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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93119-4
COA No. 72331-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS ARMSTRONG,

Petitioner.

FILED
May 10, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jim Rogers

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Armstrong seeks Supreme Court review of the decision affirming his conviction for a Felony-level no-contact order violation, issued February 29, 2016; motion to reconsider denied April 27, 2016. Appendix A.

B. COURT OF APPEALS DECISION

The Court rejected Mr. Armstrong's arguments that:

(1) his right to unanimity in alternative means cases, under Const. Art. § 21, was expressly violated by the prosecutor's "six of you" and "six of you" argument in closing, along with the jury instructions; and

(2) that his Due Process rights were violated under U.S. Const. amend. 14, by the police failure to collect the footage from an AM/PM store video taping system, of which system multiple officers were actually aware, and which footage would have partly showed the scene of the alleged incident. Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. In an alternative means case, when the prosecutor tells the jury of 12 that "six of you" can vote guilty based on one alternative, and the other "six of you" can base guilt on the other alternative (arguing that this solves the problem existing if neither means has

persuaded all 12 jurors), is the defendant's right to unanimity violated, requiring reversal, regardless of whether there was substantial evidence on both means?

2. Should this Court disapprove of the jury instruction that tells juries they need not be unanimous as to which alternative means was proved because it promotes expressly non-unanimous verdicts?

D. 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 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 Armstrong 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 off 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," so she went to the bus shelter, crossing properties, sidewalks, and the streets in order to get to where Mr. Armstrong was. 7/29/14RP at 30, 39-40.

When she arrived at the bus shelter, Mr. Armstrong became angry. 7/29/14RP at 40. According to Ms. Karavan's claims, Mr. Armstrong hit her. 7/29/14RP at 42. She also claimed that they struggled over her jacket, and Karavan then ran into a nearby AM/PM store; Armstrong briefly followed. 7/29/14RP at 45-46. The cashier called 911 at Karavan's request. When police arrived at the bus stop area, in order to persuade Mr. Armstrong to speak with them, the officers told him as follows, *inter alia*:

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"
14:24	We're going to get a video, we're going to get the video"

(Exhibit list - State's Exhibit 3, track 7674@20140420232558). At trial, also submitted as evidence were documents regarding Mr. Armstrong's two prior convictions for violations of no-contact orders, 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 the video". Exhibit 3 (DVD).

2. <u>Closing argument and verdict</u>. In closing argument, the prosecutor told the jury that there were "two ways to commit this crime" of felony-level violation – first, the alternative of the prohibited contact being an assault, or second, the alternative of the defendant having two prior convictions for no-contact order violations. The prosecutor told the jury it could convict the defendant based on six jurors believing Mr. Armstrong was guilty of the "assault" means, and the other six jurors could base guilt on the existence two prior convictions – unanimity was **<u>not</u>** required. The prosecutor specifically told the jury of 12 it could split on the basis for guilt--

> But the kind of secondary paragraph that says, that speaks about unanimity, so whether or not you have to be unanimous -- that's a hard word to say -- it's essentially instructing you that if six of you believe

> that: Hey look, we don't know if you've been twice previously convicted but we believe you assaulted her and six of you say: We think he's been twice previously convicted but we don't know if he assaulted her but we do believe he violated the no-contact order by going to her residence that that's guilty. So you don't have to be unanimous as to which of the alternative means

7/31/14RP at 17-18.

E. ARGUMENT

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

a. <u>Review is warranted because the decision was contrary to the state constitution and upholding such a non-unanimous verdict represents a grave risk of substantial erosion of a constitutional value in this State</u>.

Wash. Const. art. 1, sec. 21 protects the right to an expressly unanimous verdict. Under this rule, in alternative means cases, as the Court of Appeals noted in its decision, general verdicts have not been reversed on appeal, so long as there was substantial evidence on both alternative means. Decision, at pp. 5-6.

