

NO. 48117-1-II

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

STATE OF WASHINGTON,
Appellant,

v.

ANTHONY ELOY PEREZ,
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

The State seeks review of the trial court's dismissal of this case for perceived discovery violations without considering alternative remedies.

II. ASSIGNMENTS OF ERROR

- a. The trial court's findings regarding the discovery process were not supported by substantial evidence.
- b. The State did not commit prosecutorial or governmental misconduct or take arbitrary action so egregious as to support a dismissal.
- c. The defendant was not prejudiced as the materials provided did not disclose any new information not already known to the defense.
- d. The trial court erred by not considering any other remedies aside from dismissal, which is reversible error.

III. CRIMINAL CASE ALLEGATIONS¹

At approximately 11:23 PM on March 15, 2015, Officer Tuggle of the Elma Police Department was dispatched to a reported missing juvenile. The parents indicated that their 12 year old daughter, L.L., was missing and had last been seen at approximately 9:30 PM when she had gone to bed. The mother reported that she believed that L.L. had left to

¹ The factual history is taken from the State's original Motion and Declaration for Arrest Warrant (CP 3-7) and Motion and Declaration for Amended Information (CP 10-12).

These facts have not been adjudicated. They are presented here to provide the Court context for the importance of the evidentiary issues raised in this appeal.

meet a boy after receiving a text message from one of her daughter's friends who advised that L.L. was meeting a boy that night to lose her virginity.

L.L.'s friend had further advised that L.L. had told her that she was meeting a boy who lived about an hour away who was allegedly 14 years old. L.L.'s friend further advised that although L.L. had told her that the boy was 14 years old, she believed him to be much older since he lived an hour away and must be at least old enough to drive. L.L.'s friend advised that she did not know who the boy was because L.L. would not tell her. L.L.'s friend later told officers that L.L. had most likely met the "boy" on a social media site called "KIK."

Officer Tuggle put out a county-wide "Attempt to Locate" for L.L. L.L. was located at approximately 12:32 AM by her mother, who had begun driving around the Elma area in an attempt to locate her daughter.

L.L.'s mother had observed a parked vehicle on the side of the road near the 1500 block of Bailey Road in Elma and had made contact with the vehicle. L.L.'s mother had knocked on the window and shined a flashlight into the vehicle, observing a male, later identified as the defendant, 23 year old Anthony Perez. She further observed someone under a blanket with the defendant.

The defendant at that point stated, "My girlfriend does not appreciate that." When asked by L.L.'s mother whether the person with him was her daughter, the defendant did not respond. L.L.'s mother then pulled up the blanket and observed her daughter, L.L. Both the defendant and L.L. were naked with the defendant lying on top of L.L. L.L.'s mother attempted to pull L.L. out of the vehicle; however the defendant held L.L. down. A struggle ensued and L.L.'s mother struck the defendant, causing him to later develop a black eye and to have some blood on his face. L.L. later stated that when she saw headlights before her mother approached the car, she had told the defendant that it was probably her parents. L.L. stated that the defendant had covered her up with the blanket and told her to be quiet.

After removing L.L. from the defendant's vehicle, L.L.'s mother further observed the defendant starting to throw clothes out of the vehicle and climb into the driver's seat. L.L.'s mother told the defendant that he wasn't going anywhere and reached into the vehicle, grabbing his keys to prevent him from leaving the scene. L.L.'s mother told the defendant not to get out of the vehicle and asked a friend, who had been searching for L.L. with her, to call 911. While waiting for officers to arrive, L.L.'s mother asked the defendant how he met L.L. The defendant stated that he

met L.L. on “KIK” and that they had been communicating for about a month. L.L.’s mother asked the defendant if he knew how old L.L. was and the defendant stated that L.L. had told him she was 14 years old.

Both L.L.’s mother and her friend observed the defendant make several calls, including calls to his boss, while waiting for officers to arrive. They also overheard the defendant state, “My life is over.” The defendant also appeared to be texting and continued to attempt to use his cellular phone even after officers arrived on the scene.

Once officers arrived, L.L.’s mother advised officers that L.L. had disclosed that she and the defendant had intercourse and oral sex. L.L. stated that the defendant had not used a condom and that she believed he had ejaculated inside of her. L.L. also complained that her throat hurt and advised that the defendant had choked her and bit her neck during the assault. L.L. stated that she had told the defendant “no” during the assault but that he had merely apologized for going so fast and continued. L.L. stated that having sex had been the defendant’s idea. L.L. further stated that she had told the defendant she was only 12 years old and that he had said it made him “horny” knowing that she was only 12 years old.

