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NO. 33697-9-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ASHLEY WADE SICLOVAN,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

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- 2. THE TRIAL COURT ERRED IN ALLOWING ASHLEY SICLOVAN TO PROCEED PRO SE.**
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- 1. A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF COUNSEL MUST BE ESTABLISHED THROUGH THE COURT'S COLLOQUY WITH THE DEFENDANT OR OTHERWISE FOUND IN THE RECORD. A VALID WAIVER REQUIRES PROOF THAT DEFENDANT KNEW OF THE MAXIMUM PENALTY FOR EACH CHARGED OFFENSE. DID ASHLEY SICLOVAN MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF COUNSEL WHEN THE TRIAL COURT NEVER TOLD HIM THE**

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III. STATEMENT OF THE CASE

(a) The charges. On September 21, 2004, the Clark County Prosecutor filed a four-count information charging Ashley Wade Siclovan with manufacturing methamphetamine (count 1), possession of ephedrine or pseudoephedrine with intent to

manufacture methamphetamine (count II), possession of methamphetamine (count III), and use of drug paraphernalia (count IV). CP 1-2. All charges were alleged to have occurred between December 1, 2003, and February 15, 2004. CP 1-4. Siclovan appeared with his court-appointed counsel, George Brintnall, on October 7, 2004, and entered a not guilty plea to all charges. 1RP¹ 1. On October 26, the prosecutor filed an amended information adding a school zone enhancement to the manufacturing methamphetamine charge. CP 3-4. On November 2, Siclovan entered a not guilty plea to the amended information. 2RP 10.

Before the start of trial on February 16, 2005, the prosecutor moved to dismiss the school zone enhancement from the manufacturing methamphetamine charge (count I) and to dismiss the use of drug paraphernalia charge altogether (count IV). 14ARP 269. The court dismissed the school zone enhancement and the paraphernalia charge although the case was still tried on the amended information. 14ARP 270-72; CP 3-4.

¹ The appropriate verbatim is specified in the record by the volume number – and letter if applicable – followed by “RP” and the page number. The page numbers in the verbatim are chronological with the exception of volume XXXIV – ADDENDUM. That volume contains an in-camera hearing heard on June 22, 2005. The transcription of the in-camera hearing was ordered and transcribed after the rest of the verbatim was complete.

(b) The search warrant. The charges stem from a search warrant served on storage unit #49 at the National Storage Center in Vancouver. (See Siclovan's suppression motion at CP 18-30 with warrant affidavit attached.) On January 3, 2005, Judge Bennett heard Siclovan's challenge to the four corners of the warrant's affidavit. 8RP 77-139. The court denied the suppression motion. 8RP 139. In so doing, the court found that the use of a drug canine to sniff the outside of the closed storage unit was not a search under the federal or the state constitution. 8RP 136. The affidavit sufficiently established the informant's basis of knowledge and credibility. 8RP 136-38. It was reasonable for the issuing magistrate to find probable cause. 8RP 138. And that the warrant wasn't stale as its purpose was to locate items used in the ongoing enterprise of cooking methamphetamine. 8RP 139. Findings of Fact and Conclusions of Law were entered. CP 160-64.

(c) Pro se representation. Unhappy with his appointed counsel, Siclovan asked for a different counsel or to proceed pro se. 9RP 144; CP 52-55. On January 20, Judge Lewis heard Siclovan's argument. 9RP 144-160. The court engaged Siclovan in a brief general colloquy: he is 30 years-old, he finished the 10th grade, he can read and write, he has been in trial before, he has

written his own appeals, he has done his own sentencing, and he thought that he had nine points. 9RP 152-54. The court denied Siclovan new counsel but gave him the choice of either continuing with attorney Brintnall or representing himself. 9RP 153. After discussing the matter with Brintnall, Siclovan opted to self-represent. 9RP 154-55.

