

NO. 44801-7

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

STATE OF WASHINGTON, RESPONDENT

v.

SEAN FORSMAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry Costello

No. 12-1-00566-6

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in denying defendant's motion to compel disclosure of the identity of the confidential informant when defendant was unable to meet his burden of proving disclosure was necessary?
2. Did the trial court abuse its discretion in denying defendant's motion for an in camera hearing when defendant failed to make an initial showing satisfying either of the *Rovario* prongs?

B. STATEMENT OF THE CASE.

1. Procedure

On February 15th, 2012, the Pierce County Prosecutor's Office charged SEAN FORSMAN, hereinafter "defendant," with one count of unlawful delivery of a controlled substance. CP 1. Defendant filed a motion to disclose the identity of the confidential informant on August 30, 2012. CP 15-23, 24-30. On September 19, 2012, defendant renewed his motion to compel discovery of the confidential informant asking specifically for any criminal history and the gender of the informant. CP 52-61, 81-84. During a preliminary hearing on September 25, 2012, Judge Brian Tollefson granted defendant's motion to reveal only the gender of

the confidential informant and the State disclosed to defendant that the informant was a female. 9/25/12 RP 18; 1RP 19-20. During the same hearing, the State informed defendant and the court that the State would not be calling the confidential informant as a witness in the trial and clarified that it had already disclosed she had one crime of dishonesty in her past. 9/25/12 RP 16-17.

In December of 2012, the State notified defense and later filed an amended information that charged defendant with two additional counts of unlawful delivery of a controlled substance, with school zone enhancements. CP 111-112; 1RP 49-52. The State filed an amended list of witnesses on February 4, 2013, removing the confidential informant from its original witness list. CP 341-342, 343-344. During the CrR 3.5 hearing, the State again informed defendant and the court it did not intend to call the confidential informant as a witness. 2/11/13 RP 101.

The case proceeded to trial before the Honorable Jerry T. Costello on March 26, 2013. 1RP 4. During motions in limine, defendant renewed his motion to discover the identity of the confidential informant and in the alternative, requested the court conduct an in camera review. 1RP 19. The court denied defendant's motion to compel disclosure of the confidential informant as she was not being called as a witness and thus, was not subject to impeachment. 1RP 19-30. The court also denied

defendant's motion for an in camera review of the witness as there was no testimony being offered to review. 1RP 19-30.

At the conclusion of the State's case, defendant renewed his motion to discover the identity of the confidential informant in order to put her on the stand and impeach her credibility. 3RP 389-392. The court denied defendant's motion stating witnesses cannot be called solely for the purpose of impeachment when there is no testimony from them to impeach. 3RP 391-393. The confidential informant did not testify at trial. 1RP 70-177; 2RP 178-359; 3RP 360-495; 4RP 496-534. Defendant was found guilty of three counts of delivery of a controlled substance, cocaine. CP 164-168. The jury also found two of the crimes occurred within a thousand feet of a school bus stop. CP 164-168.

Defendant filed a pro se motion to set aside the jury verdicts based on the denial of his right to confront the confidential informant. CP 169-172. The court denied the motion and also denied a subsequent motion for reconsideration. CP 173, 185-188; 4RP 614-620. Defendant was sentenced to a standard range of 90 months to be followed consecutively by 48 months for the school zone enhancements for a total of 138 months of confinement. 4RP 648-649; CP 301.

Defendant filed a timely notice of appeal. CP 309-325.

## 2. Facts

During the winter of 2011-12, defendant sold drugs to a confidential informant who was supervised by, and worked with, Lakewood Police Officer Jeff Martin. 1RP 117, 144. The female confidential informant had been working for Washington police officers since 2006 and conducted two dozen controlled buys since working for Officer Martin. 1RP 144-146. She was a "mercenary informant" meaning she was paid money for the buys. 1RP 146. During the trial, Officer Martin stated that the confidential informant was still working for the police and disclosing her identity would compromise any current and future cases involving her and put her safety at risk. 1RP 128, 148, 151-152.

