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NO. 32426-1

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

STATE OF WASHINGTON, RESPONDENT

v.

NEIL GRENNING, APPELLANT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 02-1-01106-5, 03-1-05025-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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Table of Authorities

Federal Cases

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	2
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State Cases

<u>State v. Boyd</u> , __ Wn.2d __, 158 P.3d 54 (2007).....	2, 3, 4, 8, 9, 10
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976).....	5
<u>State v. Dailey</u> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	5
<u>State v. Garrett</u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	2
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	2
<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	5
<u>State v. Neal</u> , 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).....	8
<u>State v. Robinson</u> , 153 Wn.2d 689, 697, 107 P.3d 90 (2005).....	7, 8
<u>State v. Sherman</u> , 59 Wn. App. 763, 801 P.2d 274 (1990).....	5
<u>State v. Templeton</u> , 148 Wn.2d 193, 220, 59 P.3d 632 (2002).....	7
<u>State v. Thomas</u> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987).....	2

Rules and Regulations

CrR 4.7.....	1, 5, 7, 8
CrR 4.7(a)(1)(v).....	8
CrR 8.3.....	5, 9

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the defendant receive ineffective assistance of counsel when the court ordered that the defense expert be given unlimited access to a mirror image hard drive at a secured location where the images could not be lost, the court instructed the defense to advise him if the order was unworkable and the defense never did so, and the defendant cannot establish any resulting prejudice?..... 1

 2. Assuming, arguendo, that a violation of CrR 4.7 occurred, was any error harmless?..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 1

 1. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT ORDERED THAT THE DEFENSE EXPERT BE GIVEN UNLIMITED ACCESS TO A MIRROR IMAGE HARD DRIVE AT A SECURED LOCATION, THE COURT INSTRUCTED THE DEFENSE TO ADVISE HIM IF THE ORDER WAS UNWORKABLE AND THE DEFENSE NEVER DID SO, AND THE DEFENANT CANNOT ESTABLISH ANY RESULTING PREJUDICE 1

 2. ASSUMING, ARGUENDO, THAT A VIOLATION OF CrR 4.7 OCCURRED, ANY ERROR WAS HARMLESS..... 7

D. CONCLUSION..... 10

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

1. Did the defendant receive ineffective assistance of counsel when the court ordered that the defense expert be given unlimited access to a mirror image hard drive at a secured location where the images could not be lost, the court instructed the defense to advise him if the order was unworkable and the defense never did so, and the defendant cannot establish any resulting prejudice?
2. Assuming, arguendo, that a violation of CrR 4.7 occurred, was any error harmless?

B. STATEMENT OF THE CASE.

The statement of the case was set forth in the State's response brief.

C. ARGUMENT.

1. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT ORDERED THAT THE DEFENSE EXPERT BE GIVEN UNLIMITED ACCESS TO A MIRROR IMAGE HARD DRIVE AT A SECURED LOCATION, THE COURT INSTRUCTED THE DEFENSE TO ADVISE HIM IF THE ORDER WAS UNWORKABLE AND THE DEFENSE NEVER DID SO, AND THE DEFENANT CANNOT ESTABLISH ANY RESULTING PREJUDICE.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and

(2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In State v. Boyd, ___ Wn.2d ___, 158 P.3d 54 (2007), the court addressed the defense's pretrial request for copies of the State's child pornography evidence, including mirror images of the computer hard drive at issue. The procedural posture of Boyd, however, differs from the case at bar. In Boyd, the parties sought relief from the court before trial. Id. at *2-5. In the present case, the defendant is seeking relief after conviction, and in the context of an ineffective assistance of counsel claim. The defendant in the present case, therefore, must establish that the result of the trial would have been different. See State v. Thomas, supra. The defendant clearly cannot meet this requirement.

The defendant asserts that he was "unable to find any expert who was willing to come from Seattle or Spokane or elsewhere, away from specialized equipment in his or her laboratory, and devote full time to examining the computer at the police station." Brief of Appellant at p. 40.

