

NO. 73306-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CANDY L. MATTILA,

Appellant.

FILED  
April 12, 2016  
Court of Appeals  
Division I  
State of Washington

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

The State has already filed a brief in the consolidated case involving the co-defendant, Nicole Sands. That brief is incorporated by reference. The present brief contains additional facts and arguments that are relevant to the issues raised by Candy Mattila.

## **II. ISSUES**

(1) Prior to trial, the prosecutor provided the defense with a copy of a witness's plea agreement. The prosecutor had also provided the police reports that were referenced in that agreement. A comparison of the police reports and the plea agreement showed that the agreement contained an error in dates. During defense cross-examination of the witness, the prosecutor realized that the error existed. He did not advise defense counsel of his conclusion. Did the trial court abuse its discretion in deciding that this incident did not warrant a mistrial?

(2) In closing argument, the prosecutor claimed that the defendant had crossed out a portion of her written statement in which she said that she and her co-defendant had entered the burglarized residence. Did this argument reflect a reasonable interpretation of the defendant's testimony? [The State's argument on this issue is contained in the brief in the consolidated appeal.]

(3) If the argument was not supported by the record, did the trial court abuse its discretion in determining that a mistrial was unnecessary because the error could have been cured by an instruction? [The State's argument on this issue is contained in the brief in the consolidated appeal, supplemented by arguments in this brief.]

(4) The defendant and her accomplices loaded numerous items of stolen property onto a pickup truck to transport them from the crime scene. Did the defendant use a motor vehicle to commit residential burglary? [The State's argument on this issue is contained in the brief in the consolidated appeal.]

(5) In imposing a sentence under a first-time offender waiver, can the court impose 12 months of community custody, if the period of treatment is less than 12 months? [The State concedes that the sentence was erroneous.]

(6) In view of the State's concession of error, is the question of appellate costs moot?

### **III. ADDITIONAL STATEMENT OF THE CASE**

Ms. Mattila claims that the trial court should have granted a mistrial based on alleged discovery violations. The facts relevant to this claim are as follows:

On June 9, 2014, Amanda Rockwell pleaded guilty to residential burglary. In connection with her plea, she signed two documents: a Statement of Defendant on Plea of Guilty (ex. 52) and a Plea Agreement and Sentencing Recommendation (ex. 53). Exhibit 52 will be referred to as the "plea statement" and exhibit 53 as the "plea agreement."

The plea statement expressly refers to and incorporates the plea agreement. Ex. 52 at 3 ¶ 6(g). Under standard procedures, both documents are filed with the Clerk at the time of the guilty plea. There is no indication that this procedure was not followed in this case. 3/4 RP 54-55.

The plea agreement contains the following provision:

The State agrees not to file additional charges of theft arising out of Monroe PD 1303028 occurring on December 20, 2013 involving the victim for 1303028 listed in paragraph 8 above in return for an agreement to pay restitution for the same.

Ex. 53 at 4 ¶ 10. Monroe Police incident number M20133028 was the burglary charged in the present case. Both defense counsel

had been provided with police reports relating to that event. That burglary occurred on December 29, not December 20. 3/4 RP 58-59.

The plea statement was provided to defense counsel as part of discovery. The prosecutor did not, however, provide the plea agreement at the same time. Shortly before trial, counsel for Ms. Mattila sent an e-mail to the prosecutor requesting this document. She was unsure whether this occurred on the Friday before trial or over the weekend. The prosecutor handed her the document Monday morning, the day that trial began. 3/4 RP 51.

Monday was taken up with pre-trial motions and jury selection. Ms. Rockwell testified Tuesday afternoon. On cross-examination, counsel for Ms. Mattila asked her to read the paragraph of the plea agreement quoted above.<sup>1</sup> Counsel then asked the following questions:

Q. Okay. And who is victim 1303028?

A. I'm assuming that's – oh, Gorlick?

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<sup>1</sup> Ms. Rockwell testified that the paragraph said "arising out of Monroe PD occurring on December 20, 2013." 3/3 RP 190. She thus omitted the incident number that followed the words "Monroe PD." The appellant's brief quotes this incorrect version of the agreement. Brief of Appellant Mattila at 9-10.

Q. Okay. So the same gentlemen you're pleading guilty to robbing – or burglarizing his house?

A. Yes.

Q. They agreed not to file additional theft charges from the same victim that occurred on December 20<sup>th</sup>, 2013, is that right?

