

NO. 34653-2-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES EDWARD WIEGARD

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Richard L. Brosey, Judge  
Lewis County Cause No. 05-1-00635-2

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BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

- A. The State has an obligation to disclose to the defense in a criminal prosecution all material exculpatory evidence in its possession. During trial, Defense Counsel elicited evidence which could be construed as exculpatory or of impeachment value, which was previously unknown to the prosecution. Were Wiegard's due process rights violated?
- B. An appellant who challenges the sufficiency of the evidence admits the truth of the state's evidence and all rational inferences that may be drawn therefrom. Could a rational trier of fact find that Wiegard delivered a controlled substance within 1000 feet of a school bus stop?

## II. STATEMENT OF THE CASE

Respondent accepts as adequate, for purposes of this Response, the "Statement of Facts and Prior Proceedings" appearing in the Opening Brief of Appellant, with additions and/or clarifications as appear hereinafter in the body of this Brief of Respondent, and as follows:

On August 21, 2005, Danielle Ortiz contacted Tim King to arrange for a purchase of methamphetamine, to occur at 516 South Cedar—the Appellant's residence.<sup>1</sup> The residence is a double-wide mobile home that has been split in half, with an apartment on each side.<sup>2</sup> When she arrived, she encountered the Appellant, Charles Wiegard (hereinafter referred to as

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<sup>1</sup> 3/28/06 RP 79.

<sup>2</sup> 3/29/06 RP 28.

“Wiegard”) and Rita Masters in the living room.<sup>3</sup> The living room is just to the right, from the front door entrance.<sup>4</sup> When she told Wiegard why she was there, Wiegard offered to sell her the methamphetamine instead of King.<sup>5</sup> He sold her two baggies of methamphetamine for \$40.00. The next morning, on August 22, 2005, she went back to Wiegard’s house, and encountered Wiegard as he was coming out the door. When she asked if he had any more methamphetamine, Wiegard told her that he did, and that Masters was holding it for him. Ortiz then called Detective Fitzgerald from a pay phone and set up the next controlled purchase.<sup>6</sup> She later returned to the residence under controlled purchase protocols, and entered the residence, where she purchased more methamphetamine from Masters.<sup>7</sup> She told Masters that Wiegard had earlier told her that Masters was “holding” the methamphetamine, and Masters told her, “If Chuck told you that, I can go ahead and sell it to you.”<sup>8</sup>

During the month of August 2005, there was no telephone at the residence, and Wiegard did not have a cellular telephone.<sup>9</sup>

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<sup>3</sup> 3/28/06 RP 80-81.

<sup>4</sup> 3/28/06 RP 77.

<sup>5</sup> 3/28/06 RP 81.

<sup>6</sup> 3/28/06 RP 82, 104.

<sup>7</sup> 3/28/06 RP 83.

<sup>8</sup> 3/28/06 RP 83, 110.

<sup>9</sup> 3/28/06 RP 112.

### III. ARGUMENT

- A. THE STATE HAS AN OBLIGATION TO DISCLOSE TO THE DEFENSE IN A CRIMINAL PROSECUTION ALL MATERIAL EXCULPATORY EVIDENCE IN ITS POSSESSION. DURING TRIAL, DEFENSE COUNSEL ELICITED EVIDENCE WHICH COULD BE CONSTRUED AS EXCULPATORY OR OF IMPEACHMENT VALUE, WHICH WAS PREVIOUSLY UNKNOWN TO THE PROSECUTION. WERE WIEGARD'S DUE PROCESS RIGHTS VIOLATED

Wiegard asserts that the Deputy Prosecutor's failure to disclose evidence that Ortiz visited his home on occasions where she was not performing controlled purchases of drugs constituted a *Brady* violation.<sup>10</sup>

Pursuant to *Brady* and its progeny, the State has an obligation to disclose to the defense in a criminal prosecution all material exculpatory evidence in its possession. This duty to disclose encompasses impeachment evidence as well as exculpatory evidence.<sup>11</sup> Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

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<sup>10</sup> See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that due process requires the State to disclose evidence that is both favorable to the accused and 'material either to guilt or to punishment.); see also *In re Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999) (citing *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Brady*, 373 U.S. at 87.)).

<sup>11</sup> *Bagley*, 473 U.S. at 676.

different.<sup>12</sup> A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.<sup>13</sup>

The three essential components of a *Brady* violation are: (1) the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have occurred.<sup>14</sup> Prejudice exists "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."<sup>15</sup> Under a *Brady* analysis, prejudice exists "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."<sup>16</sup> However, in this context, reasonable probability is not determined by an inquiry into the likelihood of a different verdict. Instead, the court must determine whether the suppression of the evidence undermines confidence in the verdict.<sup>17</sup>

Wiegard's *Brady* violation claim fails on all three elements. First, standing alone, the fact that Ortiz had access to and visited Wiegard's

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<sup>12</sup> *Gentry*, 137 Wn.2d at 396.

<sup>13</sup> *Id.*

<sup>14</sup> *Strickler v. Greene*, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936, 1939 (1999).

<sup>15</sup> *In re Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998) (citing *Bagley*, 473 U.S. at 682).

