68915-1

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NO. 68915-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEAYN DUNYA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The State makes several errors in its description of the evidence.**

The State's purportedly neutral Statement of the Case contains some assertions that are factually incorrect and significantly inflammatory that should be disregarded. *See* RAP 10.3(a) (3), (b).

It asserts that Mr. Dunya told Emily Mowrey that Kriston Dunya "had to die," citing "5/30/12 RP 442-43." Resp. Brief at 4. Ms. Mowrey made no such assertion in her testimony (which actually appears at 6/4/12RP 441-45). In fact, Ms. Mowrey testified that Mr. Dunya did not seem particularly concerned about the possibility that his former wife would move out of state with their child, undermining the prosecution's theory of Mr. Dunya's purported motive. 6/4/12RP 443-44.

The State also claims that Kara Buchanan immediately recanted her confession to police that she was responsible for Ms. Dunya's death when she was being airlifted to the hospital. Resp. Brief at 8 (citing "6/12 RP 514"). The testimony at and near pages 6/11/12RP 514 involves detective Jana Bouzek, a witness called by the defense. Detective Bouzek testified that she gave *Miranda* warnings to Ms. Buchanan and questioned her while she was being treated for serious,

self-inflicted injuries. 6/11/12RP 515. 6/11/12RP 510, 514. Detective Bouzek asked Ms. Buchanan "if she could have hurt Kriston Duyna," and Ms. Buchanan responded, "the monster might have or could have." *Id.* at 516; *see also Id.* at 512-13 (while saying she did not harm Ms. Dunya, Ms. Buchanan also said that her own "monster" may have been responsible).

Ms. Buchanan explained that the "monster" means herself: "[t]he monster is an aspect of my personality that comes out to protect my inner child." 5/30/12RP 309. Although Ms. Buchanan later recanted her detailed confession of culpability, there was no immediate denouncement of responsibility as claimed in the State's brief.

2. **The State's intentional consumption of a trace amount of DNA that would clearly exculpate one of the two charged perpetrators constitutes egregious disregard for the State's obligation to provide a fair trial**

The State's duty to preserve material evidence is derived from the duty to disclose exculpatory evidence and the requirements of fundamental fairness. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. Const. amend. 14; Wash. Const. art. I, § 3. *Brady* held that due process concerns require the State to disclose evidence material to the issue of guilt or innocence. As to potentially

useful evidence that is not inherently exculpatory, the prosecutor violates due process by destroying it in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

The court has explained that there are three different frameworks used to evaluate evidence improperly concealed from the defense. *State v. Ortiz*, 119 Wn.2d 294, 305, 831 P.2d 1060 (1992) (citing *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). "First, if prosecutorial misconduct is involved, a conviction 'must be set aside if there is any reasonable likelihood' that the undisclosed evidence could have affected the jury's decision." *Id.* (quoting *Agurs,* 427 U.S. at 103). Second, "where the defense has made a specific pretrial request for evidence, the court asks if 'the suppressed evidence might have affected the outcome.'" *Id.* (quoting *Agurs,* 427 U.S. at 104). Third, without any specific request, 'the state has a duty to disclose evidence only if the "evidence creates a reasonable doubt that did not otherwise exist.'" *Id.* (quoting *Agurs,* 427 U.S. at 112 and citing *State v. Laureano,* 101 Wn.2d 745, 682 P.2d 889 (1984)).

Mr. Dunya, and his then-co-defendant Ms. Buchanan, specifically requested that the prosecution give advance notice of the

State was testing evidence that might be destroyed. CP 212, 223. These written requests were filed on the record in the court and the State has never disclaimed its actual knowledge of these requests. The State also knew the State Crime Lab needed authorization before testing the materials when the test would consume them. CP 75. It further knew that its standard practice was to obtain a court order before testing evidence that would be consumed in the test. *Id.* Yet in violation of these requests, protocol, and standard practice, it tested and consumed the DNA without notifying the defense.

The materiality of the trace amount of biological matter obtained on a latex glove left at the scene of a homicide is evident from its effect on the prosecution's case and the clear potential for contamination that exists with any trace amount of DNA.

First, at the time the State directed its destruction, it had charged two people with committing a murder and there was evidence from a surveillance videotape that only one person entered the deceased's apartment. CP 75. The State knew that DNA testing would exculpate at least one of the two charged perpetrators and "might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2538, 73 L.Ed.2d 413 (1984).

Thus, its exculpatory nature was apparent, and indeed, was part of the reason the State wanted the biological matter tested according to the prosecutor's affidavit. CP 74-75. The State offers no authority establishing that it was required to comply with its due process discovery obligations only for one defendant when it jointly charged two people with the offense.