A. Yes.

3/3 RP 190-91. Counsel then turned to another subject.

On hearing this cross-examination, the prosecutor realized that the plea agreement contained a typographical error. That evening, he contacted the prosecutor who had negotiated the plea agreement and "told him there was a typo." 3/4 RP 61.

On Wednesday morning, counsel for Ms. Mattila resumed cross-examination of Ms. Rockwell. She got Ms. Rockwell to acknowledge the number of charges that the State agreed not to file in exchange for her testimony. 3/4 RP 5-6. She then questioned Ms. Rockwell about various inconsistent statements that she had made to police. This cross-examination did not refer to any theft on December 20<sup>th</sup>.<sup>2</sup> 3/4 RP 5-9, 18-26.

Mr. Rockwell was then cross-examined by counsel for Mr.

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<sup>2</sup> Counsel later told the court that she "spent 40 minutes talking to [Ms. Rockwell] about a crime that involved the same victim." 3/4 RP 52. The record does not substantiate this claim.

Sands. He pointed to her testimony that she had never met Mr. Gorlick or been to his house before the burglary. He suggested that this was inconsistent with her agreement to pay "restitution for the crimes that you committed against Mr. Gorlick just nine days before this incident." Ms. Rockwell denied committing or being charged with any crimes against Mr. Gorlick prior to the burglary on December 29. 3/4 RP 36-39.

On re-direct examination, the prosecutor returned to this subject. He asked Ms. Rockwell if it was possible that there was a typo in the plea agreement. She agreed that it was possible. He then asked if, as far as she know, she had even been investigated by the Monroe Police Department for a theft against Mr. Gorlick, other than the burglary. She said that she had not. 3/4 RP 44-47.

Immediately after this testimony, counsel for Ms. Mattila asked to have the jury excused. She complained that the prosecutor should have told her that the plea agreement contained a typo. As a remedy, she ask the court to preclude the prosecutor from "question[ing] those officers to essentially clear up the mistake." 3/4 RP 52-53. In the alternative, "if the Court's not inclined to grant my request, then I'm making a motion for a mistrial." 3/4 RP 64.

The court ruled that the prosecutor had no obligation under CrR 4.7 to warn defense counsel that they were making a mistake. The report in defense counsel's possession was sufficient to show that the plea agreement contained a typographical error. The prosecutor's analysis of that information was a matter of work product, which is not subject to disclosure. 3/4 RP 69-75.

The court also did not believe that the incident prevented the defendant from receiving a fair trial. The court believed that the incident was "not the sort of thing that could possibly indicate to a juror ... that the lawyers shouldn't be listened to." Rather, the jury would understand that the error lay with the prosecutor, not the defense. 3/4 RP 76-77.

The court ruled that the prosecutor could present testimony that Ms. Rockwell was not suspected of any crime committed on December 20th. The probative value of such evidence exceeded its prejudicial effect. 3/4 RP 189-90. The prosecutor later elicited testimony from an officer that the investigation under case number M20133028 did not encompass any crimes on any dates other than December 29<sup>th</sup>. 3/5 RP 12.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL FOR AN ALLEGED DISCOVERY VIOLATION.**

###### **1. A Mistrial Was Not Warranted By Delay In Providing Discovery of The Plea Agreement, Where The Defense Knew That This Document Existed, Did Not Request It Until Shortly Before Trial, Received It At The Beginning Of Trial, And Did Not Request A Continuance.**

The defendant claims that a mistrial was required by the prosecutor's failure to provide discovery. "Awarding sanctions for discovery violations is within the discretion of the trial court." State v. Boot, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985). The defendant has not demonstrated an abuse of discretion.

The defendant's argument confuses two potential areas of discovery: the plea agreement, and the prosecutor's opinion concerning the meaning of the plea agreement. With regard to the plea agreement, the State agrees that it was subject to discovery as potentially exculpatory evidence under CrR 4.7(a)(3). The State also agrees that this agreement should have been provided along with the plea statement. The prosecutor's failure to do so was evidently an oversight.

The plea statement on its face indicated that it incorporated the plea agreement. If counsel had needed the agreement earlier,

she could have obtained it from the court file or requested it from the prosecutor. When she finally did request it, she received it the next business day.

