated. Mr. Gonzalez had been working on his car in the driveway of Cole Roberts. Police brought Mr. Roberts back to the police station and questioned him. Mr. Roberts eventually told police that Mr. Zapien had driven a minivan into his driveway and shot Mr. Gonzalez. And he reported that Christopher McCubbins was present at the time of the shooting, but had fled before police arrived. Police recovered four cigarette butts, a cell phone, a stocking cap, and a $100 bill from the scene of the crime. The cigarette butts and Mr. Zapien's DNA[1] were sent to the crime lab for testing on February 23, 2010.

Jeff Rhodes called the Yakima Police Department the day after the shooting. Apparently others had accused Mr. Rhodes of the murder and he wanted to tell police that Mr. Zapien was the killer. Detective Matt Lee and Special Agent E. Floyd of the Bureau of Alcohol Tobacco and Firearms (ATF) met with Mr. Rhodes and arranged for him to meet Mr. Zapien that day at the Red Carpet Motor Inn, in Yakima. Mr. Rhodes entered the motel room and stayed for about 30 minutes. Officers then met with him. He reported that Mr. Zapien admitted he shot Mr. Gonzalez one time in the back of the head with a .22 caliber revolver while Mr. Gonzalez was leaning into the trunk of a vehicle

[1] Deoxyribonucleic acid.

parked at Mr. Roberts' home. The officers asked Mr. Rhodes to return to the motel room and talk to Mr. Zapien while wearing a body wire. He refused. The officers obtained a warrant based on the information Mr. Rhodes provided, arrested Mr. Zapien at the motel, and seized methamphetamine and other drug paraphernalia from the room.

The State charged Mr. Zapien with first degree premeditated murder on January 21, 2010. The court set a trial date for March 15 and set an attorney status hearing for February 9. The attorney status hearing was delayed several times until the court eventually appointed defense counsel on February 19.

On March 9, 2010, the parties appeared at a hearing and discussed trial dates and the possibility of Mr. Zapien representing himself. Mr. Zapien objected to any continuance. The State said it needed more time to prepare because of the number of witnesses, its discovery was incomplete, and the charge was serious. The court continued the trial and set a new trial date of May 17.

On May 6, 2010, the State again requested a continuance, this time because it was awaiting DNA lab results and cell phone records. The court continued the trial to June 14. On May 21, the court ordered that discovery be completed no later than June 4. On June 11, defense counsel informed the court that the State had yet to respond to a discovery motion filed on May 26. Defense counsel said that he could not be ready for

trial without the requested information and suggested that the necessary preparation time be treated as an excludable delay.

On June 17, 2010, the State filed its memorandum in opposition to the defense request for discovery. The State objected to providing any state or federal agreements with Mr. Rhodes, Mr. Roberts, or Mr. McCubbins, as it was unclear whether any existed, and also to providing any prior police reports on them. On June 18, the State specifically argued that the requested police reports were not material to this case and that it would refuse to provide them. On July 6, the court ordered the State to provide (1) the terms of any agreement verbal or written between law enforcement and/or ATF and the informant, Jeff Rhodes; (2) any information regarding occasions in which Mr. Rhodes provided information resulting in the arrest and/or conviction of any witness or the deceased in the case; and (3) the terms of any informant agreements or favorable treatment in exchange for testimony current or past, between law enforcement and Mr. Roberts and also, Mr. McCubbins, and Mr. Gonzalez, if they related to this prosecution.

Defense counsel requested a 30-day continuance to process the newly ordered discovery items. Mr. Zapien objected. The court granted the continuance and set a trial date for August 9, 2010. On August 13, the State requested another continuance. Defense counsel objected. The court denied the motion which left the September 8, 2010

trial date. On August 30, the State requested another continuance to send evidence for DNA testing. The court denied that request. The trial started on September 7.

Detective Drew Shaw was the lead officer on the case. Defense counsel asked, outside the presence of the jury, whether he had any personal knowledge of an informant agreement between Mr. Rhodes and any law enforcement agency. He responded that Mr. Rhodes was the source for Detective Lee and that was all he knew and he said he never saw any agreement.

Mr. Rhodes testified outside the presence of the jury. He was represented by counsel. Mr. Rhodes testified he could not recall whether he went to the Red Carpet Motor Inn on January 16, 2010, or whether he had talked to Mr. Zapien on any day in January of 2010. He asserted his Fifth Amendment right against self-incrimination. His lawyer explained to the court that Mr. Rhodes was worried that if he made statements that were inconsistent with statements that he had previously made, he might subject himself to state and/or federal prosecution. The State offered "use or derivative use immunity" to compel his testimony. 4 Report of Proceedings (RP) at 411. The court made no further inquiry and Mr. Rhodes was excused, subject to recall.

