

Cause No. 30212-1-III

**FILED**

**COURT OF APPEALS  
STATE OF WASHINGTON  
(Div. III)**

JUL 30 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_



**STATE OF WASHINGTON**

*Respondent,*

v.

**JACK HEWSON**

*Appellant,*

SUPERIOR COURT No. 2010-01-01038-7  
SPOKANE COUNTY  
HONORABLE LINDA TOMPKINS

**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### I. THE STATE MISSTATES THE FACTS ON THE CRABTREE *BRADY* ISSUE

*A. The prosecution's certificates do not deny Mr. Crabtree's recollection, nor erode his reasonable belief, that his prosecutor would be told about his cooperation and that his lawyer should contact Hewson's prosecutor.*

The uncontested fact is that Crabtree thought that in exchange for his help he was getting some benefit in his unrelated controlled substance prosecution. CP 101. In Crabtree's words: "I was given the impression that my testimony would get a good word from Mr. Cipolla to the prosecutor in my controlled substance case." CP 101.

The State argues, Response Brief at page 2:16-17, that the record shows "that there were no 'good word' promises made by the prosecutor. CP 96-99." Neither the prosecutor nor the case agent deny that Crabtree asked for consideration. Both recount matters said to the witness, but neither deny the statements Crabtree attributed to them.

*B. Crabtree's belief that he would be given consideration for his cooperation was reasonable under the circumstances.*

The trial court failed to take into account Mr. Crabtree's reasonable subjective view of his encounter with Hewson's prosecutor and the case agent. Mr. Crabtree was facing drug charges filed by different

prosecutor. He asked for a good word to be put in for him in exchange for his cooperation. He was told, according to the certificates, that the prosecutor and case agent would not discuss his case with him (which, otherwise, would form the basis for a Sixth Amendment violation under Massiah). But he was *also* told that the prosecutor in his case would be advised of his cooperation. He was also told that his attorney could call to discuss “any questions.” CP 96-99.

Mr. Crabtree’s reasonable subjective expectation controls, not the State’s expectations. *In re PRP Gentry*, 137 Wn.2d 378 (1999).<sup>1</sup> The State’s response fails to make a serious argument in opposition to this analysis.

*C. Crabtree’s “good word” interview took place days before trial and the defense was not lacking diligence in failing to learn of it in time to use at trial.*

Finally, the State argues in its response that the defense did not exercise due diligence in learning from Crabtree that he had been interviewed and “a good word” was requested. Resp Br. at 16. The State implies in its response that since Crabtree was originally listed as

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<sup>1</sup> “[F]rom [the witness’s] perspective a causal relation between his testimony and favorable treatment would have been more than reasonable inference, thus providing an arguable incentive to misrepresent the facts...” *Gentry*, 137 Wn.2d at 423.

a witness for the defense, the defense was derelict in not knowing about the State's interview. The State ignores the date of this interview (early May) and how the interview fell just days before the commencement of trial on May 16. If the State's argument is to be credited, then the defense Omnibus demand for *Brady* evidence, ordered a year before, is a nullity; further, that the State can hold a late-interview with a witness, create a reasonable subjective belief on the witness's part that cooperation would be rewarded, fail to disclose this fact and *Giglio* evidence into an eleventh-hour game. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); and see *State v. Mullen*, 171 Wn.2d 881, 884 (2011).

The State need not flag matters for the defense. Where documents have been disclosed in discovery, *Brady* does not require that the State point them out. *State v. Mullen*, 171 Wn.2d at 887. Here, however, the State held an interview with a witness disclosed on the defense witness list, gave the witness a basis to believe he would receive consideration for his testimony, then called the witness a few days later in its case in chief without disclosing the *Brady* portion of the interview. Government inaction days before trial "threw the defendant off the path of the alleged *Brady* information." *Id.*, at 896, n.4.

The rule is explicit: *Brady* evidence includes disclosure of favorable consideration given in exchange of cooperation, *Giglio*, as viewed from the witness's reasonable subjective understanding, and must be disclosed in a timely manner to permit effective use by the defense. In this instance, with a closely fought trial, the naked failure to disclose that Mr. Crabtree asked for consideration and was told that his prosecutor would be advised of his cooperation triggers a responsibility on the part of the State. This responsibility was ignored.

The trial court's failure to properly evaluate the encounter and its unsupported finding that the two state agents "denied" making promises warrant the conclusion that proper *Brady* evidence was suppressed.

**II. CO-DEFENDANT DELAO AVOIDED EXPOSURE TO 24 YEARS OF PRISON AND THE JURY NEEDED TO KNOW THIS FACT TO PROPERLY WEIGH HIS TESTIMONY**

The State suggests that Mr. Delao was not exposed to six possible firearm enhancements (three weapons distributed over a Class A and Class B felony, potentially totalling 24 years), and denies that his cooperation resulted in no less than 20 years leniency. The basis for this argument is premised on the State's uncited claim that Mr. Delao's federal plea to possession of ammunition triggered the protection of the double jeopardy clause as to state charges for the Robinson burglary and

conspiracy to commit robbery. Resp. Br. at 15. The State is incorrect both on the law and facts.

