

FILED
Jul 08, 2015
Court of Appeals
Division I
State of Washington

COA No. 72331-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS ARMSTRONG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jim Rogers

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

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

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Facts. 2

 2. Closing argument and verdict. 4

D. ARGUMENT 5

 1. MR. ARMSTRONG’S RIGHT TO A UNANIMOUS
 JURY VERDICT WAS VIOLATED, REQUIRING
 REVERSAL. 5

 a. The defendant’s trial produced a verdict that fails to meet even the
most minimum standard of express unanimity possible. 5

 b. Appealability. 7

 c. The presence of sufficient evidence on both means does not cancel
out the affirmative constitutional error. 9

 2. THE STATE FAILED TO PRESERVE THE
 POTENTIALLY EXCULPATORY AM/PM
 STORE SECURITY CAMERA VIDEOTAPE,
 VIOLATING DUE PROCESS. 12

 a. The police failed to preserve the potentially exculpatory security
videotape footage from the AM/PM store, which depicted the bus stop
where the alleged assault took place. 12

 b. The totality of the facts demonstrate bad faith on the part of the
police. 13

E. CONCLUSION 21

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

RCW 26.50.110 5

RAP 2.5(a) 7,12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 5. 12

U.S. Const. amend. 14. 12

Wash. Const. art. I, § 3. 12

Const. art. I, § 21 6

WASHINGTON CASES

State v. Embry, 171 Wn. App. 714, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005 (2013). 7

State v. Furseth, 156 Wn. App. 516, 233 P.3d 902, review denied, 170 Wn.2d 1007, 245 P.3d 227 (2010). 7

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 6

State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984). 15

State v. Lamar, 180 Wn. 2d 576, 327 P.3d 46 (2014). 10

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992) 7

State v. McNichols, 128 Wn.2d 242, 906 P.2d 329 (1995). 18

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) 6,8

State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) 14

State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987). 6,7

State v. Wittenbarger, 124 Wn .2d 467, 880 P.2d 517 (1994) . . 12,15,19

UNITED STATES COURT OF APPEALS CASES

United States v. Cooper, 983 F.2d 928 (9th Cir. 1993) 19

United States v. Elliott, 83 F.Supp.2d 637 (E.D.Va.1999). 14

United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979). 20

United States v. Tercero, 640 F.2d 190 (9th Cir.1980). 19

United States v. Zaragoza-Moreira, 780 F.3d 971 (9th Cir. 2015) 12

CASES FROM OTHER STATE JURISDICTIONS

People v. Alvarez, 229 Cal. App. 4th 761, 176 Cal. Rptr. 3d 890, 901 (2014), review denied, (Nov. 25, 2014) 12

UNITED STATES SUPREME COURT CASES

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). 14,15,20

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

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L Ed.2d 413 (1984) 12

A. ASSIGNMENTS OF ERROR

1. In Dennis Armstrong's trial on a charge of felony violation of a no-contact order, the defendant's state constitutional right to a unanimous jury verdict was abridged.

2. The police failed to preserve potentially exculpatory evidence, violating Due Process and requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Armstrong was charged with an alternative means crime – alleged violation of a no-contact order, elevated to a felony either by two prior offenses, or by assault. There was no unanimity instruction or special verdict form. In fact, the jury instructions told the jurors they did not have to be unanimous as to the means, and the prosecutor told the jury in closing argument that half the jury could base guilt on one alternative, and the other half on the other. Was Mr. Armstrong's verdict the expressly unanimous verdict guaranteed to him by article 1, section 21 of the State Constitution?

2. The no-contact order violation was alleged to be an assault of Nadia Karavan, that occurred at a bus stop outside an AM/PM convenience store/ARCO gas station. The AM/PM store clerk later confirmed that he had personally viewed the security videotape, and at

least one of the video system's camera angles partially depicted the bus stop where the alleged assault occurred. At the scene, responding police officers told Mr. Armstrong that they had obtained the videotape from the AM/PM, and that he needed to be truthful because the video would show what happened. However, the police had not, and never did, collect the video. Did the police, in bad faith, fail to preserve potentially exculpatory evidence?

