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A. ARGUMENTS IN REPLY

1. THE STATE'S BRIEF MISREPRESENTS THE RECORD.

The State first disputes the factual question of whether it provided timely discovery of the crime scene photographs. This is a matter of record, and the record demonstrates that the State is wrong.

The Respondent's brief misrepresents the record regarding timely discovery of these forensic photographic exhibits. Brief of Respondent (BOR at 14). Contrary to the State's claim, the defense did not see any of the relevant crime scene photographs by Martin or Lally until the middle of the trial. The State attempts to revise the record but mischaracterizes defense counsel's remarks in doing so. BOR at 14. The record shows the defense saw both Martin's or Lally's photographs for the first time when each witness took the stand to testify.

(a) Martin's photographs. Defense counsel said:

My concern really isn't about that first set, my concern is about the other set of photos that we didn't receive ahead of time but were taken by a person who is going to testify, I believe today, a witness Toni Martin --

RP 68. Counsel then (erroneously) accepted the prosecutor's correction that he had misspoken and really meant to say witness Mary Lally instead of Toni Martin. RP 68.

The State suggests the "first set" of photos about which counsel was not concerned were Martin's, and that "today's witness" was not Martin, but Mary Lally. BOR at 14. This is wrong. The "first set" of photographs offered are exhibits 1-9. RP 66. These clearly were not Martin's. Rather, they were taken by another person who was never identified. RP 66. Martin produced her own pictures after taking the witness stand. RP 66. The prosecutor gave these to defense counsel for the first time during the next recess, and counsel expressed his concern immediately thereafter. RP 68. Martin's were exhibits 13-33. RP 73. So defense counsel did not misspeak; the photos he was concerned about and which he had not received were indeed Martin's, not Lally's.

(b) Lally's photographs. The State concedes the defense did not receive Mary Lally's photographs until the afternoon she testified. BOR at 14; RP 125. And Lally's were not "the first set" referred to above; they were exhibits 35-42.

2. WITHHOLDING THE PHOTOGRAPHS REQUIRES REVERSAL UNDER BRADY.

The State claims withholding the crime scene photographs is immune from attack under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). BOR 15-18. The State is wrong.

Due process is violated whenever the defense is prejudiced by the State's failure to provide requested discovery of evidence favorable to the accused. Brady, 373 U.S. at 87. Evidence is subject to Brady if it is material to guilt or punishment. Brady, 373 U.S. at 87; In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). It is irrelevant whether the State suppressed the evidence willfully or inadvertently. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). "[T]he defendant's due process rights are affected in either case." Seattle v. Fettig, 10 Wn. App. 773, 775, 519 P.2d 1002 (1974). Suppression of such evidence on an issue of guilt or punishment requires reversal, irrespective of whether the prosecution acted in good faith. Brady, 373 U.S. at 87.

Evidence is "material" if a reasonable argument can be made that it puts an issue in so different a light as to undermine confidence in the jury's verdict. Strickler, 527 U.S. at 290. Evidence that reveals irreconcilable conflicts in the physical evidence is material because it cannot support a guilty verdict. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The prejudice inquiry is simply whether the trial was fair. Benn, 134 Wn.2d at 916.

The State claims the Martin and Lally photographs do not implicate Brady because, standing alone, they were not directly exculpatory nor impeaching. BOR at 15. As demonstrated in appellant's opening brief, however, the failure to produce them pretrial deprived Saxton of the opportunity to support his alibi defense by showing the forensic evidence was irreconcilably conflicted. Brief of Appellant (BOA) at 10-13. Moreover, Saxton could have used the photographs to impeach Heather Saxton and Detective Coulter who gave conflicting testimony regarding blood spots, thus undermining confidence in the reliability of the overall investigation and the validity of the entire prosecution.

The State asserts the prosecutor was "unaware" of the evidence of its investigators until the middle of the trial when the evidence was "immediately" provided to the defense. BOR at 14, 18. This is irrelevant. It merely demonstrates the State's incompetence in the matter, rather than bad faith. The fact remains that relevant evidence was withheld from the defense, for which the sole remedy prescribed by Brady is reversal of both convictions.

