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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did defendant fail to preserve his claim of a discovery violation in the trial court?
2. Even if there was a technical violation of the discovery rules, has defendant failed to show that was prejudiced in the presentation of his defense?
3. Should a scrivener's error in the Judgment and Sentence be corrected?

B. STATEMENT OF THE CASE

1. Procedural History

On August 14, 2008, the State charged appellant Samuel A. Belden, "defendant," with second degree assault. CP1; RCW 9A.36.021(1)(a). CP 1. A notice of appearance was filed on September 4, 2008 by Michael Kawamura of the Department of Assigned Counsel on behalf of Jason L. Johnson. CP 107. A discovery distribution receipt shows that pages 1 through 56 of discovery were given to defense counsel on September 3, 2008. CP 108. On October 3, 2008, an additional three (3) pages of discovery were processed and forwarded to Johnson. CP 109. On October 16, 2008, three (3) more pages of discovery were processed and forwarded to Johnson. CP 110. On November 12, 2008, an order

was entered allowing the substitution of Kent Underwood for Jason Johnson as counsel for defendant. CP 111. On December 23, 2008, an additional 20 pages of discovery were processed and forwarded to new trial counsel. CP 119. Altogether, 83 pages of discovery were provided by the State to defense counsel. CP 108, 109, 110, 119.

Substitute counsel's notice of appearance also contained a demand for discovery. CP 101-105. Following an omnibus hearing, the order entered addresses various discovery issues but does not include a defense request for a copy of any 911 recordings. CP 114-116. The State's initial witness list was filed on November 14, 2008, listing Denise Severson of the Law Enforcement Support Agency (hereinafter referred to as LESA) as a potential witness. CP 112-113. A second witness list was filed by the State on December 16, 2008, again listing Severson as a witness. CP 117-118.

The case proceeded to jury trial before the Honorable Ronald E. Culpepper and the jury returned a guilty verdict as charged on April 1, 2009. CP 60. The court imposed a low-end standard range sentence of 13 months, and defendant filed this timely appeal. CP 74, 86.

## 2. Substantive Facts

Jeanice Graves was the first witness called by the State. Graves testified that on April 27, 2008, she had been over at her grandmother's house most of the day helping with some yard work. 3RP 10. At the time, Graves lived in a mobile home that she shared with Angela Hohnsbehn, Angela's minor daughter, and two other adult males. 3RP 6, 9. Graves had been living in the home for just under a month when the events of April 27, 2008 took place. 3RP 7. Hohnsbehn was dating defendant who lived in the same mobile home park. 3RP 8, 9.

When Graves arrived home, she asked Hohnsbehn to drive her to the store to get some cigarettes. 3RP 11. Hohnsbehn agreed and the two walked over to defendant's residence to pick up Hohnsbehn's vehicle which was parked in his driveway. 3RP 11. When they arrived at defendant's residence, Hohnsbehn went inside the residence while Graves stood outside near the car. 3RP 12.

While standing outside the residence, Graves heard Hohnsbehn arguing with defendant although she could not recall any specific words said between the two. 3RP 12. At some point, Graves heard Hohnsbehn's daughter, Jasmine, say that she wanted to go home. Defendant told Jasmine that she could not go home and Jasmine responded that she was scared and just wanted to go. 3RP 13-14. Graves told defendant that he

was scaring Jasmine and to let her go home. 3RP 14. At the time that she made the statement to defendant, he was in the doorway with the door open and had walked out onto the porch. 3RP 15. At no time did Graves enter defendant's residence. 3RP 14.

Defendant told Graves, "I ought to kick your ass," or something to that effect. Defendant then came down the steps and shoved Graves. 3RP 15. After defendant shoved Graves, she fell backwards. 3RP 20. Graves did not trip over anything or stumble over a stair. 3RP 26. Graves did not fall off the porch. 3RP 27. But for defendant shoving Graves, she would not have gone backwards or fallen backwards. 3RP 26.