C. STATEMENT OF THE CASE

1. Facts. Nadia Karavan was the subject of a no-contact order against her boyfriend, Dennis Armstrong. On April 20, 2014, she was living at the "Bunkhouse," a homeless residence on Orcas Street in Seattle. She knew that Mr. Armstrong was prohibited from being in contact with her. 7/29/14RP at 34-38.

However, Ms. Karavan had some of Mr. Armstrong's belongings, and she wanted to give them to him. 7/29/14RP at 36-37, 40. That night, she spoke to him on the telephone about "him getting those from [her]." 7/29/14RP at 36-37. Later, while she was eating dinner in the communal kitchen, a resident told her that her boyfriend was outside. 7/29/14RP at 38.

Rather than figure out a way to place Mr. Armstrong's belongings at his disposal, Ms. Karavan decided to walk outside the residence, and when she did, she could spot the defendant in the distance. 7/29/14RP at 39-40. Mr. Armstrong was not standing outside the residence, rather, he was sitting at a bus shelter -- which was "[a]bout a block away." 7/29/14RP at 39-40. Ms. Karavan "wanted to give him his stuff back," and she went to the bus shelter. 7/29/14RP at 39-40. She went to the bus shelter where Mr. Armstrong was sitting, a block away from the Bunkhouse residence.¹ 7/29/14RP at 30.

Mr. Armstrong looked like he had been punched in the face, and there was blood on his clothing. 7/29/14RP at 40-41. Karavan claimed that Mr. Armstrong became angry at that time. 7/29/14RP at 40. According to Ms. Karavan, he hit her. 7/29/14RP at 42. In addition, she stated, they struggled over her jacket, and Karavan then ran into a nearby AM/PM store. 7/29/14RP at 45-46. She asked the cashier to call the police. Mr. Armstrong came into the store and said "don't have

¹ Ms. Karavan admitted that the bus shelter where she observed Mr. Armstrong was up the street by the ARCO station on Martin Luther King Way. 7/29/14RP at 60. Although she didn't bring Mr. Armstrong's belongings with her, she left the area of the homeless residence by walking down the stairs that went from Orcas to Juneau Street, and walked along Martin Luther King Way. 7/29/14RP at 60-61. She then crossed the street and the light rail, to the other side of Martin Luther King Way, where Mr. Armstrong was sitting at the bus shelter near the ARCO and the AM/PM store. 7/29/14RP at 62.

them call the police.” 7/29/14RP at 46. The cashier called 911 and described what he saw, then he gave Ms. Karavan the phone, and she spoke with the dispatcher herself. 7/29/14RP at 47-48. A CD of the 911 call was played for the jury. 7/29/14RP at 48-49; State’s Exhibit 1.

Also submitted as evidence were documents regarding Mr. Armstrong’s two prior convictions for violations of no-contact orders, Supp. CP ____, Sub # 38H (Exhibit list - State’s Exhibits 6 and 8), and a videotape of the police discussions with, and arrest of Mr. Armstrong in the area of the AM/PM store – in which the officers, interrogating him about the alleged assault, tell the defendant to tell them the truth, because “we’re going to get a video, we’re going to get the video”. Exhibit 3 (DVD).

2. Closing argument and verdict. In closing argument, the prosecutor told the jury that there were “two ways to commit this crime,” these being the alternatives of the prohibited contact being an assault, or the defendant having two prior convictions for no-contact order violations. 7/31/14RP at 17. Relying on instruction no. 11, the prosecutor told the jury that the jury could convict the defendant based on six jurors believing Mr. Armstrong was guilty of the “assault” means of committing the crime, and the other six jurors could base guilt

on the two prior convictions – unanimity was not required. 7/31/14RP
at 17-18.

D. ARGUMENT

1. MR. ARMSTRONG’S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED, REQUIRING REVERSAL.

a. The defendant’s trial produced a verdict that fails to meet even the most minimum standard of express unanimity possible.

The crime of felony violation of a no contact order is an alternative means crime and was charged as such. One of the offenses (an assault in the course of violating an order) is a class C felony under subsection (4) of RCW 26.50.110. The other offense (violation of an order following conviction of two prior violations) is a class C felony under subsection (5) of RCW 26.50.110. See CP 1-2 (information). The two alternative means were also presented to the jury with an instruction that stated the jury did not need to be unanimous as to which was committed. CP 28. Instruction 11 stated in pertinent part:

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt”)

CP 28 (attached as Appendix A).

