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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 336735

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Gary B. Farnworth, II,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

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I. INTRODUCTION

The State of Washington charged Gary B. Farnworth, II, in an amended information with three counts of Theft in the First Degree under RCW 9A.56.030(1)(a), RCW 9A.56.020(1)(b) and RCW 9A.535(3)(d). CP 462-465. The matter proceeded to trial on June 1, 2016 in Spokane County Superior Court in front of The Honorable Annette S. Plese. *See generally*, RP.

Ultimately, the jury returned a verdict of guilty on Counts II & III and returned a special interrogatory allowing an exceptional sentence on Counts II & III. CP 527-535. Mr. Farnworth was sentenced on July 20, 2015 to twelve months incarceration on both counts, to be served consecutively along with restitution of \$76,092.59 in addition to other court costs and fees. CP 673, 731-744. A timely notice of appeal was filed in Spokane County Superior Court.

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. **Did the Court err when it deprived Gary Farnworth, II of his right to present a defense in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution and in violation of Article I, section 22 of the Washington Constitution?**
2. **Did the Court err when it ruled the Fraud Adjudicator was not an expert witness and would not continue trial to allow the Defense to present a rebuttal witness?**
3. **Did the Court err and violate Mr. Farnworth's right to confrontation when it:**
 - a. **Admitted into evidence the Department Orders and testimony of Alan Gruse concerning what other Department claims managers**

relied upon when paying Mr. Farnworth time loss compensation benefits; and

- b. Admitted into evidence Department of Licensing records and testimony through record custodian Richard Letteer?**
- 4. Did the Court err when it failed to dismiss Counts II & III pursuant to RCW 9A.56.010(21)(c) when the misrepresentations were parts of a series of transactions that were part of the common scheme or plan?**
- 5. Did the Court err in failing to find a *Brady* violation when the Attorney General failed to disclose pertinent *Brady* material that would have been used to impeach the lead investigator and the Court refused to allow the Defense to question the lead investigator about the *Brady* violation and further discussing the matter with a testifying witness?**
- 6. Did the Court err when it failed to include the “common scheme or plan” as an element of the crime charged in the jury instructions?**

III. STATEMENT OF THE CASE

The Appellant, Gary B. Farnworth, II, sustained an industrial injury on September 10, 2007 during the course of his employment as a welder/iron worker. CP p. 99-117, 393-461, 544-555. These injuries led to back surgery and Mr. Farnworth’s inability to maintain gainful employment. *Id.* Due to this, Mr. Farnworth was collecting worker’s compensation. *Id.* In August of 2012, the Fraud Unit at the Department of Labor & Industries conducted an investigation in response to a tip that Mr. Farnworth was performing work at TCS Auto Wholesale. RP p. 311-12. Matt McCord, Investigator with the Department of Labor and Industries, observed Mr. Farnworth performing some of the job duties of an automobile salesman. RP p. 312-13.

On October 3, 2012, Mr. Farnworth submitted a Declaration to the Department of Labor & Industries informing them that he had overlooked the portion of his Worker Verification Forms which reads: “This means you didn’t perform any type of work – paid or unpaid – such as volunteer work.” CP Exhibits D201-D208. In his declaration, Mr. Farnworth acknowledged that he performed unpaid and part-time work activities, while helping out his friend at TCS Auto Wholesale. *Id.*

After receiving notice on October 3, 2012 that Mr. Farnworth was engaged in these part-time, unpaid work activities, the Department continued to pay time loss compensation. CP Exhibits D201-D208. Shortly thereafter, the Department reached a vocational determination that Mr. Farnworth was employable as an automobile salesperson, but the Vocational Dispute Resolution Office (VDRO) accepted review of that determination. CP Exhibits D212. This vocational determination that Mr. Farnworth was employable was not upheld by the VDRO, who returned the case to the claims manager and instructed him to reinstate time loss if appropriate. *Id.*

On December 14, 2012, the claims manager reinstated time loss compensation and issued an order paying time loss from November 7, 2012 through December 13, 2012. CP Exhibit D203. Time loss eventually ended for Mr. Farnworth on February 14, 2013, as he was found able to work. CP Exhibit D208. Thereafter, Mr. Farnworth began a full-time, paid position as an

automobile salesperson with TCS Auto Wholesale. This position paid much less than his job at the time of injury. Due to this, the Board held that Mr. Farnworth had a loss of earning power, within the meaning of RCW 51.32.090(3), from February 15, 2013 through April 29, 2013, proximately caused by the industrial injury, which was more than five percent less than his earning power at the time of the industrial injury. CP Exhibits D203-D208.

On January 29, 2014, the Attorney General's office through Assistant Attorney General Tienney Milnor, filed an information with the Spokane County Superior Court charging Mr. Farnworth with Theft in the First Degree under Cause No. 14-1-000357-0. CP p. 1-2. Ms. Milnor also filed an affidavit of probable cause supported by an attached affidavit of Washington State Department of Labor & Industries Investigator, Matt McCord. Mr. Farnworth was arraigned on the matter on 02/19/2014. CP p. 3-16. The charges were later amended to three Counts of Theft in the 1st degree. CP 462-465.

Approximately five months after Mr. Farnworth's arraignment, on July 24, 2014, Matt McCord, while acting as an investigator in furtherance of developing a criminal case, had an ex parte meeting with Mr. Farnworth's treating neurosurgeon, John Demakas, M.D. CP p. 99-117, 393-461. Without a search warrant or court-issued subpoena, Mr. McCord discussed Mr. Farnworth's condition related to his industrial injury with Dr. Demakas. *Id.* He presented Dr. Demakas with paperwork and imaging that he developed through his

investigation. *Id.* Mr. McCord then requested Dr. Demakas to complete a statement regarding Mr. Farnworth's ability to work. *Id.*

On September 30, 2014, Mr. Farnworth's civil attorney met with Dr. Demakas to discuss his opinions with respect to Mr. Farnworth's industrial injury. *Id.* After considering additional information, which was not disclosed during Investigator McCord's interview, Dr. Demakas concurred with Dr. Lahtinen's statement of March 19, 2014 and opined that Mr. Farnworth was not able to perform all of the job duties, including driving, for the automobile salesman position from his date of injury through February 14, 2014 and was not released to work until 02/15/2013. *Id.*

During the meeting on September 30, 2014, Dr. Demakas also disclosed that an attorney (he couldn't recall the name) recently met with him to discuss his testimony in the upcoming criminal trial. *Id.* This attorney was the prosecutor, Ms. Milnor, who had the ex parte meeting with Mr. Farnworth's neurosurgeon. RP 5/27/15 p. 18-27. Moreover, the prosecuting attorney, Ms. Milnor, had ex parte communications with Mr. Farnworth's vocational counselor, JR Wyatt, to discuss his opinions with respect to Mr. Farnworth's employability during the period in question based upon the residuals of his industrial injury as well as other relevant factors. *Id.* It became evident through public disclosure requests and various hearings that the AG assigned to Mr. Farnworth's criminal matter has had ongoing contact with the AG assigned to Mr. Farnworth's civil L&I claim, much

of which has been redacted in the public disclosure request. CP p. 99-117, 393-461.

