

FILED  
March 31, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73741-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT HALL, JR.,

Appellant.

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

The Honorable Samuel Chung, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	6
1. HALL’S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED EXCLUSION AND DENIED A CONTINUANCE AFTER THE STATE INEXCUSABLY FAILED TO DISCLOSE A KEY WITNESS UNTIL ONE COURT DAY BEFORE TRIAL.....	6
2. APPEAL COSTS SHOULD NOT BE IMPOSED.....	19
D. <u>CONCLUSION</u> .....	21

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	20
<u>State v. Blackwell</u> 120 Wn.2d 822, 845 P.2d 1017 (1993).....	18
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	20
<u>State v. Brush</u> 32 Wn. App. 445, 648 P.2d 897 (1982).....	19
<u>State v. Cannon</u> 130 Wn.2d 313, 922 P.2d 1293 (1996).....	7
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	7
<u>State v. Dailey</u> 93 Wn.2d 454, 610 P.2d 357 (1980).....	18
<u>State v. Garza</u> 99 Wn. App. 291, 994 P.2d 868 (2000).....	8
<u>State v. Greiff</u> 141 Wn.2d 910, 10 P.3d 390 (2000).....	7, 8, 19
<u>State v. Hutchinson</u> 135 Wn.2d 863, 959 P.2d 1061 (1998).....	8, 9, 16
<u>State v. Linden</u> 89 Wn. App. 184, 947 P.2d 1284 (1997).....	8
<u>State v. Lord</u> 117 Wn.2d 829, 822 P.2d 177 (1991).....	7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Marks</u> 114 Wn.2d 724, 790 P.2d 138 (1990).....	9
<u>State v. Price</u> 94 Wn.2d 810, 620 P.2d 994 (1980).....	8
<u>State v. Sherman</u> 59 Wn. App. 763, 801 P.2d 274 (1990).....	17, 19
<u>State v. Sinclair</u> __ Wn. App. __, __ P.3d __, 2016 WL 393719 (Jan. 27, 2016) .....	20

**FEDERAL CASES**

<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	16
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5
<u>Williams v. Florida</u> 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).....	7

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 3.5.....	6
CrR 3.6.....	1, 6, 9, 10, 12, 13, 17
CrR 4.7.....	1, 6, 7, 8, 9, 15
RAP 15.2.....	19

A. ASSIGNMENTS OF ERROR

1. The State violated its discovery obligations under CrR 4.7 by failing to disclose a key witness until one court day before trial.

2. The trial court erred in denying appellant's motion to exclude the State's late-disclosed witness.

3. The trial court erred in denying appellant's request for a continuance to prepare cross-examination and adjust the defense strategy based on the State's late-disclosed witness.

4. The State's discovery violation violated appellant's right to due process of law.

Issues Pertaining to Assignments of Error

Robert Hall, Jr., and Mattie Snook were arrested for possession with intent to deliver controlled substances. Even though Snook pled guilty a month before the CrR 3.6 hearing in Hall's case, the State did not disclose her as a witness until one court day before Hall's trial. She was then a key witness for the State, authenticating several otherwise inadmissible documents and testifying to numerous details of the crime.

1. Did the trial court err in denying Hall's motion to exclude Snook as a witness where her late-disclosed testimony impacted Hall's entire trial strategy?

2. Did the trial court err in denying Hall's request for a one-day continuance to prepare a new opening statement and cross-examination, as well as adjust the defense trial strategy in light of Snook's testimony?

B. STATEMENT OF THE CASE<sup>1</sup>

On April 10, 2015, the State charged Hall by amended information with three counts of violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. CP 8-13. The State alleged that on October 31, 2014, Hall unlawfully possessed heroin, cocaine, and methamphetamine, with intent to deliver those controlled substances. CP 8-9.

On the afternoon of October 31, 2014, Officers Scott Miller<sup>2</sup> and Michael Spaulding went to the Oak Tree Motel on Aurora Avenue North looking for an outstanding warrant suspect. 1RP 18-19, 107-08.<sup>3</sup> The hotel manager informed them the suspect was not currently at the motel, but said he was having trouble with the two other tenants, Robert Hall and Mattie

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<sup>1</sup> To avoid repetition, many of the relevant facts are presented in the argument section below.

<sup>2</sup> There are two police officers in this case with the last name Miller: Officer Scott Miller and Officer Charles Miller. Because Scott Miller was more involved with the investigation, this brief refers to him solely by his last name, while referring to Charles Miller by his full name to avoid confusion.

