

No. 64919-1-I

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

STATE OF WASHINGTON,

Appellant,

v.

SAMUEL A. GONZALEZ

Respondent.

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

The Honorable Dave Needy

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial court is responsible for regulating discovery and is empowered by CrR 4.7() to sanction a party for ignoring the discovery rules. CrR 4.7(a) requires the prosecuting attorney to provide the defendant with the name, address, and statements of any witness the State intends to call at trial no later than the omnibus hearing. Despite defense counsel's numerous requests, the State did not provide Samuel Gonzalez's attorney with the identity of the key State's witness, his two contradictory statements, or the plea agreement he obtained in exchange for his testimony against Samuel until after the omnibus hearing and less than three weeks before the trial date. The prosecutor had over 40 witnesses on its witness list and was slow to provide other information to the defense. Where (1) the court found the suppressed evidence was material and relevant to the witness's credibility and to the defendant's alibi defense and (2) the prosecutor was requesting a continuance of the trial date, did the court abuse its discretion by suppressing the witness's statement pursuant to CrR 4.7(h)(7)?

2. In the alternative, did the prosecutor's tardy release of the name, address and statements of its key witness violate Samuel's constitutional right to due process?

3. CrR 4.7(f)(2) permits the prosecutor to withhold the identity of a confidential informant only if the informant will not testify at the trial or a hearing. Was the prosecutor's refusal to timely provide defense counsel with the name, address and statements of their key trial witness excused by the prosecutor's desire to keep that information confidential?

B. STATEMENT OF THE CASE

Sixteen-year-old Samuel Gonzalez was charged in Skagit County Juvenile Court with felony harassment and riot in September 2009.¹ CP 34. On November 20, 2009, the prosecutor charged Samuel in superior court with the same two charges as well as three counts of first degree assault and one count of unlawful possession of a firearm. CP 88-90. His trial date was scheduled for January 25, 2010. CP 95.

According to the declaration in support of the State's motion for determination of probable cause prepared by Mount Vernon Police Detective Brent Thompson, the police were called to a report of a shooting at 218 Maple Lane on July 11, 2009. CP 92. The officers found three people inside the home who were injured by

¹ Samuel was set for a fact-finding hearing on November 30, 2009. SuppCP __ (Objection to Trial Dates Counts 1 and 2, sub. no. 22, 12/4/09).

birdshot pellets, and they concluded that the shots were fired through a window into the house. CP 92.

A resident of the house, Janet Ramos, told the police that “Sammy” had knocked on the door about an hour and half before the shooting and asked if there were “Scrapas” there, which she took to be a reference to gang members. CP 92. Sammy left and returned to a car in the driveway. One of the car’s other occupants emerged and took a gun from the car’s trunk. CP 92. The police determined that “Sammy” was Samuel Gonzalez, who lived in a neighboring house.² CP 92.

The declaration also includes information Detective Thompson received from a witness he referred to as a confidential informant (“CI3”). CP 93. CI3 claimed Samuel called him right after the shooting and the two met at another person’s home at about 3:30 am, about two hours after the shooting. CP 93. According to CI3, Samuel said he was in the car that went to 213 Maple and related that “Beaver” got out the car with an Uzi but was too afraid to do anything. CP 93. Samuel told CI3 that he went home, put on black clothing, crept up to the Maple Street house, and shot a 20-gauge shotgun twice into the residence. CP 93-94.

² The affidavit does not explain how that determination was made.

Based upon the information provided by the detective, the Honorable Susan Cook issued a warrant for Samuel's arrest and set bail at \$250,000. CP 2. Samuel was arraigned in superior court on December 13, 2009, and the trial was set for January 25, 2010. CP 95. Defense counsel made several requests for discovery and specifically asked for information from CI3 and two other witnesses referred to as CI1 and CI2. CP 5-6, 17; SuppCP ____ (Notice of Appearance and Demand for Discovery, sub. no. 11, 11/30/09).

At the omnibus hearing, Samuel provided notice of his alibi defense, explaining that Samuel's parents would testify he was home when the shots were fired. SuppCP ____ (Notice of Alibi Defense, sub. no. 33, 12/31/10). The omnibus order required the State to provide discovery, disclose any information favorable to the defense, and to either provide any informer's name and address or claim privilege. CP 7-8.

Samuel also filed a motion to suppress evidence based upon discovery violations, focusing on the State's failure to provide information concerning the witness referred to as "CI3." CP 9, 11-16. Defense counsel asked the court to suppress evidence relating to CI3 as well as any other evidence known to the prosecutor that

was not provided to the defense by the omnibus hearing. CP 11.