The court explained to Siclovan that he would be held to the same standard as an attorney; he would have to question witnesses and properly make and respond to evidentiary objections. 9RP 155-56. Siclovan said that he understood and was reading court rules, evidence rules, and ground rules, and wanted stand-by counsel. 9RP 156. The court found Siclovan's request to proceed pro se equivocal as it seemed based on Siclovan's lack of discovery review. 9RP 161. Rather than permitting Siclovan to proceed pro se, Judge Lewis continued the trial date and encouraged Siclovan to go over discovery with Brintnall. 9RP 161-63. Judge Lewis also decided that the assigned trial judge, Judge Bennett, should make the determination of whether Siclovan could proceed pro se. 9RP 162.

Judge Bennett took up the issue on January 26 when Siclovan again requested to proceed pro se. 10RP 172. Through

his questions to Siclovan, Judge Bennett learned the following about him: he is 30, finished 10th grade, reads and writes English, possibly has an undiagnosed mental illness, has several felony convictions, unsuccessfully represented himself on a sentencing PRP, has had a stipulated facts trial on a juvenile matter, self-represented on a guilty plea in district court for driving on a suspended license, and testified at a jury trial as a victim. 10RP 172-76.

Judge Bennett told Siclovan about the jury selection process, opening statement, the State's case-in-chief, questioning witnesses while abiding by court rules, making proper objections to preserve appellate issues, submitting the case on the State's evidence alone or putting on defense witnesses, and making the decision to testify. 10RP 176-79. The court cautioned Siclovan that self-representation resulted in substandard legal representation. 10RP 179-80. As he had done before with Judge Lewis, Siclovan requested the assistance of stand-by counsel and reasserted his desire to proceed pro se. 10RP 178, 181. Judge Bennett granted both requests appointing Brintnall as stand-by counsel. 10RP 180-82.

(d) Pre-trial issues about Calvin Brown. After Judge Bennett approved Siclovan's pro se status at the January 26 hearing, Siclovan said he believed Calvin Brown was interviewed in the jail about his case but saw no record of the interview in his discovery. 10RP 194. The deputy prosecutor, Quinn Posner, said that he knew of Calvin Brown but that Brown was not connected to the case. 10RP 195. The court ordered Posner to send an e-mail to the primary officer asking if there were any statements from Calvin Brown "that has to do with the case." 10RP 195.

At a February 3 discovery review hearing, Siclovan again requested any statements taken from Calvin Brown. 11RP 210. Siclovan believed that the police and Department of Corrections (DOC) Officer Reese Campbell interviewed Brown on Siclovan's case. 11RP 208-10. Prosecutor Posner updated the court on Brown. Posner was still trying to contact the police officer – Officer Neil Martin – but that he personally was unaware of Brown's relevance whatsoever to Siclovan's case. 11RP 210. The court ordered Posner to contact Reese Campbell to determine if there were any reports or investigations in the possession of DOC that flowed from the search warrant. 11RP 211. Posner complained

that Siclovan's "requests have absolutely no relevance to his case whatsoever". 11RP 211-12.

At a February 10 hearing, Posner updated the court on Calvin Brown. 12RP 219. Posner made contact with Officer Martin and Reese Campbell. They'd said that all evidence and information they discovered has been turned over to the State. 12RP 219. Posner said Siclovan had what he had. 12RP 219.

(e) Siclovan's pre-trial review of the evidence and discovery of the destruction of evidence. Siclovan asked to see all the evidence seized from the storage unit. 11RP 207. The court approved and the State agreed. 11RP 207. The State noted that some of the materials and chemicals used in the manufacturing of methamphetamine had been destroyed pursuant to a court-authorized destruction order. 11RP 208.

After reviewing the evidence, Siclovan complained that a substantial amount of evidentiary items had been destroyed. 13RP 250. He accused the State of filtering out evidence that it did not want him to see. 13RP 250. The court ordered the State to have the police put together a trail of what happened to everything seized from the storage unit so it would be available for Siclovan to use in cross-examination. 13RP 255-56. Officer Martin later

admitted that there was no record made of the items seized from the storage unit if the items were later destroyed. 14ARP 275-85. Martin said that items were destroyed if they were believed to be contaminated by dangerous chemicals. 14ARP 282.

