COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Appellant, vs. EDWIN TROY HAWKINS, Respondent.	)))))))	NO. 30231-8 & 30239-3

AMENDED BRIEF OF APPELLANT

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I. INTRODUCTION

Douglas County appeals the August 30, 2011 order of the trial court granting Edwin Troy Hawkins a new trial following his conviction on one count of attempted possession of stolen property in the first degree, and one count of possession of stolen property in the first degree.

II. ASSIGNMENT OF ERROR

1. The defendant's motion for new trial was not timely under ER 7.5 and ER 7.8.

2. The trial court erred in granting defendant's motion for a new trial based on newly discovered evidence.

3. The trial court erred in concluding that it had to accept the declaration of Dale Martin at face value.

4. The trial court erred in failing to require defendant to demonstrate that the new evidence "will probably change the outcome of the case".

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III. ISSUES

3.1 Defendant's motion for new trial was not timely under ER 7.5 and ER 7.8.

3.2 The Trial Court abused its discretion in granting a new trial.

A. Defendant failed to establish that the new evidence would probably have changed the outcome of the trial.

B. The Court applied an improper standard under State v. Williams, 96 Wn. 2d 215, 634 P.2d 868 (1981).

C. The Court abused its discretion in failing to assess the credibility of the new evidence.

3.3 The Court erred in finding that the new evidence could not have been discovered by due diligence.

3.4 The Court erred in finding that the new evidence was material.

3.5 The Court erred in finding that the new evidence was not merely cumulative or impeaching.

IV. STATEMENT OF FACTS

4.1 EVIDENCE/TESTIMONY PRESENTED AT TRIAL

The trial in this case involved theft of orchard farm equipment from RLF Columbia Land Holdings (RLF). RLF purchased two orchards in 2001 – Beebe Ranch Orchard and Twin W Orchard. (CP 265, 269). In 2005 Hawkins, who owned/operated

Sundance Slope Orchard with his wife, Britt Hawkins, considered leasing the two orchard properties of RLF. (CP 174). Hawkins evaluated the feasibility of leasing the orchards, including use of farm equipment on the property owned by RLF. (CP 235-236). The RLF farm equipment was stored at both orchards, Beebe Ranch and Twin W Orchard. (CP 159). The equipment included a Kubota 7030 tractor, a Landini tractor, and two Air-O-Fan sprayers which Hawkins had previously inspected. (CP 160). Hawkins ultimately decided against leasing the orchards. (CP 828).

On April 2, 2006, Robert Morrison, employee of RLF discovered the Kubota tractor, Landini tractor, the two Air-O-Fan sprayers and other equipment were missing. (CP 162). All four of these pieces of equipment were subsequently found in the possession of Hawkins, or on his orchard property resulting in criminal charges being filed and the subsequent trial.

At trial Robert Morrison testified that he was employed by Beebe Ranch from 1982 through 2003. (CP 153-156). He worked as a laborer, equipment operator, then became manager in 2001. (CP 153). In 2003 Zirkle acquired the lease on Beebe and Twin W Orchard, and Mr. Morrison then worked for Zirkle

until November of 2005. (CP 156-157). Sometime in December 2005 or January 2006 he began working for RLH, primarily as security on the Beebe Orchard. (CP 157-158). In April 2006 RLH asked him to also keep an eye on the Twin W orchard. (CP 158). Mr. Morrison described that during this time period the farm equipment was present at Twin W Orchard, including a Landini 6550F, John Deere 2355, a Kubota 7030M, a Kubota L2550, and two ARROW fans. (CP 160). Mr. Morrison testified that he last saw the equipment at the Twin W Orchard on March 31, 2006. (CP 160). He noticed the equipment was missing on April 2, 2006 and notified the RLH in Colorado. (CP 163). Law enforcement was subsequently notified and provided a list of the missing equipment with serial numbers. (CP 163).

Prior to the theft of the farm equipment the defendant visited the Beebe Orchard property to determine the viability of entering into a lease arrangement with RLH (CP 174, 825-827). During defendant's visits to Beebe Orchard he assessed the viability of the existing Beebe Orchard equipment, including a Kubota 7030 tractor. (CP 826-827). Roughly during the same time period defendant visited Twin W Orchard for the same purpose. (CP 816). During the visit defendant observed farm equipment

present at the orchard, including a Landini tractor and a sprayer. (CP 818). Defendant's visits to Twin W Orchard occurred in February 2006. (CP 815). Although no specific date was given by defendant for his visits to Beebe Orchard, the decision not to lease that orchard occurred the first part of April 2006. (CP 828).

