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

NO. 315991

WHITMAN COUNTY CAUSE NO. 12-1-00206-6

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,  
Respondent/Plaintiff

v.

DARIN RICHARD BARRY,  
Appellant/Defendant

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APPELLANT'S BRIEF

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Will Ferguson, WSBA 40978  
Of Attorneys for Appellant  
LIBEY & ENSLEY, PLLC

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### III. STATEMENT OF THE CASE

On November 15, 2012, Appellant Darin Barry (“Appellant”) was charged with three counts of malicious mischief. CP 1-3. On December 11, 2012, Will Ferguson, the attorney for Appellant (“Attorney for Appellant”) appeared on Appellant’s behalf and entered a demand for discovery. CP 4-5. The demand for discovery demanded “any written or recorded statements and the substance of any oral statements made by the [Appellant]”. CP 4.

Absent from the discovery turned over by the State was the State’s recording of the Appellant’s confession. CP 79, 84. The Appellant gave two recorded statements, the first of which was of the Appellant declining to confess on record. RP at Pg. 17-18, Lines 8-25, 1-26. The first recording was turned over by the State on December 5 and 7, 2012. CP 107. The second recording was of the Appellant confessing to the crimes underlying all three charges of malicious mischief. RP at Pg. 19-20, Lines 6-25, 1-8. This recording was not turned over by the state until Friday, February 15, 2013, at approximately 8:45 a.m. CP 23. The existence of Appellant’s recorded confession was not acknowledged until Friday, February 15, 2013, at approximately 8:45 a.m. CP 79, 84. On February 11, 2013, Appellant’s Attorney personally inquired with the State’s office to determine if there

were any recordings other than the first one turned over on December 5 and 7; he was told that there were no more recordings. CP 23.

In the discovery timely delivered to Appellant's Attorney on December 5 and 7, were photographs of several items that had been spray painted with the letters "KKK". RP at Pg. 3, 50, 52-53, Lines 21, 4-9, 6-13. A photograph of the letters "KKK" spray painted on Jeff Marshall's RV was admitted by the State as Exhibit 5. RP at Pg. 53, Lines 1-5; Exhibit Index/Received Exhibit ("EI/RE") #5. At least five exhibits out of Respondent's 18 admitted exhibits were photos of the letters "KKK". EI/RE 1, 2, 5, 8, and 13.

At Arraignment on November 30, 2013, trial was set for Tuesday, February 19, 2013. CP 22. Combined Omnibus was held on December 14, 2012. CP 6-12. Trial readiness was held on February 8, 2013. CP 22. At readiness, the State did not request a continuance or move to dismiss without prejudice and re-file. *Id.* On February 14, 2013, Appellant submitted his Continuing Demand for Discovery. CP 27-28. Appellant's speedy trial period was set to run on February 28, 2013. CP 22.

The State did not disclose its witnesses until February 19, 2013 at 4:35 p.m., the afternoon before the trial. CP 78, 81. The witness list contained the names of Eric Heise and Sandy Trump, both of whom turned out to be expert witnesses, testifying on the extent of damage and the cost

of repair. CP 78, 81. Sandy Trump's estimate of costs was delivered to Appellant's attorney on Friday, February 15, 2013, at 8:45 a.m. CP 79, 85. However, even though the estimate was turned over on Friday, the specific witness who prepared the estimate and who would be testifying was not disclosed until the witnesses were disclosed on Tuesday, February 19, 2013. CP 78.

At least four of the State's witnesses had prior convictions. CP 79, 83. The convictions of those four witnesses were not disclosed until Tuesday, February 19, 2013, at 3:19 p.m. CP 79, 81.

Appellant brought four motions: Motion for Sanctions or Dismissal, Motion for Frye/ER 702 Hearing, Motion to Dismiss Count III of III, and Motion in Limine. CP 75. Appellant noted his hearings for February 20, 2013, before trial. Id. The Whitman County Superior Court ("Superior Court), by and through Judge David Frazier, immediately prior to trial, noted Appellant's Attorney's ongoing objection to the State's discovery violations and directed Appellant's Attorney to address his objections in post-trial motions. RP at Pg. 48, Lines 7-12.

The Superior Court refused to hear Appellant's Motion for Sanctions or Dismissal, Motion to Dismiss Count III of III, and Motion in Limine. RP at Pg. 48, Lines 5-8. The Superior Court, when asked to hear the motions, stated "We don't have time....We have a jury. They've been

waiting ten minutes. We need to get going.” RP at Pg. 48, Lines 6-8. Attorney for Appellant again attempted to bring Appellant’s Motions to the attention of the Superior Court. RP at Pg. 48-50, Lines 16-27, 1-16. Attorney for Appellant was again denied hearing. Id. After trial, the Superior Court scheduled Appellant’s Motions and sentencing for March 22, 2013. CP 77.

Jury trial began on Wednesday, February 20, 2013. RP at Pg. 47, Lines 1-3. Appellant was convicted of three counts of malicious mischief on Thursday, February 21, 2013. RP at Pg. 107, Lines 1-22.