On January 4, defense counsel filed a supplement to the motion, again requesting the prosecutor be sanctioned for the discovery violations. CP 17-22. Defense counsel explained that discovery problems had begun when the case was in juvenile court, where the omnibus hearing was continued twice due to the State's failure to provide discovery. CP 18. Defense counsel pointed out that the State appeared to have 46 potential witnesses in the case and the trial date was only 20 days away. CP 18. On January 5, Samuel filed a motion to compel production of the names, statements, and criminal history of three witnesses referred to as confidential informers CI1, CI2, and CI3. CP 23-25.

The next day the prosecutor filed a witness list of 43 potential witnesses, several identified by initials, including "F.N. (CI3)," who was located at the Maple Lane School in Centralia. SuppCP ___ (Witness List, sub. no. 42, 1/6/10). The State also filed an amended information adding two aggravating factors to the first five counts.³ CP 27-29, 32. An amended witness list filed later

³ Defense counsel objected to the amendment, and the defendant was never arraigned on the amended information. It does not appear the State ever asked for or obtained permission to file the Amended Information. CP 8-10, 32; 1/15/09RP.

that month continued to refer to CI3 by initials. SuppCP ____
(Witness List, sub. no. 58, 1/13/10).

The prosecutor eventually responded to the defendant's motions. The State did not assert that disclosure of the informer's names would endanger the witnesses, but expressed "some concerns" that providing a complete transcript of CI3's interview could undermine other criminal investigations. CP 30. The prosecutor opined it was "unusual" for the defendant to request the identity of the witnesses against him prior to engaging in plea negotiations. CP 31.

On January 14, 2010, Samuel filed a second supplemental motion, this time asking the court to dismiss the prosecution due to repeated discovery violations over the course of the case. CP 32-35. Defense counsel explained that on January 5 the prosecutor provided a name for CI3 – Francisco Nava --- and a juvenile court guilty plea statement. The disclosure finally came shortly after the State prematurely revoked a plea offer prior to its own three-day deadline. CP 32-33, 40. On January 6, defense counsel finally

received transcripts of Nava's October 29 and December 2 interviews with Detective Thompson.⁴ CP 33.

In the December 2 statement, Nava told the detective that much of what he said in his October 29, statement "didn't happen." CP 35. Nava now claimed the alleged conversation where Samuel admitted the shooting occurred six weeks after the incident, rather than the same night, as well as in a different location and under different circumstances than he had originally related. CP 35-36.

At a hearing on January 15 before the Honorable David R. Needy, the prosecutor admitted the information in the second statement was "significant in terms of Mr. Nava's credibility," but said the witness explained he had had more time to provide more accurate details. 1/15/10RP 13. The prosecutor said she had not been aware the second statement was different from the first because the detective told her the two statements were not substantially different. 1/15/10RP 12-13. She explained she did not obtain a copy of the interview transcript until the week before and immediately provided it to defense counsel. CP 54; 1/15/10RP 13. In an affidavit filed after the hearing, however, Detective Thompson asserted he told the prosecutor that Nava said his

⁴ The prosecutor sent the information to the defense attorney's office late on January 5. CP 65.

conversation with Samuel occurred at a later date but that his recitation of the content of the conversation remained essentially the same. CP 62; 1/27/10RP 45.

The court found that the prosecutor did not provide defense counsel with Nava's statements until January 5, after the omnibus hearing. CP 77 (Finding of Fact 7). The court noted that even if the prosecutor was initially unaware of the changes in the two statements, the detective was aware and the changes were not timely disclosed to the defense. 1/15/10RP 16. The court found Nava's credibility was critical, noting that without his allegations the State would not have had probable cause to charge Samuel. CP 77 (Finding of Fact 5-6); 1/15/10RP 14; 1/27/10RP 23. The court also noted that Nava initial statement contradicted Samuel's alibi defense whereas his later statement did not. 1/27/10RP 17-18. The court denied Samuel's motion to dismiss the charges due to the discovery violation but ordered the less onerous sanction of excluding Nava as a witness. 1/27/10RP 16; CP 78.

The State filed a motion for reconsideration and a separate motion for clarification. CP 58-59, 68-69; 1/27/10RP 3, 13-14, 43. After the court denied the State's motion for reconsideration, 1/27/10RP 47, the prosecutor asserted the practical effect of the

ruling was to terminate prosecution of Counts 3 through 6.