3. THE FORENSIC PHOTOGRAPHS WERE NOT "ADDITIONAL" EVIDENCE UNDER CrR 4.7.

The State next claims Brady does not apply because the prosecution complied with the discovery rules set forth in CrR 4.7. BOR at 18. The State is wrong.

CrR 4.7 requires the State to provide pretrial discovery of any photographs it intends to use at trial. CrR 4.7(a)(1)(v). The rule further requires the State to turn over any "additional" discoverable material it acquires "after compliance with these rules or orders pursuant thereto." CrR 4.7(h)(2). Here, the State did not comply either with the rule or the court's omnibus order requiring it to turn over photographs. CP 63-64.

Moreover, this Court should apply the same criteria to "additional" State's evidence under CrR 4.7 as to "newly discovered" defense evidence offered to justify relief from judgment under CrR 7.8(b). That is, it means evidence the State could not have learned about in a timely fashion with the exercise of "due diligence." CrR 7.8(b)(2).

Investigators Martin and Lally were State employees. At minimum, due diligence would require that they report their findings and that the prosecutor look at those reports and the proposed exhibits. If the State's investigative protocol broke down, it is beneath the dignity of this Court to suggest that Saxton, rather than the State, should be penalized for failing

to exercise due diligence so as to bring the existence of this evidence to light.

The State's failure to disclose the crime scene photographs pretrial violated Brady and denied Saxton a fair trial. Reversal of both convictions is, therefore, required.

4. THE EVIDENCE WAS INSUFFICIENT TO PROVE FIRST DEGREE MALICIOUS MISCHIEF

The State failed to produce any admissible evidence of the amount of damages, which is an essential element of first degree malicious mischief. State v. Timothy K., 107 Wn. App. 784, 789, 27 P.3d 1263 (2001); RCW 9A.48.070(1)(a). The State claims proof of the amount of damages can rest entirely on circumstantial evidence. BOR at 22. The State is wrong.

The amount of damages was an essential element the State had to prove beyond a reasonable doubt. RCW 9A.48.070(1)(a); State v. Sanders, 65 Wn. App. 28, 32, 827 P.2d 354 (1992); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). Civil cases offer a guide to proving the amount of property damage. In the case of structural damage, the amount usually is either the cost of restoring the structure to its former condition or the diminution in its market value, whichever is less. Hogland v. Klein, 49 Wn.2d 216, 220, 298 P.2d 1099 (1956). Likewise, personal property

damage is generally measured as the lesser of the reasonable value of necessary repairs or the difference between the fair cash market value of the property immediately before and after the occurrence. Thompson v. King Feed & Nutrition Serv., 153 Wn.2d 447, 454-455, 105 P.3d 378 (2005), citing WPI 30.11.

At minimum, evidence of the amount of damages must permit the amount to be ascertained "with a reasonable degree of certainty and exactness . . . by *some* accepted methodology." Dahl-Smyth v. City of Walla Walla, 148 Wn.2d 835, 843, 64 P.3d 15 (2003) (emphasis in original). The State cites to no case approving eye-balling by lay witnesses as an accepted methodology. When personal liberty is at stake, the State should at least be held to the civil standard for a "liquidated" damages claim: evidence that makes it "possible to compute the amount due with exactness, without reliance on opinion or discretion." Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 686, 15 P.3d 115 (2000).

A conviction based on insufficient evidence must be reversed and the prosecution must be dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The State in this case offered no competent evidence to establish the amount of damage by any recognized

measure of proof. Accordingly, this Court should reverse Saxton's conviction for first degree malicious mischief and dismiss the prosecution.

B. CONCLUSION

For these reasons, together with the arguments presented in the appellant's opening brief, this Court should reverse Saxton's conviction.

DATED this 5th day of November, 2008.

Respectfully submitted,

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

STATE OF WASHINGTON)

Respondent,)

vs.)

FLOYD SAXTON,)

Appellant.)

COA NO. 37108-1-II

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STATE OF WASHINGTON
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF NOVEMBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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BY  DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF NOVEMBER 2008.

x *Patrick Mayovsky*