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No.
Court of Appeals No. 59389-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SKAGIT COUNTY

PETITION FOR REVIEW

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STATE OF WASHINGTON
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GREGORY C. LINK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206)587-2711

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A. IDENTITY OF PETITIONER

Kevin Dean asks this Court to accept review of the opinion of the Court of Appeals in State v. Dean, 59389-7-I, pursuant to RAP 13.4.

B. OPINION BELOW

To investigate allegations of theft of more than one million dollars from a car dealership, the State chose to retain the services of the dealership's corporate accountant. That investigator withheld information from Mr. Dean regarding the fact and that he had an actual conflict of interest based upon information he learned in the course of his investigation regarding his client, the alleged victim dealership and its owner. That withheld information impeached the victim's testimony, corroborated the testimony of the codefendant and undercut the entire theory of the State's case. Nonetheless, the Court of Appeals concluded the State's withholding of evidence did not violate Brady v. Maryland.¹

C. ISSUES PRESENTED

1. The Fourteenth Amendment of the United States Constitution requires the government disclose to the defense evidence which is material either as substantive or impeachment evidence. This obligation extends to those who are assisting the prosecution. The State's lead investigator did not disclose evidence of thefts by the alleged victim from the same

¹ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

corporation occurring at the same time as the allegations against Mr.

Dean. Did the State fail to disclose material evidence?

2. The Fourteenth Amendment Due Process Clause requires the State prove each element of a crime charged. In its best light, the State's evidence established Mr. Dean was aware of fraudulent bookkeeping of codefendant Lisa Mullen, but did not establish Mr. Dean agreed to assist in that fraud or in any way benefited from the fraud. Was the evidence sufficient to convict Mr. Dean of first degree theft and conspiracy to commit first degree theft?

3. The Equal Protection Clause of the Fourteenth Amendment precludes sentencing similarly situated defendants differently in the absence of a rational basis to do so. Where the parties and trial court agreed Mr. Dean was substantially less culpable than his codefendant and where Mr. Dean was convicted of fewer offenses, was there any rational basis to nonetheless impose a substantially harsher sentence upon Mr. Dean as compared to his codefendant?

D. STATEMENT OF THE CASE

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP 130. At the time of Mr. Rennebohm's purchase, Lisa Mullen was employed in the bookkeeping department of the dealership and soon Mr. Rennebohm made her the comptroller. 1/18/06 RP 132. Mr. Dean

was hired as the dealership's general manager in 1996. Richard Rekdal, and his firm Clothier and Head, were retained as both Frontier Ford's accountant as well as Mr. Rennebohm's personal accountant beginning in the early 1990's.

Every employee at Frontier Ford had an account receivable which allowed them to take preauthorized draws on their salaries or in some instances loans from the dealership. 1/9/06 RP 91; 1/18/06 RP 172. The account balances were then deducted from subsequent salary. 1/21/06 RP 91. In June 2002, Mr. Rennebohm contacted Anacortes Police alleging Ms. Mullen had stolen hundreds of thousands of dollars from Frontier Ford. 1/5/06 RP 71. Despite the amounts allegedly involved, Mr. Rennebohm urged police to wrap up their investigation in a matter of days and simply arrest Ms. Mullen. 1/5/07 RP 79.

In their most basic form, the alleged thefts concerned Ms. Mullen using draws from her own account receivable, as well as those of other current and former employees, to purchase nonbusiness items for personal use. Through the machinations of the bookkeeping process, Ms. Mullen was then able to "pay off" the debts reflected in the accounts receivable by transferring funds from other accounts within Frontier Ford's ledger, but without ever actually paying money back to Frontier Ford. Given the fact that Frontier Ford's annual sales totaled nearly \$80 million dollars, Ms.

Mullen's mispostings within the ledger went unnoticed for years, even as the accumulated misstatements surpassed \$1,200,000. 1/25/06 RP 82, 181

Because the Anacortes Police Department did not have the ability to investigate such complex allegations of fraud, the Skagit County Prosecutor elected to retain Mr. Rekdal to investigate the allegations. 1/5/07 RP 87; 1/30/06 RP 94-95. Despite working on behalf of the prosecutor's office, Mr. Rekdal and his firm continued to act as Frontier Ford and Mr. Rennebohm's personal accountant. 1/26/06 27-30; 1/27/06 RP 46. During the course of the investigation, Mr. Rekdal learned that over the course of years Mr. Rennebohm had underreported a substantial amount of corporate and personal income, between \$250,000 and \$1,000,000, had used corporate funds to pay off personal loans, and had failed to pay state or federal taxes on any of those funds. CP 1262-75. Despite the fact that he was at that time retained by the Skagit County Prosecutor's office, Mr. Rekdal did not reveal the information to the parties in the present matter. CP 1266. The full extent of Mr. Rekdal's nondisclosure is discussed in greater detail in the arguments that follow.

The vast majority of questionable transactions in Frontier Ford's books were posted by Ms. Mullen personally, and the remainder were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. Mr. Dean did not write a single check or make a single inappropriate transfer

or posting in Frontier Ford's book. Unlike the hundreds of thousands of dollars of purchases traced directly to Ms. Mullen by receipts, checks, and even pictures, the State did not offer a single transaction traceable to Mr. Dean. See 1/8/06 RP 180 (testimony regarding Ms. Mullen writing checks to herself and debiting amount to Mr. Dean's account receivable); 1/9/06 RP 15-23 (detailing Ms. Mullen's purchase of more than \$33,000 in jewelry in 20 month period); 1/11/06 RP 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly \$32,000 in a seven month period); 1/11/06 RP 181-84 (detailing Ms. Mullen's purchases of stuffed toy rabbits from Bunnies by the Bay totaling \$19,622); 1/13/06 RP 140-50 (detailing Ms. Mullen's purchases at St John Boutique totaling nearly \$75,000 over four months), 1/17/06 RP 34 (detailing single purchase of jewelry by Ms. Mullen totaling \$17,500).

Ms. Mullen testified the mispostings which were at the heart of the state's case were done with Mr. Rennebohm's knowledge and approval. 1/31/06 RP 120; 2/1/06 RP 42 Ms. Mullen testified the postings were designed to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 160. By reducing the reported profits, the postings decreased the salaries of managers (such as Mr. Dean) whose pay was in part determined as a percentage of profit. 1/31/06 RP 161-62. In return for her involvement, Mr. Rennebohm

provided her numerous and expensive gifts purchased by Frontier Ford.

1/31/06 RP 163.

A large portion of Mr. Dean's salary was determined based upon the dealership's monthly sales, his salary fluctuated significantly from month to month depending on monthly sales. Because Mr. Dean was then going through a divorce and needed a predictable monthly pay from which to calculate child support, Ms. Mullen testified that at the direction of Mr. Rekdal and with Mr. Rennebohm's knowledge, she created an accrued salary account for Mr. Dean in which, after paying Mr. Dean a predetermined amount each month in salary, she deposited his surplus monthly income. 1/29/06 RP 65-68; 1/31/06 RP 127-28. Ms. Mullen testified she ceased using the account for that purpose in 1999 at the direction of Mr. Rekdal because of potential tax liabilities arising from the accrued salary structure. 2/1/06 RP 43-45. Ms. Mullen testified that without Mr. Dean's knowledge, she continued to use that account, which still bore Mr. Dean's name, to launder money from her other activities. 2/1/06 RP 44-45. Mr. Rekdal confirmed that numerous postings in this second account were for checks written to and endorsed by Ms. Rennebohm and for items purchased by Ms. Mullen. 1/27/06 RP 82.

Numerous witnesses testified that Mr. Dean and Ms. Mullen had a romantic relationship at some point in time while both were employed at Frontier Ford. 1/6/06 RP 151; 1/13/06 RP 47.

