71125-3

71125-3

NO. 71125-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTY R. DIEMOND,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

To establish that evidence was "material" for Brady[1] purposes, a defendant must establish that there is a "reasonable probability" that disclosure would have produced a different verdict; if the trial resulted in a verdict worthy of confidence notwithstanding the suppression, no "reasonable probability" has been shown. The State presented multiple witnesses in an animal cruelty case who made the same observations of the defendant, the horses and their surroundings during a two-day period, including a lesser witness who was later found to have impeachment material and an expert who formed the crux of the State's case. Where the case boiled down to a "battle of the experts" and the trial court found the lesser witness's testimony cumulative, has the defendant failed to establish a reasonable probability of a different outcome?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Christy Diemond was charged by information with two counts of animal cruelty in the first degree. CP 15-16. The State alleged that Diemond starved and dehydrated her elderly horses, Bud

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

and Brandy. CP 4-6. The jury convicted Diemond as charged and returned a special verdict indicating that they were unanimous as to the alternative means of starvation, but not dehydration. CP 50-55.

Following the verdict but prior to sentencing, the prosecutor learned of potential impeachment evidence against the King County Animal Control officer in this case, Jenee Westberg. CP 1435-36. These 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. CP 1177-1217, 1435-36. After successfully discharging her first two attorneys, Diemond made a motion for a new trial based partly on a Brady claim.[2] 7RP 16-22, 39-54[3]; CP 742-1229,1534-42. After a hearing, the trial court denied the motion in a written ruling. 7RP 105-65; CP 1514-16.

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[2] Diemond filed numerous *ex parte* motions and declarations throughout this case. Because she was continuously represented by three different trial counsel, those will not be addressed in this brief.

[3] The verbatim report of proceedings consists of eight consecutively paginated volumes which will be referred to as 1RP (9/27/12); 2RP (10/1/12); 3RP (10/2/12); 4RP (10/3/12); 5RP (10/8/12); 6RP (10/9/12); 7RP (10/10/12, 1/11/13, 2/22/13, 3/1/13, 3/22/13, 3/27/13, 4/12/13, 10/4/13, 10/18/13); 8RP (2/22/13).

2. SUBSTANTIVE FACTS.

a. Trial Facts.

For approximately 20 years, Christy Diemond owned two elderly horses named Bud and Brandy at her property in Woodinville. 4RP 25-28, 31-32. On February 26, 2011, King County Sheriff's Sergeant Bonnie Soule went to Diemond's property after receiving an email from a horse rescue group that Bud and Brandy were not being fed properly. 3RP 9-11. The weather was "very cold," with temperatures down in the 20's, and the ground was frozen. 3RP 14.

Soule, a 32-year veteran of the Sheriff's Office, also had extensive familiarity with horses, having owned horses continuously since the age of 15, and was trained in their proper care and feeding. 3RP 5-8, 21. When she arrived at the property, she observed immediately that the horses were "very thin" and "gaunt," that no hay or food was visible, and that the bark had been chewed from at least three trees in the paddock, one all the way through. 3RP 16-17, 20-22, 65; Ex. 5. Based on her experience, she knew this meant that Bud and Brandy were hungry, as horses resort to eating bark when they have no other food source. 3RP 21.

Diemond admitted to Soule that she had been trying to find the horses a home and that she had not fed the horses yet even though it

was already 11:00 a.m. 3RP 24-25. Diemond claimed that she was with the Woodinville City Council and was being "set up" by people. 3RP 26. Soule encouraged and offered to help Diemond feed the horses, accompanied her to the garage where two bags of feed sat, and observed her put a couple of inches of feed into a small bucket and add about a half bucket of water. 3RP 26-28; Ex. 6. Diemond told Soule that this was all that she gave each horse twice a day, along with some hay "but not too much because they couldn't eat it very well." 3RP 28-32. The horses were visibly hungry, pushing to get quickly to their buckets and eating rapidly. 3RP 34-35, 80.