Mr. Armstrong argues, however, that a verdict that is <u>expressly</u> **non**-unanimous – meaning under all the circumstances of the case -- must always violate this state constitutional protection, *without regard* to whether there was substantial evidence on both means. The

constitutional provision, and the existing case law, require this outcome. When a panel of jurors is told by the prosecutor that 6 of them can base guilt on one statutory means, and the other 6 can convict the defendant based on the other means if they aren't persuaded by the first, a verdict procured in that manner is expressly non-unanimous, in the circumstances of the case. This is constitutional error and it is a matter of substantial public interest. Review should be granted. RAP 2.5(a)(3), (4).

The Court of Appeals mistakenly apprehended that it would need to depart from existing Supreme Court and Court of Appeals precedent to so rule. It did not need to do so. Existing cases that make the statement, that defendants are not entitled to expressly unanimous verdicts where there is substantial evidence on both means, are simply not like this case, because this case involves a verdict that was expressly non-unanimous – not just a verdict that fails to bear adequate express assurances of unanimity, but which error can be deemed harmless. RAP 2.5(a)(1),(2).

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

The two alternative means of committing felony-level violation of a no-contact order were presented to the jury with an instruction that

stated the jury did not need to be unanimous as to which was committed. RCW 26.50.110; CP 28. Instruction 11 stated in 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. Owens, 180 Wn. 2d 90, 95, 100, 323 P.3d 1030 (2014). 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 based on the presence of substantial evidence -- and the conviction produced thereby, violated Mr. Armstrong's right to unanimity under article I, section 21.

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

The presence of substantial evidence on both means should not be a basis to affirm in this particular case. 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. The primary problem with the State's "substantial evidence on both" argument for affirmance is demonstrated in this case. The argument 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. Review is warranted because of the constitutional issue at stake where the record shows actual knowledge of the taping system by the police, and shows that the defendant was dissuaded from collecting the potentially exculpatory evidence by the officers' bad-faith claims that they would be collecting it.

The Court of Appeals rejected Mr. Armstrong's argument that the police acted in bad faith and allowed the destruction of potentially exculpatory evidence. The Court of Appeals reasoned that the officers did not know of the videotape's existence. Decision, at pp. 8-9.

But it shouldn't matter that one or more officers among the many responding to the scene that night, might have been only surmising (correctly, in any event) about the existence of the specific videotape – rather than being specifically "aware of whether there actually was footage of the incident." Decision, at p. 8. The argument raised by Mr. Armstrong is that police knew about the AM/PM

videotaping system, and then , the police conduct of not gathering the videotape from the taping system -- of which they were aware – after telling Mr. Armstrong they were going to get it – allowed it to be recorded over.

There was common police knowledge among the arrest team that this AM/PM store had security video cameras, and officers had obtained such tapes before, and viewed tapes at the store. Thus the evidence demanded a conclusion of police knowledge that the threats of "getting the tape" referred to something that certainly existed to be collected. The bad faith, therefore, is the statements of threat (tell us the truth because we're getting the tape) that would reasonably dissuade the defendant from getting the videotape.

Mr. Armstrong – like most all lay defendants, not being a sophisticate in the ways of law investigation and evidence procurement – was in these circumstances, understandably, of the belief that he need not try to get the videotape himself. And then it was destroyed -- because the police who threatened Mr. Armstrong with getting the tape allowed him to continue with the mis-impression that they would do so, now that their particular interest in the tape (using it to threaten Mr. Armstrong) had lapsed. This is bad faith.

Crucially, this is no idle post-trial speculation. Mr. Armstrong, repeatedly demanded of his defense counsel and the court to know where that videotape was. See AOB, at pp. 8-10. The police conduct and failures that rendered that tape lost to the winds, however categorized, were not "mere oversight." Decision, at p. 8. Review is warranted. RAP 13.4(b)(3).

b. 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.