Todd Johnson, employee of RLH, participated in a telephone conference with defendant on April 12, 2006. (CP 291). During this conference call the defendant was asked if knew the location of the missing farm equipment, to which he responded that he would look into it. (CP 291). On April 14, 2006 Todd Johnson participated in a second conference call with defendant where the issue of the missing farm equipment was discussed. (CP 291). Defendant again stated that he would look into it. (CP 292). On April 21, 2006 Todd Johnson participated in a third conference call with defendant. (CP 292). During this call defendant stated that neither he nor his orchard managers had moved the farm equipment and that he had no knowledge of its location. (CP 293). During the conference calls with defendant the parties discussed specifically that the missing equipment included the two missing Kubota tractors, Landini tractor, and sprayers. (CP 300-301).

On September 5, 2006 the two missing ARROW fan sprayers were located on property leased by defendant. (CP 326). On April 3, 2007 the defendant took the stolen Kubota M7030 tractor to Valley Tractor in East Wenatchee for service. (CP 395, 418, 620). On June 7, 2007 defendant returned to Valley Tractor to pick up the stolen Kubota M7030 tractor. (CP 625). He was arrested by law enforcement at that time. (CP 854). The arresting deputy testified he told defendant that he was arresting him for the possession of the stolen tractor. (CP 491). The defendant returned to Valley tractor the next day and removed the Kubota M7030 tractor. (CP 856). The tractor was subsequently recovered from his ranch on June 11, 2007 by law enforcement. (CP 349-350). On October 8, 2007 the stolen Landini tractor was recovered from an orchard leased by defendant. (CP 867). The defendant was present when the Landini tractor was recovered, and told Deputy Schlaman that the tractor belonged to him and refused to tell him where he got it from. (CP 558).

Hawkins testified at trial that he owned Kubota 7030 tractors and Landini tractors. (CP 843-844). During the spring of 2007 he pulled them out of his Sundance Slope storage to get them

ready for the upcoming season. (CP 843-844). Hawkins claimed at trial that someone switched his Kubota and Landini tractor with the stolen tractors from RLF. Hawkins supported his claim by asserting that when he tried to move the Kubota tractor it would not start, and was not in the same condition. (CP 710, 722, 846-847). To further support his claim Hawkins called his employee Alvin Anderson to testify. Anderson testified that the tractor he worked on was not the same Kubota tractor that he assisted Hawkins in purchasing at the end of the 2006 season. (CP 724).

4.2 PROCEDURAL HISTORY

On March 20, 2009 the defendant was convicted after trial of attempted possession of stolen property in the first degree as charged in count 2 (Kubota M7030 tractor) and of possession of stolen property in the first degree as charged in count 3 (Kubota M7030 tractor). (CP 19, 20). The jury found the defendant not-guilty on count 1 (possession of the two Air-O-Fan sprayers) and count 4 (possession of the Landini tractor). (CP 18, 21).

Mr. Hawkins was sentenced on May 5, 2009, and he subsequently appealed his conviction to Division III of the Court of Appeals. While Mr. Hawkins's appeal was pending he filed a motion for new trial with the trial court on August 24, 2010. (CP

1096-1103). The motion alleged newly discovered evidence consisting of new facts presented by witness (Dale Martin) that had previously testified for the defense in the first trial. The hearing on Mr. Hawkins's motion for new trial was held on September 27, 2010. In support of his motion Mr. Hawkins submitted his own declaration (CP 1109-1110), and two declarations of witness Dale Martin (CP 1105-1107, 1124-1125). No testimony was presented at the hearing.

On October 7, 2010 the trial court entered a letter Decision on Motion for New Trial, granting Mr. Hawkins a new trial. (CP 1127-1131). No formal order was entered by the trial court at that time. On December 6, 2010 the Court of Appeals issued a letter directing that permission from the Court of Appeals be obtained prior to entry of the formal order for new trial. (CP 1269).

The underlying convictions were affirmed by the Court of Appeals in Cause No. 28118-3, and the mandate was issued on April 13, 2011. (CP 1132-1149). Following issuance of the mandate by the Court of Appeals the trial court thereafter entered the formal order granting Mr. Hawkins's motion for new trial on August 29, 2011. (CP 1150-1152).