Later, text messages between the defendant and L.L. confirmed that L.L. had told the defendant she was 12 years old to which the

defendant stated, “I kind of want to meet you even more now that I know that [smiley face icon].” The text messages reveal that the defendant was well-aware that the victim was 12 years old and promoted a covert, sexual relationship with her over a period of time via electronic means. The defendant went to great lengths to groom and coach the victim, including going into explicit detail regarding his sexual intentions, giving her advice as to how they could meet up and how not to be discovered being with him, acknowledging the illegality of what he was doing, and the like.

Furthermore, during the course of the defendant’s conversations with the victim via electronic means, the defendant sent the victim photographs and/or videos of his genitalia, along with explicit descriptions of sexual acts that he wanted to perform on/with the victim and that he wanted the victim to perform on/with him, knowing/believing that he was speaking with a 12 year old girl.

Later, when the victim tells the defendant that she just turned 12, the defendant responded by stating, “I want you sooo bad” and went on to describe multiple sex acts they could do together, essentially mirroring what occurred during the rape. The defendant then stated, “And that’s just the first time we meet [smiley face]... i want you to know how to make me cum really hard before you turn 13.”

Additionally, the defendant requested that the victim engage in sexually explicit conduct during the course of the defendant's conversation with her via electronic means. Specifically, the defendant stated to the victim, "I'm sooo horny but I want to jerk off to the pic of you in the bra, but I forgot to save it [sad face] can you send me something to make me cum? [smiley face]." Further, after apparently receiving a photograph and/or video from the victim, the defendant stated, "That ass is going to be mine soon [heart icon]" and "Mmmmm send one more baby, I'm gonna cum [smiley face]."

Officers observed signs that intercourse had taken place in the vehicle, including visually observing what appeared to be white female panties on the rear, driver's side floorboard of the vehicle. The vehicle was sealed and seized as evidence. L.L. was taken from the scene to the hospital for examination and a rape kit was to be completed later in the morning. L.L.'s cellular phone and laptop computer were also taken as evidence.

Once at the scene, Officer Tuggle had made contact with the defendant. Officer Tuggle observed the superficial injuries to the defendant's face and the defendant had refused aid for those injuries. When Officer Tuggle made contact with the defendant, he asked him

“What was going on tonight,” to which the defendant responded, “Apparently, I was f***ing a 12 year old.” Officer Tuggle asked where this had taken place and the defendant indicated that the sexual encounter took place in his vehicle. The defendant was taken into custody and his clothes were seized as evidence along with his cellular phone.

IV. PROCEDURAL/FACTUAL HISTORY

On March 17, 2015, the State filed charges against the defendant for Rape of a Child in the Second Degree. CP 1-2. Initially, the trial court appointed James Foley to represent the defendant. CP 8.

On March 25, 2015, the State received additional reports and discovery, namely photographs of the text messages from the victim’s phone that showed the conversations between the defendant and the victim.² The State provided these materials on March 26, 2015. CP 118; Corrected CP 182.

On April 13, 2015, after reviewing the evidence, most significantly the text messages on L.L.’s phone between the defendant and L.L., the State moved to amend the charges to include an allegation that the

² It should be noted that the Grays Harbor County Sheriff’s Office retained a disc copy of the original messages taken from the victim’s phone, which was retained by the department under RCW 9.68A.170 (1) and (2). All of the text messages between the defendant and victim were photographed with any pornographic photos blacked out and provided to the State, which were, in turn, provided to defense counsel. 7/28/16 RP 1-2.

defendant's conduct was predatory contrary to RCW 9.94A.836 and two additional charges of Communicating with a Minor for Immoral Purposes and Sexual Exploitation of a Minor. CP 14-15. The Court allowed the amendment and the defendant was thereafter arraigned on those charges, pleading not guilty. CP 13.

On May 11, 2015, the defendant hired counsel, retaining Tom E. Creekpaum, III of Ingram, Zelasko & Goodwin out of Aberdeen. CP 16-17. New hearing dates were selected and the trial was re-set as a result, the defendant waived time-for-trial through July 8, 2015. CP 18.

An Omnibus Order was entered by the parties on June 1, 2015. CP 19-21. This ordered that discovery would be provided by June 15, 2015. CP 21. The obligations this order placed on the State closely follows the requirements of CrR 4.7. The order references several times that items must be "in the possession of the plaintiff." CP 19-21.