Mr. Dean was charged with one count each of first degree theft, conspiracy to commit first degree theft, and criminal profiteering. CP 542-52. At the close of the State's case, the trial court dismissed the profiteering count against Mr. Dean, but while noting the paucity of evidence on the remaining counts refused to dismiss them. 1/31/06 RP 54.

Following a trial in January and February 2006, a jury convicted Mr. Dean of both the remaining theft and conspiracy charges. CP 1030-31. Following the jury's verdict Mr. Dean stipulated the facts presented at trial established the crimes were a major economic offense. CP 1032.

In the weeks following the verdict, Mr. Dean obtained copies of documents filed in a lawsuit brought by Mr. Rennebohm against Clothier and Head. 5/19/06 RP 5. In particular, the documents for the first time revealed Mr. Rekdal was aware, at least two years before the trial in this case, of Mr. Rennebohm's embezzlement and tax evasion. 5/19/06 RP 12. The documents revealed that immediately following his trial testimony, Mr. Rekdal had significant doubts in the truth of Mr. Rennebohm's claim's of ignorance of the alleged thefts.

Based on this information Mr. Dean filed a motion for new trial alleging the State had violated Brady by failing to disclose evidence known to its investigator. CP 1188. The trial court denied the motion, concluding the State's obligation did not extend beyond information known to the prosecutor himself. CP 1279-1280.

The court imposed an exceptional sentence of 30 months. CP 1283-94.

E. ARGUMENT

1. THE STATE DEPRIVED MR. DEAN OF DUE PROCESS BY FAILING TO DISCLOSE MATERIAL EVIDENCE.

The State withheld information from Mr. Dean regarding the fact its lead investigator had an actual conflict of interest based upon his contemporaneous role as the victims accountant as well as evidence of criminal acts by the victim discovered in the course of the investigation. The Court of Appeals concluded the suppression of this material information did not violate Brady. As set forth below, that conclusion is contrary to United States Supreme Court precedent and presents a substantial constitutional issue.

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; California v. Trombetta,

467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires the government disclose to a defendant material evidence. Brady, 373 U.S. at 87. This requires the government disclose to a defendant all exculpatory or impeachment evidence whether it is requested or not. Brady, 373 U.S. at 87; see also Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

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, 527 U.S. at 281-82.

Non-disclosed evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Bagley, 473 U.S. at 682. More specifically, the Court has emphasized four points regarding this test of materiality. This standard does not require a defendant to show the withheld evidence would have led to an acquittal. Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995).

The Brady rule encompasses evidence beyond that actually known by the prosecutor because “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case..” Kyles, 514 U.S. at 437.

a. The State suppressed material information. The Court of Appeals concluded the withheld information was not material. Opinion at 11-12. If a homicide detective withheld information of his relationship with the victim of the case he was investigating, that evidence would plainly be material and its suppression would certainly violate Brady. Plainly, if nothing else that information would be material to the investigator’s credibility and raise questions about the judgments he made in his investigations. Yet the Court of Appeals concluded that Mr. Rekdal doing precisely the same thing did not violate Brady.

The court excuses the State’s failure to disclose saying “[t]hey had no reason to perceive the exculpatory value of documents . . .until Mullen testified at trial.” Opinion at 14. The opinion also states “the prosecutor did not recognize that the entries were significant to the defense.” Opinion at 15-16. Those two sentence alone, undercut the opinion’s conclusion that the evidence was not material. First, those statements necessarily recognize the information was material, they simply excuse the nondisclosure. Indeed, the State’s response brief makes that implicit

concession as well. Brief of Respondent at 23. Second, even if the State was unaware of the evidence's materiality prior to trial, the obligation under Brady does not merely exist pretrial. Third, a Brady violation arises regardless of whether the withholding of evidence is intentional or inadvertent. United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Fourth, whether the prosecutor had personal knowledge of the information or its materiality is irrelevant. Kyles, 514 U.S. at 437. The fact that Mr. Rekdal or even the prosecutor did not appreciate the materiality of the evidence does not matter as it is the court that is the final arbiter of materiality. Kyles, 514 U.S. at 438., Thus, Mr. Rekdal's or the prosecutor's subjective view of the evidence is irrelevant.

But Mr. Rekdal withheld the information precisely because he understood its materiality. First he withheld it because he implicated a former client, who happened to be the alleged victim in the present case. Second, he disclosed it in the professionally liability suit because it rebutted Mr. Rennebohm's claims in precisely the same fashion that Mr. Dean attempted in his trial; i.e. what made it relevant as a defense in the civil suit is precisely what made it material in Mr. Dean's trial. When asked during his deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Mr. Dean and Ms. Mullen, Mr. Rekdal invoked the attorney client privilege.

CP 6517 (Deposition p.169). Mr. Rekdal fully appreciated the import of the evidence he withheld.

Mr. Rekdal's opinion **was** the State's evidence that Mr. Dean committed a crime. Unlike Ms. Mullen, the State did not present evidence of a single misposting by Mr. Dean, nor did it present a single item of evidence to establish that Mr. Dean received any unauthorized funds.

On February 7, 2006, one week after he completed his testimony at trial, Mr. Rekdal stated during his deposition that he had testified at the trial that money had left Frontier Ford and this was done without the authorization of Mr. Rennebohm. CP 6564 (Deposition p 245). Mr. Rekdal then stated that despite his recent trial testimony, while he was certain money had left the corporation he could no longer say it was done without Mr. Rennebohm's authorization. CP 6564-65 (Deposition pp 245-48). When asked if he had shared his doubts with the prosecutor, Mr. Rekdal responded "he hasn't asked." CP 6564 (Deposition p 246). The exclusion of this information by the State's principal investigator, made under oath on the same day the case was submitted to the jury, substantially undermines confidence in the jury's verdict. Had Mr. Rekdal expressed similar hesitancy at trial, the State's proof that Mr. Dean committed theft, weak as it already was, would have evaporated.

The evidence was plainly material, and that is precisely why Mr. Rekdal withheld it.

This Court of Appeals's analysis of the materiality of the suppressed evidence is contrary to well-settled United States Supreme Court precedent and is inconsistent with the factual record before the court. In concluding the evidence was not material, the opinion of the Court of Appeals presents a substantial question under the Due Process Clause of the Fourteenth Amendment. Thus, this Court should grant review of this matter under RAP 13.4.

b. The State's obligation under *Brady* is not excused by speculation that a defendant might have learned of the information on his own. The Court of Appeal's concluded no Brady violation occurred here as the opinion speculates Mr. Dean could have discovered the suppressed evidence on his own. Opinion at 11 (citing inter alia State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004)) The cited portion of Thomas, in turn cites to In re the Personal Restrain of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). Yet Thomas fails to mention Benn was overturned on habeas review. See Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002) (holding this Court's holding was a clearly erroneous and an unreasonable application of Brady).

The Ninth Circuit did not reach the question of whether a defendant has an obligation to seek out information which the State is suppressing, because the court found the Brady violation so egregious. Id. at 1061. However, in concluding this Court's holding was an unreasonable application of Brady, the court questioned the validity of imposing such a requirement on defendants in light of the requirement of Kyles. Id. at 1061-62.

In fact, the Supreme Court has found Brady applies even where a defendant never requested disclosure of the information. Agurs, 427 U.S. at 106; United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Kyles, 514 U.S. at 434-35. When asked why he had not disclosed information, Mr. Rekdal responded because no one asked. CP 6564 (Deposition p 246). Under Agurs, Bagley, and Kyles, the failure to ask does not relieve the State of its obligation under Brady. Due diligence by a defendant is not a component of the analysis under Brady.²

Even if a due-diligence standard existed there is simply no way Mr. Dean could have discovered the evidence which the State withheld.