Soule, who knew that the proper way to measure feed was by weight according to portion instructions on the bag, explained to Diemond that this was not a sufficient amount for the horses, but Diemond insisted that she had been told not to feed them too much. 3RP 30-31. Soule testified that the two bags of feed were only enough to feed both horses for two days. 3RP 73. Diemond admitted to her that the only water she gave to the horses was the half-bucket mixed into the feed because "they won't drink anyway." RP 49. Soule investigated other water sources on the grounds and found only a tub of frozen-solid ice. 3RP 50; Ex. 8.

Soule unbuckled Bud's blanket and felt his ribcage, noting that he was cold and shivering and that "I could clearly feel his rib bones under my hand." 3RP 37. Both horses were lethargic. 3RP 83. Brandy had an oozing sore on her back, caused by the rubbing of the ill-fitting blanket. 3RP 38-42; Ex. 7. Diemond first claimed that "it just happened" and then that her ex-boyfriend must have caused it. 3RP 45-46. She agreed to surrender her horses to animal control. 3RP 46-48. Soule came back twice over the next two days to bring the horses some hay but noticed they were not eating it; the day after her first visit, she saw the water tub, still frozen solid. 3RP 55-56.

Jenee Westberg, an animal control officer for Regional Animal Services of King County, responded to Diemond's home on the day of Soule's first visit. 3RP 96-98. Westberg observed the same thing Soule had seen: the horses' thinness, their ill-fitting blankets, the tub of frozen water, and the bark eaten off the trees, which she also noted as a potential sign of hunger. 3RP 98-100, 109-12; Ex. 5. Like Soule, Westberg felt Bud's rib bones briefly. 3RP 108.

Westberg called Diemond, who was not home at the time; Diemond told her she could not afford to take care of the horses properly, that she gave the horses no water besides that soaked in the feed, and that she thought someone had cut Brandy. 3RP 100,

108, 114-19, 130. Westberg never directly observed Diemond feed the horses, only the can she used to scoop their food. 4RP 123-27.

The next day, an equine veterinarian named Dr. Hannah Mueller[4] went to Diemond's property to evaluate the horses' health prior to their surrender; Westberg was present to process the handover, as was the horse rescue group that had offered to foster Bud and Brandy.[5] 3RP 91-93, 116-18, 137; 4RP 25-28. Before meeting Westberg and Diemond inside the home, Mueller quickly surveyed the scene and noted that the bark had been eaten off several trees, which she attributed to the horses' hunger. 4RP 28, 33-34, 49; Ex. 5. She also immediately noticed that the horses appeared weak and lethargic, their heads down, and their eyes dull and depressed. 4RP 33-34.

Mueller took a medical history directly from Diemond. 4RP 31. Diemond told her that she did not believe in vaccinating; lacked funds to pay for their dental care; believed that her farrier could substitute for a veterinarian (which she claimed she did not need); and took her

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[4] Mueller's last name at the time of the examination was Evergreen. 4RP 5.

[5] Mueller emphasized that only she conducted the exam, and Westberg was present only as an animal control officer who did nothing in terms of the examination; Westberg's role was only to take notes on the horses' condition, speak to Diemond, and assist Mueller in her report and in catching and holding the horses during the exam. 4RP 52.

nutritional advice from a clerk at a feed store called DeYoung's. 4RP 32. Diemond acknowledged that the horses were too thin and claimed that someone had cut Brandy and was poisoning the horses to make them so skinny, insisting that people had been coming after her and the horses for years. 4RP 30-31. She also said she was not feeding the horses beet pulp, a key ingredient to help older horses gain weight, because a vet had told her it caused colic; Mueller testified that the exact opposite was true. 4RP 41.