1/27/10RP 51. The court therefore entered an order dismissing Counts 3 through 6 without prejudice. CP 79. Counts 1 and 2 were transferred back to juvenile court for prosecution. 1/27/10RP 55.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING A STATE'S WITNESS DUE TO THE PROSECUTOR'S VIOLATION OF THE MANDATORY DISCOVERY RULES

The State assigns error to the trial court's ruling that the prosecutor violated CrR 4.7, but provides no argument in support of this proposition, instead arguing the violation was minor. The State's complaints about the sanction ordered by the trial court for its discovery violation are not well founded. The trial court has broad discretion in regulating discovery, and this discretion was not abused when the court excluded the witness from testifying at trial. The prosecutor willfully violated the discovery rules by refusing to reveal the identity of its star witness, apparently on the incorrect theory that the witness was a true confidential informant. The prosecutor was also guilty of other discovery violations, and continuing the matter would not have sanctioned the State, as the

prosecutor already had a motion to continue the trial date pending. The trial court's ruling excluding the witness must be affirmed.

a. CrR 4.7 requires the State to provide the defense with the names, addresses and statements of all witnesses prior to the omnibus hearing. Washington's discovery rules are designed to make pre-trial discovery as full and free as possible. State v. Boyd, 160 Wn.2d 424, 433, 158 P.3d 54 (2007); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Based upon fairness and the right to adequate representation, the rules are designed to "enhance the search for truth," and the trial court must regulate discovery in order to ensure a fair trial where neither party has an unfair advantage. Boyd, 160 Wn.2d at 433 (quoting State v. Boehme, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967), cert. denied, 390 U.S. 1013 (1968)). The liberal discovery rules are designed to "provide adequate information for informed pleas, expedite trials, minimize supervision, afford opportunity for effective cross-examination, and meet the requirements of due process." Yates, 111 Wn.2d at 797. The scope of discovery is within the sound discretion of the trial court. Id.

CrR 4.7(a) addresses the prosecutor's obligation to provide discovery to the defense. The rule specifically requires the

prosecutor to provide the defendant, no later than the omnibus hearing, the names, addresses and statements of people the government plans to call as witnesses unless the information is covered by a protective order or is otherwise privileged. CrR 4.7(a)(1)(i).

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

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.

CrR 4.7(a)(1)(i) (emphasis added). "The burden is on the State to establish, not merely claim or allege, the need for appropriate restrictions." Boyd, 160 Wn.2d at 433.

The prosecutor's obligation to disclose this information is on-going. CrR 4.7(h)(2); State v. Greiff, 141 Wn.2d 910, 919, 10 P.3d 390 (2000); State v. Krenick, 156 Wn.App. 314, 320, 231 P.3d 252 (2010).

If, after compliance with these rules or ordered pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of

the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

CrR 4.7(h)(2) (emphasis added). In addition, the prosecutor is specifically required to disclose “any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the charge.” CrR 4.7(a)(3).

b. The trial court correctly found the prosecutor had violated the discovery rules. The trial court found Nava’s December 2, 2009, statement to the police was material because it involved a significant change from his first statement as to when the defendant told him he fired the shots into the house, impacting both the Nava’s credibility and Samuel’s alibi defense. CP 77 (Findings of Fact 5-6); 1/15/10RP 14, 16. The court concluded the failure to provide the statement to defense counsel in a timely manner violated the discovery rules. CP 77-78 (Conclusion of Law 4).⁵

The State assigns error to the trial court court’s determination that the prosecutor violated CrR 4.7, but provides no argument to support the assignment of error. Brief of Appellant at

⁵ The court’s Conclusions of Law are incorrectly labeled Findings of Fact. Because the conclusions of law follow another section entitled “Findings of Fact,” this is apparently a simple oversight. CP 76-77; Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (1978) (a conclusion of law mislabeled as finding of fact will be treated as a conclusion of law).

2, 12-17. Instead, the State argues that any violation of CrR 4.7 was “technical” or “de minimus.” Brief of Appellant at 12-15. Because the prosecutor failed to provide argument or legal authority as required by RAP 10.3(a)(6), the State effectively concedes a violation of CrR 4.7, and this Court need not consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 11 P.3d 762, 27 P.3d 608 (2001) (court did not consider issue because party’s argument consisted of citation to one case and conclusory statements); State v. Motherwell, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990) (appellant “abandoned” assignments of error by not providing argument or authority).

Moreover, the trial court’s conclusion that the State violated CrR 4.7 is correct, and the trial court did not abuse its discretion by so finding. CrR 4.7(a)(1)(i) expressly requires the prosecutor to provide the names, addresses, and statements of their witnesses by the omnibus hearing. The rule is mandatory. Boyd, 160 Wn.2d at 432 (CrR 4.7(a)(v) establishes what “must be disclosed.”); State v. Grenning, 169 Wn.2d 47, 54, 234 P.3d 169 (2010) (State had “duty to disclose” evidence covered by CrR 4.7(a)(v)). The prosecutor clearly had Nava’s name, address, and the statement

he made on October 29 prior to the December 31 omnibus hearing but did not provide any of this information to the defense until days later.⁶ The prosecutor knew the police had the contradictory December 2 statement but did not obtain or reveal that statement to the defense until after the omnibus hearing.

