No. 48116-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN AQUINO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

To convict Mr. Aquino of second degree identity theft, the to-convict instructions required the jury to find an additional element. Because the State failed to prove the additional element, Mr. Aquino's conviction for that offense should be reversed for insufficient evidence. His convictions for bail jumping should also be reversed because the charging document was deficient as to those charges. Lastly, his conviction for fraud should be reversed because the trial court improperly denied Mr. Aquino's motion to dismiss for governmental misconduct and discovery violations.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, insufficient evidence supports the conviction for identity theft.

2. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, the charging document did not provide adequate notice of all the elements of bail jumping in both counts.

3. In violation of the Fourteenth Amendment to the United States Constitution, article I, § 3 of the Washington Constitution, and CrR 4.7(a)(3), the State failed to turn over exculpatory evidence to Mr. Aquino.

4. The trial court erred in denying Mr. Aquino's motion to dismiss for governmental misconduct and violation of the discovery rules.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The law of the case doctrine requires the State to prove all elements in a to-convict instruction. The to-convict instruction on identity theft in the second degree required the State to prove that Mr. Aquino did not obtain anything of value through his use of identifying information. While Mr. Aquino unsuccessfully attempted to cash a check with identifying information of another person, the State did not prove that Mr. Aquino obtained nothing of value from the identifying information. Should Mr. Aquino's conviction for identity theft be reversed?

2. A charging document must fairly allege all essential elements. An essential element of bail jumping is proof that the defendant had notice of the required court appearance and that the defendant knowingly missed this court appearance. The charging document alleged that Mr. Aquino had notice of subsequent appearances before "any court" in Washington and that he failed to appear on January 22, 2015 and March 18, 2015. The document did not allege that Mr. Aquino knew he had to appear in court on these dates. Neither did they allege that these court appearances were in Pierce County Superior Court. Was the information on these two charges constitutionally defective?

3. The State is constitutionally obligated to turn over exculpatory evidence, including impeachment evidence, to the defense. The State failed to disclose evidence that the arresting officer had been dishonest in an earlier case. The officer had alleged that a defendant had tried to run him over, but surveillance video showed otherwise and the prosecutor dismissed the charge of assault. When this evidence came to light, trial was about to start and counsel did not have time to investigate further. Did the trial court err in denying Mr. Aquino's motion to dismiss for governmental misconduct and violation of the discovery rules? Alternatively, did the trial court err in not suppressing the arresting officer's testimony?

D. STATEMENT OF THE CASE

John Aquino was at the Emerald Queen Casino on October 3, 2014. RP 88, 90, 100. Mr. Aquino went to the "cage" and asked to cash a check for $1,900.24. RP 90; Ex. 1. The check was issued by Paint Smith Company, however the word "COMPANY" was misspelled "COPMANY." Ex. 1. Mr. Aquino provided his identification. RP 90. The cashier, who was a new employee, passed the check to his supervisor to verify it. RP 91, 95, 101. The supervisor noticed deficiencies in the check that called its validity into question. RP 100. She took the check to her supervisors for evaluation. RP 100. As this was happening, Mr.

Aquino waited patiently, asking if it always took this long to cash a check. RP 92-93, 96-97; Ex. 2.[1]

The Puyallup Tribal Police were dispatched to investigate. RP 110, 114. Officer Gary Tracy contacted Mr. Aquino. RP 116. According to Officer Tracy, he immediately advised Mr. Aquino of his Miranda[2] rights. RP 117; CP 108. Mr. Aquino then answered questions about the check. RP 118. In his report, Officer Tracy did not quote what Mr. Aquino said in response to his questioning, other than that he answered "yes" in response to the Miranda warnings. RP 136-38. He did not offer Mr. Aquino the opportunity to provide a written statement. RP 141. Rather, Officer Tracy summarized his interaction with Mr. Aquino, recounting that Mr. Aquino said he was employed by the company that had issued the check, but then clarified he worked for a subcontractor. RP 118. Mr. Aquino was unable to provide details on how much he made per hour or where his last job site was located. RP 118. After about ten minutes, Officer Tracy arrested Mr. Aquino. RP 119; Ex. 2.