² The opinion also cites to Rector v. Johnson, 120 F.3d 551, 558 (5th Cir. 1997), as support for the notion that due diligence is component of a Brady. Indeed that decision identifies due diligence as the fourth component of a Brady claim. Id. However, in Strickler, the Court made clear a Brady claim has only three components, and does not list due diligence among them. 527 U.S. at 280.

Such a conclusion fails to appreciate what exactly Mr. Rekdal withheld and why he did so. Mr. Rekdal did not disclose the information because of his professional obligation to his former client prevented it. CP 1266. That obligation existed regardless of whether the prosecutor or defense counsel asked Mr. Rekdal to divulge what he knew. In light of his willingness to withhold the information from a client who was paying him nearly a quarter of a million dollars precisely to investigate the books of Frontier Ford, there can be no reason to expect Mr. Rekdal would have ever disclosed that information to the defendants no matter how hard they tried to find it. But for a mistake by an employee at the King County Superior Court Clerk's Office the evidence would have never come to light. And, the only reason Mr. Rekdal discussed this information during the course of his deposition, was that that deposition was part a of a professional liability suit by Mr. Rennebohm and thus the privilege was waived. However, the deposition, as with much of the case, was sealed because of the disclosure of privileged information. If Mr. Rekdal was willing to withhold the information from a client that paid him nearly \$250,000 there is no way imaginable that Mr. Dean could have pried that information from him. Even if such a standard could coexist with Brady and Kyles, there is no reasonable basis to conclude Mr. Dean could have discovered the information.

The conclusions that Brady imposes a due-diligence standard is contrary to United States Supreme Court precedent and presents a substantial question under the Fourteenth Amendment. Thus this Court should grant review under RAP 13.4

2. THE STATE FAILED TO PRESENT
SUFFICIENT EVIDENCE FROM WHICH TO
CONVICT MR. DEAN OF EITHER COUNT.

The State presented overwhelming evidence to establish Ms. Mullen's guilt of each the three crimes of which she was convicted. By contrast the sum of the State's evidence to support Mr. Dean's convictions was that he may have been aware of Ms. Mullen's activities and that he and Ms. Mullen had a prior romantic relationship. Mr. Dean's convictions, based upon this paucity of evidence, deprived him of due process.

In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The State did not prove Mr. Dean made a single posting or wrote a single check taking money from Frontier Ford. Instead, every questionable posting was made by Ms. Mullen or the bookkeeping staff she supervised.

The State was able to offer mountains of receipts, cancelled checks and other records detailing Ms. Mullen's use of Frontier Ford money to buy things such as jewelry, clothes, and stuffed rabbits. The State was able to offer photographs of Ms. Mullen wearing some of those items. The State was even able to demonstrate the resale of some of these items by Ms. Mullen on eBay. But the State could not point to a single item purchased by Mr. Dean with Frontier Ford's money.

What the State proved was Mr. Dean was the general manager, responsible for the day-to-day operations at Frontier Ford, and that he had at one time had a romantic relationship with the comptroller who admitted making erroneous bookkeeping entries. The State proved that many of these entries were made in Mr. Dean's account, and that checks were drawn off those accounts. But the State did not prove that Mr. Dean ever received money or anything of value in excess of what he was owed by the dealership. The Court of Appeals concluded that because Mr. Dean

endorsed these checks when his account showed a balance owing he knew he was acting contrary to the company policy and thus was complicit in Ms. Mullen's actions. Opinion at 22. That conclusion ignores the fact that the State's proof established identical activity in Mr. Rennebohm's account and yet he was never charged him with theft. And the reason why was that there was no policy against such acts by an employee.

At best the State established Mr. Dean's knowledge of Ms. Mullen's activities. Knowledge of another's criminal activities is insufficient to prove complicity in those crimes.

One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed. State v. Gladstone 78 Wn.2d 306, 474 P.2d 274 (1970); Nye & Nissen v. United States, 336 U.S. 613, 619, 93 L.Ed. 919, 69 S.Ct. 766 (1949). Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime. State v. Gladstone, supra; State v. Dalton, 65 Wash. 663, 118 P. 829 (1911).

In re the Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161

(1979). Thus, without some evidence beyond his potential knowledge of Ms. Mullen's acts, the State did not establish Mr. Dean committed either a theft or was engaged in a conspiracy to commit a theft.

By affirming Mr. Dean's convictions based merely upon his potential knowledge of Ms. Mullen's acts, the opinion of the Court of

Appeals presents substantial issue under the Fourteenth Amendment, and this Court should accept review under RAP 13.4.

3. THE TRIAL COURT DEPRIVED MR. DEAN OF EQUAL PROTECTION IN IMPOSING A DISPROPORTIONATELY HARSHER SENTENCE ON HIM AS COMPARED TO HIS MORE CULPABLE CO-DEFENDANT.

Despite finding Mr. Dena was less culpable than is codefendant, the trial court imposed a sentence on Mr. Dean that was substantially and disproportionately harsher than the more culpable codefendant. That sentence deprives Mr. Dean of the equal protection of the law in violation of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution “directs that ‘all persons similarly circumstanced shall be treated alike.’” Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed.2d 989 (1920)). Where either a suspect class is involved or a fundamental right is at stake, a court must apply strict-scrutiny analysis to disparate treatment of similarly situated people. Doe, 457 U.S. at 216. Strict scrutiny requires the government show the disparate treatment is “precisely tailored to serve a compelling governmental interest.” Id. at 217.

While equal protection analysis often focuses on legislative acts, “[a] denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons.” Stone v. Chelan Cy. Sheriff's Dep't, 110 Wn.2d 806, 811, 756 P.2d 736 (1988); State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). In such a scenario, a defendant establishes his membership in a class where he demonstrates he was alleged to have engaged in similar conduct as a codefendant. Handley, 115 Wn.2d at 290; State v. Caffee, 117 Wn.App. 470, 480 n.3, 68 P.3d 1078 (2002), review denied, 149 Wn.2d 1023, cert. denied sub nom., Musgrave v. Washington, 540 U.S. 1059 (2003). Once a defendant establishes his membership in the class, a reviewing court must determine if there is a basis justifying disparate treatment of members of the class. Handley, 115 Wn.2d at 290.

The jury and trial court each found Ms. Mullen to be more culpable than Mr. Dean. While the jury convicted Ms. Mullen of criminal profiteering in addition to the theft and conspiracy charges, 2/7/06 RP 2, the trial court dismissed the profiteering charge against Mr. Dean at the close of the State’s case but the jury convicted Ms. Mullen of that charge. 1/31/06 RP 54. In ruling on Mr. Dean’s motion for a new trial, the court again recognized the disparity in proof of Ms. Mullen’s acts as opposed to those of Mr. Dean. CP 1280. Finally at sentencing, the court stated:

Now I happen to agree with [defense counsel] that it was clear to me . . . that one person benefited significantly more than the other in this case, and I think it is appropriate to distinguish between the two when it comes to sentencing.

12/11/06 RP 42. Even the prosecutor recognized “it’s a little different for the two defendants because count three for Mr. Dean was dismissed.”

12/11/006 RP 13.

The court imposed an exceptional sentence upon Mr. Dean which is six times greater than his standard range. CP 1285-1287, 12/11/06 RP 42. Despite the universal agreement regarding Mr. Mullen’s substantially greater culpability, the court imposed only a 36 month exceptional sentence which is only 2.57 times greater than Ms. Mullen’s standard range.³ Despite the fact that she received 6 months more than Mr. Dean, relative to Ms. Mullen, Mr. Dean’s sentence is more than twice as onerous, despite the recognition that she was substantially more culpable than he. In fact, had the court simply imposed the top end of each defendant’s standard range, Ms. Mullen’s sentence would have been 9 months longer than Mr. Dean’s. Yet after an exceptional sentence was imposed that gap relative to each other, narrowed to only six months. Even had the court simply employed the same multiplier (2.57), an arguably indefensible position based on Ms. Mullen’s greater culpability,

³ Ms. Mullen’s offender score was three and her standard range was 12 month + 1 day to 14 months. 12/11/06 RP 14.