Phelps & Associates substituted in as counsel on the above captioned case on September 26, 2014. RP 5/27/15 p. 11. At that time trial was set for June of 2015 over the objection of defense counsel. RP 6/1/15 p. 11. On May 27, 2015, the parties went before the Honorable Harold D. Clarke, III, for a motion hearing. RP 5/27/15. The first motion was a request for a continuance by defense counsel due to the nondisclosure of expert witnesses and conflicting federal hearings. RP 5/27/15 p.3-4, CP 126-157. The court ruled that the grounds stated “don’t rise to an appropriate reason to continue trial.” RP 5/27/15 p. 15, CP 220-221. Second, defense argued a motion to suppress evidence obtained in violation of the defendant’s right to privacy when the prosecutor had ex parte communications with the defendant’s treating physician and obtained medical records without a warrant. RP 5/27/15 p. 18-26, CP 118-125. The court denied the motion because the court believed Mr. Farnworth’s waiver in the civil realm carries over to the criminal realm because he availed himself by collecting unemployment benefits. RP 5/27/15 p. 26-27, CP 22. Lastly, defense argued a motion to dismiss and disqualify the Attorney General for violating RPC 8.4. RP 5/27/15 p. 27-33. The Judge ruled that the facts presented did not rise to the level of prosecutorial misconduct and denied the motion. RP 5/27/15 p. 33-34, CP 223-224.

The case proceeded to trial on June 1, 2015 with the Honorable Annette Plese. RP 6/1/15. The Defense renewed its motion for a continuance on the day of trial. CP 381-383. Again, the Judge denied the motion to continue. CP 391-392. The case proceeded to trial. RP. During motions in limine, the court ordered the defense to not talk about Mr. Farnworth's civil Department of Labor & Industries case under Claim No. AG-38593. RP 55-57, 72.

THE COURT: Again, we're not going to mention the civil case. I want to make sure because my concern is you keep arguing about the civil case, and we're not going to talk about that in front of the jury.

MR. PHELPS: Judge, its there. I don't know how were going to keep it out.

THE COURT: Because I ruled that you keep it out.

Similarly, the court denied the defendant's request to present evidence that the Department would have paid either time-loss compensation and/or loss of earning power benefits even if it had known that Mr. Farnworth was engaged in work activity. RP 64-66, 934-38, 945, CP Exhibits D201-2012. The defense requested to present evidence that the defendant was legally entitled to time loss compensation and/or loss of earning power benefits during the period in question regardless of the deception. *Id.* However, the court ruled that:

the statute for theft by deception does not focus on the net result of the defendant's benefit based on the amount that he might have legally received. Instead, theft by deception centers on the deceptive act and the value of the property obtained by the deceptive act, and it's not a defense under *Casey* that he could have gotten benefits what happened. So based on

that, the Court is not going to allow him to testify to what he would have gotten. RP 935. (emphasis added).

The Court further explained:

[f]rom looking over all the cases, it talks about basically not what he would have received. That's important in the civil arena in the case law, but not important in the criminal arena. What he would have gotten had he not deceived them is not a defense in the criminal statute." RP 936.

Enforcing this earlier ruling, the court denied the defendant's request to fully cross-examine the treating medical provider Dr. Duncan Lahtinen regarding his opinions and the treatment he provided to Mr. Farnworth. RP 675-678. The court explained, "[a]gain, this is a criminal case, not a Department action, and so we're looking at very narrow issues." The court further explained, the treatment and injuries to Mr. Farnworth were "not relevant as to this case because they're not disputing he was injured. They're not disputing that he had an L&I injury. That's not a dispute." RP 676. Moreover, the court denied the defendant's request to fully cross examine the treating medical provider Dr. Demakas, regarding his opinion about Mr. Farnworth's physical abilities related to his industrial injury. RP 900-01. The court explained, "I've already told you are not allowing the fact that whether or not they would have paid him had he not deceived him. That's not relevant. That's why I'm sticking to that issue... I'm not going to allow those questions. We're not going into it. I'll let you generally ask him some questions about it, but we're not going to go into it." RP 900-901.

During the direct examination of Alan Gruse, Workers' Compensation Adjudicator, the state was allowed to admit payment orders made by claims managers over the hearsay, authentication, and confrontation clause objections of defense counsel. RP 400-415, 963, 1095. The prosecuting attorney asked Mr. Gruse whether the Department relied on documentation (worker verification forms) from Mr. Farnworth in paying him time loss compensation benefits. *See* RP 986-987. The defense objected on the basis of hearsay, confrontation and lack of foundation. *Id.* Thereafter, the State moved to admit various Department Orders paying Mr. Farnworth time loss compensation benefits, which were issued by various claims managers that did not testify in this case. *Id.* The defense again objected on the basis of hearsay and violation of right to confrontation. In support of its objection as to exhibit P104, the defense was permitted to voir dire Mr. Gruse, which revealed the following:

MR. SMITH: Permission to voir dire, Your Honor.

THE COURT: You may.

MR. SMITH: Thank you.

Q (By Mr. Smith) Mr. Gruse, this is a payment order, correct? Document you're referring to is a payment order?

A Yes, it is.

Q Right. You said that's a legal document; is it not?

A It is.

Q All right. And this is a legal document created by the claims manager, correct?

A Yes.

Q All right. And at no time during the period February 15, 2010 through October 5, 2012, were you a claims manager in this case, correct?

A I was not a claims manager in this case, no.

Q All right. And the claims manager in this particular document at the time was Vicky Damora, correct?

A That is correct.

