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NO. 100260-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(COURT OF APPEALS DIV I, NO. 81420-6-I)

CHRISTY DIEMOND,

Appellant,

v.

KING COUNTY,

Respondent.

RESPONDENT KING COUNTY'S ANSWER TO PETITION FOR REVIEW

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TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Washington Regulations and Rules

I. IDENTITY OF RESPONDENT

King County is the respondent in this case.

II. COURT OF APPEALS DECISION

In an unpublished decision, the Court of Appeals ruled that Diemond's appeal was untimely as to three of the four orders at issue in this case. These three orders: (1) denied Diemond's motion to continue the summary judgment hearing, (2) granted the County's motion for summary judgment, and (3) denied Diemond's motion to reconsider. *Diemond v. King County.*, No. 81420-6-I, 2021 WL 3910280 (Wn. App. 8/30/2021). The Court also found that the trial court did not abuse its discretion in its ruling on the fourth order at issue here, which denied Diemond's CR 60 motion to vacate because the record supported the trial court's decision. *Id*.

III. COUNTERSTATEMENT OF ISSUE

The court rules do not require a trial court to notify the parties when it enters an order. Here, Diemond was

warned about the summary judgment hearing in an email, the County served Diemond with notice of the summary judgment hearing and briefing at her address of record, and Diemond chose to neither attend the hearing nor submit any briefing beyond a motion to continue. The Court of Appeals found that Diemond's appeal of the orders relating to the summary judgment proceedings was untimely and that the trial court did not abuse its discretion in denying her CR 60 motion. Does this decision present any grounds for discretionary review by this Court under RAP 13.4(b)?

IV. STATEMENT OF THE CASE

1. Diemond made over 45 public records requests to two separate County agencies.

Over three years, Diemond made over 25 PRA requests to the Executive. CP 843. She also made 21 public records requests to the Sheriff's Office between 2011 and 2018. CP 976. Diemond's PRA requests are

often broad and involve large numbers of responsive records. CP 783-86, 723-26, 792-93, 795-97, 819-20, 977, 988-96.

King County Code (KCC) section 2.12.005 defines the Executive Branch and the Sheriff's Office as separate agencies for the purposes of responding to public records requests. King County Code 2.12.005.A, 2.12.230.B; CP 970-75. A request to one agency does not constitute a request to any other agency. *Id*.

2. Diemond sued the Sheriff's Office for alleged PRA violations shortly after submitting her request, while the agency was still responding to her request, and when no final action had been taken on her request.

On February 17, 2015, Diemond submitted a broad public records request to the Sheriff's Office for the personnel file and all communications, including emails, relating to four employees. CP 977, 988-96.

The Sheriff's Office started by working on the employees' personnel files as this was a high priority for

Diemond. CP 977-78, 1000, 1059, 1076-77. Given the sensitive nature of the information contained in personnel files, reviewing each page and making redactions to exempt information required careful review. CP 977. The Sheriff's Office also ran an initial centralized email and voice mail search, locating around 67,000 emails that were potentially responsive. CP 979, 1010-12.

On April 8, 2015, the Sheriff's Office produced a first installment of records consisting of 615 pages and 11 audio files. CP 978,1000. The Sheriff's Office informed Diemond that the second installment of records would be available by May 30, 2015. *Id*.

On May 21, 2015, Diemond filed this lawsuit. CP 848, 943-49. On May 29, 2015, the Sheriff's Office produced a second installment that consisted of personnel-related records. CP 978, 1002-04. By March 2018, the Sheriff's Office had produced 23 installments to Diemond. CP 985, 1000-56.

From the fifth installment through the twenty-third installment, the Sheriff's Office made records available to Diemond via an online record retrieval system called GovQA. CP 985. As of March 2018, Diemond had not accessed records provided by the Sheriff's Office responsive to this request since December 2016. *Id.*

3. Diemond sued the Executive for alleged PRA violations shortly after submitting her requests, while the agency was still responding to her requests, and when no final action had been taken on her requests.

On February 17, 2015, Diemond made a broad request for records to the Executive for the personnel file and all communications, including emails, relating to a former employee of the King County Executive Branch. CP 843, 851-52.

Executive staff started producing this former employee's personnel file because that was Diemond's preference. CP 845. Responding to Diemond's PRA request took a substantial amount of time because

records had to be scanned, converted into a PDF file, and each page had to be reviewed for potential redactions and exemptions. CP 844-46. Staff also researched, gathered, and reviewed documents responsive to Diemond's other pending PRA requests. CP 845-46.

On March 12, 2015, Diemond submitted another broad PRA request to the Executive for the personnel file and all communications, including emails, relating to a former King County Sheriff's Office employee. CP 846, 926-30. The Executive had responsive records because they provide personnel-related services for all King County employees. CP 782-83.

The Executive provided the first installments of records responsive to these two requests on April 22, 2015. CP 846, 951. These installments included various personnel-related records. CP 846-48. Second installments of records for both requests were provided on May 8, 2015. CP 846-48, 952. The Executive notified

Diemond that the next installments of records for both requests would be provided to Diemond in two weeks. CP 952.

After this lawsuit was filed, the Executive continued to provide Diemond with regular installments of records. CP 723-81, 846-48, 951-69. The Executive provided Diemond with numerous installments of records over the next several years. *Id.*

4. Over three years after this lawsuit was filed and after extensive discovery, the County served its summary judgment motion on Diemond at the address she provided in her notice of appearance.

Despite having received records from the Sheriff's Office and the Executive, with promises of additional installments, Diemond initiated this lawsuit on May 21, 2015. CP 978, 848, 943-49.

After extensive discovery and nearly three years after the filing of this lawsuit, King County noted a motion for summary judgment for April 11, 2018. CP 615-16,

619-28, 630-39, 641-53. The County's motion was served on Diemond's prior counsel, Michael Kahrs. CP 616, 655-65. The County then struck its motion for summary judgment and it was not heard. CP 693.