Also during the trial, Officer Martin explained that when preparing to do a controlled buy, officers meet the informant at a designated meeting area. 1RP 138. The officers then thoroughly search the informant's person and vehicle before and after the buy to ensure that any drugs come from the targeted individual and not the informant. 1RP 138. Officer Martin also explained that part of becoming a confidential informant means agreeing to be subjected to a strip search at any time if deemed necessary. 1RP 134, 162-163. He described how the confidential informant used in the defendant's case always wore sweatpants, T-shirts,

no bra and flip flops or flat shoes during the buys to make the search easier and clear that she is not hiding contraband. 1RP 153-154.

Officer Martin testified that during the operations, multiple officers are on scene to conduct surveillance and maintain a visual observation of the informants at all times. 1RP 134-144. Officers watch the informant after the informant is searched, during the transaction, and up until the search after the completion of the buy, which is done after the informants return to the arranged meeting place. 1RP 134-144. Officer Martin testified that if at any point it appears the informant is reaching or doing something suspicious, he will stop the operation and question the informant. 1RP 143-144. If the informant's explanation does not make sense, Officer Martin will not go through with the buy. 1RP 143-144.

The first buy between defendant and the confidential informant occurred on December 14, 2011, at the B&I shopping area in Lakewood. 1RP 165. Prior to first buy, Officer Martin met the confidential informant at a designated meeting spot and thoroughly searched her person and vehicle. 1RP 163-164. He then gave her \$250 of prerecorded money that had been photocopied and documented by serial number to buy a quarter ounce of crack cocaine. 1RP 163-164. Officer Martin maintained a visual observation of the confidential informant throughout the buy and watched as defendant got into her vehicle for 45 seconds to a minute. 1RP 165-

172. Officer Martin never observed anything exchange hands as the vehicle blocked his view and he could only see the heads and shoulders of defendant and the confidential informant through the windows. 2RP 257-258. Lakewood Police Officer Sean Conlon was also present and observed the interaction between defendant and the confidential informant. 2RP 310-314.

After defendant left, Officer Martin followed the confidential informant as she drove her car back to the meeting area without making any stops. 1RP 172-174. Once there, she gave Officer Martin approximately seven grams of crack cocaine and no longer had the \$250 in marked bills. 1RP 172-174. Officer Martin again searched her person and vehicle and found no contraband other than the crack cocaine she had given him. 1RP 174-175.

The second controlled buy between the defendant and the confidential informant took place on December 27, 2011, at the 7-11 on the corner of 96th and South Steele Street. 2RP 195. Again, Officer Martin met the confidential informant and thoroughly searched her person and vehicle. 2RP 199-200. He did not find any contraband and gave her \$250 in prerecorded bills to buy a quarter ounce of crack cocaine. 2RP 199-200. Officer Martin watched the confidential informant as she parked and defendant got into her car for approximately a minute and half before

leaving the area. 2RP 203-204. Officer Martin could see the upper portion of defendant and the confidential informant's bodies, but not their hands.

2RP 201-204. After defendant got out of the vehicle, Officer Martin followed the confidential informant back to the original meeting spot where he searched her person and vehicle again. 2RP 203-206. He found no contraband except approximately seven grams of crack cocaine. 2RP 203-206.

A third controlled buy between the defendant and the confidential informant took place on February 7, 2012, in the Taco Time parking lot off South Tacoma Way in Lakewood. 2RP 207-208. Prior to the buy, Officer Martin met the confidential informant and thoroughly searched her person and vehicle finding no contraband. 2RP 210-211. He gave her \$125 to buy an eighth of an ounce of crack cocaine. 2RP 212. Officer Martin observed the confidential informant park her vehicle and watched as defendant got in the passenger side for around two minutes before leaving. 2RP 215-217. He maintained visual contact of the informant, but could only see defendant and the confidential informant's heads. 2RP 273. After defendant got out, Officer Martin followed the confidential informant to the meeting spot and again searched her person and vehicle finding nothing except 3.7 grams of crack cocaine. 2RP 217-219.

On February 14, 2012, Officer Martin and his partner Officer Sean Conlon obtained a search warrant for the defendant's home. 2RP 219-221. They decided to do a "low profile contact" in an attempt to possibly use the defendant to get to his supplier. 2RP 221-222. The officers stopped the defendant in his vehicle as he was pulling up to his home. 2RP 222-223. The officers arrested defendant and walked with him to his home where they performed a search of his residence. 2RP 222-223.

