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

59388-9

LISA A. MULLEN

Appellant,

v.
THE STATE OF WASINGTON

Respondent.

APPEALED FROM SKAGIT COUNTY SUPERIOR COURT
CAUSE NO: 02-1-00654-9

APPELLANT'S BRIEF

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A. Assignments of Error

1. The trial court erred when it denied the defendants post-verdict motion for a new trial when evidence was found to have been withheld by the State's investigator.

2. The trial court erred when it denied the defendants post-verdict motion for a new trial in the face of newly discovered evidence.

Issues Pertaining to Assignments of Error

1. Did the State violate the 14th Amendment of the United States Constitution's Due Process clause when the State's investigator/expert witness failed to disclose material evidence to the defense? (Assignment of Error 1)

2. Did the trial court err when it denied Ms. Mullen's motion for a new trial under CrR 7.5 due to an irregularity in the prosecution which denies the defendant a fair trial or where newly discovered evidence would change the outcome of the trial when Ms. Mullen was denied a fair trial because material evidence was suppressed and new evidence was found after trial that corroborates the defense?
(Assignment of Error 1 & 2)

B. Statement of the Case

Procedural History

The State filed the first information on December 20, 2002, and the information was subsequently amended five times (2/24/03, 3/7/03,

9/10/03, 10/14/04 & 2/6/06). The State went to trial on charges against Ms. Mullen of Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, Use of Proceeds of Criminal Profiteering, and Tampering with Physical Evidence. After four years of pre-trial hearings and motions, the case proceeded to a jury trial. The tampering charge was dismissed by the Court at the conclusion of the State's case. The Jury convicted Ms. Mullen on the remaining Counts.

Before sentencing, defendants discovered additional evidence including conflicting sworn testimony from the two primary prosecution witnesses made after their testimony against Ms. Mullen. Ms. Mullen made a motion for a new trial based on the discovery of new evidence and for Brady violations on September 12, 2006. After hearing on November 15, 2006, the motion for a new trial was denied. Sentencing occurred on December 11, 2006, and this appeal was filed January 2, 2007. As of May 19, 2008, a restitution hearing has not been held.

Statement of Facts

Appellant Lisa Mullen ("Mullen") was the Bookkeeper/Comptroller at the Ford new car dealership ("Frontier Ford") located near Anacortes, Washington starting in 1993. 1/18/06 RP 132. In 2002, the dealership's owner, Ron Rennebohn, accused Mullen of "stealing" money from the

dealership, and reported the "theft" to the City of Anacortes Police Department. RP 1/5/06 p. 71.

Although Frontier Ford is organized as a corporation under Washington law, R. Rennebohn is the sole owner and as such was treated as the "victim" of the alleged crimes. RP 1/25/06 p.152. Mr. Rennebohn testified against Mullen at trial. RP 1/18/06 p.120.

Four years after the alleged crimes were reported, during January 2006, Mullen and a co-worker at Frontier Ford, Kevin Dean, were tried in Skagit County Superior Court. They both were convicted by the jury of theft in the first degree, and related counts. RP 2/7/06 p. 2. The dollar amount of the alleged theft was not determined by the jury. Prosecution testimony suggested that accounting irregularities may exceed $1,000,000, but neither a specific list of transactions nor any claim of exact amounts was testified to as constituting "theft" by either Mullen or Mr. Dean. RP 1/25/06 p.181-183.

Mullen acknowledged all of the alleged "irregular" transactions presented at trial, and provided explanations. RP 1/31/06 p.118-165. First, Mullen testified that all of the transactions were performed under the authority and with the knowledge of business owner R. Rennebohn, including transactions that directly benefited Mullen. RP 1/31/06 p.119. Secondly, Mullen testified that the bookkeeping methods and accounts,

including the "irregular transactions", were either created by or known to the businesses outside accountant/CPA during the time periods in question. That accountant/CPA was Mr. Rick Rekdal, who was also Mr. Rennebohn's personal accountant/CPA during the same time periods. RP 1/31/06 p.126-129.

It is at this point that the "Statement of the Case" takes on a soap operatic flavor. The State's case against Mullen (and, by association, Mr. Dean) was based on the "Expert" testimony of an accountant/CPA hired by the State to prepare summaries, and who then testified to "irregular" transfers and/or procedures used by Mullen. That "Expert", paid over $230,000 by the State, was none other than Frontier Ford's former CPA, Mr. Rekdal. RP 1/5/06 p.87, 1/30/06 p.94-95, CP 1059-69.

