

NO. 49584-8-II

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

STATE OF WASHINGTON, Appellant

v.

MARK THOMAS HENSLEY, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01021-2

2nd AMENDED BRIEF OF APPELLANT

Attorneys for Appellant:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID #91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	1
I. The trial court erred in dismissing the criminal charges against Hensley pursuant to CrR 8.3.....	1
II. The trial court erred in dismissing the criminal charges against Hensley pursuant to CrR 4.7.....	1
III. The trial court erred in dismissing the criminal charges against Hensley pursuant to <i>Brady v. Maryland</i>	1
IV. The trial court erred in failing to set forth its reasons for dismissing the criminal charges in a written order as required by CrR 8.3(b).	1
V. The trial court erred in dismissing the criminal charges when the defendant did not provide the State with advance notice of its motion to dismiss.	1
VI. The trial court erred in dismissing the criminal charges without holding a proper hearing.	1
VII. The trial court erred in finding the evidence regarding the letter and therapist’s potentially differing statement was “ <i>Brady</i> material.”	1
VIII. The trial court erred to the extent its ruling held the State had an obligation to conduct additional investigation.....	2
IX. The trial court erred to the extent it found the State’s actions caused the defendant to choose between either an adequate defense or a speedy trial.	2
X. The trial court erred to the extent it found the State was in possession or control of Charles Bender’s alleged statements.	2
XI. The trial court erred in finding the State withheld information from defense.	2
XII. The trial court erred to the extent its holding necessitates that it found the evidence was material.	2
XIII. The trial court erred to the extent its holding necessitates that it found the evidence was favorable to the defendant.	2
XIV. The trial court erred to the extent its holding necessitates that it found the evidence was suppressed by the State.....	2

XV. The trial court erred to the extent its holding necessitates that it found the evidence was exculpatory.	2
XVI. The trial court erred to the extent its holding necessitates that it found the evidence was not known to the defendant.	2
XVII. The trial court erred to the extent it found the State committed a <i>Brady</i> violation.	2
XVIII. The trial court erred to the extent it found that information discovered by defense during its investigation, information unknown to the State, can be “Brady material.”	2
XIX. The trial court erred in finding the State engaged in misconduct or mismanagement.	2
XX. The trial court erred to the extent it found the State engaged in arbitrary action.	3
XXI. The trial court erred in dismissing the charges without taking evidence in the form of testimony or exhibits.....	3
XXII. The trial court erred to the extent it adopted defense counsel’s statements as facts.....	3
XXIII. The trial court erred in failing to allow the State adequate time to respond to the motion and allegations contained therein.....	3
XXIV. The trial court erred in finding the State withheld information from defense when it was clear from the record that the State and its witnesses had provided all information known to them regarding the conversation between Lt. Rhine and Hensley’s mental health care provider.	3
XXV. The trial court erred in finding Charles Bender disagreed with Lt. Rhine’s memory of their conversation without any evidence to support this finding.	3
XXVI. The trial court erred to the extent it found the State violated its obligations to provide discovery to defense.....	3
XXVII. The trial court erred in finding the State was in possession or control over the letter defense counsel discussed in its oral motion to dismiss without any evidence to support this finding.....	3
XXVIII. The trial court erred to the extent it found the State was in possession or control of Charles Bender’s statements regarding the letter from Lt. Rhine.	3

XXIX. The trial court erred in finding there was communication between Lt. Rhine and the prosecutor’s office regarding the conversation Lt. Rhine had with Charles Bender absent any evidence to support this finding.	3
XXX. The trial court erred in finding the defendant was prejudiced by the State’s actions.	4
XXXI. The trial court erred in finding there was prejudice to the rights of the defendant which materially affected his right to a fair trial.	4
XXXII. The trial court erred in failing to consider the appropriate legal authority.	4
XXXIII. The trial court erred in failing to consider all potential remedies.	4
XXXIV. The trial court erred in failing to consider less extreme alternatives to dismissal.	4
XXXV. The trial court erred in finding the supposed violation warranted dismissal of the criminal charges.	4
XXXVI. The trial court erred in entering an order of dismissal pursuant to CrR 8.3. <i>See</i> CP 186.	4
ISSUES PRESENTED	4
I. Whether the trial court erred in finding facts established to support defense’s motion to dismiss in the absence of an evidentiary hearing, testimony of witnesses, or admitted exhibits supporting such findings.	4
II. Whether the trial court erred in finding a <i>Brady</i> violation when defense was in possession of the evidence that supported the purported violation.	4
III. Whether the trial court erred in finding a <i>Brady</i> violation when the evidence was able to be discovered by defense with due diligence.	4
IV. Whether the trial court erred in finding a <i>Brady</i> violation when the evidence was not material.	4
V. Whether the trial court erred in finding a <i>Brady</i> violation when the evidence was not favorable to the defendant.	4
VI. Whether the trial court erred in finding a <i>Brady</i> violation when the State did not suppress the evidence.	5
VII. Whether the trial court erred in finding governmental mismanagement or misconduct pursuant to CrR 8.3(b).	5

VIII.	Whether the trial court erred in finding the State violated its discovery obligations pursuant to CrR 4.7.	5
IX.	Whether the trial court erred in finding the defendant’s trial rights were substantially prejudiced.	5
X.	Whether the trial court erred in dismissing the criminal charges.	5
	STATEMENT OF THE CASE	5
	ARGUMENT	15
I.	The trial court erroneously dismissed the criminal charges against Hensley.....	15
II.	The trial court erred to the extent it found the State violated its discovery obligations.....	19
III.	The trial court erred in finding the late discovery of the letter was a violation of the Due Process Clause.....	24
IV.	The trial court erred in dismissing the charges pursuant to CrR 8.3(b)	36
V.	The trial court erred in failing to hold a proper hearing pursuant to Hensley’s motion to dismiss.	39
	CONCLUSION.....	41

TABLE OF AUTHORITIES

Cases

<i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).....	14
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....	13, 15, 21, 22
<i>City of Seattle v. Holifield</i> , 170 Wn.2d 230, 240 P.3d 1162 (2010).....	36
<i>Fendler v. Goldsmith</i> , 728 F.2d 1181 (9th Cir. 1983).....	21
<i>Giglio v. U.S.</i> , 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).....	23
<i>In re Pers. Restraint of Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	28
<i>In re Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (2015)	28
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	23, 28, 29
<i>Raley v. Ylst</i> , 470 F.3d 792 (9th Cir. 2006).....	27, 30
<i>State ex rel. Carroll v. Junker</i> , 9 Wn.2d 12, 482 P.2d 775 (1971)	16
<i>State v. Allert</i> , 117 Wn.2d 156, 815 P.2d 752 (1991).....	13
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	13, 15
<i>State v. Autrey</i> , 136 Wn.App. 460, 150 P.3d 580 (2006).....	22
<i>State v. Baker</i> , 78 Wn.2d 327, 474 P.2d 254 (1970).....	34
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993)	18
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	19
<i>State v. Clark</i> , 53 Wn. App. 120, 765 P.2d 916 (1988), <i>rev. denied</i> , 112 Wn.2d 1018 (1989).....	20
<i>State v. Davila</i> , 184 Wn.2d 55, 357 P.3d 636 (2015)	30
<i>State v. Dunivin</i> , 65 Wn. App. 728, 829 P.2d 799, <i>rev. denied</i> , 120 Wn.2d 1016, 844 P.2d 436 (1992).....	19
<i>State v. Evans</i> , 80 Wn. App. 806, 911 P.2d 1344 (1996)	13
<i>State v. Garza</i> , 99 Wn.App. 291, 994 P.2d 868 (2000)	33, 34, 35
<i>State v. Gentry</i> , 183 Wn.2d 749, 356 P.3d 714 (2015).....	24
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	27, 29
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991)	13
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	37
<i>State v. Hoffman</i> , 115 Wn. App. 91, 60 P.3d 1261 (2003), <i>reversed on other grounds</i> , 150 Wn.2d 536, 78 P.3d 1289 (2003)	19
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 959 P.2d 1061 (1998).....	19, 20
<i>State v. Judge</i> , 100 Wn.2d 706, 675 P.2d 219 (1984).....	25
<i>State v. Lewis</i> , 115 Wn.3d 294, 797 P.2d 1141 (1990).....	16, 34
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007) (citing <i>Kyles</i> , 514 U.S. at 438)	26, 27

