

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 38888-0-II

Appellant,

v.

CANDI LEE BANGE,

UNPUBLISHED OPINION

Respondent.

Bridgewater, P.J. — The State appeals the trial court’s dismissal of Candi Bange’s delivery of a controlled substance charge for mismanagement. We hold that the trial court erred in dismissing the case because the State’s mismanagement, which it concedes, did not prejudice Bange. We reverse and remand for trial.

FACTS

During an undercover sting, Centralia Police Officer Gary Byrnes met Stanley C. Davies in a parking lot to purchase methamphetamine. While Officer Byrnes waited in the parking lot with Davies, Candi Bange drove up. Officer Byrnes handed Davies the money for the drugs, Davies walked over to Bange, talked for a few minutes, and returned to hand Officer Byrnes a small bindle of crystal substance. The bindle field-tested positive for methamphetamine.

On October 28, 2008, the State charged Bange with delivery of a controlled substance; Bange pleaded not guilty on November 6, 2008; and trial was scheduled trial for the week of

January 19, 2009. On December 18, 2008, an omnibus hearing was held and the following order was entered:

4. **MUTUAL DISCOVERY DEADLINE:** 10 days prior to trial. Both parties shall complete discovery, including names, and all required information pertaining to witnesses (including conviction data), by this deadline date.

CP at 37. The parties set the deadline for discovery on January 12, 2009; Bange's speedy trial deadline was February 4, 2009.

On January 22, 2009, thirteen days before the speedy trial deadline, the State requested a one-week continuance, citing that it was not ready to proceed because it had subpoenaed the wrong lab technician and because it had obtained the wrong lab report. The lab technician would testify about the lab report, which was a one-page summary of the crime lab's test of the crystal substance found that field-tested positive for methamphetamine.

The trial court denied the State's request for a continuance and dismissed the case, concluding that under CrR 4.7, the State mismanaged the case when it failed not only to provide the name of the correct lab technician but also to provide a copy of the correct lab report.

ANALYSIS

The State conceded that it mismanaged discovery on a motion for reconsideration before the trial court, and does not otherwise appeal the trial court's conclusion that it mismanaged the case and violated the discovery order.¹ The State only argues that the trial court erred in concluding that the State's discovery violations prejudiced Bange to the extent that dismissal

¹ Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994), and we limit review to determining whether the findings of fact support the conclusions of law. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

under CrR 4.7 was appropriate. We agree that the State's mismanagement did not prejudice Bange's right to a fair trial and, accordingly, we hold that the trial court erred in denying the State's continuance and in dismissing the case.

Under CrR 4.7(h)(7)(i), the trial court may grant a continuance, dismiss the action, or enter another appropriate order as a sanction for failure to comply with a discovery order. The purpose of the rule is to protect against surprise that may prejudice the defendant. *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992), *review denied*, 121 Wn.2d 1019 (1993). The trial court has discretion in dealing with violations of a discovery order, and we review only for a manifest abuse of discretion. *Smith*, 67 Wn. App. at 851. A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Dismissal for violating a discovery order is an extraordinary remedy. *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). The court rules clearly allow the trial court to grant a continuance "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2); *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

The State contends that the trial court abused its discretion by dismissing Bange's delivery charge because granting the State's continuance would not have prejudiced Bange. Bange maintains that there was no error because the State's mismanagement impermissibly forced her to choose between prejudicing either her right to a speedy trial or her right to counsel who had sufficient opportunity to prepare a defense. See *State v. Michielli*, 132 Wn.2d 229, 245-46, 937

P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving his right to speedy trial or right to effective assistance of counsel).

We agree with the State that the trial court erred in undertaking the extraordinary remedy of dismissal when granting the State's continuance would not have prejudiced Bange. *See, e.g., State v. Ramos*, 83 Wn. App. 622, 638, 922 P.2d 193 (1996) (dismissal improper where speedy trial had not tolled and defendant would not suffer prejudice). First, a brief continuance to afford the State discovery would not have interfered with Bange's speedy trial right because Bange's trial began within the speedy trial period and sufficient time remained for a brief continuance. “[F]or speedy trial purposes, a trial commences when the case is assigned or called for trial and the trial court hears and disposes of preliminary motions.” *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). Bange had 13 days before her speedy trial expired; thus, a brief continuance would not have pushed the start of trial beyond such expiration.

Second, nothing in the record suggests that 13 days was insufficient for her counsel to prepare an adequate defense. As the late discovery would not have interjected any new facts into the case, 13 days was more than adequate. Bange had the same defense counsel from the beginning, who knew that the controlled substance had field-tested positive for methamphetamine and who knew that a crime lab witness would testify. *Smith*, 67 Wn. App. 854-55 (no prejudice when defendant had notice of evidence prior to the late discovery disclosure).

The circumstances here do not resemble the egregious facts in the cases Bange relies on to argue that her counsel would not have adequate time to prepare a defense. In those cases, substantial prejudice was apparent. *State v. Chichester*, 141 Wn. App. 446, 456-59, 170 P.3d

583 (2007) (upholding dismissal where State's scheduling problems prevented prosecutor from trying the case and prosecutor refused alternatives to a continuance); *State v. Stephans*, 47 Wn. App. 600, 603-04, 736 P.2d 302 (1987) (upholding dismissal where the State failed to provide a formal witness list and encouraged two witnesses to disobey a court order); *State v. Sulgrove*, 19 Wn. App. 860, 862-63, 578 P.2d 74 (1978) (upholding dismissal where State failed to comply with a last minute discovery order that compromised the defendant's speedy trial).

Instead, the facts here are analogous to other cases involving belated scientific testing, which were anticipated from the inception of the proceedings and the results of which were not a surprise. *See, e.g., Cannon*, 130 Wn.2d at 328-29. (no prejudice when defendant had notice from outset that State would rely on forensic evidence from blood samples and paint chips); *State v. Woods*, 143 Wn.2d 561, 584, 23 P.3d 1046 (no prejudice when delayed forensic test results did not inject new facts into trial), *cert. denied*, 534 U.S. 964 (2001). Like the defendants in *Cannon* and *Woods*, Bange had notice that the State intended to use the results from a lab technician to prove that Officer Byrnes purchased a controlled substance that Bange delivered. Bange cannot demonstrate interjection of new facts into the case that compromised her ability to defend herself.

The trial court erred in dismissing the case when a continuance would not have prejudiced Bange. The State's mismanagement was not willful but rather a mere oversight. Bange still had 13 days left until her speedy trial expired and her defense counsel could easily anticipate the fruits the discovery requested. The trial court should have considered less drastic remedies, such as granting a shorter continuance than requested. *See, e.g., State v. Koerber*, 85 Wn. App. 1, 4 n.2, 931 P.2d 904 (1996) (trial court abused discretion in dismissing case when it failed to consider

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less drastic alternatives). Absent a showing of prejudice to Bange on the record, the trial court abused its discretion in dismissing the case.

Reversed and remanded for trial.

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.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.