The defendant's assertion is without merit. First, the defendant claims that no expert was willing to go view the evidence, but provides no citation in his brief to substantiate such a claim. Second, the defendant did have an expert of his choosing—Mr. Apgood. While the defendant asserts in his supplemental briefing that “the defense had no computer expert to help prepare for trial or to testify on behalf of Mr. Grenning,” such assertion is unsupported by the record. Supp. Brief of Appellant at p. 6. The record does support, however, that Mr. Apgood was involved in the case to some degree. While he did not testify at trial, it could easily have been because his findings were not helpful to the defense. The record does not support that he did not assist the defense in preparing for trial. In his affidavit to the court, Mr. Apgood never indicated that the protective order precluded him from doing his job. CP 601-609.

Moreover, the trial court invited the defendant to advise the court if the protective order was not workable. RP 3/26/04 at 84-85. It does not appear that the defendant ever indicated to the court he could not work within the parameters of the court's protective order.

As the court in Boyd, supra, held, a criminal defendant is entitled to a mirror image copy of hard drives and other evidence subject to a protective order. Boyd, __ Wn.2d __ at *13-24. Because the court in Boyd addressed the discovery request pretrial, the court did not reach the issue of remedies for failure to provide such discovery. In the present case, the defendant has raised the issue in the context of ineffective

assistance of counsel and fundamental fairness, and therefore must establish that there was a resulting prejudice. The defendant cannot meet such a burden here. The defendant cannot, and does not, allege that there was any specific action he would have taken if he had been provided his own personal copies of the evidence. It is clear that the defendant had an expert who was granted access to the mirror image hard drive, and his expert failed to indicate that the protective order stopped him from performing his analysis of the evidence. The defendant also never advised the court that the order was “unworkable,” as the court advised him to do.

While Boyd holds that the defendant is entitled to copies of such discovery, under the facts of the present case the defendant is not entitled to relief. He must be able to show some resulting prejudice and he cannot. While the defendant asserts that he was unable to find an expert willing to devote a sufficient amount of time to examine the evidence at the secured location, he does not provide any supporting documents for such allegation. It is clear that Mr. Apgood was available to work with the defendant and had an opportunity to advise the court if he was unable to work within the perimeters of the protective order. While the defendant now appears to assert that there was no expert called as a defense witness at trial solely because of the court’s protective order, such claim is unsupported. There are many other potential reasons Mr. Apgood was not called to testify at trial. Therefore, such claim is not appropriate on direct appeal, but would be properly raised in a personal restraint petition.

The defendant cites to State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976), State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980), State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997), and State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990), in support of his assertion that dismissal is the appropriate remedy here. All of those cases, however, involve dismissals under CrR 8.3, not CrR 4.7. In Burri, supra, the State precluded the defense's presence in a special inquiry proceeding in which defense alibi witness were questions. Burri, 87 Wn.2d 175 at 176. In Dailey, supra, the court dismissed under CrR 8.3 after the State committed multiple instances of mismanagement. Dailey, 93 Wn.2d 454 at 457. The court in Dailey specifically declined to analyze the case under CrR 4.7. Id. In Michielli, supra, the court dismissed after it found governmental mismanagement when it appeared that the State added additional charges to harass the defendant. Michielli, 132 Wn.2d 229 at 244. Finally, in State v. Sherman, supra, the court held that there were numerous instances of governmental mismanagement. Sherman, 59 Wn. App. 763 at 772. In the present case, there was no governmental mismanagement or misconduct. The State was working within the confines of the court's protective order. There is nothing to suggest that the State did not comply with the court's order, and therefore did not commit mismanagement. Moreover, the defendant is not seeking a dismissal under CrR 8.3, so those cases cited by the defendant are not applicable.

As argued above, the defendant is unable to establish any prejudice on direct appeal. The nature of the defendant's defense in this case is further evidence that the result of the trial would not have been any different if a mirror image hard drive had been given to the defense. In the present case, the defendant's defense was that of general denial. In closing argument, defense counsel argued that the case was ". . . not about whether or not something inappropriate happened here; it's about how many times." RP 6/18/04 952. There were multiple photos admitted into evidence depicting the defendant raping, molesting, and sexually exploiting the two victims. See, Brief of the Respondent p. 14-23. The defense in this case was not that the photos were manipulated or tampered with, but rather that the dozens of photos the State used for multiple charges were from one incident. RP 6/18/04 949-950. The defendant argued:

Because I am supposing that, based on the evidence presented to you, you have already come to the conclusion that at least one movie exists. But that doesn't mean you naturally come to the conclusion that there has to be a second, a third, a fiftieth, a seventy-fourth.