The defendant claimed that her counsel did not have “enough time to thoroughly review Rockwell’s plea agreement.” Brief of Appellant Mattila at 20. It should not, however, have taken any extensive review to recognize the existence of the typographical error. As the trial court pointed out, the plea agreement cross-referenced the same police reports that had already been provided in discovery. Those reports made it clear that Ms. Rockwell was not suspected of any crime against Mr. Gorlick on December 20<sup>th</sup> – only of the burglary on December 29<sup>th</sup>. If counsel believed that she needed more time to review the plea agreement, she could have asked for a continuance. “Because the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor’s noncompliance with the discovery rule was not prejudicial error.” State v. Krenik, 156 Wn. App. 314, 321 ¶ 18, 231 P.3d 252, 256 (2010); State v. Brush, 32 Wn. App. 445, 456, 648 P.2d 897, 903 (1982).

**2. A Prosecutor Is Not Required To Advise Defense Counsel Concerning His Opinion Of The Meaning Of A Plea Agreement.**

With regard to the prosecutor's opinion, there was no discovery violation. A prosecutor's opinion concerning the meaning of a plea agreement does not fall into any of the categories that are subject to discovery under CrR 4.7(a). It is neither a witness statement, a document that will be used at the trial, nor evidence negating the defendant's guilt. Rather, it represents "opinions, theories or conclusions of ... prosecuting agencies." Such opinions constitute work product that is not subject to disclosure. CrR 4.7(f)(1). The trial court correctly ruled that the prosecutor's failure to disclose his opinion was not a discovery violation.

**3. The Trial Court Properly Concluded That This Incident Did Not Damage The Credibility Of Defense Counsel, So As To Require A Mistrial.**

To the extent that there was any discovery violation, the trial court properly exercised its discretion in denying a mistrial.

The grant or denial of a motion for mistrial is reviewed by this court through an abuse of discretion lens. An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. A trial court's denial of a motion for mistrial will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. In determining whether the effect of an irregular occurrence at trial affected the trial's outcome, this court examines: (1) the seriousness of the irregularity; (2) whether it

involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.

State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citations omitted).

In Greiff, a case was re-tried after a mistrial. Between the two trials, a witness changed his testimony. The prosecutor knew of this change but did not inform defense counsel. In opening statement, defense counsel outlined the witness's anticipated testimony, based on his testimony at the first trial. The prosecutor then elicited the witness's changed testimony.

Defense counsel moved for a mistrial. He claimed that his mis-description of the opening statement damaged his credibility. The trial court denied a mistrial, holding that the incident was not significantly prejudicial to the defendant. The Supreme Court held that this ruling was not an abuse of discretion.

Many of the circumstances present in Greiff apply equally to this case. In Greiff, the facts surrounding the witness's change in testimony were presented to the jury. The jury was also instructed to disregard any remark by counsel that was unsupported by the evidence. The court held that these events mitigated any prejudice. Greiff, 141 Wn.2d at 922.

In the present case, the jury was likewise presented with the facts surrounding the error in the plea agreement, on which counsel had relied. The jury was also given the same instruction concerning unsupported remarks by counsel. CP 48, inst. no. 1. Just as these measures mitigated any prejudice in Greiff, they had the same effect in the present case.

The present case presents an even weaker showing of prejudice than Greiff, for two reasons. First, unlike in Greiff, defense counsel here was given all relevant evidence concerning the plea agreement prior to the commencement of trial. 3/4 RP 51. Second, counsel for Ms. Mattila did not mis-describe the witness's anticipated testimony. She merely asked her to recite portions of the plea agreement. 3/3 RP 190-91. At the time that examination occurred, the prosecutor had no idea that the plea agreement contained an error. 3/4 RP 60.

Contrary to her claims, counsel for Ms. Mattila did not conduct any further cross-examination on this subject. 3/4 RP 5-9, 18-26. The only subsequent cross-examination dealing with the error in the agreement was conducted by counsel for co-defendant Sand. 3/4 RP 36-39. Even if this reflected on his credibility, that

would have nothing to do with the credibility of counsel for Ms. Mattila.

The trial court concluded that this incident did not result in any prejudice to the defense. 3/4 RP 76-78. Nothing in the record establishes that this conclusion was an abuse of discretion. The court therefore properly denied a mistrial.