<i>State v. McReynolds</i> , 104 Wn.App. 560, 17 P.3d 608 (2000)	36
<i>State v. Moen</i> , 150 Wn.2d 221, 76 P.3d 721 (2003)	34
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011)	22, 28
<i>State v. Perez</i> , 69 Wn. App. 133, 847 P.2d 532, <i>rev. denied</i> , 122 Wn.2d 1015 (1993)	13
<i>State v. Price</i> , 94 Wn.2d 810, 620 P.2d 994 (1980)	24
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	16, 34
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	33, 34
<i>State v. Rundquist</i> , 79 Wn.App. 786, 905 P.2d 922 (1995)	14
<i>State v. Sherman</i> , 59 Wn. App. 763, 801 P.2d 274 (1990)	20
<i>State v. Smith</i> , 67 Wn. App. 847, 841 P.2d 65 (1992)	19, 20
<i>State v. Smith</i> , 67 Wn.App. 81, 834 P.2d 26 (1992), <i>affirmed</i> , 123 Wn.2d 51, 864 P.2d 1371 (1993)	38
<i>State v. Templeton</i> , 148 Wn.2d 193, 59 P.3d 632 (2002)	21
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	27
<i>State v. Uglem</i> , 68 Wn.2d 428, 413 P.2d 643 (1966)	14
<i>State v. Wilson</i> , 149 Wn.2d 1, 65 P.3d 657 (2003)	16, 35
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	24
<i>State ex rel. Carroll v. Junker</i> , 9 Wn.2d 12, 482 P.2d 775 (1971)	33
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)	22, 30
<i>Taylor v. Illinois</i> , 484 U.S. 400, 19, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)	20
<i>U.S. v. Agurs</i> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)	23
<i>U.S. v. Aichele</i> , 941 F.2d 761 (9th Cir. 1991)	26, 27
<i>U.S. v. Augurs</i> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)	30
<i>U.S. v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)	29
<i>U.S. v. Brown</i> , 582 F.2d 197 (2d Cir. 1978)	30
<i>U.S. v. Dupuy</i> , 760 F.2d 1492 (9th Cir. 1985)	27
<i>U.S. v. Hsieh Hui Mei Chen</i> , 754 F.2d 817 (9th Cir. 1985)	26
<i>U.S. v. Pasha</i> , 797 F.3d 1122 (D.C. Cir. 2015)	23
<i>U.S. v. Shryock</i> , 342 F.3d 948 (9th Cir. 2003)	27
<i>Williams v. Scott</i> , 35 F.3d 159 (5th Cir. 1994)	28

Rules

CrR 4.7	13, 15
CrR 4.7(a)(4)	17, 18
CrR 4.7(c)(1)	17
CrR 4.7(h)(7)(i)	17, 19
CrR 8.3	13
CrR 8.3(b)	15, 33, 34

INTRODUCTION

The State of Washington was the plaintiff below and the appellant on appeal. The State appeals the trial court's dismissal of the criminal charges against Hensley in Clark County Superior Court Cause No. 15-1-01021-2.

ASSIGNMENTS OF ERROR

- I. The trial court erred in dismissing the criminal charges against Hensley pursuant to CrR 8.3.¹**
- II. The trial court erred in dismissing the criminal charges against Hensley pursuant to CrR 4.7.**
- III. The trial court erred in dismissing the criminal charges against Hensley pursuant to *Brady v. Maryland*.**
- IV. The trial court erred in failing to set forth its reasons for dismissing the criminal charges in a written order as required by CrR 8.3(b).**
- V. The trial court erred in dismissing the criminal charges when the defendant did not provide the State with advance notice of its motion to dismiss.**
- VI. The trial court erred in dismissing the criminal charges without holding a proper hearing.**
- VII. The trial court erred in finding the evidence regarding the letter and therapist's potentially differing statement was "*Brady* material."**

¹ The trial court did not enter written findings of fact or conclusions of law, thus the State is unable to refer to numbered findings or conclusions in assigning error. Instead, the State refers to page numbers from the verbatim report of proceedings. The State assigns error to the entirety of the court's oral findings and conclusions in this matter.

- VIII. The trial court erred to the extent its ruling held the State had an obligation to conduct additional investigation.**
- IX. The trial court erred to the extent it found the State's actions caused the defendant to choose between either an adequate defense or a speedy trial.**
- X. The trial court erred to the extent it found the State was in possession or control of Charles Bender's alleged statements.**
- XI. The trial court erred in finding the State withheld information from defense.**
- XII. The trial court erred to the extent its holding necessitates that it found the evidence was material.**
- XIII. The trial court erred to the extent its holding necessitates that it found the evidence was favorable to the defendant.**
- XIV. The trial court erred to the extent its holding necessitates that it found the evidence was suppressed by the State.**
- XV. The trial court erred to the extent its holding necessitates that it found the evidence was exculpatory.**
- XVI. The trial court erred to the extent its holding necessitates that it found the evidence was not known to the defendant.**
- XVII. The trial court erred to the extent it found the State committed a *Brady* violation.**
- XVIII. The trial court erred to the extent it found that information discovered by defense during its investigation, information unknown to the State, can be "Brady material."**
- XIX. The trial court erred in finding the State engaged in misconduct or mismanagement.**

- XX. The trial court erred to the extent it found the State engaged in arbitrary action.**
- XXI. The trial court erred in dismissing the charges without taking evidence in the form of testimony or exhibits.**
- XXII. The trial court erred to the extent it adopted defense counsel's statements as facts.**
- XXIII. The trial court erred in failing to allow the State adequate time to respond to the motion and allegations contained therein.**
- XXIV. The trial court erred in finding the State withheld information from defense when it was clear from the record that the State and its witnesses had provided all information known to them regarding the conversation between Lt. Rhine and Hensley's mental health care provider.**
- XXV. The trial court erred in finding Charles Bender disagreed with Lt. Rhine's memory of their conversation without any evidence to support this finding.**
- XXVI. The trial court erred to the extent it found the State violated its obligations to provide discovery to defense.**
- XXVII. The trial court erred in finding the State was in possession or control over the letter defense counsel discussed in its oral motion to dismiss without any evidence to support this finding.**
- XXVIII. The trial court erred to the extent it found the State was in possession or control of Charles Bender's statements regarding the letter from Lt. Rhine.**
- XXIX. The trial court erred in finding there was communication between Lt. Rhine and the prosecutor's office regarding the conversation Lt. Rhine had with Charles Bender absent any evidence to support this finding.**

- XXX.** The trial court erred in finding the defendant was prejudiced by the State's actions.
- XXXI.** The trial court erred in finding there was prejudice to the rights of the defendant which materially affected his right to a fair trial.
- XXXII.** The trial court erred in failing to consider the appropriate legal authority.
- XXXIII.** The trial court erred in failing to consider all potential remedies.
- XXXIV.** The trial court erred in failing to consider less extreme alternatives to dismissal.
- XXXV.** The trial court erred in finding the supposed violation warranted dismissal of the criminal charges.
- XXXVI.** The trial court erred in entering an order of dismissal pursuant to CrR 8.3. *See* CP 186.