In April 2018, Kahrs and counsel for the County signed an electronic service agreement for this case under CR 5(B)(7). CP 1181-83. Paragraph 6 of the agreement made clear that "[n]othing in this stipulation shall preclude a party from serving another party by traditional means as described in CR 5." CP 1183. The service agreement signed by Kahrs and the County was the only service agreement in this case. CP 1130.

On August 24, 2018, Diemond informed the County that her attorney had withdrawn and that she was representing herself. CP 616, 667-71. Diemond filed a Notice of Appearance, provided a mailing address, and requested that any further correspondence in this case be directed to her at that address. *Id*.

On September 7, 2018, the County notified Diemond by email of its intention to re-note its summary judgment motion for October 12.[1] CP 1130, 1191-92. Three days later, on September 10, 2018, the County emailed Diemond that it intended to re-note its summary judgment motion for October 19 due to a scheduling conflict. *Id*. The same day, Diemond replied "[t]hanks for letting me know." *Id*.

King County met with Diemond on September 12, 2018, to discuss settling this case but the parties did not reach a resolution at that meeting. CP 1130.

On September 19, 2018, the County re-noted its summary judgment motion for October 19, 2018. CP 693. Also, on September 19, the motion was served on the address Diemond provided in her Notice of Appearance.

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[1] In relevant part, the County's email to Diemond stated "We are hopeful we will settle this case; however, out of an abundance of caution we plan to re-note our motion for summary judgment to be heard on October 12th." CP 1192 (emphasis added).

CP 1130, 1198-1209. The County's motion was identical to the summary judgment motion that had been filed and served on her counsel months earlier. CP 1169-79, 1198-1209.

The County's summary judgment motion addressed the timelines of the County's response to Diemond's PRA requests under RCW 42.56.520 and RCW 42.56.550(2). CP 1101-04. It addressed the premature nature of Diemond's lawsuit under RCW 42.56.550(1) because neither the Sheriff's Office nor the Executive had taken any final action denying Diemond access to a record. CP 1099-1101. The County also argued that Diemond had abandoned her request to the Sheriff's Office under RCW 42.56.120(4). CP 1104.

5. Diemond filed no substantive response to the County's summary judgment motion. Instead, she asserted she was unavailable for any court proceedings from one week prior to the summary judgment hearing "to an undetermined time," and simultaneously stated she was unavailable for at least three months.

On October 12, 2018, Diemond filed a notice of unavailability and a motion for continuance of the summary judgment hearing scheduled for October 19. CP 707-15. Diemond asserted that she was "unavailable for any hearings, trials, motions, or any other required court appearance[s]" from October 12, 2018, "to an undetermined time." CP 714. With no compelling explanation, Diemond simultaneously stated that the earliest she could be available for a court hearing was January 25, 2019. CP 712. Diemond did not file any response to King County's summary judgment motion.

On October 19, 2018, Snohomish County Superior Court Judge Marybeth Dingledy denied Diemond's motion for a continuance of the summary judgment hearing and granted King County's unopposed motion for summary judgment. CP 610-13. Diemond did not appear at the hearing. CP 1358.

On November 2, 2018, Diemond filed an untimely "Request for Reconsideration RE: King County Summary Judgment." CP 594-95. King County opposed Diemond's request for reconsideration. CP 1356-60. On January 17, 2019, Judge Dingledy denied Diemond's request for reconsideration. CP 563.

6. Diemond's CR 60 motion, which argued that the trial court, the clerk's office, and opposing counsel had treated Diemond unfairly, was denied.

On February 14, 2019, Diemond filed a CR 60 Motion to Vacate, noting it before Snohomish County Civil Presiding Judge Bruce Weiss for February 22, 2019, only five court days later. CP 544. King County opposed the motion because it raised many meritless, factually inaccurate and legally deficient arguments. Judge Weiss declined to hear the motion and directed Diemond to note it before Judge Dingledy. CP 22-23. The motion was reset before Judge Dingledy for March 5, 2019. CP 16-

17. On March 18, 2019, Judge Dingledy denied Diemond's motion to vacate. CP 1-2.

7. Diemond's appeal was untimely except as to the order denying her CR 60 motion.

On February 21, 2019, while her CR 60 motion was pending, Diemond filed a Notice of Appeal to the Washington State Supreme Court. CP 30-31. On March 8, 2019, Diemond filed a Statement of Grounds for Direct Review pursuant to RAP 4.2(a). On March 21, 2019, Diemond filed an amended notice of appeal to the Supreme Court. King County answered Diemond's Statement of Grounds on March 22, 2019.

On July 19, 2019, King County filed a motion to dismiss three of the issues in Diemond's appeal on procedural grounds. In September 2019, this case was transferred to the Court of Appeals, including a decision on King County's Motion to Dismiss. On May 26, 2020, the Court of Appeals denied the County's motion to

dismiss because Diemond's CR 60 appeal was timely but noted that the parties could address the scope of review in their briefing on the merits.

8. Diemond's motion to supplement the record was properly denied by the Court of Appeals and by a Commissioner of this Court.

On October 23, 2020 the Court of Appeals denied a motion to supplement the record brought by Diemond's counsel. Diemond sought to add documents not considered by the trial court and that had no bearing on the issues in this case. Diemond also failed to provide any cogent explanation for how the requirements of RAP 9.11 and ER 201 had been met.

On June 4, 2021 Commissioner Michael Johnston of this Court denied Diemond's motion for discretionary review of the Court of Appeals decision denying her motion to supplement the record.

