

No. 36212-1-II

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION TWO**

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

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STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ROBERT COVARRUBIAS,  
  
Appellant.

---

FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
#05-1-00079-1

**BRIEF OF RESPONDENT**

---

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ORIGINAL

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## INTRODUCTION

Before trial, counsel for defendant Robert Covarrubias requested and received thousands of pages of documents from the State. Defendant's trial spanned three weeks, during which his counsel made additional discovery requests. After the jury convicted him, Covarrubias alleged that the Prosecuting Attorney mismanaged discovery, requiring a new trial. The trial judge held multiple hearings on defendant's motion and concluded there was no mismanagement. First, the timing of discovery did not interfere with defendant's right to a speedy trial.

When I looked at the speedy trial issue, I went back as best I could through the trial, I didn't listen to the tape recordings of any of it, but it seems to me that the continuances that were had as reflected in the minutes were certainly more or less agreement of the parties and I couldn't find anything in there that reflected that the Defendant was ready to go and it was mismanagement that caused the delays.

(11/16/06 VRP 35).

Second, the timing of disclosure did not prejudice counsels' ability to prepare a defense.

Much of this complaint about the lateness of receiving it, much of the items here were peripheral items, if I may say so. I don't think they were major to the defense in this case. And because of that I don't find Mr. Covarrubias failed to receive an adequate defense by his attorneys. I think they – despite the

lateness of some of this information, I think they provided a defense that I don't think would have changed materially in any way had they received this 6 months prior to the case.

(11/16/06 VRP 37). The trial court denied defendant's motion for new trial. (Findings of Fact and Conclusions of Law on Defense Motions for New Trial; CP 6) (Appendix A).

Because the trial court did not abuse its discretion by denying the motion, the State respectfully requests this Court to affirm the trial court's ruling and dismiss defendant's appeal.

**I. RESTATEMENT OF ISSUES PRESENTED.**

Defendant's appeal raises two issues:

A. Appellate courts "will not disturb the trial court's denial of the motion to dismiss [for discovery violations] unless we find that the denial constitutes a manifest abuse of discretion." State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001). Here the trial court reviewed the entire court file and held two hearings before denying defendant's motion to dismiss. Did the trial court abuse its discretion by refusing to grant defendant a new trial?

B. "Before a trial court should exercise its discretion to dismiss a criminal prosecution, a defendant must prove that it is more probably true than not true, that (1) the prosecution failed to

act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process which essentially compelled the defendant to choose between two distinct rights.” Woods, 143 Wn.2d at 583. Defendant identifies documents that the State disclosed shortly before or during trial, but does not show the prosecution was dilatory or that the information disclosed was withheld and critical to the defense. Did defendant prove by a preponderance of the evidence that he qualifies for a new trial?

## **II. STATEMENT OF FACTS.**

Defendant claims the State delayed disclosure of six categories of documents. (Opening Brief at 3-12). But he does not mention that he had received substantial discovery on each category, and that the new information duplicated or supplemented what he already had. As the trial court found, “the majority of these facts were peripheral and not major to the defense and further...the defense would not have changed had defense counsel received them six month earlier.” (Finding of Fact ¶ 12; CP 6) (Appendix A).

### **A. Evidence of Travis Criswell’s Statement**

Defendant argues that the State delayed disclosure of Travis Criswell’s statements inculcating him in Melissa Carter’s death.

(Opening Brief at 3-5). Yet defendant had Criswell's statements in earlier discovery and did not find the relevance of the evidence until trial. As the trial court concluded,

Criswell made two statements to law enforcement both of which were summarized by officers in the initial discovery in early 2005. The defense was also provided with a transcript of the second statement in early 2005. The first statement was not transcribed but a copy of the recording of that statement was provided approximately two weeks prior to trial. While the defense has argued that it was unaware that Criswell had denied a sexual relationship prior to the second interview, it was provided in a summary of that interview in which he represented that their relationship was like a brother and sister, and also provided a separate report in which Criswell claimed to actually be the victim's brother.

(Findings of Fact ¶ 2; CP 6)(Appendix A).

Along with this evidence, the State provided additional evidence on Criswell's statement in time for defense counsel to use at trial. Counsel on cross-examination thoroughly questioned Criswell on his inconsistent statements, concluding with this admission.

Q. The fact is, Mr. Criswell, the first time you were interviewed by the police you knew that it was about a possible dead person and you lied to the police about your sexual relationship with Melissa Carter; correct?