What the jury was not told was that during 2004, after being hired by the State to prepare summaries and to testify as an expert for the prosecution, with the permission of his clients Frontier Ford and Mr. Rennebohn, Mr. Rekdal terminated his professional relationship with both Frontier Ford and R. Rennebohn after discovering financial misstatements by both. CP 1262-75. By that time, however, R. Rekdal working for Frontier Ford had prepared and submitted on behalf of Frontier claim

documents requesting insurance coverage for the alleged employee "embezzlement" as charged against Mullen and Dean. CP _____(CH)[1]

With this criminal case pending, during December 2004 Peninsula Auto World, Inc., dba Frontier Ford (Frontier) filed in King County Superior Court a civil matter for damages alleging malpractice by Clothier & Head, P.S., the professional service corporation/CPA firm where Mr. Rekdal was employed as a partner. CP____(CH).

Neither Mr. Rennebohn, Frontier's owner and the "victim" in this criminal matter, nor Mr. Rekdal, Frontier's CPA before 2004 and the State's "expert" in this criminal matter, were named individually in the litigation. CP____(CH).

Unknown to defense counsel for Mullen or Dean, or apparently to the prosecutor at the time, in April, 2005 the parties to the King County litigation entered into a Stipulated Protective Order, approved by Judge Armstrong, that prohibited the disclosure of discovery and/or documents related to the dispute between the parties. CP___(CH). Both Mr. Rennebohn and Mr. Rekdal were bound by the terms of the Protective

[1] There was a large volume of evidence that was submitted with Ms. Mullen's motion for a new trial; a good majority of it was submitted as exhibits to Mr. Murphy's (Mullen trial counsel) declaration. A supplemental designation of clerk's papers needs to be completed. An updated brief will be submitted with additional citation when available.

Order even though they were not named individually in the lawsuit. CP____(CH).

The King County civil matter centered directly around the allegations of embezzlement asserted against Mullen (and Dean), with Frontier alleging that Rekdal had breached his professional duties by not "discovering" the irregular accounting practices allegedly used by Mullen. CP___(CH). As later admitted, Rekdal had personal although confidential knowledge of Rennebohn's direct involvement and approval of the practices, and Rekdal was or became aware that Rennebohn was benefiting from the practices and under reporting taxable income. Rekdal asserted this information as a defense to Frontier's claims. CP___(CH).

After three years of delays and pre-trial disputes, most of which centered around discovery (and failure there of) by the prosecution (Rennebohn and Frontier Ford documents known to Ms. Mullen but withheld from production) and objections to "summary" expert testimony being offered by the State's chosen expert, Mr. Rekdal, the criminal trial commenced on January 5, 2006. RP 1/5/06 p. 68.

Mr. Rennebohn, the complainant and "victim" of the alleged theft, testified for the prosecution on January 18, 19, 20, and 23. Mr. Rekdal, the State's expert witness and Mr. Rennebohn's/Frontier Ford's CPA during the entire time periods of the alleged theft, testified for the

prosecution on January 24, 25, 26, 27, and 30. The State rested on January 30, 2007.

Unknown to defense counsel during the criminal trial (or to the Court) during those days of testimony, the corporate entities for the two primary witness's were facing motions to compel, for sanctions, and for dismissal in the King County civil matter. The stakes were high. CP_____(CH).

On January 6, 2008, Rekdal's counsel filed their motion to compel and for sanctions against "Frontier", or Rennebohn, with a hearing date of January 17, 2008. CP_____(CH). Further pleadings were filed 1/13; 1/17; and 1/18 – all under seal. CP___(CH). Judge Armstrong granted the motion, in part, on 1/17 but filed and provided it to the parties on 1/19—*while Mr. Rennebohn was testifying in the criminal matter.* CP___(CH). Sworn answers were due from Frontier / Rennebohn in 5 days, or barred. Apparently in response, Frontier's counsel served a notice of deposition and document subpoena on Rekdal on 1/26 – *while Rekdal was testifying in the criminal matter* – for a deposition to be taken on 1/31/2008. CP_____(CH).

For the weekend of 1/28-1/29, the prosecutor allowed Mr. Rekdal to "borrow" and "produce" to Frontier's counsel all of the State's exhibit notebooks, while Mr. Rekdal was still under oath and testifying as the

State's expert witness. CP_____(CH). Mr. Rekdal was finally dismissed on January 30, only to be deposed the next day by Frontier's counsel. 1/30/06 RP 27, CP_____(CH).

Mr. Rekdal's "defense" deposition testimony given on 1/31/2006 – while the criminal trial was continuing—differed significantly from his "expert" testimony at trial for the prosecution. CP____(CH). Most significantly, in the deposition he described in detail his actual knowledge of Mr. Rennebohn's significant involvement in the "irregular" transactions used by Ms. Mullen at Frontier Ford for many years. CP____(CH).

RCW 18.04.405, **Confidential information—disclosure, when,** prohibits any disclosure of confidential client information by a CPA or accountant and would normally bar Mr. Rekdal's disclosures. However, because the King County action claimed damages arising from alleged malpractice, he was allowed to disclose confidential information during his deposition as a part of his defense. CP 1266.

