

NO. 39190-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL A. BELDEN,

Appellant.

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STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor's failure to provide required discovery violated appellant's right to effective representation and a fair trial.

2. An error in the judgment and sentence must be corrected.

Issues pertaining to assignments of error.

1. Several months before trial, defense counsel filed a demand for all discovery pursuant to CrR 4.7, including a copy of the 911 tape. The prosecutor never provided a copy of the tape, however, and defense counsel did not hear the tape until it was offered in evidence at trial, after the complaining witness had finished testifying. Where the prosecutor's discovery violation impeded counsel's investigation and preparation for trial, was appellant denied effective representation and a fair trial?

2. A box is checked on the Judgment and Sentence indicating that appellant's conviction is based on a guilty plea. Where appellant was actually convicted following a jury trial, must the error in the Judgment and Sentence be corrected?

B. STATEMENT OF THE CASE

1. Procedural History

On August 14, 2008, the Pierce County Prosecuting Attorney charged appellant Samuel A. Belden with second degree assault. CP 1;

RCW 9A.36.012(1)(a). The case proceeded to jury trial before the Honorable Ronald E. Culpepper, and the jury returned a guilty verdict. CP 60. The court imposed a low-end standard range sentence of 13 months, and Belden filed this timely appeal. CP 74, 86.

2. Substantive Facts

a. **Accusations leading to assault charge**

In April 2008, Jeanice Graves was between jobs and going through a divorce. Her husband had a restraining order against her, and she could not return to their home, so she was staying with her friend Angela Hohnsbehn. 3RP¹ 6-7, 29. Graves was unable to pay any rent, although she bought groceries one time. 3RP 52; 4RP 20, 122.

One evening, Graves asked Hohnsbehn to drive her to the store to buy beer and cigarettes, because it was raining and she did not want to walk. 3RP 11, 31. Hohnsbehn agreed. Hohnsbehn was dating Samuel Belden, and her car was parked at his house within the same neighborhood, so Graves and Hohnsbehn walked over there. 3RP 8, 12. Hohnsbehn went inside, and she and Belden began arguing. 3RP 12. Belden felt Graves was taking advantage of Hohnsbehn's generosity, and

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: 1RP—3/26/09; 2RP—3/30/09 (a.m.); 3RP—3/30/09 (p.m.); 4RP—3/31/09; 5RP—4/1/09; 6RP—4/10/09.

he argued that Graves should find someone else to drive her to the store. 4RP 122-24. After a time, Graves attempted to intervene in the argument, and she and Belden had words. 3RP 14-15; 4RP 125, 127. The confrontation ended when Graves fell down and broke her wrist. 3RP 18-19, 24.

Graves told several versions of her encounter with Belden. She told the 911 operator that there was a scared little girl she was trying to get out of the situation, an argument was going on, and Belden shoved her. Exhibit 1. She told the deputy she spoke with that night that she had gone to Belden's home to speak with Hohnsbehn, she could hear Belden and Hohnsbehn arguing inside, and she attempted to stop the argument. 4RP 47, 52. Belden started shouting obscenities at her and then pushed her, yelling "I'll fucking kill you, bitch." 4RP 47.

She told the friend who drove her home from the hospital that night that Belden had never made physical contact with her. 5RP 8. Graves said she and Belden were arguing, and as he started down the stairs, she fell and hurt her arm. 5RP 7.

Graves told a detective two days after the incident that she had gone to Hohnsbehn's trailer to talk to her. 4RP 60. She heard Hohnsbehn and Belden arguing, but before she could intervene in any way, Belden came outside and pushed her. 4RP 60.

The day after the incident, Graves stopped by the Mountain Highway Pit Stop, where she was scheduled to begin work. 4RP 117. She told the cashier and manager that she had been drinking at Belden's house and she fell down the steps and broke her arm. 4RP 114, 117.

Graves told a neighbor four different stories about what happened. First, she said that she had been out in the street while Belden and Hohnsbehn were arguing, and Belden came out of nowhere and pushed her. She was very clear that she was nowhere near the porch. 5RP 13. In the next story, Graves said she was in the driveway when it happened. 5RP 14. Then, she said she was on the steps, she started arguing with Belden, and Belden got mad and pushed her off the steps. 5RP 14. And finally, Graves said she was on the porch trying to pull Hohnsbehn's daughter Jasmine from behind Belden when Belden pushed her. 5RP 14.

Graves told another neighbor three different stories. First, she said she went into Belden's house to get Jasmine, and Belden pushed her. 5RP 31. She told the neighbor another time that she was standing at the end of the driveway when Belden ran up and pushed her, and she also said that she had been standing on the porch and Belden pushed her off. 5RP 31.