Mr. Dean's sentence would only have been 12.85 months. In light of the trial court's repeated recognition of the relative weight of evidence, as well as the court's stated intent at sentencing there is no rational basis to justify the substantially harsher sentence imposed on Mr. Dean.

On appeal, the State correctly observes Ms. Mullen had an additional conviction and that Mr. Dean and Ms. Mullen were not "similarly situated by virtue of nearly identical participation." Response at 42. But lost on the State is that both these factors weigh substantially in favor of a harsher sentence for Ms. Mullen, and do not provide support for Mr. Dean's disproportionately harsher sentence. The State nonetheless posits Mr. Dean's position as general manager supports the disproportionately harsher sentence. Response at 42. But this is not a meaningful distinction for a variety of reasons.

First, it contradicts the State's own admissions at sentencing that Ms. Mullen was more culpable. 12/11/06 RP 13. Second, it contradicts the trial court's own finding that Ms. Mullen "benefited significantly more than" Mr. Dean and "it is appropriate to distinguish between the two" for sentencing purposes. 12/11/06 RP 42. Third, Ms. Mullen's position as comptroller plainly but her in position of authority, at least of financial matters, equal to or greater than Mr. Dean. Fourth, the State's theory is wholly unsupported by the jury's verdicts.

Nonetheless, the Court of Appeals rejected Mr. Dean's equal protection claim saying "the evidence supported a conclusion that Dean was more culpable." Opinion 27-28. Assuming that's true, that is not conclusion the trial court reached. Quite to the contrary, the trial court concluded Ms. Mullen "benefited significantly more than" Mr. Dean and "it is appropriate to distinguish between the two" for sentencing purposes. 12/11/06 RP 42. Indeed, the State conceded Ms. Mullen was more culpable. 12/11/06 RP 13.

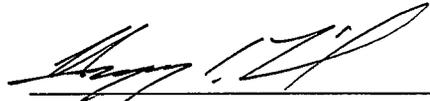
What the trial court appears to have done is fail to account for the fact that Mr. Dean's standard range was not the same as Ms. Mullen. Thus, when the court imposed the sentence on Mr. Dean, the court plainly thought it was imposing a less onerous sentence. In fact it was not.

Thus the only question on appeal is whether having found Mr. Dean less culpable there is a rational basis for the trial court to impose a sentence that is more than twice as onerous as Ms. Mullen's sentence. There is no basis for that disparate treatment. The opinion of the Court of Appeals presents a substantial question under the Fourteenth Amendment and review is proper under RAP 13.4.

F. CONCLUSION

For the reasons set forth above, this Court should grant review of
the opinion of the Court of Appeals in Mr. Dean's case.

Respectfully submitted this 8th day of February, 2010.



GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

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JAN - 8 2010

Washington Appellate Project

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,

Appellant.

NO. 59389-7-1

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant Kevin Dean having filed a motion for reconsideration of the opinion filed October 26, 2009, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 8th day of January 2010.

FOR THE COURT:

Becker, J.
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN - 8 AM 11:07

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

OCT 26 2009

Washington Appellate Project

STATE OF WASHINGTON,)	NO. 59388-9-I
)	
Respondent,)	
)	
v.)	
)	
LISA A. MULLEN,)	
)	
Appellant.)	
<hr/>)	
STATE OF WASHINGTON,)	NO. 59389-7-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
KEVIN DEAN,)	
)	
Appellant.)	FILED: October 26, 2009

BECKER, J. — Lisa Mullen and Kevin Dean were convicted of stealing from their employer, Frontier Ford. Their defense was that the owner of Frontier Ford had actually authorized them to withdraw company funds for their personal use as part of his own scheme to hide assets.

The company's former accountant provided testimony that helped to establish the amount of money taken out of the company for nonbusiness purposes. After their trial, Mullen and Dean discovered that in a related lawsuit brought by the owner against the accountant, the accountant had given testimony calling into question the honesty of the owner. They sought a new trial alleging that the substance of the accountant's new testimony had been withheld from them, and they could have used it at trial to corroborate their defense and to impeach the owner and the accountant.

We conclude the trial court properly denied a new trial, both because the defendants could have obtained the evidence on their own before trial, and because the evidence was cumulative or too speculative to be material. We affirm.

FACTS

According to testimony at trial, Lisa Mullen became the office manager of Frontier Ford in 1992. One of her responsibilities was to keep the dealership's account books. Frontier Ford's owner, Ron Rennebohm, hired Kevin Dean in 1996 to be the dealership's general manager. Within months after Dean was hired, he and Mullen began a romantic relationship and eventually lived together for a time.

Mullen and Dean were observed spending a significant amount of time together each month in the office, going over Frontier Ford's financial statements.

Mullen's wardrobe changed dramatically. She told co-workers that she earned a lot of money buying and selling items on eBay, implying that explained how she could afford expensive designer clothes. When another employee complained to Dean about Mullen spending so much time on eBay, he told the employee to do her own work and forget about Mullen and eBay.

By late 2001, Rennebohm's wife suspected that Mullen was stealing from Frontier Ford. In early 2002, Rennebohm hired a consultant to look over the operations and soon brought him on as the corporate general manager. As a result of discussions with the new manager, Rennebohm fired Dean in late May 2002. Mullen commented to another employee, "I may be next."¹ Rennebohm called Rick Rekdal, his long-time personal and business accountant from the Seattle firm of Clothier and Head, and asked him to look over the financial books and records to find out whether money was "leaving the store."² Aware that the accountant would soon be arriving, Mullen made an appointment to talk to Rennebohm privately. Rennebohm testified that during this conversation, Mullen admitted she had been stealing from him and told him "it snowballed" on her. She said she had a rental house that she would sell to pay the money back, but if he fired her, "she could never pay us back." Referring to money Dean had borrowed from the company, Rennebohm said he asked Mullen "did he ever pay

¹ Report of Proceedings (Jan. 9, 2006) at 125.

² Report of Proceedings (Jan. 24, 2006) at 40.

that \$60,000 back that you said that he did." Mullen responded that Dean did not pay it back and in fact owed another \$200,000.³

After this conversation Rennebohm reported his suspicions to the Anacortes police and an investigation ensued. Rekdal and his staff spent weeks tracing transactions posted on the books of the dealership and discovered that Mullen had been responsible for manipulating the accounts for the benefit of herself and Dean. The State filed first degree theft and other related charges against Mullen and Dean. The police investigators did not have sufficient skills to establish how much had been stolen, so in 2003, the Skagit County prosecutor hired Rekdal for that purpose.

More than three years elapsed before the case went to trial in January 2006. The joint trial of Dean and Mullen took up the entire month of January. Frontier Ford employees testified that Rennebohm relied upon Mullen and Dean to run Frontier Ford. Rennebohm did not come to the dealership every day, but even when he did, he did not look closely at the account books. He did not even have a password to log on to the computer. Mullen was the only person at the dealership who had access to all of the databases in the computer, giving her the ability to hide her transactions.

Mullen's yearly salary at Frontier Ford never exceeded \$77,000, but a variety of merchants established that she bought thousands of dollars worth of

³ Report of Proceedings (Jan. 19, 2006) at 76.

clothing, jewelry, and other goods unrelated to the auto business using Frontier Ford checks. For example, she spent more than \$27,000 at a clothing boutique in Seattle in one year and spent \$14,925 in one day at a store in Palm Desert, California.

