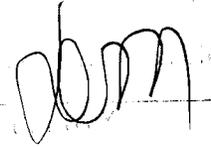


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NO. 40942-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

HEIDI J. COREY, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Ms. Corey of harassment where there is insufficient evidence to convince a reasonable jury of her guilt beyond a reasonable doubt.
2. The trial court erred in denying Ms. Corey's motion to dismiss charges of harassment based on lack of evidence.
3. The State violated Ms. Corey's due process rights when it did not disclose material impeachment information about its primary witness, Officer Downey, until after trial.
4. The court abused its discretion in applying the wrong standard in its decision to deny Ms. Corey's motion for new trial based on new evidence disclosed by the State.
5. The court erred in denying Ms. Corey's motion for a new trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED BY CONVICTING MS. COREY OF HARASSMENT WHERE THERE IS INSUFFICIENT EVIDENCE THAT HER STATEMENT "I'M GOING TO GET YOU," WAS A THREAT TO CAUSE BODILY INJURY.
2. THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR A NEW TRIAL WHEN IT WAS SHOWN THAT THE STATE HAD NOT DISCLOSED PRIOR TO TRIAL EVIDENCE THAT THE PRIMARY STATE WITNESS, THE

ARRESTING OFFICER, HAD BEEN FOUND TO HAVE LIED IN A COLLATERAL COURT PROCEEDING.

III. STATEMENT OF THE CASE

On October 13, 2009, Heidi Corey appeared in the Milton District Court for a scheduled hearing date. RP 57. The prosecutor for Milton, Krista White-Swain, had previously represented Ms. Corey in another county, and therefore there was a conflict prosecutor present to represent Milton.¹ RP 137, 217. Ms. White-Swain called Milton Officer William Downey prior to the hearing and asked him to investigate whether Ms. Corey had been using marijuana—telling him she believed she could smell marijuana on Ms. Corey. RP 60, 99.

Officer Downey walked past Ms. Corey as she, her lawyer and another man stood outside the courtroom talking. RP 60. Officer Downey thought he could smell marijuana, but he could not tell whether it was emanating from Ms. Corey or one of the men. RP 60. Officer Downey reported back to Ms. White-Swain that he also smelled it. RP 97.

Ms. Corey was called for her hearing. The conflict prosecutor, stated on the record to Judge Sandra Allen that he believed Ms. Corey had

¹ Ms. White-Swain said that she had been permitted to withdraw from Ms. Corey's case due to communication problems. RP 217. Ms. Corey did not object to her withdrawal. RP

been using marijuana and asked the court to take her into custody. RP 139, 380, 408. Ms. Corey denied using marijuana and Judge Allen could not smell anything. RP 139-40, 181. Ms. Corey's attorney told the court he did not smell marijuana on her and she did not appear compromised in any way to him. RP 378. Judge Allen warned Ms. Corey and the gallery that it is not appropriate to come to court intoxicated. RP 139, 381. The case was continued and Ms. Corey left the courtroom without incident. RP 140-41.

When Ms. Corey exited the court, Officer Downey took it upon himself to approach her and accuse her of using marijuana, even though he could not smell marijuana on her during this encounter. RP 63, 69, 105. Ms. Corey again denied it, but despite having no probable cause of any crime Officer Downey pushed the issue. RP 54, 66, 69, 105.

Ms. Corey became angry and yelled at Officer Downey, then re-entered the courtroom. RP 69-70, 142. The court had just called the next case. RP 142. Officer Downey followed her into the courtroom. Ms. Corey began yelling at Officer Downey and demanding, loudly, that the judge intervene in their dispute. RP 183. In her frustration, Ms. Corey used obscenities toward Officer Downey. RP 70. Judge Allen told Ms. Corey to be quiet or be held in contempt. RP 73. Almost simultaneously,

Officer Downey told Ms. Corey that she was under arrest and to put her hands behind her back or he would deploy his taser. RP 74, 77.