A. Yes.

(4/17/06 VRP 93). Defendant used the discovery to show Criswell hid his relationship with Melissa. None of the information defendant now identifies as delayed would have changed or improved on this examination.

B. Dr. Selove's Notes

Dr. Daniel Selove performed the autopsy on Melissa's body and defense counsel received his written report soon after it was finished. (4/4/06 VRP 92). Later, defense counsel asked for and received Dr. Selove's handwritten notes from the autopsy. In response to defendant's motion to dismiss based on the notes, the trial court found them supplemental to information the defense already had.

I am going to deny the motion to dismiss as I indicated and I don't find the information received as prejudicial information that would cause the defendant not to be able to defend the case and proceed with his case.

(4/4/06 VRP 107).

The court rescheduled Dr. Selove's testimony to give defense counsel time to confer with their expert about the notes.

[I]n light of Exhibit 75, which are 1, 2, 3, 4, 5, 6 pages worth of notes and diagrams from Dr. Selove that before cross examination of Dr. Selove, Mr. Anderson [defense counsel] needs an opportunity to talk to his expert and go over those items with him to learn the

significance, if anything, that is stated there and that would certainly I think be something that he would want to do and should do before he cross examines Dr. Selove.

(4/4/06 VRP 107).

Dr. Selove testified the next day, and in an extensive cross-examination, defense counsel questioned the witness closely on the notes and the possibility Melissa was not strangled. (4/5/06 VRP 106; 115-133).

C. DNA Analysis

Law enforcement investigators asked the Washington State Patrol Crime Laboratory in Marysville to analyze evidence found at the crime scene or obtained from witnesses.

There were a large number of items that were submitted. We – talking with the agency we narrowed those down to first actually looking at vaginal, anal and oral swabs from Melissa Carter. Reference samples from Melissa Carter, Travis Criswell, Kelly Banner, and Robert Covarrubias, and then a – lastly, a pair of men's boxers that were – I believe found near the body at the crime scene.

(4/13/06 VRP 179-180). Included with these samples was a brown hair that Dr. Selove found on the victim's body. (4/17/06 VRP 33).

Greg Frank, forensic scientist with the Crime Laboratory performed the DNA tests on the samples. (4/13/06 VRP 169). He found a match between defendant Covarrubias' DNA and semen

found in Melissa Carter's throat. (4/13/06 VRP 190-91). In December 2005, Mr. Frank prepared a report of his findings, which the State disclosed to defense counsel. (4/13/06 VRP 196, 200).

Mr. Frank had not tested the brown hair for the December 2005 report. He looked at the hair again in March 2006, shortly before trial, but had not reached any conclusions. As defense counsel brought out on cross-examination,

Q. So you've conducted -- you conducted an examination of that item [the hair] and haven't completed a report on it?

A. That is correct.

Q. And you commenced that one back just a few weeks ago?

A. That's my recollection. I don't have the paperwork with me so I don't know exactly when. But yes, I believe it was in late March that I was asked to make a general exam of the hair.

(4/13/06 VRP 202-03). Dr. Randell Libby, a neurogeneticist who testified as defendant's expert, suggested examining the hair.

(4/13/06 VRP 203). The hair had a unique identifier -- item number 32843. (4/13/06 VRP 202).

In his opening brief, defendant argues that he did not receive a report on the testing of the hair. (Opening Brief at 6)

(4/13/06 VRP 216). But the report defendant complains about concerned two different hairs from the investigation, items 32706 and 32712. (4/13/06 VRP 208) (“in February you submitted them to microscopic examination”) (4/13/06 VRP 216) (“can you tell the jury when you did the examination of the hairs that are referred to in your February report”). Defendant received everything that existed on item number 32843 – the hair found on Melissa’s body.

D. Testimony Regarding Blood Alcohol Tests

On April 12, 2006, counsel and the trial court discussed a new test on Melissa Carter’s urine that showed a .03 alcohol level. (4/12/06 VRP 69-70). The Prosecutor ordered the test after talking with Dr. Donald Reay, defendant’s expert pathologist.

Dr. Reay asked the question of me did the crime lab test for urine for alcohol. At that point I realized that I assumed that they had tested it for alcohol but I didn’t know the answer to his question. So I called the...State toxicology lab to ask that question and was told no, it had not been tested...

I was also told that it was possible to test the urine and to do so rapidly and I figured at that point, well, let’s find out what the answer is. So I asked her to perform those tests. They were done and I was provided the results – handed the results and a note by my office during trial yesterday and I provided it to counsel within – at the next break.