9. Diemond's appeal was denied.

Diemond's appeal proceeded, and the Court of

Appeals affirmed in an unpublished decision on August 30, 2021. The Court found that Diemond's appeal of the orders denying her motion to continue the summary judgment hearing, granting the County's motion for summary judgment, and denying her motion to reconsider was untimely. *See Diemond v. King County.*, No. 81420-6-I, 2021 WL 3910280 (Wn. App. 8/30/2021). The Court also determined that the trial court did not abuse its discretion when it denied her CR 60 motion to vacate its order granting summary judgment because the record supported the trial court's decision. *Id*.

Diemond filed a Petition for Discretionary review with this Court on September 30, 2021.

V. ARGUMENT

1. Standard for Discretionary Review

RAP 13.4 provides four bases for this Court to consider when determining whether to grant discretionary review of a Court of Appeals decision:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Diemond asserts that the Court of Appeals' ruling in this case meets all the above criteria. *See* Petition, at 17-18. She provides no persuasive analysis supporting this claim. Diemond's petition should be rejected for the reasons set forth below.

2. <u>There is No Conflict Between the Court Rules and a Litigant's Obligation to Pursue Her Own Case.</u>

The Court of Appeals decision is consistent with existing case law and presents no significant question of constitutional law under RAP 13.4(b). Without any

persuasive authority, Diemond asserts the trial court should have proactively notified her of the outcome of the summary judgment hearing for which she chose not to appear.

To support this contention, Diemond relies on cases analyzing obsolete court rules and that are not applicable. Two of these cases involved outdated court rules that required service on a party before the appeal window began. *See Coleman v. Dennis*, 1 Wn.App. 299, 461 P.2d 552 (1969); *State ex rel. L. L. Buchanan & Co. v. Washington Pub. Serv. Comm'n*, 39 Wn.2d 706, 237 P.2d 1024 (1951).

Diemond reliance on a federal criminal case where a court rule required the trial court to mail its order to the petitioner or his attorney, which is completely different from the circumstances in this case, is also misplaced. *Rosenbloom v. United States*, 355 U.S. 80, 78 S. Ct. 202, 2 L. Ed. 2d 110 (1957). She also argues that *Wright v.*

Washington State Dep't of Labor & Indus., 197 Wn.App. 1017 (2016) (unpublished), supports her position; however, there the Department of Labor & Industries conceded an inmate's administrative appeal was timely where delays were caused by the prison legal system. This case is inapplicable to the matter at hand.

Finally, Diemond incorrectly asserts that the Court of Appeals' decision here conflicts with this Court's ruling in *Denney v. City of Richland*, 195 Wn.2d 649, 462 P.3d 842 (2020). But the primary issue in *Denney* was whether a summary judgment order resolving all substantive legal claims is a "final judgment" that started the 30-day window to appeal, despite a later money judgment. *Id*. at 651-58. This Court found Denney's appeal was timely because of "excusable error" interpreting reasonably confusing court rules – CR 54 and RAP 5.2(a)(1). *Id*. at 658-60.

In contrast, there is no question that County's motion for summary judgment sought and obtained a final judgment of dismissal in this case and that Diemond was aware of that fact and chose to neither appear for the hearing nor respond to the motion. Further, she took no action to immediately determine the outcome of the hearing. None of the cases Diemond relies on involve similar facts or similar lack of diligence by the appealing party and thus do not conflict with the Court of Appeals' decision in this case.

Moreover, the denials of Diemond's motion to continue the summary judgment and motion for reconsideration do not involve issues of substantial public interest under RAP 13.4(b). These rulings were in keeping with established legal standards and compliance with court rules, involve facts particular to this case, and do not affect anyone other than Diemond.

Finally, Diemond makes numerous assertions about exculpatory *Brady* material relating to her criminal convictions, but these arguments have no bearing on this PRA lawsuit. Significantly, the Court of Appeals has rejected, and this Court has declined to further review, Diemond's claims alleging exculpatory *Brady* material. App. A., p. 827-850.

3. Diemond's Claims about the Appearance of Fairness and her CR 60 Motion Do Not Warrant Review.

Without citing any legal authority, Diemond claims the Court of Appeals is "out of touch with what 'reasonable' people consider an appearance of fairness" and asks this Court to "state the law required for judicial notice of connections and perceived conflicts with parties including when the judge was prosecuted by and is on probation with the government entity for whom she is

ruling."[2] *See* Petition at 27-28. This argument omits any discussion of RAP 13.4 criteria. It also ignores that Diemond provided the trial court with no substantive opposition to King County's summary judgment motion. This barebones argument is insufficient to merit review.

VI. CONCLUSION

Diemond presents no credible argument that review is warranted under RAP 13.4(b). For these reasons, King County respectfully asks this Court to deny Diemond's petition for review.

[2] Diemond routinely engages in the tactic of attacking the integrity of individuals working within the court system. For example, in her personal restraint petition, she claimed that (1) transcripts and evidence from her criminal trial had been altered, (2) the trial judge "attempted to use his position as the judge of criminal court to issue a phony bench warrant" for a defendant in an unrelated case, and (3) her case should be decided by Division Two of the Court of Appeals. App. A. Division One of the Court of Appeals found that no basis for relief in Diemond's allegations, many of which were based on speculation. *Id*. Diemond's allegations against a judicial officer from Snohomish County Superior Court and various King County personnel are likewise unfounded. *See also* October 12, 2017, Ruling Denying Review Wash. Sup. Ct. Case No 94697-3 (denying Diemond's request to "recuse all Division One judges").

WORD COUNT

I certify that this memorandum contains 3,142 words in compliance with RAP 18.17.

DATED this 4th day of November, 2021.

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Certificate of Service

I, Liah Travis, certify under penalty of perjury of the laws of the state of Washington that on November 4, 2021, a true and correct copy of the foregoing was filed with the Washington State Court of Appeals Court using the Court's e-filing system, which will automatically provide notice to all required parties.