On June 22, 2015 a new trial date was set by agreement of the parties for August 4, 2015, this included a new time-for-trial waiver through August 8, 2015. CP 22. A new Omnibus compliance date was not set.

The defendant filed a Motion to Dismiss on July 24, 2015. CP 31-42. Defense counsel alleged that certain discovery was not provided

timely. Specifically, he alleged: 1) late announcement of video from Officer Tuggle's body camera, 2) failure to make key witnesses available, 3) misrepresentation to the Court by the State regarding defense counsel's request for interviews, 4) late disclosure of the Thurston County Investigator's report regarding examination of two cell phones, and 5) late disclosure of DNA evidence. CP 36.

The State denied any discovery violations and filed a response. CP 117-123; corrected at CP 181-189.

At the July 28, 2015 hearing, defense counsel focused his argument on the DNA evidence and the text conversations between the defendant and victim. RP 1. However, he acknowledged that when he "joined onto the case" the State had provided photos of messages contained on the victim's phone. RP 1-2.

In the trial court, the parties materially agreed on the timeline of the discovery process. The defense attorney stated that on May 15, 2015 he had requested several items: "documentation that resulted from the search warrant served on 'KIK', any information recovered from Mr. Perez's cell phone, results of DNA testing, and other evidence...not provided." He further indicated that the State had verbally informed him that they were not in possession of these materials. CP 28.

Due to a mistake with sending body camera video to the previous attorney, the State re-sent all discovery within its possession to Mr. Creekpaum on July 2, 2015. CP 118; Corrected CP 182. Mr. Creekpaum acknowledged receiving this on July 6, 2015. CP 29.

On July 13 and 20, 2015, additional discovery was received by the State. CP 118; Corrected CP 182. This material included: “(a) a Crime Laboratory Report dated June 25, 2015, which discussed the results of the DNA swabs taken from Mr. Perez and the alleged victim; (b) Thurston County Sheriff’s Office Investigator’s Report dated June 23, 2015, on two cell phones taken from the alleged crime scene; (c) Declaration from Det. Sgt. Johansson re: new affidavit of search warrant; (d) Search Warrant for Samsung cell phone FCC ID #A3LSMG900V; and (e) CV for Joyce Gilbert, M.D.” CP 30. These items were sent to the defense on July 21, 2015. CP 118; Corrected CP 182.

On July 27, 2015, the State received an additional Y-STR DNA analysis done in addition to the earlier testing. CP 118; Corrected CP 182; RP 7. This was immediately emailed to the defense. RP 7. This was all at least a week prior to the August 4, 2015 trial.

V. ARGUMENT

A. The trial court's findings of fact are not supported by substantial evidence.

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the trial court's findings of fact must be supported by substantial evidence in the record. *Id.* If the findings are supported by substantial evidence, then the appellate court must decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

“A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974) (quoting *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961)). Challenged findings of fact are reviewed under a substantial evidence standard. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). “Substantial

evidence” is evidence sufficient to persuade a fair minded, rational person of the finding's truth. *State v. Hill*, 123 Wn.2d 641, 644, 87 P.2d 313 (1994).

Reviewing courts give deference to the fact finder and consider the evidence and reasonable inferences therefrom in the light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. *Hill*, 123 Wn.2d at 647 (citing *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983)).

The State challenges the trial court’s findings nos. 18, 19, and 20. The State also challenges the trial court’s conclusions of law.

In the challenged findings, the trial court found that the State was not thorough nor diligent in its review of discovery or follow-up with police investigators. The court also opined that the State “ignored this case for weeks as if it was unimportant.” CP 48. However, these were not the allegations brought by the Defendant in his motion and the record before this Court does not support these conclusions.

The State’s responsive brief provided a timeline, which was agreed to by the Defendant, which showed the State had been making diligent

attempts to provide discovery materials to the Defendant. In fact, the bulk of the material discovery was provided on or before July 6, 2015. The only additional information to come after that date was the defense interviews of witnesses and DNA testing results. The only delay in discovery was material received on July 13 and 20, 2015 that was not sent out until July 21, 2015. CP 117; Corrected CP 182.

In an attempt to receive reconsideration from the trial court, the State provided a number of declarations. CP 73-79; 82-87; 89-91; 97-99; 107-109. These bear out the State's contention that none of the discovery was unduly delayed, especially when having DNA testing completed by the Washington State Patrol Crime Lab.