(4/12/06 VRP 74).

The trial court allowed defense counsel extra time to consult with the lab technician, Ann Marie Gordon, and defense experts. (4/12/06 VRP 80). On April 19, 2006, Ms. Gordon testified to the blood alcohol levels but did not testify about the new urine test. (4/19/06 VRP 42-45). Furthermore, defense counsel withdrew his objection to the question of whether the lab tested the victim's urine for alcohol. (4/19/06 VRP 41).

Finally, on cross-examination, defense counsel eliminated any potential confusion from Ms. Gordon's testimony.

Q. So, at the time that Ms. Carter died she was not significantly impaired by any alcohol or drugs based on the blood analysis that was conducted; is that correct?

A. Yes.

(4/19/06 VRP 47).

E. Statements Regarding Jon Sonnebend

As detailed in the State's Response Brief in State v. Covarrubias, No. 34042-4-II, defense counsel cross-examined Jon Sonnenbend extensively about his hallucinations, mental health issues, and medications. (State's Response Brief at 9-15). The jury was fully aware of Mr. Sonnebend's mental status and the reasons for discounting his testimony.

The State provided defense counsel with the statements of Mr. Sonnebend's friend, Tichtler, and a treatment provider before trial. (Opening Brief at 30). These statements confirmed what was already known about Mr. Sonnebend – he suffered from mental illness.

F. Disclosure of Miscellaneous Evidence

Defendant lists a number of miscellaneous, unrelated, pieces of information that it alleges the prosecutor delayed in producing. (Opening Brief at 9-12). The trial court examined this allegation and found no mismanagement or prejudice.

This was a long, complicated trial with many volumes of discovery and many witnesses and exhibits. No intentional failure to disclose has been alleged and the Court does not believe there was any deliberate withholding of evidence. There were, however, many facts that were disclosed shortly before and during trial. The Court finds the majority of these facts were peripheral and not major to the defense and further finds the defense would not have changed had defense counsel received them six months earlier.

Moreover, the defense did not make a general discovery demand and many of the items were either never specifically requested or requested shortly prior to or during the trial. None of these discovery items were so material that they prejudicially impacted defense counsel's ability to prepare or the Defendant's ability to receive a fair trial.

The Court has reviewed the continuances in this case and finds that they were by agreement of the parties,

with at least one of the last two continuances occurring in part for the convenience of defense counsel. The new facts disclosed were not the cause of any trial delays.

(Findings of Fact ¶¶ 12-14; CP 6) (Appendix A).

Defendant contended that the alleged delays deprived him of a fair trial. After addressing this claim at multiple hearings, the trial court denied defendant's request for a new trial. Defendant now appeals.

## ARGUMENT

### III. STANDARD OF REVIEW

This court reviews the trial court's denial of a new trial for an abuse of discretion.

A trial court is given wide latitude in granting or denying a motion to dismiss a criminal prosecution for discovery violations. See State v. Hanna, 123 Wn.2d 704, 715, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994). This court will not disturb the trial court's denial of the motion to dismiss unless we find that the denial constitutes a manifest abuse of discretion. Id. We have also announced on several occasions that " ' "dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial." ' " State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (quoting City of Spokane v. Kruger, 116 Wn.2d 135, 144, 803 P.2d 305 (1991) and City of Seattle v. Orwick, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)).

State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001).

**IV. DEFENDANT COVARRUBIAS HAS NOT PROVEN DILATORY CONDUCT OR PREJUDICE.**

To justify a new trial on discovery grounds, defendant Covarrubias must satisfy a stringent test.

Dismissal is an extraordinary remedy, available only when there has been prejudice to the accused that materially affected his right to a fair trial. Woods, 143 Wn.2d at 582. Thus, before a trial court exercises its discretion to dismiss,

a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights.

Woods, 143 Wn.2d at 583.

State v. Farnsworth, 133 Wn. App. 1, 13-14, 130 P.3d 389 (2006).

Defendant fails to satisfy either element of this standard.

**A. The State Acted with Due Diligence**

The trial court found no dilatory conduct by the State and defendant Covarrubias offers no contrary evidence in his Opening brief. (Conclusion of Law ¶ 6; CP 6) (“the Court finds no mismanagement that prejudiced Defendant, such that he was

compelled to choose between his right to speedy trial or prepared counsel”). Instead, defendant alleges that the timing of discovery prejudiced his preparation of the case.

