

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

GEORGE ALAN KELLY,
Appellee.

No. 2 CA-CR 2024-0158
Filed January 22, 2026

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Santa Cruz County
No. S1200CR202300026
The Honorable Thomas Fink, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellant

Brenna Larkin, Tumacacori
Counsel for Appellee

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MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Presiding Judge Kelly and Judge Brearcliffe concurred.

S K L A R, Judge:

¶1 After a hung jury resulted in a mistrial of murder and assault charges against George Alan Kelly, the trial court dismissed the case with prejudice. The state appeals. It argues that the dismissal should have been without prejudice. As we explain below, however, we conclude that the court did not abuse its discretion in dismissing the case with prejudice. We therefore affirm that decision.

BACKGROUND

¶2 On his ranch in January 2023, Kelly fired his rifle at a group of people he believed were drug “mules,” killing one of them. Kelly was charged with one count of second-degree murder and two counts of aggravated assault. The state later moved to dismiss one of the assault counts due to the alleged victim’s unavailability, and the trial court granted its motion.

¶3 In April 2024, after a nineteen-day trial, the jury was unable to reach a verdict on either count, and the trial court ordered a mistrial. The state moved to dismiss the case, explaining that it had decided not to seek a retrial due to “unique circumstances and challenges surrounding this case.” The court indicated that it would grant the motion and set a hearing to determine whether the dismissal would be with or without prejudice. After briefing and oral argument, the court dismissed the case with prejudice. The state appealed.

DISMISSAL WITH PREJUDICE

¶4 The state argues that the trial court erred by dismissing the case against Kelly with prejudice. We review the court’s ruling for an abuse of discretion. *State v. Huffman*, 222 Ariz. 416, ¶ 5 (App. 2009). A court abuses its discretion “when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” *State v. Mohajerin*, 226 Ariz. 103, ¶ 23 (App. 2010)

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(quoting *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 14 (App. 2003)). We accord “great deference to trial court determinations of conflicting procedural, factual or equitable considerations.” *Huffman*, 222 Ariz. 416, ¶ 18 (quoting *State v. Winegar*, 147 Ariz. 440, 445 (1985)).

¶5 Rule 8.2(c) of the Arizona Rules of Criminal Procedure provides that “a trial ordered after a mistrial . . . must begin no later than 60 days after entry of the court’s order.” Under Rule 8.6, if a trial court determines that a time limit established by the rules has been violated, it “must dismiss the prosecution with or without prejudice.” Similarly, Rule 16.4(d) instructs that dismissal of a prosecution is without prejudice “unless the court finds that the interests of justice” require dismissal with prejudice. *State v. Leota*, 256 Ariz. 351, ¶ 23 (App. 2023); see also *Huffman*, 222 Ariz. 416, ¶ 10 (rule “applies broadly to all dismissals”).

¶6 The state challenges the applicability of Rules 8.2(c) and 8.6. It does so because it disagrees with a finding by the trial court that “the Rule 8-time limits have expired.” The court was presumably referring to the fact that when it issued its dismissal order, more than sixty days had passed since the mistrial. The state argues that this finding was error because, among other things, the sixty-day limit did not pass until after argument on the motion to dismiss. Kelly does not meaningfully challenge this argument. We therefore assume without deciding that no Rule 8 violation occurred, such that Rule 8.6 is inapplicable. It follows that our analysis is governed solely by Rule 16.4’s “interests of justice” standard. Notwithstanding its conclusion about Rule 8, the trial court also followed that standard. We turn to its analysis now.

¶7 Under Rule 16.4, dismissal with prejudice is justified “if the defendant can show that the state delayed for the purpose of gaining a tactical advantage over him or to harass him, and if he can show that he actually suffered prejudice as a result.” *State v. Garcia*, 170 Ariz. 245, 248 (1991). In assessing whether dismissal should be with or without prejudice, trial courts can consider factors from Sixth Amendment case law such as the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Leota*, 256 Ariz. 351, ¶ 24 (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (alteration in *Barker*). As long as a court “has considered the relevant competing interests of the defendant and the state,” it is not limited to a specific list of factors to balance. *Huffman*, 222 Ariz. 416, ¶ 15 (App. 2009).