First, where the police allow potentially exculpatory evidence to be destroyed, the defendant must show that the police acted in "bad faith" in order to secure reversal. The presence of "bad faith" on the part of the police must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

At the scene of the bust stop, the police officers repeatedly made clear to Mr. Armstrong their assertion that the videotape from the AM/PM store would show what had or had not occurred in the alleged incident. It doesn't matter that a particular officer, or officers, among the many responding might have been only surmising about the

existence of the videotape. The issue is the dissuasive effect on the listener of the many statements that the officers made. This is the error in the analysis of the Court of Appeals – Mr. Armstrong heard the police say repeatedly that they were going to get the videotape. As the evidence in this case shows in perhaps the most clear manner possible, this had a cause and effect. Mr. Armstrong absolutely expected that the officers would do what they said they were going to do – get the tape. He felt repeatedly ignored during trial when he asked *where the videotape was*. It was, it turns out, lost – the police did not get it.

The Court of Appeals wrongly held that the evidence was not potentially useful. Videotape of the area of the incident was potentially exculpatory evidence. The complainant alleged that the defendant was sitting at the bus stop, but then she claimed he got angry at her, began pounding the walls of the bus stop, and then punched her. See 7/29/14RP at pp. 33-65 (and Appendix A hereto) (testimony of Ms. Karavan). A video that shows even part of the bus stop, throughout the incident that occurred there, is "potentially useful" to a high degree. This Court failed to consider that a videotape – the best possible evidence that could exist -- depicting the scene, at the time, 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 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. 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. The authorities never sought to obtain the tape before it was recorded over. 7/30/14RP at 52.

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, 645-47 (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.

Showing grave unfairness is the fact that Mr. Armstrong relied on the police assertions at the scene. 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 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.

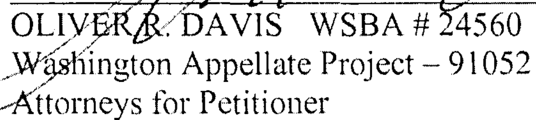
This is potentially exculpatory evidence destroyed as a result of bad faith. Police do have a duty to not misrepresent the availability of evidence in a way that would result in the defendant not pursuing it by other avenues. See, e.g., United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993) (bad 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). This Court should grant review. U.S. Const. amends 5, 14; Arizona v. Youngblood, 488 U.S. at 56.

F. CONCLUSION

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

Respectfully submitted this 8 day of May, 2016.



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

2016 FEB 29 AM 10: 12

STATE OF WASHINGTON,	)	
	)	No. 72331-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
DENNIS ARMSTRONG,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 29, 2016

SPEARMAN, C.J. — Dennis Armstrong was convicted of domestic violence felony violation of a court order. He appeals, arguing that his constitutional right to a unanimous jury verdict was violated when the jury was expressly instructed that they did not have to be unanimous as to the means of committing the charged offense. He also argues that his due process rights were violated because the State failed to preserve potentially exculpatory evidence from a nearby surveillance camera. We find no error and affirm.

FACTS

On April 20, 2014, Nadia Karavan was living at a residence on Orcas Street in Seattle known as the "Bunkhouse." Verbatim Report of Proceedings (VRP) (7/29/14) at 35-6. At that time she had a no-contact order against her boyfriend, Dennis Armstrong, but she had some of his belongings that she wanted to return to him. Karavan was eating dinner when another resident told

her that Armstrong was outside. Karavan walked outside the residence and saw Armstrong sitting at a bus shelter about a block away. Id. at 39. She went to the bus stop to tell him that she was going to give his things back to him. Id.

Armstrong appeared to have been injured and became angry at Karavan when she arrived. They struggled and Armstrong hit Karavan. Karavan ran into a nearby Arco AM/PM store and asked the cashier to call the police. Armstrong followed her inside and said not to call the police.