Lisa Mullen commenced testifying in her own defense to the criminal charges on the very same day—January 31, 2006. RP 1/31/06 p.117. In what is one of those unexplainable twists of fate, her testimony matches many of the same "disclosures" made by Mr. Rekdal during his concurrent "defense" deposition offered against the civil claims of Mr. Rennebohn. RP 1/31/06, p. 120, 160, CP____(CH).

Unfortunately, the jury did not get to hear Mr. Rekdal's "defense" testimony, as he was already dismissed, but instead was limited to his "expert" testimony acting as an agent of the State. CP____(CH). In Mullen's criminal trial, Mr. Rekdal's testimony was contrary to and in opposition with Mullen's factual testimony. While testifying in defense of himself, under a Stipulated Protective Order, Mr. Rekdal's factual testimony corroborates Ms. Mullen's testimony. CP____(CH).

The trial ended on February 6, 2006. RP 2/06/06 p.118. The jury returned a "guilty" verdict the next day, February 7, 2006. RP 2/7/06 p. 2. In a second twist of fate, Frontier's counsel continued with the deposition of Mr. Rekdal on that very day, February 7, 2006. CP____(CH). Again, under RCW 18.04.405(2), Mr. Rekdal continued to reveal his factual knowledge of Mr. Rennebohn's direct involvement in the "irregular" accounting practices at Frontier Ford that underlay the testimony by both Rennebohn and Rekdal against Mullen. CP____(CH).

For a number of unrelated reasons, the sentencing hearing for both Lisa Mullen and Kevin Dean was delayed until May 19, 2006.
RP 5/19/06 p.2.

During the time between February 7 and May 19, there was tremendous activity in the Frontier vs. Clothier & Head matter. Trial was scheduled for June 6, 2006. CP____(CH). After depositions and additional

discovery, counsel for Clothier & Head (Rekdal) filed a motion for summary judgment on March 30 with the hearing scheduled for April 27, 2006. CP____(CH). All moving papers and supporting evidence was filed under seal. CP____(CH).

Judge Armstrong denied the motion on April 27, 2006. CP____(CH). The parties proceeded to a mandatory settlement conference on May 6, 2006. CP____(CH). The parties then reached a confidential settlement, and agreed to dismiss the matter. RP 5/19/06 p.7, CP____(CH). All of the discovery and factual documentation filed under seal concerning the motion for summary judgment was required to be destroyed. CP____(CH).

Defendant Dean somehow learned of the "settlement", and traveled to the King County Courthouse to review the file. RP 5/19/06 p.5. On or about May 12, just days after the confidential settlement and less than a week before the sentencing hearing, Mr. Dean was provided access to the case file by the Court Clerk and was able to copy certain documents. RP 5/19/06 p.7. Those documents revealed that witness's Rekdal and Rennebohn told very different stories in the lawsuit between themselves than they did as witnesses for the prosecution in the criminal matter against Mullen and Dean. CP____(CH).

Relying on the information discovered in the King County court file, defense counsel moved to continue the 5/19/2006 sentencing hearing, and subsequently filed motions for a new trial and/or to dismiss. Arguments were held on November 15, 2006. RP 11/15/06 p.1-84. After review, the motions were denied by the Court. CP 1279-80. Sentencing was held on December 11, 2006. CP 1283-94.

C. **Summary of Argument**

Ms. Mullen knew that Mr.'s Rennebohn and Rekdal were lying when they testified for the prosecution against her at trial. She knew that documents supporting her testimony had been destroyed and/or concealed. She testified to the same in her own defense—only to be mocked by the prosecutor in front of the jury. There was no collaborating evidence. Who to believe? The "innocent" business owner/victim, supported by his own CPA testifying as an expert for the State, or the defendant who admitted to questionable accounting practices but claimed authorization from the "victim" and training from the CPA?

The evidence to prove Ms. Mullen's testimony did exist, but had been concealed before and during trial. Intentionally, by both Rennebohn and Rekdal. Both had an interest in concealing the requested documents from Mullen, the jury, and the Court even though as between themselves certain documents benefited each as against the other. After the verdict, the defense discovered proof of the existence of the documents, and

discovered proof that both prosecution witnesses were aware of the existence of the documents.

Discovery after trial of the suppressed documents and that both prosecution witnesses were aware of their existence during trial is alone a sufficient basis to grant defendant Mullen a new trial under *Brady*. However, the post-trial discoveries didn't end with concealed documents. Post-trial sworn testimony provided by both "victim" Rennebohn and "Expert" Rekdal—intended to be private and confidential—was discovered that directly contradicts their trial testimony and corroborates Mullen's defense testimony. The evidence did not exist until after trial, but thru a stroke of luck was discovered before sentencing.