The State, in response to Appellant’s Motion for Sanctions or Dismissal, submitted a declaration and briefing on March 22, 2013. CP 105-11. The Superior Court heard the Appellant’s Motions on March 22, 2013. CP 77, RP at Pg. 108-12. The Superior Court denied all of Appellant’s Motions. RP at Pg. 108-12. The Superior Court entered Felony Judgment and Sentence on March 22, 2013. CP 92-99, 101-02. Appellant filed his Notice of Appeal on April 19, 2013. CP 188-89.

#### **IV. ASSIGNMENTS OF ERROR**

1. The Whitman County Superior Court abused its discretion when it denied the Appellant’s Motion & Declaration for Sanctions under CrR4.7(h)(7)(i) or For Dismissal Under CrR 8.3.

2. The Whitman County Superior Court abused its discretion when it denied Appellant's Motion to Dismiss Count III of III.

3. The Whitman County Superior Court abused its discretion when it denied Appellant's Motion in Limine.

#### V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court abuse its discretion when it refused to grant the Appellant's Motion to Dismiss?
2. Did the Superior Court abuse its discretion when it refused to grant the Appellant's Motion to Dismiss Count III of III?
3. Did the Superior Court abuse its discretion when it denied Appellant's Motion in Limine?

#### VI. STANDARD OF REVIEW

A superior court's decision to deny a Motion to Dismiss under CrR 8.3 is reviewed for manifest abuse of discretion. State v. Michielli, 132 Wash.2d 229, 240, 937 P.2d 587, 593 (1997). "Dismissal of a criminal prosecution for discovery violations [under CrR 4.7] is discretionary and is reviewable only for manifest abuse of discretion." State v. Ramos, 83 Wash.App. 622, 636, 922 P.2d 193 (1996).

Refusal to grant dismissal under the misdemeanor compromise statute is reviewed for abuse of discretion. State v. Perdang, 38 Wash.App. 141, 144-45, 684 P.2d 781, 782-83 (1984). See also State v. Stalker, 152 Wash.App. 805, 810, 219 P.3d 722, 724 (2009).

A trial court's application of WA ER 403 is subject to review for abuse of discretion. State v. Kennealy, 151 Wash.App. 861, 886-87, 214 P.3d 200 (2009).

## VII. ARGUMENT

**A. The Superior Court abused its Discretion when it refused to Grant Appellant's Motion for Sanctions or Dismissal because the Superior Court's decision was based on an Incorrect Understanding of the Law and its Application to the Facts of this Case.**

The Superior Court abused its discretion when it refused to hear pretrial motions before the trial, permitted the State to disclose its witnesses the afternoon before trial, and permitted the State to repeatedly play the recording of a confession the State failed to disclose to Appellant until two judicial days before the trial.

The charges against the Appellant should have been dismissed under CrR 8.3, CrR 4.7(h)(7)(i) and due process for the State's violation of CrR 4.7. Under CrR 4.7, the State was required to provide the Appellant with a list of witnesses and all recordings made by the Appellant:

Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial,

together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant...

CRR 4.7(a)(1)(i-ii). Two of the witnesses on the State's list were experts who offered their professional opinions on the cost of repairs. RP 108-09, Lines 24-26, 1-2. "The prosecuting attorney shall disclose to the defendant...any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." CrR 4.7(a)(2)(ii).

CrR 4.7(h)(7)(i) permits sanctions or dismissal of charges for discovery violations:

**if at any time during the course of the proceedings** it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CRR 4.7(h)(7)(i) (emphasis added). In addition to a motion under CrR 4.7,

Appellant's Attorney moved pursuant to CrR 8.3, which provides:

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 affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). "We believe that the question of whether dismissal is an

appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis.” State v. Sherman, 59 Wash. App. 763, 770-71, 801 P.2d 274, 278 (1990). “A trial court's power to dismiss charges is reviewable under the manifest abuse of discretion standard. State v. Michielli, 132 Wash. 2d 229, 240, 937 P.2d 587, 593 (1997). “Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” Id. (quoting State v. Blackwell, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993)). “A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take.” Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 669, 230 P.3d 583, 585 (2010) (internal quotations omitted).

“Dismissal under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct, **but the governmental misconduct need not be of an evil or dishonest nature, simple mismanagement is enough.**” State v. Brooks, 149 Wash. App. 373, 384, 203 P.3d 397, 402 (2009) (emphasis added) (citing State v. Dailey, 93 Wash.2d 454, 457, 610 P.2d 357 (1980) (see also State v. Sherman, 59 Wash. App. 763, 767, 801 P.2d 274, 276 (1990)). “It also requires the defendant to show that such action prejudiced his right to a fair trial.” Id. “Such prejudice includes the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.’”

Id.

“Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct.” State v. Michielli, 132 Wash. 2d 229, 239, 937 P.2d 587, 592 (1997) ((citing State v. Blackwell, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993) (citing State v. Lewis, 115 Wash.2d 294, 298, 797 P.2d 1141 (1990)). Governmental misconduct, however, “need not be of an evil or dishonest nature; **simple mismanagement is sufficient.**” Id. (emphasis in original) (quoting State v. Blackwell, 120 Wash.2d at 831).