(f) Trial. The focus of the State's case was two-fold: to establish a tie between Siclovan and storage unit 49 and to prove that the storage unit contained a methamphetamine lab. To establish Siclovan's tie, the storage facility's on-site manager, Beverly Bates, testified that Siclovan initially rented a smaller storage unit, 6001, in November 2003. 14BRP 417-18. In December 2003, Siclovan brought in his girlfriend, Sandra Gray, and signed Gray up for unit 49. 14BRP 420-21. Although Gray was the renter of unit 49, Siclovan had approved access through Gray. 14BRP 422. Siclovan also paid the rent on unit 49. Bates saw Siclovan at unit 49 often, mostly at night, and sometimes up to seven times a day. 14BRP 426-28. Unit 49 is near the on-site office and residence. She monitored the unit through a security camera. 14BRP 424.

As much as Bates had seen Siclovan at the unit, he seemed to have stopped coming there a few weeks before the police took control of the unit on February 15, 2004. 14BRP 428.

Officer Martin described how he found Siclovan's property in unit 49. In a Nike box, he found photos, a temporary Washington identification card, personal notes, and mail including a PUD bill dated January 20, 2004. 14ARP 322-23. Unit 49 also held photo albums belonging to Siclovan. 14ARP 322.

Missing from the proof of a connection between Siclovan and the lab items were any fingerprints. Some efforts were made to lift prints from a few items with no results. 15ARP 571-72. Martin offered that lab cooks tend to wear latex gloves because of the caustic chemicals involved. 15ARP 572.

Through Martin, the State admitted into evidence numerous pictures documenting the contents of unit 49. 14A RP 313. Martin, who had been trained in clandestine lab processing, offered that the items in unit 49 were completely consistent with a methamphetamine lab. 14A 310-11, 336. A lab-trained Washington State Patrol (WSP) trooper reviewed the photographs and police reports and offered the same opinion. 15ARP 622-40. WSP forensic scientist Bruce Siggins tested and determined that a bag of white sludge contained pseudoephedrine. 14ARP 343, 613. And he found methamphetamine in a liquid form. 15ARP 602. He opined that the items he tested from the storage unit were

consistent with the tablet extraction method used to isolate pseudoephedrine for making methamphetamine. 15ARP 613.

Siclovan did not testify but he did present testimony from several persons. Sandra Gray, Siclovan's on-again, off-again girlfriend explained that she rented unit 49 when she and Siclovan planned to join their households and move in together. 15BRP 668-69. That plan fell through and the couple broke up. 15BRP 668-69. After the breakup, Gray rented unit 49 to a man named Calvin. 15BRP 684, 698-701. She provided him with the security code and the key for the unit's lock so he could come and go. 15BRP 699-701. She thinks that happened around February 6, 2004, but acknowledged being bad with dates. 15BRP 699. Roger Womack, an acquaintance of Siclovan's, helped Siclovan move items from the large unit, 49, to the small unit, 6001, at the end of January, 2005. 15BRP 792-93.

Ms. Bates testified earlier in the trial the storage area was very secure. 14BRP 437-439. Persons coming and going had to use their own security codes to open the main gate. 14BRP 437. Once inside the gate, they also had to use their code to access their storage area. 14BRP 437-38. If the wrong code was used, an alarm would sound. 14BRP 437. By contrast, Siclovan's witnesses

testified that anyone could pass an access code on to anyone else, Ms. Bates infrequently challenged strangers on the premises, and alarms were frequently ignored. 15BRP 780.

During closing argument, Siclovan conceded that there was a methamphetamine lab in unit 49. 16RP 900. He argued that the evidence failed to prove that he had anything to do with the lab and focused on the unknown person who likely accessed unit 49 after he stopped using it. 16RP 917-23.