Mullen's timely motion for a new trial was based on substantive new evidence, and on the discovery and proof that documents specifically requested by the defense that would have collaborated Mullen's defense testimony. The documents and new evidence were not collateral—they cut the heart out of the prosecution's case. The new evidence makes a strong "case" that witnesses Rennebohn and Rekdal should have been the defendants on trial, and Ms. Mullen should have been the primary witness for the prosecution against Rennebohm and/or Rekdal. The discovery of the suppressed documents and new evidence requires that Ms. Mullen be granted a new trial.

D. **Argument**

I. THE STATE DENIED MS. MULLEN DUE PROCESS BY SUPRESSING MATERIAL EVIDENCE.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amend. XIV; State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

The Court in *Brady*, said that suppression of material evidence is a violation of the Due Process Clause of the Fourteenth Amendment. *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194 (1963). The Court found that due process requires the government to disclose material evidence to the defense, holding 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." Id at 87.

"There are three components of a Brady violation: 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 (1999).

In this case, the State suppressed evidence requested specifically and generally by Ms. Mullen. The evidence withheld by the State was both impeaching of the State's two main witnesses and exculpatory for Ms. Mullen.

The evidence specifically requested but withheld included Ms. Mullen's pay-plan which included information that health insurance cost reimbursement was approved by Mr. Rennebohm, PIPI documents that showed Mr. Rennebohm was taking money out of the dealership in ways that cheated managers of the dealership out of their share of profits and explained many of the "irregular" transfers that were attributed by Mr. Rekdal and Mr. Rennebohm to Ms. Mullen embezzling from the corporation, and billing records that proved that Mr. Rekdal worked directly with Ms. Mullen on a regular basis. CP__

Additional exculpatory evidence was also withheld, including information and documents that showed that money the Rennebohms put into the dealership was to replace funds used for the purchase of another dealership and not due to Ms. Mullen's alleged embezzlement, as Mr. Rennebohm testified to and to which Mr. Rekdal claimed no knowledge. The withheld evidence further revealed that Mr. Rekdal had examined the books and records of the dealership previously and did not find evidence of funds being diverted by Mullen or Dean from the dealership. CP__

Impeaching evidence was also withheld, that showed Mr. Rennebohm had been cheating the IRS on his income taxes by underreporting income by up to $1 million; had stolen money from a former business partner, Ragnar Pettersson; that Mr. Rekdal was aware of the circumstances surrounding the "phony note" between Rennebohm and his former partner Pettersson, contrary to his testimony; that both Mr. Rennebohm and Mr. Rekdal were aware of the accounts receivable balances contrary to their testimony at trial; that Mr. Rekdal terminated CPA services to the Rennebohms due to improperly reporting income and lack of honesty, contrary to his testimony at trial; that Mr. Rekdal's billing records that showed he spent more time working with Ms. Mullen than he testified to at trial. CP__

A. The Evidence withheld by the State was material because it corroborated Ms. Mullen's defense and impeached the State's two main witnesses.

Mr. Rekdal acknowledged he withheld information he learned in the course of his investigation on behalf of the State. CP 1266. Mr. Rekdal's explanation for the suppression was that his professional duty to Mr. Rennebohm and potential criminal liabilities against himself prevented him from disclosing the information. *Id.* The evidence suppressed by Mr. Rekdal was material for three reasons: 1) it

corroborated Ms. Mullen's defense; 2) it impeached Mr. Rennebohm and; 3) it impeached Mr. Rekdal.

Suppressed evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.ed.2d 481 (1985).

In Kyles, the court emphasized four specific aspects of materiality. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). First, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulting ultimately in the defendants acquittal. *Id.* at 434. Thus, 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 worth of confidence. *Id.*

Second, materiality is not a sufficiency of evidence test. *Id.* at 435. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. *Id.*

Third, after a finding of constitutional error under Bagley, there is no need for further harmless-error review because a Bagley error can not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different necessarily entails the conclusion that the suppression must have had "substantial and injurious effect or influence in determining the jury's verdict. *Id.*

Fourth, in determining materiality the suppressed evidence should be considered collectively, not item by item. *Id.* at 437.

In this case, the evidence suppressed by the State was material.

1. The evidence withheld corroborated Ms. Mullen's defense.

Ms. Mullen testified that at Mr. Rennebohm's direction she used bookkeeping entries to reduce the reported corporate income and that all of her activities were authorized by Mr. Rennebohm. RP 1/31/2006, p.119, lines 13-17.

PIPI Loans

As an example, Ms. Mullen testified that Frontier Ford sold extended warranties offered by Payment Insured Plan Inc. (PIPI). PIPI loaned the dealership money and then allowed the dealership to inflate the cost of the warranty to repay the loans. She further testified that Mr. Rennebohm received the loan checks personally and paid them off using

dealership funds. Mr. Rennebohm did not report the loans as income on the dealership books and the dealership books reflected the full cost of the inflated warranty price as an expense. Mr. Rennebohm was using corporate money to pay off personal debt and was not reporting it on the books or his personal taxes. 2/1/06 RP p. 27-29.