Diemond showed Mueller the feed scoop that she used, which Mueller estimated "generously" as a 4-cup size. 4RP 37-39, 199; Ex. 16. Diemond told her that she fed each horse one scoop of Equine Senior plus one scoop of Dairy 16 cattle feed twice a day, as recommended by the feeding clerk, plus some alfalfa. 4RP 37-39. Mueller described this amount as "outrageous. Nowhere near enough." 4RP 42. She stated that a horse requires 1-2 pounds of food per hundred pounds of body weight, eating 10-20 pounds per day.[6] 4RP 42. She also saw the frozen-solid water in the tub, which was placed on a downward slope in front of a hotwire fence such that the horses' ears would touch electric wire if they put their heads in the tank. 4RP 43-47; Ex. 8.

[6] This was similar to Westberg's opinion on food/water amounts. 3RP 128, 130.

Mueller performed a physical exam of the horses and noted clinical signs of dehydration in both horses. 4RP 43, 54-56, 84, 99. Mueller also noted extensive clinical signs of starvation, using an objective assessment tool called a body condition score (BCS) that rates horses from 1-9 and requires a visual and hands-on examination and palpation of a horse's fat content in six different areas. 4RP 61, 76-77, 99-103. A score of 1-2 means that a horse is emaciated. 4RP 61. The horses each had a score of 2, which was a "definitive diagnosis of starvation in this case." 4RP 61, 92, 168.

Mueller also noted that Bud and Brandy suffered from "severe dental pathology," with ulcers caused by multiple sharp points in their teeth, "waves" (unsteady grinding surfaces), "steps" (teeth that locked preventing the horses from grinding), and a festering loose tooth (for Brandy). 4RP 65-70, 93, 156-58. Mueller testified that because horses' teeth continuously grow out of alignment, they require routine filing down of the points at least once per year or they cannot grind and eat hay fibers. 4RP 65-70. So severe was Bud and Brandy's pathology that the teeth would never regain full functionality. 4RP 68.

Besides their numerous other health ailments, the horses were visibly emaciated. 4RP 70-82, 86-111. Photographs taken on February 27 and 28 showed the horses with bones protruding even

through their shaggy winter coats, without which Mueller said the emaciation would be even more pronounced. 4RP 78-82, 93, 100-11; Ex. 21-23, 25-28. Mueller described feeling "no fat" on Bud's body and noted his "protruding" vertebra, ribs, hip bones, hind end, and withers (base of neck). 4RP 78-82; Ex. 21, 25-26. She also described "using my hands to feel [Brandy] and there was nothing but bones under that hair," noting the emaciation detailed vividly in pictures taken February 28 at her facility. 4RP 92, 110-12; Ex. 27-28.

Mueller estimated that the horses were about 200 pounds underweight, with an ideal weight of 900-1000 pounds. RP 70-71, 117. After being taken to Mueller's rehabilitation facility for two months, the horses drank copious amounts of water without coaxing and ate increasing amounts of food including beet pulp without any issues, contrary to Diemond's assertions, and had no problems gaining weight. 4RP 113-20, 149-50. This was clearly evidenced by photographs of the thriving horses taken two months later on April 11, 2011. 4RP 133; Ex. 34-35.

By that point, Mueller testified, they were up to a BCS of 3.5 (with an ideal score of 5), and consuming 14 cups of grass and hay pellets, 8 cups of alfalfa pellets, 4 cups of beet pulp and 2 cups of Senior Equine food every day; this totaled more than 11 pounds of

dry feed material, plus 6-10 pounds of hay. 4RP 117-20, 133-35. In comparison, Diemond had by her own admission been feeding the horses a total of only 8 cups of the Senior Equine/Dairy 16 mixture every day, or about 3 pounds or less of food. 4RP 121. Photographs of the horses taken on May 29, 2011 and July 29, 2011, three and five months after their removal from Diemond, showed them looking normal weight and extremely healthy. 4RP 136-37; Ex. 36-37, 39-40.