Q In reaching this determination, she reviews documents, relies on evidence and makes a determination whether or not benefits are payable, correct?

A That is correct.

Q All right. And back on December 27, 2010, you weren't working with her for purposes of issuing this, correct?

A For purposes of this payment?

Q Yes.

A No.

MR. SMITH: Thank you, Your Honor. I have an objection on hearsay. It violates right to confrontation, as well as relevance in any -- it is irrelevant, substantially outweighed by the prejudicial effect.

THE COURT: I'll note your objection. The Court is going to admit P104.

RP 994-995.

Q (By Mr. Smith) Now, Mr. Gruse, I asked you some similar questions from the last exhibit. Again, you weren't the claims manager for Mr.

Farnworth during the period February 15, 2010 through October 5, 2012, correct?

A Correct.

Q And during that period, you weren't responsible for making any decisions with regards to payment orders, correct?

A Not that I'm aware of.

Q All right. And these payment orders are legal documents issued by claims managers after reviewing information in the claim file, correct?

A Correct.

Q And you didn't work with any of those claims managers during this time while issuing these payment orders, correct?

A Well, yes, I worked with them.

Q Well, on this claim in particular.

A Not to my recollection.

MR. SMITH: All right. Your Honor, the same objection, and if I could have a standing objection on all payment orders so I don't have to keep interrupting the witness. My objection is based upon Article 1 Section –

THE COURT: Counsel, no standing objections.

MR. SMITH: Objection is based upon the right of confrontation, hearsay.

THE COURT: Counsel -- counsel, no standing objection. You made your objection. I'm going to overrule it at this time, and as I said, again, no standing objections.

MR. SMITH: Okay.

THE COURT: I'll note your objection, and you can address it outside the presence of the jury.

MR. SMITH: Okay. Will the same objection stand for all payment orders so I don't have to interrupt him?

THE COURT: It'll stand. I'm going to make you say objection on the record as we go through.

MR. SMITH: Okay. Thank you.

THE COURT: So P105A is admitted.

RP 1006-07.

Similarly, during the direct examination of Richard Letteer, Custodian of Records for the Department of Licensing, the state was allowed to admit Department of Licensing sales transaction records created by various people over the hearsay, authentication, and confrontation clause objections of defense counsel. RP 480-482. In support of its objection as to exhibit P80, the defense was permitted to voir dire Mr. Letteer, which revealed the following:

Q (By Mr. Phelps): Did you prepare those documents?

A No.

Q So have you had any involvement preparing these documents?

A No.

Q Have you seen these documents before today?

A Yes.

Q When was it you saw them?

A It's been over a period of time. I've viewed quite a few yesterday and last week and then.

Q Have you ever had communication with Susan Mitchell?

A Yes.

Q And did you review the documents with Ms. Mitchell?

A No.

Q Actually, isn't it true that Ms. Mitchell prepared these documents?

A Yes.

Q And were you there when she prepared them?

A No.

Q Did you observe the preparation of them?

A No.

Q The documents that you reviewed, did they have that documentation down in the lower right-hand corner of them?

A Such as in?

Q The documents prepared by Ms. Mitchell, do you know if they had the Farnworth Exhibit 80-000 with a number on the lower right-hand corner?

A Yes, some of them that I viewed had that.

Q And you haven't reviewed then the actual documents?

A I don't understand.

Q Have you ever seen the original documents?

A No.

Q And did you have any help -- did you prepare or look at the original documents at any time?

A No.

RP 478-480.

The Department of Labor & Industries Investigator, Matt McCord, was the lead investigator and the State's chief witness in Mr. Farnworth's case. RP 311, 863-874, CP 469-473. Through a background investigation it was discovered that Matthew McCord resigned in lieu of being terminated from the Simi Valley Police Department for participating in a fraudulent Ponzi scheme. *Id.* While testifying under a Grand Jury subpoena, Matthew McCord asserted his 5th Amendment right not to incriminate himself. *Id.* Upon cross examination of McCord, defense counsel attempted to elicit testimony about his involvement in fraud. RP 863-874. The Government objected and the jury was taken out of the courtroom. *Id.* Once the jury was out of the courtroom, defense counsel motioned the court for dismissal based on *Brady* violations and requested to further voir dire the witness to make a proper record. *Id.* The court ruled that information pertaining to Mr. McCord's involvement in fraud is irrelevant, would not allow defense counsel to voir dire the witness, and denied the motion. *Id.*

After the State's case-in-chief, counsel for the defendant argued a halftime motion to dismiss. CP 384-390, RP 1101-1103. Since the State alleged that Mr. Farnworth committed a series of thefts, that when considered separately would constitute theft in the third degree because of value (time loss rates vary from \$113.60 to \$1,120.38 per day and that the series of thefts were part of a "common

scheme or plan” element the State improperly aggregated the daily transactions into multiple counts of Theft in the First Degree. *Id.* As such counts II & III should be dismissed. *Id.* The judge denied the motion. RP 1103.

Defense counsel submitted a Jury Instruction that included the element of “common scheme or plan” but the Court instead chose to use an instruction leaving out this key element. RP 1124, CP 474-479. Defense Counsel objected. *Id.* Similarly, defense counsel proposed an instruction to the jury for a special verdict requesting the jury to specifically find the total dollar amount for time loss and/or loss of earning power benefits the Department would not have paid had it known the true facts and it was not submitted to the jury. RP 1127-1135.

The jury found Mr. Farnworth not guilty on Count I and guilty on Counts II and III in the June 5, 2015 Second Amended Information for Theft in the First Degree with a special verdict for a major economic offense. CP 527-532. Mr. Farnworth was sentenced on July 20, 2015 to twelve month’s incarceration on both counts, to be served concurrently along with \$76,092.59 to be paid in restitution to the Department of Labor and Industries, and other court costs and fees. CP 673, 731-744.

IV. ARGUMENT

- 1. The trial court deprived Gary Farnworth, II of his right to present a defense in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution and in violation of Article I, section 22 of the Washington Constitution.**

a. **The state and federal constitutions guarantee an individual the right to present a defense.**

The Sixth and Fourteenth Amendments of the U.S. Constitution separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citations and internal quotations omitted). Article I, § 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Consistent with these rights, a defendant is entitled to have the jury instructed on his theory of the case where it is supported by the law and evidence. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000). "In evaluating whether the evidence is sufficient to support such a jury instruction, the trial court must interpret the evidence most strongly in favor of the defendant." *State v. Ginn*, 128 Wn. App. 872, 878-79, 117 P.3d 1155 (2005). In the case before the court, the court refused to allow introduction of evidence that the defendant was entitled to, and in-fact received, time loss benefits after he disclosed he was volunteering for a friend, pursuant to RCW 51.32.090.