ISSUES PRESENTED

- I.** Whether the trial court erred in finding facts established to support defense's motion to dismiss in the absence of an evidentiary hearing, testimony of witnesses, or admitted exhibits supporting such findings.
- II.** Whether the trial court erred in finding a *Brady* violation when defense was in possession of the evidence that supported the purported violation.
- III.** Whether the trial court erred in finding a *Brady* violation when the evidence was able to be discovered by defense with due diligence.
- IV.** Whether the trial court erred in finding a *Brady* violation when the evidence was not material.
- V.** Whether the trial court erred in finding a *Brady* violation when the evidence was not favorable to the

defendant.

- VI. Whether the trial court erred in finding a *Brady* violation when the State did not suppress the evidence.**
- VII. Whether the trial court erred in finding governmental mismanagement or misconduct pursuant to CrR 8.3(b).**
- VIII. Whether the trial court erred in finding the State violated its discovery obligations pursuant to CrR 4.7.**
- IX. Whether the trial court erred in finding the defendant's trial rights were substantially prejudiced.**
- X. Whether the trial court erred in dismissing the criminal charges.**

STATEMENT OF THE CASE

On June 4, 2015, Mark Hensley (hereafter 'Hensley') called 911 a number of times, making threats to shoot Lieutenant Roy Rhine of the Ridgefield Police Department. CP 3-4. During the calls, Hensley also told the 911 dispatcher that he was "prepared to go kill a man" and that he "intended on murdering a gentleman by name of Matthew." CP 3. Hensley also told the dispatcher that he had "instructed [his service dogs] to wait patiently while [he] beat[s] Matthew to death." *Id.* Hensley also stated he would kill Matthew's wife if she got in the way. *Id.* In addition, Hensley told the 911 dispatcher that "I'm going to go over there and beat him to death, I'm going to quite literally. Mam [*sic*] I'm quite serious, I'm going to do that. I've already called 911 to tell them before I go kill a man. I

guess this is the call back. I'm preparing to go kill a man. In fact I'm heading over there now." *Id.* Hensley then hung up the phone. *Id.*

A few days prior to these events, Lt. Rhine had telephone contact with Hensley's therapist, a man named Charles Bender. RP 351-57. Lt. Rhine recalls that Mr. Bender expressed concern for Hensley's safety. *Id.* Lt. Rhine described Hensley as a very dangerous person based on his conversation with Mr. Bender. *Id.* Lt. Rhine summarized the contents of this phone call in a letter he authored in June 2016. RP 351-57.

Hensley was arrested on June 5, 2015. CP 2. The State originally charged Hensley with one count of Felony Harassment involving threats to a criminal justice participant and two counts of Felony Harassment – death threats. CP 5-6. The State later amended the information charging Hensley with one count of felony harassment involving a criminal justice system participant, and one count of felony harassment death threats. CP 142. Both counts involved Lt. Rhine as the listed victim. *Id.* Hensley was appointed counsel on June 8, 2015. RP 5-6. Counsel requested the trial court order an evaluation pursuant to RCW ch. 10.77 to evaluate Hensley for competency on June 9, 2015. CP 7-10; RP 12-13. On July 2, 2015, the Clark County Superior Court entered an order of commitment to restore competency after having found that Hensley was incompetent to stand trial. CP 13-14.

While on supervised release Hensley was charged with Driving While License Suspended by the Battle Ground City Attorney in Battle Ground Municipal Court for an incident occurring on August 27, 2015. CP 23. On September 2, 2015, Hensley called 911 and asked to speak with La Center Police Officer Jerry Lester. CP 23. Hensley told Officer Lester that if law enforcement did not stop harassing him that he would be forced to defend himself, including killing any officer who came to his house or came after him. CP 23. Based on these allegations, a Clark County Corrections Officer issued a notice of a supervised release violation. CP 23-24. At a hearing on September 14, 2015, the Superior Court declined to revoke Hensley's release. CP 30.

In October 2015, a psychologist from Western State Hospital authored a report opining that Hensley was competent to stand trial. CP 33-38. On October 12, 2015, the trial court found Hensley competent, and set a trial date for December 14, 2015, and a readiness hearing for December 10, 2015. CP 39-41.

While the felony harassment charges were pending, Hensley also had a pending domestic violence stalking charge in district court. CP 45. On October 27, 2015, Hensley was arrested for violating the no contact order with the victim of the stalking case. CP 45. The Clark County Corrections unit again recommended the superior court revoke Hensley's

release due to the supervised release violation. CP 45-46. The court found Hensley violated his release conditions and revoked his release and set bail in the amount of \$50,000 on November 4, 2015. CP 49; RP 150-56.

On December 4, 2015, defense counsel interviewed Lt. Roy Rhine. RP 362. At that interview, Lt. Rhine indicated he had received a phone call from a mental health provider expressing extreme concern for Hensley's welfare. RP 362. During the interview Lt. Rhine also indicated the mental health provider said that Hensley had become extremely dangerous in the prior few weeks and that the provider wanted to wash himself of contact with Hensley as he felt threatened. RP 362. Lt. Rhine passed this information on to the county mental health department at that time. RP 362. Lt. Rhine would later summarize his conversation with this provider, Charles Bender, in a letter dated June of 2016. RP 351-65.

On December 10, 2015, Hensley requested the trial court continue his trial date of December 14, 2015, so that he could hire a private investigator. RP 175. The State did not object to a continuance. RP 176. Hensley entered a waiver of speedy trial with a commencement date of December 10, 2015. RP 186-87; CP 66. The court entered a new trial date of February 16, 2016, and a readiness hearing date of February 11, 2016. CP 67.

On December 22, 2015, Hensley's defense attorney asked the trial court to allow him to withdraw as counsel due to a breakdown in communication between himself and Hensley. RP 192; CP 68. The court granted the attorney's motion and appointed new counsel. CP 70. The court then set a new trial date of March 14, 2016, with a readiness hearing on March 10, 2016. CP 71.

On March 10, 2016, defense moved to continue the trial date of March 14, 2016, so that defense could pursue a potential diminished capacity defense. CP 72; RP 172. The trial court set a new trial date of June 20, 2016, with a readiness hearing date of June 16, 2016. CP 79. On April 12, 2016, the court held a review hearing wherein defense counsel indicated it was still waiting for a report from its expert on a potential diminished capacity defense. RP 208-10.

On May 9, 2016, Hensley was charged with a new misdemeanor charge of harassment in the City of Battle Ground. RP 218, 228. The superior court found a new supervised release violation and increased Hensley's bail to \$70,000. RP 236; CP 92.