By: _____
Liah Travis, Paralegal

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

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APPENDIX A

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 76147-1-I
CHRISTY RUTH DIEMOND, Petitioner.	)	ORDER DISMISSING PERSONAL RESTRAINT PETITION

Christy Diemond filed this personal restraint petition challenging the judgment and sentence imposed following her conviction for two counts of animal cruelty in King County No. 11-1-06177-5 SEA. Diemond contends: (1) the State withheld exculpatory material evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (2) the prosecutor committed misconduct; and (3) she received ineffective assistance of trial and appellate counsel. Diemond also makes various allegations of judicial bias and a conspiracy to fabricate evidence. To successfully challenge a judgment and sentence by means of a personal restraint petition, a petitioner must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Because Diemond's petition presents no arguable basis for collateral relief, it must be dismissed.

The facts are taken from the unpublished opinion of this court in Diemond's direct appeal, State v. Diemond, noted at 187 Wn. App. 1005 (2015). Diemond owned two elderly horses, Bud and Brandy, pastured at her home in Woodinville. Jennie Edwards, the director of a horse rescue group called Hope for Horses,

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noted the horses' poor condition and alerted the King County Sheriff's Department. King County Sheriff's Sergeant Bonnie Soule and King County animal control officer Jenee Westberg[1] both noted that the horses were gaunt, appeared to have been eating bark off trees, and had infected wounds. Diemond stated that she was overwhelmed, did not have any money, and would give up the horses. Dr. Hannah Mueller, an equine veterinarian, testified the horses were neglected, emaciated and had not received necessary medical care. A jury convicted Diemond of two counts of animal cruelty.

After the verdict, but prior to sentencing, the State learned of potential impeachment evidence against Westberg, including a shoplifting arrest in 2006, a 2008 deferred sentence for attempted drug possession that was dismissed in 2009, and a four-day suspension from work for lying about her attendance at a training and the number of hours she had worked on a particular shift. Diemond moved for a new trial based on ineffective assistance of counsel and a potential Brady violation. The trial court denied the motion for a new trial.

In her direct appeal, Diemond argued that the trial court erred in denying her motion for a new trial. This court held that Diemond failed to establish a Brady violation because the impeachment evidence was not material. The focus of the trial was the testimony of medical experts; the testimony presented by Westberg

[1] Diemond notes that the names of both Soule and Westberg are misspelled in this court's opinion in her direct appeal, as "Sole" and "Wesenberg," respectively. This appears to be due to a mistake made by the court reporter in transcribing the names accurately.

as to her observations was "merely cumulative as the condition of the horses was observed by both Sgt. Sole [sic] and Dr. Mueller."

1. Brady Violations

Diemond again argues that the State's failure to disclose the impeachment evidence regarding Westberg was a Brady violation. But a petitioner may not renew issues that were considered and rejected on direct appeal unless the interests of justice require relitigation of those issues. In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "A personal restraint petition is not meant to be a forum for relitigation of issues already considered on direct appeal[.]" In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Nor may a petitioner simply revise a previously rejected argument by alleging different facts or by asserting different legal theories. Lord, 123 Wn.2d at 329. Diemond fails to establish that the interests of justice require allowing her to relitigate this claim.[2]

Diemond also claims that the State failed to disclose that King County Sheriff's Detective Robin Cleary was terminated for cause in late 2014, while Diemond's case was pending appeal. In a criminal case, the prosecution must disclose to the defense any evidence that is favorable to the accused and material

[2] Diemond contends that that she has since discovered other impeachment evidence regarding Westberg, including that Westberg was allegedly a "person of interest" in other crimes. Because this court determined in Diemond's direct appeal that Westberg's credibility was not critical to the State's case, these allegations, even if true, do not serve as a basis for reconsidering the claim.

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to guilt or punishment. Brady, 373 U.S. at 87. Evidence is material only if there is a "reasonable probability" that, had the evidence been disclosed, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682.

In order to prevail on a Bradv claim, a defendant must show three things: (1) that the evidence in question is favorable to the defendant "either because it is exculpatory, or because it is impeaching"; 2) that the evidence was "suppressed by the State, whether willfully or inadvertently"; and 3) that "prejudice must have ensued." State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011).

Here, Diemond fails to establish a Brady violation. Detective Cleary did not testify at trial. She testified only in a pretrial hearing as to the admissibility of statements made by Diemond. The State did not introduce these statements at trial. Thus, Diemond does not establish that any alleged misconduct by Cleary would have had any effective on the verdict.

2. Prosecutorial Misconduct

Diemond also raises wide-ranging claims of prosecutorial misconduct, including that the State (1) presented false evidence; (2) failed to produce photos prior to trial; (3) failed to file a notice of appearance; (4) conspired to fabricate evidence regarding Diemond's mother; (5) failed to disclose that a prosecutor had received an employment reprimand; (6) failed to call Diemond's veterinarian to testify; (7) improperly told the jury in closing argument that one of the horses was

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currently healthy when it in fact had been euthanized; (8) euthanized the horses to cover up evidence; (9) altered transcripts; (10) failed to produce invoices and other financial records regarding care of the horses; and (11) enlisted Diemond's ex-boyfriend to break into Diemond's house and steal her hair follicles and identity.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If the defendant objected at trial, he or she must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). However, where defense counsel fails to object, any error is waived unless "the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61.

However, a personal restraint petition must set out the facts underlying the claim and the evidence available to support the factual assertions. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). Bare assertions and conclusory allegations are not sufficient to command judicial consideration and discussion in a personal restraint proceeding. Rice, 118 Wn.2d at 886.

Here, Diemond fails to meet her burden to establish misconduct. Diemond's claims that "all the State's evidence was fabricated" or that the State altered transcripts, destroyed evidence, failed to produce financial records and engineered a residential burglary are not supported by any credible evidence. And Diemond

does not identify how she was prejudiced by the prosecutor's alleged failure to file a notice of appearance or provide exhibits.