Rennebohm testified that he trusted Mullen and Dean to run the dealership. He denied that he authorized them to spend dealership money for their personal expenses.

Rekdal's testimony explained how, through the use of a complex system of draws and balance transfers, Mullen was able to write checks that benefited her and Dean personally without being detected. According to Rekdal's testimony, the total amount of money that left Frontier Ford in this manner for nonbusiness purposes was \$1.2 million over a six-year period.

In her defense, Mullen acknowledged spending the dealership's money, but claimed that everything she did at Frontier Ford had been authorized by Rennebohm. She testified that over the years she had loyally followed Rennebohm's instructions to assist him in "cooking the books"⁴ and hiding profits from his ex-wife, the government, a former business partner, and employees such as Dean whose salaries depended on the company's profits. She said he told her that her assistance had helped him to make "millions."⁵ According to Mullen, Rennebohm approved of her spending the company's money on Dean's

⁴ Report of Proceedings (Feb. 1, 2006) at 21.

⁵ Report of Proceedings (Feb. 1, 2006) at 24.

behalf as a means of retaining him because he was an extremely talented manager. She said the jewelry and other personal items she purchased with corporate checks were approved by Rennebohm, either as gifts that he intended to give to others, or as a reward to her for keeping quiet about his own bad acts, and in keeping with his insistence that his employees present a nice image. Mullen testified that she met with Rennebohm when she heard the accountants were coming for the sole purpose of asking him what he wanted her to tell them.

Dean did not testify. His defense theory was that he was unaware of Mullen's misappropriation of the dealership's funds and that he did not benefit from her acts.

On February 7, 2006, the jury brought in a verdict convicting both defendants of theft in the first degree and conspiracy to commit theft in the first degree. Mullen was also convicted of criminal profiteering based on the evidence that she was buying and reselling merchandise through eBay. The defendants filed motions for a new trial that were heard in November 2006.

The motions for a new trial arose from the defendants' discovery of testimony given by accountant Rick Rekdal in another lawsuit. Rekdal's accounting firm, Clothier and Head, had terminated Rennebohm and his dealerships as a client in July 2004. Six months later, Frontier Ford sued Clothier and Head for accounting malpractice, alleging that Rekdal should have discovered Mullen's and Dean's embezzlement sooner. From this point forward

the Skagit County prosecutor's contact with Rekdal was limited because he felt that ethical considerations compelled him to coordinate all conversations with Rekdal through defense counsel for Clothier and Head.⁶

The King County court issued protective orders with respect to much of the discovery and other substantive pretrial activity in the malpractice lawsuit. But the litigants in the criminal trial knew that Rekdal's firm had refused to continue working for Rennebohm and his companies as of July 2004. They were aware of the malpractice lawsuit and they had a copy of the complaint and answer.⁷

Rekdal gave his testimony on behalf of the State at the criminal trial of Mullen and Dean in Skagit County during the last week of January 2006. On January 31, 2006, while the criminal trial was still going on, Rekdal gave a deposition in Seattle in the malpractice lawsuit. A week later, Mullen and Dean were found guilty.

In May 2006, Clothier and Head reached a confidential settlement with Frontier Ford. At this time, the defendants in the criminal matter obtained a transcript of Rekdal's deposition. They then obtained an unsealing order from the court in King County for the depositions and the rest of the record, including declarations given by Rekdal in support of his firms' motions.

⁶ Clerk's Papers at 6094.

⁷ See, e.g., Report of Proceedings (Jan. 26, 2006) at 81 et seq.

In the malpractice lawsuit, one of Rennebohm's claims was that he had relied on Rekdal's accounting firm to help him stay out of trouble in terms of taxes. Rekdal testified that there could have been no such reliance because Rennebohm had on occasion failed to provide his firm with information critical to preparing correct tax returns.⁸ Asked about this during his deposition, Rekdal testified that when he was working on the criminal case, he saw entries on Frontier Ford's books that led to his discovery of information showing that some income was not being properly reported.⁹ Rekdal also testified that until the criminal trial, he had no reason to question Rennebohm's representation that Dean and Mullen took the money without his authorization. But after Rekdal heard about Mullen's defense at trial, he was not so sure: "I don't know what to believe anymore."¹⁰ He said he had caught Rennebohm "in several misstatements."¹¹ For example, Rennebohm said he never authorized Mullen to have medical insurance, but Rekdal later found signed documents in Mullen's personnel file showing that Rennebohm did authorize the insurance.

Dean and Mullen used these excerpts in support of their motion for a new trial. They alleged that whereas Rekdal's testimony in the criminal trial had depicted Rennebohm as an innocent victim of the defendants' duplicitous behavior, he changed his tune when defending himself from Rennebohm's

⁸ Rekdal Second Declaration, Clerk's Papers at 5701 et seq.

⁹ Clerk's Papers at 6575, Deposition at 285.

¹⁰ Clerk's Papers at 6564, Deposition at 246.

¹¹ Clerk's Papers at 6567, Deposition at 258.

accusations of malpractice and suggested that Rennebohm was intentionally hiding income. In their view, Rekdal should have given that same testimony in the criminal trial, where they could have used it to corroborate Mullen's testimony that Rennebohm was himself a crook who had authorized her to make personal withdrawals as part of a general scheme to hide income.

The defendants sought a new trial based upon CrR 7.5 (newly discovered evidence), and they also alleged that Rekdal's failure to disclose his doubts about Rennebohm's integrity was a breach of the State's duty under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The trial court denied the motions.¹² These linked appeals followed.

ALLEGED BRADY VIOLATION

Review of a motion denying a new trial based on alleged Brady violations is de novo. United States v. Woodley, 9 F.3d 775, 777 (9th Cir. 1993). Brady holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The duty to disclose favorable evidence to the defense encompasses impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The evidence is material if there is a reasonable probability that

¹² Clerk's Papers at 1279.

the result of the proceeding would have been different if the evidence had been disclosed. Bagley, 473 U.S. at 682. A true Brady violation, therefore, has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The State does not need to "disgorge every piece of evidence in its possession." Rector v. Johnson, 120 F.3d 551, 558 (5th Cir. 1997). Rather, the State must disclose evidence that is favorable to the accused and material to guilt. Rector, 120 F.3d at 558. When deciding if evidence is material under Brady, the question to ask is whether it could reasonably be taken to put the whole case in a different light, thereby undermining confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). "For example, where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." United States v. Avellino, 136 F.3d 249, 257 (2^d Cir 1998). Similarly, the government is not obligated under Brady to communicate preliminary or speculative information. United States v. Diaz, 922 F.2d 998, 1006 (2d Cir.

1990). There also is no Brady violation if the defendant, using reasonable diligence, could have obtained the evidence himself. Rector v. Johnson, 120 F.3d 551, 558 (5th Cir. 1997); State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004). "The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." Rector, 120 F.3d at 558-59. Even when the State destroyed drunk drivers' breath samples, the United States Supreme Court held that the State did not violate the defendants' due process rights because, to be constitutionally material, the evidence needed to "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

A prosecutor has a duty to learn of any favorable evidence "known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. We assume, without deciding, that the prosecutor's duty extends to information known to a private individual like Rekdal who assists the prosecution with its case.