Mueller's blood tests on each horse showed a mixture of normal results along with certain indicators of starvation, including reduced glucose, anemia, and abnormal liver and muscle enzyme levels. 4RP 123-29, 181-82. Because of her extensive experience in horse rescue operations and distressed animals, Mueller testified that the normal results did not surprise her nor change her ultimate opinion, given that chronically a starved horse often normalizes the abnormalities in its bloodwork as its system becomes accustomed to being in an emaciated state. 4RP 127.

Mueller's ultimate opinion was that the horses had been starved and dehydrated, and that they were emaciated because they had not been given enough adequate nutrition to maintain an appropriate BCS. 4RP 129, 143, 168. She also opined that their state of starvation caused them pain and suffering, demonstrated by

their significant lethargy, and dull and depressed mentation. 4RP 33-34, 64-65, 137-42, 187-88. She noted that animals have a nervous system identical to humans, and that being emaciated is a painful condition that includes joint/muscle/gastric/stomach pain, weakness and fatigue, and headaches and malaise. 4RP 138.

Contrary to Diemond's claim that Carole Gallagher, the feed clerk at DeYoung's, had told her to feed Dairy 16 to the horses, Gallagher testified that she had recommended Equine Senior and had explicitly told Diemond that she did *not* recommend Dairy 16, nor had she ever done so for any horse. 3RP 169-72. Equine Senior contained fat digestible by horses and was specifically designed to help them gain weight, whereas a horse could not put on weight with Dairy 16. 3RP 171, 178.[7] She specifically recalled taking Diemond to the feed room, turning over the bag of Equine Senior, and telling her that it was important to follow the portion recommendations on the back; for an 800-pound horse on a maintenance diet, that meant 10 ½ pounds of food daily. 3RP 173-74; Ex. 15.

Diemond presented defense expert Dr. Paul Mabrey, a retired veterinarian-turned-attorney. 4RP 5-8. He testified extensively about

[7] Mueller reiterated on the stand that she would "strongly recommend against" feeding horses Dairy 16. 4RP 123.

his assessment of Bud and Brandy, which he performed by reviewing Mueller's records and labwork and without examining the horses themselves. 5RP 10, 12-13. He testified that he only "skimmed" through Jenee Westberg's report because portions of it "really have nothing to do with the case," and that he usually does not read the intake or police reports. 4RP 77. He disputed almost all of Mueller's findings, opining that eating bark was normal; that labwork, not a physical examination or behavioral observation, was the "definitive" factor in determining starvation in this case; that pain and suffering only exist when it "is such that the animal can no longer tolerate it" and can be observed visibly in a physical manifestation; and that although he had never performed a BCS of any horse, he disagreed with Mueller's score based on pictures. 5RP 60-67, 154-61.

Closing arguments on both sides focused almost exclusively on the two experts' conflicting opinions, or as defense counsel repeatedly emphasized, "the eyeball test [Dr. Mueller] versus science [Dr. Mabrey]." 6RP 9-56, 63-64, 72, 80. The prosecutor barely mentioned Westberg, noting that Westberg "s[aw] the same thing that Sergeant Soule saw" and that Dr. Mueller received "much of the same information that we have already talked about that Officer Westberg got." 6RP 22, 26. Defense counsel told the jury that "the

ultimate issue really is whether or not the State has proved starvation and/or dehydration" and that "there's two ways to determine whether or not it existed . . . [t]he eyeball test or science." 6RP 63.

b. Motion For New Trial.

Diemond made a motion for a new trial based on an alleged Brady violation. The prosecutor maintained that Westberg's dismissed drug conviction and her compromise of misdemeanor for the theft charge were inadmissible under ER 608 or 609 and thus not material, but conceded that the defense could have impeached Westberg regarding a lie she told during the drug arrest, as well as her work suspension for time theft/dishonesty under ER 608(b). 7RP 142; CP 1436.