Mr. Rhodes was recalled the next day. He testified that he met with Mr. Zapien at the Red Carpet Motor Inn on January 16, 2010, and that Mr. Zapien admitted he shot Mr.

Gonzalez. Mr. Rhodes testified that Mr. Zapien thought Mr. Gonzalez had previously called him a rat. Defense counsel asked Mr. Rhodes whether he had an informant agreement or some understanding with a law enforcement agency in which he would be given favorable treatment in return for his testimony. The State objected. The jury was excused and Mr. Rhodes testified that, "Nobody's given me nothing. I mean, I don't—." 5 RP at 517.

Mr. Zapien testified he was a drug dealer with a drug addiction. He testified that he had been awake on drugs for several days prior to the day of the shooting. And he testified that Mr. McCubbins shot Mr. Gonzalez. The jury found Mr. Zapien guilty of first degree murder and that he was armed with a firearm at the time of the murder. The court sentenced Mr. Zapien to 668 months, which included a 120-month firearm enhancement.

DISCUSSION

Right to Confrontation

Mr. Zapien contends his constitutional right to confrontation was violated when the trial court ruled that he could not inquire whether Mr. Rhodes received immunity or favorable treatment in exchange for his testimony and by the court's failure to make further inquiry after Mr. Rhodes asserted his Fifth Amendment right not to incriminate

himself.

The Sixth Amendment confrontation clause guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Whether a trial court has violated a defendant's right to confrontation is a question of law that we will review de novo. *United States v. Aguilar*, 295 F.3d 1018, 1020 (9th Cir. 2002), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

Mr. Rhodes was called to testify, outside the presence of the jury, about his conversations with Mr. Zapien the day after the homicide. Mr. Rhodes said he could not recall. Mr. Rhodes' attorney explained that Mr. Rhodes was afraid of incriminating himself. The State offered "use or derivative use immunity." 4 RP at 409-11. The court made no further inquiry and Mr. Rhodes was excused, subject to recall.

"Use immunity" prohibits the direct use of compelled statements in a later criminal trial. *State v. Bryant*, 97 Wn. App. 479, 485, 983 P.2d 1181 (1999). "Derivative use immunity" bars the use of any evidence from statements made after immunity has been granted. *Id.* When granted together, "derivative use" and "use" immunity provide protection that is "coextensive" with the Fifth Amendment privilege. *Kastigar v. United*

States, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); *Bryant*, 97 Wn. App. at 485. "In essence, use and derivative use immunity leave the witness, and the government, in the same situation they would have been in had the witness not given a statement or testified." *Bryant*, 97 Wn. App. at 485.

Mr. Zapien argues that the court should have pushed Mr. Rhodes further on his reasons for invoking his right against self-incrimination. *See Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). But after the prosecution offered the use or derivative use immunity the inquiry simply ended. And Mr. Rhodes was excused subject to recall, and he testified the next day. The court was under no obligation to inquire of Mr. Rhodes further because it was unclear whether he was continuing to invoke the privilege. *See Hoffman*, 341 U.S. at 486 ("It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.'" (citation omitted) (quoting *Temple v. Commonwealth*, 75 Va. 892, 899 (1881)). And, more significantly, he testified about his conversations with Mr. Zapien the next day.

Mr. Rhodes testified about the admissions Mr. Zapien made to him in the motel room. Defense counsel asked him if he had an informant agreement or whether he was

being given favorable treatment in exchange for his testimony. The State objected on the ground that it had already been established that there was no such agreement and the court refused to allow further inquiry. Mr. Zapien contends Mr. Rhodes had been given something—the use and derivative use immunity. He contends he should have been allowed to impeach Mr. Rhodes' credibility with that information.

A defendant may impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony. *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). Here, the court allowed questioning of several witnesses outside the presence of the jury to explore whether there were any agreements. There was simply no showing here of any agreement for leniency or favorable treatment in exchange for testimony and Mr. Rhodes said as much, "Nobody's given me nothing. I mean, I don't—." 5 RP at 517. Immunity in these circumstances simply removes the constitutional grounds a witness may have for refusing to testify, it is not a promise of any form of leniency. *Bryant*, 97 Wn. App. at 484.

In sum, the court never restricted defense counsel from asking Mr. Rhodes about the grant of immunity. Defense counsel clarified and Mr. Rhodes answered he was not expecting any favorable treatment for testifying. The court then properly refused to allow further inquiry.

Mr. Zapien also contends that he was denied his right to confront and examine Mr. Rhodes by the court's refusal to allow him to ask police witnesses about agreements with Mr. Rhodes. Specifically, Mr. Zapien contends the court should have allowed defense counsel to ask Detective Lee if he had any informant agreement with Mr. Rhodes and if he knew of any relevant federal agreements.