B. Defendant Did Not Suffer Prejudice

To justify a new trial, defendant must prove more than that the timing of discovery made trial preparation difficult.

The due process clause does not, however, compel a trial court to declare a mistrial in every instance where the State has violated a discovery rule. As we have noted previously, a mistrial should be granted “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

State v. Greiff, 141 Wn.2d 910, 920-921, 10 P.3d 390 (2000). This Court asks whether there is a “substantial likelihood’ that the State’s violation of CrR 4.7 affected the outcome at trial. Greiff, 141 Wn.2d at 921.

The timing of discovery did not affect the outcome at trial. First, the evidence of Covarrubias’ guilt was compelling. As described in the State’s Response Brief in State v. Covarrubias, No. 34042-4-II, defendant was the last person seen with Melissa Carter, his DNA matched the semen found in her throat, he denied to investigators that he had sex with her, and he offered an

implausible story to the jury about his whereabouts and the cause of his injuries after the murder. The jury had ample reason to disbelieve Covarrubias and credit the compelling circumstantial evidence of his guilt. (Response Brief at 18-20).

Second, defendant fails to show prejudice from the timing of discovery that substantially affected the outcome at trial. Defendant does not argue that he did not receive the six categories of information, but that he received it near or during trial. Counsel could and did use it at trial. Defendant asserts only that he could not use it as effectively as he wanted. For example, he claims he could not prepare for Greg Franks, the State Patrol's forensic scientist, without receiving his handwritten notes *in addition to* his previously disclosed written report.

Without the notes and report, the defense team was unable to formulate and ask the appropriate questions during jury selection, was unable to confidently articulate a theory of the case during opening statements, and was unable to adequately prepare for and cross-examine Frank when he testified.

(Opening Brief at 27). Yet the handwritten notes supplemented the material in the disclosed report. As the trial court concluded, "the majority of these facts were peripheral and not major to the defense." (Findings of Fact ¶ 12; CP 6).

Defendant's opening brief lists many of the documents it requested from the State shortly before trial, but it does not prove their importance beyond general allegations of prejudice. The trial court appropriately denied defendant's motion for new trial, finding the State acted diligently and defendant did not suffer prejudice that would have affected the outcome at trial.

### **CONCLUSION**

Washington appellate courts rightly defer to trial courts to judge the prejudice from events at trial. State v. Greiff, 141 Wn.2d 910, 922, 10 P.3d 390 (2000) ("the trial judge is best suited to judge the prejudice"). Here, the trial judge carefully examined defendant's discovery claims before, during and after trial. Given all the information disclosed, the trial court appropriately concluded that the supplemental information did not prejudice defendant. The State respectfully requests this Court to affirm the trial court and dismiss this appeal.

DATED this 12th day of March, 2008.

DEBORAH S. KELLY  
Clallam County Prosecuting Attorney

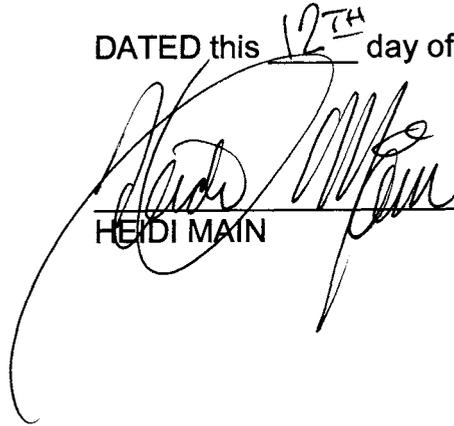
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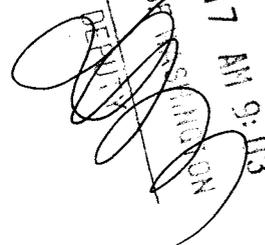
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

Manek R. Mistry/Jodi Backlund  
Backlund & Mistry  
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DATED this 12<sup>TH</sup> day of March, 2008.

  
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STATE OF WASHINGTON  
BY 

# APPENDIX A

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BARBARA CHRISTENSEN, Clerk

IN THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
ROBERT GENE COVARRUBIAS,  
Defendant.

NO. 05-1-00079-1

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
DEFENSE MOTIONS FOR NEW  
TRIAL

Hearings on defense motions for a new trial were held in this matter on October 26, 2006 and November 16, 2006. The Defendant was present by telephone conference and represented by his attorneys, Harry Gasnick and Ralph Anderson. The State was represented by Deborah S. Kelly, Prosecuting Attorney for Clallam County. The Court considered sworn declarations of counsel, its observations during the course of trial and pretrial proceedings in this matter, the pleadings and files herein, and the arguments of counsel.