The prosecutor argues she could not provide defense counsel with the transcripts until January 5 because she did not have them before that date. Brief of Appellant at 12 (citing CP 65, 77). The prosecutor, however, does not explain why she did not request the information in time to comply with the discovery rules. The prosecutor cannot fail to do her job in order to avoid providing information to the defense as required. Such an argument was summarily dismissed in Coe, where the prosecutor told defense counsel one witness underwent hypnosis before her testimony but did not reveal that two other witnesses had also been hypnotized. State v. Coe, 101 Wn.2d 772, 784, 684 P.2d 668 (1984). The Court found the prosecutor's claim "unacceptable" and held the defendant was "entitled to be informed that the witnesses were

⁶ According to a timeline created by a Mount Vernon Police Lieutenant in support of the prosecutor's motion for reconsideration, the police department prepared a transcript of Nava's October 29 interview on October 30 and provided the prosecutor with a draft copy that day. CP 67. The transcript of Nava's December 2 interview was completed on December 4. CP 67.

hypnotized and to receive the tapes of the hypnotic sessions no later than the omnibus hearing." Id. (emphasis added). Here too, Samuel was entitled to be informed that Nava's story changed in the second interview and to receive a tape recording or transcript of both interviews before the omnibus hearing.

The prosecutor also claimed she was unaware the second interview differed from the first. The prosecutor's determination of the importance of the statement, however, is irrelevant, as the pertinent discovery rules are mandatory. Grenning, 169 Wn.2d at 52; Boyd, 160 Wn.2d at 43. This Court found a discovery violation where the prosecutor failed to disclose an eyewitness's second statement to defense counsel because the prosecutor did not believe the witness's recantation was true. State v. Garcia, 45 Wn.App. 132, 137, 724 P.2d 412 (1986). This Court held the prosecutor's belief about the truth of the statement did not excuse the prosecutor's failure to provide it to the defense given the mandatory nature of the discovery rules. Id.

The principles behind the broad discovery rules adopted in this state and the express language of CrR 4.7(a)(1)(i) and 4.7(h)(2) required the deputy prosecutor to immediately disclose to defense counsel the substance of the September 14 oral statement made by the only eye witness to the crime. There is no exception to this obligation to disclose

which would allow either the prosecutor or the court to determine whether the statement was false and, if so, permit nondisclosure. A rule of disclosure that depends upon the, perforce, subjective analysis of a deputy prosecutor made during the preparation of the case would be meaningless.

Id. (emphasis added). Similarly, here, the prosecutor's assumption that a key witness's second statement was consistent with his first did not excuse her from providing both statements to the defendant.

c. The witness was not a confidential informant entitled to protection under CrR 4.7(f)(2). The prosecutor refers to Nava as an informant in her brief, cites CrR 4.7(f)(2), and argues without authority that the discovery violation and sanction should be viewed "in light of the informer's privilege." Brief of Appellant at 12, 13, 15, 17, 22. Nava, however, was not a confidential informant entitled to protection.

The discovery rules provide an exception for confidential informants, and the State may decline to disclose such an informant's identity in certain circumstances. CrR 4.7(f)(2). A simple reading of CrR 4.7(f)(2), however, shows the government may only keep an informant's identity confidential if the prosecutor does not intend to call the informant as a witness at trial or in a pre-trial hearing. Id.

Disclosure of an informant[']s identity shall not be required where the informant[']s identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the witnesses to be produced at a hearing or trial shall not be denied.

CrR 4.7(f)(2) (emphasis added).

Here, the State intended to call Nava as a witness. He was on the State's two witness lists, and the prosecutor later admitted she was unable to proceed to trial without Nava's testimony. CP 79; 1/27/10RP 51. Thus, the State's failure to timely provide Samuel with information about this important witness is not excused on the grounds the witness was a confidential informant.

The prosecutor now asserts Nava's identity needed to be protected because portions of his statements addressed separate crimes under investigation by the police. Brief of Appellant at 7, 15-16; CP 61. In that case, the State could easily have asked the court for a protective order. Pursuant to CrR 4.7(h)(5), the court could have restricted defense counsel's access to portions of Nava's statement if they were truly confidential and irrelevant to the crimes being prosecuted. Additionally, CrR 4.7(e)(2) permits the court to deny disclosure if the court finds there is a substantial risk of harm to a person that outweighs the usefulness of the

information to the defense. The prosecutor, however, made no effort to take advantage of any provision of CrR 4.7 that would permit her to legitimately conceal her witness's identity.