“The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial.” Id. at 240. “Such prejudice includes the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense....’” Id. (quoting State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994 (1980)). A defendant “being forced to waive his speedy trial right is not a trivial event. This court, as a matter of public policy, has chosen to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice.” Id. at 245.

“A defendant is denied his Sixth Amendment right to counsel if the actions of the State deny the defendant's attorney the opportunity to prepare

for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.” State v. Smith, 67 Wash. App. 847, 861, 841 P.2d 65, 72 (1992) (dissenting opinion of Kennedy, J.).

In this case, the Motion in Limine, Motion to Dismiss Count III, and Motion for Sanctions or Dismissal were not heard before trial. Counsel objected to the Court’s decision not to hear the Motions once before the jury was recalled and again when the jury returned to the courtroom. The Court noted the objections and noted the objections as continuing. The trial proceeded and the Defendant, Darin Barry, was convicted of all three Counts of malicious mischief, including one felony count.

Appellant’s case meets both prongs of the CrR 8.3 dismissal test. First, the State committed discovery violations. The State did not turn over its list of witnesses until February 19, 2013, at approximately 4:35 p.m., less than 24 hours before trial. CP 78. The State disclosed only the criminal convictions of some of its fact witnesses and did not disclose the convictions of its experts. CP 79. The prior convictions of three of the fact witnesses were not disclosed until February 19, 2013, at 3:19 p.m. Id. Finally, the most relevant and prejudicial item of discovery, the recorded confession of the Appellant, was not turned over or even identified as being in existence until February 15, 2013, at 8:45 a.m., less than two judicial days before the trial and well after the plea offer had been withdrawn and the jury had been

called. CP 79.

Second, actual prejudice occurred in this case. The key item of evidence leading to the conviction of the Appellant was his recorded confession. The only recording delivered in discovery before or within a reasonable time after omnibus was the first recording of the Appellant, which contained no confession. Only two judicial days before the jury trial was the existence of the recorded confession even acknowledged. The acknowledgement was the surprise delivery of the second recording. The State showed admissibility at the CrR 3.5 hearing the day of trial and used the recording in its case in chief and played it again for the jury in its closing argument. There were no witnesses to the crimes, there was no forensic evidence, and the Appellant did not testify to the crimes at trial. In fact, the Appellant did not testify, so there can be no argument of harmless error when the only time the jury heard the Appellant's voice was when his recorded confession was played. The lack of forensic evidence, matching the spray paintings to the Appellant's handwriting and the lack of a matching boot print negate any other inculpatory evidence. The only inculpatory evidence used by the State was the taped confession of the Appellant. Attorney for Appellant had no opportunity to advise the Appellant on whether he should accept or reject the State's plea offer based on the existence of the only significant inculpatory evidence. The Attorney

for the Appellant was left with less than two judicial days to examine the confession. Without relying on the recorded confession, the State likely could not have convicted the Appellant.

The mismanagement by the State in this case is similar to that in State v. Dailey, 93 Wash.2d 454, 610 P.2d 357 (1980). In Dailey, the State was ordered at omnibus, on September 23, 1977, to provide the defendant with certain information, including lab reports. Id. The State was also ordered to provide the names and addresses of all witnesses and the defendant moved for a bill of particulars. Id. Trial was set for November 7, 1977. Id. The motion on bill of particulars was continued and then granted on October 28, 1977. Id. On October 28, the trial court also learned that the State had failed to deliver the lab reports it had been required to produce at omnibus. Id. When questioned as to why it failed to produce the lab reports, the State had no explanation and the defendant moved to dismiss the case on due process grounds, alleging the State had permitted evidence to be destroyed and that it had failed to file the information in a timely manner. Id. The motion was continued until November 2, 1977, at the State's request. Id. Late Friday afternoon, October 28, 1977, a little over a week before trial, the State at last delivered the information and lab reports listed in the omnibus order. Id. On November 2-3, the defendant's motion to dismiss was argued and denied, but the trial court gave the defendant the

opportunity for a continuance. Id. at 456. The defendant declined the offer, the State dismissed charges against a co-defendant and, on November 4, 1977, the Friday before the trial, the State finally furnished a supplemental list of witnesses. Id. The original information, filed in August, had indicated five people were to be called as State's witnesses. Id. The supplemental list increased the number to 16. Id.

On the day of the trial, November 7, the defendant again moved to dismiss the charge, claiming that the State's actions violated due process. Id. Though the trial court characterized the State's behavior as "reprehensible", the trial court again denied the motion to dismiss and again offered a continuance. Id. Defense counsel then suggested the alternative of proceeding to trial with only the original list of witnesses and excluding the additional witnesses named in the State's tardy supplemental list. Id. The trial court's oral ruling was "[t]his Court's going to rule that you either try it with the original list of witnesses or I'll dismiss it", to which the State replied that it could not try the case with the witnesses originally listed in the information. Id. The trial court dismissed the charges in lieu of providing for sanctions for failure to comply with discovery. Id. The court of appeals reversed and remanded. Id.