Officer Martin interviewed the defendant in a bedroom after defendant was read his rights. 2RP 224-225. Defendant agreed to speak with them. 2RP 224-225. Defendant admitted he was selling four to six ounces every other day to 12 to 15 clients. 2RP 227. They discussed the possibility of defendant being able to work off his charges in exchange for information about his supplier and agreed to meet at the police station later that night. 2RP 231-232. The officers did not find any drugs in their search of the home, but found \$1,050 in cash and a digital scale commonly used to measure drugs. 2RP 232-234. The officers seized defendant's vehicle before releasing him. 2RP 234-25.

Defendant went to the police station later that night and spoke with Officer Martin and Officer Conlon about what would be required of being a confidential informant. 2RP 235-236. The officers determined it was not going to work with defendant and released him. 2RP 236-238.

Concerned he may tip off his supplier about their operation, the officers called the defendant back in and arrested him. 2RP 239-240.

Evidence was presented establishing that two of the buy locations were within 1000 feet of two school bus stops. 1RP 70, 110-113. 2RP 242-250. Evidence was also presented that the drugs the confidential informant gave to Officer Martin after each of the buys was cocaine. 1RP 70, 74-77, 80.

Defendant testified and denied selling drugs to the confidential informant. 3RP 459, 464, 479, 484, 514. Defendant admitted that from the discovery, he knew the confidential informant was his friend "Marie" with whom he had had a personal relationship and had known for four or five years. 3RP 457-459. Defendant said he would meet with Marie usually three to four times a month for personal reasons and they would discuss problems in life. 3RP 459. He admitted meeting her during the first buy at the B&I and said she had called him to borrow money which he occasionally would lend to her. 3RP 457, 459-362. Defendant also admitted to meeting Marie at the Taco Time in February to give her money for a motel room, but did not remember the other meeting. 3RP 463-464.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT WHEN DEFENDANT WAS UNABLE TO MEET HIS BURDEN OF PROVING DISCLOSURE WAS NECESSARY.

The trial court's grant or denial of a motion to compel the disclosure of a confidential informant's identity is reviewed under the abuse of discretion standard. *State v. Uthoff*, 45 Wn. App. 261, 268 724 P.2d 1103, *review denied*, 107 Wn.2d 1017 (1986). A trial court abuses its discretion when its decision is based on untenable grounds or reasons or if it makes a determination that is manifestly unreasonable. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Generally, the government is not required to disclose the identity of an informant providing information related to criminal activity. *Rovario v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 627, 1 L. Ed. 2d 639 (1957); *State v. Harris*, 91 Wn. 2d 145, 148, 588 P.2d 720 (1987). The purpose of the "informer's privilege" is to encourage citizens to report their knowledge of criminal activities to the police to further effective law enforcement. *Rovario* 353 U.S. at 59, 77 S. Ct. at 639; *Harris* at 148. In Washington, the privilege is codified in the court rules and legislative

statute. CrR 4.7(f) describes prosecutor's obligations under discovery rules and matters which are not subject to disclosure, specifically "informants" stating:

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

CrR 4.7(f)(2)

RCW 5.60.060(5) also provides "a public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure."

However, the privilege is not absolute and a defendant's request for disclosure of a confidential informant's identity at trial raises constitutional issues of fundamental fairness and due process. *United States v. Raddatz*, 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). When disclosure of a confidential informant's identity is relevant and useful to the defendant, or if disclosure is essential to a fair determination of the case, then disclosure is warranted. *State v. Petrina*, 73 Wn. App. 779, 783-84, 871 P.2d 637 (1994) (citing *Rovario*, 353 U.S. at 60-61, 77 S. Ct. at 628). The defendant has the burden of proving disclosure is necessary, meaning circumstances exist which justify an exception to the State's

privilege. *Petrina*, at 784. The trial court should not require disclosure of the confidential informant's identity unless the court finds either prong of the *Rovario* test has been satisfied (relevant and useful to the defense or essential to a fair determination of the case). *Harris*, at 149.