In his rebuttal, prosecutor Posner argued that contrary to Gray's testimony, Calvin never existed. 16RP 934-35.

The jury found Siclovan guilty on all three counts. CP 85-87; 18RP 940-41.

(g) Post-trial motions. Post-verdict, Siclovan immediately made a motion for a new trial. 16RP 942. The court allowed leeway on the normal post-verdict timelines. 16RP 947; 17RP 970. Siclovan filed his motion pleadings on April 1, 2005. CP 165-88. Prosecutor Posner filed his response on April 26. CP 220-47. The court heard and denied the motions over several dates – May 6 (20RP), May 26 (21RP), July 21(25RP), August 1 (26RP).

On June 22, the court held an in-camera review at Posner's request. 24RPAdd² 1646. At the hearing, Posner acknowledged knowing that Calvin Brown was a real person and that he was the informant for the search warrant. 24RPAdd 1647. Posner's defense for never revealing his knowledge of Calvin Brown was that Siclovan had never asked for disclosure of the informant. 24RPAdd 1648-49.

(h) Post-trial challenge to pro se status. In one of his a post-trial motions for a new trial or to dismiss, Siclovan challenged the trial court's acceptance of his waiver of counsel complaining that the court had not advised him of the statutory maximum penalty for any of his three charges. CP 189, 210-11. Judge Bennett took the issue up at the May 26, hearing. 21RP 1100-02, 1112-60. Siclovan denied knowing the potential penalties for counts I and II or that those charges were class B felonies. 21RP 1121. He acknowledged knowing that count III, possession of methamphetamine, is a class C felony but said nothing about being aware of the statutory maximum. 21RP 1122. The court asked prosecutor Posner if Siclovan was ever given a written plea offer. 21RP 1115-28. Posner said that he had given a plea offer to

² "24RPAdd" stands for the addendum to volume 24.

Siclovan's attorney, Brintnall. 21RP 1122-23. He supported his statement with a Declaration Explaining Prosecutor's Offer of Settlement. CP 248-54. The offer set out a range of 124-144 months for manufacturing methamphetamine (count I), 124-144 months on the possession of pseudoephedrine with intent to manufacture (count II), and 12+-24 months on the possession of methamphetamine. CP 252. 21RP 1123-24. The ranges on counts I and II included 24 months for the school zone enhancement. CP 252. The prosecutor mailed the offer to Brintnall on October 12, 2004. CP 249. Siclovan denied having any knowledge through Brintnall of the maximum penalty for any of his three charges. 21RP 1127-28. The court took Siclovan's denial as a waiver of the attorney-client privilege and asked Brintnall if he had shared the offer with Siclovan. 21RP 1128. Brintnall said that he had. 21RP 1128. The court denied Siclovan's motion for a new trial on the improper waiver of counsel argument specifically finding that, "You were told that the maximum penalty was 120 months." 21RP 1160.

(i) Sentencing. Siclovan was sentenced to concurrent standard range sentences of 110 months, 110 months, and 24 months.

IV. ARGUMENT

I. ASHLEY SICLOVAN DID NOT MAKE A VALID PRE-TRIAL WAIVER OF COUNSEL; HE DID NOT KNOW THE MAXIMUM PENALTY FOR HIS OFFENSES.

The Sixth and Fourteenth Amendments to the United States Constitution afford a defendant the right to assistance of counsel. A defendant also has a right to self-representation. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed. 2d (1975). These rights are also explicit guarantees of Article I, Section 22 of the Washington State Constitution. State v. Kolocotronis, 73 Wn.2d 92, 97, 436 P.2d 774 (1968). Because of the tension between the right to counsel and the right to self-represent, a defendant wishing to proceed pro se must make an unequivocal request to do so and the trial court must ensure that the waiver of counsel is knowing, voluntary, and intelligent. State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); State v. Buelna, 83 Wn. App. 658, 660, 922 P.2d 1371 (1996). There is no specific formula for determining a waiver's validity. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The best method of determining whether a defendant's waiver of counsel is knowing, intelligent, and voluntary is for the trial court to conduct an on-the-record colloquy "detailing at a minimum the seriousness of the charge, the possible maximum