An employee of Paint Smith Company, who was responsible for issuing checks, testified that the check appeared to have been issued by

---

[1] This exhibit contains video footage from the casino.

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

her company. RP 132. She did not testify about the misspelling of "Company" on the check. RP 131-34; Ex. 1. Based on the check's number, however, she believed the check had originally been made out to "PCI Performance Contracting." RP 132. The check appeared altered to her. RP 133. The check had been issued for about $498, not $1,900.24. RP 133; Ex. 1. The employee did not know who Mr. Aquino was. RP 133-34.

Mr. Aquino was charged with identity theft in the second degree, forgery, and two counts of bail jumping for failing to appear for court dates on January 22, 2015 and March 18, 2015. CP 4-6. Following a CrR 3.5 hearing on June 25, 2015, Mr. Aquino moved to dismiss for discovery violations. CP 7-23. The court denied his motion. RP 34, 47, 50. Mr. Aquino was found guilty as charged. RP 232-33.

E. ARGUMENT

1. The State failed to prove that Mr. Aquino committed identity theft.

a. The State bears the heavy burden of proving every element the crime beyond a reasonable doubt.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. State v. Rich, __ Wn.2d __, 365 P.3d 746, 749 (2016); Const. art. I, § 3. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, a trier

of fact could find all elements of the crime were proved beyond a reasonable doubt. Rich, 365 P.3d at 749. Any inferences drawn from the evidence must be reasonable and not speculative. Id.

b. Under the law of the case doctrine, the State was required to prove that Mr. Aquino, through his possession or use of identifying information, either obtained something valued at $1,500 or less, or that he did not obtain anything at all.

The identity theft statute reads:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> (2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
>
> (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020.

Under this language, the elements of first and second degree identity theft are the same, except that the crime is raised to the

first degree when the violation involves items of value in excess of $1,500. See State v. Sells, 166 Wn. App. 918, 923, 271 P.3d 952 (2012).

The note on use for the pattern jury instruction pertaining to second degree identity theft recommends that language specifying the $1,500 threshold "should be used only for cases in which the crime of second degree theft is submitted to the jury as a lesser offense, when the crime needs to be distinguished from the greater offense." 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 131.06 note on use at 561 (3d ed. 2008). Otherwise, the instruction for second degree identity theft should simply track RCW 9.35.020(1).

Here, second degree identity theft was not submitted as a lesser offense. Still, the State proposed a to-convict instruction including this element. RP 202-203. Mr. Aquino did not object. RP 202-03. The trial court accepted this instruction. RP 206; CP 58. As a result, the to-convict instruction for identity theft required the jury to find an extra element referring to the $1,500 threshold:

> To convict the defendant of Identity Theft in the Second Degree as charged in Count I, the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about 3rd day of October, 2014, the defendant knowingly obtained, possessed, or

transferred, or used a means of identification or financial information of another person;

(2) That the defendant acted with the intent to commit or aid or abet any crime;

(3) That the defendant obtained credit, money, goods, services, or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services, or other items of value; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 58 (emphasis added)

If an additional element is included in a to-convict instruction without objection, the State assumes the burden of proving the added element. State v. Hickman, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998). This is the law of case doctrine. Id. at 102. "The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." Id. at 101. Hence, in the late 19th century, the Washington Supreme Court held "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and

constitutes upon this hearing the law of the case. . . ." Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896). The doctrine finds special support in the Washington Constitution, which provides that judges "shall declare the law." Const. art. I, § 16; see id. at 185 (discussing provision in connection with the doctrine).

c. The State failed to prove Mr. Aquino obtained something valued at less than $1,500 or that he did not obtain anything of value at all through his possession or use of the identifying information.