Regarding the prosecutor's closing argument, the statement that the horses were doing fine was not supported by the record. There was no evidence in the record of the horses' current condition at all. The trial court instructed the jury:

> Members of the jury, during closing argument Ms. Nave made a statement about the current condition of the horses. There is no evidence in this trial from any witness about the current condition of the horses. So that is stricken. And you shall not consider her argument on that on the current condition of the horses.

"Because we presume that juries will ordinarily follow the court's instructions, such an instruction would have substantially alleviated any prejudice caused by the remark." State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000).

Finally, while Diemond includes a disciplinary notice involving the trial prosecutor's failure to file cases by a filing deadline, Diemond does not establish how she would have been prejudiced thereby, nor whether such evidence would have been admissible in her case.

3. Ineffective Assistance

Diemond contends that she received ineffective assistance of trial counsel. Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, Diemond must demonstrate both (1) that her attorney's representation was deficient, i.e., that it fell below an objective standard

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of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). An attorney's performance is not deficient if it can be characterized as part of a legitimate trial strategy. McFarland, 127 Wn.2d at 336. There is a strong presumption that a defendant received effective representation. McFarland, 127 Wn.2d at 336.

Diemond contends that trial counsel Dave Roberson was ineffective for failing to investigate Westberg's background prior to trial. But it is unclear what information would have been available or admissible had Roberson done so. As the trial court stated in denying Diemond's motion for a new trial, Westberg's theft conviction and drug use would likely not have been admissible. And while Westberg's alleged dishonest conduct at work would have been admissible, the likelihood that Roberson, even through reasonable diligence, would have discovered the existence of the disciplinary proceedings on his own was not high.

Diemond contends that Roberson was ineffective for failing to call Diemond's veterinarian as a witness and failing to secure the testimony of a photography expert to support Diemond's belief that the photographs had been

altered. But Diemond presents no evidence to show what either of these witnesses would have testified to, other than to assert that it would be somehow exculpatory. Competent, admissible evidence, such as affidavits, is required to establish facts entitling a petitioner to relief.[3] Rice, 118 Wn.2d at 886.

Diemond contends that Roberson failed to show a video that she took of the horses the day that they were removed to Dr. Mabrey, the defense expert. She contends that the video shows the horses galloping around instead of standing lethargically, as Dr. Mueller had testified. But Dr. Mueller's testimony indicates that Diemond was not recording when she first noticed the horses standing lethargically. Diemond did not begin recording until Dr. Mueller attempted to catch the horses to examine them, at which point the horses began running away. Thus, Diemond fails to establish that the video was material to her defense, since even the State's witnesses acknowledged that the horses "were able to have bursts of energy when pressured."

Diemond contends that Roberson failed to establish the actual age of the horses. Dr. Mueller testified that Bud appeared to be between 20 to 25 years old based on his teeth, and that she did not know how old Brandy was, but admitted that both horses certainly could have been in their late 30s. And Dr. Mabrey testified that Brandy was approximately 37 years old. It is undisputed that all of the

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[3] Cf. In re Pers. Restraint of Khan, 184 Wn.2d 679, 689, 363 P.3d 577 (2015) (petitioner entitled to a reference hearing to develop his claim that defense counsel was ineffective for failing to secure petitioner an interpreter, based on a "sworn declaration, supported by affidavits from acquaintances, that creatives a cognizable question of

evidence showed testified that the horses would have been considered "old" or "elderly." Diemond fails to establish that if the jury had been instructed as to their actual ages, the outcome of the proceedings would have been different.

Diemond claims that Roberson "failed to pursue any exculpatory evidence of fraud," "systematically, with malice and premeditation, in conspiracy with the State's numerous actors and their perjured witnesses, suppressed every bit of exculpatory evidence found prior to trial," "misrepresented material facts to the court and to the jury" and "violated attorney-client privilege repeatedly." These claims are too vague and conclusory to warrant review.

After trial, attorney Ramona Brandes was appointed to represent Diemond in filing a motion for a new trial. Diemond argues that Brandes withheld and suppressed evidence, never responded to emails or phone calls, missed court deadlines, and attempted to intimidate Diemond, refused to address certain issues with the court, and intentionally filed false transcripts. None of these claims are supported by credible evidence.

Diemond subsequently retained attorney Jeff Jared to file a motion regarding her allegations that photographs were doctored or altered by the State. Diemond argues that Jared withheld and suppressed evidence and overcharged her. Again, Diemond fails to present any credible evidence to support these assertions.

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whether he did need that assistance" and the court's own review of the verbatim report of proceedings, which indicated that petitioner clearly did not understand English well.)

Finally, Diemond contends she received ineffective assistance of appellate counsel because her court-appointed appellate counsel "withheld, concealed and secreted exculpatory evidence" and "made false statements." These claims are simply too conclusory to warrant review.

4. Judicial Bias

Diemond contends that Judge Jim Rogers, who presided over the trial: (1) interfered with the jury's viewing of a defense exhibit; (2) failed to declare a mistrial after the prosecutor's inaccurate statement in closing argument regarding the horse's condition; (3) "feigned that he could not find" the order of another judge in an unrelated case suppressing evidence collected by Westberg; (4) improperly denied Diemond's motion for a new trial based on the alleged Brady violation; and (5) "attempted to use his position as the judge of criminal court to issue a phony bench warrant" for a defendant in an unrelated case. Diemond's failure to cite to relevant portions of the record renders these claims largely unreviewable. And, as previously discussed, it was not error to deny a mistrial or a new trial.

Diemond also makes allegations of bias and misconduct against two other judges who presided over trials of other, unrelated defendants who were charged with animal cruelty. Diemond fails to establish that she was prejudiced thereby.