The law of double jeopardy is straightforward: the Dual Sovereignty Doctrine permits prosecutions for crimes involving the same elements if each offense is brought by a separate sovereignty. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Furthermore, the elements of Delao's federal ammunition charge would not even remotely overlap the elements of the state burglary and conspiracy to rob charge. *Blockberger v. United States*, 284 U.S. 299 (1932) (same elements test); *State v. Bryant*, 78 Wn.App. 805, 810 (Div 2, 1995) (reviewing *Blockberger* and state cases adopting the same elements test). The State's uncited argument to the contrary, there was *no* legal requirement that Mr. Delao's plea spared him state-based firearm enhancements and the substantive Robbery/Burglary charges. The State's wishful gobbledigook should be rejected.

The facts, too, are clear: Mr. Delao was subject to the same charges as Mr. Hewson but was allowed to plead to a federal possession of ammunition charge, given 70 to 87 months, and then allowed to work that sentence down by giving testimony against rival (non-Sureños) gang members and other assistance (including condemning Mr.

Hewson).

Nevertheless, Mr. Delao was permitted — without contradiction — to tell the jury that his deal avoiding state charges “didn’t really save myself much time”. CP 200:21-22. The trial court, *sua sponte*, halted Hewson’s bias impeachment and held that as a matter of law Delao’s state sentencing exposure could not be revealed to the jury lest it speculate on the penalty’s application to Hewson. CP 202:12-24.

Hewson does not argue that the jury was entitled to speculate on Hewson’s sentence, and to that extent the trial court was correct and the court could have reasonably interposed a cautionary instruction. But its categorical bar against correcting Delao’s false testimony grossly distorted the factual record. The trial court’s ruling permitted the jury to credit Delao’s testimony without knowing he bought himself nearly 20 years of freedom by cooperating against rivals.

The jury was entitled to know that Mr. Delao’s prison time went from 26 years to fewer than 7. The defendant was entitled to impeach Mr. Delao on his self-interest bias. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (where cross-examination exposes untrustworthiness or inaccuracy, denial of confrontation “would be constitutional error of the first magnitude”); *State v. Calhoun*, 13 Wn.App 644, 673 (1975) (self-

interest may be impeached under bias attack).

The trial court's *sua sponte* ruling permitting Delao's false claim to having modest self-interest in testifying against rivals stripped Hewson of his constitutional right to an effective cross examination and unduly abbreviated his right to confront Delao.

**III. VICTIM ROBINSON'S TESTIMONY WAS IN PART REJECTED BY THE VERDICT, AND THE STATE RELIANCE ON HER IDENTIFICATION DOES NOT RENDER THE IDENTIFIED ERRORS AS HARMLESS**

The State argues, at Resp. Br. 11-12, that even discounting the testimony of the three conspirators, the testimony of Ms. Robinson was definitive. The record is not so clear. In truth, the one significant time the victim's testimony varied from the co-defendants, the jury sided with the co-defendants.

The victim testified compellingly that she saw three weapons: an assault rifle, a shotgun, and a pistol. RP 273, 278. The jury, however, only made two special verdict finding, not three. According to the State, the jury determined that what Robinson swore was a shotgun was in fact a hammer. Resp. Br. 3, 5; and see RP 149:7, 153:18, 188:1. The victim's inability to distinguish a hammer from a shotgun weakens the State's arguments touting the jury's reliance on her accuracy and recall.

The State also ignores that Mr. Robinson's testimony was unequivocal in tenor but was challengeable on many key facts: details of the robbery were confused and contradictory — as one might expect — but more importantly, she claimed to have never before seen Mr. Hewson prior to the robbery. RP 277:21-24, 289:10-25, 295:17-25. This claim was placed in doubt when Mr. Crabtree testified on behalf of the State. While Crabtree denied introducing Hewson and Robinson, he admitted that Hewson visited the Robinson home months before the robbery and admitted that Robinson was home on one occasion when Mr. Hewson came by. RP 220:16-19.