Hence, under the law of the case doctrine, the State assumed the burden of proving that Mr. Aquino, through his use or possession of identifying information, obtained something valued at $1500 or less, *or that he obtained nothing of value*. The State was required to affirmatively prove this negative beyond a reasonable doubt. The State did not overcome this significant hurdle.

The State presented evidence showing that Mr. Aquino tried to cash the check (which contained the identifying information) at the casino and that the teller did not cash it. However, contrary to the prosecutor's closing argument, RP 213, this does not prove that Mr. Aquino obtained nothing of any value from his possession or use of the identifying information. The lack of evidence does not prove this requirement. It would be illogical to conclude that the absence of evidence on this point

necessarily proves it beyond a reasonable doubt. For example, a lack of evidence that the sun rose this morning does not prove that the sun did not rise. In other words, the absence of evidence is generally not evidence of absence. Hence, contrary to the prosecutor's conclusory assertions during closing argument, we do not "know that [Mr. Aquino] didn't get anything." RP 213. We also do not "know that [Mr. Aquino] did not obtain anything of value." RP 213. The prosecutor's arguments were speculative. Speculation is not proof beyond a reasonable doubt. See State v. Vasquez, 178 Wn.2d 1, 18, 309 P.3d 318 (2013).

The evidence did not establish that Mr. Aquino obtained something valued at less than $1,500 or that he did not obtain anything of value at all through his possession or use of the identifying information. Accordingly, this Court should reverse the conviction and order the charge dismissed. Hickman, 135 Wn.2d at 106.

2. The charging document alleging two counts of bail jumping was constitutionally deficient.

a. A charging document must include all the elements of the offense.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, § 22; U.S. Const. amend. VI. When hearing a

challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document?" Kjorsvik, 117 Wn.2d at 105. If the court does not find the missing element, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). If the element is found, the court analyzes whether the defendant was actually prejudiced by the inartful language. Kjorsvik, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 425.

b. The charging document alleging bail jumping omitted the requirement that the State must prove that the defendant had knowledge of the requirement to appear before a particular court on a particular date.

Mr. Aquino was charged with bail jumping. RCW 9A.76.170(1). The statutory language of this offense includes a knowledge element:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1) (emphasis added). As interpreted, this knowledge requirement means that the State must prove that the defendant knew he was required to appear on *the specific date* for which he did not appear.

State v. Cardwell, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) ("In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates."), remanded on other grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011); State v. Ball, 97 Wn. App. 534, 535-36, 987 P.2d 632 (1999) (State must prove that the defendant knew he was required to appear at the scheduled hearing).

Mr. Aquino did not appear in Pierce County Superior Court on January 22, 2015 or on March 18, 2015. These were the bases for the two bail jumping charges. Both counts, however, failed to allege that Mr. Aquino knew he was supposed to appear in *Pierce County Superior Court* on either *January 22, 2015* or *March 18, 2015*:

> That JOHN PALACIO AQUINO, in the State of Washington, on or about the 22nd day of January, 2015, did unlawfully and feloniously, having been held for, charged with, or convicted of Identity Theft in the Second Degree and/or Forgery, a class "B" or "C" felony, and been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court in this state, fail to appear as required, contrary to RCW 9A.76.170(1), (3),(c), and against the peace and dignity of the State of Washington.

CP 5 (count III) (emphasis added). The language used in the second bail jumping count was identical except as to the date, "18th day of March, 2015." CP 5-6 (count IV).

The generic language, having "been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court in this state," did not tell Mr. Aquino that the State must prove that he *knew* he was supposed to appear *in Pierce County Superior Court* on *January 22, 2015* and *March 18, 2015*. Fairly read, the language only told him that he had been released or admitted to bail with knowledge of a requirement to appear at a later *unspecified date* before an *unspecified Washington court*.