But article I, section 21 guarantees criminal defendants the right to a expressly unanimous jury verdict. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime, when they are so distinct – by legislative sectioning, or by diversity of the conduct – that they are not simply factual examples of committing a single statutory crime. State v. Green, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980). Where an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). If the jury does not provide – i.e., not given the tools to provide -- a particularized expression of unanimity through a special verdict form, a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. Ortega-Martinez, 124 Wn.2d at 707-08.

Here, the Court cannot conclude that the jury rested its decision on a unanimous finding as to the means, and reversal is required. Jury instruction 11 affirmatively told the jury it did not have to be

unanimous as to whether the conviction rested on two prior violations, or on a finding that an assault was committed. CP 28. This instruction – maladapted from case law regarding the standard for finding some unanimity errors *non-reversible* on appeal -- and the conviction produced thereby, violated Mr. Armstrong’s right to unanimity under article I, section 21.

b. Appealability. Importantly, the error certainly may be raised now. Unanimity error may be raised initially on appeal. See State v. Furseth, 156 Wn. App. 516, 519 n. 3, 233 P.3d 902, review denied, 170 Wn.2d 1007, 245 P.3d 227 (2010). It is true that generally, an appellant cannot challenge jury instructions for the first time on appeal unless the erroneous instruction is a “manifest error affecting a constitutional right.” RAP 2.5(a); State v. Embry, 171 Wn. App. 714, 756, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005 (2013). Under the four-part analysis of State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), the “manifest” aspect of the Rule requires a showing that the alleged error is apparently, and then ultimately, constitutional, that the error is manifest in that it causes prejudice that is identifiable, and finally whether prejudice requires reversal.

With regard to the two related Lynn constitutional questions, the Supreme Court has said that constitutional Due Process does not require an affirmative pronouncement of jury unanimity as to the alternative means of a single crime. See State v. Ortega-Martinez, 124 Wn.2d at 707–08. However, the constitution does require unanimity itself -- and an instruction which affirmatively authorizes the jury to be **non**-unanimous plainly violates the state constitution. Thus the Supreme Court definitively stated in Ortega-Martinez, “We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable.” Ortega-Martinez, at 717, n.2 (citing State v. Whitney, 108 Wn.2d at 511).

In this case, a jury instruction that affirmatively authorized what the state constitution guarantees against, was error of constitutional magnitude, and further, the error is manifest, because it has practical and identifiable consequences -- a verdict resting on a non-unanimous jury. See State v. Lynn, 67 Wn. App. at 345. Such a verdict is not a representation of the State having proved the crime to a jury of 12 beyond a reasonable doubt. Const. art. I, § 21. That consequence is manifest -- plain and observable -- because two sources of inaccuracy

affirmatively induced this verdict that bears affirmative indicia of non-unanimity. The ultimate, constitutionally violative consequence was not just authorized by the erroneous jury instruction, it was encouraged by the State in closing argument. 7/31/14RP at 17-18. Mr.

Armstrong's challenge to the unanimity violation worked upon him may be raised for the first time on appeal.

b. The presence of sufficient evidence on both means does not cancel out the affirmative constitutional error. The State may argue that because it presented sufficient evidence to survive a Due Process challenge as to both alternative means, this Court should affirm. The State would find language that appears to support this argument in Ortega-Martinez, 124 Wn.2d at 707-08. However, it is generally understood that the assumption on which this idea is based is flawed. The Court in Ortega-Martinez reasoned:

If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.