The main evidence that Mullen and Dean argue should have been disclosed by Rekdal related to "PIPI" income. "PIPI" (Payment Insured Plan Inc.) refers to a payment insurance plan that Frontier Ford offered its customers. The

insurance was provided by National Warranty Corporation, which loaned money to Rennebohm, Frontier Ford, and Rennebohm's other dealerships. According to Mullen's testimony at trial, Frontier Ford charged its customers a premium for the insurance, which National Warranty refunded to Frontier Ford to pay off Rennebohm's and the dealerships' loans. Mullen testified that PIFI income should have been credited to the dealership, but Rennebohm directed her to credit it to his personal account to hide the income from others, including his former business partner Ragnar Pettersson, the government, and employees whose pay was based on the dealership's profits.¹³

In the deposition for Rennebohm's civil suit, Rekdal said that he knew Ragnar Pettersson had complained about Rennebohm keeping PIFI income for himself. Rekdal said he had asked Rennebohm about the income to be sure it was properly reported, and Rennebohm admitted keeping it. Rekdal reported the income on Rennebohm's personal tax return, but later, when Rennebohm showed Rekdal the actual loan documents, Rekdal concluded that some of the income should have been reported on Frontier Ford's corporate tax returns.¹⁴

Mullen and Dean argue that Rekdal was obligated under Brady to disclose, pretrial, his concerns that Rennebohm was not properly reporting the PIFI income because it supported the defense theory that Rennebohm allowed Mullen to spend Frontier Ford's money for her personal use in exchange for her

¹³ Report of Proceedings (February 1, 2006) at 16-19, 85.

¹⁴ Clerk's Papers at 6575-76; 6490-6494.

silence about his own misconduct. The argument is unpersuasive for a variety of reasons.

To begin with, the record on appeal includes thousands of pages of documents. Some of the appellants' argument consists of sweeping statements without a pinpoint cite to any particular page or document. For example, Mullen contends that in his deposition, Rekdal "described in detail his actual knowledge of Mr. Rennebohm's significant involvement" in Lisa Mullen's irregular transactions at Frontier Ford. Mullen cites to the entire deposition.¹⁵ We are unable to find any particular statement in the deposition that confirms this general statement. Mullen also alleges generally that other exculpatory and impeaching evidence was withheld; that Rekdal had "significant involvement in Mr. Rennebohm's business dealings"; that he had "a conflict of interest that prevented him from fully testifying about his knowledge," and that he had a "financial incentive to give misleading testimony."¹⁶ For these arguments, Mullen cites to Clerk's Papers 4066-6696, the entire collection of more than 1,800 pages of documents submitted in support of their motion for a new trial. Without more specific support in the record, these allegations do not warrant careful scrutiny.

Most of the documents cited relating to PIPI come from Frontier Ford's lawsuit against Clothier and Head, including Clothier and Head's discovery requests for PIPI evidence from Rennebohm and National Warranty Corporation.

¹⁵ Br. of Appellant Mullen at 7-8.

¹⁶ Br. of Appellant Mullen at 22.

The defendants suggest that Clothier and Head's discovery requests show that Rekdal and his firm understood the relevance of the PIFI evidence in the criminal case. But before trial, neither Rekdal nor the prosecutor knew what the defense in the criminal case would be. They had no reason to perceive the exculpatory value of documents relating to PIFI until Mullen testified at trial and claimed that Rennebohm was complicit in her manipulation of the accounts.

Furthermore, Mullen and Dean knew before trial that there was a basis for questioning whether Rennebohm had properly reported PIFI income and, if not, whether his actions were intentional. This is made abundantly clear by the State's recitation of the procedural history of the case¹⁷ and the State's accompanying brief in response to the motion for a new trial.¹⁸ Moreover, the defendants shared information with Rennebohm's former partner, Ragnar Pettersson, who had sued Rennebohm over a \$1.4 million promissory note. Pettersson had also accused Rennebohm of keeping PIFI income that belonged to their jointly-owned dealership. The lawyer who represented Pettersson also represented Dean in a civil suit that Rennebohm brought against Mullen and Dean. That lawyer had documents from the Pettersson litigation showing the address and telephone number of Northwest Warranty Corporation, which Mullen and Dean could have used to subpoena PIFI evidence to support their defense.

¹⁷ Clerk's Papers at 6962-7005.

¹⁸ Clerk's Papers at 6913-6931.

Mullen herself testified that Rennebohm asked her to direct PIPI income to his home and that "the PIPI thing is huge."¹⁹

The initial discovery provided by the State to the defendants also included references to PIPI income. Rennebohm's receivables account, for example, included entries related to PIPI notes. The prosecutor did not recognize that the entries were significant to the defense. But questions the defendants asked Rennebohm when they deposed him in September 2003 show that they knew and understood the PIPI issue. For example, they specifically asked Rennebohm whether PIPI income was deposited in Frontier Ford's bank account.²⁰ Yet the defendants did not question either Rennebohm or Rekdal about PIPI at trial.

In short, the record supports the position taken by the State in its response to the motion for a new trial:

The defense had clear knowledge of the principal subject matter at issue, NWC/PIPI through a variety of sources independent of the prosecution. For tactical reasons the defense consciously chose to conceal its knowledge of this subject to prevent the prosecution from being able to respond to it once the defense injected it at trial. The defense had opportunity to corroborate its claims related to NWC/PIPI during trial but consciously and conspicuously chose not to, so as to leave the jury with a broad impression and innuendo of corruption [by Rennebohm].^[21]

¹⁹ Report of Proceedings (Feb. 1, 2006) at 70.

²⁰ Clerk's Papers at 6979.

²¹ Clerk's Papers at 6913-14.

Finally, the PIPI documents were merely cumulative of other evidence introduced for the purpose of showing that Rennebohm was disreputable. For example, Mullen and Dean presented evidence that Rennebohm gave Ragnar Pettersson the \$1.4 million promissory note, which Rennebohm claimed was “phony,” to prevent Rennebohm's ex-wife from getting a share of his interest in the dealership that he and Pettersson owned.

The PIPI evidence had little exculpatory or impeachment value, the defendants could have obtained and developed on their own evidence of how Rennebohm handled the PIPI income, and the outcome of the trial is not likely to have been different if the defendants had had the evidence. Therefore, the State's failure to disclose PIPI evidence did not violate Brady.

The defendants also argue that Rekdal violated Brady by failing to disclose his opinion and “mental impressions” that Rennebohm may have authorized Mullen to spend dealership money.²² They claim that Rekdal's deposition testimony contradicted his trial testimony. But defendants have not shown that Rekdal was asked at trial whether Rennebohm authorized the defendants' actions or that he gave an opinion on that issue. The opinion he gave was that through Mullen's manipulation of the accounts, money left the store for nonbusiness purposes. Moreover, Rekdal did not begin to wonder whether Mullen's actions were authorized by Rennebohm until after he testified at

²² Br. of Appellant Mullen at 30.

the criminal trial and learned what Mullen alleged in her defense. And even then, Rekdal only said he was not sure what to believe. Such an opinion is too speculative to be considered material. Dean cites a statement from Rekdal's deposition that the majority of nonbusiness activity in Mr. Rennebohm's account receivable benefited Mr. Rennebohm, and argues that the statement contradicts the testimony in the criminal trial where Rekdal explained how Rennebohm's account had been used to disguise transactions made for Mullen's benefit.²³ But when the quote from Rekdal's deposition is read in context, it is consistent with Rekdal's testimony at trial; the sum of \$210,472 in Rennebohm's account went for the purchase of antiques and other transactions benefitting Mullen and Dean.

The defendants argue Rekdal believed that Rennebohm hid as much as \$1 million in PIPI income and should have disclosed that opinion. The defendants cite a portion of Rekdal's deposition testimony where he was discussing how the information he received from Ragnar Pettersson about the PIPI loans caused him to be concerned about whether the corporate income was being understated. Asked how much PIPI income was not being properly reported, Rekdal said \$1 million was possible.²⁴ But a declaration by Rekdal in response to the defendants' motion for a new trial shows that Rekdal was referring to the possible understatement of PIPI income not only by Frontier Ford

²³ See Report of Proceedings (Jan. 25, 2006) at 151 et seq.