The State appeals the trial court's order granting a new trial.

4.3 DALE MARTIN'S TRIAL TESTIMONY

Dale Mann testified as a defense witnesses at the first trial. (CP 734-766). The primary focus of Mr. Martin's testimony at trial concerned his prior experience with the two Air-O-Fan sprayers, their relative condition and value in 2005 and 2006. (CP 742-745). However, Mr. Martin was questioned directly by defense counsel concerning whether he had observed tractors at Twin W Orchard when he visited the orchard with Mr. Hawkins. (CP 746). He was further questioned by the prosecutor during cross examination about whether he had observed tractors on the Twin W Orchard property. (CP 762-763). It was apparent from Mr. Martin's testimony that he was involved in a significant business relationship with Edwin Hawkins as a field man for the Sundance orchard, and that they had significant contacts between 2005 and 2007. (CP 744-745, 751-753, 754-758). Since 2005 Mr. Martin has had a continuing business relationship with Mr. Hawkins. (CP 758). The relationship also included Mr. Martin providing an evaluation of the Twin W Orchard for the possibility leasing by Mr. Hawkins. (CP 760-761).

4.4 NEWLY DISCOVERED EVIDENCE

Dale Martin (CP 1105-1107)

Martin recalled that in the spring of 2007 he was at the Sundance Slope orchard to pick up a fertilizer spreader. (CP 1106). While at the orchard he observed a white flatbed truck arrive at the orchard and offload an orange Kubota tractor. Martin did not recognize the driver of the flatbed ford. (CP 1106). A short time later he observed the truck leave the property with an orange Kubota tractor. (CP 1106). Martin claimed to recognize that the driver was not an employee of the orchard. (CP 1106). This observation did not stand out in his mind because it is a common practice to move equipment around during the growing season. (CP 1106).

Martin acknowledges that he was interviewed prior to the first trial by Hawkins' attorney concerning the sprayers, but that he did not know what all equipment Hawkins was alleged to have possessed that was stolen. (CP 1106). Martin indicates that he became aware that a Kubota tractor was involved after the first trial. (CP 1106).

Martin submitted a supplemental declaration after the hearing on the motion for new trial. (CP 1124-1125). In the new

declaration Martin now recalls that he specifically saw the man drive the Kubota tractor off of the truck and then drive it around the shop. (CP 1124). He then recalled hearing a tractor start up and the same man place a similar orange Kubota tractor back onto the truck before driving away. (CP 1124).

E. Troy Hawkins

Hawkins declaration in support of his motion for new trial indicates that the Martin new disclosure occurred in July 2010 when he had a conversation with Martin at the Sundance Slope orchard. (CP 1109).

V. ARGUMENT

5.1 Defendant's motion for new trial was not timely under ER 7.5 or ER 7.8.

ER 7.5 (b) provides:

> (b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

Pursuant to ER 7.8(b)(2), if the 10 day period has expired a party may seek a new trial based upon newly discovered evidence "which could not have been discovered in time to move for a new

trial under 7.5". However, motions brought under ER 7.8(b)(2) are subject to a one year time bar:

> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130 , and .140.

The defendant's motion for new trial was brought under ER 7.8(b)(2) (newly discovered evidence).

The verdict in this case was rendered on March 20, 2009, and the judgment and sentence was entered on May 5, 2009. Defendant's motion for new trial was filed with the trial court on August 25, 2010, over 15 months after the judgment and sentence was entered and therefore is untimely.

5.2 The trial court abused its discretion in granting a new trial.

The trial court granted defendant a new trial on the basis of newly discovered evidence. The "new evidence" consisted of defense witness, Dale Martin, who testified in the original trial, recollecting three years after the fact an ambiguous event that occurred in the spring of 2007. The event consisted of Martin observing an individual unload and then load an orange Kubota tractor at Sundance Slope on a white flat-bed pickup truck and driving away. Mr. Martin claimed in his declaration that he is

familiar with every employee of the defendant, and he did not recognize the individual driving the pickup. At the same time Mr. Martin did not identify either of the Kubota tractors that were unloaded/loaded as the tractor that was subject to the criminal charges. Mr. Martin's declaration, in fact, did not distinguish whether the same tractor was unloaded and then loaded again, or if two separate tractors were involved. Mr. Martin acknowledged that what he observed was a very common practice at orchards during the growing season, nor did the event stand out in his mind in any way. Given Mr. Martin's extensive involvement with Hawkins's orchard it seems unlikely that this event was the only time he observed similar activities at Sundance Slope, yet after speaking with Hawkins that event now has taken on new meaning some 3 years afterward.