Ortega-Martinez, 124 Wn.2d at 707. Initially, it must be noted that the presence of substantial evidence is a very rough-hewn basis for excusal of any unanimity as harmless. The presence of substantial evidence on

both alternative means is helpful if the jury is told that it must be unanimous as to the means. Under such circumstances, a reviewing court could presume that the jury was unanimous as to the means even without a special verdict form, because juries are presumed to follow instructions. See State v. Lamar, 180 Wn. 2d 576, 586, 327 P.3d 46 (2014). But if the jury is not told it must be unanimous as to the means, then the fact that sufficient evidence is presented as to both means logically makes it less likely that the jury unanimously agreed as to a means. And unanimity is certainly utterly unlikely where, as here, the jury is explicitly told by the court that it need not be unanimous as to which alternative the State proved, and the State relies on this in closing to obtain a verdict it believed it might not obtain if it had to convince a full 12 jurors of one theory, beyond a reasonable doubt.

The primary problem with the State’s “substantial evidence on both” argument is that it conflates the Due Process right to sufficiency of the evidence with the state constitutional right to a unanimous jury. These are separate rights, and the fact that one is honored does not mean the other can be ignored. The right to unanimity is the right to unanimity on the elements. The Supreme Court has said:

If the evidence is sufficient to support each alternative means submitted to the jury a particularized expression

of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm the conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is insufficient to present a jury question as to the whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

(Emphasis in original, internal citations omitted.). Ortega–Martinez, 124 Wn.2d at 707-08. Nothing in that holding suggests that unanimity is not required. The opposite is true, as shown where the Court stated that, “unanimity with respect to at least one of the theories by which the crime may be committed remains the minimum constitutional requirement for conviction.” Ortega-Martinez, at 838 n.4. Excusing the absence of express unanimity as harmless or not requiring reversal on appeal does not mean that the trial court and the State can affirmatively endorse non-unanimity simply because, before verdict (a jury might acquit, after all), it appears there was substantial evidence submitted on both alternative means. Mr. Armstrong’s conviction violated the requirement of unanimity and should be reversed.

2. THE STATE FAILED TO PRESERVE THE POTENTIALLY EXCULPATORY AM/PM STORE SECURITY CAMERA VIDEOTAPE, VIOLATING DUE PROCESS.

a. The police failed to preserve the potentially exculpatory security videotape footage from the AM/PM store, which depicted the bus stop where the alleged assault took place. A videotape depicting the crime scene, at the time of the incident, is potentially exculpatory. See, e.g., United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir. 2015) (video of scene of alleged border/drugs violation); People v. Alvarez, 229 Cal. App. 4th 761, 774-75, 176 Cal. Rptr. 3d 890, 901 (2014), review denied, (Nov. 25, 2014) (video of parking lot at time of robbery was potentially exculpatory).

If the defense can show the State failed to preserve evidence, the case must be dismissed. California v. Trombetta, 467 U.S. 479, 485–89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); see Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. Const. amends. 5, 14. Due Process requires the State to preserve such evidence if it is “potentially exculpatory.” State v. Wittenbarger, 124 Wn .2d 467, 477, 880 P.2d 517 (1994); Wash. Const. art. I, § 3. The was developed below and may be raised. RAP 2.5(a); State v. Lynn, *supra*.

In this case, Mr. Todd Hawkins, the store clerk from the AM/PM, testified that the Seattle police routinely obtained video footage from that store's surveillance cameras; in fact, officers had done so in many previous incidents. 7/30/14RP at 50-53. Hawkins revealed that officers had also viewed footage at the store, in the special room where the video equipment was contained. 7/30/14RP at 51.

However, in the Armstrong incident, Hawkins stated, he was never asked about the video by the police, or by any prosecutors. Hawkins volunteered to those investigating the case that recorded video surveillance footage existed – he had viewed it himself -- and this was part of the written report he had filed with AM/PM management. 7/30/14RP at 52. However, the authorities never sought to obtain the tape before it was recorded over. 7/30/14RP at 52.

b. The totality of the facts demonstrate bad faith on the part of the police. The police failure to collect the videotape was an act of bad faith, after warning Mr. Armstrong that his story needed to match the truth shown by the video. First, the police appeared to fail to follow their own routine procedure. Officer Quindelia Martin, the primary police officer responding to the AM/PM scene, knew that Officer Elliott had raised the topic of the AM/PM security video with Mr.