Based upon those, the Court makes the following:

I. FINDINGS OF FACT

**With respect to the defense motion for a new trial based upon the argument that the defense was unable to present other suspect evidence concerning the deceased's boyfriend, Travis Criswell:**

1 - FINDINGS OF FACT AND CONCLUSIONS OF  
LAW; STATE'S OBJECTIONS TO PROPOSED  
DEFENSE FINDINGS

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1. While the Court initially limited the defense from presenting other suspect evidence with respect to Travis Criswell, it later reversed its ruling and allowed the presentation of such evidence. The Court had from the outset permitted the defense to present other suspect evidence with respect to Kelly Banner.

2. Criswell made two statements to law enforcement both of which were summarized by officers in the initial discovery in early 2005. The defense was also provided with a transcript of the second statement in early 2005. The first statement was not transcribed but a copy of the recording of that statement was provided approximately two weeks prior to trial. While the defense has argued that it was unaware that Criswell had denied a sexual relationship prior to the second interview, it was provided a summary of that interview in which he represented that their relationship was like a brother and sister, and also provided a separate report in which Criswell claimed to actually be the victim's brother.

**With respect to the argument that the prosecutor's cross-examination of the Defendant was improper and prejudiced the jury, the Court has listened to the recording of proceedings and reviewed the series of questions complained of and makes the following findings:**

3. The prosecutor asked the defendant if he wanted the jury to believe him because he took an oath, whether he agreed that if he didn't tell the truth under oath that it would be perjury, and whether perjury wasn't a crime of dishonesty just like the previous conviction he had admitted to. The Court sustained the objection that was made at that point, and the prosecutor dropped the issue. Under State v. Borboa, 157 Wn.2d 108, 122 (2006), the defense bears the burden of proving that the prosecutor's conduct was both improper and prejudicial, i.e., that there is a substantial likelihood that the conduct affected the jury's verdict. The Court finds the prosecutor was not saying that theft and perjury are the same but eliciting that they are both crimes of dishonesty, which the Court believes is obvious to any member of any jury.

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1 **With respect to the argument that the Prosecutor's use of a prop during closing argument**  
2 **that added an additional paragraph (the Castle language) to the Court's instruction on**  
3 **reasonable doubt:**

4 4. The Court has again reviewed the record of proceedings to inform its ruling. The  
5 Prosecutor offered a modified reasonable doubt instruction that incorporated both the standard  
6 WPIC modified to the Court's preference and the Castle formulation of reasonable doubt. The  
7 Court rejected the offered instruction and gave its preferred instruction.

8 5. In closing, the prosecutor took its rejected instruction, placed it upon an easel before  
9 the jury, and told its members: "I have added a paragraph to the Court's instruction...." The  
10 Court sustained a defense instruction at this point, whereupon the prosecutor argued, in  
11 response to a defense assertion that it was an incorrect statement of the law, that it was not  
12 incorrect and that the Court had previously allowed such argument. The Court stood by its  
13 ruling sustaining the objection and the prosecutor removed the prop.

14 6. The interchange was extremely brief; the prop was only in front of the jury a short  
15 period of time although the jury undoubtedly had the opportunity to read it.

16 7. While the Court found and finds the use of the prop improper as it appeared similar  
17 to a jury instruction, the Court finds that the Castle instruction has been approved by all three  
18 divisions *of the Appellate Court.* ~~and that the prosecutor was entitled to use the Castle language to explain the~~  
19 ~~traditional reasonable doubt formulation in argument.~~ Moreover, the prop contained the Court's  
20 instruction as well as the Castle language. The jury had the Court's instructions as well as an  
21 admonishment that it was to disregard any argument not in accordance with the Court's  
22 instructions.

23 **With respect to the defense request for a new trial based upon the prosecution's failure to**  
24 **disclose out-of-state history of two witnesses, Edward Steward and Cody Snow:**

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8. The State has conceded that it failed to disclose the out-of-state history of the above two witnesses. The Court finds this was not a deliberate or intentional failure. Nonetheless the issue is whether the failure to disclose caused prejudice to the defendant. Mr. Steward had no other criminal history with which the defense could impeach him. The State failed to discover and timely turn over evidence of a 1992 robbery conviction in Illinois, and a 2004 felony theft conviction in California.