The trial court then made erroneous conclusions of law based on these unsupported findings of fact. Conclusion 4 asserts that the State should have provided the defense with "any disks containing materials not protected by statute from distribution..." CP 49. However, the State has maintained that this was done. The disks contained the content of the victim's phone and that material was provided in the initial discovery.

The court also concluded in no. 10 that the cell phone contents were "crucial evidence." CP 50. Again, all information that was obtainable from the cell phones was given to the defense prior to July 6, 2015.

B. The State did not commit prosecutorial or governmental misconduct or take arbitrary action so egregious as to support a dismissal.

A trial court's decision on a motion to dismiss is reviewed by this Court for an abuse of discretion. *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *Blackwell*, 120 Wash.2d at 830.

In considering whether a criminal case may be dismissed under CrR 8.3(b), the trial court must determine: (1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused. CrR 8.3(b); *State v. Koerber*, 85 Wn.App. 1, 4, 931 P.2d 904 (1996). The trial court's authority under CrR 8.3(b) to dismiss has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." *Id.* (quoting *State v. Duggins*, 68 Wn.App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). Dismissal of a criminal proceeding is an extraordinary remedy. *Id.* at 5. Absent a finding of prejudice to the defendant, dismissal

of a criminal case is not warranted. Fairness to the defendant underlies the purpose of CrR 8.3(b). *Id.*

In *State v. Sherman*, Division One Court of Appeals affirmed a trial court's finding of prosecutorial misconduct. *See State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990). The *Sherman* court found that the State had agreed to undertake production of the Internal Revenue Service (IRS) records of one of its witnesses. The State, however, failed to produce the records by the court-imposed deadline even though the State was given several weeks to comply. *Sherman*, 59 Wn.App. 763 at 765-66. Although the records were not in the State's possession, they were available to the State's chief witness, who failed to find them in his files. *Id.* at 769. The State also did not follow up to ensure that the records would be available in time for trial and copies were not requested from the IRS until long after the court-imposed deadline. *Id.* Furthermore, the State waited until after the trial date to consider reconsideration of the order obligating it to produce the records in the first place. *Id.* at 768. Therefore, the *Sherman* court held that such mismanagement amounted to prosecutorial misconduct. *Id.*

In *State v. Stephans*, Division 2 Court of Appeals also affirmed the trial court's finding of misconduct that was sufficient to warrant a

dismissal of the charges. *See State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987). The *Stephans* court acknowledged that the both the State and defense were headed for difficulty in preparing the case for trial from the beginning of the case, namely due to the victims and several potential witnesses being in the State of Alaska and that all of the witnesses, including the Alaskan authorities, were all uncooperative. *Id.* at 601. An omnibus order was entered, specially requiring the State to serve and file a witnesses list, to provide defense counsel with the names, addresses, qualifications and subject of testimony of any expert witnesses the State planned to use at trial, and to supply reports obtained by the State of any physical or mental examinations by January 15, 1995. *Id.* As late as March 29, 1985, the State had not yet supplied a witnesses list. *Id.* On February 8, 1985, defense moved for the appointment of an expert to evaluate the children and to assist in the defense. The State agreed that defense should be entitled to an expert to examine the victims and to do an interview. *Id.*

Seven hearings were conducted regarding discovery matters and the case was continued twice because defense counsel, lacking information from the State, was unable to prepare a defense. *Id.* at 602. During those discovery hearings, the Court referred at least nine times to

its order for examination of the victims and repeatedly announced its intention to dismiss the charges unless the order was complied with. *Id.*

The State argued that it had no better cooperation with the witness than did defense, however, it was revealed that the State gave egregiously bad advice to the witnesses, encouraging the witnesses to disobey the court's order and not comply with the defense's requests for examination. *Id.* at 602, 604.

The *Stephans* court acknowledged that difficulty and confusion attended the efforts by both sides to prepare for trial, however, did not suffice to excuse non-compliance with court orders. The court further stated that while the State's failure to supply a formal witnesses list was symptomatic of the State's poor management of the case, among the other discovery issues, even so, the court would be inclined to hold that dismissal was too drastic a remedy. *Id.* at 604. It was the State's conduct concerning the court's order for evaluation of the child witnesses and its advice to the children's custodians to not comply with the examinations that was determined to be egregious misconduct that warranted dismissal. *Id.* The Court found that under no circumstances may a prosecuting attorney counsel encourage, or suggest his approval of, disobedience. *Id.*

Furthermore, the trial court had repeatedly warned counsel that disobedience of the order would result in dismissal. *Id.* Additionally, the *Stephans* court found that the case was no closer to being ready for trial six months in than it was at the time of filing and could not see when, if ever, the case could be ready for trial. Therefore, the *Stephans* court found that the trial court recognized these issues and properly exercised its discretion in dismissing the case.