There is no "informer's privilege" for a witness the State intends to call at trial or a hearing. Additionally, the State may not keep an informant's identity confidential if the informer's information is relevant and helpful to the defense or essential to a fair determination of the case. CrR 4.7(f)(2). Here, the State fully intended to call Nava as a witness; in fact, the State's case rose and fell upon his testimony. The State was without legal authority in refusing to disclose the name, address, statements, and criminal history of the witness who entered a favorable plea agreement in exchange for providing testimony against Samuel.

d. The trial court's decision to exclude Nava's testimony was not an abuse of discretion because exclusion of a non-disclosed witness is a sanction available to the court in regulating discovery, under CrR 4.7. The trial court is responsible for ensuring that the discovery rules are honored so that the parties receive a fair trial and the defendant can receive effective assistance of counsel. Boyd, 160 Wn.2d at 433. A wide range of sanctions are available

to the trial court when the rules are violated, including dismissal of the action. CrR 4.7(h)(7). The rule reads:

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

(ii) Willful violation by counsel of an applicable discovery rule or order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

CrR 4.7(h)(7) (emphasis added). When a court rule permits the court to dismiss a prosecution, it necessarily permits a wide range of sanctions, including suppression of evidence. Seattle v. Holifield, ___ Wn.2d ___, 240 P.3d 1162 at ¶¶ 15-16 (2010) (describing suppression of evidence as an “intermediate remedial step” less onerous than the “extreme remedy of dismissal under CrRLJ 8I3(b)). Exclusion of the undisclosed evidence is a sanction available under CrR 4.7(h)(7)(i). State v. Hutchinson, 135 Wn.2d 863, 880-84, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999).

The State argues the court’s sanction was too severe because the prosecutor’s violation was technical or minor, but

provides no support for the proposition that the court lacks authority to sanction a party for a “de minimus” violation. Brief of Appellant at 15-17. This Court may assume that counsel was unable to find any such authority after a diligent search. Oregon Mutual Insurance Co. v. Barton, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001), rev. denied, 146 Wn.2d 1014 (2002).

The State also argues the trial court failed to utilize the criteria set forth in Hutchinson in determining whether to exclude evidence as a sanction to violating the discovery rules. Brief of Appellant at 16. The State, however, did not make this argument in the trial court. CP 30-31. The prosecutor cited Hutchinson in her motion for reconsideration but never argued the Hutchinson factors despite the opportunity to do so. CP 53-60; 1/27/10RP 12-14, 27-28, 45-47. The argument that the trial court abused its discretion by failing to apply the Hutchinson factors is thus waived by the prosecutor’s failure to bring the issue to the attention of the superior court judge. RAP 2.5(a); see Allen v. Asbestos Corp. Ltd., 138 Wn.App. 564, 578, 157 P.3d 406 (2007), rev. denied, 162 Wn.2d 1022 (2008) (appellant could not raise on appeal a new argument for admissibility of deposition not raised in trial court).

The Hutchinson Court set forth the following factors relevant to the determination of whether excluding evidence is the appropriate sanction for a discovery violation: (1) the effectiveness of less severe sanctions, (2) the impact of witness preclusion on the evidence at trial and the outcome of the case, (3) the extent to which the witness's testimony will surprise or prejudice the opposing party, and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 882-83. All but the second factor support the trial court's determination.

The first factor directs the court to consider the effectiveness of less severe sanctions. While exclusion of a witness's testimony is not a typical sanction for a discovery violation, a less severe sanction such as a continuance would not have sanctioned the prosecutor in this case. The prosecutor had just moved for a continuance of the trial date, and the motion had been granted. 1/15/10RP 17-18. In addition, the prosecutor had consistently been tardy in providing discovery throughout the case, intentionally withholding discovery in order to obtain the upper hand in plea negotiations. CP 18, 26, 31, 32-33; 1/15/10RP 8, 10, 19-20; 1/27/10RP 30-31, 40-41.

In Hutchinson, a continuance was not an appropriate sanction when the defendant violated CrR 4.7 by refusing to undergo a court-ordered psychological evaluation, as continuance would not alleviate the problem. Hutchinson, 135 Wn.2d at 881-82. Similarly, here, the less severe sanction of a continuance would not sanction prosecutor, and exclusion of the witness was the appropriate remedy. Id. at 883.

In addition, the third and fourth factors support the court's choice of sanction. Up until 20 days before trial, the only information the State provided the defense concerning their key witness was Detective Thompson's declaration in support of probable cause. In a case with numerous witnesses, the suppression of any other information concerning this witness clearly prejudiced the defense.