The Court, therefore, denied the defense an opportunity to explain that the government's loss calculation was flawed.

b. The court denied Gary Farnworth, II the right to present a defense.

In this case, the court denied Mr. Farnworth the right to present a defense by denying him the opportunity to present material evidence that demonstrated the Department of Labor & Industries was legally obligated to pay him disability benefits (either time loss or partial time loss/loss of earning power benefits) even if it had known the true facts: that he had engaged in part-time, unpaid work activity during certain periods while receiving time loss benefits. In theft by color or aid of deception cases under RCW 9A.56.020(1)(b), the State must also prove that it relied on the defendant's deception, which "is established where the deception in some measure operated as inducement." *State v. Mehrabian*, 175 Wn.App. 678, 700, 308 P.3d 660, review denied 178 Wn.2d 1022, 312 P.3d 650 (2013), citing *State v. Casey*, 81 Wn.App. 524, 529, 915 P.2d 587 (1996). Acquiring property by "aid of deception" requires that the victim relied on the deception. *Casey*, 81 Wn.App. at 529. "If the victim would have parted with the property even if the true facts were known, there is no theft." *Mehrabian*, 175 Wn.App. at 700, citing *State v. Renhard*, 71 Wn.2d 670, 672-74, 430 P.2d 557 (1967).

A Washington injured worker's entitlement to disability benefits is governed by the Industrial Insurance Act under RCW 51. The Industrial Insurance Act does

little to explain the requirements for entitlement to temporary total disability (a.k.a. time loss). The statute, RCW 51.32.090(1), merely states that “[w]hen the total disability is only temporary; the schedule of payments contained in RCW 51.32.060(1) and (2) shall apply, so long as total disability continues.” The referenced RCW outlines how pension (permanent *total* disability) benefits are to be calculated. Since the statute does not explain how to determine if a worker is entitled to time loss benefits, it is necessary to look at case law. An injured worker is entitled to time loss compensation through the Washington State Department of Labor & Industries if he or she is totally disabled. The Court of Appeals explained that temporary total disability differs from permanent total disability only in duration of disability and not in character. *Bonko v. Department of Labor & Industries*, 2 Wn.App. 22, 466 P.2d 526 (1970); see also *Herr v. Department of Labor & Indus.*, 74 Wn.App. 632, 875 P.2d 11 (1994). In the case of *Hubbard v. Department of Labor & Indus.*, 140 Wn.2d 35, 992 P.2d 1002 (2000), the Washington Supreme Court noted that “temporary total disability” is a condition that temporarily incapacitates a worker from performing any work at any gainful employment. In *Fochtman v. Dept. of Labor & Indus.*, 7 Wn.App. 286, 499 P.2d 255 (1972), the Court of Appeals, relying on *Kuhnle*, reiterated the principle that “sporadic” work and irregular employment do not qualify as gainful employment.”

An injured worker is entitled to temporary partial disability benefits (a.k.a. partial time loss and loss of earning power) compensation benefits through the Washington State Department of Labor & Industries when his or her present earning capacity is only “partially restored” to the worker’s pre-injury earning capacity, as long as the loss exceeds five percent and is causally related to the industrial injury or occupational disease. RCW 51.32.090(3). If a worker proves an inability to return to his or her job of injury, but returns to lighter work paying less than their wage of injury, the fact that the post-injury job pays less than the job of injury creates a rebuttable presumption that the worker has sustained a loss of earning power. *In re Howard Dyer*, BIIA Dec., 15,763 (1962).

In support of his defense at trial, Mr. Farnworth made several attempts to present evidence that the Department had to legally pay him time loss and/or loss of earning power benefits under RCW 51.32.090 regardless of the deception. *See generally*, RP. However, the court repeatedly refused Mr. Farnworth to present such a defense. The court ordered the defense to not talk about Mr. Farnworth’s civil Department of Labor & Industries case. RP 72.

THE COURT: Again, we’re not going to mention the civil case. I want to make sure because my concern is you keep arguing about the civil case, and we’re not going to talk about that in front of the jury.

MR. PHELPS: Judge, it’s there. I don’t know how were going to keep it out.

THE COURT: Because I ruled that you keep it out.

At trial, the court denied the defendant's request to present evidence through his witness Jerry Myron, who is a vocational counselor and also worked at the Department of Labor & Industries as an adjudicator (vocational service specialist), in order to establish facts indicating that the Department would have paid either time-loss compensation and/or loss of earning power benefits even if it had known that Mr. Farnworth was engaged in work activity. (RP 934-38 & 945).

The court ruled that:

the statute for theft by deception does not focus on the net result of the defendant's benefit based on the amount that he might have legally received. Instead, theft by deception centers on the deceptive act and the value of the property obtained by the deceptive act, and it's not a defense under *Casey* that he could have gotten benefits what happened. So based on that, the Court is not going to allow him to testify to what he would have gotten. RP 935. (emphasis added).

The Court further explained:

[f]rom looking over all the cases, it talks about basically not what he would have received. That's **important in the civil arena in the case law, but not important in the criminal arena.** What he would have gotten had he not deceived them is not a defense in the criminal statute." (emphasis added). RP 936.

The court's ruling, however, is clearly inconsistent with *Mehrabian*, 175 Wn.App. at 700 (If the victim would have parted with the property even if the true facts were known, there is no theft).

Additionally, Mr. Farnworth was precluded from offering evidence that the Department did, in fact, continue to pay Mr. Farnworth time loss compensation even after it had discovered that he had been engaging in work-

activities. The court suppressed any such evidence about the Department's continued payment of time loss even after it knew the true facts. *See* RP 62-66. The court also denied the Defendant's request to present evidence that the Department paid Mr. Farnworth Loss of Earning Power benefits after it became aware of the fact that he engaged in work activities. *See* RP 75-77.