A trial court ruling granting a new trial will not be overturned except for an abuse of discretion. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Such discretion, "however, does not give the trial court license to weigh the evidence and substitute its judgment for that of the jury, simply because it may disagree with the verdict." Williams, id. at 221, citing Bunnell v. Barr, 68 Wn.2d 771, 775, 415 P.2d 640 (1966).

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

Williams, 96 Wn.2d at 222, citing Rettinger v. Bresnahan, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953), quoted in Bunnell v. Barr, 68 Wn.2d at 777. "In this state a trial judge is not deemed a 'thirteenth juror.'" Williams, 96 Wn.2d at 221-22; State v. Marks, 90 Wn. App. 980, 984, 955 P.2d 406 (1998).

Reviewing the grant of a new trial involves a fine balance among the functions of the trial judge, the jury, and the appellate courts. State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Although a trial court has discretion in granting a new trial, that discretion does not allow the court to weigh the evidence and substitute its judgment for that of the jury. Id. at 221. Consequently, when a new trial is sought on the basis of newly

discovered evidence, the moving party must demonstrate that the evidence:

> (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

Id. at 223 (court's emphasis). If any one of these factors is absent, the grant of a new trial is an abuse of discretion, because based on untenable grounds. Id. at 222-23; State v. Koloske, 100 Wn.2d 889, 898, 676 P.2d 456 (1984). In the present case, at least four of the factors are missing: the evidence will probably change the result of the trial, the evidence could not have been discovered before trial by the exercise of due diligence, the evidence is material, the evidence is not was merely cumulative or impeaching.

A. The Defendant failed to establish any basis to believe the new information would probably have changed the outcome of the case.

If newly discovered evidence affects only an immaterial fact, it does not justify a new trial. State v. Pierson, 175 Wn. 650, 652, 27 P.2d 1068 (1933). In the present case it is important to understand the underlying factual basis for the two counts Hawkins was convicted of at trial.

Defendant was convicted on count 2 for attempted possession of the stolen Kubota tractor owned by RLH. On that particular count the trial evidence established that defendant delivered the stolen tractor to Valley Tractor in East Wenatchee for repairs on April 3, 2007. (CP 395, 418, 620). Valley Tractor employees working on the tractor observed that the serial number had been ground off and notified law enforcement. (CP 400-402, 421). On June 7, 2007 defendant returned to Valley Tractor to pick up the stolen Kubota M7030 tractor. (CP 491). He was arrested by law enforcement at that time. (CP 493). The arresting deputy testified that he specifically told defendant that he was arresting him for the possession of the stolen tractor. (CP 493). With regard to count 3, possession of stolen property in the first degree, the evidence at trial established that defendant, after having been arrested the day before for attempting to possess the stolen tractor and being told the tractor was stolen, returned to Valley tractor the next day and took tractor off the lot without contacting any employee of Valley Tractor. (CP 429-431, 437-438). The tractor was subsequently recovered by law enforcement at defendant's ranch on June 11, 2007. (CP 349-350).

The declarations filed by Dale Martin, at most, established that in the spring of 2007 a Kubota tractor was offloaded at the Sundance Slope ranch, and either the same or a different Kubota tractor was loaded and driven away. Mr. Martin did not establish a clear time frame or date when this event occurred, other than in the spring of 2007. It is entirely likely that this event occurred after Hawkins had already delivered the stolen Kubota tractor to Valley Tractor on April 3, 2007. Defendant testified at trial that during the time periods in question he actually owned Kubota tractors that were used in the orchard, thus the observation that Martin had, more probably than not, was typical movement of equipment during the growing season. Martin indicates that his observation had no meaning at the time because it is a standard practice during the growing season to move equipment around. Furthermore, Martin does not describe any unusual behaviors of the individual offloading/loading the tractor that attracted his attention or suggested the person was involved in unlawful behavior. Although not stated in Martin's declaration the event apparently occurred during business hours when others were present or would likely be present as Martin was at the orchard for business purposes. Under these circumstances it is unimaginable that a person would boldly drive a large flatbed pickup loaded with a