penalty involved, and the existence of technical, procedural rules governing the presentation rules governing the presentation of the accused's defense." State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). This court recommends that trial court's deciding to give a defendant the opportunity to proceed pro se follow the colloquy suggested in State v. Christensen, 40 Wn. App. 290, 295-96, n. 2, 698 P.2d 1069, review denied, 104 Wn.2d 1003 (1985). Buelna, 83 Wn. App. at 662.

If the trial court does not conduct a colloquy, a waiver may still be valid if a reviewing court determines from the record that the accused was fully apprised of these factors and other risks associated with self-representation that would indicate he made his decision with is "eyes open." Silva, 108 Wn. App. at 540. But such a determination is rare. "[R]arely will adequate information exist on the record, in the absence of a colloquy, to show the [defendant's] required awareness of the risks of self-representation." Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). The defendant has the burden of demonstrating that his waiver of the right to counsel was invalid. State v. Hahn, 106 Wn.2d 885, 901, 726 P.2d 25 (1986). A trial court's determination

of a valid waiver is reviewed for abuse of discretion. State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986).

The trial court failed to adequately determine that Siclovan waived his constitutional right to counsel with his eyes open. Siclovan sent a letter to the court asking to proceed pro se and expressing dissatisfaction with his appointed counsel. CP 52-55. The court, Judge Lewis, reviewed the letter at a January 20, 2005, hearing. 9RP 144. The court engaged Siclovan in a brief general colloquy learning that he is 30 years-old, finished the 10th grade, can read and write, has been in trial before, written his own appeals, done his own sentencing, and thought that he had nine points. 9RP 152-54.

The court explained to Siclovan that he would be held to the same standard as an attorney; he would have to question witnesses and properly make and respond to evidentiary objections. 9RP 155-56. Siclovan told the court that he understood and that he was reading court rules, evidence rules, and ground rules, and wanted stand-by counsel. 9RP 156. The court found Siclovan's request to proceed pro se equivocal as it seemed based on his lack of discovery review. 9RP 161. Judge Lewis decided

that the assigned trial judge, Judge Bennett, should make the determination of whether Siclovan could proceed pro se. 9RP 162.

Judge Bennett took up the issue on January 26 when Siclovan again requested to proceed pro se. 10RP 172. Through questions and answers, Judge Bennett learned that Siclovan is 30 years-old, has a 10th grade education, reads and writes English, possibly has an undiagnosed mental illness, has several felony convictions, unsuccessfully represented himself on a PRP dealing with a sentencing issue, been to “trial” once before at juvenile on stipulated facts, self-represented on a guilty plea in district court for driving on a suspended license, and testified at a jury trial as a victim. 10RP 172-76.

Judge Bennett told Siclovan about the jury selection process, opening statement, the State’s case-in-chief, questioning witnesses while abiding by the court rules, making proper objections to preserve appellate issues, submitting the case on the State’s evidence alone or putting on defense witnesses, and making the decision to testify himself. 10RP 176-79. The court cautioned Siclovan that self-representation resulted in substandard legal representation. 10RP 179-80. As he had done before with Judge Lewis, Siclovan requested the assistance of stand-by

counsel and reasserted his desire to proceed pro se. 10RP 178, 181. Judge Bennett granted both requests and appointed Brintnall as stand-by counsel. 10RP 180-82.