Furthermore, the court denied the defendant's request to fully cross-examine the treating medical provider Dr. Duncan Lahtinen regarding his opinions and the treatment he provided to Mr. Farnworth. RP 675-678. The trial judge explained, "[a]gain, this is a criminal case, not a Department action, and so we're looking at very narrow issues." The court further explained, the treatment and injuries to Mr. Farnworth were "not relevant as to this case because they're not disputing he was injured. They're not disputing that he had an L&I injury. That's not a dispute." RP 676.

In the criminal trial, the court denied the defendant's request to fully cross examine the treating medical provider Dr. Demakas, regarding his opinion about Mr. Farnworth's physical abilities related to his industrial injury. RP 900-01. The court explained, "I've already told you are not allowing the fact that whether or not they would have paid him had he not deceived him. That's not relevant. That's why I'm sticking to that issue... I'm not going to allow those questions. We're not going into it. I'll let you generally ask him some questions about it, but we're not going to go into it." RP 900-901.

Finally, Defense Counsel submitted a Jury Instruction that included the element of “common scheme or plan” but the Court instead chose to use an instruction leaving out this key element. RP 1124, CP 474-479. Defense Counsel objected. *Id.* Effectively, the court also precluded the defense from arguing that the amount of loss was reduced by the amounts that the defendant was entitled to receive pursuant to his loss of earning power status under RCW 51.32.090 (3), *In re Howard Dyer*, BIIA Dec., 15,769 (1962). The court denied Mr. Farnworth the opportunity to explain he was still entitled to benefits for time loss and loss of earning power pursuant to RCW 51.32.090.

Overall, the record clearly establishes that the court denied Mr. Farnworth the opportunity to present his versions of the facts to the jury, so that it may decide where the truth lies: whether the Department was legally obligated to pay him either time loss or partial time loss (loss of earning power benefits) even if it knew he was engaged in work activities. The court improperly excluded the proposed evidence, which violated Mr. Farnworth’s right to present a defense.

c. The trial court’s error requires reversal

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error “did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *United States v. Neder*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The State cannot meet that burden here. Mr. Farnworth was not allowed to argue or present

evidence that the Department was legally obligated to pay him disability benefits regardless of the deception. The State cannot establish beyond a reasonable doubt that this error did not contribute to the jury's verdict of guilty on two counts of Theft in the First Degree, that the facts constituted a major economic offense to justify an exceptional sentence. The major economic offense was based upon the large amount of the loss the government based on a false premise that Mr. Farnworth had no right to receive benefits for partial time loss. The failure to allow the introduction of this evidence left the defendant along with the court's failure to properly interact with the jury was fatal to the defense's case.

2. The Court erred when it ruled the Fraud Adjudicator was not an expert witnesses and would not continue trial to allow the Defense to present a rebuttal witness.

CrR 4.7 provides that the trial court may grant a continuance, dismiss the action, or enter appropriate order as a sanction for failure to comply with a discovery order. The purpose of the rule is to protect against surprise that might be prejudicial to the defense. *State v. Clark*, 53 Wash. App. 120, 124, 765 P.2d 916 (1988), review denied, 112 Wash. 2d 1018 (1989). "The question of whether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis." *State v. Sherman*, 59 Wash. App. 763, 770-71, 801 P.2d 274 (1990).

The court rules clearly allow the trial court to grant a continuance “when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.” CrR 3.3 (h)(2); *State v. Gulory*, 104 Wash. 2d 412, 428, 705 P.2d 1182 (1985). Mr. Farnworth was advised on the eve of trial that the government sought to use a fraud adjudicator, Mr. Gruse, to testify about the practices within the Department of Labor and Industries. Moreover, the fraud adjudicator would testify, rather than the claims managers directly involved in administering the worker’s compensation claim.

On May 27, 2015, the parties went before the Honorable Harold D. Clarke, III, for a motion hearing. RP 5/27/15. The first motion was a request for a continuance by defense counsel due to the nondisclosure of expert witnesses and unavailability of a rebuttal witness. RP 5/27/15 p.3-4, CP 126-157. The court ruled that the grounds stated “don’t rise to an appropriate reason to continue trial.” RP 5/27/15 p. 15, CP 220-221. The Defense renewed its motion for a continuance on the day of trial. CP 381-383. Again, the Judge denied the motion to continue. CP 391-392.

Here, Mr. Farnworth was denied his Sixth Amendment right to bring witnesses in his own defense. Further, he was denied his due process right to adequately prepare his defense. The court’s denial of a continuance to adequately prepare his defense is contrary to CrR 4.7 and *State v. Clark*, 53 Wash. App. 120, 124, 765 P.2d 916 (1988). The defense requests that the court remand the case for

a new trial based upon the government's failure to disclose an expert witness followed by the court's failure to grant a continuance to obtain a rebuttal witness. RP 5/27/15 p.3-4, CP 126-157.

3. Mr. Farnworth's right to confrontation was violated when the trial court admitted into evidence the Department Orders and Department of Licensing records without the person preparing the documents appearing at trial.

a. Department Order

In the case at hand, the State called a fraud adjudicator with the Department of Labor & Industries, Alan Gruse, to testify about what information various claims managers relied upon when issuing orders paying Mr. Farnworth time loss compensation benefits during the periods in question. None of these claims managers testified in this trial. Over the defendant's objection based on hearsay and confrontation, the court admitted such testimony from Mr. Gruse as well as numerous payment orders under exhibits identified as P104, P105A-CC and P106 B-R. Mr. Farnworth contends that the court's ruling violated his right to confront witnesses under the confrontation clause.

The Sixth Amendment guarantees a defendant's "right to confront those who bear testimony against him." The Sixth Amendment "does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits" and "the admission of such evidence . . . [is] error." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2542, 174 L.Ed.2d 314 (2009). A witnesses' testimony against a

defendant is inadmissible unless the witness appears at trial, or, if the witness is unavailable, the defendant has had a prior opportunity for cross-examination.

The Supreme Court has held that the class of testimonial statements covered by the Confrontation Clause includes “affidavits . . . or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial statements such as affidavits. . .” *Melendez-Diaz*, 129 S.Ct. at 2531, *quoting Crawford*, 541 U.S. at 51-52.

In *Melendez-Diaz*, the Supreme Court held that a certificate by an analyst stating that the substance found in the defendant’s possession was cocaine was testimonial. In analyzing the certificate, the Court noted that it was “incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Melendez-Diaz*, 129 S.Ct. at 2532, *quoting Crawford*, 541 U.S. at 51. Moreover, the statement was made under circumstances that would lead an “objective witness reasonably to believe that the statement would be available for use later at trial.” *Melendez-Diaz*, 129 S.Ct. at 2532, *quoting Crawford*, 541 U.S. at 52.