Second, the reason the teeny amount of a biological sample triggers particular obligations on part of the prosecution is due to the fallibility of testing such small amounts of DNA. "STR" DNA testing, as occurred in the case at bar, requires at least one nanogram of DNA. 5/29/12RP 138, 182. This minimum amount of DNA is necessary to avoid random processes dominating or skewing the DNA test results. *United States v. Davis*, 602 F.Supp.2d 658, 668-89 (D. Md. 2009) (In STR DNA testing, "[u]sing samples with either more or less than the optimum amount will produce unreliable results"); *see also United States v. McCluskey*, 954 F.Supp.2d 1224, 1276-77 (D.N.M. 2013) ("When there is too small a sample," DNA testing "carries a greater potential for error due to difficulties in analysis and interpretation caused by four stochastic effects: allele drop-in, allele drop-out, stutter, and heterozygote peak height imbalance.").

There is a heightened risk of contamination for low copy number DNA, because the lab must amplify the material more times than it generally would need to in order to reach the amount of material needed to test. National Forensic Science Technology Center, DNA Analyst Training, § 9, Low Copy Number DNA[1] (Low copy number DNA requires additional amplifications which risks either "stochastic sampling artifacts" or "the detection of otherwise-undetectable, extraneous DNA contamination"). The sterile nature of the laboratory facility is particularly critical and special controls are required. *Id.*

Many labs will not conduct a DNA test "if the total amount of measured DNA is below 150 pg" which is 0.150 ng. *McCluskey*, 954 F.Supp.2d at 1277.

Here, the State Crime Lab recovered 0.102 ng of biological material, which constitutes "low copy number" DNA. 5/29/12RP 182. In order to compensate for the inadequate amount of DNA required to test the material, forensic scientist Mariah Low conducted additional "amplifications" in an effort to reach the one nanogram of material

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[1] Available at: http://www.nfstc.org/pdi/Subject09/pdi_s09_m01_03b.htm (last accessed May 30, 2014).

needed to test. 5/29/12RP 182. These additional amplifications heighten the risk of inaccuracy in the results and susceptibility to contamination.

By insisting that the State Crime Lab test the trace amount of biological material, transferred along with Mr. Dunya's known DNA sample, without letting Mr. Dunya know or giving him the opportunity to observe the testing procedures, the State withheld critical evidence. The reason minute amounts of DNA should not be tested absent notice to the adverse party, when possible, is this heightened risk of error, combined with the inability to independently verify the results.

When the State fails to follow standard procedure involving the powerful evidence of generating a DNA profile, this failure "is probative evidence of bad faith, particularly when the procedures are clear and unambiguous." *United States v. Elliott*, 83 F.Supp.2d 637, 647 (E.D.Va. 1999). In *Elliott*, a DEA agent authorized the destruction of "valuable evidence" because he thought the items might be contaminated, but he did not first verify the actual risk of contamination and acted contrary to "rather plainly worded regulations requiring the preservation of evidence for due process purposes." *Id.* The court distinguished cases where the destruction of evidence flowed from

established practice because protocol required preservation. Id. It concluded that because,

> the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/ Youngblood* test."

Id. at 647-48. As a policy matter, the court explained that "a contrary holding would permit law enforcement officials to ignore the clear text of the governing regulations on which they say their policy is predicated and to act inconsistently with it." *Id.* at 648.

There is no ambiguity at issue in the case at bar. The prosecution admitted it disregarded its own policy without cause, and acted in contravention to the State Crime Lab's protocol and the defense attorneys's written requests for advance notice before consumption.

In the cases relied on in the State's brief, the government followed its own protocols when it destroyed evidence. *State v. Wittenbarger*, 124 Wn.2d 467, 477, 880 P.2d 517 (1994) ("defendants concede that the State in this case has acted in compliance with its established policy regarding the evidence at issue"); *Ortiz*, 119 Wn.2d at 302 (state did not act in bad faith when state handled samples "its usual

manner"). In *Groth*, the police got rid of decades-old evidence from a long-unsolved murder before they had any inkling they might be prosecuting someone for this crime, and they mistakenly thought that triplicated of records had been preserved. *State v. Groth*, 163 Wn.App. 548, 559, 261 P.3d 183 (2011). The remoteness of a possible a future prosecution as in *Groth* when the police lost or destroyed evidence is far different from the case at bar. Both Mr. Dunya and Ms. Buchanan had been arrested and charged when the State directed the Crime Lab to secretly consume the only biological material recovered from the apartment that might be a link to the perpetrator's identity.

The timing of the State's consumption order, its disobedience of admitted regular practice, its disregard of established Lab protocol, and its direct refusal to comply with defense counsels' requests without explanation demonstrate bad faith and denial of the right to fundamental fairness. *See Freeman v. State*, 121 So.3d 888, 895, *reh'g denied* (Miss. 2013). The trial court should have granted the request to suppress the evidence that was obtained through improperly disregarded protocols that exist to ensure the fairness of the proceedings.

3. The State's manipulation of evidence and comments on the perpetrator's race affected the fairness of the trial

The court impermissibly let police officers interpret evidence for the jury that needed no interpretation.