In determining whether the identity of an informant should be disclosed, the court should balance the State's interest against disclosure against the defendant's reasons for disclosure. *Petrina*, at 784. In other words, "the public interest in protecting the free flow of information against the individual's right to prepare his defense." *Id.* (quoting *Rovario*, 353 U.S. at 62, 77 S. Ct. at 629). When weighing these factors, the court should consider "the facts of the case, the crime charged, the possible defenses, the possible significance of the informer's testimony," whether the informant is currently acting as an informant in other cases, whether there has been or may be any personal danger to the informant if his or her identity is disclosed and any other relevant factors. *Id.* (quoting *Rovario*, 353 U.S. at 62, 77 S. Ct. at 629); *State v. Potter*, 25 Wn. App. 624, 629, 611 P.2d 1282 (1980); *see also Harris*, at 150.

In the present case, defendant was unable to satisfy either prong of the *Rovario* test and meet his burden that disclosure was necessary to his defense and thus, the trial court did not abuse its discretion in denying defendant's motion to compel disclosure. First, defendant was unable to

show the confidential informant's identity was information that was relevant and useful to the defense. In his trial briefs, defense counsel argued that the identity of the confidential informant was relevant and useful because her credibility was at issue and he needed to investigate potential impeachment evidence. CP 24-30, 52-61, 81-84. However, early on in the proceedings the State chose not to call the confidential informant as a witness and made defendant aware of this fact. 9/25/12 RP 16-17. Because she was not a witness called to testify by the State, the confidential informant's credibility was not at issue and there was no testimony for defendant to impeach. Thus, the argument that it would be helpful and relevant to learn her identity in order to attack her credibility is moot when her credibility is not at issue in the case.

Defendant also argued in his trial brief that because the confidential informant could corroborate or deny the defendant's story that made her a relevant and useful witness to the defense. However, under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 U.S. Md. (1963), the prosecution has an obligation to disclose to the defense anything which may be considered exculpatory information. If the State was aware that the confidential informant intended to say something other than the fact that she bought drugs from the defendant for money, it would have an obligation to disclose such information. During the trial, the prosecutor

specifically denied possession of any exculpatory information and stated the State would have turned over any such information as required under *Brady*. 3RP 352.

Presumably the confidential informant's testimony would have been consistent with the police reports and other discovery. The fact that the confidential informant's anticipated testimony would have been consistent with Officer Martin's testimony means that she would not have been relevant or useful to defendant. In fact, not having her testify consistently with Officer Martin could have helped the defense as the jurors were required to rely on one individual witness rather than two consistent ones. The jury was left to infer through circumstantial evidence that the confidential informant bought drugs from defendant rather than actually hearing direct testimony that that occurred. Defendant might have seen the failure to call the confidential informant as a weakness in the State's case that created a strong argument for defendant.

Furthermore, it should be noted that the court did compel the disclosure of the gender of the confidential informant during the initial review of the issue as it found that information was relevant and useful to the defendant. The court found this because it went to the thoroughness of the search Officer Martin was able to conduct before and after the controlled buys. Knowing this information, defendant was able to

question the ability of Officer Martin, a male, to conduct a thorough search of the confidential informant, a female, and ensure she was not hiding drugs in areas he did not physically search. Defense counsel explored this area of impeachment throughout his cross of Officer Martin. 2RP 260-263, 266-268, 277-278

Knowing the name of the female confidential informant had no relevant or useful purpose to the defense when she did not testify or implicate the defendant and her credibility was not at issue. Rather, the court correctly understood it was Officer Martin's credibility and the sufficiency of the evidence that was at issue. No direct evidence was presented that drugs came from defendant. Rather, the jury relied on inferences from circumstantial evidence that defendant had sold drugs to the confidential informant. The gender of the confidential informant was relevant to the testimony of Officer Martin and the sufficiency of the evidence, not the confidential informant's identity.

Defendant was also unable to show that disclosure was essential to a fair determination of the case under the second prong of the *Rovario* test. The informant's privilege precludes disclosure of a confidential informant's identity by the State; it does not however, preclude defendant from confronting an individual they believe to be the confidential

informant at trial. In the present case, the following exchange took place when defendant testified:

Defendant: I am familiar with the CI, familiar who she is. So December around the 7th, 10th, whatever, the CI, Marie, is her name, Marie contacted me. She told me that she needed some gas money because she was going to CPS to do something, deal with something with her kids. She called me up to meet her at the B&I to give her 20 bucks.