In finding that the certificate was testimonial, the Court rejected the State’s argument that the analyst who authored the certificate was not subject to confrontation because the analyst was not accusatory. *Melendez-Diaz*, 129 S.Ct. at 2533-34. The Court noted that the certificate provided testimony against the

defendant—it proved “one fact necessary for his conviction—that the substance he possessed was cocaine.” *Id.* Thus, the analyst was a witness against the defendant, and the defendant had the right to confront him. *Id.*

The Court also rejected the State’s argument that the certificate was a business record and therefore admissible as an exception to the hearsay rule. *Id.* at 2538. The Court noted that a business record may *not* be admitted without confrontation if the regularly conducted business activity is the production of evidence for use at trial. *Id.* Rather, records created “for the sole purpose of providing evidence against a defendant must be subject to cross-examination.” *Id.* The Court specifically noted that a “clerk’s certificate attesting to the fact that the clerk has searched for a particular business record and failed to find it” should be subject to confrontation because it would serve as substantive evidence against the defendant. *Id.* at 2539.

Significantly, the U.S. Supreme Court recently rang in on this very issue in a blood DUI case in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Bullcoming*, the defendant was convicted in a jury trial of DUI. His blood sample had been tested at the New Mexico Department of Health State Laboratory Division by a forensic analyst named Caylor—who completed, signed, and certified the report. However, the state did not call Caylor to testify at trial. In lieu of Caylor, the state called another forensic analyst, Razatos, to validate the report. Notably, Razatos was familiar with testing the devices used

to test the defendant's blood and with the laboratory's procedures, but had neither participated in nor observed the test on the defendant's blood sample. The Supreme Court held this violated the defendant's right to confrontation.

Washington has reiterated this rule of law in our own state, by examining *Bullcoming* in the recent case of *Jasper*:

Prior to the United States Supreme Court's decision in *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), we held the confrontation clause does not forbid the admission of [certifications attesting to the existence or nonexistence of public records]. *State v. Kirkpatrick*, 160 Wash.2d 873, 161 P.3d 990 (2007); *State v. Kronich*, 160 Wash.2d 893, 161 P.3d 982 (2007). The teaching of *Melendez–Diaz*, however, is that certifications declaring the existence or nonexistence of public records are in fact testimonial statements, which may not be introduced into evidence absent confrontation. Accordingly, we now overrule our prior decisions to the extent they are contrary to United States Supreme Court precedent.

State v. Jasper, 174 Wash.2d 96, 100 (March 15, 2012).

In this case, the prosecuting attorney asked Mr. Gruse, the “fraud adjustor,” whether the Department relied on documentation (worker verification forms) from Mr. Farnworth in paying him time loss compensation benefits. *See* RP 986-987. The defense objected on the basis of hearsay, confrontation and lack of foundation. *Id.* Thereafter, the State moved to admit various Department Orders paying Mr. Farnworth time loss compensation benefits, which were issued by various claims managers who did not testify in this case. *Id.* The defense again objected on the basis of hearsay and violation of right to

confrontation. In support of its objection as to exhibit P104, the defense was permitted to voir dire Mr. Gruse, which revealed the following:

MR. SMITH: Permission to voir dire, Your Honor.

THE COURT: You may.

MR. SMITH: Thank you.

Q (By Mr. Smith) Mr. Gruse, this is a payment order, correct? Document you're referring to is a payment order?

A Yes, it is.

Q Right. You said that's a legal document; is it not?

A It is.

Q All right. And this is a legal document created by the claims manager, correct?

A Yes.

Q All right. And at no time during the period February 15, 2010 through October 5, 2012, were you a claims manager in this case, correct?

A I was not a claims manager in this case, no.

Q All right. And the claims manager in this particular document at the time was Vicky Damora, correct?

A That is correct.

Q In reaching this determination, she reviews documents, relies on evidence and makes a determination whether or not benefits are payable, correct?

A That is correct.

Q All right. And back on December 27, 2010, you weren't working with her for purposes of issuing this, correct?

A For purposes of this payment?

Q Yes.

A No.

MR. SMITH: Thank you, Your Honor. I have an objection on hearsay. It violates right to confrontation, as well as relevance in any -- it is irrelevant, substantially outweighed by the prejudicial effect.

THE COURT: I'll note your objection. The Court is going to admit P104.

RP 994-995.

Q (By Mr. Smith) Now, Mr. Gruse, I asked you some similar questions from the last exhibit. Again, you weren't the claims manager for Mr. Farnworth during the period February 15, 2010 through October 5, 2012, correct?

A Correct.

Q And during that period, you weren't responsible for making any decisions with regards to payment orders, correct?

A Not that I'm aware of.

Q All right. And these payment orders are legal documents issued by claims managers after reviewing information in the claim file, correct?

A Correct.

Q And you didn't work with any of those claims managers during this time while issuing these payment orders, correct?

A Well, yes, I worked with them.

Q Well, on this claim in particular.

A Not to my recollection.

MR. SMITH: All right. Your Honor, the same objection, and if I could have a standing objection on all payment orders so I don't have to keep interrupting the witness. My objection is based upon Article 1 Section –

THE COURT: Counsel, no standing objections.

MR. SMITH: Objection is based upon the right of confrontation, hearsay.

THE COURT: Counsel -- counsel, no standing objection. You made your objection. I'm going to overrule it at this time, and as I said, again, no standing objections.

MR. SMITH: Okay.

THE COURT: I'll note your objection, and you can address it outside the presence of the jury.

MR. SMITH: Okay. Will the same objection stand for all payment orders so I don't have to interrupt him?

THE COURT: It'll stand. I'm going to make you say objection on the record as we go through.

MR. SMITH: Okay. Thank you.

THE COURT: So P105A is admitted.

RP 1006-07.