In *State v. Brooks*, Division 2 Court of Appeals again found governmental mismanagement due to the State's failure to provide timely discovery and "dumping" of large amounts of information on the defendants on the day of trial. *See State v. Brooks*, 149 Wn.App. 373, 203 P.3d 397 (2013). The *Brooks* court specifically found that the State failed to provide, along with other discovery materials, a 60-page victim statement until the day before trial, the defendant's statement to a deputy from the night of the incident, the lead detective's report, which would have likely revealed other witnesses that would have needed to be interviewed, and to subpoena the victim to trial. *Id.* at 376.

In addition to missing and truly last minute reports and materials, there were also significant delays in getting material to defense once it was obtained by the State, which was, in some cases a month and a half later.

Id. at 382. Furthermore, the Court had already attempted to remedy the errors by the State by granting numerous continuances, including two trial resets to allow the State to complete its discovery obligations, as an alternative to dismissal during the pendency of the case. *Id.* at 377, 379-380. Ultimately, the *Brooks* court found that in light of the multitude of serious discovery violations, coupled with the fact that the trial court had applied alternative remedies to resolve those issues prior to dismissal, a finding of governmental misconduct was warranted and the dismissal was not an abuse of discretion. *Id.* at 407-407. The *Brooks* court further clarified that it did not dispute that dismissal is an extraordinary remedy; however, it viewed *Brooks* as an extraordinary case.

In the case in hand, there are simply no examples of the behaviors by the State as seen in the case law as cited above where governmental misconduct was found. There were not repeated violations of the Court's order for the production of material, interviews of witnesses, or submission of missing discovery materials. Further, there was no action taken by the State or any individual prosecutor to frustrate the defense, to engage in any unfair "gamesmanship," or to commit any intentional act to prevent the court from administering justice. What is abundantly clear from the cases where dismissal was warranted based on governmental

misconduct or arbitrary action taken by the State was the Defendant addressing the issues before the court, for which there was then an order, or several orders, and/or other remedies taken before a dismissal was considered. It was only after those orders and/or remedies were ignored or were not effective in making the State take appropriate action to rectify the situation that the court took the drastic action of dismissing the cases.

Here, we have a situation where the State provided discovery as it was made available to it from the investigating agencies, immediately rectified any errors such as the mailing of the body cam video to the prior defense attorney, and complied with the Court's sole order to schedule and conduct interviews with the victim and victim's mother by a date certain.

The State has further provided declarations from the State showing the steps taken by the assigned prosecutor, the State's co-counsel, and lead investigator in this case and from persons with the various agencies that handled the evidence that was at issue in the discovery that was provided in July as evidence of the State's diligence in this case. CP 54-116.

Additionally, unlike the cases cited above where discovery was provided the night before trial or not made available at all, it must be noted that the "late" discovery in this case, albeit after the date on the omnibus order, was still provided a week to two weeks prior to the

schedule trial date with time still remaining under speedy trial. Most importantly, no new facts or witnesses were introduced by any of the discovery provided after July 2, 2015.

There simply is nothing in the handling of this case that could be seen as so egregious as to warrant a dismissal. The processing time for the evidence and any delays in the discovery process were not unusual or extraordinary. It certainly would be a different case entirely if the State had been ordered to do something and then ignored the Court's order or if the State encouraged its witnesses not to cooperate with the interviews or if the State had received evidence a month or more prior and purposely held on to it before forwarding it to defense the night before trial, but that is not the case here. This is simply a case with the inherent problems associated with almost all cases and the State took appropriate action to ensure that the case moved along as it should have.

C. The defendant was not prejudiced as the materials provided did not disclose any new information not already known to the defense.

Dismissal for discovery violations is an extraordinary remedy available only when the alleged misconduct has material affected the defendant's right to a fair trial. *Brooks*, 149 Wn.App. 373 at 389 (*quoting State v. Jacobson*, 36 Wn.App. 446, 450, 674 P.2d 1255 (1983)). The

common rule that evidence is “material” if there is a reasonable probability that, had the prosecution disclosed the evidence to the defense, the result of the proceedings would have differed. *Id.* “The mere possibility that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial, however, does not establish “materiality” in the constitutional sense.” *Id.* (quoting *State v. Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)).