Mr. Rekdal testified, during a deposition for the civil case between Frontier Ford and Clothier and Head, that during his investigation for the prosecutor he discovered Mr. Rennebohm had failed to report between $150,000 and $1,000,000 in income and interest in loans from PIPI. CP___ Rekdal dep., p. 158, lines 13-25 (Exhibit 120, Murphy dec.). Failure to properly report these loans defrauded the IRS, business partners and managers of the dealership (including Ms. Mullen).

Medical Insurance Reimbursement

Ms. Mullen contends that she was entitled to funds for health insurance reimbursement. However, Mr. Rekdal presented these funds to the jury as funds that left Frontier Ford without authorization from Mr. Rennebohm. The sum of $21,701.38 was presented to the jury at trial as unauthorized funds that left Frontier Ford by the act of Ms. Mullen. RP 1/25/06, p.114-116. However, Mr. Rekdal, in his deposition, testified that he had caught Mr. Rennebohm in several misstatements. Mr. Rennebohm had told Mr. Rekdal that he had not authorized medical insurance for Ms.

Mullen. Later Mr. Rekdal saw in Ms. Mullen's employee file that Mr. Rennebohm had authorized the insurance. CP__ Rekdal dep., p. 258, 60, lines 9-25 (Exhibit 120, Murphy Dec.)

Previous Investigation by Mr. Rekdal Revealed No Theft

The defense was not advised that Mr. Rekdal had conducted an examination, in the fall of 2001, of the books and records of Frontier Ford and advised Mr. Rennebohm that he did not see any evidence of embezzlement by Ms. Mullen and if she was stealing from Mr. Rennebohm it was nickels and dimes. CP__ R.Rennebohm dec., p. 3(Exhibit 133, Murphy supplemental dec.); D. Rennebohm dec., p.2 (Exhibit 134, Murphy supplemental dec.)

Cash Flow Problems

Ron Rennebohm testified at trial that he needed to borrow approximately $700,000 to put into the company because it was experiencing cash flow problems caused by Ms. Mullen and Mr. Dean's theft. RP 1/18/06 p. 212-215. However, Ms. Mullen testified that Mr. Rennebohm needed to borrow the money because he was purchasing a new dealership and remodeling Frontier Ford and needed to refinance his business interests. RP 1/31/06, p. 164-166 Ms. Mullen's testimony was corroborated by Mr. Rekdal's testimony, in his deposition for the civil case, that Mr. Rennebohm needed capital in the fall of 2001 and spring of

2002 because he was expanding his business and that Clothier and Head had assisted in this matter. CP__ Rekdal Dep., p.214, lines 4-25, p.216, lines 1-25(Exhibit 120, Murphy Dec.).

Scope of Services

Ms. Mullen testified at trial that she made the book keeping entries with the approval of Mr. Rennebohm and was often instructed by Mr. Rekdal. RP 1/31/06 p. 119, lines 11-16 & p. 126-128. Mr. Rekdal testified to a limited relationship that included corporate tax returns and the occasional special project. RP 1/24/06 p. 39, lines 11-18. The defense specifically asked for detailed billing records from Mr. Rekdal and obtained an order from the court directing Clothier and Head explaining the billing Statements. CP__, (Exhibit 16 & 17, Murphy dec.) Mr. Rekdal provided a letter dated March 23, 2004. CP__ (Exhibit 18, Murphy dec.) However, in the civil trial, Clothier and Head turned over detailed billing records that showed the scope of services provided by Clothier and Head had no limitation on the engagement and was more extensive than Mr. Rekdal testified. CP__ (L. Sanders dec., exhibit 5 attached as Exhibit 119, Murphy dec.)

2. The suppressed evidence impeaches Mr. Rennebohm.

The credibility of Mr. Rennebohm was essential to the State's case. The only way the alleged acts constitute theft is if Mr. Rennebohm did not

authorize them. The evidence discovered after trial creates serious doubts about Mr. Rennebohm's credibility.

The evidence shows that Mr. Rennebohm was not truthful even when under penalty of perjury. Mr. Rennebohm failed to report substantial income, related to the PIPI loans (discussed above), on his personal tax return, despite signing under penalty of perjury. (Exhibit 69, Murphy Dec.). That Mr. Rennebohm didn't testify truthfully about the $700,000 loan that he took out to expand his business. That Mr. Rennebohm had stolen money from his former business partner Ragnar Pettersson in the amount of between $40,000 and $60,000. CP__ (Rekdal dep., p. 157, lines 3-25 (Exhibit 120, Murphy dec.))That Mr. Rennebohm had misrepresented to Mr. Rekdal, about giving authority for Ms. Mullen to obtain medical insurance reimbursement and not authorizing or benefiting from the activity in his accounts receivable. CP__ (Rekdal dep., p. 255, line 25, p. 256 lines 1-12, p. 258, lines 9-15 (Exhibit 120, Murphy dec.))