<sup>3</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – May 19, 2015; 2RP – May 20, 2015; 3RP – May 21, 2015; 4RP – May 26, 2015; 5RP – May 27, 2015; 6RP – May 28, 2015; 7RP – May 29, 2015; 8RP – July 22, 2015.

Snook. 1RP 22-24, 107-09. The manager believed Hall and Snook were dealing drugs out of their room. 1RP 23-24.

The officers ran Hall's and Snook's name in the police database and found they had outstanding arrest warrants. 1RP 24-31, 111. Miller and Spaulding called Officer Charles Miller for backup after deciding to stake out the motel and take Hall and Snook into custody. 1RP 32-36, 164-68. Miller remained in the parking lot, while Spaulding parked across the street and Charles Miller parked behind the motel. 1RP 34-36, 112-14, 166-68.

Soon after, Miller saw three or four people in the parking lot, two of whom he recognized as Hall and Snook based on their photos in the police database. 1RP 32-34. He explained he did not arrest them immediately because it is Seattle Police Department policy not to make arrests when only one officer is present, absent exigent circumstances. 1RP 39. Within a minute or so, Hall and Snook went inside their motel room. 1RP 37. It was unclear whether Miller radioed to his colleagues before or after Hall and Snook disappeared from view.<sup>4</sup> 1RP 72-75.

Spaulding joined Miller within a few minutes and Charles Miller guarded a window in the back of the motel. 1RP 43-44, 166-68. Miller knocked on Hall's and Snook's motel room door, announced "police," and

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<sup>4</sup> The above facts were testified to at a CrR 3.5 and 3.6 hearing. At trial, the jury heard only that the officers went to the Oak Tree Motel to contact Hall and Snook. 5RP 20-24, 168. The officers did, however, testify at trial regarding their subsequent search of the motel room. 5RP 30-32, 50-52, 171-72.

asked them to open the door. 1RP 44. Hall opened the door about a foot. 1RP 45. Miller then pushed the door open all the way, and stepped inside the room with Spaulding. 1RP 45, 117-18. They placed Hall under arrest and Spaulding took him outside. 1RP 45, 117-20.

The bathroom door at the far end of the room was closed, so Miller called for Snook to come out. 1RP 46-47. When she did, Miller placed her under arrest and took her outside. 1RP 46-47. Another man was sitting on the floor of the motel room, who the officers released without interviewing. 5RP 32, 138; 6RP 45. The officers claimed they went back in the room to maintain control of this person, but did not mention him in their police reports. 1RP 68, 177; 5RP 117.

While in the room, Miller saw what he described as “narcotics-type evidence,” including scales, hypodermic needles, and what appeared to be a drug ledger. 1RP 46-49. The ledger contained a list of names and dollar figures, like “somebody keeping track of their drug sales.” 1RP 49. Miller claimed this was all in plain view when he entered the room to arrest Hall and Snook, and he immediately recognized it as drug paraphernalia. 1RP 49-54.

Once outside, Miller read Hall and Snook their Miranda<sup>5</sup> rights. 1RP 57-58. Miller patted Snook down and found a tin containing a small amount of methamphetamine and heroin. 5RP 101-04. Spaulding searched Hall and found \$910 in his pants pocket. 5RP 171. Spaulding asked Hall what he was doing with the money and Hall said, "We were just about to go buy some heroin." 5RP 172-73.

Miller and Spaulding claimed Hall and Snook wanted to talk with them individually inside the motel room to see if they could get out of going to jail. 1RP 61-63, 121-23. Miller said they went back inside the room with Snook first and then Hall, but ultimately decided to book them. 1RP 61-63. Snook said, however, it was the officers' idea to take her and Hall back into the room one at a time to question them. 2RP 17-21. Spaulding testified he saw drug paraphernalia, including needles, ledgers, and a metal pin used to cook heroin while inside the room with Hall. 1RP 123-25.

That same afternoon, the officers applied for and received a telephonic warrant to search the motel room. 1RP 63-64. They found more ledgers and scales, including one with a dark residue on it that Miller believed was black tar heroin. 5RP 50-53, 84-87. They also found an unlocked lock box in the bathroom sink cabinet with narcotics inside, including powdered and black tar heroin, powdered and crack cocaine, and

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<sup>5</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

crystal methamphetamine shards. 5RP 61-75, 156-63. The drugs were divided up into several individual baggies. 5RP 63. Snook was the last person in the bathroom. 5RP 122.