However, the prosecutor pointed to the record and argued that "[t]his case boiled down to a battle of the experts," that Westberg's testimony was cumulative as "one of three witnesses who saw the horses" during the same two-day period, and that "our most important witness was the doctor [Mueller]." 7RP 143-47; CP 1438-39. Defense counsel openly acknowledged that trial counsel "very clearly was focusing on a battle of the expert [sic] in the trial" and added,

"I spoke with Mr. Roberson. He focused on the expert only and the blood work, and I think that that is evident in trial."[8] 7RP 131, 133.

The trial court agreed, finding that Soule, Westberg, and Mueller all observed and testified to the same things and that "one looks in vain at the transcripts to see any different information that Officer Westberg did"; that Mueller gave "the most complete testimony" and "far more in-depth opinions on the same topic [sic], including medical opinions after physical examinations, opinions on nutrition, and other medical issues"; and that the defense had presented an expert to directly rebut her. CP 1514. The court also ruled that only the work-related suspension would have been admissible and not Westberg's drug offense, because "there's no legal theory under which drug use can be used to impeach honesty, and there was no allegation that she was under the influence during these proceedings." CP 1514-15. The theft "might have been admitted, though it apparently was a diversion." CP 1514.

[8] Diemond also noted in the brief for her Motion for New Trial: "Ms. Diemond's defense focused on expert testimony that the blood work of the horses demonstrated that they were not starving or dehydrated." CP 743.

C. ARGUMENT

1. THE UNDISCLOSED MATERIAL WAS NOT MATERIAL, AND THUS NOT A BRADY VIOLATION.

Diemond argues that evidence of Westberg's 2006 compromise of misdemeanor for shoplifting, 2008 deferred sentence for attempted drug possession, and 4-day suspension for lying about work-related obligations was material and that there is a reasonable probability that its disclosure would have resulted in a different verdict. This is incorrect. Because the first two items would have been inadmissible at trial, Westberg's testimony was cumulative, and this case was acknowledged by all to be a "battle of the experts," the undisclosed information was not material under Brady.

It is well-established that "the 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." Brady, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Brady rule encompasses impeachment evidence as well as exculpatory evidence. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). In addition, the duty to disclose favorable evidence is not limited to evidence possessed

by prosecutors; it extends to evidence possessed by law enforcement as well. Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

In order to prevail on a Brady 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) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). The terms "prejudice" and "materiality" are used interchangeably. Mullen, 171 Wn.2d at 897. The question of materiality under Brady is reviewed de novo. In re Personal Restraint of Stenson, 174 Wn.2d 474, 491, 276 P.3d 286 (2012).

In this case, the first two parts of the Brady test were not disputed in the lower court, and cannot reasonably be argued here. 7RP 141-42. The three items were not disclosed to the defense; the parties agreed and the trial court found that it was unintentional and that the prosecutor learned of the information post-verdict. 7RP 135, 141-42, 156-57; CP 1436, 1515. The items were also arguably favorable to the defense, although the question of whether the drug

arrest constitutes impeachment evidence will be incorporated into the question of "materiality" below.

Evidence is "material" for Brady purposes "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 United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481(1985), and In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)). In turn, under 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, 514 U.S. at 434)).

Put another way, "the reasonable probability of a different result is shown when the State's suppression 'undermines confidence in the outcome of the trial.'" Thomas, 150 Wn.2d at 851(quoting Bagley, 473 U.S. at 678). Because this determination inherently involves analyzing the importance of the omitted information relative to all of the evidence presented, the omission must "be evaluated in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112-13, 96 S. Ct. 2932, 49 L. Ed. 2d 342 (1976); Mullen, 171 Wn.2d

at 897, 900 (undisclosed evidence must be reviewed "collectively, not item by item" and in view of the "totality of the evidence").