While the court did not find the failure to disclose evidence was willful or in bad faith, the fourth Hutchinson factor, there is information to support such a finding. The prosecutor had an ethical responsibility to respond to the defendant's discovery requests. American Bar Association, Standards for Criminal Justice, Prosecution Function and Defense Function, (3rd ed. 1993) (hereafter ABA Standards), Standard 3-3.11(b) ("A prosecutor

should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.”). The prosecutor, however, did not request the needed information from the police department in time to provide it to the defense by the omnibus hearing as required by the court rules. Instead the prosecutor tried to force Samuel to engage in plea bargaining without knowledge of the second statement, as the court noted. 1/27/10RP 8. The prosecutor acted as if the witness was a confidential informant when he clearly was not, ignoring both CrR 4.7(f)(2) and the court’s omnibus order. CP 8. Thus, there is sufficient evidence to show that the prosecutor acted at best recklessly and more likely unethically in failing to provide the mandatory discovery.

The State now argues that the trial court may have come to a different conclusion if it had been aware of the impact on the trial of preventing their witness from testifying, the second Hutchinson factor. Brief of Appellant at 16. The State, however, had two opportunities to bring this factor to the court’s attention but did not do so. The State did not explain how the absence of the witness would impact its case or provide the court with the discovery; the court had only the original declaration in support of probable cause and the State’s lengthy witness list. 1/27/10RP 43-44. It was not

until after the court denied the prosecutor's motion for reconsideration that the State mentioned the importance of the witness by deciding it could not proceed without Nava. 1/27/10RP 49 (prosecutor intends to go forward with all charges), 51 (prosecutor asks court to dismiss because unable to go forward on Counts 3-6). It is too late for the State to claim the trial court ignored this factor.

The State did not mention Hutchinson in the trial court or argue against the sanction of excluding Nava as a witness, and thus this Court need not consider the issue. A review of the Hutchinson factors, however, shows the trial court did not abuse its discretion in sanctioning the State for its serious multiple discovery violations. See Holifield, 240 P.3d at ¶ 16 (trial court did not abuse discretion by suppressing evidence after finding governmental misconduct impacted defendant's right to fair trial).

e. The trial court's ruling was correct, and this Court may uphold the ruling on any valid grounds. The trial court correctly found that the prosecutor violated CrR 4.7. The State argues the trial court's findings of fact lack evidentiary support and are irrelevant to the discovery violation. Brief of Appellant at 19-21. Because the trial court's conclusion is correct, however, this Court

may affirm the ruling on grounds not mentioned in the Findings of Fact and Conclusions of Law. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); Pannell v. Thompson, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979) (when trial court's result is correct, it will not be reversed simply because trial court gave incorrect or sufficient reason for ruling).

i. The trial court's ruling may be affirmed based upon the cumulative effect of numerous discovery violations. Even if this Court finds the specific discovery violation relied upon by the trial court to sanction the prosecutor was de minimus, this Court should uphold the trial court's ruling based upon the prosecutor's violation of CrR 4.7 throughout the course of the case. The State began its prosecution of Samuel by concealing the names and addresses of an essential witness and two other witnesses. Despite several requests for discovery, the only information defense counsel was provided by the omnibus hearing concerning the State's key witness were the brief paragraphs included in the declaration in support of probable cause. CP 26, 30, 33. Thus, not only was the December 2 interview withheld from the defense, so were Nava's name, address, his October 29 statement, his plea agreement to testify against Samuel, and his criminal history. CP 17-18, 33. In

addition, the State claimed two other witnesses mentioned in the declaration in support of probable cause were confidential and did not reveal their names or any statements or criminal histories. CP 24. The case had also been continued twice in juvenile court because of the prosecutor's failure to provide any discovery to the defense. CP 18. The trial court correctly determined the prosecutor violated CrR 4.7.

ii. The trial court's concern that the arrest warrant was no longer based upon probable cause was valid because the prosecutor may not ethically prosecute a case in the absence of probable cause. The trial court was concerned that the prosecutor had information about the credibility of its main witness that was not mentioned in the declaration in support of probable cause and thus not disclosed to the superior court judge who made the probable cause determination and issued a warrant for Samuel's arrest. CP 76-66 (Findings of Fact 2-4; Conclusions of Law 1-3). The court felt the integrity of the judicial process was undermined because the information the prosecutor failed to disclose information that might have changed the judge's decision in issuing a warrant for Samuel's arrest. 1/15/10RP 14-15.