Before trial, the court held a lengthy CrR 3.5 and 3.6 hearing. 1RP-2RP; CP 61-68 (CrR 3.5 findings); CP 69-76 (CrR 3.6 findings). The court admitted Hall's statement to police that they were about to go buy some heroin. CP 66. The court also found the officers' entry into the motel room was reasonable given Hall's and Snook's outstanding arrest warrants. CP 75. The court believed the officers were immediately able to recognize the drug paraphernalia in plain view. CP 75. The court concluded the evidence supporting the search warrant was legally obtained and admitted it. CP 76.

The jury found Hall guilty as charged. CP 54-56. The court found the three counts to constitute same criminal conduct and sentenced Hall to 36 months confinement. CP 82; 8RP 4-14. Hall timely appealed. CP 77.

C. ARGUMENT

HALL'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED EXCLUSION AND DENIED A CONTINUANCE AFTER THE STATE INEXCUSABLY FAILED TO DISCLOSE A KEY WITNESS UNTIL ONE COURT DAY BEFORE TRIAL.

The State did not disclose Snook as a witness until one court day before trial. This inexcusable delay violated the State's discovery obligations under CrR 4.7. The trial court then refused to exclude Snook as

a witness and refused the defense a continuance. This left Hall's counsel inadequately prepared for trial, given the significant of Snook's testimony. Hall was denied his right to due process as a result. This Court should reverse and remand for a new trial.

CrR 4.7(a)(1)(i) requires the prosecutor to disclose to the defense, no later than the omnibus hearing, "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." The purpose of this rule "is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

The U.S. Supreme Court has explained the philosophy behind such discovery rules: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970), quoted in State v. Coe, 101 Wn.2d 772, 783, 684 P.2d 668 (1984).

Due process requires the prosecution to "comport[] with prevailing notions of fundamental fairness such that [the accused is] afforded a meaningful opportunity to present a complete defense." State v. Greiff, 141 Wn.2d 910, 920, 10 P.3d 390 (2000) (quoting State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). The Washington Supreme Court has recognized:

[I]f the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Therefore, the State's failure to comply with a discovery rule can violate the accused's right to due process. Greiff, 141 Wn.2d at 920.

CrR 4.7(h)(7) outlines available sanctions for the State's discovery violations: "the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." Failure to identify witnesses in a timely manner is "appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence." State v. Hutchinson, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998); see also State v. Linden, 89 Wn. App. 184, 196, 947 P.2d 1284 (1997) (holding the trial court properly granted the defense a continuance after the prosecution's late disclosure of information).

Exclusion of evidence is also an appropriate remedy when it isolates the prejudice. State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000);

State v. Marks, 114 Wn.2d 724, 730-32, 790 P.2d 138 (1990). Courts consider four factors in deciding whether to exclude evidence as a discovery sanction: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the defense will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 882-83. A trial court's discovery decisions based on CrR 4.7 are reviewed for abuse of discretion. Id. at 882.

In Hall's case, the omnibus hearing was held on May 11, 2015. Supp. CP\_\_ (Sub. No. 37, Order on Omnibus Hearing). The State did not disclose Snook as a witness at that time. 4RP 4. The State filed its trial memorandum on May 19, 2015. Supp. CP\_\_ (Sub. No. 43, State's Trial Memorandum). The State listed six potential witnesses: the three investigating officers, Officer Ryan Kennard, forensic scientist Mark Strongman, and Sergeant Jennifer Schneider to authenticate jail calls. Supp. CP\_\_ (Sub. No. 43, at 1-2). Again, the State did not disclose Snook as a potential witness. Supp. CP\_\_ (Sub. No. 43, at 1-2).

The court held the CrR 3.6 suppression hearing on May 19 and 20, 2015. 1RP-2RP. The defense called Snook as a witness. 2RP 9. Her testimony was relatively limited. She explained that while she and Hall sat on the curb outside their motel room, one of the officers went back inside the

room without them. 2RP 17-19. She testified the officers then decided to take her and Hall back into the room one at a time to question them individually. 2RP 17-21. While back inside the room, the officers picked up items and inspected them. 2RP 20.

At the suppression hearing, the State attempted to impeach Snook with several prior bad acts, including food stamp fraud and making a false claim about a miscarriage. 2RP 48-55. The court ultimately struck this evidence, concluding it was not relevant. 2RP 49-55. The State also asked Snook whether she pled guilty to conspiracy to deliver cocaine and heroin in this case, which she admitted. 2RP 60.