stolen Kubota tractor onto defendant's orchard, off load the stolen Kubota, then find a different orange Kubota tractor and load it onto the flatbed pickup and drive off. Although not stated in Martin's declaration, the event he describes necessarily would have taken some time to complete, and all the while this person is open to discovery by defendant and any employee of Sundance Slope. The scenario that defendant invites the court to accept as evidence that would probably change the outcome of the trial is beyond belief. The State recognizes that the defense theory at trial was that some other person planted all four pieces of stolen property to frame defendant, however, no other person materialized or was identified in the first trial, or thereafter for that matter. This new information provides no support for the defense theory and is entirely explainable as usual orchard practices. Martin's declaration does not distinguish what model Kubota tractor he observed, nor did he identify for the court that the tractor he observed was in fact the stolen Kubota tractor. The strength of Martin's declaration establishes only that he observed an event which plays itself out time and time again in the orchard industry, and is immaterial to the ultimate issue presented at trial.

For the above stated reasons the court erred in concluding that the new evidence would probably change the outcome of the

trial. The lack of substance in this new information is even more glaring when the new evidence is applied to defendant's conviction on court 3, possession of stolen property in the first degree. On this particular charge, defendant when arrested, was specifically told by the officer that the tractor he was attempted to pick up on June 7, 2007 was stolen. The next day defendant returned to Valley Tractor and took possession of the very same tractor, loaded it and transported it to his ranch at Sundance Slope. Notwithstanding any claims made by Hawkins that he didn't know the tractor was stolen on the June 7th incident, he absolutely knew it was stolen when he took possession of it on June 8th. Clearly, the Martin declarations have no bearing on the facts surrounding defendant's possession of the stolen tractor on June 8, 2007 (count 3).

The trial court erred in concluding that the new information would probably change the trial outcome.

IMPROPER STANDARD

In its ruling the trial court actually failed to apply the proper standard on the first of the five Williams criteria. The rule requires that the court first determine whether the new evidence "will probably change the outcome of the case." In the court's order it concluded in paragraph 3(a):

> The Court can't state with certainty or conviction that had Dale Martin testified in the first trial about his observations of the Kubota tractor in the spring of 2007 that it would not change the outcome of the case. The Court believes that this testimony could have an impact on the jury's decision.

(CP 1151). The trial court looked at the test from the wrong side of the equation. Intellectually it appears the court asked itself if it was certain that the new evidence would NOT have changed the outcome, and then stated that it could not be certain. That is the incorrect standard. Hawkins assumed the obligation to establish that the new evidence would probably change the outcome. The Court failed to hold him to that standard, and only concluded in its order that ". . . testimony could have an impact on the jury's decision." (CP 1151).

The standard applied by the trial court lowered the burden required for granting of a new trial, and in effect removed the term "probably" from the analysis. Under the trial court's application of the standard any new information would justify a new trial if it merely "could" have impacted the jury's decision. This is not the correct standard, and therefore the trial court committed error.

ABUSE OF DISCRETION

Although ultimately granting Hawkins a new trial, the trial court had serious misgivings about the quality and credibility of the Dale Martin's new information. The Court voiced those concerns in its order for new trial in paragraph 3.1:

> 3.1 It is difficult for the Court to believe that throughout these proceedings, and particularly when Dale Martin testified at trial concerning the sprayers, that he was unaware of the allegations concerning the Kubota tractor. Nonetheless, the Court believes that the declaration of Dale Martin must be taken at face value.

(CP 1151). The Court failed to recognize its discretion in evaluating the weight and credibility of the new evidence, and believed that it had no choice but to accept the information at face value. This failure to exercise discretion resulted in an abuse of its discretion. Failure to exercise discretion may constitute an abuse of discretion. State v. Grayson, 154 Wn. 2d 333, 11 P.3d 1183 (2005); State v. Pettitt, 93 Wn. 2d 288, 296, 609 P. 2d 1364 (1980).