At the time defendant shoved Graves, she was standing on a concrete driveway area at the bottom of the stairs leading to defendant's residence. 3RP 15, 17. Prior to being shoved by defendant, Graves did not pick up any objects that could have been used as a weapon, nor did she strike or otherwise make physical contact with defendant. 3RP 18. As a result of being intentionally shoved by defendant, Graves sustained a fracture to her right wrist which required two separate surgeries. 3RP 23,24. Two plates and eight screws were required to put the wrist back together. 3RP 23.

Graves told a friend, Elizabeth Holman, that she had been pushed down and as a result, broke her wrist. 3RP 29. Graves was scheduled to

start a new job at a convenience store the morning after the assault took place. Graves went to the store and told the cashier who was working that she had been assaulted and broke her wrist. 3RP 30.

Graves' grandmother, Myrna Hamilton, testified and was asked if Graves had told her how her wrist had been injured. Counsel objected on hearsay grounds. 4RP 29. The objection was overruled and Hamilton testified that Graves told her that defendant had pushed her and that she had fallen on cement, resulting in the broken wrist. 4RP 29. No instruction was requested by defense counsel or given by the court which limited the purposes for which the statements were admitted. 4RP 29.

Fred Wendt, a firefighter/medic, testified that he responded to Graves' residence and noticed that Graves appeared to be in pain. 4RP 36. Wendt noted that Graves' wrist appeared deformed and that it did not appear that the bone was in line. 4RP 36, 37. Graves did not appear to be overreacting to the broken wrist, was able to speak, and told Wendt that she was pushed to the ground. 4RP 36. No objection was raised to the statements made by Graves to Wendt. 4RP 36.

Deputy Gary Nicholson testified that he also responded to the scene and spoke with Graves. Graves told Nicholson that she was pushed and fell back onto her arm and tried to catch herself resulting in the injury to her arm. 4RP 46. Graves also told Nicholson that the incident occurred

in the same mobile home park but at Space 33, defendant's residence.

4RP 46. Graves told Nicholson that she heard an argument between her friend, Angela and Angela's boyfriend, Samuel, that she attempted to intervene in the argument and was approached by defendant who shouted obscenities at her and pushed her. 4RP 46, 47.<sup>1</sup> Nicholson searched the area for defendant without success. 4RP 48-51.

Detective Deborah Heishman testified that on April 29, 2008, she went out to Graves' residence and spoke with her regarding the assault. Hohnsbehn was present at the time Heishman spoke with Graves. 4RP 57. Graves told Heishman that she heard Hohnsbehn and defendant yelling inside the residence and that defendant came outside and pushed her backwards. 4RP 58. Graves told Heishman that the contact with appellant occurred outside the residence, that appellant came up to her, yelled something at her and pushed her causing her to fall backwards onto the concrete. 4RP 58.<sup>2</sup>

During a 911 call, Graves told the 911 operator that defendant, whom she identified by name, had shoved her. Exhibit 10.

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<sup>1</sup> Again, no objection was raised to the statements made by Graves to Nicholson. 4RP 46, 47. No instruction was requested by defense counsel limiting the purpose for which the statements were to be considered by the jury. 4RP 46, 47.

<sup>2</sup> No objection was raised to the statements made by Graves to Heishman. 4RP 58. No limiting instruction was requested by defense counsel as to the purpose for which the statements to Heishman were to be considered. 4RP 58.

C. ARGUMENT

1. ANY CLAIM OF A DISCOVERY VIOLATION  
WAS NOT PROPERLY PRESERVED BELOW.

CrR 4.7(a)(1)(i) requires that the prosecuting attorney disclose to the defendant any written or recorded statements and the substance of any oral statements of any persons whom the prosecuting attorney intends to call as witnesses at trial. Discovery violations should be raised in the trial court so that the court can compel discovery if necessary. *State v. Boot*, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985). The language of the rule itself indicates that the party should raise noncompliance with the discovery rules “during the course of the proceedings.” *Boot*, 40 Wn. App. at 220. Failure to properly raise the issue below waives the right to assign error to the violation on appeal. *Boot*, 40 Wn. App. at 220.