Additionally, Mr. Rennebohm testified that he had not graduated from High School and had worked his way up from being a Lot Boy to owning car dealerships. RP 1/18/06 p. 121, lines 19-20, p. 122 lines 11-24. However, he and his wife testified that he was financially illiterate and did not understand a basic financial Statement. D. Rennebohm, RP 1/17/06 p.

139, line 3. R. Rennebohm, RP 1/18/06 p. 139 & 144-151. Mrs. Rennebohm testified he didn't even know how to write a check. RP 1/17/06 p.138, line 6. Mr. Rennebohm testified that he is just a guy who loves cars and relies on other people's talents to succeed, that he trusts them completely to take care of the businesses. 1/18/06 RP 164.

Had the defense been able to present the evidence that was suppressed, the defense could have painted an alternative picture of Mr. Rennebohm as a sophisticated schemer who was willing to lie when it suited his purposes. Additionally, Ms. Mullen's description of Mr. Rennebohm as a crook would have been supported by evidence not just her word. The prosecution was quite dismissive of Ms. Mullen calling Mr. Rennebohm a crook and the evidence discovered after trial shows that he is a crook. RP 2/1/06, p. 119, lines 85-86.

3. The suppressed evidence impeaches Mr. Rekdal

Mr. Rekdal was presented by the prosecution as an expert witness who investigated the alleged crime and had done some limited work for the alleged victim. RP 1/24/06 p. 39, lines 11-18. Mr. Rekdal's testimony did not include his personal knowledge of the business dealings of Frontier Ford and Mr. Rennebohm. Mr. Rekdal testified that he provided limited services to Frontier Ford and Mr. Rennebohm and that he did not know about or had limited involvement in many of Mr. Rennebohm's

business dealings such as the note with Mr. Pettersson, the PIPI loans and valuation of the dealership during Mr. Rennebohn's divorce.

The evidence discovered after trial to be in Mr. Rekdal's possession showed that Mr. Rekdal had significant involvement in Mr. Rennebohm's business dealings and that he had a conflict of interest that prevented him from fully testifying about his knowledge. The evidence also shows that Mr. Rekdal has financial incentive to give misleading testimony. Had the defense been able to present this evidence the jury would have been able to discount his testimony of Mr. Rekdal based on his bias and self interest.

B. The State's Brady obligation extends to Mr. Rekdal, as an agent of the State, because he conducted the investigation on behalf of the State.

Mr. Rekdal is an agent of the State because he was hired to investigate the alleged crime and was substituted for the police. This extends the Brady obligation to evidence in Mr. Rekdal's possession.

The Brady requirements extend to evidence beyond that actually known to the prosecutor because the Prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *See*, *Kyles* 514 U.S. at 437.

In this case, Detective Nordmark, of the Anacortes Police Department testified during trial that the police department determined

early on in the investigation that it did not have the expertise or resources to investigate the alleged crime. RP 1/30/06, p. 94, lines 5-13. Nordmark further testified that he had hoped to get assistance from the State Attorney General's office but he didn't get his way. RP 1/30/06, p.94, lines 14-25. The State instead hired Rick Rekdal, who was also the alleged victims personal and corporate CPA, to investigate and be a witness on behalf of the State.

Mr. Rekdal didn't just assist or consult; he was the central figure in the State's team. Detective Nordmark testified that the police role was limited to the initial response and gathering information requested by Mr. Rekdal. See generally, RP 1/5/06, p.75, 1/6/06, p.44, 1/11/06, p. 26. Additionally, after Ms. Mullen was convicted the State submitted a cost bill seeking reimbursement for "accounting fees for investigation" billed by Mr. Rekdal and his firm for over $200,000. CP 1059-69.

Further, Mr. Rekdal understood his role as an agent of the State. In a declaration Mr. Rekdal avers that he learned of Mr. Rennebohm's own embezzlement while assisting the State's investigation. CP__ Rekdal dec., p. 8,¶12 (Exhibit 68, Murphy dec.)

The State should not be able to escape its Brady obligation by hiring an outside investigator rather than using a State agency to investigate. Indeed the court recognized the pitfalls of the argument that

the Prosecutor should not be responsible, under Brady, for information he does not have when the court reasoned that "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id* at 438.

Additionally, the 9th Circuit found that "exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor doesn't have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them." *United States v. Zuno-Acre*, 44 F.3d 1420, 1427, (9th Cir.), cert denied, 516 U.S. 945 (1995).