On review, the Washington Supreme Court, En Banc, overturned the Court of Appeals and unanimously found that incidents of

mismanagement in the case—the State's late compliance with the omnibus order, its failure to disclose its witness list until 1 court day before trial, its dilatory compliance with the bill of particulars, and late dismissal of charges against a codefendant—amply supported the trial court's decision to dismiss the charge because of due process violations. *Id.* at 459 (see also State v. Sherman, 59 Wash. App. 763, 772, 801 P.2d 274, 279 (1990)).

Here, a full 24 pages of discovery material were not disclosed to Appellant's Attorney until two judicial days before trial, the State's witness list was not disclosed until the afternoon before trial, the State failed to disclose Appellant's recorded confession, which it likely had or had access to since August of 2012, and sought out additional expert witnesses and damage estimates. Not only does this mismanagement arise to the level of due process violations, but the prejudice resulting therefrom forced Appellant to decide between two constitutional rights: his right to a speedy trial and his right to be represented by counsel who is adequately prepared to meet the State in trial. In addition, plea negotiations likely would have unfolded differently had Appellant's Attorney been apprised of the State's case, particularly the existence of the recorded confession. A continuance on the day of trial would only have served to reward the State's dilatory surrender of its evidence and force Appellant to abandon his right to a speedy trial.

In State v. Sherman, the Washington Court of Appeals affirmed a trial court's dismissal of charges due to the State's failure to produce IRS records of a complaining witness and the State's failure to comply with a discovery order. State v. Sherman, 59 Wash. App. 763, 801 P.2d 274, 277 (1990). On appeal, the State argued that the defendant should simply have sought a continuance. The Court of Appeals rejected this argument:

Nor do we find persuasive the State's argument that the defendant should have sought a continuance to allow time for the State to produce the records. Here, the speedy trial expiration date had been extended a total of seven times, and was scheduled to expire again on the day the case was dismissed. **To require [the defendant] to request a continuance under these circumstances would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense.**

State v. Sherman, 59 Wash. App. 763, 770, 801 P.2d 274, 277 (1990) (emphasis added).

The Washington Supreme Court recognized this same problem in State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994 (1980):

We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. **Such unexcused conduct by the State cannot force a defendant to choose between these rights.**

(emphasis added in part, emphasis in original.) **"In circumstances such as**

**these, we do not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence.”** Sherman, 59 Wash. App. at 770 (emphasis added). The Court of Appeals held that the defendant was not required to request a continuance. Id. at 773.

In State v. Brooks, the Court of Appeals again addressed the State’s failure to comply with CrR 4.7. State v. Brooks, 149 Wash. App. 373, 384, 203 P.3d 397, 404 (2009). In that case, the State contended “that it did not have control or possession over much of the missing or tardy discovery and, accordingly, it did not mismanage the case.” Id. at 387. To support its assertion, the prosecution in Brooks cited State v. Blackwell, in which the Washington Supreme Court held that the State’s actions were reasonable when the State attempted to obtain the requested documents and asked the trial court to issue a subpoena duces tecum when the State was unable to obtain them under CrR 4.7(d). Id. (citing Blackwell, 120 Wash.2d at 832, 845 P.2d 1017).

The Brooks court easily dismissed the State’s argument under Blackwell by distinguishing it from the facts. Id. at 385. The Brooks court stated:

the facts in this case based on the prosecutor's attempts to procure the requested information. Blackwell involved a defendant's request for the arresting police officers' personnel files and service records

when defense counsel believed that the files might reveal the officers' alleged racial bias. The city attorney in Blackwell told the prosecutor that he was not eligible to receive those records. Because the prosecutor could not obtain the records himself, he asked the trial court to use its subpoena power to require the city to deliver the records. It does not appear here that the State put forth the same effort to satisfy its CrR 4.7(a) discovery obligations [in this case].

Id. What was dispositive to the Court of Appeals in Brooks was that:

The trial court specifically found that the lag time between the date of the incident and the date the officers transcribed the report and the witness statements was beyond the prosecutor's control. But the trial court indicated that there was no evidence that the prosecutor's office attempted to work with the sheriff's office to resolve the time lag any time before February 14, 2007. This detail distinguishes this case from Blackwell.

Id. at 386.

Here, Appellant's Attorney was led to believe that the State only had one recording of Appellant's statements during interrogation. CP 23, 79. Knowledge of the evidence against a client is a key fact in negotiations and determining whether to counsel a client to bargain further or to proceed to trial. CP 79.

By the time the recording was finally disclosed, Appellant had made the decision to go to trial and couldn't have withdrawn that decision even if he had been counseled to do so, due to the local superior court criminal rule. WCLCrR3.3(d)(i)(2), the local superior court criminal rule, states: "At the conclusion of the readiness hearing, the court will no longer accept any plea bargaining arrangements. Thereafter, the case will be tried by jury, unless

waived by the defendant, or concluded by guilty plea(s) to the original charge(s), or by dismissal of the charge(s).” Therefore, Appellant was caught twofold ‘between a rock and a hard place’ once the State decided to produce all of its evidence, primarily when the State decided to produce its most powerful evidence-Appellant’s confession. The Appellant couldn’t accept a plea offer because of the local rule and couldn’t bring a Motion for Sanctions or Dismissal in a timely fashion because the disclosures by the State were made only two judicial days before trial. The second of the ‘rock and a hard place’ scenarios was that Appellant now had to choose between the constitutional right to counsel who was adequately prepared and his speedy trial right.

