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No. 71125-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

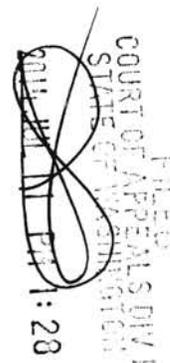
STATE OF WASHINGTON,

Respondent,

v.

CHRISTY R. DIEMOND,

Appellant.



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

The Honorable James E. Rogers

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Christy Diemond owned two elderly horses, aged 35 and 39. Ms. Diemond was convicted of first degree animal cruelty for failing to provide sufficient food for the horses, based primarily on the testimony of an animal control officer. After trial it was discovered that the animal control officer, Jenee Westberg had been convicted of theft and drug offenses, as well as being punished by her employer for dishonesty. This information was never disclosed. Ms. Diemond sought a new trial based upon this impeachment evidence. The trial court denied the motion, finding the animal control officer's testimony cumulative.

Ms. Diemond submits there was a reasonable probability of a different result had she been allowed to impeach the witness, thus she is entitled to reversal of her convictions and remand for a new trial.

B. ASSIGNMENT OF ERROR

The trial court's denial of Ms. Diemond's motion for a new trial based on a violation of *Brady*¹ violated her constitutionally protected rights to due process and a fair trial.

¹ *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State's failure to disclose potentially exculpatory evidence to the defendant, or evidence that could be used to impeach a witness, violates the defendant's right to due process and a fair trial under the Fifth and Fourteenth Amendments. Here, the State failed to disclose impeachment evidence concerning the first law enforcement officer who contacted Ms. Diemond and observed the two horses that were the subject of this action. Did the State's failure violate Ms. Diemond's right to due process and a fair trial necessitating reversal of her convictions and remand for a new trial?

D. STATEMENT OF THE CASE

Acting on a tip regarding horses that were not being fed. On February 26, 2011, King County Sheriff's Sergeant Bonnie Soule went to Christy Diemond's residence and observed two elderly horses in a pasture. 10/2/2012RP 9-11. Sergeant Soule spoke to Ms. Diemond as she was assisting Ms. Diemond in feeding the horses. 10/2/2012RP 23-30. Based upon her observations, Soule had concerns, so she referred the matter to the King County Animal Shelter. 10/2/2012RP 34-42, 54.

The following day, Animal Control Officer Jenee Westberg arrived at Ms. Diemond's residence in response to the referral.

Although Ms. Diemond was not at home when Westberg arrived, Ms. Diemond's mother's caregiver gave Westberg permission to look at the horses. 10/2/2012RP 100.

Westberg claimed the horses were very thin and the blankets on them improperly fit. 10/2/2012RP 98. Westberg noted the temperature was below freezing and there was snow on the ground. 10/2/2012RP 99. The horses were in a pasture Westberg estimated at an acre to an acre and one half. 10/2/2012RP 101. Westberg claimed the horses' water trough was frozen and the bark from nearby trees had been stripped by the horses. 10/2/2012RP 101-02. Westberg claimed she felt under the male horse, Bud's, blanket and felt what she described as skin and bones. 10/2/2012RP 108.

When she first arrived, Westberg left Ms. Diemond a voice message. 10/2/2012RP 100. A short while later, Ms. Diemond returned Westberg's call. 10/2/2012RP 114. According to Westberg, Ms. Diemond was very cooperative and stated she was having financial troubles and had been looking for new owners for the horses. 10/2/2012RP 114. Westberg claimed Ms. Diemond said she could not afford a veterinarian and was willing to surrender the horses. 10/2/2012RP 115-16.

The horses were examined by a veterinarian and taken to a shelter. 10/2/2012RP 133-37. Ms. Diemond was subsequently charged with two counts of first degree animal cruelty.² CP 64. Following a jury trial, Ms. Diemond was convicted as charged. CP 50-55.³

After the trial, it came to light that damaging information regarding Westberg had not been disclosed to Ms. Diemond. CP 1227. Specifically, that Westberg had been prosecuted for the possession of narcotics in 2008, convicted of theft in 2006, and was suspended from her employment for four days because of employee theft of wages and dishonesty. *Id.*

Prior to sentencing, Ms. Diemond moved for a new trial, on among other grounds a violation of *Brady*. CP 1220-29. The trial court denied the motion for a new trial, finding there was not a reasonable

² First Degree animal cruelty as charged here states in relevant part:

A person is guilty of animal cruelty in the first degree when, . . . he or she, with criminal negligence, starves, dehydrates or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

RCW 16.25.205(2).

³ Ms. Diemond was charged with the alternative means of committing animal cruelty; by starvation and by dehydration. CP 15-16. By special verdict, the jury found Ms. Diemond guilty of animal cruelty by starvation but not by dehydration. CP 51-52, 54-55.

likelihood that the result of the trial court would have been any different since Westberg's testimony was cumulative. CP 151-16.

Ms. Diemond appeals.