²⁴ Clerk's Papers at 6492.

but also by other dealerships Rennebohm owned.²⁵ Furthermore, the defendants knew about PIFI income and could have asked Rekdal at trial to give his opinion about whether Rennebohm was understating it. The use of the word "possible" shows that Rekdal was speculating about the amount, not giving a considered estimate of a factual matter. Because the opinion Rekdal expressed in his deposition was speculative, cumulative, not clearly exculpatory, and the defendants could have discovered it themselves, Rekdal did not violate Brady by failing to disclose it.

None of the other evidence that Mullen and Dean argue should have been disclosed so undermined Rekdal's or Rennebohm's credibility or so strongly supported the defense that failing to disclose it constituted a Brady violation. For example, the defendants say they should have been given Rekdal's letter to Rennebohm informing him, in July 2004, that Clothier and Head would no longer work for him. They argue that it shows the real reason Clothier and Head quit was Rennebohm's dishonesty, contrary to Rekdal's testimony at trial that the firm discontinued its work for Rennebohm and his companies because Rennebohm had too frequently involved them in litigation. Actually, Rekdal's letter did state that Clothier and Head were withdrawing because of the persistent litigation. The letter also advised Rennebohm to amend his previously filed tax returns to properly report PIFI income. It does not say that Clothier and Head believed the

²⁵ Clerk's Papers at 6900-6902.

unreported income meant that Rennebohm was dishonest. The letter would not have furnished a basis to impeach Rekdal's trial testimony.

Even if the PIFI documents, Rekdal's opinions, and other evidence had been disclosed to the defendants and presented at trial, the evidence was not likely to have changed the outcome of the trial. None of it, including evidence related to PIFI income, medical insurance, Clothier and Head's billing records, and Rekdal's knowledge of Dean's accounts receivable, clearly impeached Rekdal or Rennebohm or established that Rennebohm authorized Mullen and Dean to spend dealership money for their personal purposes. The undisclosed evidence was insignificant and peripheral when compared to the evidence that Mullen and Dean were acting without authorization when they took money out of Frontier Ford that was not part of their pay plans.

Our review of the record confirms the trial court's summary:

All of the ammunition was there. It was, or should have been, apparent to both the State and the defense from day one that there was the potential for conflict and mischief in the Rennebohm/Rekdal relationship. The parties were aware early on of the fact of other litigation involving these important witnesses, of depositions and statements made, all of which had the possibility of corroborating or contradicting respective positions. No one should be surprised or shocked by the information brought to the Court's attention in these post-trial motions. This jury did its job. The decision that it made was well within the evidence. All of the assumptions that the defense now wants drawn in a new trial could have easily been drawn in the case tried earlier this year.^[26]

²⁶ Letter order denying motion for a new trial, November 17, 2006.

We conclude the trial court did not err when it denied the motion for a new trial based on alleged Brady violations.

NEWLY DISCOVERED EVIDENCE

Mullen and Dean also argue that the trial court should have granted them a new trial under CrR 7.5(a)(3). That rule allows a court to grant a new trial if newly-discovered, material evidence (1) would probably change the result of the trial; (2) was discovered after trial; (3) could not have been discovered with due diligence before trial; and (4) is not merely cumulative or impeaching. State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). If any one of these factors is absent, the court may deny a new trial. Macon, 128 Wn.2d at 800. A trial court's decision on a motion for a new trial will not be disturbed on appeal unless it constitutes an abuse of discretion. Macon, 128 Wn.2d at 805. As discussed above, the evidence disclosed after trial with due diligence could have been discovered before trial and was unlikely to change the outcome of the trial. The trial court, therefore, did not abuse its discretion when it denied Mullen's and Dean's requests for a new trial under CrR 7.5(a)(3).

SUFFICIENCY OF THE EVIDENCE

To find the defendants guilty of theft in the first degree, the State needed to prove beyond a reasonable doubt that the defendants wrongfully obtained or exerted unauthorized control over the property of another and that the value of the property exceeded \$1,500. RCW 9A.56.020(1)(a); former RCW

9A.45.030(1)(a) (2006). Dean contends that the evidence was insufficient to convict him.

Evidence is sufficient if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the State's evidence, and all reasonable inferences therefrom are drawn in favor of the State. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Criminal intent may be inferred from conduct, and circumstantial evidence is as reliable as direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Each employee at Frontier Ford had a "draw" account. Mullen had the authority to approve employees' requests to borrow money (i.e., take a draw), but each employee's draws were to be repaid in full out of the employee's next paycheck. Unlike other employees, the draw accounts for Dean and Mullen did not zero out each month.

Rekdal testified that \$50-60 million flowed through Frontier Ford's 750 accounts each year, and Mullen was able to hide her use of company funds by posting checks to various account ledgers, such as auto parts or petty cash, and moving the debts from one account to another. For example, she sometimes properly posted a check she wrote to herself to her draw account, but later she

transferred the debt to a different account ledger so it looked as if she had repaid the draw. Similarly, she transferred money between Dean's two draw accounts to make it appear that Dean repaid what he took. Rekdal established that Mullen issued hundreds of checks for her own or Dean's benefit, which she hid by manipulating the account books.

Although Dean did not write any of the checks that the State claimed were unauthorized, the evidence showed that he endorsed checks Mullen wrote to him even when his draw account had a balance owing, contrary to Frontier Ford's policy. Mullen also wrote checks to pay Dean's credit card bills, telephone bills, and a tuition bill for his son's school. Dean's knowledge about Mullen's acts could also be inferred from their close relationship and from the testimony that he brushed off questions from other employees about Mullen's eBay activity. Mullen's confession to Rennebohm provided further supporting evidence. Rennebohm testified at trial that Mullen tearfully admitted stealing from him after he fired Dean and in the same conversation told him that the \$60,000 Dean borrowed from Frontier Ford for the down payment on a house had never been paid back and that Dean also owed another \$200,000.

We conclude the evidence was sufficient, when viewed in the light most favorable to the State, for any reasonable jury to find that Dean, in conspiracy with Mullen, wrongfully obtained unauthorized control over more than \$1,500 of Frontier Ford's property.

MOTION FOR MISTRIAL

Dean argues also that the trial court should have granted his request for a mistrial after the State elicited testimony from Rekdal that was a comment on Dean's right to remain silent. The Fifth Amendment right against self-incrimination prohibits a prosecutor from eliciting a comment about the defendant's silence, which may imply that the defendant is guilty. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996). A court should grant a mistrial only when the defendant has been so prejudiced that only a new trial can ensure a fair trial. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court's denial of a request for a mistrial is reviewed for an abuse of discretion. Lewis, 130 Wn.2d at 707.

Rekdal testified about a table he had created with two columns to show which improper transfers of Frontier Ford's funds he attributed to Mullen and which ones he attributed to Dean. Rekdal said that he looked for evidence besides Frontier Ford's checks to decide where to put each transfer. Rekdal explained:

A. I would find checks written to Acanthus Antiques where I found no evidence where, in any of the e-mails or anything that I can look at Frontier Ford that would suggest that Mr. Dean, this was being ordered for Mr. Dean. So on those types of things, if I found, since, I primarily found all communications with Lisa Mullen, I would move that over to the Lisa activity. That allowed me to separate black from white, if you will, and I could look at that. Did I know who this is really to or for in essence, no.