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9. Mr. Steward was one of numerous attendees at the drug and alcohol party from which the victim disappeared. He was only present for a short period of time and was not present at the time of her actual disappearance. Some of his testimony was duplicative of other witnesses and some of his testimony was beneficial to the defense's theory of the case. For example, in cross-examination of Mr. Steward, the defense elicited his testimony that relations were strained and distant between the victim and her boyfriend, that he saw some of an argument between them, and that she told her boyfriend to stay away from drugs.

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10. The Court finds that the inability or failure to impeach Steward through his convictions had no likelihood of affecting the jury's verdict.

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11. The prosecution additionally failed to disclose an out-of-state misdemeanor theft conviction of Cody Snow. The jury was informed of Snow's recent two felony theft and two felony possession of stolen property convictions. Additionally, Snow's testimony was largely irrelevant and/or collateral to the case.

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21  
**With respect to the defense request for new trial based upon allegations of general failure of discovery and mismanagement.**

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12. This was a long, complicated trial with many volumes of discovery and many witnesses and exhibits. No intentional failure to disclose has been alleged and the Court does not believe there was any deliberate withholding of evidence. There were, however, many facts that were disclosed shortly before and during trial. The Court finds the majority of these facts

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1 were peripheral and not major to the defense and further finds the defense would not have  
2 changed had defense counsel received them six months earlier.

3 13. Moreover, the defense did not make a general discovery demand and many of the  
4 items were either never specifically requested or requested shortly prior to or during the trial.  
5 None of these discovery items were so material that they prejudicially impacted defense  
6 counsel's ability to prepare or the Defendant's ability to receive a fair trial.

7 14. The Court has reviewed the continuances in this case and finds that they were by  
8 agreement of the parties, with at least one of the last two continuances occurring in part for the  
9 convenience of defense counsel. The new facts disclosed were not the cause of any trial delays.

10 15. Additionally, at the outset of trial when the defense first complained of discovery  
11 issues, the Court offered the Defendant a continuance within the existing speedy trial expiration  
12 which was refused.

13 16. The Defendant has also complained of the State's attempt shortly before trial to  
14 remove his counsel from his representation, based upon the Public Defenders Office prior or  
15 current representation of the vast majority of the State's witnesses. The Court finds that the  
16 State legitimately raised this issue, as it was one that could be raised for the first time on  
17 appeal. While it is unfortunate that it was addressed as late as it was, it was an issue that needed  
18 to be dealt with and was properly brought to the Court's attention by the State.

19 Based upon all of the foregoing, the Court makes the following:

## 20 Conclusions of Law:

21 1. The "other suspect" defense was well and vigorously presented. The Court's earlier  
22 ruling did not detrimentally impact the defense provided and there is no likelihood that it  
23 impacted the jury's final decision.

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2. The Court sustained the objection to the prosecutor's cross-examination of Defendant; there was no prejudice and no likelihood that the questioning affected the verdict.

3. A jury is presumed to follow the Court's instructions. The Court finds there is no likelihood that the use of a prop affected the jury's verdict.

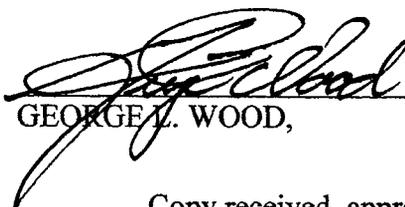
4. The Court finds no likelihood that the failure to provide impeachment material for Edward Steward and Cody Snow impacted the jury's verdict.

5. The standard governing when relief is to be granted on an allegation of general mismanagement or failure of discovery is, whether the defense has proved by a preponderance of the evidence that the State inexcusably failed to act with due diligence such that material facts are not disclosed until shortly before a crucial stage of the proceeding, thereby compelling a defendant to choose between his right to speedy trial and the right to prepared counsel.

6. The Court finds no mismanagement that prejudiced the Defendant, such that he was compelled to choose between his right to speedy trial or prepared counsel.

7. The defense motion for a new trial should be and is hereby denied.

DONE ~~IN OPEN COURT~~ this 9<sup>th</sup> day of April, 2007.

  
GEORGE L. WOOD, JUDGE

Presented by:

Copy received, approved for entry notice of presentation waived:

  
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6 - FINDINGS OF FACT AND CONCLUSIONS OF LAW; STATE'S OBJECTIONS TO PROPOSED DEFENSE FINDINGS

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