¶8 The most important factor, however, is prejudice to the defendant. *State v. Gilbert*, 172 Ariz. 402, 404 (App. 1991). A court must

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make a “particularized finding” that a dismissal without prejudice “would result in some articulable harm to the defendant.” *State v. Wills*, 177 Ariz. 592, 594 (App. 1993). Actual prejudice requires the defendant to “show[] that the delay impairs his or her ability to defend against the State’s charges.” *Leota*, 256 Ariz. 351, ¶ 27. Speculative or general arguments, such as witness memory loss, are insufficient to establish prejudice. *Id.* ¶ 29 (defendant did not establish prejudice when she “failed to argue or show how a witness’s specific memory loss harmed her defense”).

¶9 Here, as to the length of and reason for the delay, the trial court concluded that the state’s interest in retrying Kelly at some undetermined future date was to gain a greater tactical advantage. The state had pointed to the possibilities that: (1) Kelly might make incriminating statements to the media; (2) new witnesses or evidence might be discovered; (3) peremptory strikes might be permitted in the future, which could affect the jury’s composition; or (4) “the political situation may change and that may change the attitudes of jurors.” The court found that these asserted interests were speculative and illusory. It pointed to the fact that Kelly has consistently maintained his innocence and that the initial investigation was thorough, including cooperation from one alleged victim and the Mexican Consulate. It also found no reasonable probability that a theoretical restoration of peremptory strikes or a change in public opinion would change the result of a future trial. This is especially true because, as was publicly reported, the jury voted 7-1 to find Kelly not guilty. *C.f. Huffman*, 222 Ariz. 416, ¶ 16 (“adequate basis” for trial court to conclude retrial would have different result when first jury voted 11-1 or 10-2 in favor of conviction).

¶10 The trial court also weighed the state’s asserted interests against the possibility of prejudice to Kelly. It found that a later retrial would impair Kelly’s ability to participate in his defense due to his older age, failing health, and memory loss. It concluded that the interests of justice would not be advanced by dismissal where “the only thing to be accomplished” would be “the harassment of the Defendant.”

¶11 In challenging this ruling, the state first argues that the trial court improperly imposed upon it the burden of showing why dismissal should be without prejudice. It appears to argue that the court started with the presumption that dismissal should be with prejudice and thus failed to properly balance the conflicting interests involved. In response, Kelly argues that the court properly evaluated a range of factors, including the

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length and reason for any delay, whether the state acted for tactical advantage, and actual prejudice.

¶12 We disagree with the state's assessment of the trial court's ruling. Although most of the court's analysis addressed the state's asserted interests in a retrial, it does not follow that the court improperly placed the burden on the state. Rather, the court was simply addressing the state's arguments, which concerned the relevant factors from Sixth Amendment case law of the length of the delay and the reason for it.

¶13 As to the factors, we conclude that the trial court did not abuse its discretion in applying them. It had presided over a nineteen-day jury trial in which it heard witness testimony and was able to assess the strengths and weaknesses of the investigation. Because the court was in a better position to "assess the impact of what occurs before [it]," we defer to its findings. *See id.* ¶ 18 (quoting *Winegar*, 147 Ariz. at 445). And we agree that the state's asserted interests are speculative rather than based on possibilities that are reasonably likely to occur, especially in the near future. The court reasonably understood the state as seeking a tactical advantage.

¶14 The state also argues that the trial court overstated the potential prejudice to Kelly. Specifically, it argues that emotional suffering, annoyance or inconvenience, and the financial burdens of preparing for a second trial are not sufficient harms to justify dismissal with prejudice. However, while our case law provides that these types of harms can be insufficient where they are merely generalized, the court explained why they are specifically prejudicial here. It found that the potential for fading memories was serious, given that Kelly was seventy-five years old at the time of the dismissal, and "experiencing senility and memory loss." This was especially prejudicial given that the state offered no potential timeline for a retrial and that the murder charge carried no statute of limitations. *See* A.R.S. § 13-107(A). We thus find no abuse of discretion in the court's prejudice analysis and consequently in its dismissal with prejudice. *See Huffman*, 222 Ariz. 416, ¶ 15 (court's duty satisfied "as long as it has considered the relevant competing interests of the defendant and the state in light of the particular circumstances of each case").

DISPOSITION

¶15 For the foregoing reasons, we affirm the decision of the trial court.