5. Other Claims

Diemond alleges that the King County Sheriff's Office lacked jurisdiction to respond to a complaint on her property, located in the City of Woodinville. But Diemond cites no authority in support of this proposition.

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Diemond claims that the photographs offered into evidence were altered as to when they were taken. This claim was raised and rejected in Diemond's direct appeal. This court held that "the witnesses all testified that the photographs accurately depicted their memory of the day and the condition of the horses, all of which the jury heard" and "[t]he case did not rise or fall on the photographs." And none of Diemond's claims regarding the photographs are supported by any evidence other than her own speculation.

Diemond contends that the verbatim reports of proceeding were altered. She includes several pages of the transcript along with her notes as to how the transcripts should actually read based on her review of the audio recording. But Diemond does not establish how she was prejudiced by any alleged inaccuracies.

Diemond also alleges several conspiracy theories: (1) that Detective Cleary purposely staged a break-in of her work vehicle and engineered the theft of a laptop to conceal evidence; (2) that the King County Prosecutor's Office actively suppressed "the fact that there is full bore an animal sex trade going on" in Enumclaw; (3) that the King County Prosecutor's Office prosecuted Diemond and other innocent property owners under the guise of animal cruelty to create distressed properties; (4) that Hope for Horses targeted innocent horse owners in hopes of making a profit by boarding the horses for King County; and (5) that the director of Hope for Horses reported Diemond to Adult Protective Services (APS) for elder abuse in order to discredit her. These allegations are based only on Diemond's speculation and do not establish any basis for collateral relief.

In her reply brief, Diemond requests that her petition be decided by Division Two of this court. But "[a] personal restraint petition filed in the Court of Appeals must be filed in the division that includes the superior court entering the decision on the basis of which petitioner is held in custody..." RAP 16.8(b). Because Diemond was sentenced in King County, this division is the proper division to decide Diemond's petition.

Finally, Diemond appears to raise new claims in reply, including new allegations of alleged judicial misconduct. But this court generally will not consider issues raised for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 6th day of June, 2017.

Trickey, ACJ
Acting Chief Judge

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

FILED
KING COUNTY, WASHINGTON
FEB - 1 2018
DEPARTMENT OF
JUDICIAL ADMINISTRATION

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 76147-1-I
	)	CERTIFICATE OF FINALITY
CHRISTY RUTH DIEMOND,	)	King County
Petitioner.	)	Superior Court No. 11-1-06177-5 SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington, Division I, filed on June 6, 2017, became final on January 26, 2018. A ruling denying a motion for discretionary review was entered in the Supreme Court on October 12, 2017.

c: Amy R. Meckling
Christy Ruth Diemond

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 26th day of January, 2018

SEAL OF THE COURT OF APPEALS • STATE OF WASHINGTON •

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State of Washington Division I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 71125-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
	)	
CHRISTY R. DIEMOND,	)	
	)	
Appellant,	)	FILED: April 20, 2015

TRICKEY, J. — To prevail on a Brady[1] claim, a defendant must show that the State suppressed evidence favorable to the defendant as a result of which the defendant was prejudiced. Here, there were multiple witnesses to the condition of the two horses that support the defendant's conviction of two counts of first degree animal cruelty. The failure to produce evidence that could be used to impeach a witness whose testimony was cumulative was not material as it did not undermine the confidence in the jury's verdict. We affirm the judgment and sentence.

FACTS

Christy Diemond owned two elderly horses, Bud and Brandy. Both horses were pastured at her property in Woodville. Jennie Edwards, director of a horse rescue group, Hope for Horses, sent an e-mail to Sgt. Bonnie Sole of the King County Sheriff's Department regarding the poor condition of the horses.

Sgt. Sole had extensive familiarity with horses, having owned them continuously since the age of 15 and had also been trained in their proper care and feeding. On Saturday, February 26, 2011, Sgt. Sole went to the property and noted that the horses

[1] Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

were thin and that their blankets did not fit correctly. In fact, the horses appeared very gaunt. Sgt. Sole also testified that bark had been eaten off the trees. This, she said, was an indication that the horses were hungry. Sgt. Sole did not take any photographs, but testified that the photographs presented at court accurately presented the conditions at the time that she saw the horses.

Diemond told Sgt. Sole that she had not yet fed the horses that day even though it was 11:00 a.m. She also stated that she had been trying to find the horses a home, but had been unsuccessful. Sgt. Sole offered to help feed the horses and accompanied Diemond to the garage where the feed was kept. Diemond placed a couple of inches of feed into a bucket and filled the bucket half way with water. She explained that she fed this amount to the horses twice a day, along with some hay, but not much because they were not able to eat it. Sgt. Sole noted that the horses came up and ate rapidly.

Sgt. Sole placed her hand underneath Bud's blanket and felt the rib bones. Sgt. Sole also noticed a sore on Brandy's withers. Sgt. Sole adjusted Brandy's blanket to avoid rubbing the putrid sore which was oozing pus. Diemond told Sgt. Sole that the wound had occurred recently. When Sgt. Sole suggested that Diemond have a veterinarian look at the sore, Diemond explained that she was overwhelmed and did not have any money. Diemond told Sgt. Sole that she was willing to give up the horses.

Sgt. Sole returned about 1:30 p.m., but Diemond was not there. At that time, Sgt. Sole put out more hay for the horses and called animal control. On Sunday, February 27, Sgt. Sole went back on her own initiative bringing hay from home that might be easier for the hoses to eat. The water in the tub was still frozen solid.

Jenee Wesenberg, an animal control officer for King County, responded to the call. She saw the horses in the pasture and made contact with Diemond. Wesenberg noticed their spines sticking up even through the blankets. Wesenberg also noticed that bark had been eaten off the trees and that water was frozen in the trough. Wesenberg felt Bud's thinness, but Brandy would not let her. Wesenberg testified that horses do not eat bark off the trees unless they are hungry. Diemond told Wesenberg that she was having financial difficulties and had not been able to care of the horses and was looking for resources to take them. Wesenberg testified that the horses looked emaciated.