Ms. Mullen cited to *Kyles*, which extends the *Brady* obligation to others acting of on the governments behalf, in her motion for a new trial based in part on violations of *Brady*. *Kyles* 514 U.S. at 437. Despite citing *Kyles* the trial court ruled that *Brady* was not violated because the prosecutor was not aware of the information and "no authority cited supports [the] proposition" that Mr. Rekdal's nondisclosure implicates

Brady. CP 1279. However, as discussed above, Kyles clearly extends the Brady obligation to others acting on the governments behalf, Mr. Rekdal was clearly acting on the State's behalf and applies regardless of whether the Prosecutor was aware of the information.

The court in Kyles also found that the "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf..." Id at 437. In this case there is evidence that the prosecutor did not undertake to learn of favorable evidence known to Mr. Rekdal. In a deposition taken after trial Mr. Rekdal was asked about his testimony during the criminal trial that he believed Ms. Mullen was not authorized to take money for her own benefit and if that belief had changed. Mr. Rekdal replied "I don't know what to believe anymore". Mr. Rekdal was then asked if he had shared that hesitancy with the prosecuting attorney. Mr. Rekdal replied "He's not asked". Rekdal dep., p. 245, lines 19-23(exhibit 120, Murphy dec.). The prosecutor was aware of the lawsuit between Mr. Rekdal and Mr. Rennebohm and he did not ask his investigator and witness about it. The prosecutor also felt it was "not his duty to go out and get pleadings like this and try to figure out what these ancillary lawsuits are about." RP 1/17/06 p. 11, lines 1-4.

Under Kyles the information and documents within Mr. Rekdal's knowledge was subject to *Brady* and failure to disclose that information was a violation of Ms. Mullen's constitutional right to a fair trial.

C. There is reasonable probability that the outcome would be different had the defense been able to present the suppressed information and reversal is required.

A constitutional error occurs, and the conviction must be reversed, if the evidence is material in the sense that its suppression undermines the confidence in the outcome of the trial. *Agurs*, 427 U.S., at 112.

In this case, Ms. Mullen testified and presented her defense, however, she did not have any evidence to corroborate her story. The suppressed evidence as discussed above would have corroborated her story. The prosecutor pointed out twice to the jury that Ms. Mullen didn't have any evidence to back up her story, once while cross-examining her saying: "you come here in court, and you don't have any documents, whatsoever, to corroborate what you are telling the jury." RP 2/2/06 p. 22, lines 3-5. Second, during closing arguments. RP 2/6/06 p. 18, lines 8-12.

Additionally, the prosecutor mocked Ms. Mullen and her story as unbelievable, frequently commenting and characterizing her answers

during cross examination. RP 2/1/06 p. 52-190 & 2/2/06 p. 6-94. The suppressed evidence shows that Ms. Mullen was telling the truth.

The trial court Stated in its ruling:

> [the] jury carefully followed all aspects of the trial, listened to Messrs Rennebohm and Rekdal tell their side of the story, listened to Ms. Mullen trash the main witnesses for the State. The jury could easily have concluded, consistent with the position of the defense that Rennebohm and Rekdal conspired to cheat the government, former partners, and a whole number of others....The Court allowed broad impeachment...Regardless the jury chose not to find for the defense.

The State's investigator knew Ms. Mullen was correct and suppressed evidence that would have corroborated her story. It would have been much easier for the jury to believe her story and find for the defense if Ms. Mullen had been able to show additional evidence that confirmed her story. There is a reasonable probability that the outcome would have been different had the suppressed evidence been presented and reversal is required.

II. MS. MULLEN WAS ENTITLED TO A NEW TRIAL UNDER CrR 7.5

CrR 7.5 allows a court to grant a new trial. CrR 7.5 provides in relevant part:

> (a)**Grounds for a New Trial.** The court on motion of a defendant may grant a new trial for any one of the following

causes when it affirmatively appears that a substantial right to of the defendant was materially affected:

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

The denial of a motion for a new trial is evaluated for abuse of discretion. *See*, *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981).

Ms. Mullen submitted a motion for a new trial based on the Brady violation and on newly discovered evidence. CP 1193. The trial court denied Ms. Mullen's motion for a new trial because it concluded the information was available to the defense prior to trial and was not material. CP 1279. The trial court abused its discretion in denying the motion for a new trial because the information was not available before trial and it was material to the defense.

A. The newly discovered evidence was not available before trial.

The defense could not have discovered the evidence with reasonable diligence and produced it at trial. After trial the defense discovered evidence associated with the civil case between Mr. Rekdal's accounting firm and the alleged victim Frontier Ford/Ron Rennebohm

which, as discussed above, corroborated the defense and impeached both Mr. Rekdal and Mr. Rennebohm.