In this case, defendant does not claim that his trial counsel was unaware of the existence of the 911 tape. From the time of the filing of the discovery demand on November 14, 2008, to the start of trial on March 26, 2009, defense counsel did not contact the State regarding the request for a copy of the 911 tape, nor did counsel provide the State with a copy of a blank CD, DVD or audio cassette tape in order to copy the 911 tape. 4RP 94. Even at trial, defense counsel did not claim that he was unaware that a 911 call had been made or a recording of the call existed,

rather counsel assumed that the State would not be using the tape at trial.  
4RP 96-97.

Counsel had numerous opportunities during trial to request a copy of the 911 tape or raise any alleged discovery violations. When pre-trial motions in limine were held on March 26, 2009 prior to the start of trial, defense counsel did not raise the issue of the 911 tape. 1RP 13. During voir dire, the court read off a list of potential witnesses which included Denise Severson. Defense counsel did not bring up the issue of the 911 tape or seek clarification of whether or not the State still intended to call Severson as a witness. 2RP 25.

Counsel again could have raised the issue during the State's direct of Graves when she was questioned about the 911 call. 3RP 22. Another opportunity presented itself during the re-direct of Graves, when she again was asked about the content of the 911 call. 4RP 10-11. Counsel could have asked for a copy of the tape when he saw that the tape had been marked as an exhibit. 4RP 90.

Denise Severson was the last witness to testify for the State during its case in chief. Counsel had an opportunity at the beginning of Severson's testimony to make the court aware of the fact that he did not have a copy of the 911 tape. 4 RP 86. Counsel acknowledged that he had seen Severson testify before and that the fact that she appeared on a

witness list might give a clue that she would be called about getting a tape into evidence. 4RP 95. Counsel did not object when Severson was first called to the witness stand nor did he bring to the court's attention the fact that he did not have a copy of the tape. 4RP 86. Severson was handed State's Exhibit 10 which was a copy of the 911 tape related to the incident described by the previous witnesses. 4RP 90. The exhibit had already been marked for identification and shown to defense counsel. 4RP 90. Defense counsel did not object to Severson's testimony and did not correct the statement that the exhibit had previously been shown to him. 4RP 90. Defense counsel did not request a recess in order to listen to the tape. 4RP 92. When the State moved for admission of the 911 tape, counsel did not claim surprise nor did he ask the court to compel the State to produce a copy of the tape. 4RP 92. Defense counsel did not ask for a mistrial or dismissal of the charges. 4RP 92.

Had counsel made the court aware at any point during the trial that he wanted a copy of the 911 tape the Court could have recessed the trial for a reasonable period of time and ordered the State to provide a copy of the tape or taken other steps to remedy the oversight. In failing to ask for the relief of a mistrial or dismissal of the charges, defendant waived his right to request reversal of the conviction or a new trial on appeal. *Boot*, 40 Wn. App. at 220.

2. EVEN IF THERE WAS A TECHNICAL VIOLATION OF THE DISCOVERY RULES, IT DID NOT PREJUDICE DEFENDANT IN THE PRESENTATION OF HIS DEFENSE.

The trial court has wide discretion in ruling on discovery violations. *State v. Linden*, 89 Wn. App. 184, 189-190, 947 P.2d 1284 (1997); *see also State v. Dunivin*, 65 Wn. App. 728,732, 829 P.2d 799 (1992). These decisions will not be disturbed on appeal unless the court abused its discretion. Even if the court commits an error, the appellant must demonstrate this error was prejudicial. Thus, error is not reversible unless it materially affects the trial's outcome. *Linden*, 89 Wn. App at 190.

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *State v. Hutchinson*, 135 Wn.2d 863, 882-883, 959 P.2d 1061 (1998). Even though *Hutchinson* involved a violation of the discovery by the defense, the principles set forth apply in this case.