Each of them have to be individually proved . . .

RP 6/18/04 952-953.

The defendant contested the number of counts the State had charged, not that the photos have been altered in any way. Therefore, even if the defendant had been granted his own personal mirror image

hard drives to examine away from police headquarters, he cannot establish that he would have done anything different, that he was prejudiced, or that the outcome of the case would have been different. The defendant, post trial, has no evidence to support an ineffective assistance of counsel or due process claim, as he was granted unlimited access to the electronic materials at a secured location, he had an expert to examine the materials, many of the photos depicted the defendant himself engaging in sexual acts with children, and his defense did not challenge the forensic evidence.

2. ASSUMING, ARGUENDO, THAT A VIOLATION OF CrR 4.7 OCCURRED, ANY ERROR WAS HARMLESS.

When an asserted error is a violation of a court rule, rather than a constitutional violation, a harmless error analysis applies¹. State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005), citing State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002). The court in Robinson held:

Thus, only if the error was prejudicial in that “within reasonable probabilities, [if] the error [had] not occurred, then outcome of [the] motion would have been materially affected” will reversal be appropriate.

¹ The defendant asserts that any error here was presumptively prejudicial and the record cannot show harmlessness of any error because the defendant was “completely denied the discovery.” Supp. Brief of Appellant at p. 19. The defendant does not articulate why any error here is not subject to a harmless error analysis. Furthermore, he was not “completely” denied discovery—the discovery was made available to him at a secured location, with the operating system of the expert’s choosing, a CPU, a monitor, a keyboard, and a mouse. The secured location was going to be available Monday through Friday from 8:30 am to 4:30 pm.

Robinson, 153 Wn.2d 689 at 697, quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

CrR 4.7(a)(1)(v) provides:

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

....
(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant;

The court in Boyd held that CrR 4.7 required copies of the discovery, including digital images, because the "culpability of the acts depicted may vary based on when the photos were taken, by whom, and what they actually display." Boyd, ___ Wn.2d at *13. The allegation in the present case was not that the defendant was denied access to the discovery, but rather that he was denied his own personal mirror images of the hard drives away from the secured location. Any error that occurred by the court's failure to order that mirror image hard drives be produced constitutes a violation of Cr.R 4.7, not a constitutional violation. Under Robinson, supra, such court rule violation is subject to a harmless error analysis.

In this case, any violation of CrR 4.7 was harmless. As argued above, the defendant cannot establish prejudice. The trial court instructed

the defendant that if the protective order was not workable, to advise the court. The record is void of any subsequent requests from the defendant to modify the protection order. The defendant also has not established that he was unable to present his defense based on the protection order that was issued. This is not a case in which the State somehow refused to disclose material or provide discovery or engaged in mismanagement. At issue in this case is the method in which the electronic discovery was provided. The defendant was not prejudiced, and therefore any error was harmless.

If this court were, however, to find that the defendant was somehow prejudiced, the remedy would not be dismissal of the charges. There was no CrR 8.3 violation, or any other actions that would mandate dismissal of the charges. Even if this court were to find that the court's protection order was erroneous and that the defendant was somehow prejudiced, the correct remedy would be to remand this case for a new trial and a new protective order in accordance with Boyd.

D. CONCLUSION.

Under Boyd, the defendant is not entitled to relief. He cannot meet his burden of establishing ineffective assistance of counsel because he cannot establish prejudice. Any violation that occurred was court rule violation, and was harmless. The State respectfully requests that the court affirm the defendant's convictions.

DATED: June 29, 2007.

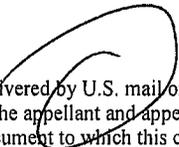
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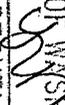

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail 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.


Date Signature


Griffith

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