Ms. Corey did not immediately comply with Officer Downey's orders. RP 78, 80. Ms. Corey had not been physically aggressive with anyone at that time. RP 115, 405, 417. A few seconds after the warning, Officer Downey deployed the taser—hitting Ms. Corey in her chest. RP 78, 80, 184, 404, 410. The probes lodged in Ms. Corey's clothing and the taser had no effect. RP 81. Officer Downey shocked her again—again with no effect. RP 184. So, Officer Downey tried to physically control Ms. Corey, trying to grab her arms. RP 83. Each time Officer Downey grabbed for Ms. Corey's hand, she pulled away. RP 83. Witnesses described her as “flailing” trying only to get away from the officers. RP 185, 118, 417. Eventually, two or three other officers entered and together they subdued and arrested Ms. Corey. RP 87.

In the melee, Ms. Corey purportedly struck Officer Downey at least once. RP 84, 197-98, 335. Officer Downey did not document any injuries. RP 122. He testified that he suffered a fat lip. RP 122. He also struck her more than once. RP 123.

Ms. Corey was taken to and placed inside the jail transport van while they awaited medical assistance for her. RP 300. As soon as Officer Downey left, she calmed down and became compliant. RP 301.

While they waited there, Ms. White-Swain walked past them. RP 303-4. Ms. Corey blurted out something to the effect of “I got you” or “I’ll get you.” RP 235, 303-4, 320. She said this with an angry tone, but did not get physical or even stand up. RP 304. She then went on to tell the officer sitting with her that she was going to sue over the incident. RP 313, 318.

Ms. Corey was taken to the hospital and then to jail upon her release. RP 309. While at the hospital, Ms. Corey told Officer Savage she that she was on medication for anger issues, but that because of court, she had missed a dose that morning. RP 307.

She was charged with third degree assault, attempting to disarm a law enforcement officer, and harassment. CP 59-60. Following trial, she was acquitted of attempting to disarm a law enforcement officer, but convicted of third degree assault and gross-misdemeanor harassment. CP 84, RP 516-17.

The defense moved to dismiss the harassment charge at the close of the State’s evidence based on this insufficiency. RP 362-63. The court denied the motion. RP 370-71.

Prior to sentencing, the prosecutor informed the defense that Officer Downey had been under investigation by the Pierce County Prosecutor’s Office for lying under oath in a child custody hearing and abusing his position by using the government database to look up a private

person without cause. CP 69-70, 74-75. The defense brought a motion for new trial based on this new evidence and the discovery violation. CP 61-65, RP 6/25/10 3. The defense argued that the information was material both because Officer Downey was the victim-witness to the assault, and because the defendant's decision not to testify would have been different if she and her attorney had known they could show the jury he had lied under oath in the past. RP 6/25/10 4-5. The State conceded that there had been a discovery violation. RP 6/25/10 15. The court held that the potential impeachment evidence against Officer Downey would have been admissible and "certainly could have" affected the jury's verdict. RP 6/25/10 19-21. However, the court denied the motion to dismiss, finding that other evidence in the record could support the assault verdict. RP 6/25/10 31.

Ms. Corey was sentenced in the standard range and this appeal timely follows. RP 6/25/10 47-48.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING MS. COREY OF HARASSMENT WHERE THERE IS INSUFFICIENT EVIDENCE THAT HER STATEMENT "I'M GOING TO GET YOU," WAS A THREAT TO CAUSE BODILY INJURY.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d

479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Ms. Corey was convicted of harassment under RCW 9A.46.020(1), which provides in relevant part that a person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

In *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), the Washington Supreme Court held that, to avoid infringing on constitutionally protected speech, RCW 9A.46.020(1)(a)(i) must be read as prohibiting only “true threats.” The term “true threat” is defined as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of the intention to inflict bodily harm upon or to take the life” of another person. *Kilburn*, 151 Wn.2d at 43. “[T]he statute as a whole requires that the perpetrator knowingly threaten to

inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury.” *State v. J.M.*, 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001). The court applies an objective standard when determining whether a statement constitutes a true threat, which focuses on the speaker. *State v. Johnston*, 156 Wn.2d 355, 361, 127 P.3d 707 (2006) (quoting *Kilburn*, 151 Wn.2d at 44).