Armstrong. 7/30/14RP at 72. Officer Martin admitted that she was the officer who should delegate the collection of the video to another officer, but here, she simply assumed Officer Elliott would obtain the video. He did not, and she did not follow up. 7/30/14RP at 72-73. Following usual police procedures is probative of police good faith. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992); see also United States v. Elliott, 83 F.Supp.2d 637 (E.D.Va.1999). But likewise, in a contrasting case, failing to act per the evidence collection procedures of the applicable law enforcement manual was deemed probative of bad faith, because agents in that case had acted in contravention of established procedures when the evidence was destroyed. Elliott, 83 F.Supp.2d at 645–47.

The present case involves a failure to follow procedure which, though not a violation of any written police evidence collection standard, accompanies the other facts that amount to bad faith in combination.

Most importantly, the police made misrepresentations that show that this potentially exculpatory evidence went unpreserved as a result of dramatically bad faith on the part of the police. The Supreme Court in Arizona v. Youngblood held that “the presence or absence of bad

faith . . . turn[s] on the police's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed.” Arizona v. Youngblood, 488 U.S. 51, 56, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Here, the Youngblood analysis – which focuses on police knowledge of the potential evidence and actions taken or inaction that allow it to be lost – will establish the bad faith necessary to make out a Due Process violation. Arizona v. Youngblood, 488 U.S. at 56; see also State v. Wittenbarger, 124 Wn .2d at 477.

It is true that the State's duty to preserve potentially useful evidence does not necessarily include going out to seek and discover evidence, or exhausting every angle on an investigation. State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). However, when Mr. Armstrong himself raised the issue of the videotape below, key facts were elicited that establish “bad faith.”²

Mid-trial, during one of Mr. Armstrong’s several requests for new defense counsel, he raised his concerns that no one had communicated with him about a video from the AM/PM store, which it now appeared had been recorded over. 7/30/14RP at 8. When the court inquired, the prosecutor asserted the State had never been in

² The appellate courts review an alleged due process violation *de novo*. State v. Mullen, 171 Wn.2d 881, 893–94, 259 P.3d 158 (2011).

possession of a video. The prosecutor did note that Todd Hawkins, the AM/PM clerk, had communicated to him about a video that would have been recorded over per store practice. 7/30/14RP at 9-10. The court then offered Mr. Armstrong the following reasoning:

So there never was a video for you to get, unfortunately, I don't know whether that would have helped or hurt, but the bottom line is there wasn't a video.

7/30/14RP at 9.

However, the court's analysis that there "never was a video" was ultimately belied by the testimony of Hawkins, and the facts regarding how the police at the scene of the crime abused and falsely employed their knowledge that the AM/PM store, by policy, did indeed record surveillance video footage. Seattle police officer Milton Rodrigue, part of the team responding to the incident, testified about the officers' apparent awareness that there was an AM/PM video of the incident. 7/29/14RP at 69. Rodrigue himself knew that this *particular* AM/PM store had security video – both inside, and outside -- because he had responded to the business before. 7/30/14RP at 33.

In this incident, police had located Mr. Armstrong walking near the store, and spoke with him, an interaction which was captured on the officer's patrol-car video. 7/29/14RP at 69-72, 78-84. Officer

Rodrigue admitted that he concurred when another officer, Officer Elliott, specifically told Mr. Armstrong, while questioning him about the incident, that the store's video depicted what genuinely happened. 7/29/14RP at 79-80; Exhibit 3.

In fact, the officers appear to tell Mr. Armstrong that they already possessed or had viewed the video. Exhibit 3. But the police actually had not obtained the AM/PM video, and neither Officer Rodrigue, Officer Elliott, or any other officer ever did get the video. 7/29/14RP at 80. Officer Rodrigue's testimony was interesting -- he testified that he assumed the video had been collected, stating:

The officer, Officer Elliott, referred to the video, so I'm figuring that he viewed it and possibility was I was just going off his key of the video, possibility of there being one.

7/29/14RP at 80. The next trial day, Officer Rodrigue testified further and made clear that he and the other officer had told Mr. Armstrong that there was a security camera video that would show what happened. 7/30/14RP at 30-32.