Proving these alleged facts would be insufficient to convict Mr. Aquino of bail jumping, as Cardwell illustrates. There, the defendant was charged for bail jumping after not appearing for his court date on December 14, 2005. This Court rejected the State's argument that it only had to prove that the defendant knew he had to appear "some time in the future," rather than the actual court hearing date of December 14, 2005:

> At trial, the State maintained that as long as Cardwell knew that he would have to appear at some time in the future, it did not have to prove that he knew about the December 14, 2005 court hearing date. We disagree. Not only does the record establish that at the time of his release Cardwell's obligation to appear was contingent on the State's filing criminal charges before December 7, 2005, a future event that might not occur, there is no evidence that he had been given notice of the required court date. In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates.

Cardwell, 155 Wn. App. at 47.

Under the Kjorsvik test, if an element is missing, prejudice is presumed and reversal is required. McCarty, 140 Wn.2d at 425-26. Here, an essential element is missing. The State had to prove that Mr. Aquino was notified of the requirement to appear on January 22, 2015 and March 18, 2015 in Pierce County Superior Court. The information does not convey these requirements. Hence, this Court should reverse both convictions for bail jumping.

3. By failing to disclose exculpatory evidence, the State committed misconduct that justified dismissal of the case or, alternatively, suppression of the interrogating officer's testimony.

a. The State is required to turn over all material exculpatory evidence to the defense.

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 v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963). This rule applies to evidence undermining witness credibility. Giglio v. United States, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Evidence is material when there is any reasonable likelihood that the evidence could affect the jury's judgment. Id. at 154. To obtain relief based on Brady evidence discovered after

conviction, the defendant must show that the new evidence is sufficient to undermine confidence in the verdict. Wearry v. Cain, No. 14-10008, 2016 WL 854158, at *3 (U.S. Mar. 7, 2016).

Under Washington's Criminal Rules, absent a protective order, the prosecutor must "disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." CrR 4.7(a)(3). The prosecutor's obligation to disclose evidence under the court rule includes "information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4).

When a prosecutor violates Brady or CrR 4.7(a)(3) and the defendant discovers the violation before conviction, the court rules offer relief. CrR 8.3(b) authorizes the dismissal for governmental misconduct:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). Simple mismanagement is sufficient to show misconduct. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). This includes the State mismanaging its discovery obligations. State v. Brooks, 149 Wn. App. 373, 384-87, 203 P.3d 397 (2009). Dismissal is not the

only remedy. Where suppression of evidence is adequate to eliminate any prejudice caused by the misconduct, this is the proper remedy. City of Seattle v. Orwick, 113 Wn.2d 823, 831, 784 P.2d 161 (1989).

Relatedly, CrR 4.7(h)(7) authorizes the trial court to dismiss or take other appropriate action when the State violates its discovery obligations:

> (7) *Sanctions.*
>
> (i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.
>
> (ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

CrR 4.7(h)(7).

Decisions on motions made under CrR 8.3(b) and CrR 4.7(h)(7) are reviewed for an abuse of discretion. Brooks, 149 Wn. App. at 384. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. Id.

b. The prosecution failed to turn over exculpatory evidence tending to show that the arresting officer was dishonest and not credible.

During the CrR 3.5 hearing, Mr. Aquino's counsel had a sudden realization. See RP 14-15, 34-35. Officer Tracy, the same officer who had interrogated and arrested Mr. Aquino, had been involved in misconduct about two years earlier in a case involving a different client. See CP 8; RP 34-35. Counsel's client from that case had also been investigated by Officer Tracy. CP 8. In that case, Officer Tracy had accused counsel's client of trying to run him over with a motor vehicle, which had led to a charge of second degree assault with a deadly weapon. CP 8, 12, 21. Surveillance video, however, revealed that the officer was dishonest in his account. CP 8, 22.