The "mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial . . . does not establish 'materiality'" under Brady. State v. Turner, 143 Wn.2d 715, 728, 23 P.3d 499 (2001) (italics in original). The United States Supreme Court has held that a "reasonable probability" requires more: a defendant must "show[] that the favorable evidence could reasonably be taken to *put the whole case in such a different light* as to undermine confidence in the verdict." Kyles, 514 U.S. at 435 (italics added); see also Strickler, 527 U.S. at 281 ("there is never a real 'Brady violation' *unless the nondisclosure was so serious* that there is a reasonable probability that [it] would have produced a different verdict") (italics added).

Accordingly, courts have found undisclosed impeachment evidence to be material only when it implicated witnesses who provided the sole link between the defendant and the crime or were otherwise deemed "crucial" by the record or the parties. See e.g. Kyles, 514 U.S. at 429, 451 (noting that the "heart of the State's case" was four eyewitnesses described by the prosecution as the "crux of the case" and whose earlier inconsistent statements were

never disclosed); Smith v. Cain, __ U.S. __, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012) (finding a Brady violation where an eyewitness "was the *only* evidence linking [defendant] to the crime" and whose testimony at trial was directly contradicted by his initial inability to identify any of the perpetrators at the scene) (emphasis in original); In re Stenson, 174 Wn.2d at 478 (holding that suppression of pretrial contamination of gunshot residue was "material," where it was "instrumental to the State's case" and comprised one of only "two key pieces of forensic evidence [that] directly tied the defendant to the shootings").

In the absence of evidence that attacks the major link to the crime, the courts have held against materiality. In Strickler, the court affirmed a conviction even where the sole eyewitness to a kidnapping had given several undisclosed statements directly contradicting her trial testimony, because two other witnesses had placed the defendant near the scene and "considerable forensic and other physical evidence" supported the State's case. 527 U.S. at 289-96; see also Smith, 132 S.Ct. at 630 ("We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict.").

In most cases where the court found materiality, the evidence consisted of either statements that directly contradicted the primary witness's testimony regarding the *actual crime itself*, or circumstances undermining the reliability of key forensic evidence. Most recently in State v. Davila, the court found that undisclosed evidence of a former crime lab analyst found to be incompetent in other cases was not material, even though "the DNA evidence was the crux of the State's case, and . . . Ms. Olson was the critical link in the chain that handled the DNA swabs and performed the initial testing." 2014 WL 4114314 (Aug. 21, 2014). The suppression of her "undisputed incompetence" as an analyst in other cases presented no reasonable probability of a different outcome because the record showed "little likelihood that her handling of the evidence could have contaminated the evidence *at issue.*" Id. (italics added).

"An important aspect of materiality under Brady is admissibility." Mullen, 171 Wn.2d at 897; see also Wood v. Bartholomew, 516 U.S. 1, 6, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995) (holding that undisclosed polygraph results were not material because they were inadmissible under the evidence rules in Washington and thus "could have had no direct effect on the outcome of the trial"); State v. Gregory, 158 Wn.2d 759, 797, 147 P.3d 1201

(2006) ("[I]f evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding").

Under ER 609(a), only crimes of dishonesty or felonies are admissible to impeach a witness. A dismissed conviction is not admissible for impeachment. In re Personal Restraint of Lord, 123 Wn.2d 296, 315, 868 P.2d 835, 849 (1994). A compromise of misdemeanor is not a conviction. State v. Ford, 99 Wn. App. 682, 685, 995 P.2d 93 (2000). Drug convictions are not crimes of dishonesty under ER 609 and are thus presumed inadmissible unless the proponent can meet its burden of establishing that probative value exceeds prejudicial effect. State v. Hardy, 133 Wn.2d 701, 707-12, 946 P.2d 1175 (1997).

2. THE 2006 ATTEMPTED DRUG POSSESSION CHARGE AND 2008 COMPROMISE OF MISDEMEANOR FOR THEFT IN THE THIRD DEGREE WERE INADMISSIBLE AND THUS NOT MATERIAL.