Graves testified at trial that she stood outside Belden's house for ten to 15 minutes while Hohnsbehn and Belden argued, but she never stepped onto the porch or went inside. 3RP 13, 15, 37. She heard Jasmine

say she wanted to go home because she was scared, but Belden told her she was not scared. 3RP 14. Graves then told Belden he should let Jasmine go home. 3RP 14. With that, Belden rushed down the steps, said something to the effect of “I should kick your ass,” and pushed her. 3RP 15, 48. Graves denied saying she tried to break up the argument between Belden and Hohnsbehn. 3RP 38. She did not remember telling police that Belden said he was going to kill her, and she admitted that he never said that. 3RP 40. She also denied running at Belden and slipping on the wet steps, although she said she might have told someone she was on the stairs. 3RP 52, 54. She denied telling anyone that Belden pushed her at the end of the driveway or inside the house. 3RP 55. And Graves denied telling anyone she slipped while she was drunk. 3RP 57.

Hohnsbehn testified that she and Belden were arguing for a few minutes when Graves came onto the porch and stuck her head in the door. Graves told Belden in an angry tone that he could not tell Hohnsbehn what to do, and Belden told Graves to leave. 4RP 125, 127. After they argued back and forth for a few minutes, Graves started to leave but then came back to the door and said to Belden, “Look what you made me do; you made me break my arm.” 4RP 127.

b. The State's discovery violation

Prior to trial, Belden's attorney filed a notice of appearance and demand for discovery in which he requested all discovery pursuant to CrR 4.7, including a copy of the 911 tape. Supp CP (Notice of Appearance Demand for Discovery, filed 11/17/08, at 3). Defense counsel received no response from the prosecutor regarding this request. 4RP 96.

At trial, after Graves had testified and left the building, the State offered the 911 tape in evidence, arguing Graves's statements on the tape constituted excited utterances. 4RP 91, 98. Defense counsel objected. 4RP 91. Out of the jury's presence, he explained that he had requested a copy of the tape, and it was never provided. 4RP 92.

The prosecutor responded that defense counsel was aware the standard practice in the county is for the defense to provide the prosecution with a blank tape or disk for the copy. Defense counsel did not do that and did not follow up on his demand for discovery. 4RP 94. Counsel explained that the usual practice is for the prosecutor to respond to the discovery demand by informing defense counsel what media format is needed for the copy, tape or disk. The prosecutor never did that in this case, so he assumed the State had decided not to use the 911 tape at trial. 4RP 96-97, 105.

The court found a “technical violation of the discovery rule.” 4RP 107. It ruled, however, that the prosecutor’s violation did not cause any prejudice, because it could have been cured by a request from defense counsel to listen to the tape in the prosecutor’s office or reminding the prosecutor of her obligation and providing a blank tape. 4RP 107.

After listening to the tape, the court determined that Graves’s statements qualified as excited utterances. 4RP 99. When the court asked if Graves was still available for cross examination about the statements, the prosecutor explained that Graves was leaving the country the next day on a vacation, but she would try to reach Graves and have her return to court. 4RP 100. The court admitted the tape over defense objection, and it was played for the jury. 4RP 108-09.

At the end of the day, the prosecutor informed the court that Graves could return the next day if required. 4RP 138. Defense counsel explained that, although the prosecution said Graves was available, they wanted the defense to pay for a taxi or bus fare. 4RP 139-40. Counsel said there were two questions he wanted to ask Graves about the 911 tape, but he would forego that given the difficulty of securing her presence. 4RP 139.

C. ARGUMENT

1. THE PROSECUTOR'S FAILURE TO PROVIDE THE REQUIRED DISCOVERY VIOLATED BELDEN'S RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

Washington's Criminal Rules require the State to provide timely discovery. The rules of discovery are essential to the protection of a defendant's due process rights. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007).

It is the 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. Dunivan, 65 Wn. App. 728, 733, 829 P.2d 799 (internal citation omitted), review denied, 120 Wn.2d 1016 (1992). Inadequate discovery can violate the Fifth and Sixth Amendments. State v. Dingman, 149 Wn. App. 648, 664 n.12, 202 P.3d 388 (citing Boyd, 160 Wn.2d at 434-35), review denied, 217 P.3d 783 (2009).

The State has special obligations under the discovery rules beyond those imposed on defendants. CrR 4.7(a). Under CrR 4.7(a)(1)(i)², the

² CrR 4.7(a)(1)(i) provides as follows:

prosecutor must disclose to the defense recorded statements of witnesses it intends to call. “The evident purpose of the disclosure requirement is to protect the defendant's interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation.” Boyd, 160 Wn.2d at 432. In Boyd, the Washington Supreme Court held that consistent with the Sixth Amendment rights to present a defense and to effective representation, CrR 4.7 mandates the State provide “meaningful access” by giving copies of the materials to the defense. Boyd, 160 Wn.2d at 433.