In passing upon the question whether newly discovered evidence will probably result in a different outcome upon retrial, the trial court must of necessity pass upon the credibility, significance and cogency of the proffered evidence. See State v. Peele, 67 Wn. 2d 724, 409 P. 2d 663 (1966); State v. Thorp, 133 W. 61, 65, 233

P. 297 (1925). The trial court may utilize the knowledge that it gained from presiding at the trial, e. g., United States v. Curry, 497 F.2d 99 (5th Cir.), cert. denied, 419 U.S. 1035, 95 S. Ct. 519, 42 L.Ed. 2d 311 (1971), and may take into account the criminal records of the persons whose affidavits are submitted at the hearing. Brandon v. United States, 190 F.2d 175, 178 (9th Cir. 1951). When considering whether newly discovered evidence will probably change the trial's outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence. State v. Gassman 160 Wash.App. 600, 609, 248 P.3d 155, 159 (Wash.App. Div. 3, 2011) citing; State v. Barry, 25 Wash.App. 751, 758, 611 P.2d 1262 (1980). Significantly, the standard is "probably change," not just possibly change the outcome. State v. Williams, 96 Wash.2d 215, 223, 634 P.2d 868 (1981). "[D]efendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial." State v. Riofta, 166 Wash.2d 358, 369, 209 P.3d 467 (2009).

The trial court herein mistakenly believed that it was obligated to accept the information offered by Dale Martin as truthful and compelling, and not subject it to scrutiny as to the

circumstances surrounding the giving of the information, the amount of time that had passed, contacts Martin had with defendant, the fact that Martin had previously testified at trial, and the credibility of the information. This mistaken belief that the court had no discretion in evaluating the information constituted an abuse of discretion. The necessity of evaluating the new evidence is borne in the obligation of the trial court to determine whether the evidence "will probably change the outcome of the trial". Without this gatekeeping function of the trial court all allegations of new evidence would constitute a basis for a new trial.

The trial court committed error in accepting the new information provided by Dale Martin at face value, without assessing the credibility, significance, and cogency of the proffered evidence.

5.3 The Trial Court erred in finding that the new evidence could not have been discovered by due diligence of Hawkins.

Dale Martin was not only a known witness to defense counsel, he actually was interviewed prior to trial and in fact testified at the first trial. The essence of defendant's argument for a new trial was that he did not know Martin had useful information and so he did not ask him about tractors; and Martin not realizing

defendant was accused of stealing a tractor didn't think to inform anyone of his observations about the tractor. Common sense would dictate that a field man who is familiar with defendant's orchard property, operations, equipment, and personnel, and who meets with defendant every Tuesday for a good portion of the year over a period of several years could have information useful to defense counsel about the tractors. Under these circumstances due diligence would dictate that defense counsel should have questioned Martin concerning any observations he had of tractors while he was at Sundance Slope. It certainly was known to defense counsel that Martin visited the Sundance Slope, and other orchard property farmed by defendant during the period of time that was involved.

The defendant bears the burden of establishing the facts showing due diligence. State v. Fackrell, 44 Wn. 2d 874, 880, 271 P. 2d 679 (1954). Defendant's showing of due diligence in this case is merely to say, "I didn't know so I didn't ask." This position falls far short of demonstrating adequate due diligence. It should have been obvious to defense counsel that an individual with the significant contacts that Martin had with defendant and his orchard

properties could have useful information about the tractors. Due diligence has not been shown where this evidence was available at the time of trial from a witness who was not only available but who also testified. Evidence that is readily obtainable prior to trial cannot be considered "newly discovered." State v. Barry, 25 Wn. App 751, 611 P.2d 1262 (1980). When counsel is aware of potential witnesses, due diligence requires that he interview those witnesses. State v. Vance, 29 Wn. 435, 488-89, 70 P. 34 (1902). Logic would dictate that when defense counsel interviewed Dale Martin he should have inquired of any and all information that Martin had that would be potentially useful, and not just limit it to his observations and evaluation of the two sprayers.

Defendant failed to establish that he exercised due diligence when he failed to inquire of a testifying defense witness concerning any knowledge he had of movement of tractors onto and off of Sundance Slope orchard. The trial court erred in concluding that the new information could not have been discovered through due diligence.

5.4 The Trial Court erred in concluding the new information from Dale Martin was material.

The State incorporates those arguments set forth in paragraph 5.2 above in support of its position that the Martin information is not material.

The trial court concluded in its order granting a new trial that the State "concedes that the evidence is material to the issue." (CP 1152). This conclusion is not supported by the record, and the State is at a loss as to how the court arrived at this conclusion. The State at all times has taken the position that the new information of Martin is not material, and fails the Williams criteria for granting of a new trial.

"Evidence, if competent and relevant, is said to be material when it logically tends to prove or disprove a fact in issue. To be admissible as material evidence, it must explain, demonstrate or have a tendency to establish or disestablish the fact with which it is sought to be connected. Materiality, therefore, should be judged not only on what the evidence shows standing separately but also from whatever inferences may sensibly be drawn therefrom when it is viewed in connection with other evidence."