The trial court correctly found that Westberg's dismissed conviction for attempted drug possession did not qualify as Brady evidence because "drug offenses are simply not admissible" as impeachment evidence and there is "no legal theory under which

drug use can be used to impeach honesty." 7RP 125-26; CP 1514-15. The drug conviction was also inadmissible because it was not a felony and had been dismissed. Diemond does not cite to any authority that would otherwise allow its use, nor could she, given the well-established caselaw to the contrary.[9] She only asserts that evidence of Westberg's drug use "may have [created] . . . a very reasonable probability of a different result" without explaining how. Because evidence of drug use cannot be presented as evidence of dishonesty or a general propensity for misconduct, it was properly found to be non-material.

Nevertheless, Diemond disputes the trial court's ruling that the only basis for admissibility would have been if Westberg was under the influence at the time of the offense or while testifying in court, arguing that she "did not have an opportunity to investigate whether Westberg was under the influence of drugs either at trial or during her investigation of Ms. Diemond because the evidence had not been disclosed." App. Br. 9; 7RP 125-26; CP 1514-15. This argument is

[9] Diemond does not actually cite to any specific evidence rules under which the incidents could have been admitted, making only the blanket statement that "whatever the definition is for 'material,' the impeachment evidence disclosed about Westberg was material." App. Br. 8.

specious. Diemond was given ample opportunity to observe Westberg in an open courtroom and had more opportunity than anyone else to scrutinize her at her own home on February 27, where she was in close proximity to her for an hour before Dr. Mueller arrived. 3RP 123; 4RP 29. Not knowing about the prior drug arrest did not obscure her ability to make personal observations.

The 2008 misdemeanor theft arrest was resolved by a compromise of misdemeanor and dismissal, making it inadmissible on two grounds; trial counsel acknowledged that it was not a "true conviction." 7RP 19. Thus, although the trial court ruled that it "might" have been admissible, it correctly concluded that "[i]n summary, the jury would have known [only] that Westberg stole from her employer and lied to her employer." CP 1514-15.

3. THE WORKPLACE SUSPENSION INCIDENT WAS NOT MATERIAL.

The State concedes that the workplace suspension incident in which Westberg was found to have lied about working a full shift and attending a training would have been admissible at trial under

ER 608(b) as a specific instance of conduct.[10] This was the trial court's conclusion as well. CP 1515. However, Diemond still fails to meet her burden in establishing that the incident was material.

Westberg was far from the crucial or critical witness that Diemond attempts to portray. Unlike the cases cited above, Westberg was the least important of the State's three on-scene witnesses, and definitely not the sole link between Diemond and her crimes. As the trial court correctly found when it stated that "[o]ne looks in vain at the transcripts to see any different information that Officer Westberg gave" that the other State's witnesses did not, Westberg's testimony was wholly cumulative.[11] CP 1515.

Two other witnesses, Sergeant Soule and Dr. Mueller, saw and testified to almost the exact same subjects as did Westberg. All three witnesses, during the same two-day period, observed the visibly thin horses, frozen-solid trough, condition of the paddock, and the bark torn off the trees. All three felt Bud's rib bones personally with

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[10] Although the prosecutor stated in the lower court that the defendant's lie during her 2006 drug arrest about being the on-duty officer may also have been admissible under ER 608(b), the trial court did not make this ruling nor does Diemond address it in her brief, citing only the fact of her drug use/conviction. The State therefore does not reference it here.

[11] Although Diemond properly concedes that at least "some of Westberg's testimony was cumulative," she maintains that the impeachment evidence would have "leveled the playing field." App.Br. 10. This is not the standard for materiality.

their hands. All three heard Diemond admit that she gave each horse only one cup of cattle food and senior equine twice a day, that she was unable to care for the horses, and that people were after her.