**B. SINCE THE EVIDENCE SHOWED THAT THE DEFENDANT'S TESTIMONY WAS INCONSISTENT WITH A STATEMENT THAT SHE SIGNED, THE PROSECUTOR COULD COMMENT ON THAT INCONSISTENCY IN ARGUMENT.**

The defendant next claims that the prosecutor committed misconduct in closing argument. Most of her argument tracks the arguments raised by the co-defendant. In response, the State will rely on its previous briefing.

This incident was even less prejudicial to Ms. Mattila than it was to co-defendant Sands. For her, the evidence clearly showed a contradiction between her testimony and the written statement. Two officers testified that Ms. Mattila had admitted going inside the house. 3/4 RP 214; 3/4 RP 106. One of these officers testified that he had written down what Ms. Mattila told him, had her review it, and gotten her to sign it. 3/4 RP 160. Ms. Mattila testified to the

contrary. She claimed that she never went into the house, and what the officer wrote down was not what she said. 3/5 RP 81, 87.

Ms. Mattila's testimony thus made it clear that parts of her testimony were inconsistent with the written statement. It was also clear that her testimony concerning the statement was inconsistent with the officer's testimony. The prosecutor could properly discuss this inconsistency in closing argument.

Ms. Mattila essentially argues that the prosecutor mis-stated one detail – whether Mr. Sand accompanied her into the house. This detail had some significance with regard to *his* guilt, but it had very little significance with regard to *her* guilt. For her, the key issue was whether she had participated in the burglary – not whether Mr. Sand had done so. The prosecutor properly discussed the conflict in testimony on this subject. Even if that discussion contained an error, it was not sufficiently prejudicial to warrant a new trial.

**C. FOR THE REASONS SET OUT IN THE CONSOLIDATED BRIEF, THE TRIAL COURT PROPERLY FOUND THAT THE CRIME INVOLVED USE OF A MOTOR VEHICLE.**

In addition to her challenge to the conviction, the defendant challenges two aspects of the sentence. First, she claims that the court should not have found that the crime involved use of a motor vehicle. With respect to this issue, Ms. Mattila's position is

substantially identical to that of her-codefendant. The State will rely on its briefing in the consolidated appeal.

**D. THE STATE CONCEDES THAT THE TRIAL COURT IMPROPERLY IMPOSED 12 MONTHS OF COMMUNITY SUPERVISION.**

The other sentencing issue is unique to Ms. Mattila. The trial court granted her a first-time offender waiver. The sentence included 12 months of community custody. The defendant claims that this sentence was excessive.

The State is compelled to agree. Community custody under the first-time offender waiver is governed by RCW 9.94A.680(3):

The court may impose up to six months of community custody, unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.

In this case, the court did order treatment. CP 7. The defendant could therefore receive community custody "up to the period of treatment." The State agrees, however, that if the period of treatment is less than one year, the court cannot impose a full year of community custody. The imposition of an illegal sentence can be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744 ¶ 5, 193 P.3d 678 (2008).

The appropriate remedy is to remand for re-sentencing. On remand, the court will have discretion on how to proceed. The court

could simply correct the term of community custody. Alternatively, the court could reconsider the sentence as a whole. See State v. Kilgore, 167 Wn.2d 28, 38-41 ¶¶ 14-17, 216 P.3d 393 (2009).

**E. SINCE THE STATE HAS CONCEDED THE NEED FOR RE-SENTENCING, THE ISSUE OF APPELLATE COSTS IS MOOT.**

Finally, the defendant asks this court not to impose appellate costs. In view of the concession above, the State does not intend to seek costs. This issue is therefore moot.

**V. CONCLUSION**

The conviction should be affirmed. The case should be remanded for re-sentencing.

Respectfully submitted on April 12, 2016.

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CONSOLIDATED WITH  
NICOLE A. SAND)

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 12<sup>th</sup> day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary T. Swift, Nielsen, Broman & Koch, [swiftm@nwattorney.net](mailto:swiftm@nwattorney.net); and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net). (Candy L. Mattila) and:

via Electronic Filing and to Maureen M. Cyr, Washington Appellate Project, [Maureen@washapp.org](mailto:Maureen@washapp.org); and [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org). (Nicole A. Sand)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12<sup>th</sup> day of April, 2016, at the Snohomish County Office.

  
\_\_\_\_\_  
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