But counsel asked Detective Shaw, the lead officer on the case, whether he was aware of any agreement between the Yakima Police Department, the ATF, and Mr. Rhodes. He responded that he was unaware of any such agreement. And the court then properly ruled, "It sounds to me like Detective Shaw is not aware of any, so you can't ask him that question." 4 RP at 381. We find no reference in this record to a similar ruling as to Detective Lee. So it is unclear where the court actually ruled that Detective Lee could not be questioned about any informant agreements with Mr. Rhodes. Nor is there any suggestion anywhere of a deal with Mr. Rhodes for leniency or any other benefit for his testimony. Indeed, there is no showing here that Mr. Rhodes ultimately accepted, or testified because of, the State's offer of immunity (in response to Mr. Rhodes unreasonable concerns).

We conclude that Mr. Zapien was not denied the right to confront witnesses.

Speedy Trial

Mr. Zapien next contends that his constitutional right to a speedy trial was violated because of a full nine-month delay between his arrest and trial. We review his claim de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). He argues that these delays were over his objections and caused by the State's failures to timely conclude testing and otherwise prepare for trial.

The United States Constitution and the Washington Constitution both provide criminal defendants the right to a speedy public trial. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10). The Sixth Amendment speedy trial right attaches when a charge is filed or an arrest is made that holds one to answer to a criminal charge, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). The constitutional right to a speedy trial is violated at the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). As a threshold matter, a defendant arguing violation of speedy trial rights must show that the length of pretrial delay was presumptively prejudicial. *Iniguez*, 167 Wn.2d at 283. We consider the length of delay, the complexity of the charges, and the reliance on eyewitness testimony in determining a presumption of prejudice. *Id.* at 292.

Once a defendant shows presumptive prejudice, we then consider four factors to pass on whether the delay impaired the constitutional right to the prompt adjudication of

criminal charges: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.* at 283.

The State arrested and filed charges against Mr. Zapien in mid-January 2010. The trial began on September 7, 2010. So nearly nine months passed between the arrest and the beginning of trial. Mr. Zapien's pretrial delay is presumptively prejudicial and meets that threshold showing. *Id.* at 290. We then apply the four factors to determine if his constitutional right has been impaired.

(1) *Length of delay*. This factor focuses on "'the extent to which the delay stretches beyond the bare minimum needed to trigger'" the four-step analysis. *Id.* at 293 (quoting *Doggett v. United States*, 505 U.S. 514, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). A longer pretrial delay compels a court to give a closer examination into the circumstances surrounding the delay. *Id.* Here, the almost nine-month lapse between arrest and trial is at the bottom end of the spectrum for a presumption of prejudice (8 months to 12 months). So even though Mr. Zapien remained in custody for approximately nine months, this was not necessarily an undue delay given the nature of the charges.

(2) *Reason for delay*. This factor requires that we look at each party's responsibility for the delay and weigh the respective reasons. *Id.* at 294. Here, the State

requested several continuances to allow time to prepare for trial. It also failed to promptly respond to a discovery motion filed by defense counsel. Defense counsel requested a 30-day continuance to process the discovery ordered by the court. The State collected DNA samples and cigarette butts and mailed them to the crime lab on February 23, 2010, but did not receive a final report on the DNA evidence until August 18—this was a delay outside of its control. The trial court left the speedy trial date at September 8, 2010. Ultimately, then, both the State and the defense contributed to the delay and the delay was prompted by the seriousness of the charges, first degree premeditated murder, and the necessity of completing, receiving, and processing scientific testing—DNA testing.

(3) *Assertion of right.* This factor requires the court to consider the extent to which the defendant asserted his speedy trial right. *Id.* at 294-95. Mr. Zapien objected to each continuance. The State agrees.

(4) *Prejudice.* We pass on the question of prejudice by considering the interests protected by the right to speedy trial: (1) preventing oppressive pretrial incarceration, (2) minimizing the defendant's anxiety and worry, and (3) limiting impairment to the defense. *Id.* at 295. A defendant makes a stronger case for a speedy trial violation if he can show prejudice. *Id.*

Here, there is no showing, other than an unsupported conclusory statement, that the delay interfered with Mr. Zapien's ability to defend himself. And the State's case against him was strong. *See id.* (holding defendant may rely on a presumption of prejudice but 10-month pretrial incarceration is not prejudicial absent any actual impairment of the defense).

Considering the nature of the charges, the reasons for the continuances, the strength of the State's case, and the tenor of Mr. Zapien's defense, we are unable to conclude that he was denied his constitutional right to a speedy trial. *Id.* Certainly being imprisoned pending trial would be, and we assume was, anxiety producing and troublesome. But there is no suggestion that this lengthy incarceration interfered with Mr. Zapien's ability to defend himself or help his lawyer. And the evidence of guilt here, both direct and circumstantial, is overwhelming.