A continuance was not available for the State. The speedy trial rule cannot be discarded due to congestion of the trial docket, mismanagement of the State’s case, or administrative oversight. “Governmental mismanagement is not a proper ground to avoid the requirements of the speedy trial rule.” State v. Tidwell, 32 Wash. App. 971, 978, 651 P.2d 228, 232 (1982). “Where delay of trial is caused by some administrative oversight or by trial docket congestion, “[s]elf-created hardship is not an excuse for violating mandatory rules.” Id. (quoting State v. Mack, 89 Wash.2d 788, 794, 576 P.2d 44 (1978) (construing CrR 3.3)). CrR 3.3(b)(2)(i) provides:

A defendant who is not detained in jail shall be brought to trial within the longer of  
(i) 90 days after the commencement date specified in this rule

CrR 3.3(b)(2)(i).

In dismissal for discovery violations, the materiality of the effect on a defendant's rights must be addressed. State v. Brooks, 149 Wash. App. 373, 389-91, 203 P.3d 397, 405-06 (2009). Dismissal for discovery violations is an extraordinary remedy available only when the alleged misconduct has materially affected the defendant's right to a fair trial. Id. The State in Brooks appeared to read the rule as requiring the moving defendant to prove that the untimely evidence is material to the case. Id. However, **“it is, in fact, the prejudice to the defendant’s right to a fair trial that must be material, rather than the evidence itself.”** Id. (emphasis added).

At oral argument before the Court of Appeals, counsel for the defense in Brooks provided an extensive list of what the case *did not* entail; the list is much like the list that can be drawn from Appellant’s case:

- It was not the case here where the State didn't know what was needed.
- It was not also the case where the State didn't see that sooner or later, if they continued to fail to comply with their obligations because they're the party charging the defendants ... the court would have to consider that dismissal.
- This is not a case where the defense was lying in the weeds on this issue.

- It is also not a case where the tasks to be completed by the defense to prepare for trial were vague or unimportant and unexplained.
- It's not a case where the State had any explanation at all for their failure.
- It's not a case where the State could not have simply earlier dismissed the case without prejudice to refile when they were ready.
- It's not a case where the State could not possibly have known about all of the missing items because a multitude of them were referred to in discovery that they had already handed over.
- And finally, it's not a case where the State stood back and demanded written demands before they would agree to turn over items. They readily and repeatedly agreed to turn over items and yet took no further action.

Id. at 390. Trial in this matter was set on November 30, 2012, over three months after the acts underlying the charges took place. CP 22. Trial occurred over six months after the alleged acts underlying the charges took place. CP 22. It was not the case where the State did not know the evidence it needed. It was not the case where the State did not realize that to prove the charge of Malicious Mischief in the 2<sup>nd</sup> Degree, a Class C Felony, it had to prove the amount of damage. It was not the case that the State did not know the identities of the victims, their location, or how to locate the damaged items. It is also not the case that the alleged victims had no further recourse; each one has an independent right to seek civil remedies if they in fact prove Appellant to be the tortfeasor. Appellant, on February 8, 2013, already agreed to a continuance within the speedy trial period from February 19, 2013 to February 20, 2013, to accommodate the State's and the Superior

Court's schedules. CP at 22. The State had every opportunity to collect the evidence it needed, prepare a list of witnesses, disclose its evidence, disclose its witnesses, conduct an investigation that outlined all of the physical evidence, including the boot print on one of the doors, and ensure that it had all of the recordings from the deputies who interviewed Appellant.

One of the items the State failed to deliver in Brooks was the lead detective's report. Id. The Court of Appeals immediately recognized the significance:

It seems unlikely that this report could be immaterial in any circumstance and **it was certainly material as to how defense counsel would have interviewed the investigator at trial. The delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.** We well know that this is a serious case and has serious public interest consequences, as did the trial court, who so carefully addressed its well-reasoned findings and conclusions. But we also know the potential ramifications if the State's behavior is not curtailed. We hold that the trial court did not abuse its discretion by failing to require Jason and Natalie to establish the materiality of evidence the State had not yet disclosed. We hold that the trial court did not abuse its discretion by finding governmental mismanagement and prejudice.

Id. at 391.

In Appellant's case, the State submitted a new police report of one of the investigating deputies, submitted new photos, including a boot print, and new claims of the cost of repairs for the damage alleged to have been inflicted by Appellant. CP 29-54. In addition, the State added more items

that Appellant was alleged to have damaged. CP 29-30, 117, 167-68.