The Court addressed what “disclose” means for purposes of the rule and concluded it includes making actual copies of certain kinds of evidence. Boyd, 160 Wn.2d at 433. The Court reasoned:

The principles underlying CrR 4.7 require meaningful access to copies based on fairness and the right to adequate representation. The discovery rules “are designed to enhance the search for truth” and their application by the trial court should “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.”

(a) Prosecutor's Obligations.

(1) 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 prosecuting attorney'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;

Boyd, 160 Wn.2d at 433 (quoting State v. Boehme, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967)).

Recognizing that effective assistance of counsel and access to evidence are “crucial elements of due process and the right to a fair trial,” the court noted that the right to effective assistance includes reasonable investigation by defense counsel. Boyd, 160 Wn.2d at 434-35. Where copies are necessary in order for counsel to fulfill this function, “CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial.” Boyd, 160 Wn.2d at 435.

In this case, the prosecutor failed to provide defense counsel with a copy of the 911 tape, which she then offered into evidence at trial, despite counsel’s specific discovery demand for a copy. The trial court correctly rejected the prosecutor’s claim that she fulfilled her obligation by disclosing the fact that a 911 call was made, ruling the failure to provide a copy violated the discovery rule. 4RP 104, 107; see Boyd, 160 Wn.2d at 433 (rejecting State’s argument that disclosure duty satisfied by merely acknowledging existence of evidence).

Nonetheless, the trial court ruled that the prosecutor’s discovery violation did not prejudice the defense, because defense counsel could

have taken further steps to obtain the copy from the prosecutor or, failing that, could have listened to the tape in the prosecutor's office. 4RP 107. This ruling is inconsistent with the goal of open discovery established under CrR 4.7. See Dingman, 149 Wn. App. at 664 (prosecutor's complaint that converting evidence to format readable by defense expert would be time consuming insufficient to overcome goal of open discovery). Defense counsel clearly requested a copy of the 911 tape in his demand for discovery filed more than four months before trial started. Supp. CP. (Demand for Discovery, at 3). The prosecutor was under obligation to provide that copy. If she required a blank tape or disk from defense counsel to make the copy, it was incumbent upon her to inform counsel what media format was needed. Her failure to do so limited the defense access to evidence and impeded counsel's investigation and preparation for trial.

Because of the prosecutor's discovery violation, defense counsel was not prepared to fully cross examine Graves while she was on the witness stand. It was not until Graves had concluded her testimony and left the courthouse that the State offered the 911 tape into evidence. 4RP 91. Defense counsel had never heard the tape, however, and did not expect it to be offered because the prosecutor had ignored his timely request for a copy. 4RP 105. After hearing the tape at trial, counsel had

questions for Graves regarding her statements to the 911 operator, but by that time it would have been too difficult and costly to the defense to secure her return to court, and counsel made the hard choice not to pursue the matter. 4RP 139-40. It was the prosecutor's discovery violation which put defense counsel in the position of having to make that choice.

The defense case rested on attacking Graves's credibility and examining her motives through analysis of the various statements she had made about the incident. In closing, the prosecutor argued that the jury could believe Graves's testimony because it was consistent with her statements on the 911 tape, despite the fact that she made wildly different claims to several other people. 5RP 43-44. Defense counsel was denied the opportunity to fully explore this issue because the prosecutor never provided him with a copy of the 911 tape. See Dunivan, 65 Wn. App. at 731 (State's discovery violation deprived defendant of opportunity to confront accusers through preparation for trial). The prosecutor's failure to fulfill her obligation under the discovery rule violated Belden's right to effective assistance of counsel and a fair trial. See Boyd, 160 Wn.2d at 435. This Court must reverse Belden's conviction and remand for a new trial. See Dingman, 149 Wn. App. at 665.

2. AN ERROR IN THE JUDGMENT AND SENTENCE
MUST BE CORRECTED.

On the first page of the Judgment and Sentence, a box is checked indicating that Belden is guilty of the charged offense based on a guilty plea. CP 71. This is clearly an error, since Belden was convicted after a jury trial based on the jury's verdict. CP 60. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). As currently written, the Judgment and Sentence form is inconsistent with the record in this case. The Judgment and Sentence must be corrected to remedy this error.

D. CONCLUSION

The prosecutor's discovery violation denied Belden effective representation and a fair trial, and his conviction must be reversed. In addition, the error in the Judgment and Sentence must be corrected.

DATED this 6th day of November, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Samuel A. Belden*, Cause No. 39190-2-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
November 6, 2009

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