Even if there could be some error assigned by the minor issues and delays in this case, there is still evidence of prejudice. Although the Court assigned prejudice in that that the defendant was forced to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a material part of his defense, the materials provided “late” to defense contained no new information.

The only items not in the Defendant’s possession after July 6, 2015:

- (a) A Crime Laboratory Report dated June 25, 2015, which discussed the results of the DNA swabs taken from Mr. Perez and the alleged victim;

(b) Thurston County Sheriff's Office Investigator's Report dated June 23, 2015, on two cell phones taken from the alleged crime scene;

(c) Declaration from Det. Sgt. Johansson re: new affidavit of search warrant;

(d) Search Warrant for Samsung cell phone FCC ID #A3LSMG900V;

(e) CV for Joyce Gilbert, M.D.

(f) Y-STR DNA analysis report.

DNA Evidence

The DNA discovery material confirmed what should have already been known to defense, i.e. that the defendant's DNA was found on and in the victim's person. This really should not come as any surprise given that the defendant was caught "red-handed," essentially in the act, naked with the victim who was also naked and he admitted to just having had sex with her. However, if the Court finds this was unduly delayed, the remedy should be suppression of this evidence, not dismissal.

Thurston County report regarding cell phones

The forensic analysis report of the cellular phones by Detective Beall did not reveal any new information as he was never able to obtain the program necessary to extract the deleted messages off of the

defendant's phone. Again, there was no new information that was revealed in that report.

The only real issue with the text messages and photographs was that the defense attorney, Mr. Creekpaum, was admittedly unaware that he could view the recovered text messages that were on a disk under the care and custody of the Grays Harbor County Sheriff's Office pursuant to RCW 9.68A.170 (1) and (2). While the Court concluded that the State could have and should have made a hard-copy of the entirety of the text messages located on the disk and redacted any pornographic photographs that may have been part of those messages, this was not something that the State was given the opportunity to do prior to the dismissal.

The State had provided copies of the text messages with the pornographic materials blacked out from the materials located on the disk that pertained to the defendant and any conversations that were captured between the defendant and the victim on March 26, 2015. Any other text messages or photographs on the disk that had been under the care and control of the Grays Harbor County Sheriff's Office between the victim and other persons were irrelevant to the case and were, therefore, not copied or provided to either the State or defense. However, had the Court ordered the State to provide those materials to defense regardless of their

use at trial or admissibility, the State would have happily complied with that order.

Declaration from Det. Sgt. Johansson re: new affidavit of search warrant/ Search Warrant for Samsung cell phone

No material was ever provided to the State from the execution of this warrant.

CV for Joyce Gilbert, M.D.

This was provided as is usual for an expert witness. The Defendant did not make any specific complaint about this piece of discovery. The doctor's credentials were not at issue.

D. The Court did not consider any other remedies aside from dismissal, which is reversible error.

Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. *State v. Koerber*, 85 Wn.App. 1, 4, 931 P.2d 904 (1996). The Supreme Court has included this requirement in its CrR 8.3(b) analysis as well. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Intermediate remedial steps include: (1) release of the defendant to extend the speedy trial time from

60 to 90 days under *Wilson*; (2) exclusion of witness testimony under CrR 4.7(h) in *State v. Hutchinson*, 1325 Wn.2d 863, 882, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999); (3) suppression of evidence under *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990); or (4) sanctions and a continuance as was initially done before dismissal in *Brooks*, 149 Wn.App 373 at 379-80.

Here, the court failed to consider any remedies other than dismissal in this case. While the State does not agree that sanctions were appropriate, the court had other options at its disposal to address any concerns that could have been considered before dismissing the case outright.

Furthermore, the court did not appear to take into consideration the rights of the both the victim and her family and the community at large in making its decision to dismiss the case, particularly without considering any other available remedies outside of an outright dismissal. Certainly, the dismissal of the case has had a major impact on the victim and her family as well as the community, in both Grays Harbor County and Pierce County where the defendant resides.

VI. CONCLUSION

The State respectfully requests that the trial court's order of dismissal be overturned, and this case remanded to the Superior Court for trial before another judge.

DATED this 27 day of May, 2016.

Respectfully Submitted,



KATHERINE L. SVOBODA
34097

GRAYS HARBOR COUNTY PROSECUTOR

May 02, 2016 - 3:29 PM

Transmittal Letter

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