The Superior Court relied upon untenable grounds as shown in the court's ruling:

So very clearly it was provided late... It wasn't done in bad faith, but it was admittedly late and I think it has to be almost as admitted to be a negligent failure to provide discovery....However, the evidence here also is that the fact of the interview, the fact that there was a confession, **the substance of the interview**, and specifically of the confession that was recorded, **was disclosed in writing in the police report and the fact that the confession was recorded was also disclosed to the Defendant here.** So because of that, I am finding there was a problem and there was a violation. I do not feel that it's such that constitutes prejudice that would justify dismissal of the charges and had the matter been brought to the Court's attention—well, it was brought to the Court's attention before trial—I do not feel that I would have felt that it was such a violation that would be so prejudicial that it would warrant a continuance even, so I'm going to deny the Motion to Dismiss because of the late, late disclosed recording.

RP at Pg. 108, lines 9-23. The above statement by the Superior Court outlines the only discernable reason for the Superior Court's denial of Appellant's Motion for Sanctions or Dismissal. The Superior Court relied on the fact that the police reports turned over by the State on December 5 and 7 contained summaries of the Appellant's confession. RP at Pg. 108, 15-18. Attorney for Appellant reiterated the ruling in State v. Brooks, a case it had cited in its briefing to the Superior Court:

WILL FERGUSON:	Your Honor, if I may be heard on one point?
JUDGE FRAZIER:	Sure.
WILL FERGUSON:	I cite the Court to <u>State v. Brooks</u> , 149

Wash. App. 373 (2009). In that case the Court of Appeals said, and I quote, “The State first countered that the defense should not be surprised by what the taped statements contained”—and this was a case involving taped statements—“by what the taped statements contained because the officer’s reports contain summaries of the taped statements. The trial court corrected the State that CrR 4.7 requires the State to provide the statements as opposed to a summary of the statement.” So . . .

JUDGE FRAZIER: Read that last—I didn’t catch the last—

WILL FERGUSON: “The trial court corrected the State that CrR 4.7(a)(1)(ii) requires the State to provide the statement as opposed to a summary of the statement.” And what we had requested was the statement, not a summary thereof, in both the first demand for discovery and the continuing demand for discovery.

JUDGE FRAZIER: Yeah, and I don’t disagree with that. I found there was a violation, but because the summary was provided, I don’t feel it was prejudicial to warrant a dismissal. As I say, that’s—I’m not saying you don’t have a very good argument in that regard. I’m just not buying it as grounds to dismiss.

RP at Pg. 109, Lines 8-24; CP 61. “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 669, 230 P.3d 583, 585 (2010). Inexplicably, the Superior Court acknowledge the ruling in Brooks and still denied the Motion. The Superior Court simply concluded that it just wasn’t “buying” the argument as grounds to dismiss.

In that same ruling, the Superior Court outlined just how important the undisclosed evidence was:

**...I will acknowledge here after having heard the recording as evidence during the trial and then it was a large part—it was played very effectively in the final argument phase of the trial.**

**It was very damaging evidence as far as the [Appellant] and very helpful evidence as far as the prosecution was concerned, so it is a big issue in the case here.**

RP at Pg 108, Lines 11-15. No reasonable person could conclude, after acknowledging that the State used the recorded confessions to damaging effect and that the recordings were “a large part” of the State’s case, that the State’s violations of the discovery rules were not grounds for dismissal.

Portions of the Appellant’s confession were played no less than six times during the State’s case in chief. RP at Pg. 13, 14, 19, 20, 62, 82. Rounding out its frequent use of the confession, the State played no less than seven full minutes of the confession during the State’s closing argument. RP at Pg 95-102. The State’s attorney even went so far as to say before playing the confession again: “You don’t need me to tell you that or reiterate all of the evidence from everybody here, but it’s worth seven minutes or so to hear the [Appellant] tell you.” RP at Pg 95, Lines 7-9.

Finally, the Superior Court abused its discretion when it permitted the State to call Eric Heise and Sandy Trump as expert witnesses. The problem with the Superior Court’s ruling at this stage is that the cat is now out of the bag; the Superior Court did not hear Appellant’s pretrial motion until the post-trial sentencing. In denying Appellant’s motion at sentencing, the Superior Court attempted to reverse-engineer why it would have made the same ruling before trial and why the Appellant suffered no prejudice.

Both instances of reverse engineering are untenable. The root of the problem was the Superior Court's rush to bring the Appellant to trial, which is very similar to the rush that the Washington Supreme Court found to be unacceptable in Salas v. Hi-Tech Erectors:

We should not permit untenable decisions to stand merely because the parties failed to adequately brief the court. We are sympathetic to busy trial courts that must rely on the authority provided to them, but just because an error is understandable does not mean it is excusable.

Salas, 168 Wash.2d at 673. "Also, I feel that the report which had the business card of Mr. Heise and the estimate was sufficient disclosure of the possibility that he would be called as a witness and the substance of his testimony. Ms. Trump was a witness that was obtained at the last minute, or late, but once obtained was immediately disclosed, so I don't feel that that constitutes a discovery violation." RP at Pg. 108-09, lines 24-26, 1-2.

By not hearing Appellant's motions before trial, the Superior Court was left with only two possibilities at sentencing: deny the motion or dismiss the charges. Had it heard the motions before trial, the Superior Court could have crafted an appropriate remedy somewhere between denial of the motion and dismissal of the charges.