Robinson's testimony was challenged on several grounds: her internal inconsistencies<sup>2</sup>, the multiple occasions she was shown photo

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<sup>2</sup> A few examples: Officer Streltsoff recalled the victim stating to him at the scene that she saw a person at the bus stop just before the robbery but did not connect him to the robbers. Robinson, three-and-one-half years later, testified that on the night of the robbery she *denied* saying the bus-stop figure was unconnected. "I did not say that. I did not.... I fully believed that he was." Compare RP 51 to RP 283:12-20. She also admitted to giving differing versions of the robbery attempt. Example: RP 288 (the third robber's wearing or not wearing a hood, a cap, or nothing on his head). Her confidence in her identification of Hewson gained momentum with time. RP 300-01 (Robinson: "I said 97%", then, I said "greater than 90... between 90 and 95 percent I believe"... "I was certain that it wasn't 90 percent." At trial, Miya produced a "trimmed" version of the montage, RP

montages, the statement to her by the case agent (“I know who did this”) prior to his showing her the first unsuccessful montage, RP 298:20 to 299:19, her ever-growing confidence in her identification over time, and, most critically, the Crabtree revelation that Hewson was at Robinson’s home months prior when she was in residence.

**IV. THE STATE’S RESPONSE MISSTATES THE SEQUENCE OF *IN LIMINE* RULINGS REGARDING DELAO’S BIAS TO PROTECT AN UNDISCLOSED GANG MEMBER**

The State argues that the lower court ruled against reference to Delao’s gang involvement prior to any testimony on the topic. Resp. Br. at 8 (“It is interesting that defense counsel would ask those questions during a deposition after being put on notice by the trial court that gang membership was going to be a problem.”) This is inexplicably wrong: the defense’s opening brief provided citations and verbatim quotes from each of the *in limine* rulings. The State does not provide any other record citations, merely asserts conclusions to its likely and ignores the actual events.

The record discloses that Hewson was restricted in his February cross examination of Andrew Oakes only as to specifics of criminal

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97-98, after being misplaced and shredded or mangled and frayed.

acts. Defense counsel stated that he intended to go into certain activities by Delao and Oakes, including Delao's gang affiliation and the court explicitly stated that the specific activities were off limites but that counsel's questions could "proceed on the balance". The defense was given a clear green light. Directly following this ruling, the State did not object to Oakes' answer about Delao's known gang membership, nor move to strike. CP 36:8; and see Opening Brief at 12-13.

Next, the State does not deny or even address the spill-over effect created by the lower court's ruling. The jury, given only part of the facts, may have concluded that Mr. Hewson was himself involved in gang activity.

Finally, the State completely ignores the appellant's argument that the lower court committed legal error in holding that Delao's gang affiliations (including his cooperation with federal authorities against rival gang members) was "not relevant" as a matter of law.<sup>3</sup> RP 128. Thus, in performing her Evidence Rule 403 balance, the trial court accredited *no relevance* to Hewson's proffer and ignored the prejudice to Hewson in limiting his bias evidence only to "business animus." See

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<sup>3</sup> Proof of bias is almost always relevant. *United States v. Abel*, 469 U.S. 45 at 52 (1984). Bias evidence may be restricted if so prejudicial as to *disrupt the fairness of the fact-finding process*. *State v. Perez*, 39 Wn.App. 522, 529 (Div. 2, 2007).

Opening Br. at 18; and see RP (In Limine Hearing 5/9/11) at 35:17-23 (lower court challenging veracity, reliability of Delao's gang affiliation); and see RP (In Limine Hearing 5/9/11) at 33 and CP 166 (case agent's identification of Delao's gang tattoo during testimony to federal magistrate).

Under no circumstances was Delao's membership in the *Sureños* gang, nor his cooperation against rivals in any doubt. Whether on a *de novo* or abuse of discretion standard, an error of this magnitude, going to the heart of the defendant's theory, should be reversed.

The State ultimately dismisses the relevance of Delao's affiliations and possible biases by noting that the reference to gang membership was "fleeting." Respon. Br. at 7. If fleeting, it was because the lower court forbade defense counsel from questioning Delao on his gang, its tenets, and the benefits he accrued by testifying against rivals. While the State is correct, Resp. Br. at 9, that mere membership is not admissible where relevancy is limited to 404(b) character, *Dawson v. Delaware*, 503 U.S. 159, 165 (1992), its use in a bias attack where the witness has a record of cooperation against rivals goes well beyond the rationale in *Dawson*. The inference that he protected his own as part of his self-interest, and that his gang protected its own as part of its

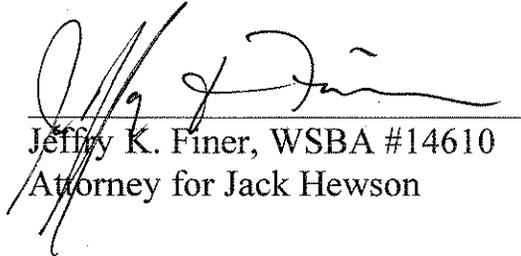
tenents, was fair game, and highly relevant. Its exclusion was reversible error as impermissibly restricting Hewson's right to confront a key witness against him.

### CONCLUSION

For the reasons set forth above, Jack Hewson respectfully asks this Court to vacate the verdict and remand for new trial.

DATED THIS 30 day of July, 2012.

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