On June 16, 2016, the parties entered an agreed motion to continue the June 20, 2016 trial date. RP 238-39. The trial court reset the matter for trial on July 18, 2016, with readiness on July 14, 2016. RP 239; CP 101. On July 7, 2016, the State brought a motion to continue due to officer

unavailability before the superior court. RP 243-44; CP 104-05. Defense agreed to the motion to continue, and the trial court set a new trial date of August 8, 2016, with a readiness hearing set for August 4, 2016. RP 243-45; CP 110. On August 4, 2016, the State asked for a continuance because the prosecutor had another case proceeding to trial on August 8, 2016; defense agreed to the continuance and the trial was set for September 6, 2016, with a readiness hearing set for September 1, 2016. RP 249-50; CP 112.

On August 31, 2016, the State provided defense with a document dated June 22, 2016, regarding the City of Ridgefield police department discussing Hensley's mental status with a psychologist. RP 251. This document made reference to Hensley's mental health provider, Charles Bender. RP 370. The State also let defense know it had just learned that the City of Ridgefield was in the process of conducting an internal affairs investigation. RP 253. The State informed defense counsel it had no intention of using any of this information at trial. RP 253. On the basis of this document from Ridgefield police, Hensley's defense attorney requested a continuance of the trial date set for September 6, 2015. RP 251-52. The trial court granted Hensley's requested continuance and reset the trial for October 3, 2016. RP 255-56; CP 117.

On September 26, 2016, defense counsel conducted a second interview with Lt. Rhine, wherein they discussed conversations Lt. Rhine had had with doctors that had treated Hensley. RP 359. Defense counsel asked Lt. Rhine about Charles Bender during this interview. RP 369. Lt. Rhine did not withhold any information from counsel in any interview. RP 369. Subsequently defense called the case ready for trial. RP 359.

On October 3, 2016, the trial in this matter commenced. RP 262. The trial court heard motions in limine, a jury was impaneled, and opening statements were given on the first day of trial. RP 262-350. At some point on October 3, 2016, defense again interviewed Lt. Rhine. RP 351-58. On the second day of trial, October 4, 2016, defense counsel asked to bring a matter to the Court's attention immediately after court commenced. RP 351. Defense counsel moved to dismiss the charges against Hensley because counsel claimed he received information the day prior that showed the State was aware of "Brady material" that it had failed to disclose. RP 355. Counsel stated that he had received a letter authored by Lt. Roy Rhine of the Ridgefield Police Department, dated June 20, 2016, that discussed a phone conversation Lt. Rhine had with Hensley's therapist, Charles Bender, on June 1, 2015. RP 351-52. This letter was allegedly part of a packet of materials defense counsel had received from the City of Ridgefield pursuant to its request, made the last week of

September 2016, for information pertaining to the internal affairs investigation relevant to this case. RP 351-58. Defense counsel stated the letter indicated Lt. Rhine had discussed the contents of his conversation with Mr. Bender with the prosecutor's office. RP 353. Counsel claimed the letter itself was not "Brady material," but that the "investigation [he was] able to conduct [after receiving the letter] had disclosed Brady material." RP 354. Defense moved to dismiss the case pursuant to *Brady v. Maryland* and *Kyles v. Whitley*, claiming the State had an affirmative duty to investigate this issue. RP 354-55. Defense counsel further represented that he had spoken with Mr. Bender, Hensley's therapist, and Mr. Bender indicated "there's no way he would have just called [the police]" with regards to Hensley, and that Lt. Rhine's letter summarizing their conversation was a "complete distortion." RP 352. Defense counsel told the court the letter indicated Lt. Rhine quoted Mr. Bender as saying Hensley was a "very dangerous person." RP 352. Counsel told the court that Mr. Bender told him that what he told the police was that Hensley "does not back down from authority and because of his ticks is going to get himself shot." RP 352.

The trial court asked to clarify whether Mr. Bender did or did not call the police as the court indicated it would be contrary to Mr. Bender's licensing requirements to disclose patient confidences absent an imminent

threat. RP 357. Defense counsel then told the court that Mr. Bender “might have returned a phone call,” and that Mr. Bender agreed there was indeed a conversation with police. RP 357. Defense counsel then further disclosed that “Mr. Bender indicated he felt this conversation was regarding his duty to protect and Mr. Hensley putting himself in harm’s ways....” RP 357.

During counsel’s argument, it was clear that he believed the pertinent evidence was not the letter, itself, but rather that a party to a conversation with Lt. Rhine had a different recollection as to the substance of their conversation. Mr. Bender purportedly disagreed with Lt. Rhine’s statements in the letter he authored in June 2016. Hensley’s attorney discovered this after calling Mr. Bender on the phone and asking him some questions. RP 351-65.

The State pointed out the trial court did not have any sworn testimony or an affidavit from Mr. Bender, and Lt. Rhine may have a different version of events. RP 358. The State also asked the court to allow a brief recess to give the State adequate time to respond to the defense’s allegations and motion. RP 365. Defense had initially indicated to the court that the State had no idea what he was about to disclose to the court and that the prosecutor had not seen a copy of the letter defense counsel

based his motion upon. RP 351-52. The trial court denied the State's request for adequate time to respond. RP 365.

The trial court orally ruled that pursuant to CrR 8.3(b) the case would be dismissed. RP 366-69. The court stated,

We're under 8.3(b) here under the request by the defense. One of the things that 8.3 starts out and says, in furtherance of justice. I mean, that's what we're attempting to do here. That's what the whole idea of disclosure and Brady material and all the progeny off of Brady talk about.

As mentioned earlier, and I will specifically find, I do not find that there was any kind of evil intentional wrongdoing, act by the State, the governmental agencies involved bringing their forces together to prosecute – attempt to prosecute Mr. Hensley.

Do I find – I believe this is prejudicial to Mr. Hensley getting this material that should have been provided sooner. It is prejudicial to him prejudicial to the possibility of defense that he's able to put forward.

Yesterday we had by the defense a motion to dismiss under similar grounds, different issue with the 911 call. I denied that. And I think that was the appropriate ruling because there's case law that supports if you can as opposed to dismissing suppress the evidence, that's what you should do. And that's what we did – I did in this case. I suppressed that evidence.

Here this is different. This isn't suppressing this evidence, this information, this letter. It's denying the right to have further investigation, look into.

Yes, they made the decision to call the case ready for trial but there are cases that talk about when they get stuck in that position of waiving speedy trial rights versus doing that further investigation, it's not a fair place to put the defendant in to make those choices and options.

This case was called ready. We're now in the middle of trial. This coming up last night – kind of the nexus of it coming up last night at a follow-up interview – this could have been provided before. I believe it should have been provided before.

We've been talking about all this information throughout this case of wanting to get all the reports and contacts and information. Coming in mid-trial is not acceptable. I think the cumulation effect of both yesterday's I denied and this one – but this is probably enough standing alone, but the cumulative effect, I'm dismissing this matter.

RP 367-68.

The State timely filed its notice of appeal of the trial court's dismissal of the charges in this matter.

ARGUMENT

I. The trial court erroneously dismissed the criminal charges against Hensley.

The trial court erroneously dismissed the criminal charges against Hensley after it found that the State failed to timely disclose evidence to the defendant and that the defendant was prejudiced by this action. The trial court's findings and conclusions are not clear, and at times the arguments of counsel and the statements of the trial court appear to conflate the State's discovery obligations pursuant to CrR 4.7 with the State's obligations pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct.