Defense Counsel: Now, let me just backtrack a little bit. You say that you know this CI who you call -- you believe is Marie, at least fits the description of what you heard and the testimony?

Defendant: (witness nods head)

The Court: Mr. Forsman, you need to answer out loud.

Defendant: Yes. Yes.

3RP 457.

Defendant admitted on the stand that he knew the confidential informant was "a close friend, a good friend" named Marie he had known for four or five years and said "she would call me up, and we would hang out." 3RP 457-458. During his testimony, defendant also admitted he remembered meeting Marie during two of the incidents the police had observed and testified about, the meetings at the B&I and the Taco Time.

3RP 457-463. Defense counsel questioned defendant about when he came to suspect Marie was the confidential informant, saying:

Defense Counsel: So how long has it been since you have seen [Marie]?

Defendant: Probably about two months ago at the most.

Defense Counsel: At that time, you suspected she was involved?

Defendant: I didn't want to believe it. I had my suspicions, but what can I -- I can't really -- I mean, that's all I have was suspicions, like I said. The State still hasn't produced or gave a full detail as specifics who this CI is. But I know -- I mean, I have a --

Defense Counsel: Just based on what you have heard, and you think that's about the only explanation you have.

Defendant: Yeah. So far as the CI supposedly called me and then I will go see her and I was supposed to leave my house and go see her. And at the time I was in the Crown Vic and at B&I, it's only -- that's the only person who could have access like that that I just...

3RP 462. .

Not only did defendant admit he knew who the confidential informant was, he admitted he was in frequent contact with her.

Defendant testified that in 2011 he saw Marie three to four times a month

to talk about personal issues and said she would occasionally borrow money from him. 3RP 457-460. It was also not unusual for them to contact one another to hang out. In describing their relationship, defendant said:

it was nothing out of the ordinary to -- for me to -- for her to call me up, and I will go see her, give her occasionally some money or you know. She would borrow money, she would return it most of the time, but sometimes she wouldn't. So it wasn't nothing out of the ordinary for her to call me and say, can you come see me.

3RP 461.

Because defendant knew who the confidential informant was and how to contact her, the State did not need to disclose any information in order for defendant to call her as a witness in this case. Defendant could easily have called her as a witness himself or interviewed her to determine what her testimony would be. Furthermore, based on what he had learned during the 14 to 15 months the trial was pending, defendant knew Marie was the confidential informant at least two months before the trial began. 3RP 461-463. He had ample opportunity to investigate and determine what her testimony would be if he wanted to call her as a witness.

In essence, defendant had a choice. He knew who the confidential informant was. Before the trial he could have contacted her, interviewed her and determined what, if any, of her testimony would be helpful to him.

Then at trial, he could have decided whether to call her as a witness in his case. Defendant made a strategic decision not to call Marie. If he had called her, she would have likely testified consistently with the police reports and officers' testimony. Rather than risk that likelihood, defendant chose to proceed to trial on a weakened State's case that relied solely on circumstantial evidence and inferences. Having made that strategic decision not to call her during trial, defendant cannot now benefit from that decision by claiming that the State's failure to disclose the confidential informant deprived him the ability to prepare his defense.

The premise behind disclosing witnesses is to allow each party to interview the witnesses, determine what the witness' testimony will be and whether the witness will provide evidence helpful to the parties' cases. Here, disclosing the confidential informant's identity would not have given the defendant the opportunity to discover anything he did not already have the ability to find out. Allowing defendant to make the argument that the State's failure to disclose the informant deprived him of a fair determination of the case is allowing it to be used as a trump card.

Defendant already knew what information disclosure would provide and he strategically chose not to call her on his own accord. Learning the confidential informant's name would not have served any functional purpose for defendant during the trial. The information he

would have ascertained by the State disclosing the confidential informant's identity was already information that was readily available to him. He cannot now argue his own decision not to contact and speak with Marie deprived him of the right to a fair trial when he made that decision as part of his trial strategy.