As the trial court correctly pointed out, however, Mueller was the primary witness; it was Mueller whose observations were the "most thorough" and "in-depth" of the three witnesses. As the parties agreed in their briefing and argument, the case boiled down to a "battle of the experts" and it was therefore the experts who were the key witnesses. Even the defense expert paid little attention to Westberg's report when forming his opinions.

The closing arguments also focused on the experts. Westberg was barely mentioned by either side. The prosecutor and defense counsel devoted almost the entirety of their remarks to Dr. Mueller and Dr. Mabrey. Defense counsel instructed the jury that the ultimate issue of guilt boiled down to whether it accepted "science" (Mabrey) versus "eyeball" (Mueller).

The record also reflects that the heart of this case lay in the two expert witnesses. Their testimony took up most of the trial time, with extensive cross-examination by each side. It was Mueller who conducted a thorough physical examination of the horses, which Westberg made clear "was the veterinarian's exam . . . it wasn't my

exam." The exam, plus the medical history of the horses that Diemond gave directly to Mueller, formed the backbone of the State's case for starvation. Everything that Westberg described as a passive observer of the clinical assessment simply summarized Mueller's more detailed testimony; as Westberg said, "I wasn't really involved." 3RP 106, 116, 130, 136, 145, 154, 156.

Diemond nevertheless contends that Westberg was "allowed to opine" as an authority figure and "pseudo-expert." Neither the record nor the trial court's findings support this. For example, Westberg stated that she did not even know what Dairy 16 was or how much of it to give a horse. 3RP 125, 145-46. Her repeated deferrals to Mueller's medical opinion also belie her role as a "pseudo-expert." Furthermore, Westberg's comment that animal control officers were "the animal experts" came in response to a question about the difference between the King County Sheriff's Office and Animal Control. 3RP 139-40. It was also of no moment in this case, where Soule, the first responder on scene, was not an average law enforcement officer but one uniquely experienced in horse care.

The court was also equivocal about Diemond's characterization of Westberg, noting that although "it might be objected that Officer Westberg gave some 'expert' testimony," this testimony was limited to her direct observations of the scene, a vague "body score" that she herself described as incomplete and an "educated guess," and her opinion that the horses were not being fed enough. 3RP 134; CP 1514. All of these points were reiterated independently and more clearly by either Soule or Mueller. Even Soule, who personally observed Diemond scoop and prepare the two inches of the horses' food, presented more substantial testimony on that issue than Westberg, who never even saw Diemond feed the horses.

Finally, Diemond claims that she has established a reasonable probability of a different outcome because the jury unanimously convicted her of starvation rather than dehydration. This argument is unsound. Just because the verdict was not unanimous on one means does not mean the evidence was not powerful on the other. The evidence of starvation was overwhelming even had Westberg not testified or been thoroughly impeached. The jurors heard Soule's

and Mueller's testimony regarding Diemond's admissions, the scant volume of food provided, the horses' physical condition, and the fact that they were 200 pounds underweight. The jury saw only pictures of the bony horses with their ribs and hip bones jutting out, their significant and visible improvement following removal from Diemond's home, and actual bags of food exemplifying what each horse received per Diemond's own admission versus what was recommended by an actual veterinarian. 4RP 118-21.

Finally, Diemond misstates the holding in Strickler; that court did not hold that a reasonable probability may exist "even where the remaining evidence would have been sufficient to convict the defendant." App. Br. 7-8. It simply held that sufficiency of the evidence is not the correct standard to measure materiality under Brady; it said nothing about how findings under both tests could co-exist. Strickler, 527 U.S. at 290.

Diemond has failed to meet her burden to establish the materiality of the undisclosed evidence and a reasonable probability of a different outcome. The verdict in this case is worthy of confidence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Diemond's convictions.

DATED this 19 day of September, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to THOMAS KUMMEROW, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHRISTY DIEMOND, Cause No. 71125-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of September, 2014

Name
Done in Seattle, Washington