This evidence would never have been discovered but for a mistake on the part of the King County Clerk's office. All of the documents in the civil case were under seal and were accidentally provided to the defendants. Mr. Rekdal, despite being paid over $200,000 by the State, never revealed his knowledge to the State and there is no evidence that he would have disclosed it to the defense if pressed further.

In fact, there are several reasons Mr. Rekdal was unlikely to ever reveal the information he had. Under the professional guidelines for CPAs, which are very similar to the RPCs that govern lawyer conduct, Mr. Rekdal would have faced disciplinary action for revealing information he learned while working for Mr. Rennebohm and Frontier Ford. Mr. Rekdal also faced potential criminal liability.

Ms. Mullen's defense counsel worked diligently for over four years to obtain information from Mr. Rekdal and Mr. Rennebohm. Mr. Rekdal was interviewed at least three times by the defense, was served with multiple subpoenas and participated in several pre-trial hearings. The defense questioned Mr. Rekdal on the subject of much of the evidence discovered after trial, on each occasion Mr. Rekdal claimed to not know or gave a misleading answer. Mr. Rekdal and his firm also ignored the

subpoenas and did not seek a protective order or to quash the subpoenas. Redkdal dep., p.339, lines 107 (Exhibit 120, Murphy dec.). Mr. Rekdal was willing to go to great lengths to protect the information as there was personal benefit to him to keep the information from the defense and there is no evidence to suggest that with further efforts by the defense would have yielded the information discovered after trial. Additionally, a lot of the information was Mr. Rekdal's mental impressions and knowledge he possessed, these mental impressions were not reduced to a form of evidence that could be discovered until after trial was over as the transcripts from his depositions (that occurred during the criminal trial) were not transcribed until mid-February 2006.

The defense was also not able to get information from Mr. Rennebohm despite diligent efforts. The defense had to get an order for a deposition of Mr. Rennebohm just to interview him and when those interviews weren't fruitful, the trial court had to appoint a special master to help conduct the depositions. RP 3/7/03 p. 14, 6/13/03 p.12, 8/22/03 p.12, 19-24. The defense also sought information from Mr. Rennebohm through subpoenas which Mr. Rennebohm either moved to quash or failed to respond. RP 8/27/04 p. 159, 9/2/05 p. 4. In the civil suit between Frontier Ford and Clothier and Head, sanctions were ordered against Mr. Rennebohm for failing to produce documents related to PIPI income and

loans. Mr. Rennebohm responded to the sanctions by asserting that much of the documentation requested no longer existed. Declarations submitted by Mr. Rekdal's attorneys in the civil matter complain that Mr. Rennebohm and his attorney stonewalled them during discovery to prevent them from obtaining much of the information discovered after trial. CP__

Both Mr. Rekdal and Mr. Rennebohm, through their attorneys, worked very hard to suppress the evidence discovered after trial and there was no evidence that indicates that either one would have revealed this information prior to trial with more diligence on behalf of the defense.

B. The Brady Violation was an irregularity of proceeding that deprived Ms. Mullen of a fair trial.

As discussed at length above, the State suppressed material evidence and denied Ms. Mullen a fair trial. A Brady violation is necessarily an irregularity in the proceeding and deprives the defendant of a fair trial.

The evidence discovered after trial was material and not available to the defense prior to trial, therefore it was error for the trial court to deny Ms. Mullen's motion for a new trial. The court should reverse the trial court's ruling.

E. CONCLUSION

Ms. Mullen was denied her constitutional right to a fair trial. The State suppressed material evidence and new material evidence was found after trial that could not be obtained previously. Ms. Mullen is entitled to a new trial under Brady and CrR 7.5. The decision of the trial court should be reversed.

DATED this 22nd day of May, 2008.

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Attorneys for Appellants

IN THE COURT OF APPEALS OF

THE STATE OF WASHINGTON

DIVISION I

59388-9

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 22 AM 10: 10

LISA A. MULLEN

Appellant,

v.
THE STATE OF WASINGTON

Respondent.

APPEALED FROM SKAGIT COUNTY SUPERIOR COURT
CAUSE NO: 02-1-00654-9

DECLARATION OF SERVICE

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DECLARATION OF SERVICE

I, Jennifer L. Castro, under penalty of perjury and in accordance with the laws of the State of Washington, declare that on the 22nd day of May 2008, I caused true and correct copies of the following documents:

1. Appellant's Brief
2. Declaration of Mailing

to be delivered personally, to the following parties of record:

COUNSEL FOR THE STATE OF WASHINGTON
Erik Pedersen
Skagit County Deputy Prosecuting Attorney
605 South 3rd Street
Mount Vernon, WA 98273

DATED this 22nd day of May, 2008.

MAGNUSSON LAW OFFICE, P.S.

By Jennifer Castro
Jennifer L. Castro