This situation is similar to the facts in *State v. Riggins*, 11 Wn. App. 449, 523 P.2d 452 (1974). In *Riggins*, the defendant sold drugs to an undercover officer in the presence of a male and female companion. *Id.* at 450-451. During trial, defendant took the stand and said he remembered the male and female companions of the undercover officer, that the male's first name was Tom, that he had loaned money to Tom on more than one occasion, and Tom was a friend of his. *Id.* at 451-452. He also testified he had been to Tom's residence several times and he knew Tom and his wife for 30 days prior to the offense. *Id.*

The court held that the testimony established the defendant knew the identity of the informers and had a personal acquaintanceship with the informer before the incident. *Id.* at 452. The court also noted defendant failed to discover any further information about the informer or his whereabouts during the pendency of the case and did not attempt to subpoena him. *Id.* Based on this, the court found that the trial court had

not abused its discretion in denying the motion to compel the state to identify and produce the informer, much as in the present case. *Id.*

In addition, *Harris* establishes that if either *Rovario* prong is met the court must require disclosure of the informant's identity. However, the court must still balance the State's interest against disclosure against the defendant's reasons for disclosure. *Petrina*, at 784.

In the present case, there were several factors weighing against disclosure of the confidential informant's identity. The confidential informant was working on other cases with the police. 1RP 128, 148, 151-152. Officer Martin testified that disclosing her identity would compromise any current and future cases involving her. 1RP 128, 148, 151-152. He also testified that disclosure could put her safety at risk. *Id.* The State's case was more difficult to prove without the confidential informant's testimony. Yet, the State still chose to proceed despite this because of the significant safety concerns and potential domino effect revealing or confirming the confidential informant's identity could have on her other cases. Those are factors that weigh against disclosure and were likely considered by the court in making its decision.

Defendant in the present case fails to explain how the facts of the present case meet either of the *Rovario* prongs; rather, defendant argues that because the *Rovario* court ordered disclosure, this court should.

However, there are factors present in *Rovario* that distinguish it from the present case. In *Rovario*, a police officer hid in the trunk of the informant's vehicle while the informant bought drugs from the defendant. *Rovario*, 353 U.S. at 57, 77 S. Ct. at 626. The defendant's own statements overheard by the police officer were used against him during the trial. The court noted this was important in deciding the trial court had abused its discretion in not compelling the State to disclose the identity of the informant saying:

the Government's use against [the defendant] of his conversation with [the informant] while riding in [the informant]'s car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than [the defendant] himself, who could controvert, explain [*sic*<sup>1</sup>] or amplify [the officer's] report of the important conversation was [the informant].

*Id.* 353 U.S. at 64, 77 S. Ct. at 629-630.

This is why the court relied so heavily upon the fact that the informant was the only witness in a position to amplify or contradict the testimony of government witnesses; testimonial evidence from that transaction was being used against the defendant. In comparison, the present case no testimonial statements by the defendant to the informant were ever used in. In fact, the record makes clear, the court clarified with both counsel that no statements of the defendant to the confidential

informant, nor statements about actions or statements of the defendant from the confidential informant to Officer Martin, were ever introduced or used as substantive evidence at any point in the trial. 1RP 22-28.

Furthermore, in *Rovario*, the defendant denied ever having known or even seen the informant. The fact that the defendant in *Rovario*, if believed, did not know the informant's identity meant he could not have called that person to interview or question about the incident. In contrast, in the present case, as in *Riggins, supra*, defendant not only admitted to officers that he sold drugs to 12-15 clients every other day, he admitted on the stand he had suspected who the confidential informant was for two months before trial and as a result, had the time and knowledge to contact and question her if he wanted to. 2RP 227, 231-232.

Finally, in *Rovario*, the prosecutor admitted that disclosing the informant's identity would have no impact on future activities of the informant. *Rovario*, 353 U.S. at 59, 77 S. Ct. at 627 n.5. In the present case, as stated above, Officer Martin testified that disclosure would create safety concerns and given that she was currently working on other cases, would compromise any current and future cases involving her. 1RP 128, 148, 151-152. This is a significant distinguishing factor between the two

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<sup>1</sup> In the opinion, the word is written as "emplain," but most likely meant to read "explain."

cases that should be considered when the court's responsibility is to balance the State's interest against disclosure against the defendant's reasons for disclosure.