1194, 10 L.Ed.2d 215 (1963). The trial court's order also is unclear at times as to whether its dismissal order is based on a violation of a discovery obligation pursuant to CrR 4.7, or for misconduct which prejudiced the defendant's right to a fair trial pursuant to CrR 8.3. Defense counsel combined these three theories while arguing that the criminal charges should be dismissed. However, these three theories are not all applicable and they may not be combined in a piecemeal fashion to accomplish a dismissal as the trial court did below. The trial court's dismissal of this action should be reversed.

A trial court's conclusions of law are reviewed de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). A trial court's findings of fact are reviewed under the "clearly erroneous" standard. *State v. Evans*, 80 Wn. App. 806, 811, 911 P.2d 1344 (1996) (citing *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)). "Findings are clearly erroneous 'only if no substantial evidence supports [the trial court's] conclusion.'" *Evans*, 80 Wn. App. at 812 (citing *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991); *State v. Perez*, 69 Wn. App. 133, 137, 847 P.2d 532, *rev. denied*, 122 Wn.2d 1015 (1993)). Substantial evidence exists only "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). In

reviewing a defense motion to dismiss for governmental misconduct, this Court should grant all reasonable inferences in favor of the State as the non-moving party. *State v. Rundquist*, 79 Wn.App. 786, 790, 905 P.2d 922 (1995) (citing to *State v. Uglem*, 68 Wn.2d 428, 432, 413 P.2d 643 (1966)). In this appeal, the State assigns errors to findings of fact and conclusions of law.²

With respect to the trial court's findings of fact as gleaned from its oral rulings, such findings are clearly erroneous as no evidence existed to support the trial court's conclusions let alone substantial evidence. The trial court did not hold a proper hearing on the defendant's motion to dismiss. The trial court took no testimony and admitted no exhibits during its consideration of the motion to dismiss. The trial court did not make the letter that was central to Hensley's claim and basis for his motion to dismiss a part of the record below. As such, the trial court failed to find the defendant established any facts by a preponderance of the evidence. The trial court did not hear any testimony from any witness as to the timing of the receipt by defense counsel of the letter authored by Lt. Rhine. The trial court did not hear any evidence that the State was in possession of this document and failed to disclose it. The trial court did

² There are no written findings of fact or conclusions of law. The State assigns error to the entirety of the court's oral findings and conclusions in this matter.

not hear any evidence that the State was aware of the existence of this document. The trial court also did not hear any evidence that Hensley was previously unaware of the name of his mental health care provider, or that this provider would testify to any facts which directly contradicted Lt. Rhine's prior statements or anticipated trial testimony. Quite simply, the trial court heard no evidence regarding the potential discovery violation, *Brady* violation, or misconduct by the State, nor did it see any exhibits that were admitted into evidence. The trial court thereby had no evidence from which to base its implicit findings of fact. To this extent, the trial court erred in finding any facts which gave rise to a basis for it to dismiss the criminal charges in this case.

The trial court's legal conclusions are reviewed de novo. *Armenta*, 134 Wn.2d at 9. The trial court erred in confounding the legal standard for dismissal pursuant to CrR 4.7, CrR 8.3(b), and *Brady v. Maryland, supra*. The trial court's conclusions of law regarding the legal standard to find were therefore improper.

When a trial court applies the proper legal standard and draws correct legal conclusions, its decision to dismiss a criminal prosecution is reviewed for an abuse of discretion. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or when it exercises its discretion on untenable

grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 9 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if “it rests on facts unsupported in the record...” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court’s decision is also manifestly unreasonable if it adopts a view “that no reasonable person would take.” *State v. Lewis*, 115 Wn.3d 294, 298-99, 797 P.2d 1141 (1990)).

The trial court below abused its discretion because its decision to dismiss the matter as opposed to continuing the trial or suppressing evidence was manifestly unreasonable, because it rested its decision on facts not supported by the record, and because its decision to dismiss the matter was based on untenable grounds under CrR 4.7, CrR 8.3, and/or *Brady, supra*. Accordingly, the trial court’s order dismissing the matter should be reversed.

II. The trial court erred to the extent it found the State violated its discovery obligations.

Though never referred to as such during the argument and order at the trial court level, the most appropriate analysis of this issue is pursuant to CrR 4.7 which outlines the State’s discovery obligations. If the State violates its obligations under CrR 4.7, the trial court has discretion to allow a continuance of the matter, exclude the late-disclosed evidence, or

dismiss the action. CrR 4.7(h)(7)(i). Critical here, CrR 4.7(a)(4) provides that:

The prosecution attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecution attorney's staff.

CrR 4.7(a)(4).

If the trial court's intent was to analyze the issue under the discovery rules, it erred in finding the State violated its discovery obligations, and further erred in dismissing the charges as dismissal was an inappropriate remedy when a lesser alternative would have ensured Hensley received a fair trial.

Pursuant to discovery rules, the State is required to disclose the names, addresses, and written and oral statements of witnesses to defense. CrR 4.7(a)(1)(i). The State may also be required to provide "relevant material and information regarding" specified searches and seizures, the acquisition of specified statements from the defendant or the relationship of specified person to the prosecuting attorney. CrR 4.7(c)(1). A trial court may also, within its discretion, require disclosure of other relevant material and information not otherwise covered in the rule, if defense makes a showing of materiality. CrR 4.7(e)(1). All of these discovery

obligations are limited to material that is within the state's possession or control. CrR 4.7(a)(4).

The trial court erroneously found the State had a duty to provide material and information that was not within its possession or control. In *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993), the trial court compelled the State to supply the defendant with personnel files of its police officer witnesses. *Blackwell*, 120 Wn.2d at 825. The State objected because the personnel files were not within the possession of the prosecuting attorney, but rather were in the possession and control of the police department, and the State's attempts to obtain these files were unsuccessful. *Id.* When the State was unable to obtain the personnel files, the trial court granted the defendant's motion to dismiss pursuant to CrR 8.3(b) for mismanagement based on the State's failure to produce the requested documents. *Id.* at 826. On appeal, the Supreme Court reversed the trial court's decision finding the trial court abused its discretion. *Id.* In reversing, the Supreme Court found that the trial court erred in compelling the State to obtain materials not within the State's control. *Id.* at 827. Similarly, the evidence Hensley claimed was not provided by the State was not within the State's possession or control.

Even if the State had violated its obligations under CrR 4.7, the trial court abused its discretion in dismissing the case for such a violation

because it failed to consider the factors required by *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998). A court has wide latitude in determining appropriate sanctions for a discovery violation, but its decision may be overturned if the court abused its discretion. *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799, *rev. denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992). Exclusion of or suppression of evidence is “an extraordinary remedy” and it should be “applied narrowly.” *Hutchinson*, 135 Wn.2d at 882. Further, dismissal of a case for a discovery violation is “an extraordinary remedy available only when the defendant has been prejudiced by the prosecution’s action.” *State v. Hoffman*, 115 Wn. App. 91, 102, 60 P.3d 1261 (2003), *reversed on other grounds*, 150 Wn.2d 536, 78 P.3d 1289 (2003) (citing *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996)). The defendant bears the burden of proving prejudice by a preponderance of the evidence. *Cannon*, 130 Wn.2d at 328-29.