Snook's CrR 3.6 testimony was corroborated by Ryan Weatherstone, a housing ordinance specialist for the City of Seattle. 2RP 63-64. He explained he went to the Oak Tree Motel that afternoon to help Hall and Snook because they were being unlawfully evicted from their motel room. 2RP 65-66. When he pulled up to the motel, he saw a man in handcuffs and a young woman sitting outside the motel room, whom he believed to be Hall and Snook. 2RP 67-68. Even though Hall and Snook were outside, Weatherstone "saw at least one police officer inside the hotel room. I couldn't tell you if there's more than one. It was at least one." 2RP 68-69.

The next day, Thursday, May 21, the trial court held a hearing on the parties' motions in limine. 3RP. The State disclosed Weatherstone as a

witness for the first time, explaining Weatherstone's testimony would establish Hall's and Snook's dominion and control over the motel room. 3RP 4-5. Defense counsel objected to this late disclosure, but the trial court allowed Weatherstone to testify. 3RP 4-5, 50. Again, the State did not announce its intent to call Snook as a witness.

Trial began on Tuesday, May 26, after the three-day holiday weekend. 4RP 3. The State announced it informed defense counsel late in the afternoon on Thursday, May 21, that it intended to call Snook as a witness in the State's case-in-chief. 4RP 3. The State asserted it needed to call Snook so she could authenticate the drug ledgers and testify she cooperated with Hall to sell drugs. 4RP 7-11. The State hoped to put Snook on the stand immediately after lunch that same day—as the State's first witness—because Snook was due to begin inpatient drug treatment the next day. 4RP 10-11. The State acknowledged it could get a material witness warrant for Snook if needed. 4RP 23-24.

Defense counsel objected, pointing out it was well past omnibus and even past the motions in limine. 4RP 3-4. Furthermore, the State knew defense counsel was out of the office on Friday, May 22, and traveling over the long weekend, but nevertheless waited to disclose Snook as a witness until late Thursday. 3RP 3, 40-41; 4RP 3-4, 41.

Defense counsel explained she prepared her entire trial strategy around the State's representations that it would be calling only police witnesses and a toxicologist. 4RP 4-9. Counsel explained:

Defense made . . . the strategic[] decisions, made my motions in limine, made my trial brief, made my representations to the Court on Thursday based on [the prosecutor's] affirmative representation as to who he was calling as a witness. The entire defense strategy up to this point, the voir dire that will take place today and the opening that is set to take place today, is based on the trial strategy and the trial preparation based on [the prosecutor's] affirmative representations.

4RP 9. She also pointed out the State disclosed Weatherstone late and asserted "the State is essentially springing witnesses based on your Honor's motions in limine ruling. That is not appropriate, and it should not be allowed." 4RP 4. The State had also known for a long time that the defense intended to call Snook as a witness at the CrR 3.6 hearing. 4RP 4-5.

In response, the State claimed it had "no access to Ms. Snook because she was a represented co-defendant until she took the witness stand for the defense." 4RP 6. Defense counsel objected to this misrepresentation and pointed out that Snook pled guilty over a month before the CrR 3.6 hearing and her attorney withdrew soon thereafter, negating any Fifth Amendment basis for her not to testify. 4RP 8, 45. Further, the prosecutor in Hall's case also made the plea offer to Snook, so he was well aware she pled guilty before Hall's CrR 3.6 hearing. 4RP 8-9.

After voir dire with the prospective jurors, the trial court ruled it would allow Snook to testify. 4RP 19-20. The court believed the “main focus” in considering whether to exclude a late-disclosed witness “is whether or not defense was, in fact, surprised.” 4RP 19. The court concluded the defense was not surprised because Snook testified on Hall’s behalf at the CrR 3.6 hearing, and the defense “had ample opportunity to know and discuss what she actually knows and may testify.” 4RP 20.

Defense counsel then requested the court recess until the following morning to give her an opportunity to adjust her trial strategy based on Snook’s testimony. 4RP 38-41. Counsel explained:

[Y]ou’re essentially handicapping the defense into a place of ineffective assistance of counsel where I -- Your Honor has allowed the State to spring a witness on the defense that the opening I’m about to give was prepared...with the affirmative understanding that Ms. Snook was not being called, and you’re essentially [allowing] the State to be able to change its case at any time.