As recounted by Mr. Aquino's counsel in an e-mail to the prosecutor assigned to the case:

> I watched the video and the officer lied in his police report regarding the assault. His report reads "The driver placed the vehicle in drive and drove directly toward me. I could see the driver was intent on continuing and would have struck me if I had made the decision to stand my ground."
>
> The video shows the officer chasing the car as it is backing up. The car puts it in drive and turns away from the officer. The officer gets close to the car and kicks the side of the

> car then takes a swipe at the car with his hand and the car drives off. The officer never got in front of the car. If he had stood his ground, the car would have drove off without touching him.
>
> If you watch the video, it is pretty clear that the officer lied about assault 2.

CP 22. The prosecutor wrote back, agreeing with defense counsel:

> I have finally gotten around to watching the video too. Your observations are correct. I am looking to have this file transferred to the Fraud Unit, unless your client wants to resolve the case with a plea on the Forgery and ID Theft.
>
> I am alerting my supervisor about the case problem.

CP 22. Shortly thereafter, the prosecutor agreed to dismiss the charge, stating "Upon review of the surveillance tape, the State does not have sufficient evidence to pursue the charge of Assault in the Second Degree." CP 23.

Here, the trial court reviewed the video and concluded this was not impeachment evidence. RP 62-63. But this information was plainly impeachment evidence against Officer Tracy, whose credibility was central to the prosecution against Mr. Aquino. After viewing the video, the trial court noted that "clearly, the video is at odds with [the officer's] description of the event." RP 61. Still, the court refused to draw the logical conclusion that Officer Tracy had been dishonest, reasoning:

> any time there is video, the video is almost always at odds with at least somebody's description of the event. To find

> that everybody is lying who describes an event different than it appears in a video is, in my judgment, not something that's appropriate.

RP 62. This might be true in the abstract. But finding that Officer Tracy was dishonest based on the specific video evidence and documents presented in this case is not the same as finding that "everybody is lying who describes an event different than it appears in a video." RP 62.

Because the trial court did not hear testimony, make credibility determinations, or resolve conflicting evidence in deciding Mr. Aquino's motion, this Court stands in the same position as the trial court and owes no deference to its conclusion on the matter. See Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989) (appellate court stands in the same position as the trial court in reviewing the record when the trial court's decision is not based on resolving credibility determinations or conflicting evidence). A review of the video and the documents before the trial court supports defense counsel's contention that Officer Tracy was dishonest. Pretrial (6/30/15) Ex 1; CP 7-44. Thus, this was plainly impeachment evidence that the State was obligated to turn over. The trial court erred.

c. The misconduct required dismissal or, at a minimum, suppression of the arresting officer's testimony.

The trial court ended its analysis upon concluding that the State had not violated its duty to turn over potential impeachment evidence. RP 62-63. Hence, the court did not evaluate the issue of prejudice.

Mr. Aquino's defense was prejudiced because once his counsel realized the State withheld Brady material, trial was about to start. His counsel had little to no time to investigate Officer Tracy further. Had Mr. Aquino received the Brady material, he would have had a fair opportunity to investigate Officer Tracy and possibly modify his defense strategy. This was especially important because Officer Tracy's account of his interaction with Mr. Aquino was in conflict with Mr. Aquino's account. CP 108-10. With the exception of Mr. Aquino's responses to the Miranda warnings, Officer Tracy did not quote what Mr. Aquino said to him and did not try to get a handwritten statement from him. RP 136-38, 141. By failing to create a paper trail, Officer Tracy could summarize his interaction with Mr. Aquino without corroboration and put words into Mr. Aquino's mouth. Officer Tracy summarized that Mr. Aquino had been unable to answer questions regarding the check and that Mr. Aquino changed his story during the questioning. RP 118-19. The jury, however, was not satisfied with Officer Tracy's testimony because the jury asked to

review his report. CP 47. The report, however, had not been admitted into evidence. CP 47.