Assuming without conceding that the State violated CrR 4.7 by failing to disclose the letter discussed by defense counsel, the trial court should not have dismissed the charges, as such an extreme measure was unwarranted. To remedy a discovery violation, a trial court may grant a continuance, dismiss the action, or enter another appropriate order. *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992); CrR 4.7(h)(7)(i). The purpose of this rule is to protect against surprise that might prejudice the

defendant. *Smith*, 67 Wn. App. at 851 (citing *State v. Clark*, 53 Wn. App. 120, 124, 765 P.2d 916 (1988), *rev. denied*, 112 Wn.2d 1018 (1989)**Error! Bookmark not defined.**). Whether dismissal of an action is an appropriate remedy for a discovery violation is “a fact-specific determination that must be resolved on a case-by-case basis.” *State v. Sherman*, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990). In *Hutchinson*, *supra*, our Supreme Court held that trial courts should consider several factors prior to suppressing evidence for a discovery violation as suppression was such a harsh remedy that should only be used sparingly. *See Hutchinson*, 135 Wn.2d at 882. Given that dismissal of an action is even more harsh a remedy than suppression, the trial court erred in failing to consider the relevant *Hutchinson* factors prior to dismissing the charges.

In *Hutchinson*, the Supreme Court found that trial courts should consider four factors in determining whether to exclude evidence as a sanction for a discovery violation. *Id.* at 883. Those factors 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 objecting party] will be surprised or prejudiced by the witness’s testimony; and (4) whether the violation was willful or in bad faith.” *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 415, n. 19, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181,

1188-90 (9th Cir. 1983)); *State v. Templeton*, 148 Wn.2d 193, 221, 59 P.3d 632 (2002). Factors two and three, discussing the exclusion of evidence, are inapplicable in a trial court's analysis of whether dismissal is an appropriate remedy. However, at a minimum, prior to dismissing the matter the trial court below should have considered the effectiveness of less severe sanctions, such as a continuance or suppression, and whether the violation was willful or in bad faith. There is nothing in the record to show that lesser sanctions, such as a continuance or suppression would have been ineffective in this case. And no evidence supported the proposition that the alleged violation was willful or done in bad faith. In fact, all evidence supported the opposite conclusion. By failing to consider and employ these options, the trial court abused its discretion.

III. The trial court erred in finding the late discovery of the letter was a violation of the Due Process Clause.

The basis for Hensley's motion below was an alleged "*Brady* violation." The trial court erred in finding the late disclosure of the evidence violated the State's obligations under *Brady v. Maryland, supra*, and in dismissing the matter as a continuance or granting a new trial would have ensured the defendant received a fair trial.

The Due Process Clause of the U.S. Constitution requires that the State provide any exculpatory information to the defense. *Brady*, 373 U.S.

at 87. A violation of *Brady* occurs when three elements are established: (1) “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;” (2) “that evidence must have been suppressed by the State, either willfully or inadvertently; and” (3) “prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). If the evidence could have been discovered by the defense, there is no *Brady* violation. *State v. Mullen*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011). This Court reviews an alleged due process violation de novo. *State v. Autrey*, 136 Wn.App. 460, 467, 150 P.3d 580 (2006).

The trial court’s conclusion that the State committed misconduct by failing to disclose evidence to defense appears to have been based at least in part on the rule adopted pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This rule requires the State to disclose material exculpatory evidence. *Brady*, 373 U.S. at 87. In *Brady*, the U.S. Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. The *Brady* rule, as this holding has been termed, has been expanded to require disclosure of impeachment evidence, evidence not specifically requested

by defense, and evidence in the possession of law enforcement as well. *Giglio v. U.S.*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *U.S. v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Brady violations are most commonly raised post-conviction as an alleged basis to receive a new trial. The U.S. Court of Appeals for the District of Columbia summarized the post-conviction remedy analysis for a *Brady* violation in *U.S. v. Pasha*, 797 F.3d 1122 (D.C. Cir. 2015). There, the Court stated:

(1) a *Brady* violation requires a remedy of a new trial; (2) such new trial may require striking evidence, a special jury instruction, or other additional curative measures tailored to address persistent prejudice; and (3) if the lingering prejudice of a *Brady* violation has removed all possibility that the defendant could receive a new trial that is fair, the indictment must be dismissed. To be sure, dismissal is appropriate only as a last resort, where no other remedy would cure prejudice against a defendant.

Pasha, 797 F.3d at 1139. When a defendant alleges the State failed to disclose material facts in a timely manner, the trial court must find the State failed to act with due diligence and that material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, thereby compelling the defendant to choose between his right to a

speedy trial and his right to be represented by counsel who had a sufficient opportunity to adequately prepare a material part of his defense, prior to dismissing the charges. *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001) (citing *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). The trial court did not apply this standard in deciding Hensley's motion to dismiss.

The State did not fail to act with due diligence. It was clear from the record of Hensley's motion to dismiss that the prosecutor had not seen the letter that defense produced at the time of his motion to dismiss, nor was there any reason the prosecutor would have known of its existence based on the evidence it possessed at the time of trial. Furthermore, the trial court never considered whether the State's actions had compelled Hensley to choose between his right to a speedy trial and the right to be represented by adequately prepared counsel. There was no consideration given to how much time Hensley's lawyer would need to prepare given the additional evidence, or whether a brief continuance to allow him to so prepare was possible. When a trial court rests its decision on facts that are not supported in the record it abuses its discretion. *State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015). The trial court abused its discretion in finding the late discovery of the letter constituted a *Brady* violation.

a. The evidence was not favorable to Hensley.

The evidence that Hensley claims was suppressed by the State was a letter from Lt. Rhine indicating he had contact with Hensley's mental health care provider who indicated Hensley was "extremely dangerous." This evidence was not beneficial to Hensley, as, on its face, the evidence tended to support one of the elements of the crime charged, that any fear Lt. Rhine had that Hensley would carry out his threats was objectively reasonable. That defense counsel conducted a further investigation which led to evidence that could impeach Lt. Rhine's version of that phone call is not the evidence that is the subject of the alleged *Brady* violation. There was never any allegation that the State was aware of the mental health care provider's differing take on his conversation with Lt. Rhine. The entirety of the claim of withholding of evidence was based on the State's failure to provide defense with a copy of the letter that contained Lt. Rhine's summary of the conversation he had with Hensley's provider.

To the extent that Hensley appeared to argue that the State had a duty to discover the opinion of Mr. Bender (the mental health care provider), this argument is without legal support. The State has no duty to search for exculpatory evidence. *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). The State has no duty to do an investigation that the defendant approves of, nor does the State have a duty to interview all

potential witnesses so that it can notify defense of their potential trial testimony. The State's obligations are to inform the defendant of any material exculpatory evidence known to the State and its agents. The trial court's decision, to the extent it may have rested upon the belief the State had an obligation to interview Mr. Bender and provide that evidence to Hensley, is flawed and constitutes an abuse of discretion. The evidence actually complained of was not favorable to Hensley.

b. The evidence was not suppressed by the State.