In a post-trial motion to dismiss, Siclovan challenged the trial court's acceptance of his waiver of counsel complaining that the court had not advised him of the statutory maximum penalty for any of his three charges. CP 189, 210-11. Judge Bennett took the issue up at a May 26 hearing. 21RP 1100-02, 1112-60. Siclovan denied knowing the potential penalties for counts I and II or that those charges were class B felonies. 21RP 1121. He acknowledged knowing that count III, possession of methamphetamine, is a class C felony but said nothing about being aware of the statutory maximum. 21RP 1122. The court asked the prosecutor, Posner, if Siclovan was ever given a written plea offer. 21RP 1115-28. Posner said that he had given a plea offer to Siclovan's counsel. 21RP 1122-23. He supported his statement with Declaration Explaining Prosecutor's Offer of Settlement. CP 248-50. The offer set out a range of 60-120 months for manufacturing methamphetamine (count I), 100-120 months on the possession of pseudoephedrine with intent to manufacture (count II), and 12+-24 months on the possession of methamphetamine.

21RP 1123-24. The prosecutor mailed the offer to Brintnall on October 12, 2004. CP 249. Siclovan denied having any knowledge through Brintnall of the maximum penalty for any of his three charges. 21RP 1127-28. The court took Siclovan's denial as a waiver of the attorney-client privilege and asked Brintnall if he had shared the offer with Siclovan. 21RP 1128. Brintnall said that he had. 21RP 1128. The court denied Siclovan's motion for a new trial on the improper waiver of counsel argument specifically finding that, "You were told that the maximum penalty was 120 months." 21RP 1160.

The trial court's effort to make a knowing, intelligent, and voluntary waiver from an incomplete colloquy – where Siclovan was not advised of the statutory maximum for any of his offenses – fails. The maximum penalties, if communicated at all, were misstated. Both counts I and II are class B felonies with standard statutory maximum sentences of 10 years. Count III is a class C felony with a standard statutory maximum of 5 years. However, Siclovan has four prior felony drug convictions in Washington. CP 388. Pursuant to RCW 69.50.408, a person convicted of a second or subsequent drug offense may be imprisoned for a term up to twice the statutory maximum for the current offense. Apparently, neither

the court nor the prosecutor nor standby counsel nor, most importantly, Siclovan were aware of this doubling statute. The true, enhanced maximum penalty for both counts I and II is 240 months, not 120 months. The true, enhanced penalty for count III is 120 months.

The trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds for untenable reasons. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). The trial court's finding that Siclovan was aware of the maximum penalty for all of his charges at the time of his waiver of counsel is manifestly unreasonable. If Siclovan knew of any maximum penalty at all when he waived counsel, it was the wrong maximum because the court, the prosecutor, and defense counsel/stand-by counsel misadvised Siclovan giving him a maximum range that was, in total, 25-years too low.

II. PROSECUTOR POSNER FAILURE TO ABIDE BY THE COURT'S DISCOVERY ORDER DENIED ASHLEY SICLOVAN DUE PROCESS.

Every criminal trial is "a search for the truth and not an adversarial game". United States v. Perry, 471 F.2d 1057, 1063, (D.C. Cir. 1972). The disclosure of evidence to the defendant is

both a federal and state constitutional obligation. State v. Wright, 87 Wn.2d 783, 786-88, 557 P.2d 1 (1976). Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Under Washington's court rules, if a defendant makes a showing of materiality to the preparation of the defense and the request is reasonable, the court on its own discretion may require disclosure to the defendant of all relevant material. CrR 4.7(e)(1).

It is a long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process . . ." To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

State v. Dunivin, 65 Wn. App. 728, 733, 829 P.2d 799 (citation omitted) review denied, 120 Wn.2d 1016 (1992). The prosecutor's discovery obligation is ongoing. CrR 4.7(h)(2).

In Brady, the court adopted a materiality test holding that due process requires a state to disclose evidence when it is

material to the issue of guilt or innocence. In United States v. Agurs, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S. Ct. 2392 (1976), the Supreme Court applied the Brady rule to three distinct suppression situations. First, where prosecutorial misconduct is involved, a conviction must be set aside if there is any “reasonable likelihood” that undisclosed testimony could have affected the jury’s decision. Agurs, at 104. Second, if the defense has made a pretrial request for specific evidence, the test focuses on whether the suppressed evidence “might have affected the outcome.” Agurs, at 104. The last situation is where a general Brady request has been made or nor request has been made at all. The duty to disclose evidence in such a situation arises only if the evidence “creates a reasonable doubt that did not otherwise exist.” Agurs, at 112. State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984).