The State offered the testimony of Sandy Trump of Steve's Glass and Eric Heise of Eric's Auto Body. The identities of these witnesses were not disclosed until near the close of business on the afternoon before trial.

Before Mr. Heise's name appeared on the witness list, the only indication that he could be called as a witness was a copy of his business card in the discovery initially disclosed by the State. CP at 158. The witness list contained no explanation of substance of the testimony of these witnesses. Clearly they were expert witnesses because they offered no factual testimony regarding the circumstances of the crimes, but instead offered testimony on the jurisdictional amount. Without the testimony of Trump and Heise, the State likely would not have been able to prove the jurisdictional amount of Count I, Malicious Mischief in the Second Degree, a class C felony.

The Superior Court abused its discretion when it refused to dismiss the charges against the Appellant for the State's violation of the Appellant's rights.

**B. The Superior Court abused its Discretion when it refused to grant Appellant's Motion to Dismiss Count III of III because the Superior Court's refusal was based on the Timing of the Motion to Dismiss Count III of III.**

Refusal to grant dismissal under the misdemeanor compromise statute is reviewed for abuse of discretion. State v. Perdang, 38 Wash.App. 141, 144-45, 684 P.2d 781, 782-83 (1984). See also State v. Stalker, 152 Wash.App. 805, 810, 219 P.3d 722, 724 (2009).

RCW 10.22 contains no restrictions on using a misdemeanor compromise in Washington Superior Courts. To qualify for a misdemeanor compromise, the crime charged must be a misdemeanor and must be a crime for which there is an independent civil remedy. RCW 10.22.010. Misdemeanor compromises cannot be used in cases where the crime was committed by or upon an officer while in the execution of his duties, riotously, with an intent to commit a felony, or a crime of domestic violence. Id. Gross misdemeanors are subject to dismissal under a misdemeanor compromise. State v. Britton, 84 Wash.App. 146, 150, 925 P.2d 1295 (1996).

Here, Appellant was charged with two gross misdemeanors and one felony. CP at 1-2. Appellant's Motion to Dismiss Count III of III should have been granted because the Appellant obtained the Motion and Victim's Acknowledgement in Support of Misdemeanor Compromise from one of the victims, Jeff Marshall. CP at 15-17. At trial, Mr. Marshall testified that he had signed the Victim's Acknowledgment. RP at Pg 54, Lines 23-26. There was no evidence that the acts were performed riotously, upon an officer, with the intent to commit a felony, or in an act of domestic violence.

The Superior Court's denial of the Appellant's Motion was based on one ground: the timing of the Motion. Specifically, the Superior Court stated:

JUDGE FRAZIER: The Prosecutor didn't argue as far as the misdemeanor compromise argument, and I don't know the answer. I had thought that that was a remedy that was only available in District Court, but that's what I thought. That's not what I know....My concern--so if it is available as a means of dismissing a charge, I would have granted it, but that wasn't presented to the Court prior to the readiness, was it?

WILL FERGUSON: We didn't have the signed misdemeanor compromise form from Mr. Marshall, and that's what was required. We can't bring a Motion for a Misdemeanor Compromise if we don't have the signature from Mr. Marshall, and we didn't have that until the week before trial.

JUDGE FRAZIER: Well, and had it been--I guess that's [Appellant]'s problem. So I'm going to assume that misdemeanor compromise is an available remedy or means of getting a charge dismissed, but presenting it after the readiness hearing is not timely. **It's too late under local rules** to resolve cases at that time, so I'm not going to dismiss that charge.

RP at Pg. 109-110, Lines 16-26, 1-8 (emphasis added).

The local rule, to which the Superior Court referred, is a rule it adopted, which states in part: “[a]t the conclusion of the readiness hearing, the court will no longer accept any plea bargaining arrangements.” WCLCrR 3.3(i)(2). However, the local rule says nothing about compromises, which are not plea bargaining arrangements, they are motions before the court. Furthermore, the timing was the sole basis for the Superior Court's denial of the Motion. By the court's own admission, it would have granted the Motion, had the misdemeanor compromise been presented before readiness. However, Appellant's Attorney made it clear that the timing of obtaining Mr. Marshall's signature was out of his control. This

Motion, like the Appellant's motions related to the discovery violations by the State, was ignored by the Superior Court and put off until a full month after the trial. RP at Pg. 48-49, 50, Lines 25-27, 1-2, 14-16.

The Superior Court abused its discretion by refusing to hear the Motion to Dismiss Count III of III before trial and then used its refusal as grounds to deny the Motion after the trial, when it finally decided to hear the Motion. Therefore the only reason Appellant faced jail and fines for the damage to Mr. Marshall's property was simply because the Superior Court decided that the Motion was late, even though the only complaining party, Mr. Marshall, had been satisfied. Count III of III should have been dismissed with prejudice, based upon misdemeanor compromise.

**C. The Whitman County Superior Court abused its Discretion when it denied Appellant's Motion in Limine because the Danger of Unfair Prejudice brought about by the State's Evidence outweighed the Probative Value of the Evidence.**

The Superior Court should have prohibited the State from inquiring into, permitting testimony on, or introducing evidence containing the spray painted letters "KKK". At the very least, it should have granted a curative instruction to the jury.