When the court did become aware of the situation regarding the 911 tape, it not only played the tape in open court outside of the jury's presence, it also asked the State to assist in making Graves available for additional testimony the following morning. 4RP 100, 111, 138. It was defense counsel who ultimately decided that he did not want Graves to come back for additional testimony. 4RP 138. A party may choose not to proceed with discovery for tactical reasons. *Boot*, 40 Wn. App. at 220. Counsel made a tactical decision that any questions which he would have for Graves regarding the statements on the 911 tape were not critical to the defense case. 4RP 139.

The fact that defense counsel waited so long to raise the issue of the 911 tape indicates that he did not believe that the tape's contents would affect his strategy at trial. There is little indication in the record that defense counsel was surprised by the contents of the 911 tape. On appeal, defendant does not argue that the tape contained information regarding potential new witnesses which he could have but failed to call at trial. Defense counsel interviewed Graves prior to trial and had a full and fair opportunity to ask questions regarding who she had spoken to about the events of April 27, 2008. 4RP 104.

The defense strategy at trial, as shown both through cross-examination of the State witnesses as well as the testimony of defense

witnesses, was to attack the credibility of Graves' testimony by pointing out inconsistencies. Defense counsel called six witnesses during his case in chief all of whom testified regarding statements made to them by Graves. All of these witnesses testified after the 911 tape had been played for the jury and after defense counsel had the benefit of having heard the contents of the tape. Defendant does not argue and has not shown that his strategy at trial either in cross-examining the State's witnesses or in which witnesses he chose to call would have been different as a result of any of the statements made in the 911 tape. In calling these witnesses, defense counsel showed that he was fully prepared in the presentation of his case. There is no indication that the outcome of the trial would have been any different had counsel been provided with a copy of the tape at an earlier date. Nor is there any indication that defendant was prejudiced in his ability to present his defense.

This case is unlike *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007) in that the State in *Boyd* claimed that defense counsel was not entitled to copies of the evidence requested and actively opposed an order compelling production of the evidence. *Boyd*, 160 Wn.2d at 429, 431. Here, the State did not conceal the existence of the 911 tape or oppose an order requiring that it provide a copy of the 911 tape to defense counsel. No such motion was ever brought. Defense counsel did not follow up on

his request for a copy of the 911 tape, nor did he provide a blank media for copying the 911 tape. Defense counsel acknowledged that he was familiar with the practice for obtaining copies of 911 tapes by supplying blank tapes or disks to the State. 4RP 96. Counsel further acknowledged that he had supplied blank tapes or disks to the State in the past and received copies of the requested recordings. 4RP 96. For whatever reason, counsel did not follow up on his discovery demand nor did he provide a blank audio tape to the State with a request to copy the 911 recording. 4RP 95-96. Defense counsel also did not ask to listen to the 911 tape during the pendency of the action including the two weeks that the parties were waiting for a trial court. 4RP 104. Counsel's actions both prior to trial and during trial clearly indicate that he did not believe that defendant was being prejudiced in the presentation of his defense.

Defense counsel acknowledged that his generic demand for discovery included a demand that did not apply to this particular case – specifically his request to produce at trial a criminalist who performed the drug and/or chemical analysis. 4RP 105-106. Defense counsel stated that he did not send a follow up asking for the drug testing because it did not seem relevant. 4RP 106. Defense counsel also acknowledged that if something gets overlooked, both sides frequently send reminders to the other side and that he had not done so in this case. 4RP 107. Counsel was

asked several times why he did not follow up on the 911 tape or ask to listen to the tape. Defense counsel responded that he expected the State to do that. 4RP 106. Counsel's response did not suggest to the trial court that he was inadequately prepared or that defendant was prejudiced in his ability to present a defense.

CrR 4.7(h)(7) sets forth the available remedies for violation of a discovery rule or order, including ordering the party to permit the discovery of material and information not previously disclosed, granting a continuance, dismissing the action or entering such other order as it deems just under the circumstances. None of these remedies were requested by defense counsel. Defense counsel did not request an order requiring the State to provide a copy of the 911 tape. Nor did defense counsel request a continuance of the trial date prior to the start of trial or a recess of the trial in order to obtain a copy of or listen to the tape.