<sup>16</sup> *Benn*, 134 Wn.2d at 916 (quoting *Bagley*, 473 U.S. at 682).

<sup>17</sup> *Benn*, 134 Wn.2d at 916 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

home is not exculpatory or impeaching. Ortiz still had belongings in the residence, and she was involved in an ongoing investigation with several of the home's denizens, including Wiegard and Masters. There was no telephone in the residence, so going to the residence at times when she was not under controlled purchase conditions—in itself—is not exculpatory. Nor is the fact that Detective Fitzgerald knew that Ortiz was going there. Indeed, with no telephone at the residence, it would be difficult for Ortiz to arrange controlled purchases of controlled substances *without* visiting the residence. The evidence became fodder for impeachment only in light of Ortiz' testimony—following Detective Fitzgerald's—that she did not go to the residence while under contract, apart from the controlled purchase occasions. This development during trial is not the type of “evidence” that *Brady* contemplates, and such a development surely was not in the knowledge of the State. Indeed, it was Wiegard's counsel's questions on cross-examination that brought out the fact that Detective Fitzgerald knew that Ortiz had been to the residence.

Second, Wiegard cannot satisfy the suppression element of the *Brady* rule. There is no evidence that the State knew that Ortiz had visited the residence other than during the controlled buys. Nor did the State know that Detective Fitzgerald knew this. To the contrary, record indicates that the State did not have this knowledge at the time of trial,

until it was elicited by Wiegard's trial counsel. Further, although the State cannot avoid its obligations under *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to search for exculpatory evidence.<sup>18</sup> Absent knowledge, the State could not have suppressed or hidden the evidence. Further, "[e]vidence is suppressed for *Brady* purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of due diligence."<sup>19</sup> Here, the evidence was discovered by defense counsel during cross-examination of Detective Fitzgerald and Ortiz. He utilized it effectively to discredit Ortiz, and to raise a defense—i.e., that Ortiz planted the methamphetamine in the residence during one or more of these visits. Thus, the discovery of the evidence did not come too late to be of use. Indeed, it proved very useful for the defense. Additionally, the evidence was available to the defendant through the exercise of due diligence. Defense counsel never interviewed Detective Fitzgerald—the case agent and Ortiz' handler. Had he bothered to do so, he certainly could have—and likely would have—learned of the facts he revealed during cross-examination.

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<sup>18</sup> *Gentry*, 137 Wn.2d at 399.

<sup>19</sup> *Boss v. Pierce*, 263 F.3d 734, 740 (7<sup>th</sup> Cir., 2001).

Finally, as the foregoing establishes, there was no prejudice. As previously demonstrated, Wiegard actually benefited from the revelation that Ortiz was going to the residence while not under the direct supervision of Detective Fitzgerald. First, Ortiz' denial that she did so—when contrasted with Detective Fitzgerald's testimony—served as impeachment of Ortiz' credibility. Second, it set—or at least supported—the defense theory that Ortiz planted the methamphetamine in the residence, then retrieved it during the controlled buys. Had this evidence been disclosed, it would likely have been used exactly as it *was* used—to impeach Ortiz, and to show that not only did Ortiz have the motive to plant evidence to “frame” Wiegard, but that she had the *means*, as well.

Thus, Wiegard fails in all regards to establish a *Brady* violation in the instant case. His claim must fail.

B. AN APPELLANT WHO CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADMITS THE TRUTH OF THE STATE'S EVIDENCE AND ALL RATIONAL INFERENCES THAT MAY BE DRAWN THEREFROM. COULD A RATIONAL TRIER OF FACT FIND THAT WIEGARD DELIVERED A CONTROLLED SUBSTANCE WITHIN 1000 FEET OF A SCHOOL BUS STOP?

Wiegard next challenges the sufficiency of the evidence that he delivered a controlled substance within 1000 feet of a school bus stop.

Appellate courts review a challenge of insufficient evidence in the light most favorable to the State to determine “whether ... any rational trier of fact could have found guilt beyond a reasonable doubt.”<sup>20</sup> “The court may infer criminal intent from conduct.”<sup>21</sup> “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”<sup>22</sup> “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.”<sup>23</sup> The reviewing court considers circumstantial evidence equally reliable as direct evidence.<sup>24</sup> “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”<sup>25</sup>

Wiegard challenges the sufficiency of the evidence supporting the school zone enhancements on two grounds.

First, he seems to argue that, as a matter of law regardless of the measurements, there can be no school bus stop enhancement unless the terminus of the measurement is the exact site of the prohibited conduct.