In Brooks, a trial court dismissed the defendants' charges following the State's failure to provide the defense with certain discovery material until the eve of trial. Brooks, 149 Wn. App. at 377–83. This Court affirmed the trial court's CrR 8.3(b) dismissal order, holding that the State's late disclosure of discovery material prejudiced the defendants because it "prevented defense counsel from preparing for trial in a timely fashion." Id. at 390. Our Supreme Court has similarly held that prejudice under CrR 8.3(b) includes an infringement on the "'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. . . .'" Michielli, 132 Wn.2d at 240 (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)); see also State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980) (affirming trial court's CrR 8.3(b) dismissal for the State's mismanagement in providing supplemental witness list on the eve of trial and for other delays in providing discovery). Similarly, dismissal was also warranted in this case based on the Brady violation.

The State made two arguments as to prejudice. First, the State argued that because Mr. Aquino's counsel knew about the Brady material,

there was no prejudice. RP 58, 62; CP 27. Although not addressing the issue of prejudice, the trial court properly rejected this argument. RP 62.

The State secondarily argued that Mr. Aquino could not show prejudice because he would be unable to elicit the exculpatory evidence at trial. CP 27-28. Mr. Aquino had noted that the prosecutor from the other case would be available to testify at trial. RP 58. Citing ER 608(b), the State maintained that this prosecutor's testimony could not be used to impeach Officer Tracy on a collateral matter. RP 58-59.

This argument does not address the problem created for counsel in preparing for trial. That Mr. Aquino's ability to impeach Officer Tracy might have been limited is not the issue.

Regardless, ER 608(b) must give way to a defendant's right to present a defense. See State v. Jones, 168 Wn.2d 713, 720-22, 230 P.3d 576 (2010) (trial court violated defendant's right to present a defense when it excluded evidence offered for the purpose of attacking the victim's credibility). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In a criminal case, the defendant must be permitted some cross-examination into an important area. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). A "criminal defendant is

given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the state's case." Id. Here, given that Mr. Aquino's defense on the fraud and identity theft charges turned largely on determinations of credibility, ER 608(b) would have had to give way to Mr. Aquino's right to present a defense.

Accordingly, the State's misconduct was prejudicial. Dismissal of the charges was appropriate. At the least, the trial court should have suppressed Officer Tracy's testimony. The failure to exclude his testimony was prejudicial. Officer Tracy's testimony about Mr. Aquino's purported inability to answer Officer Tracy's questions implied that Mr. Aquino knew the check was altered. Absent Officer Tracy's testimony, the jury could have entertained a reasonable doubt on whether the State had met its burden proving the fraud or identity theft. This Court should reverse.

4. This Court should direct that no costs will be awarded to the State for this appeal.

If Mr. Aquino does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1) ("The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs."); RAP 14.2

("commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."). This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 2016 WL 393719, at *4 (January 27, 2016). This means "making an individualized inquiry." Id. at *6 (citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). A person's ability to pay is an important factor. Id.

Here, Mr. Aquino was found to be indigent. Supp. CP __ (sub. no. 83). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 2016 WL 393719, at *7. Given this record, the Court should exercise its discretion and decline any request for costs. Cf. Sinclair, 2016 WL 393719, at *6-7 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

The State failed to prove identity theft. That charge should be dismissed. The convictions for bail jumping should be reversed and dismissed without prejudice to refile because the charging document was deficient as to those two charges. The convictions for forgery and identity

theft should be reversed because the State's misconduct in withholding discovery was prejudicial as to these two offense.

DATED this 24th day of March, 2016.

Respectfully submitted,

s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 48116-2-II
v.	)	
	)	
JOHN AQUINO,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDQUIST, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] JOHN AQUINO 952 SW CAMPUS DR APT 38-A1 FEDERAL WAY, WA 98023	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MARCH, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

March 24, 2016 - 4:18 PM

Transmittal Letter

Document Uploaded: 4-481162-Appellant's Brief.pdf

Case Name: STATE V. JOHN AQUINO

Court of Appeals Case Number: 48116-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us