In Washington, the prosecuting attorney is empowered to charge by information without a preliminary hearing or determination by a grand jury. CrR 2.1(a); State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971). The court, not the prosecutor, may issue a warrant for the defendant's arrest if the court determines there is probable cause to believe the defendant committed the crime charged. U.S. Const. amends. IV, XIV; Const. art. 1, § 7; CrR 2.2(a)(1), (2); Kalina v. Fletcher, 522 U.S. 118, 129, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); State v. Klinker, 85 Wn.2d 509, 516-17, 537 P.2d 268 (1975). In reviewing declarations to determine if probable cause exists, the court necessarily determines whether the information it reviews is reliable. Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); State v. Jackson, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

A criminal information may not be filed indiscriminately; the prosecutor must have a good faith belief there is probable cause to support the charges. State v. Cameron, 30 Wn.App. 229, 231, 633 P.2d 901, rev. denied, 96 Wn.2d 1023 (1981); RPC 3.8(a); ABA Standards, Standard 3-3.9(a). The decision to file charges is that

of the prosecutor, not the police. ABA Standards, Standard 3-3.4(a). The prosecutor in this case signed the Information charging Samuel with six felony charges, thus indicating her belief there was probable cause to support the charges. CP 88-90; Mark v. King Broadcasting Co., 27 Wn.App. 344, 351-52, 618 P.2d 512 (1980), aff'd on other grounds, 96 Wn.2d 473 (1981), cert. denied, 457 U.S. 1124 (1982); CP 11.

The prosecutor also has an ethical responsibility to dismiss charges if she discovers during the course of preparing for trial that she lacks the admissible evidence needed to convict. RPC 3.8(a); ABA Standards, Standard 3-3.9(a). Thus, the trial court's concern for the integrity of the criminal justice system was proper. The trial court does make credibility determinations when determining if probable cause exists for an arrest or search warrant, so Finding of Fact 2 is supported by the law. While the later discovery of Nava's second statement does not void the superior court's initial probable cause determination, it does require the prosecutor to reexamine the evidence to confirm she has sufficient evidence to continue to prosecute. The prosecutor's failure to review the relevant information obtained by the police as it became available thus calls

her professionalism into question, as did her refusal to provide this information to the defense in a timely manner.

The State violated its clear discovery obligations in this case. Even if this Court does not agree with the rationale stated by the trial court, the ruling should be upheld on the alternative ground of the multiple discovery violations. Additionally, the trial court was on the right track in noting problems with withholding exculpatory information from the judge determining probable cause to arrest. While the prosecutor may not be required to bring this information to the judge's attention, the State may not continue a prosecution once it lacks probable cause. The court's finding thus support its ruling.

f. The trial court's ruling must be affirmed. The trial court correctly found that the State had violated CrR 4.7(a) by not providing the defense with its key witness's second statement which differed materially from the first statement concerning the timing of defendant's alleged inculpatory statements, thus impacting the witness's credibility and the defendant's alibi defense. In addition, the court's ruling could just as well have been based upon other significant delays in providing information required by CrR 4.7 to defense counsel until shortly before trial. Finally, the

court did not abuse its discretion by excluding the witness from testifying because other remedies such as a continuance would not have sanctioned the prosecution. The court order must be affirmed.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING A WITNESS DUE TO THE STATE'S VIOLATION OF SAMUEL'S DUE PROCESS RIGHTS

The trial court's decision to exclude Nava's testimony was alternatively based upon the denial of Samuel's constitutional right to due process of law because the witness's second statement was material and exculpatory. CP 77 (Conclusion of Law 4). While the government is permitted to vigorously prosecute a criminal case, it may not resort to improper methods to obtain a conviction. Cone v. Bell, ___ U.S. ___, 129 S.Ct. 1769, 1782, 173 L.Ed.2d 701 (2009); Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The government's failure to disclose evidence material to a defendant's guilt or punishment, whether intentional or inadvertent, violates a criminal defendant's constitutional right to due process of law. U.S. Const. amends. V, XIV; Cone, 129 S.Ct. at 1782; Brady, 373 U.S. at 86, 87.

Any evidence that is favorable to the defense is considered material, whether it is exculpatory or merely impeaching. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Giglio v. United States, 405 U.S. 150, 154, 96 S.Ct. 763, 31 L.Ed.2d 104 (1972). Moreover, government is responsible for providing the defendant with material evidence whether the evidence is in the possession of the prosecutor or the police. Youngblood v. West Virginia, 547 U.S. 867, 869-70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (per curiam); Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); United States v. Price, 566 F.3d 900 (9th Cir. 2009). Because the prosecutor has a “duty to learn” the results of the investigation he directed the police to perform, he cannot be excused from disclosing what he did not know but could have learned. Kyles, 514 U.S. at 437; Price, 566 F.3d at 911. Thus, for example, this Court found the prosecutor’s office committed misconduct when it failed to disclose to defense counsel an oral promise of reduced charges made by the prosecutor and a state trooper to a key witness’s lawyer. State v. Soh, 115 Wn.App. 290, 292-94, 62 P.3d 900, rev. denied, 150 Wn.2d 10007 (2003), cert. denied, 540 U.S. 1220 (2004).