E. ARGUMENT

The Trial Court's Denial Of A New Trial For A Violation Of *Brady* Violated Ms. Diemond's Fifth And Fourteenth Amendment Rights To A Fair Trial And Due Process

1. Due process requires the State produce material evidence impeaching a State's witness.

The Due Process Clause of the United States Constitution requires the government provide any exculpatory information to the defense. U.S. Const. amends. VI, XIV; *Brady*, 373 U.S. at 87. The underlying rationale behind the decision in *Brady* is that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Brady*, 373 U.S. at 87.

In *Brady*, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Giglio v. United States*, the Supreme Court extended this principle to include evidence that bears upon the

credibility of a government witness. 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Brady holds that a prosecutor violates due process when he or she (1) suppresses evidence (2) that is favorable to the defendant, when that evidence (3) is material to guilt or innocence. *Brady*. 373 U.S. at 87. Evidence is material under *Brady* if it creates “a ‘reasonable probability’ of a different result.” *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). “A reasonable probability does not mean that the defendant ‘would more likely than not have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’ ” *Smith v. Cain*, ___ U.S. ___, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012), *quoting Kyles*, 514 U.S. at 434.

“Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution’s case.” *United States v. Kohring*, 637 F.3d 895, 905-06 (9th Cir. 2011), *quoting Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005).

Brady violations are reviewed *de novo*. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

Here, the court found the evidence would have been favorable to Ms. Diemond and that it had not been disclosed by the State. Thus, the remaining issue here concerns the final *Brady* factor; materiality. Ms. Diemond submits the trial court erred when it found the impeaching evidence not to be material.

2. There was a reasonable probability the result would have been different had Ms. Diemond been allowed to use the previously undisclosed impeachment evidence regarding Westberg.

The test for materiality is “not a sufficiency of evidence test.” *Kyles*, 514 U.S. at 434. Thus, a “showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Id.* Rather, the issue “is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.*

Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A “reasonable probability” may exist even where the remaining evidence would have

been sufficient to convict the defendant. *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Moreover, the court may find a “reasonable probability” without finding that the outcome would more likely than not have been different. *Kyles*, 514 U.S. at 434. Instead, “[a] ‘reasonable probability’ of a different result [exists] when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Id.*, quoting *Bagley*, 473 U.S. at 678.

Finally, the determination of the materiality of non-disclosed evidence is to be considered collectively, not item by item. *Kyles*, 514 U.S. at 436.

Whatever the definition is for “material,” the impeachment evidence disclosed about Westberg was material. Westberg was cloaked in authority status; an Animal Control Officer for all of King County, vested with the power to investigate animal cruelty cases, including serving search warrants. 10/2/2012RP 88. She described Animal Control Officers such as herself as “animal experts.” 10/2/2012RP 140. Westberg was allowed to opine that the pasture in which the horses were kept was not in good condition, that the horses were in an emaciated condition, that the amount of food they were fed

was insufficient, and that the type of food was improper for horses.

10/2/2012RP 105-06, 112-13, 125-28.

The trial court opined that the Westberg's theft conviction and dishonesty at work likely would have been admissible, but the evidence of drug use would not have been admissible because "there was no allegation that she was under the influence during these proceedings." But that puts the cart before the horse. Ms. Diemond did not have an opportunity to investigate whether Westberg was under the influence of drugs either at trial or during her investigation of Ms. Diemond because the evidence of her drug use had not been disclosed. Thus, contrary to the trial court's conclusion, whether the evidence of Westberg's drug use would have been admissible at trial for impeachment purposes was an open question at best. Certainly had the jury been aware of Westberg's drug use, there may have been a very reasonable probability of a different result. *See Kohring*, 637 F.3d at 905-06 ("Indeed, had the evidence of Allen's past conduct been disclosed, 'there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment' regarding Allen's testimony against Kohring.").

While some of Westberg's testimony was cumulative as the trial court found, her testimony carried significant weight given her cloak of authority as a King County Animal Control Officer. Westberg testified as a pseudo-expert whose testimony was presented as though carrying extra weight. The impeachment evidence would have leveled the playing field, giving the jury more to contemplate other than Westberg's bald assertions.

Finally, it must be remembered that the jury was not convinced the evidence of guilt was overwhelming. Although charged with alternative means of committing animal cruelty, the jury found Ms. Diemond guilty of only one of the two alternative means, acquitting her of the other. If the impeachment material altered just one juror's mind, that would have been sufficient to find it material. *Kohring*, 637 F.3d at 905-06. This is such a case. The trial court erred in failing to find there was a reasonable probability of a different result based upon the impeachment material of Westberg.

3. Ms. Diemond is entitled to reversal of her convictions.

Once a reviewing court has found constitutional error under *Brady*, there is no need for further harmless-error review. *Kyles*, 514 U.S. at 435. Here, Ms. Diemond has established a reasonable

probability of a different result based upon the impeachment evidence regarding Westberg. She is entitled to reversal of her convictions.

F. CONCLUSION

For the reasons stated, Ms. Diamond asks this Court to reverse her convictions and remand for a new trial.

DATED this 9th day of July 2014.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71125-3-I
v.)	
)	
CHRISTY DIEMOND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> CHRISTY DIEMOND 14241 NE WOODINVILLE DUVALL RD #154 WOODINVILLE, WA 98072-8564	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JULY, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710