

No. 35011-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Javier Cruz,**

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]

Clallam County Superior Court

Cause No. 06-1-00025-0

The Honorable Judge George Wood

**Appellant's Reply Brief**

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT..... 1

I. Respondent invokes the wrong legal standard in  
evaluating Mr. Cruz’s *Brady* claim. .... 1

II. The court’s “knowledge” instruction created an  
unconstitutional mandatory presumption. .... 4

III. Mr. Cruz was denied the effective assistance of counsel.  
..... 6

CONCLUSION ..... 7

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

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

*Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)  
..... 1, 3

*U.S. v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984)..... 3

*United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481  
(1985)..... 3

**STATE CASES**

*Seattle v. Gellein*, 112 Wn.2d 58, 768 P.2d 470 (1989) ..... 5

*State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996) ..... 6

*State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992) ..... 1, 2

*State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) ..... 4

*State v. Mertens*, 148 Wn.2d 820, 64 P.3d 633 (2003) ..... 5

*State v. Nunez-Martinez*, 90 Wn. App. 250, 951 P.2d 823 (1998) ..... 4

*State v. Reid*, 74 Wn. App. 281, 872 P.2d 1135 (1994)..... 6

*State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) ..... 1, 2

## ARGUMENT

### **I. RESPONDENT INVOKES THE WRONG LEGAL STANDARD IN EVALUATING MR. CRUZ'S *BRADY* CLAIM.**

Respondent has accepted Mr. Cruz's statement of facts, conceded that withheld information should have been provided to the defense, and agrees that Mr. Cruz "has ample reason to complain." Brief of Respondent, pp. 1, 3, 5-6. Despite this, Respondent argues that reversal is not required unless Mr. Cruz demonstrates "a manifest abuse of discretion." Brief of Respondent, p. 1. Respondent invokes the wrong legal standard for evaluating a *Brady* violation. Brief of Respondent, pp. 1-6, citing *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992) and *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001).

Failure to disclose material exculpatory evidence violates the constitutional right to due process. *Brady v. Maryland*, 373 U.S. 83 at 87, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963). Reversal is required whenever there is a reasonable probability that disclosure would have led to a different result. *Kyles v. Whitley*, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). Once a defendant has demonstrated a failure to disclose evidence that is both material and exculpatory, reversal is required and "there is no need for further harmless-error review." *Kyles v. Whitley*, at 435.

The two cases upon which Respondent relies, *Woods* and *Dunivin*, govern motions to dismiss for discovery violations generally; they do not purport to overrule the standards relating to exculpatory evidence announced by the U.S. Supreme Court. In *Woods*, the state failed to provide DNA test results implicating the defendant until after a deadline imposed by the trial court. Dismissal would have been appropriate if this delay had “interject[ed] ‘new facts’ into the case which then [caused] the defendant to choose between two constitutional rights,” such as the right to effective assistance and the right to a speedy trial. *Woods*, at 584. In *Dunivin*, the prosecution failed to provide information it planned to use to impeach a defense witness; the case was analyzed under CrR 4.7, without reference to *Brady v. Maryland*. Neither *Woods* nor *Dunivin* address the due process violation that occurs when the government withholds material exculpatory evidence, and the abuse of discretion standard set forth in those cases is inapplicable here.

Respondent does ultimately address the “reasonable probability” standard. Brief of Respondent, pp. 5-6. Respondent praises defense counsel for ferreting out some of the information on his own and for conducting a vigorous cross-examination of two of the witnesses, and suggests that Mr. Cruz received a fair trial because “the evidence was sufficiently tested.” Brief of Respondent, p. 6, citing *U.S. v. Cronin*, 466

U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984). But *Cronic* is an ineffective assistance case, wherein the Supreme Court declared that “[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Cronic*, at 656. Mr. Cruz does not allege that his attorney, Harry Gasnick, was ineffective for failing to test the state’s evidence. Indeed, Mr. Gasnick deserves a great deal of praise for his pursuit of the truth despite the Forks Police Department’s intentional efforts to hide evidence. Respondent’s assertion that the evidence was “sufficiently tested” is irrelevant.