It is clear based upon the testimony of Mr. Gruse that he had no part in the issuance of the Department Orders or determination that Mr. Farnworth was entitled to time loss compensation benefits. Mr. Gruse acknowledges that the payment orders are legal documents issued by claims managers. He further agreed that when issuing these orders and reaching their determination, claims managers

review information in the claim file, review documents and rely on evidence to determine whether benefits are payable. Since, Mr. Gruse had no part in reaching these determinations; Mr. Farnworth was unable to cross examine him on what information was actually relied upon by the claims managers, when they decided to pay him time loss benefits. In a Theft by deception case under 9A.56.010(4), the State must prove that it relied on the defendant's deception. *State v. Casey*, 81 Wn.App. 524, 529, 915 P.2d 587 (1996). Since Mr. Farnworth was not afforded an opportunity to confront the claims managers on what information they relied upon, his right to confrontation was violated when the court entered the exhibits and testimony from Mr. Gruse pertaining to this issue.

b. Department of Licensing Records

Similarly, during the direct examination of Richard Letteer, Custodian of Records for the Department of Licensing, the state was allowed to admit Department of Licensing sales transaction records created by various people over the hearsay, authentication, and confrontation clause objections of defense counsel. RP 480-482. In support of its objection as to exhibit P80, the defense was permitted to voir dire Mr. Letteer, which revealed the following:

Q (By Mr. Phelps): Did you prepare those documents?

A No.

Q So have you had any involvement preparing these documents?

A No.

Q Have you seen these documents before today?

A Yes.

Q When was it you saw them?

A It's been over a period of time. I've viewed quite a few yesterday and last week and then.

Q Have you ever had communication with Susan Mitchell?

A Yes.

Q And did you review the documents with Ms. Mitchell?

A No.

Q Actually, isn't it true that Ms. Mitchell prepared these documents?

A Yes.

Q And were you there when she prepared them?

A No.

Q Did you observe the preparation of them?

A No.

Q The documents that you reviewed, did they have that documentation down in the lower right-hand corner of them?

A Such as in?

Q The documents prepared by Ms. Mitchell, do you know if they had the Farnworth Exhibit 80-000 with a number on the lower right-hand corner?

A Yes, some of them that I viewed had that.

Q And you haven't reviewed then the actual documents?

A I don't understand.

Q Have you ever seen the original documents?

A No.

Q And did you have any help -- did you prepare or look at the original documents at any time?

A No.

RP 478-480.

Based on this testimony it is clear that Mr. Letteer did not create the sales records and has not seen the original sales records. The state courts ruled specifically that department of licensing records admitted on a clerk's certification deny defendants the opportunity to cross-examine the official who authored the certifications violating the defendants' rights under the confrontation clause. *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876, 887 (Wash. 2012). The *Jasper* court reasoned that DOL records fall within the "core class of testimonial statements" described in *Crawford* and *Melendez-Diaz*. *Melendez-Diaz*, 129 S.Ct. at 2532. "They were created, and in fact used, for the sole purpose of establishing critical facts at trial. Because each certificate was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *id.* (internal quotation marks omitted) (quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354), they are testimonial and

require confrontation to comport with the Sixth Amendment.” *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876, 887 (Wash. 2012). Since Mr. Farnworth was not afforded an opportunity to confront the person creating the sales records on what information they relied upon, his right to confrontation was violated when the court entered the exhibits and testimony from Mr. Letteer pertaining to this issue.

4. The Court erred when it failed to dismiss Counts II & III pursuant to RCW 9A.56.010(21)(c) when the misrepresentations were parts of a series of transactions that were part of the same scheme or plan.

In *State v. Hoyt*, 79 Wn.App. 494, 904 P.2d 779 (Div. II, 1995), the Court addressed the issue of whether RCW 9A.56.010(12)(c) permits a series of thefts, using a common scheme or plan over a six month period, to be aggregated into a multiple counts of felony theft. At that time, RCW 9A.56.010(12)(c), enacted in 1975, provided:

Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are part of a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

The court held that if the defendant committed a series of third degree thefts, and the series of third degree thefts were part of a “common scheme or

plan,” then the thefts may be aggregated in one count. *Hoyt*, 79 Wn.App. 494, 496. “One count obviously means a single count.” *Id.*

Currently, RCW 9A.56.010 (21)(c) provides identical language: Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

In the instant case, the State alleged that Mr. Farnworth committed a series of thefts, when considered separately would constitute theft in the third degree because of value (time loss rates vary from \$113.60 to \$1120.38 per day). CP 462-465. The State further alleged that the series of thefts were part of a “common scheme or plan” and improperly aggregated the daily transactions into multiple counts of Theft in the First Degree. *Id.*

After the state’s case-in-chief, counsel for the defendant argued a halftime motion to dismiss. CP 384-390, RP 1101-1103. Since the State alleged that Mr. Farnworth committed a series of thefts, that when considered separately would constitute theft in the third degree because of value (time loss rates vary from \$113.60 to \$1,120.38 per day and that the series of thefts were part of a “common scheme or plan” element the State improperly aggregated the daily transactions

into multiple counts of Theft in the First Degree. *Id.* As such the court erred when it failed to dismiss counts II & III. RP 1103.

5. The Defendant was not afforded the right to fair trial because the Attorney General failed to disclose pertinent *Brady* material that would have been used to impeach the lead investigator and the Court refused to allow the Defense to question the lead investigator about the *Brady* violation.

Matthew McCord was the lead investigator and the State's chief witness in Mr. Farnworth's case. RP 311, 863-874, CP 469-473. Through a background investigation it was discovered that Matthew McCord resigned in lieu of being terminated from the Simi Valley Police Department for participating in a fraudulent Ponzi scheme. *Id.* While testifying under a Grand Jury subpoena, Matthew McCord asserted his 5th Amendment right not to incriminate himself. Upon cross examination of McCord, defense counsel attempted to elicit testimony about his involvement in fraud, going directly to his credibility. *Id.* The Government objected and the jury was taken out of the courtroom. *Id.* Once the jury was out of the courtroom, defense counsel motioned the court for dismissal based on *Brady* violations. *Id.* Judge Annette Plese ruled that information pertaining to McCord's involvement in fraud is irrelevant. *Id.*

The Defendant was entitled to a dismissal of his criminal charges due to the misconduct of the government in violating his due process rights by failing to disclose *Brady* material. CrR 8.3(b) provides: "[t]he court, in the furtherance of

justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.”