Hensley discovered the evidence that he claims the State suppressed, at the latest possible date of the first day of trial. Hensley cannot show the State suppressed evidence when he, himself, was fully able to discover the evidence, and did in fact discover the evidence. In fact Hensley alerted to the prosecutor to the existence of the evidence after he discovered it. To sustain a *Brady* claim, Hensley must have shown the trial court that the State suppressed evidence favorable to him. The State's *Brady* obligations include disclosure of evidence in the possession of the police. *State v. Lord*, 161 Wn.2d 276, 292, 165 P.3d 1251 (2007) (citing *Kyles*, 514 U.S. at 438). However, the State does not have an obligation to turn over materials not in its control or possession, or of which it is unaware. *U.S. v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991); *U.S. v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985). In *U.S. v. Shryock*, 342

F.3d 948 (9th Cir. 2003), the federal Court of Appeals held that federal prosecutors did not violate their *Brady* obligations by failing to disclose records in possession of a state agency. *Shyrook*, 342 F.3d at 983-84. This supports a finding by this Court that the State did not violate *Brady* by failing to disclose records in possession of a city agency, such as the City of Ridgefield.

Furthermore, if a defendant has enough information to ascertain the supposed *Brady* material on his own, the government has not suppressed the evidence. *Aichele*, 941 F.2d at 764. If a defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, or if the means of obtaining the evidence have been provided to the defendant, then there has been no *Brady* violation. *See Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006); *U.S. v. Dupuy*, 760 F.2d 1492, 1501 n. 5 (9th Cir. 1985). In *Gentry*, the Supreme Court held that there is no violation of the rule requiring the State to disclose exculpatory evidence if the defendant could have obtained the information using reasonable diligence. In sum, “[e]vidence that could have been discovered but for lack of due diligence is not a *Brady* violation.” *Lord*, 161 Wn.2d at 293; *see also State v. Gregory*, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006); *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004); *Gentry*, 137

Wn.2d at 396; *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

In *Williams v. Scott*, 35 F.3d 159 (5th Cir. 1994), the defendant argued the government violated *Brady* by failing to provide the full text of a witness's statement. *Williams*, 35 F.3d at 163. There, the government had provided the defendant with a summary of the witness's statement and defense counsel could have obtained the entirety of the statement through due diligence. *Id.* On appeal the Court found there was no *Brady* violation as defense could have obtained the allegedly suppressed evidence on its own by exercising due diligence. *Id.*

Though a *Brady* violation can occur when the evidence was not known to the prosecution if it was known to law enforcement, there is no violation if the evidence could have been discovered by defense. *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). In this case, the evidence was actually discovered by defense, therefore there was no *Brady* violation.

c. The evidence was not material.

Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defendant. *Kyles*, 514 U.S. at 433-34. A "reasonable probability" is shown if the non-disclosed evidence "undermines

confidence in the outcome of the trial.” *Id.* at 434 (quoting *U.S. v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Moreover, in determining materiality, 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*, 514 U.S. at 434. If evidence is not admissible, nor likely to lead to admissible evidence, it is not material. *Gregory*, 158 Wn.2d at 797.

The trial court necessarily found that the State suppressed material evidence as it found that Hensley was prejudiced. However, the letter that defense counsel complained of as being withheld by the State would not have been admissible at trial. The letter constituted hearsay and would have only been admissible at trial if it met a hearsay exception. *See* ERs 801, 803, 804. As it contained only a witness’s summary of events, it was much like a police report: inadmissible. The information contained within the letter was within the knowledge of Lt. Rhine, a witness made available to the defense on multiple occasions for pretrial interviews. Furthermore, the event detailed in the letter was discussed with defense counsel at Lt. Rhine’s first pretrial interview nearly 10 months prior to trial. The defendant therefore was ““aware of the essential facts enabling him to take

advantage of any exculpatory evidence....” *Raley*, 470 F.3d at 804 (quoting *U.S. v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978)).

In *State v. Davila*, 184 Wn.2d 55, 357 P.3d 636 (2015), the Supreme Court found that though the evidence suppressed by the State could have been used to undermine the credibility of the Crime Lab, “the defense failed to meaningfully connect [its] ineptitude with the evidence used to convict Davila.” *Davila*, 184 Wn.2d at 78. In essence, the defense failed to show that the facts were material in his case. *Id.* Though the State has the duty to disclose impeachment evidence as well as exculpatory evidence to the defendant, the effect of the omission of that impeachment evidence from the trial must be evaluated cumulatively and in the context of the whole trial record. *Davila*, 184 Wn.2d at 78 (citing *Strickler*, 527 U.S. at 280, *Kyles*, 514 U.S. at 440, and *U.S. v. Augurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

In Hensley’s trial, the letter was not substantively admissible, nor was it impeachment. Defense claimed however that receipt of the letter caused him to conduct additional investigation which revealed impeachment evidence. Though Hensley’s lawyer claimed to have first become aware of this letter when he received a copy of it the day prior to bringing his motion, Hensley’s lawyer had already been able to investigate the issue and had made contact with the mental health care provider Lt.

Rhine discussed in his letter, Mr. Charles Bender. Though the potential evidence from Mr. Bender, that Lt. Rhine's version of their conversation does not comport with Mr. Bender's memory of their conversation, may have cast slight doubt on Lt. Rhine's version of events, the actual threats that formed the basis of the harassment charges were recorded and were to be played for the jury at trial. Therefore any potential impeachment of Lt. Rhine on the basis of his memory of the conversation with Mr. Bender would not have been material to Hensley's trial. It would not have changed the potential outcome of the trial, nor would it have undermined the confidence in the outcome of the trial. In analyzing the totality of the evidence to be presented at trial, the exclusion of the potential impeachment of Lt. Rhine as to the details of this conversation with Mr. Bender would not have undermined anyone's confidence that Hensley received a fair trial (had he received one where this evidence was not presented).

Furthermore, the evidence that Hensley's counsel discovered and which could have been used to impeach Lt. Rhine was of little evidentiary value. Lt. Rhine had described that Mr. Bender felt Hensley was "very dangerous," whereas Mr. Bender purportedly told defense counsel that he had only told Lt. Rhine that Hensley "does not back down from authority and because of his ticks is going to get himself shot." RP 352. Defense

counsel also represented that Mr. Bender referred to Hensley as putting himself in harm's way. RP 357. What was never fleshed out because the trial court did not conduct a proper hearing with witness testimony was whether Lt. Rhine's statement that Hensley was considered "very dangerous" was his own interpretation of what Mr. Bender's statements meant, or whether they were a direct quote from Mr. Bender. Thus it is entirely possible that Lt. Rhine would have fully agreed with Mr. Bender's version of the conversation and that Lt. Rhine considers someone who does not back down from authority and who is going to get himself shot as being "very dangerous." However, no matter whether Lt. Rhine and Mr. Bender agreed as to the contents of their conversation, there is nothing Mr. Bender's potential testimony regarding that conversation could have done to lessen the significance of the taped statements of Hensley telling the 911 dispatcher that he was going to shoot Lt. Rhine as well as his numerous statements that he was going to kill a man and that he was serious. The effect of the omission of the impeachment evidence Hensley discovered was minimal. Therefore the trial court erred in finding, as it necessarily did, that the evidence purportedly withheld by the State was material.

IV. The trial court erred in dismissing the charges pursuant to CrR 8.3(b)

Pursuant to CrR 8.3, a trial court may dismiss an action when arbitrary action or governmental misconduct prejudiced the rights of the defendant and there has been a material effect on the defendant's right to a fair trial. CrR 8.3(b). Dismissal therein is an extraordinary remedy that is only appropriate when there has been such prejudice that no other action would ensure a fair trial. *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868 (2000).