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<sup>20</sup> *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

<sup>21</sup> *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

<sup>22</sup> *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

<sup>23</sup> *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

<sup>24</sup> *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

<sup>25</sup> *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

For this proposition, he relies on *State v. Clayton*<sup>26</sup>--a Division III case where the court analyzed the issue ostensibly through a sufficiency of the evidence analysis. The *Clayton* court focused solely on the language of the statute, which it interpreted as requiring that the 1000 foot prohibition be measured from the actual site of the prohibited conduct to the perimeter of the school zone. The court disregarded the standards for analyzing challenges to the sufficiency of the evidence--i.e., the appellant's admission of the truth of the State's evidence; drawing all reasonable inferences in the State's favor; and interpreting the evidence most strongly against the defendant. Rather, the *Clayton* court seemed to hold that the terminus of the measurement from the school zone must be the actual site of the prohibited conduct regardless of the distance. Taken to its logical conclusion, such a holding would mean that if the measurement from the perimeter of the school to the furthest point of the property where the acts occurred was 100 feet, there could be no enhancement. Such a conclusion defies logic, and exalts form over substance. To the extent that the *Clayton* holding can be so interpreted, this Court should not adhere to it.

Adhering to the well-established standards for analyzing challenges to the sufficiency of the evidence, this Court must find that the

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<sup>26</sup> 84 Wn.App. 318, 927 P.2d 258 (1996).

State's evidence of the distances between the bus stop and Wiegard's residence is less than 1000 feet.

Dale Dunham testified that there is a school bus stop at the northwest corner of the intersection of Yew and Chestnut Streets, which is one block south of the intersection of Yew and Cherry Streets.<sup>27</sup> Steve Spurgeon testified that the distance between Yew and Cherry Street intersection and the defendant's residence is 446.14 feet.<sup>28</sup> Detective Hoium testified that the distance between the middle of the intersection of Yew and Cherry Streets and the northwest corner of the intersection of Yew and Chestnut Streets is 398 feet.<sup>29</sup> The calibration of the measuring device goes to the weight of the evidence—i.e., credibility, and is thus not subject to review by the reviewing court. The sum of the two measurements is approximately 844 feet. In challenging the sufficiency of the evidence, Wiegard admits the truth of this evidence. In essence, he asks this Court to find that the distance from the residence to the point of the transactions was more than 156 feet. It is a reasonable inference that the distance measured by Spurgeon was from the middle of the residence to the middle of the intersection. To assume otherwise would be to interpret the evidence against the State, rather than the defendant. Taking

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<sup>27</sup> 3/29/06 RP 66, 67, 68.

<sup>28</sup> 3/29/06 RP 75.

<sup>29</sup> 3/29/06 RP 77.

all reasonable inferences in a light most favorable to the State, the drug transactions occurred within 1000 feet of a school bus stop.

Wiegard next argues that the enhancement does not apply to accomplices who are not themselves within 1000 feet of a school bus stop, but who are liable for the acts of another who commits the prohibited act within this protected zone. He relies on *State v. Silva-Baltazar*<sup>30</sup> for this position. However, the *Silva-Baltazar* court expressly reserved this issue, declining to rule on it, and instead confined its holding to the facts of that case—where the accomplices were within the protected zone.<sup>31</sup> The court did *not* rule in the instant issue before this Court, but it *did* state:

In holding that an accomplice may be liable for first degree robbery whether or not the accomplice knew the principal was armed, this court in *State v. Davis*, 101 Wn.2d 654, 659, 682 P.2d 883 (1984) noted that the Legislature has an interest in discouraging deadly weapons by imposing strict liability on all those involved in a robbery. In this way, RCW 69.50.435 is more akin to the first degree robbery statute in *Davis* than it is to the prior deadly weapon enhancement interpreted in *McKim*.<sup>32</sup> Not only does the Legislature have an interest in imposing strict liability for certain drug activity in specific locations, it has explicitly done so. Therefore, although *Davis* involves a substantive crime and *McKim* involves a sentence enhancement, the analysis in *Davis* is more persuasive here.<sup>33</sup>

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<sup>30</sup> 125 Wn2d 472, 866 P.2d 138 (1994).

<sup>31</sup> *Id.* at 474, 480.

<sup>32</sup> *State v. McKim*, 98 Wn.2d 111, 653 P.2d 1040 (1982).

<sup>33</sup> *Silva-Baltazar* at 482.

Thus—recognizing that the *Silva-Baltazar* court did not include in its holding the scenario presented in the instant case—it certainly gave an indication that it viewed the school zone enhancement as analogous to the application of the firearm enhancement to accomplices. Adopting the *Silva-Baltazar* court’s reasoning, this Court should similarly view the school zone enhancement, and apply the *Davis* court’s reasoning and analysis. This is particularly applicable in a case such as this, wherein Wiegard actually made the drug deal while he was within the protected zone. It was only during the actual hand-to-hand transfer that he was absent from the residence.

#### IV. CONCLUSION

Wiegard’s *Brady* argument must fail because—even if he meets the first element of the test—he fails to meet the second and third. The prosecution did not suppress the evidence (of which it had no knowledge), and Wiegard fails to establish any prejudice under the appropriate test. Further, there was sufficient evidence that Wiegard delivered the methamphetamine within 1000 feet of the school bus stop, and he fails to present a persuasive argument that he cannot be held to the enhancement

where he was convicted as an accomplice. Accordingly, his appeal should be denied.

#### V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Wiegard be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 15<sup>th</sup> day of February, 2007.

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By:

  
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CERTIFICATE

I certify that on 2/15/07, I mailed a copy of the foregoing supplemental response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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