Under our facts, the State’s failure to provide the required discovery about Calvin Brown falls under the first Agurs test. Prosecutorial misconduct was involved and there was a “reasonable likelihood” that undisclosed testimony could have affected the jury’s decision. After Judge Bennett approved Siclovan’s pro se status at the January 26 hearing, Siclovan told the court that he believed a person named Calvin Brown had been

interviewed in the jail about his case but that he saw no record of the interview in his discovery material. 10RP 194. Siclovan did not articulate at that time what specific relevancy he thought Brown might have to his case. The deputy prosecutor, Quinn Posner, said that he knew of Calvin Brown but that he was not connected with the case. "I don't know anything about Calvin Brown. I don't see the name Calvin Brown once in any of the reports." 10RP 195. Nevertheless, the court ordered Posner to send an e-mail to the primary officer asking if there was any statement from Calvin Brown "that has to do with the case." 10RP 195.

At a February 3 hearing, Siclovan extended his discovery request to include information about Brown obtained by Department of Corrections (DOC) Officer Reese Campbell. 11RP 208-10. The court ordered Posner to contact Campbell. 11RP 211. Prosecutor Posner also updated the court on the discovery status of Brown:

MR. POSNER: I -- I know who Mr. Brown is. I've prosecuted Mr. Brown in the past, and Mr. Brown currently is in prison. I have absolutely -- and Mr. Siclovan brought this up last time before Your Honor. I've been playing phone-tag with Officer Martin to try to address any concerns about Calvin Brown, but the State still is not aware of how Calvin Brown has any relevance to this case whatsoever.

11RP 210.

On February 10, Posner answered the Brown discovery concerns:

MR. POSNER: I just wanted also to get it on the record that I have contacted Officer Neil Martin of VPD and Reese – DOC Officer Reese Campbell in regards to evidence, and anything that arose from the search of the storage locker. They responded to me that all evidence they discovered and all information that they have is in the reports and has been turned over to the State, and the same has been provided to the Defense.

12RP 219.

The importance of Brown to the case as a material witness was foreshadowed at a pre-trial February 15 hearing where Siclovan disclosed his defense theory so that the court would issue subpoenas for his witnesses. 13RP 228-66. The theory was that Siclovan had moved out of the storage unit in February and that security at the facility was loose leaving others the opportunity to access unit 49. 13RP 229-31, 236-37. At trial, Sandra Gray testified that she had in fact rented unit 49 to a man named Calvin after Siclovan stopped using the unit. 15BRP 684, 693. As such, the State's awareness that Calvin had been to the storage unit and had access to it was material. Posner acknowledged as such at a March 4 hearing.

THE COURT: I understand. So, yes, anything that links Cal-- anything that links Calvin Brown to this storage unit at the relevant time period would be discoverable --

MR. SICLOVAN: Yes.

THE COURT: -- and would be Brady material, it's called, and should have been provided to you.

Mr. POSNER: And I agree.

17RP 976.

With this agreement as to materiality, the State must also agree to a retrial do to Posner's prosecutorial misconduct in failing to disclose Calvin Brown's known relationship to unit 49.

III. PROSECUTOR POSNER'S UNTRUE STATEMENTS DURING HIS REBUTTAL CLOSING ARGUMENT MERIT DISMISSAL OF ALL CHARGES.

Post-trial, on April 5, 2006, Siclovan filed a 30-page Motion for New Trial or Dismissal. CP 189-219. Issue No. 13 claims prosecutorial misconduct in that Posner improperly argued in his rebuttal closing argument that Calvin Brown did not exist. The court heard the motion -- and many others -- on May 26, 2005. The court later entered a simple finding that Siclovan's issue was without merit. CP 358. Siclovan's motion No. 13 has significant merit. The court erred in denying it.