4RP 38-39. Defense counsel needed until the morning to prepare additional motions in limine and cross-examination. 4RP 39. She emphasized, “my concern is Mr. Hall and his Constitutional rights.” 4RP 29.

The trial court denied the request for a continuance because Snook was entering treatment the next day. 4RP 40. Defense counsel responded that the court was essentially asking her to change her entire trial strategy in 15 minutes time. 4RP 40. She reiterated she was not prepared to cross-

examine Snook and, further, Snook's circumstances should not "supersede Mr. Hall's right to prepared counsel." 4RP 40-41.

Nevertheless, Snook testified that afternoon. 4RP 51. She explained she and Hall dated for about three years and used drugs together. 4RP 51-52. She testified they lived at the Oak Tree Motel for approximately five months and sold heroin, cocaine, and methamphetamine out of their motel room. 4RP 54-56. She said their supplier provided them with the drugs already weighed and packaged for sale. 4RP 58-59. She agreed she and Hall "were cooperating with each other in this selling of drugs." 4RP 57. She explained neither of them had a more active role: "We were both -- I guess were active in different parts of the operation." 4RP 58. She testified they sold around \$1,500 worth of drugs every day. 4RP 59.

Snook also identified her and Hall's handwriting on two drug inventory sheets found in their motel room. 4RP 61-68. These inventory sheets listed several shorthand names for narcotics (e.g., shards, black, powder, crack). 4RP 63-64. Based on Snook's authentication of these ledgers, the trial court admitted several additional ledgers through Officer Miller's testimony, over defense objection. 5RP 51, 78-87.

Based on Snook's testimony, the State proposed an accomplice liability jury instruction. 6RP 56-57; CP 41. Defense counsel objected, arguing accomplice liability should not attach because "the overwhelming

evidence is that Ms. Snook was in the bathroom with the drugs . . . Mr. Hall didn't have any drugs on him, Mr. Hall didn't have any ledgers on him." 6RP 59. The court noted the objection but allowed the instruction. 6RP 61; CP 41. As a result, the to-convict instructions required the jury to find "the defendant or an accomplice" possessed controlled substances with intent to deliver them. CP 43-45.

The State began its closing argument by discussing the circumstantial evidence supporting a conviction. 6RP 85-93. The State then emphasized:

But we have direct evidence of all of this, and that direct evidence is Mattie Snook, whom you saw the first day of trial right after you were just being -- getting settled in as jurors, and you heard exactly what she had to say and you saw what she looked like and you heard her testimony. What she has to say is evidence, and what she had to say is direct evidence because she lived it.

6RP 93-94. The State continued to highlight Snook's testimony, pointing to the accomplice instruction and arguing "Mattie Snook and Robert Hall were accomplices throughout all of this . . . Robert Hall and Mattie Snook were lovers, Robert Hall and Mattie Snook were partners, and Robert Hall and Mattie Snook were accomplices." 6RP 96. The State concluded its closing argument shortly after making this statement. 6RP 98.

There can be no dispute that the State violated its discovery obligation under CrR 4.7(a)(1)(i) by failing to disclose Snook as a witness until one court day before trial, well past the omnibus hearing.

Snook was the State's key witness at trial, as demonstrated by the accomplice liability instruction, the State's closing argument, as well as the need for her testimony to authenticate the drug ledgers. The State's late disclosure of her as a witness was fundamentally unfair and deprived Hall's counsel a meaningful opportunity to present a complete defense.

This was evidenced in several ways. The defense theorized that Snook, not Hall, sold drugs out of the motel room, because she possessed the drugs and was the last one in the motel bathroom, where the drugs were found. 6RP 98-103. This, of course, was significantly undercut by Snook's testimony. Hall's counsel had no opportunity to adjust her trial strategy, though, because the court refused to exclude Snook as a witness and refused the defense a continuance.<sup>6</sup> Hall's counsel was likewise given no time to change her voir dire questions or opening statement. She had no time to prepare cross-examination because Snook testified the same day the trial court admitted her testimony. Having time to prepare cross-examination of the State's key witness is undoubtedly one of the most important aspects of an adequate defense.<sup>7</sup>

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<sup>6</sup> While a continuance may have been an effective "less severe sanction," Hutchinson, 135 Wn.2d at 883, it was denied, too.

<sup>7</sup> See Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.