The trial court below entered a dismissal of the criminal charges against Hensley citing CrR 8.3(b) as its basis for so ruling, finding governmental mismanagement or misconduct prejudiced the rights of the defendant. RP 366. A trial court's ruling pursuant to CrR 8.3(b) is reviewed for an abuse of discretion. *Garza*, 99 Wn.App. at 295. A trial court abuses its discretion when its decision is manifestly unreasonable, or when it exercises its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 9 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if "it rests on facts unsupported in the record...." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court's decision is also manifestly unreasonable if

it adopts a view “that no reasonable person would take.” *State v. Lewis*, 115 Wn.3d 294, 298-99, 797 P.2d 1141 (1990)).

CrR 8.3(b) states:

On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affected the accused’s right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). A dismissal under CrR 8.3(b) is an ““extraordinary remedy.”” *State v. Rohrich*, 149 Wn.2d 647, 658, 71 P.3d 638 (2003) (quoting *State v. Baker*, 78 Wn.2d 327, 332, 474 P.2d 254 (1970)). A trial court may only dismiss criminal charges pursuant to CrR 8.3(b) if the defendant has shown, by a preponderance of the evidence, (1) arbitrary action or governmental misconduct; and (2) prejudice affecting the defendant’s right to a fair trial. *Id.* at 654. A defendant must show actual prejudice to his right to a fair trial to warrant a dismissal. *Id.* at 657. A dismissal under CrR 8.3(b) is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the defendant. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). Though “simple mismanagement” may justify a dismissal if it prejudiced the defendant’s right to a fair trial, the rule still requires some wrong-doing. *See Garza*, 99 Wn.App. at 295.

The trial court did not appear to employ any standard of proof in assessing whether Hensley showed that dismissal was warranted pursuant to CrR 8.3(b). Thus the trial court erred in failing to require Hensley to show governmental misconduct and actual prejudice by a preponderance of the evidence.

Assuming there was governmental misconduct, it did not materially affect the defendant's right to a fair trial. Hensley did not show that he was so significantly prejudiced that only a dismissal of the case could remedy the situation. *See Garza*, 99 Wn.App. at 295. Hensley did not show his right to a fair trial was actually prejudiced by the late receipt of the letter from Lt. Rhine. Hensley could have received a fair trial after the court continued the matter a couple of days to allow further investigation by defense counsel, or he could have received a fair trial that did not include any evidence regarding Lt. Rhine's conversation with Mr. Bender. Furthermore, as discussed above, the potential impeachment of Lt. Rhine was of minimal value compared to the numerous recorded phone calls Hensley made to 911 during which he threatened to kill Lt. Rhine. For these reasons, Hensley's right to a fair trial was not prejudiced.

The trial court erred in failing to consider alternative sanctions under CrR 8.3(b). This type of dismissal should only be a last resort. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Further, a trial court is

required to consider a lesser remedial action prior to dismissing a case. *City of Seattle v. Holifield*, 170 Wn.2d 230, 238-39, 240 P.3d 1162 (2010); *see also State v. McReynolds*, 104 Wn.App. 560, 579, 17 P.3d 608 (2000).

Suppression of evidence is an appropriate alternative sanction to a CrR 8.3(b) motion to dismiss. *See State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). There, the Supreme Court held that “[d]ismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct.” *Id.* The trial court also should have considered a brief continuance of a few days to allow defense counsel time to investigate. The trial court’s failure to either continue the trial or suppress the evidence was an abuse of its discretion as a dismissal should have only been a last resort if alternative remedies could not have ensured that Hensley would receive a fair trial. The trial court’s dismissal order should be reversed.

V. The trial court erred in failing to hold a proper hearing pursuant to Hensley’s motion to dismiss.

The trial court heard Hensley’s oral motion to dismiss the charges against him on the second day of trial, without notice to the State, without requiring the defendant’s motion to be in writing, and without holding an evidentiary hearing wherein it made any findings of fact. The trial court’s failure to hold a proper hearing and to give the State adequate time to

respond denied the State a fair opportunity to respond to the defendant's claims. The trial court erred in failing to hold a proper hearing and this failure precluded the State from making its record, from fleshing the issues out, and from making appropriate citation to legal authority. To the extent this failure precludes adequate appellate review of the matter, the trial court erred.

CrR 8.3(b) requires the trial court set forth its reasoning for dismissing the charges in writing. The trial court failed to enter any written findings of fact or conclusions of law, or in any other way set forth its reasoning for dismissing the case in writing. After a diligent search, the State was unable to find any legal authority that discusses the failure of a trial court to set forth its reasoning for a CrR 8.3(b) dismissal in writing. The general purpose of written findings is to allow adequate appellate review. In this way, the case law on the entry of written findings pursuant to CrR 3.5 and 3.6 are instructive.

Written findings and conclusions after a hearing facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). Written findings also allow the parties to focus the issues for review, and prevent the pursuit of issues that are clearly lacking merit. *Id.* Generally, the trial court's failure to enter written findings pursuant to CrR 3.5 is harmless error if the court's oral findings

are sufficient to permit appellate review. *State v. Smith*, 67 Wn.App. 81, 87, 834 P.2d 26 (1992), *affirmed*, 123 Wn.2d 51, 864 P.2d 1371 (1993). The trial court's failure to enter its reasoning in writing was not harmless error. The trial court's oral ruling does not sufficiently set forth its reasoning or explain what facts it relied upon in making this decision. As discussed in the argument above, the lack of written findings and the lack of an evidentiary hearing make understanding the true basis for the trial court's ruling extremely difficult. To the extent the trial court's failure to hold a proper hearing after notice prevented the State from adequately responding to the defendant's claims, and to the extent the trial court's failure to enter written findings preclude adequate appellate review, the trial court erred.

CONCLUSION

The trial court did not have an adequate basis to dismiss the criminal charges against Hensley for a discovery violation, a due process violation, or due to governmental misconduct. The trial court erred in dismissing the criminal charges and its order should be reversed and the criminal charges against Hensley should be reinstated.

////

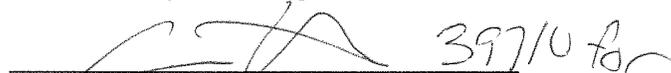
////

DATED this 19th day of June 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:

 39710 for
RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

June 19, 2017 - 4:24 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49584-8
Appellate Court Case Title: State of Washington, Appellant v. Mark T. Hensley, Respondent
Superior Court Case Number: 15-1-01021-2

The following documents have been uploaded:

- 1-495848_Briefs_20170619160135D2804022_2048.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was 2nd Amended Brief - Hensley.pdf

A copy of the uploaded files will be sent to:

- penoyarlawyer@gmail.com

Comments:

2nd Amended Brief of Appellant. The header, Response to Assignments of Error, has been changed to "Assignments of Error." See Page i of the Table of Contents and page 1 of the brief. No other changes have been made.

Sender Name: Pamela Bradshaw - Email: Pamela.Bradshaw@clark.wa.gov

Filing on Behalf of: Rachael Rogers Probstfeld - Email: rachael.probstfeld@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 4476

Note: The Filing Id is 20170619160135D2804022