Under the rule, first, a defendant must show arbitrary action or governmental misconduct. *State v. Blackwell*, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993) (citing *State v. Lewis*, 115 Wash.2d 294, 298, 797 P.2d 1141 (1990)). Washington courts have repeatedly held that the prosecutor may commit misconduct by mismanagement of a case that materially prejudices the defendant. *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274 (1990); *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980). As explained in *Dailey*, arbitrary action or governmental misconduct may warrant dismissal "in furtherance of justice" under CrR 8.3(b). Such "'governmental misconduct' need not be of an evil or dishonest in nature; simple mismanagement is sufficient." *Dailey*, 93 Wn.2d at 457. The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. *State v. Cannon*, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996).

Furthermore, under *Brady*, the Government is constitutionally obligated “to disclose evidence favorable to the accused that is material to either guilt or punishment.” *United States v. Johnson*, 592 F.3d 164, 170 (D.C. Cir. 2010) (reversing conviction because Government suppressed evidence that heroin in question belonged to defendant’s cousin). *Brady* affirmatively requires disclosure

of exculpatory materials so as “to allow the defense to use the favorable material effectively in the preparation and presentation of its case.” *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976).

There are three elements to a “Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A violation occurs whenever the prosecution suppresses “evidence favorable to an accused . . . irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

Prejudice occurs “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Prejudice is determined by analyzing the evidence withheld in light of the entire record. *In re Pers. Restraint of Sherwood*, 118 Wn.App. 267, 270, 76 P.3d 269 (2003) (citing *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir.), cert denied, 537 U.S. 942 (2002)). While a prosecutor has no duty to independently search for exculpatory evidence, the prosecutor has a duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d

1250 (1999); *In re Pers. Restraint of Brennan*, 117 Wn.App. 797, 804, 72 P.3d 182 (2003) (citing *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

“Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.). The animating purpose of *Brady* is to preserve the fairness of criminal trials.” *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir.2006) (citing *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). “*Brady* obligations include not only evidence in the prosecutor's file but also include evidence in the possession of the police and others working on the State's behalf. *State v. Lord*, 161 Wash.2d 276, 292, 165 P.3d 1251 (2007) (citing *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555).

Here, the Government’s failure to promptly disclose Matthew McCord’s involvement in a pyramid scheme and dismissal from his job as an officer is clearly a *Brady* violation. First, this evidence was favorable to the defendant because it goes directly to the veracity and credibility of the state’s chief witness. Second, whether willfully or inadvertently, this evidence was not disclosed by the State. The prosecutor cannot play ignorant. Under *Kyles*, if the police know about exculpatory information (including impeachment material) it is considered

to be within the possession of the prosecution and must be disclosed pursuant, even if the police never told the prosecutor about it.

Third, the Government's failure to promptly disclose and the Court's unwillingness to allow testimony of Matthew McCord's involvement in a pyramid scheme and stepping down from his job as an officer in lieu of being fired, left the Defense completely unable to effectively prepare for trial and impeach the state's chief witness. Defense counsel believes that the Government intentionally and tactically failed to disclose Mr. McCord's negative work history in order to preserve this case. The defendant was prevented from having a fair trial due to the irregularity in the proceeding where the State failed to disclose *Brady* material and the court ruling *Brady* impeachment evidence irrelevant because the investigator was allowed to resign under threat of termination.

6. The Court erred when it failed to include the “common scheme or plan” as an element of the crime charged in the jury instructions.

The WPIC specifically provides that “common scheme or plan” is an element of Theft by color or aid of deception if common scheme or plan is alleged for the purpose of aggregating damages. In the case at hand, the State alleged “common scheme or plan” yet failed to include that as an element of the crime charged. Defense Counsel submitted a Jury Instruction that included the element of “common scheme or plan” but the Court instead chose to use an instruction leaving out this key element. Defense Counsel objected.

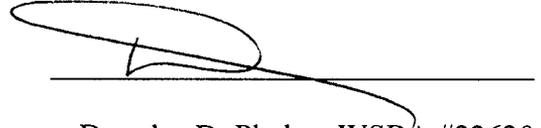
WPIC 79.20 provides the definition for “value” to be used when defining Fraud: “‘Value’ means the market value of the property at the time and in the approximate area of the act.” The WPIC goes on to provide bracketed material that applies in the case at hand: “[Whenever any series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be *[the value]* considered in determining the *[degree of theft involved]**[amount of value].*” The Note on Use after WPIC 79.20 provides that “If a common scheme or plan is alleged for the purpose of aggregating damages and the bracketed second paragraph is used, the existence of a common scheme or plan is a separate element that must be set out separately in the elements instruction.”

It is clearly an error of law that the jury was improperly instructed on the elements of the crime and this substantially prejudiced the Defendant to a fair trial.

V. CONCLUSION

The case should properly be remanded for a new trial because the trial court failed to allow the defense to present its theory of the case. The court refused to properly instruct the jury on the common scheme or plan. Ultimately, the improper rulings of the court require remand for a new trial based upon the multiple errors of the trial court.

Respectfully submitted this 15th day of May, 2016

A handwritten signature in black ink, appearing to read 'D. Phelps', is written over a horizontal line.

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FILED

MAY 16 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ORIGINAL

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

STATE OF WASHINGTON)	
Respondent)	
)	Cause No. 336735
vs.)	Cause No. 14-1-00357-0
)	
)	DECLARATION OF
GARY BRUCE FARNWORTH)	SERVICE
Appellant)	
_____)	

I, Patricia Snyder, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as an paralegal in the office of Phelps & Associates, PS, served in the manner indicated below, an original of the Appellant's Opening Brief, on May 16, 2016.

COURT OF APPEALS – DIVISION III	
500 N. CEDAR	<input checked="" type="checkbox"/> Legal Messenger
SPOKANE, WA 99201	<input type="checkbox"/> U.S. Regular Mail

I further declare that I served in the manner indicated below, a true and correct copy of the Appellant's Opening Brief, on May 16, 2016.

SPOKANE COUNTY SUPERIOR COURT	
1116 W. BROADWAY	<input checked="" type="checkbox"/> Legal Messenger
SPOKANE, WA 99260	<input type="checkbox"/> U.S. Regular Mail

I further declare that I served in the manner indicated below, a true and correct copy of the Appellant's Opening Brief, on May 16, 2016.
Supplemental Designation of Exhibits

TIENNEY MILNOR, AAG
800 5TH AVE. STE. 2000
SEATTLE, WA 998104

Legal Messenger
 U.S. Regular Mail

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

Signed at Spokane WA on this 16 day of May, 2016.


PATRICIA L. SNYDER