There is a reasonable probability that earlier disclosure would have led to a different result: the question is not “whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, at 434. The Forks Police Department’s attempts to suppress the evidence (and the possibility that additional evidence remains undisclosed) “undermines confidence in the outcome of the trial.” *United States v. Bagley*, 473 U.S. 667 at 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Because of this, the conviction must be reversed.

**II. THE COURT’S “KNOWLEDGE” INSTRUCTION CREATED AN UNCONSTITUTIONAL MANDATORY PRESUMPTION.**

Respondent claims that a delivery charge requires proof of a single *mens rea*, rather than two which can be conflated by an erroneous knowledge instruction. On this basis, Respondent seeks to distinguish *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). Brief of Respondent, pp. 6-7. Respondent is incorrect.

The elements of the crime of Delivery of a Controlled Substance are (1) delivery, and (2) guilty knowledge. *State v. Nunez-Martinez*, 90 Wn. App. 250 at 253, 951 P.2d 823 (1998). The first element (“delivery”) is established if the state proves an intentional act-- the delivery itself. The second element (“guilty knowledge”) is established if the state proves that the defendant knew “that the substance being delivered [was] a controlled substance.” *Nunez-Martinez*, at 254. The conflation problem at issue in *Goble* is identical to the problem caused by the instruction in this case. *Goble* controls, and Mr. Cruz’s conviction must be reversed.

Furthermore, the underlying problem with the court’s knowledge instruction is its use of an irrebuttable mandatory presumption; Respondent does not address this problem.

A mandatory presumption is one which requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle*

*v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Furthermore, conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

Without citation to authority and without argument in the body of its brief, Respondent asserts (in a heading) that the instruction “Did Not Create A Mandatory Presumption.” Brief of Respondent, p. 6. This is incorrect.

In this case, the instruction required the jury to find that Mr. Cruz acted knowingly if he acted intentionally. Instruction No. 10, CP 34. Thus the elemental fact (“Acting knowingly or with knowledge”) is conclusively presumed from the predicate fact (“if a person acts intentionally.”) Instruction No. 10, CP 34. This runs afoul of the rule against conclusive presumptions. *Mertens, supra*.

Without citation to authority or the record, Respondent asserts that the instruction “does not mean that the person is guilty if he did any intentional act...” Brief of Respondent, p. 7. But nothing in the court’s

instructions limited the intentional acts that could serve as a predicate fact for the conclusive presumption. Court's Instructions, CP 22-35.

Finally, again without citation to authority or the record, Respondent asserts that any error was harmless. Brief of Respondent, p. 8. The use of a conclusive presumption in a jury instruction is harmless only if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. *State v. Deal*, 128 Wn.2d 693 at 703, 911 P.2d 996 (1996).

Here, the state did not provide any independent proof of "guilty knowledge." RP (6/5/06) 21-126; RP (6/6/06) 16-209; RP (6/7/06) 13-135. There is no way of knowing how the jury used the "knowledge" instruction, with its conclusive presumption. Accordingly, the conviction must be reversed. *See, e.g., State v. Reid*, 74 Wn. App. 281 at 289, 872 P.2d 1135 (1994) (where jury may have relied solely on a permissive inference instruction to establish element of fraudulent intent, reversal is required because "[t]here is no way of knowing beyond a reasonable doubt whether the jury relied on the improper basis.")-

### **III. MR. CRUZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Appellant rests on the arguments presented in the opening brief.

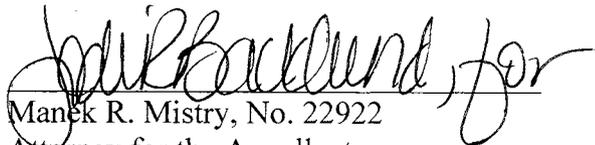
**CONCLUSION**

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Javier Cruz, DOC 828237  
Stafford Creek Correction Center  
191 Constantine Way  
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and to:

Clallam County Prosecuting Attorney  
223 East Fourth Street, Suite 11  
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 16, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 16, 2007.

  
\_\_\_\_\_  
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