

**No. 95105-5**

**No. 336735**

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

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**State of Washington,**  
*Respondent*

v.

**Gary B. Farnworth, II,**  
*Appellant*

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Appeal from the Superior Court of Spokane County

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*REPLY BRIEF OF APPELLANT*

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Appellant, Gary B. Farnworth, II, by and through his attorney of record, Douglas D. Phelps, submits this reply brief in response to the brief submitted by the government. By this Reply Brief, no attempt is made to set forth a response to each of respondent's contentions, most of which are fully covered by the opening brief. Only those points requiring additional comment will be raised to assist this court in resolving the pertinent issues.

## I. ARGUMENT

- 1. The Trial Court abused its discretion by not allowing the Defendant to present the defense that he was entitled by law to receive time loss benefits or loss of earning power benefits and that the government was incorrect in calculating the loss to the Department.**

The defense in his case was that Mr. Farnworth volunteered at the car dealership to help an ailing friend; he had not intended to deceive the department; and the amount of loss to the department was much less than alleged in the information because even if it was determined he was working he was entitled to time loss benefits. Not allowing the evidence related to the benefits he was entitled to receive was an abuse of discretion that allowed the jury to return a special verdict for major economic offense and increased restitution. CP 527-532.

A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Evidence is relevant if it has "any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

"All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible." ER 402. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). And relevant evidence need provide only "a piece of the puzzle." *Bell v. State*, 147 Wash.2d 166, 182, 52 P.3d 503 (2002). To be able to present a defense to the jury, the defendant must only present evidence that, evaluated in the light most favorable to the defendant, would justify giving the jury the instruction on the defense. *State v. Ginn*, 128 Wn. App. 872, 879 (2005).

Here, the court held that the introduction of evidence pertaining to time loss or loss of earning power benefits was not relevant, thus not admissible under ER 402. This is contrary to the case law that provides the burden of relevant evidence is "very low" and need only provide a "a piece of the puzzle." *Bell v. State*, 147 Wash.2d 166, 182, 52 P.3d 503 (2002); *State v. Darden*, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). Not allowing the introduction of evidence that the defendant was entitled to, and in-fact received, time loss benefits after he

disclosed his work to the Department denied the defense an opportunity to show the jury how the government's loss calculation was flawed.

The State argues that evidence pertaining to benefits Mr. Farnworth was entitled to is irrelevant because the State was not required to prove the amount of time loss compensation that Farnworth might have received had he been forthcoming with L&I just that L&I paid time loss benefits because it relied on his deception. Br. Resp. at 19. This argument is flawed because the State included a special verdict for a major economic offense and restitution was based on the evidence provided at trial. Further, to prove a 1<sup>st</sup> Degree Theft the State must prove an amount of loss to convict for the charged offense. Again, evidence is relevant even if it provides just "a piece of the puzzle."

**2. Jury Instruction 16 and 17 failed to include the "common scheme or plan" as an element of the crime charged in the jury instructions.**

The Defendant was charged with the crime of Theft in the First Degree. CP 1-2. The State alleged that the Defendant by color or aid of deception, obtained control over property, in a value that exceeded \$5,000, with the intent to deprive the Department of the property. *Id.* Originally, the State failed to include the element of "common scheme or plan." *Id.* The Defense moved to dismiss the charges prior to trial. VRP June 1, 2015 p. 124-128. The State objected and the Court denied the motion. *Id.* The morning trial started the State moved to amend the information to include the element of "common scheme or

plan.” CP 462-465. Upon the entry of jury instructions, the State failed to propose an instruction that included the element of “common scheme or plan” despite acknowledging that was an essential element by filing an amended complaint the day of trial. CP 178-213, 467-468. Defense Counsel, on the other hand, 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. CP 487-522. Defense Counsel objected. VRP June 10, 2015 P. 1125.

WPIC 70.02 provides the elements for First Degree Theft:

“To convict the defendant of the crime of theft in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt: (1) That on or about (date), . . . the defendant by color or aid of deception, obtained control over property of another [and] (2) That the property [or services] exceeded \$5,000 in value; (3) That the defendant intended to deprive the other person of the property [or services]; and (4) That this act occurred in the State of Washington.”

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 onto 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.” 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.

It is logically and legally inconsistent for the State to claim “common scheme or plan” is not an essential element of the crime charged, yet amend the information the day of trial to include the element of “common scheme or plan.” Once included in the Information the element of “common scheme or plan” should have been included in the jury instructions. It is clearly an error of law that the jury was improperly instructed on the elements of the crime and this denied the Defendant to a fair jury trial as guaranteed by the Sixth Amendment to the U.S. Constitution.

**3. The Court erred when it failed to dismiss Counts II & III pursuant to RCW 9A.56.010(21)(c) because 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.*

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). The State is 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. The Defense maintains that under the plain meaning of RCW 9A.56.010.21(c) the State must either charge Mr. Farnworth with multiple counts of Theft in the Third Degree for the daily time loss, or aggregate the series of thefts into a single count of felony theft.

- 4. 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.**

The State is correct in that they had no duty to independently search for exculpatory evidence. However, 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 (1995)).

Here, the Lead Investigator, Matthew McCord, resigned in lieu of being fired from the Simi Valley Police Department for participating in a fraudulent Ponzi scheme. Acting on behalf of the government Mr. McCord had a duty to disclose this information to the Prosecutor. Pleading ignorant is not an excuse for the State to withhold impeachment evidence of their lead witness. Discrediting the Lead Investigator for participating in fraud is clearly favorable to the defendant when the trier of fact is faced with weighing the credibility of witnesses when reaching their decision.

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. 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. The Government should not be allowed to claim ignorance of the background of a State employee to deny Mr. Farnworth his due process rights at trial. The trial court denied the Defendant his Sixth Amendment right to confront the State's lead investigator regarding his involvement in a fraudulent Ponzi scheme.

#### V. CONCLUSION

Based on the forgoing arguments the Defendant respectfully request the case be remanded for a new trial.

Respectfully submitted this 19<sup>th</sup> day of December, 2016



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DIVISION III  
SPOKANE, WA

**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 Reply Brief, on December 19, 2016.

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I further declare that I served in the manner indicated below, a true and correct copy of the Appellant's Reply Brief, on December 19, 2016.

SPOKANE COUNTY SUPERIOR COURT  
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SPOKANE, WA 99260

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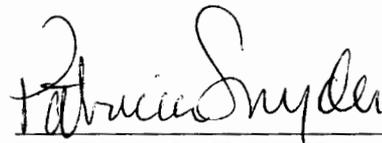
I further declare that I served in the manner indicated below, a true and correct copy of the Appellant's Reply Brief, on December 19, 2016.

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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 19<sup>th</sup> day of December, 2016.

  
PATRICIA L. SNYDER