Wesenberg's supervisor suggested that she contact Dr. Hannah Mueller. When Diemond, Wesenberg, and Dr. Mueller all met at the property on Sunday, February 27, 2011, Diemond was still willing to surrender the horses. Diemond said that someone had knifed the horses. While Wesenberg was speaking with her, Diemond asked if she could record the conversation with the veterinarian. Both Wesenberg and Dr. Mueller agreed. Neither had heard the recording.

Diemond explained to them that she feeds two scoops of food, one scoop of senior equine and one scoop of Dairy 16, two times a day for each horse. Dairy 16 is a feed for cows and Wesenberg was unaware of it being given to horses. Diemond said it was recommended to her by the feed store.

Carole Gallagher, an employee of DeYoung's Farm & Garden feed store at the time, has a degree in animal science from Washington State University. Gallagher owned three horses, and had owned several elderly horses in the past. She testified that a 1,000 pound horse eats approximately 13 1/2 pounds of feed a day. Gallagher also stated that

Diemond shopped at the feed store and used the same farrier that she did. It was that farrier who suggested that Diemond speak with Gallagher regarding the appropriate feed.

When Diemond told Gallagher that she was feeding the horses Dairy 16, Gallagher explained that the feed was formulated for ruminants, dairy cows, rather than horses, and recommended that she feed them Purina Mills Equine Senior, a sweeter feed more palatable to horses that contained added fat digestible by horses. Diemond told her that she had been a customer at the feed store longer than Gallagher had worked there. Gallagher testified that an older animal, at 600 pounds, needs to be fed 8 pounds of feed, and 800 pound horse should be fed 10 1/2 pounds of feed just to maintain their weight.

Diemond told Dr. Mueller that she did not believe in vaccinating, had no funds to pay for their dental care, and believed that she did not need a veterinarian because she had a farrier. Diemond told Dr. Mueller that she received nutritional advice from the feed store. Diemond also told Dr. Mueller that someone was poisoning her horses to make them thin and that someone had cut Brandy.

Dr. Mueller was called as the State's expert witness. Dr. Mueller owns her own equine facility and has worked extensively with local rescue organizations to provide professional local care for their horses. Dr. Mueller explained that when she received a call from animal control, she referred them to a network of rescues to find an organization that could take the horses. In this instance, it was SAFE (Save a Forgotten Equine).

Dr. Mueller first went through a list of questions that she asked to obtain a medical history. She learned that Diemond had the horses for a number of years, owning Bud since 1991 and Brandy much longer. Diemond did not provide routine normal dental care for the horses' teeth. Dr. Mueller was not able to obtain a clear answer on how long the

blankets had been on the horses other than it was sometime in December and that Diemond had not checked the blankets. Dr. Mueller's testimony described the amount of food fed to the horse as "outrageous. Nowhere near enough."[2] She also noted the frozen water in the trough.

Dr. Mueller's physical exam noted extensive clinical signs of starvation. She arrived at this conclusion by using a body condition score (BCS), which is an objective assessment tool that rates horses from 1 to 9 and requires both a visual and hands-on examination and palpation of a horse's fat content in six different areas. A score between one and two signifies emaciation. Bud exhibited severe dental pathology and was in need of significant dental work. The average horse's teeth are floated once a year.

Bud's feet indicated that there had been some hoof care within the last few months, but the hooves were long and out of balance, indicating that trimming had not been consistent. Bud's coat was dull and filthy, crusted with dirt and debris, and it appeared that he had not been groomed in some time. Bud's eyes had discharge and his skin exhibited rain rot. When Dr. Mueller placed her hands on Bud, she noted that there was no fat on his neck, behind his withers, shoulders, or over his ribs. His vertebra were protruding along his sides. Bud's mucous membranes were blue and gray. A healthy horse's gums are pink.

Brandy's temperature, pulse, and respiration were all within normal limits. Dr. Mueller found a significant heart murmur, which is common of a neglected, emaciated horse. As a horse gains weight, there is a change in its blood viscosity. Brandy, like Bud, had her head down, her eyes were dull and depressed, and her coat was dull and dirty.

[2] 4 Report of Proceedings (Oct. 3, 2012) at 42.

Dr. Mueller also observed rain rot and a blanket wound on Brandy's withers. The front end of the blanket was digging into her wound every time she took a step, similar to having a blister on the human foot.

Like Bud, Brandy had abdominal distention and Dr. Mueller could feel nothing but bones under the hair with very little fat content. Brandy's teeth were worse than Bud's, with some rotting in the sockets. Brandy also had a small wound on her hind distal below the fetlock.

Dr. Mueller testified that horses are fed on their ideal weight not on their emaciated weight. The ratio of feed needed is 1 to 2 pounds per 100 pounds of body weight. She estimated that Brandy and Bud were approximately 200 hundred pounds underweight.

The horses were taken to Dr. Mueller's equine rehabilitation center where Bud and Brandy began to gain weight. They were fed 14 cups of grass/hay pellets, 8 cups of alfalfa pellets, 4 cups of beet pulp, and 2 cups of senior equine. In addition to the 11 pounds of grain, the horses were fed 6 pounds of hay daily. Previously they had been fed less than three pounds a day.

Brandy's blood count was within normal limits and her infections were not systemically noted in the blood work, even though they were clinically obvious. Her glucose was low, which is consistent with starvation, as was the AST (a liver and muscle enzyme).

Dr. Mueller opined that the horses had been emaciated for quite some time and were in obvious pain. After two months at her facility, the horses had a BCS of 3.5 (ideal score being a 5). At that point, the horses were transferred to SAFE.