Sufficiency of the Evidence—Premeditation

Mr. Zapien contends there was insufficient evidence to find that he premeditated Mr. Gonzalez's murder. The question for us is whether the State has produced sufficient evidence, which if believed by the jury, would support the element of premeditated first degree murder. *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992). How persuasive that evidence may have been was for the jury. *State v. Thomas*, 150 Wn.2d

821, 874-75, 83 P.3d 970 (2004). We then view the evidence in a light most favorable to the State. *State v. Vladovic*, 99 Wn.2d 413, 424, 662 P.2d 853 (1983).

The State had to show that the murder was premeditated. RCW 9A.32.030(1)(a). "Premeditation" is "'the deliberate formation of and reflection upon the intent to take a human life, and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992) (citation omitted) (internal quotation marks omitted) (quoting *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). Premeditation "must involve more than a moment in point of time." RCW 9A.32.020(1).

Premeditation may be established by circumstantial evidence. *State v. Gentry*, 125 Wn.2d 570, 598, 888 P.2d 1105 (1995). And a number of circumstances have been held to support premeditation. Evidence showing that the victim had been shot three times in the head, two after he had fallen to the floor, established premeditation. *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992). Evidence showing that the victim brought a gun to the murder site supported a finding of premeditation. *State v. Massey*, 60 Wn. App. 131, 145, 803 P.2d 340 (1990). "The planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury." *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109

(1986).

Mr. Zapien's account of the events supports the conclusion of premeditation. Mr. Zapien testified that he and Mr. Gonzalez were involved in an altercation at one time that resulted in Mr. Zapien getting stabbed and Mr. Gonzalez going to jail. Other witnesses testified that Mr. Zapien shot Mr. Gonzalez because he had called Mr. Zapien a rat. They testified that Mr. Zapien had a gun in his pocket when he arrived at the scene and attempted to put Mr. Gonzalez's body in the trunk of the car. So the unresolved differences between the two men, bringing of a gun to the murder site, and then attempting to put the body in the trunk before running away amount to "more than a moment in point of time." RCW 9A.32.020(1).

The State produced sufficient evidence to support the conclusion of premeditation.

Ineffective Assistance of Counsel—Voluntary Intoxication

Mr. Zapien next argues ineffective assistance of counsel, citing his counsel's failure to request a jury instruction on voluntary intoxication where there was evidence that he had been using methamphetamine on the day Mr. Gonzalez died. We review the challenge de novo. *State v. White,* 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899

P.2d 1251 (1995). We presume counsel was effective. *Id.* at 335. Mr. Zapien must show an absence of legitimate strategic reasons to support the challenged conduct. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

Mr. Zapien argues that without the instruction on voluntary intoxication the jury had no way of assessing whether he was capable of premeditation because of intoxication. Counsel's strategy, however, was to attack the credibility of the State's witnesses, the quality of the police investigation, and to point the finger at Mr. McCubbins as the one responsible for the murder. Defense counsel clearly chose not to draw attention to Mr. Zapien's credibility. An instruction on voluntary intoxication would have undermined the theory of the case that Mr. Zapien developed at trial. It is, then, easy to understand why counsel did not offer a voluntary intoxication instruction. This was not ineffective assistance.

Statement of Additional Grounds

Mr. Zapien argues two additional grounds: (1) the special jury instruction on the possession of a firearm was flawed where it required unanimity, and (2) the trial court erred by doubling the firearm enhancement where there is no evidence in his criminal history that he previously served a sentence with a firearm enhancement.

The challenged jury instruction provided in relevant part:

> In order to answer the special verdict form "yes," you must

> unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no", or if after full and fair consideration of the evidence you cannot agree as to the answer, you must fill in the blank with the answer "no".

CP at 94 (Instruction 18). An instruction that the jury must be unanimous to answer such a special verdict form "no" is an incorrect statement of the law. *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). The instruction here is a correct statement of the law.

Mr. Zapien was convicted as charged. The court imposed a high-end standard range sentence of 548 months for the first degree murder conviction. The court doubled the mandatory 60-month firearm enhancement for the conviction without any evidence as to why, other than an asterisk citing to RCW 9.94A.533(3). Subsection (d) of that statute states in pertinent part:

> If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, . . . all firearm enhancements under this subsection shall be twice the amount of the enhancement listed.

RCW 9.94A.533(3)(d). Mr. Zapien had an extensive criminal history. However, the felony judgment and sentence does not list whether any of the prior convictions carried deadly weapon enhancements. The record before us does not support the doubling of the 60-month firearm enhancement. Mr. Zapien may well be entitled to be resentenced with

just the 60-month enhancement.

We affirm the convictions but remand for further consideration of the sentence.

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

WE CONCUR:

_____
Sweeney, J.

_____
Siddoway, A.C.J.

_____
Kulik, J.