The State argued that Ms. Corey committed harassment against Krista White-Swain when she said either: “This is all this little bitch’s fault. I’m going to get you,”² or “I got you,” or possibly “I’m going to get you” “you prosecutor for Algona.”³ At the time of the statement, Ms. Corey was handcuffed and inside the jail van. RP 300. Although her tone was angry, Ms. Corey did not stand or attempt to get physically threatening. RP 304. Just after the comment to Ms. White-Swain, Ms. Corey told the officer with her she planned to file a lawsuit. RP 313, 318.

The first problem with the State’s evidence in this case is that the actual words Ms. Corey used were in dispute because no one wrote them down when they were said. According to the alleged victim, Ms. White-Swain, Ms. Corey said something “to the effect of ‘I got you,’ or ‘I’m going to get you, you prosecutor for Algona.’” RP 235. This statement is

² From the testimony of Officer David Savage. RP 303-4.

³ From the testimony of Krista White-Swain. RP 320.

not a threat of bodily harm in the present or future. It is, at most, a statement of past actions. As such, it cannot support the harassment conviction.

According to Officer Savage, Ms. Corey said, “This is all this little bitch’s fault. I’m going to get you,” and then went on to talk about lawsuits. RP 303-4, 313, 318. Officer Savage testified that Ms. Corey was sitting inside the jail van at the time and took no physical action toward Ms. White-Swain. RP 300, 304. The words in this statement convey, at best, a threat that is so vague that it cannot be said to be a threat of bodily harm beyond a reasonable doubt. Who knows what the intent was when Ms. Corey said she would “get” her—maybe she meant to sue or file a complaint. There is no doubt that Ms. White-Swain felt threatened by Ms. Corey—but this was due to what had transpired inside the courtroom earlier and Ms. Corey’s size, rather than what she said. RP 236. Ms. White-Swain said she was concerned because “she’s a lot bigger than me.” RP 236. She said she took the statement as a threat to her “personal safety” because she took into account “the entirety of the time” she had known Ms. Corey. RP 238.

Whichever version of Ms. Corey’s statement to Ms. White-Swain the jury believed, neither constitutes a threat “To cause bodily injury

immediately or in the future,” as required by the statute. Therefore, there is insufficient evidence to support the harassment conviction.

ISSUE 2: THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR A NEW TRIAL WHEN IT WAS SHOWN THAT THE STATE HAD NOT DISCLOSED PRIOR TO TRIAL EVIDENCE THAT THE PRIMARY STATE WITNESS, THE ARRESTING OFFICER, HAD BEEN FOUND TO HAVE LIED IN A COLLATERAL COURT PROCEEDING.

A trial court’s denial of a motion for a new trial will not be overturned absent a manifest abuse of discretion. *State v. Franks*, 74 Wash.2d 413, 445 P.2d 200 (1968). Abuse of discretion is discretion “exercised on untenable grounds, or for untenable reasons.” *State ex. rel Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Cr.R. 7.6(a) provides that a trial court may grant a new trial based upon either prosecutorial misconduct or newly discovered evidence. Cr.R. 7.6(a)(2),(3).

The failure of the Pierce County Prosecutor’s Office to turn over information that their primary witness, the arresting officer, Officer William Downey had lied under oath in a court proceeding and was under investigation for perjury was a violation of Ms. Corey’s due process rights. *See Brady v. Maryland*, 373 U.S. 83, 87, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also In re Gentry*, 137 Wash.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.)).

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), requires that the government provide a defendant with exculpatory evidence within the government's knowledge or control "where the evidence is material either to guilt or to punishment," irrespective of the prosecutor's good or bad faith. Impeachment evidence falls within the *Brady* rule as evidence favorable to the accused. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Nondisclosure of material exculpatory evidence, including impeachment evidence, violates a defendant's due process right to a fair trial. *See Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379-80.