This is bad faith. The police never obtained the video after (a) declaring its evidentiary value, and (b) using its existence to question Mr. Armstrong's account. 7/30/14RP at 32. The police misrepresented the circumstances surrounding the tape when they told Mr. Armstrong

that they had it in their possession, and/or that they would get the video. Particularly notable in Exhibit 3, the DVD of the patrol car video in which the police are specifically asking Mr. Armstrong about his alleged assault of Ms. Karavan and his conduct inside the AM/PM, are the following statements by the officers, in Exhibit 3, track 7674@20140420232558:

Time Point	Police Statement
12:45	“We got the whole incident on video”
12:53	“We got you on video”
13:03	“Either you tell us what happened, or we pull the video and it goes to court”
13:33	“tell the truth, like I say, we got the whole thing on video”
13:40	“If you tell me a lie and I go look at the video, I’m going to take it personally”
14:24	We’re going to get a video, we’re going to get the video”

Supp. CP ____, Sub # 38H (Exhibit list - State’s Exhibit 3, track 7674@20140420232558).

Of course, it is true that the police have no duty to help the defendant in obtaining exculpatory evidence. State v. McNichols, 128 Wn.2d 242, 249, 906 P.2d 329 (1995). Police, however, do have a duty to not misrepresent the availability of evidence in a way that would result in the defendant not pursuing it by other avenues. See, e.g.,

United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993) (bad faith where police responded to defense request for laboratory equipment evidence by falsely saying it was being held by them for trial evidence, when it was then destroyed).

Here, it must be presumed that the video footage – stated to exist by officers of a Police Department that regularly responded to this AM/PM store and had viewed and/or obtained video footage in the past – was precisely as important to this criminal case as they specifically told Mr. Armstrong it was. The specific, express statement by the officers was that the AM/PM tape would be obtained and preserved for court, in order to show whether Mr. Armstrong was lying about the claimed assault.

The motivation of law enforcement is pertinent to the question of bad faith. Wittenbarger, 124 Wn.2d at 475–77. The defendant has the burden of showing that the failure to preserve potentially useful evidence “was improperly motivated.” Wittenbarger, 124 Wn.2d at 478. The foregoing is surely the worst possible faith. Mere negligence is insufficient to establish bad faith in the area of lost evidence.

Youngblood, 488 U.S. at 58; United States v. Tercero, 640 F.2d 190, 193 (9th Cir.1980). “Bad faith” in this context requires some showing

of “connivance.” United States v. Loud Hawk, 628 F.2d 1139, 1146 (9th Cir. 1979). That is shown by the facts here. Telling Mr. Armstrong the video was collected or observed – in order to force admissions from him -- when it was not collected, and never was collected, is no mere negligent act.

The police, under the totality of the circumstances, in bad faith, failed to preserve this potentially exculpatory evidence, requiring reversal. Importantly, Mr. Hawkins himself reviewed the video footage – which the police had not requested – and confirmed that the footage screen contained multiple camera angles, depicting not only the interior of the AM/PM store, but also multiple outdoor camera views. 7/30/14RP at 45, 47-8. When looking at the video footage he reviewed from this particular incident, Mr. Hawkins focused on the camera angle showing the interior of the store and the cash register, but the cameras also showed the gas station area and provided a “low view shot” of the bus stop *where the alleged assault occurred*. 7/30/14RP at 47-48. Such a video tape of the crime scene at the time of the crime is potentially exculpatory, and Mr. Armstrong’s conviction should be reversed for a violation of Due Process. U.S. Const. amends 5, 14; Arizona v. Youngblood, 488 U.S. at 56.

E. CONCLUSION

Based on the foregoing, this Court should reverse Dennis Armstrong's conviction and sentence.

Respectfully submitted this 8th day of July, 2015.

s/ Oliver R. Davis

OLIVER R. DAVIS WSBA # 24560
Washington Appellate Project – 91052
Attorneys for Appellant

Appendix A

No. 11

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 20, 2014, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That:
 - (a) the defendant's conduct was an assault or
 - (b) the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3) and (5), and either of the alternative elements (4)(a), or (4)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

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

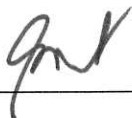
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72331-6-I
v.)	
)	
DENNIS ARMSTRONG,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2015, 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:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] DENNIS ARMSTRONG	(X)	U.S. MAIL
939746	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JULY, 2015.

X _____ 

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