Dr. Gilbert Paul Mabrey, an attorney who previously practiced veterinarian medicine with a focus on horses, testified as an expert for the defense. He reviewed the statements from Wesenberg and Sgt. Sole, the medical records and lab reports, as well as journals and articles. Dr. Mabrey disagreed with Dr. Mueller's diagnosis and opined that there was insufficient evidence to establish starvation because the blood work was for the most part in the normal range.

He testified that horses like to eat trees, stating that if they do not get enough roughage, they will eat wood. Dr. Mabrey also disputed Dr. Mueller's opinion that the animals were in pain. He opined that pain and suffering only existed when the animal can no longer tolerate it.

Based on the photographs he viewed, he disagreed with Dr. Mueller's BCS of Bud and Brandy. Dr. Mabrey did not conduct an examination of the horses himself.

Diemond did not testify. In closing arguments, counsel primarily focused on the divergent expert testimony. A jury convicted Diemond of two counts of first degree animal cruelty. By special verdict, the jury found Diemond guilty of animal cruelty by starvation but not by dehydration.

After the verdict, but prior to sentencing, the prosecutor learned of potential impeachment evidence against Wesenberg. That evidence included a shoplifting arrest in 2006, a 2008 deferred sentence for attempted drug possession that was dismissed in 2009, and a four-day suspension from work for lying about her attendance at a training and the number of hours she had worked on a particular shift. Diemond moved for a new trial based on ineffective assistance of counsel and a potential Brady violation.

The State conceded in argument that some information contained in the police reports would probably have been admissible under ER 608. That information included Wesenberg's lies that she had been at a training when she was not, worked a full day when she did not, and her claim that she was on call when she was not.

The trial court denied the motion for a new trial. Diemond appeals.

ANALYSIS

In Brady, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In addition to exculpatory evidence, the use of evidence impeaching a government witness by showing bias or interest falls within the Brady rule. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

"Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Thomas, 150 Wn.2d 821, 850, 83 P.3d 970 (2004) (quoting Bagley, 473 U.S. at 682), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). In other words, when the credibility of a witness may be determinative of guilt, the failure of the prosecutor to disclose material evidence regarding that witness's credibility violates due process and requires a new trial if there is a reasonable likelihood that the absence of such evidence affected the jury's determination. Applying the "'reasonable probability' standard, the question is whether the defendant received a fair trial without the evidence—that is, 'a trial resulting in a verdict

worthy of confidence.'" Thomas, 150 Wn.2d at 850-51 (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

In determining whether an error infringing a defendant's right to cross-examine was harmless, we consider "the importance of the witness'[s] testimony, whether the evidence was cumulative, the extent of corroborating and contradicting testimony, the extent of cross-examination otherwise permitted, and the strength of the State's case." State v. Buss, 76 Wn. App. 780, 789, 887 P.2d 920 (1995), overruled on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999). Here, the focus of the trial was the testimony of the two experts. Further, the testimony presented by Wesenberg was merely cumulative as the condition of the horses was observed by both Sgt. Sole and Dr. Mueller.

Before a constitutional violation occurs under Brady, three elements must be satisfied: (1) the State failed to disclose evidence that is favorable to the accused, either because it is exculpatory or impeaching; (2) the State suppressed the evidence either willfully or inadvertently; and (3) the undisclosed evidence was prejudicial. State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011). Diemond has failed to satisfy the third prong of the Brady test, that is, whether "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Youngblood v. West Virginia, 547 U.S. 867, 870, 126 S. Ct. 2188, 1685 L. Ed. 2d 269 (2006) (quoting Kyles, 514 U.S. at 435). The evidence was not material in the sense that if it had been disclosed to the defense, there is no reasonable probability that the result of the proceeding would have been different. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Thus, as here, the impact of

impeachment evidence "may not be material if the . . . other evidence is strong enough to sustain confidence in the verdict." Smith v. Cain, ___ U.S. ___, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012). The verdict here is worthy of confidence.

Statement of Additional Grounds[3]

Diemond also raises numerous issues in her statement of additional grounds, none support any relief on appeal. She raises issues that are not properly before us because the issues either refer to matters outside the trial record or require us to reweigh the evidence and evaluate the credibility of witnesses. It is for the trier of fact to evaluate witnesses' credibility and to determine the persuasiveness of material evidence. Thomas, 150 Wn.2d at 874-75.

Diemond contends that the trial court erred in failing to conduct a voir dire to a specific juror. However, there is nothing in the record to demonstrate any abuse of discretion. A party alleging juror misconduct has the burden to show that misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The record here is insufficient to review this contention.

Citing errors and omissions in the trial court transcripts, Diemond argues that the quality of the trial court record was insufficient to permit effective appellate review. But she fails to identify how any of these alleged errors or omissions are relevant to any issue raised in her appeal. Diemond made similar arguments below, but the trial court found that the transcripts were consistent with the judge's notes and recollection for the trial.

[3] The court granted Diemond's March 25, 2015 motion to supplement the record with the transcript from the November 30, 2012 hearing. However, supplemental clerk's papers and other documents submitted thereafter are untimely and were not considered by this court.

Thus, she has not shown that we have been prevented from effectively reviewing her case. State v. Putman, 65 Wn. App. 606, 611, 829 P.2d 787 (1992) (a record may be sufficient for review even if a verbatim report of proceeding is not available for each portion of the proceedings).

Diemond also claims that the photographs offered into evidence were altered as to when they were taken. These claims are based on alleged facts outside the record on appeal and therefore cannot be addressed on direct appeal. However, the witnesses all testified that the photographs accurately depicted their memory of the day and the condition of the horses, all of which the jury heard. The case did not rise or fall on the photographs.

There is no support in the record for Diemond's other contentions.

Affirmed.

Trickey, J

WE CONCUR:

Spearman, C.J.

Cox, J.

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