Q. Who would know?

A. You'd have to talk to the two of them.^[27]

Mullen's defense counsel immediately asked to approach the bench. After a short discussion, the judge dismissed the jury for a brief recess. After the jury left, Mullen and Dean asked the court to declare a mistrial. The trial court denied the requests, but when the jury returned, the court struck the prosecutor's question and Rekdal's answer. Neither Mullen nor Dean asked for a curative instruction. At the end of the case, the court instructed the jury that a "defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him in any way."²⁸

The prosecutor's question was improper, but the question and answer were not so prejudicial that nothing short of a new trial would ensure that Dean would be tried fairly. The exchange was brief, and the court instructed the jury to disregard it. The court also instructed the jury at the end of trial that it should not infer guilt from the fact that a defendant did not testify. Given the court's instructions and the brevity of the question and answer in the context of the weeks-long trial, Dean has not shown that he was so prejudiced by the question and answer that nothing short of a new trial would have insured a fair trial.

Dean argues that the trial court also abused its discretion when it denied the request for a mistrial because the court applied an incorrect legal standard

²⁷ Report of Proceedings (Jan. 26, 2006) at 113.

²⁸ Clerk's Papers at 996.

when it concluded that Rekdal was not a state agent.²⁹ The court, however, did not deny a mistrial based upon a conclusion that Rekdal was not a state agent. Rather, the court correctly concluded that the question and answer were not so prejudicial that they deprived the defendants of a fair trial.³⁰ The court did not abuse its discretion.

SENTENCING

Mullen and Dean were each convicted of theft in the first degree and conspiracy to commit theft in the first degree. Mullen also was convicted of criminal profiteering. Mullen's standard range for the theft was three to nine months. For conspiracy to commit theft, her standard range was 2.25 to 6.75 months. For criminal profiteering, Mullen's standard range was 12 to 14 months. The court ordered Mullen to serve exceptional sentences of 36 months for each count, to be served concurrently.

Dean's standard range for the theft charge was two to five months. His standard range for the conspiracy charge was 1.5 to 3.5 months. The court ordered Dean to serve concurrent exceptional sentences of 30 months for each count.

²⁹ Br. of Appellant Dean at 43.

³⁰ Report of Proceedings (Jan. 27, 2006) at 28.

Dean argues that the trial court violated his constitutional right to equal protection by ordering him to serve a sentence almost as long as Mullen's, even though he was convicted of one less crime.

This court scrutinizes whether a defendant was denied equal protection in the context of sentencing if (1) the defendant can establish that he is situated similarly to another defendant by virtue of nearly identical participation in the same set of criminal circumstances, or (2) the defendant is a member of a suspect class who can establish that he received disparate treatment because of his membership in that class. State v. Handley, 115 Wn.2d 275, 290-91, 796 P.2d 1266 (1990). Dean does not argue that the court intentionally discriminated against him as a member of a suspect class. We, therefore, consider only whether Dean and Mullen were situated similarly and, if so, whether the trial court had a rational basis for differentiating between them. See Handley, 115 Wn.2d at 292.

Although Dean's convictions were fewer and their standard ranges were less than Mullen's, the trial court ordered Dean to serve nearly as much time as Mullen. The evidence at trial established a rational basis for this decision. Dean was a well-educated, smart manager who understood the dealership's accounts and what Mullen was doing. The evidence supported a conclusion that Dean was more culpable because Dean pressured Mullen, who was not as well-educated, to act. Mullen's behavior changed after Dean was hired and he and

Mullen became romantically involved. Because there was a rational basis to distinguish between them, the court did not violate Dean's right to equal protection.

STATEMENT OF ADDITIONAL GROUNDS

Mullen has filed a statement of additional grounds for review as allowed by RAP 10.10. The rule permits an appellant, pro se, to identify and discuss matters the appellant believes have not been adequately addressed in the brief filed by counsel. Although citations to the record and authorities are not required, the appellate court will not undertake review of the issues raised unless the statement adequately informs the court of the nature and occurrence of alleged errors.

Mullen first contends that her trial counsel was ineffective. Courts approach ineffective assistance claims with a strong presumption that counsel's representation was effective. Reichenbach, 153 Wn.2d at 130. Competency is determined by considering the entire record at trial. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). If counsel's actions were the result of legitimate trial strategies or tactics, an ineffective assistance claim fails. Townsend, 142 Wn.2d at 847.

Mullen argues that her trial counsel was ineffective because he failed to pay attention in court, did not work diligently on her case, and was distracted by his own emotional distress. She gives few specific examples. She complains

that counsel did not call any character witnesses to rebut the State's evidence that she was abusive to other employees because he said the case was not about what other employees thought of her. If indeed counsel did make this decision, it was tactical; and the fact is, Mullen's character as a supervisor was not relevant to her defense. In our review of the record we have not encountered evidence that would support a claim of ineffective assistance.

Mullen next argues that she is entitled to a new trial based upon prosecutorial misconduct. To prevail on such a claim, the defendant must prove that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007); State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). A prosecutor's misconduct is prejudicial if there is a substantial likelihood that the misconduct affected the outcome of the trial. Weber, 159 Wn.2d at 270. If the defendant did not object, ask for a curative instruction, or move for a mistrial, the defendant waives the issue on appeal unless the misconduct was "so flagrant and ill-intentioned that no curative instructions could have obviated" the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Mullen first contends that the prosecutor's conduct was improper because he was not honest with the court or the defendants. She claims the prosecutor was dishonest when he: (1) issued subpoenas before the case against her was

filed; (2) told Mullen's lawyer that Rennebohm was not suspected of being involved in the theft of heavy equipment; and (3) did not tell Mullen that Rekdal was advised by an attorney not to talk to the prosecutor. Mullen does not explain how such conduct amounts to dishonesty nor is there any reason to believe that it affected the outcome of the case.

Mullen also contends that the prosecutor handled evidence inappropriately. She claims that some exculpatory evidence was removed from her office at Frontier Ford and, therefore, could not be presented at trial, and other incriminating evidence, which was presented at trial, was added to the material she had in her office when she left Frontier Ford. She does not specify what evidence was improperly removed or added and thus provides no basis for reviewing the alleged error.

Mullen complains that, besides the evidence her appellate lawyers argue should have been disclosed under Brady, the prosecutor also failed to provide her with other evidence he relied upon at trial. Again, she does not explain what the evidence was or why it was important.

Mullen next argues that prosecutorial misconduct entitles her to a new trial because the prosecutor's questions and presentation of evidence misled the jury. For example, she complains that the prosecutor asked questions calling for a yes or no answer when the questions required explanations. Such a tactic, however,

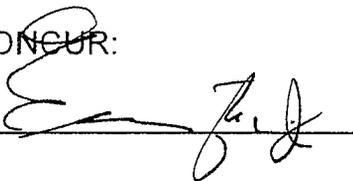
does not constitute misconduct and was not prejudicial because Mullen had an opportunity to explain her actions on direct examination.

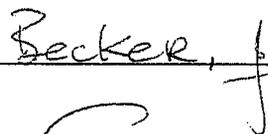
As an example of the prosecutor misrepresenting evidence, Mullen refers to Rekdal's Power Point presentation. She claims that the prosecutor led the jury to believe that the presentation was based upon evidence in certain binders, when the prosecutor had made changes that were not in the binders. Mullen does not provide specific examples to show how the presentation misled the jury or how the alleged misrepresentations affected the outcome of the case and thus fails to establish grounds for review.

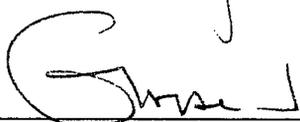
Finally, Mullen argues that she is entitled to a new trial based upon the false or misleading testimony of Rekdal and Rennebohm. But juries decide the credibility of witnesses, resolve conflicts in the evidence, and determine the persuasiveness of evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). We do not review those decisions on appeal. Thomas, 150 Wn.2d at 875.

In conclusion, neither Dean nor Mullen has established reversible error. In each appeal, the challenged rulings of the trial court are affirmed.

WE CONCUR:







DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 59389-7-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: Erik Pedersen - Skagit County Prosecuting Attorney-Appellate Unit**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 8, 2010

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