In this case, the trial court did not abuse its discretion in offering defense counsel an opportunity to listen to the tape in open court before playing it for the jury, allowing counsel to recall Graves for further testimony and asking the State to assist in contacting Graves and making her available. The less severe sanction of an opportunity to recall Graves would have been effective in this case but was not taken advantage of by defense counsel. The fact that defense counsel did not request additional

time to listen to the tape and decided not to recall Graves indicates that counsel did not believe that the contents of the tape surprised him or severely prejudiced his ability to present a defense.

The violation in this case minor and the State in fact assisted in remedying the violation by contacting Graves in an effort to secure her presence the next day at trial so that defense counsel could again examine her specifically about the contents of the 911 call. Graves agreed to make herself available for trial. 4RP 138. Defense counsel indicated that he did not wish to have Graves return to court claiming that it would be too difficult for defense to pay for bus fare and that he only had two questions for Graves. 4RP 138-139. This was a tactical decision made by defense counsel after having listened to the 911 tape and being provided with assistance from the State in contacting Graves and securing her agreement to return to court for further testimony.

The court did not find the State's failure to provide a copy of the 911 tape to be willful misconduct or arbitrary action by the State. Rather it was reliance on an established practice for obtaining certain types of evidence – a practice which defense counsel acknowledged. 4 RP 96, 106-107. Under this practice, defense counsel would provide a blank media for copying the evidence. If counsel did not know the proper media format, he would inquire of the State and then provide a blank CD or tape.

The court found that the issue of the 911 tape could have been cured by a request from defense counsel to listen to the rather short tape or reminding the State to give him and copy. 4RP 107. Given all of the facts and circumstances surrounding the failure to provide a copy of the 911 tape, the trial court did not abuse its discretion in refusing to exclude the tape. For the same reasons, this Court is not required to reverse appellant's conviction and remand for a new trial.

Even if the trial court erred in admitting the 911 tape such an error would not be grounds for reversal of appellant's conviction. In this case the State did not fail to disclose the existence of the 911 tape. Nor did the State fail to comply with a court order regarding copying of the 911 tape. The prosecutor's failure to disclose information amounts to constitutional error only when the information is material. *State v. Heath*, 35 Wn. App. 269, 272, 666 P.2d 922 (1983). Since the failure, if any, in this case did not rise to the level of constitutional error, the Court should not apply the more stringent harmless error beyond a reasonable doubt standard but the rule that any error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The trial court was well within its discretion in admitting the 911 tape after being fully advised of the facts and circumstances surrounding the failure of the State to provide a copy to defense. In this case, there was overwhelming evidence of defendant's guilt based on the testimony of Graves as to the circumstances surrounding how her wrist was broken. None of the witnesses who testified during the defense case in chief were actual eyewitnesses to the events. Their sole purpose was to attack Graves' credibility based on alleged prior inconsistent statements. Once Graves' credibility was attacked by allegations of recent fabrication the 911 tape became admissible not only as an excited utterance but also as a prior consistent statement. At least four other witnesses (Myrna Hamilton, Deputy Nicholson, Fred Wendt, and Detective Heishman) also testified as to prior consistent statements by Graves which were consistent with the statements made on the 911 tape. Based on the totality of the evidence presented, there is no reasonable probability that defendant was prejudiced in the presentation of his defense or that the outcome of the trial would have been materially affected by admission of the tape.

3. A SCRIVENER'S ERROR IN THE JUDGMENT  
AND SENTENCE SHOULD BE CORRECTED.

The State concedes that on the first page of the Judgment and Sentence, a box is checked indicating that defendant is guilty of the

charged offense based on a guilty plea. The State further concedes that this was a scrivener's error since defendant was convicted following a jury trial. The Judgment and Sentence should be corrected.

D. CONCLUSION

Any delay in providing discovery was not properly preserved below. Even if there was a technical violation of the discovery rules, it did not prejudice defendant in the presentation of his defense such that his conviction must be reversed. The scrivener's error in the Judgment and Sentence must be corrected.

DATED: February 8, 2010.

MARK LINDQUIST  
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BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/8/10 *[Signature]*  
Date Signature