Given the State's continuing representations that Snook would not testify at trial, there was no reason for defense counsel to anticipate the State would call her as a witness at the last minute. This is especially true because the prosecutor in Hall's case was also the prosecutor in Snook's case. He certainly knew of her involvement in the charged offenses well before the start of trial. He also knew Snook pled guilty a month before Hall's CrR 3.6 hearing because he negotiated that plea deal. 4RP 8-9. He nevertheless misrepresented to the court that the State "no access to Ms. Snook because she was a represented co-defendant until she took the witness stand for the defense." 4RP 6. This demonstrates the State's delay was inexcusable.

Prosecutorial mismanagement cases provide useful analogies. In State v. Sherman, this Court affirmed the trial court's finding of misconduct. 59 Wn. App. 763, 772, 801 P.2d 274 (1990). There, the State failed to produce Internal Revenue Service (IRS) records of the complaining witness by the court-imposed deadline. Id. at 765-66. Although the records were not in the State's possession, they were available to the State's chief witness, who failed to find them in his files. Id. at 768-69. The State neither followed up to ensure the records would be available for trial, nor requested them from the IRS until long after the deadline. Id. The State further waited

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The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

until after the trial date to seek reconsideration of the omnibus order obligating it to produce the records. Id. This mismanagement compromised defense counsel's ability to adequately prepare for trial. Id. at 771-72.

Likewise, in State v. Dailey, the trial court dismissed a charge of negligent homicide after finding numerous instances of prosecutorial mismanagement violated due process. 93 Wn.2d 454, 459, 610 P.2d 357 (1980). For instance, the State failed to timely comply with the omnibus order and failed to disclose its witness list until one day before trial. Id. The supreme court found this and other mismanagement "amply support[ed]" the trial court's decision to dismiss the charge. Id.

Conversely, the supreme court held in State v. Blackwell that a prosecutor's failure to produce personnel records did not amount to misconduct. 120 Wn.2d 822, 832, 845 P.2d 1017 (1993). There, the trial court ordered the State to produce the service records and personnel files of two police officers. Id. at 825. The State objected because it did not have access to or control over the documents. Id. The court held the prosecutor acted reasonably: he attempted to obtain the records, advised both the court and defense counsel of his efforts, and suggested that the court issue a subpoena duces tecum. Id. Thus, "[t]here was no showing of 'game playing,' mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense." Id. at 832.

Like in Sherman, the State's inexcusable discovery violation significantly prejudiced Hall's defense. The State's entire theory revolved around Snook's testimony. Without exclusion of Snook's testimony and without a continuance, Hall's counsel was deprived of an opportunity to adequately prepare for trial. See State v. Brush, 32 Wn. App. 445, 455, 648 P.2d 897 (1982) ("The potential prejudice resulting from the prosecutor's noncompliance with the discovery rules lies in [defense counsel's] inability to properly anticipate and prepare, i.e., surprise."). This error violated Hall's right to due process and the only adequate remedy is a new trial. Greiff, 141 Wn.2d at 920. This Court should reverse.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Hall to be indigent and unable to pay for appellate review expenses "by reason of poverty." Supp. CP\_\_ (Sub. No. 62, Order Authorizing Appeal In Forma Pauperis). Hall reported zero income, assets, or savings. Supp. CP\_\_ (Sub. No. 64, Declaration of Defendant). There is no order finding that Hall's financial condition has improved or is likely to improve. This Court must therefore presume Hall remains indigent. RAP 15.2(f).<sup>8</sup>

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<sup>8</sup> RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

If Hall does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for appellate costs. See State v. Sinclair, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2016 WL 393719, at \*4-7 (Jan. 27, 2016) (exercising discretion and denying State’s request for appellate costs).

Trial courts must make individualized findings of current and future ability to pay before imposing legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Hall’s ability to pay must be determined before discretionary costs are imposed. However, the trial court made no such finding. Instead, the trial court waived all non-mandatory fees, including court costs and recoupment for a court-appointed attorney. CP 81.

Without a basis to determine that Hall has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

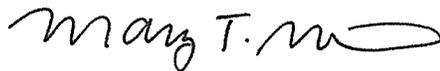
D. CONCLUSION

For the above stated reasons, this Court should reverse and remand for a new trial.

DATED this 31<sup>st</sup> day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73741-4-I
	)	
ROBERT HALL, JR.,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF MARCH, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT HALL, JR.  
DOC NO. 761365  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MARCH 2016.

X *Patrick Mayovsky*