The State asserts police detective Rich Schwallie was an "expert" and therefore could give his opinions to the jury without limits. But Detective Schwallie was a fact witness, who personally gathered videotape evidence and testified about the geography of the area where the incident occurred. 5/23/12RP 18-67. He was not identified as an expert prior to trial, as mandated by CrR 4.7(a)(2)(iii).

During the course of his factual testimony relating his own investigation, the defense objected to the State's elicitation of the detective's opinions about what the videotape showed, arguing that the jury should draw its own conclusions. 5/23/12RP 179; 5/29/12RP 20. The State sua sponte sought to qualify the detective as an expert by asking the detective if his training involved looking at infrared images on security cameras. 5/23/12RP 182-83. There was no indication of methodology, credentials, or experience.

Given this limited assertion of expertise – applying solely to experience with looking at infrared cameras and his comparison of

views on the night in question – the detective's testimony remained fraught with the problem of co-mingling a fact and expert witness. The court undertook no safeguards to separate the witness's factual and expert opinion testimony. Detective Schwallie was personally involved in collecting evidence and building a case against Mr. Dunya. His "opinion" that the person on the videotape was carrying a rifle was not drawn from the quirks of infrared cameras, but rather on any person's ability to watch a video and try to decide what it showed. Similarly, his opinion about the race of the person depicted in the video was not a valid exercise of expertise. The jury's role was to view the videotape and discern whether the person looked like Mr. Dunya. The officer's opinion that the person was someone with a "dark skin tone," like Mr. Dunya, was not based on his personal knowledge or tools that were not available to the jury. Instead, the officer's testimony amounted to an implicit opinion that Mr. Dunya was the person in the videotape and this opinion was inadmissible.

The State cannot hid behind ER 702, cloaking police opinion in the guise of expert testimony, when the fact witness was applying his own experience but not any established methodology to the question of the race of the person shown on the videotape. ER 702 "contemplates

that an expert's opinion testimony will be "helpful to the jury," not merely helpful to the prosecutor as transmutations of simple fact testimony." *United States v. Garcia*, __ F.3d _, 2014 WL1924857, *8 (4th Cir. 2014).

The improperly elicited opinion testimony and reenactments denied Mr. Dunya a fair trial.

4. ***Williams-Walker* and *Recuenco* dictate that the court has no authority to impose a firearm enhancement if it court instructs the jury that the definition of a deadly weapon controls the special verdict**

In order for the jury to "make a firearm finding" as required for a "firearm" enhancement, the court must give the correct pattern jury instructions specific to the firearm enhancement. *State v. Recuenco*, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008).

The court instructed the jury that "*for purposes of a special verdict*," it must decide whether Mr. Dunya was "armed with *a deadly weapon*." CP 59 (emphasis added). This instruction is not the approved pattern instruction for a firearm enhancement required by *Recuenco*, 163 Wn.2d at 437 (citing 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.10.01 (3d Ed 2008)). Instead of using the approved pattern instruction for the firearm enhancement, the court asked the jury to

decide whether Mr. Dunya possessed a deadly weapon under the protocol for a deadly weapon enhancement. CP 59.

In three consolidated cases in *State v. Williams-Walker*, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010), the Supreme Court held that the jury's verdicts do not authorize firearm enhancements even when the instructions told the jury that the special verdict form finding was premised on possession of a firearm, because the verdict forms asked whether the defendants had deadly weapons. 167 Wn.2d at 894, 900-01. The Court refused to hold a firearm enhancement was implicitly authorized by other verdicts even if possession of a firearm was an element. *Id.* at 901. The premise of *Williams-Walker* is that the court must assess the jury's verdict based only on what it was asked to find and that verdict controls the punishment a court may impose. *Id.* at 898.

The State misunderstands the facts at issue in *Williams-Walker* in its attempt to distinguish it. In one of the consolidated *Williams-Walker* cases, the jury received both deadly weapon and firearm definitional instructions. 167 Wn.2d at 894.[2] The mere giving of the

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[2] *Williams-Walker* cited the unpublished Court of Appeals decision in *Ruth*, which explains the jury received both deadly weapon and firearm enhancement definitional instructions. 167 Wn.2d at 894 (citing 2006 WL 2126311).

firearm definition does not change the fact that the jury was asked to find whether Mr. Dunya possessed a deadly weapon.

Instruction 15 explained what the jury would decide in the special verdict. Instruction 15 told to the jury it was deciding whether Mr. Dunya was armed with a deadly weapon. CP 59.

In *Williams-Walker*, the court explained:

> Quite simply, only three options exist: First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.

167 Wn.2d at 901. By virtue of instruction 15, the jury found the use of a deadly weapon and the court lacked authority to impose a greater punishment.

B. CONCLUSION.

For the foregoing reasons and those discussed in the opening brief, Mr. Dunya respectfully requests this Court reverse his convictions and remand the case for a new trial.

DATED this 2nd day of June 2014.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 68915-1-I
	)	
KEAYN DUNYA,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **REPLY 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF JUNE, 2014.

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