A trial court's decision granting or denying a motion for a new trial is reviewed under an abuse of discretion standard and will not be disturbed on appeal unless there is a clear abuse of such discretion. State v. Bartholemew, 98 Wn.2d 173, 211, 654 P.2d 1170 (1992). CrR 7.6(a) lists the grounds for a new trial: "The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: . . . (2) Misconduct of the prosecution . . . " A new trial may be granted if a defendant's substantial right has been materially affected by prosecutorial misconduct. State v. Perez, 77 Wn. App. 373, 375, 891 P.2d 42, review denied, 127 Wn.2d 1014 (1995). "[P]rosecutorial misconduct requires a new trial only if the misconduct is prejudicial." State v. Graham, 59 Wn. App. 418, 426, 798 P.2d 314 (1990). "Misconduct is prejudicial when, in context, there is a 'substantial likelihood' that the misconduct 'affected the jury's verdict.'" Stith, 71 Wn. App. at 19. The defendant bears the burden of proof on this issue.

In his rebuttal closing, Posner challenged Siclovan to produce Calvin.

His defense is some other dude did it, Calvin did it. Who's Calvin. What does Calvin do?

...

Sandra Gray testified that she and the defendant broke up and that she rented the storage unit to Calvin. Do we know who Calvin is? I don't think so.

Sandra Gray also testified that she had Calvin take the defendant's personal effects, his photo albums, take em' to the storage unit. That's how the defendant's stuff got there.

Well, she also testified that Calvin gave her two \$20 bills. However, I want you to recall what else Sandra Gray said. Sandra Gray said she couldn't even really remember what happened yesterday, much less a year ago, yet she's able to tell you those are the photo albums?

Oh yeah, he gave me two \$20 bills for the \$40. She stated she couldn't even remember what happened the day before, but she remembers the denominations for the currency that was given to her.

Ladies and gentlemen, I submit to you that Calvin never existed, that those -- what Sandra Gray testified to never took place. You can determine that by Ms. Gray's credibility. I don't think I need to go into the statements that Ms. Gray made a year ago, that she made last December, that she made last month and she made yesterday, because she told you that statements have been falsehoods.

16 RP 934-35.

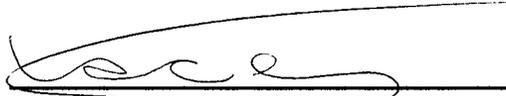
Posner's rebuttal argument to the jury is troubling because we know that his statements are untrue. Calvin did exist in relation to the storage unit and Posner knew it at the time. RPC 3.3(a)(1) requires that a lawyer shall not knowingly make a false statement of

material fact or law to a tribunal. The jury should have known that Calvin Brown had access to storage unit 49. Instead, Posner told that jury that the defense was lying when it said that he did. Without Posner's misrepresentation of the facts, there is a substantial likelihood the jury would have reached a not guilty verdict. Precedent exists for dismissal by an appellate court when the State's conduct is so shocking that it violates fundamental fairness. State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996). Mr. Siclovan respectfully requests that this court consider that remedy.

V. CONCLUSION

Ashley Siclovan's case should be reversed and remanded for retrial or reversed with instruction to dismiss.

Respectfully submitted this 3rd day of April, 2006.



LISA E. TABBUT/WSBA 21344
Attorney for Appellant

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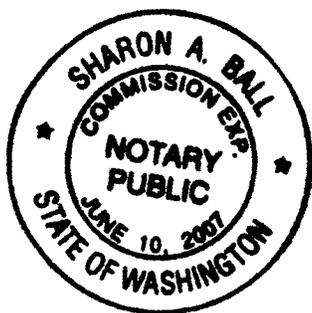
- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

Dated this 3rd day of April 2006



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 3rd day of April 2006.



Sharon A. Ball
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 06/10/07