Brady and its progeny address due process violations that were discovered after trial and conviction. Thus, the standard for determining if the defendant's constitutional right to a fair trial is violated is whether there is a reasonable possibility that, had the material been disclosed to the defense, the result of the proceeding would have been different. Kyles, 514 U.S. at 434; Price, 566 F.3d at 911; State v. MacDonald, 122 Wn.App. 804, 809-10, 95 P.3d 1248 (2004). "[T]he question is not whether the defendant would have more likely than not received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434,

Here, however, the due process violation was discovered prior to trial and a different analysis is required, as this Court does not know what evidence would have been presented at trial and cannot gauge the impact of the late disclosure of the exculpatory evidence on the verdict. Instead, the appropriate standard of review is whether the material information was disclosed sufficiently before trial that responsible defense counsel had the opportunity "to use the information with some degree of calculation and forethought." Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001).

Here, the State concedes it was obligated under principles of due process to provide defense counsel with Nava's second interview, as it impeached an important government witness's credibility. Brief of Appellant at 19. The prosecutor asserts, however, that the trial court erred by suppressing the evidence because the evidence was eventually disclosed prior to trial. Brief of Appellant at 18-19. The prosecutor's suggestion that there is no Brady violation if exculpatory information is eventually revealed must be rejected.

A majority of the federal circuit courts have held that the untimely disclosure of exculpatory material may violate a defendant's right to due process. United States v. Burke, 571 F.3d 1048, 1055-56 (10th Cir), cert. denied, 129 S.Ct. 565 (2009). "If a defendant could never make out a Brady violation on the basis of the effect of the delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information." Id. at 1054. Similarly, it would encourage gamesmanship to permit the State to delay providing discovery to

the defense until the shortly before trial so that defense counsel lacks the time necessary to study, investigate, and take advantage of the newly discovered material.

In Leka, the state prosecutor did not provide defense counsel with an eyewitness whose testimony contradicted other eyewitnesses until three business days before trial and then obtained a protection order so that defense counsel could not speak to the witness before he testified. 257 F.3d at 93-94, 99. The federal district court noted that the longer the government withholds information from the defense and the closer to trial the disclosure is made, the less opportunity defense counsel has to utilize the information at trial. Id. at 100-01. Not only was Leka unable to interview the witness, he was unable to use information obtained in the interview to direct further investigation. Id. at 101. As the court noted, new developments may require counsel to disregard prior investigation and proceed with a new trial strategy. Id. The court therefore concluded the late provision of material information violated the defendant's constitutional rights under Brady and granted his habeas corpus petition. Id. at 107.

As in Leka, Samuel's attorney did not receive the long-requested identification information and statements sufficiently in

advance of trial to make intelligent and thoughtful use of the information. Washington's discovery rules set the omnibus hearing as the deadline for providing the identity, location and statements of government witnesses, and Samuel had made several requests for the information. In a case with over 43 witnesses, the late disclosure of the key witness's statement, coupled with the lack of disclosure of the identity of two other witnesses (C11 and C12), was too late for defense counsel to make intelligent use of the information. The choice of remedy for the Brady violation was in the sound discretion of the trial court, and excluding the witness was an appropriate sanction. Burke, 571 F.3d at 1054. The trial court thus did not abuse its discretion by ordering the suppressed witness could not testify at trial.

D. CONCLUSION

The order excluding Nava from testifying must be affirmed. The trial court correctly found that the State had violated discovery rules by its tardy disclosure of the name, address, plea agreement and statements of a witness who said Samuel admitted the crime. The court did not abuse its discretion in ordering the witness could not testify for the State, as other less onerous sanctions were not available.

In the alternative the court did not abuse its discretion by finding the prosecutor's tardy disclosure violated Samuel's constitutional right to due process where the witness's second statement was valuable to the defense for impeaching the witness's credibility and supporting Samuel's alibi defense.

DATED this 24 day of November 2010.

Respectfully submitted,



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

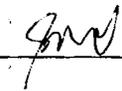
STATE OF WASHINGTON,)	
)	
Appellant,)	
)	NO. 64919-1-I
v.)	
)	
SAMUEL GONZALEZ,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF NOVEMBER, 2010.

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