Defendant also appears to argue that whenever an informant is a witness to the transaction, this necessitates disclosure of the informant's identity. However, courts have held this is not a *per se* rule, including the *Harris* opinion which stated, "It may be that even when the informer is a material witness, disclosure of his or her identity will not be required under this standard. ... In the instant case, then, the fact that the informer was a material witness is not dispositive of the question whether the *Rovario* standard requires disclosure." *Harris*, at 151; *see also United States v. Doe*, 525 F.2d 878 (5th Cir.), *cert. denied*, 425 U.S. 976, 96 S. Ct. 2179, 48 L. Ed. 2d 801 (1976); *see also State v. Enriquez*, 45 Wn. App. 580, 725 P.2d 1384 (1986). The question is not whether the informer is a material witness; rather, it is whether the defendant has satisfied either of the *Rovario* prongs and overcome the burden of proving disclosure is necessary where circumstances exist which justify an exception to the State's privilege. As stated above, because defendant in the present case was unable to show how knowing the identity of the confidential informant would have either been relevant or useful to his

defense, or essential to a fair determination of the case, the trial court did not abuse its discretion in denying the motion to compel disclosure.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR AN IN CAMERA HEARING WHEN DEFENDANT FAILED TO MAKE AN INITIAL SHOWING SATISFYING EITHER OF THE **ROVARIO** PRONGS.

The trial court's decision whether to hold an in camera hearing regarding the disclosure of a confidential informant's identity is reviewed for an abuse of discretion. *State v. Vazquez*, 66 Wn. App. 573, 582, 832 P.2d 883 (1992). As stated above, a trial court abuses its discretion when its decision is based on untenable grounds or reasons or if it makes a determination that is manifestly unreasonable. *State ex rel. Carroll v. Junker*, at 26.

The trial court should apply a relevancy standard in exercising its discretion as to whether to hold an in camera hearing. Only after defendant has made an initial showing that the confidential informant may have evidence that would be relevant to the defendant's innocence should the court conduct an in camera hearing. *State v. Potter*, 25 Wn. App. 624, 628, 611 P.2d 1282 (1980). An in camera hearing should not be conducted if the defendant's contention that the informant may have relevant information is based upon speculation. *Id.*

The trial court is not required to hold an in camera hearing before ruling on the disclosure issue. *Petrina*, at 787. In *Harris*, the Court held "[t]he *preferred* method for making this determination ... is for the court to hold an in camera session [pursuant to CrR 4.7(h)(6)] at which the judge hears the informer's testimony and applies the *Roviaro* standard." *Id.* (*quoting Harris*, at 150). Only after the defendant shows that a hearing would likely reveal the informant to have some evidence relevant to the defendant's innocence or essential to determination of the case, the trial court must not deny the motion for disclosure without an in camera hearing. *Petrina*, at 787. The decision to hold an in camera hearing is discretionary. *State v. Vargas*, 58 Wn. App. 391, 395, 793 P.2d 455 (1990).

In the present case, defendant failed to establish that either of the prongs under *Rovario* were met. He failed to show how disclosure of the confidential informant's identity would be helpful and relevant to his defense. He also failed to show how it was essential to a fair determination of his case. Case law only holds that once either of the prongs has been met is an in camera hearing necessary. Further, as stated above, simply speculating that the confidential informant may have relevant information is not a reason to hold an in camera hearing. If neither of the prongs is met, the decision to hold an in camera review is a

discretionary decision by the trial court and simply the "preferred" method for making a further determination. In the present case, because defendant failed to establish that either of the *Rovario* prongs were met, the decision whether to hold an in camera hearing was a decision within the discretion of the trial court. The fact that the court chose not to hold an in camera hearing was not an abuse of discretion given the facts of the case and the law set forth above.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

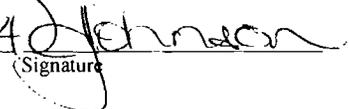
DATED: February 26, 2014.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
CHELSEY MILLER  
Deputy Prosecuting Attorney  
WSB # 42892

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ <sup>file</sup> or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/27/14   
Date Signature

# PIERCE COUNTY PROSECUTOR

## February 27, 2014 - 9:31 AM

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