State v. Gersvold 66 Wash.2d 900, 902-903, 406 P.2d 318, 320 (1965).

In the present case the Martin information fails the materiality criteria. The proffered information does not provide a date of the observation such that it is entirely possible that the subject Kubota had already been transported to Valley Tractor by defendant for repairs. The information does not identify the Kubotas observed by Martin as the stolen RLF Kubota. The information does not identify the driver of the flatbed pickup, and although Martin claims he knows all employees of defendant, such statement is highly suspect given the nature of the orchard industry. Martin describes the event as innocuous and consistent with customary and usual movement of equipment during an orchard growing season. Martin does not describe any activity that suggests criminal behavior of the driver, or even that it was a suspicious movement of the equipment. In fact, Martin's observation was so trivial and meaningless that he didn't disclose the information until over three years after the fact.

The State submits that the proffered evidence would have been excluded as irrelevant. Relevant evidence is defined in ER 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Martin information is so speculative that it is likely that the information would have been excluded at trial as irrelevant. Certainly it would have been subject to a strenuous motion to exclude from State. On its face the Martin information fails to; set a specific date and time of occurrence, identify the driver, identify if one or two Kubota tractors are involved, or identify the tractors unloaded/loaded as the stolen RLF tractor. Even if the Martin information had been brought in during the first trial, and survived a relevance challenge, any minor weight it carried would have been significantly diminished by simple cross examination on the failure of evidence to have any tie to the tractors in question, and its serious speculative nature.

Based upon the significant limitations of the Martin information, the trial court erred in finding the information material.

5.5 The Trial Court erred in finding the new information was not merely cumulative or impeaching.

It is an abuse of discretion for a trial court to grant a new trial where the alleged newly discovered evidence is merely cumulative.

State v. Williams, 27 Wn. App 430, 618 P. 2d 110 (1980). "Cumulative evidence is additional evidence of the same kind to the same point". Id at 117, Proffered testimony is cumulative where it cooberates other witnesses. Id.

The new information, if believed, is merely cumulative to the theory advanced by defendant. Defendant testified at length concerning what he believed to be the changed condition of his Kubota tractor when he pulled it out of storage for the 2007 season, and the problems that the tractor had upon removal that didn't previously exist. Alvin Anderson, defendant's employee, testified as well concerning his belief that the Kubota's condition was different when removed from storage for the 2007 season. Specifically Anderson testified it no longer had a new battery, new battery cables, no attachments for a bin trailer, and there was a problem with the four wheel drive function. (CP 710-711). Ramon Angulo, employee of Hawkins, testified for the defense as well concerning the changed condition of the Kubota tractor. Angulo noted that the tractor he observed in the spring of 2007 had lights, when during the fall of 2006 the Kubota tractor he used did not. (CP 657).

The Martin "new" information is merely cumulative of the same type of information advanced by defendant, Anderson and Angulo, that someone must have switched the defendant's Kubota tractor with the stolen RLF Kubota tractor. Accordingly, the trial court erred in concluding that the new information was not merely cumulative in granting a new trial.

VI. CONCLUSION

The defendant's motion for new trial pursuant to ER 7.8(b)(2) is untimely as it was filed over 15 months after the judgment and sentence was entered. If the court determines the motion was timely brought, the defendant failed to meet his burden in establishing the new information warranted a new trial under the criteria set forth in State v. Williams, supra. Particularly, the defendant failed to establish that the new information would probably change the outcome of the trial, could not have been discovered before trial with the exercise of due diligence, is material, and is not merely cumulative. Furthermore, the trial court erred by failing to apply the proper standard requiring the defendant to establish the new information would likely change the outcome of the trial. Lastly, the trial court erred in accepting the new information (Martin declarations) at face value without assessing

the creditability, significance and cogency of the evidence, thereby abusing its discretion.

Dated: 3/12/12

Respectfully Submitted by:

Eric C. Biggar, WSBA 17475
Deputy Prosecuting Attorney
Attorney for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Appellant,	)	NO. 30231-8 & 30239-3
vs.	)	AFFIDAVIT OF MAILING
EDWIN TROY HAWKINS, Respondent.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 12th day of March 2012, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of Appellant, addressed to:

Allen M. Ressler
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Manson, WA 98831

SUBSCRIBED AND SWORN to before me this 12th day of March, 2012.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/2015.