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

The Supreme Court has held that an individual prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*,

514 U.S. 419, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). While the prosecution cannot avoid *Brady* by keeping itself ignorant of matters known to other state agents, *United States v. Hamilton*, 107 F.3d 499, 509 (7th Cir.1997), the State has no duty to search for exculpatory evidence. *State v. Judge*, 100 Wash.2d 706, 717, 675 P.2d 219 (1984).

“Prejudice exists if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *In re Benn*, 134 Wash.2d 868, 916, 952 P.2d 116 (1998) (citing *Bagley*, 473 U.S. at 682).

In this case, Officer Downey was the primary witness for the State on the charge of assault. Although two other witnesses testified that Ms. Corey struck Officer Downey during the struggle, only Officer Downey testified that this was intentional, rather than “flailing.” Contrast RP 197-98, 335, 361, to RP 85. Several witnesses to the struggle did not see any blows at all. RP 151, 311, 388, 410. Therefore, Officer Downey’s testimony was key to the State’s case—the only evidence of an intentional blow.

In addition, the defense was clear that Officer Downey’s testimony and the lack of any evidence to impeach his credibility, was key to Ms. Corey’s decision not to testify. RP 4-5.

. . . If the defendant takes the stand, then you're subject always to a prosecutor argument of who do you want to believe, a police officer or her. You take that into consideration at arriving at a decision.

If you have a police officer who apparently has lied under oath in a court proceeding, you can arrive at very different decision as to whether or not the defendant would testify, so it taints the entire proceeding.

RP 5.

The judge held below that Officer Downey's testimony would have been admissible for impeachment. RP 19. The judge also held that this evidence:

“certainly could have affected the jury's outcome because if you attack the credibility of Officer Downey, part of my reasoning here is the fact that they found not guilty on the attempting to disarm the law enforcement officer, they must have believed Officer Downey in that regard because, my recollection of the testimony . . . is that he actually said he didn't remember her reaching for the gun and it was another officer, Officer Rhoads, who testified that he saw her reaching for the gun. So they disbelieved Rhoads and believed Downey on that point . . .”

RP 19-20, 21. Yet, the court held that there was other evidence of the punch and denied the defense motion for new trial. RP 31.

The court applied the wrong test to its decision to deny the motion for a new trial. Once the court found that the jury's verdict more likely than not would have been affected by the withheld evidence, *Brady* and due process required that the court give Ms. Corey a new trial. Thus, the court's ruling was an abuse of discretion.

Under *Brady*, the evidence here was true impeachment evidence because it is evidence that Officer Downey has lied under oath. This evidence was (at least) inadvertently withheld by the State from the defense until after the trial, when the trial deputy learned about it. The judge below, who had the opportunity to observe this trial, ruled that Officer Downey's testimony was material and that the impeachment evidence would more likely than not have affected the jury's decision. Therefore, the defendant's motion for new trial should have been granted.

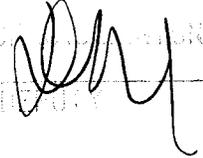
Moreover, because this evidence would likely have changed the defendant's decision on whether or not she would testify, the violation of due process extends to the harassment conviction in that Ms. Corey's testimony could well have affected the jury's verdict.

V. CONCLUSION

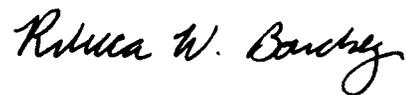
Ms. Corey's convictions must be reversed because there is insufficient evidence of a threat of physical harm to support the harassment conviction and because due process was violated by the State's withholding of impeachment evidence until after trial. Consequently, Ms. Corey asks the court of appeals to reverse her convictions and remand for a new trial.

COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON
BY: 

DATED: January 5, 2011



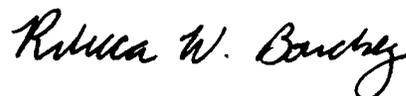
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I certify that on January 5, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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