ER 401 states that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence.” Appellant was charged with two counts of malicious mischief in the third degree and one count of malicious mischief in the second degree. “A person is guilty of malicious mischief in the third degree if he...writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or any other structure or any real or personal property owned by any other person....” RCW 9A.48.090(1)(b). “A person is guilty of malicious mischief in the second degree if he knowingly and maliciously...causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars....” RCW 9A.48.080(1)(a).

The State did not need to parade the “KKK” photographs around in front of the jury. The State certainly did not need to display the photographs to the jury at closing and did not need to repeat the letters “KKK” in order to obtain its convictions. RP at Pg. 106, Lines 17-19. The four examples of “KKK” being spray painted do not make the acts any more or less probable; merely cumulative on the malicious mischief third degree and second degree charges. The fact that “KKK” was spray-painted in connection to the malicious mischief in the third degree charge is irrelevant for the purposes of charging and conviction. Unless the charge is one of a hate crime or one motivated by racism or hatred of national origin, the letters or their symbolism matters not. The fact that “KKK” was spray-painted on a

boat and a plastic trash can in relation to the malicious mischief second degree charge is merely cumulative. To prove malicious mischief in the second degree, the State must prove that the damage exceeded \$750.00, not that someone used a certain 3 letters.

The Superior Court should have, under ER 403, prohibited the State from inquiring into or introducing evidence of the statements. ER 403 states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....” The probative value of the “KKK” was essentially zero and the danger of unfair prejudice was substantial. In this case, the jury was allowed to see the photos of the spray-painted letters and hear the State’s witnesses testify regarding the nature of the spray-painted letters. The jury could have improperly used the testimony and evidence in three ways.

First, the jury could have concluded that Appellant is a racist or a person who is prejudiced against those of foreign birth. If the jury concluded this, it could imply an improper motive and believe that Appellant targeted the alleged victims because of their race or national origin. The evidence and testimony was resoundingly that none of the alleged victims is of a race other than Caucasian/white and a citizen of the United States. Without an appropriate order limiting the introduction of inflammatory evidence, the jury could have been prejudiced against

Appellant and his witness, could have discarded exculpatory evidence, and could have drawn improper inferences from the evidence presented by the State.

Second, the jury could have been angered or incensed that Appellant spray painted racially-inflammatory letters. Such views could have caused the jury to completely ignore or intentionally discard exculpatory evidence, based upon the anger derived from the letters.

Third, the jury could have incorrectly inferred that Appellant associated with or surrounded himself with those persons having a racial or national origin bias. Such jury bias has the ability to interfere with Appellant's right to a fair trial.

The distinct possibility of unfair prejudice was outlined by the testimony of Tom Reeves, one of the victims, at sentencing:

He could probably provide some community service to—which may well go a long way towards providing restitution to the community, not just to the individuals that he vandalized, because spray painting “KKK” around LaCrosse I think does damage the community.

RP at Pg. 111, Lines 6-9. Even the Superior Court admitted:

...while I do agree that that could lead a juror to be prejudiced by perhaps believing that she was dealing with a racist and maybe deciding the issue on that grounds rather than getting to the merits of the case, so there was some prejudicial effect of that evidence, but at the same time it was real evidence in the case.

RP at Pg. 109, Lines 4-7. The test is not whether it was “real evidence in the case.” The test is whether the probative value was outweighed by the danger of unfair prejudice. The Superior Court weighed the probative value and the danger and erred when it decided that the probative value was greater. The problem with the Superior Court’s weighing of the evidence is the items it neglected to enter into the equation: the amount of evidence and varied types of evidence the State had in this case.

The Superior Court could have ordered the State to rely upon witness testimony or the simple fact that the property of the victims had been spray painted. The Superior Court incorrectly ruled that the use of “KKK” was highly probative of malicious intent.” RP at Pg. 109, Lines 14-16. However, the State had plenty of evidence regarding intent from the Appellant’s own statements and didn’t need to repeat the letters “KKK” in its case in chief and closing argument. The State certainly didn’t need to have a full ¼ of its exhibits composed of “KKK” photos. EI/RE 1, 2, 5, 8, and 13.

The Superior Court abused its discretion by not hearing Appellant’s motion when it should have been heard and it abused its discretion again when it found that the probative value outweighed the danger of unfair prejudice.

**VIII. CONCLUSION**

For the reasons stated herein, Appellant respectfully requests this Court reverse and remand the rulings by the Superior Court.

DATED this 11<sup>th</sup> day of October, 2013.

  
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Will Ferguson, WSBA 40978  
Libey & Ensley, PLLC  
Of Attorneys for Appellant Darin Barry

CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that on October 11<sup>th</sup>, 2013, I caused to be served a copy of the foregoing Brief of Appellant to the following party via U.S. Mail and hand-delivery:

Denis Tracy  
Whitman County Prosecuting Attorney  
Whitman County Courthouse  
P.O. Box 30  
Colfax, WA 99111

Dated this 11<sup>th</sup> day of October, 2013.

  
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WILL FERGUSON