Todd Hawkins, the clerk on duty, called 911 and Karavan spoke with the dispatcher. Police officers located Armstrong a couple of blocks away and apprehended him. The officers questioned him about the incident and urged him to tell the truth, because they were going to get a video recording of the incident and compare it to Armstrong's account. The questioning was recorded on the police in-car video system and presented as an exhibit at trial.

Hawkins testified "that video surveillance was taken of the whole incident because I reviewed it myself right after the incident," but that "the portion of the video that I mainly saw and focused on was what was happening in the store. VRP (7/30/14) at 45-47. He testified that there were roughly 16 cameras on the premises, with 2-3 covering the gas pumps. "They basically ... cover just the gas pumps. You may see a slight view, low view shot, of maybe the bus stop, a small piece of the sidewalk. But that's it." Id. at 47.

Officer Martin was in training with Officer Elliott when they responded to the scene and spoke with Karavan. She testified that she did not personally investigate the presence of surveillance video at the Arco AM/PM. She heard

Officer Elliott "ask about it," but was "unaware of what the answer...was, whether there was surveillance or not." Id. at 72-73. She testified that "I assumed it was the responsibility of someone else that was at the scene." Id. at 73. Detective Christiansen also did not investigate any video at the AM/PM because he "didn't know they existed." Id. at 86.

Officer Rodrigue, who responded as backup and questioned Armstrong, testified that "Officer Elliott said there was a video at the store. And then I followed up on his key, being that there was a video." VRP (7/30/14) at 30-31. He testified that "I am not sure if there was or wasn't. I didn't go back to the store." Id. at 31. He recalled telling Armstrong that there was a video, but he "[did]n't know if [it was] true or not." Id. at 32. He was basing these statements "off of the other officers." Id. He testified that he "believe[d] I was told that it did have a video on a prior case." And that the video was "[p]ossibly" inside and outside as well. Id.

Armstrong was charged with domestic violence violation of a court order, elevated to a felony by either a finding of either two prior offenses, or by the commission of an assault. While trial was pending, he brought a motion to discharge counsel and asked the court to appoint him a new attorney. His request was denied. At trial, he again requested alternate counsel and cited the lack of knowledge of the whereabouts of the surveillance video as one basis for his request.

Regarding unanimity, the jury was instructed that: "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." Clerk's Papers (CP) at 28. Consistent with this instruction, in closing argument, the prosecutor told the jury that there were two ways to commit the crime, and that the jury did not "have to be unanimous as to which of the alternative means were present; you just have to be unanimous that all four of the elements have been satisfied. VRP (7/31/14) at 18.

Armstrong was found guilty of domestic violence violation of a court order as charged. He appeals.

DISCUSSION

Armstrong argues that his right to a unanimous jury verdict under article I, section 21 of the Washington Constitution, was violated when the jury was expressly instructed that it did not have to be unanimous as to whether a conviction rested on two prior violations, or on a finding that an assault was committed. The State argues that express unanimity is not required where there is sufficient evidence to support each of the alternative means of committing a crime.

Both sides agree that the felony violation of a no-contact order is an "alternative means" crime. An "alternative means" crime is one, which provides that the proscribed criminal conduct may be proved in a variety of ways. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Under RCW 26.50.110(4), any assault that is a violation of a valid protection order that does not amount to first- or second-degree assault, is a class C felony. If a defendant has been convicted

of at least two prior violations of a protection order, the third violation is also a class C felony. RCW 26.50.110(5).

Under Washington law, a defendant may only be convicted if the members of the jury unanimously conclude that he or she committed the criminal act with which he or she was charged. State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991). A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (abrogated on other grounds by In re Personal Restraint of State v. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992)) (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22). This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when he or she is charged with an alternative means crime. When there is sufficient evidence to support each of the alternative means of committing the crime, express unanimity as to which means is not required. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). If there is insufficient evidence to support any of the means, however, a particularized expression of jury unanimity is required. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

Armstrong concedes that the evidence is sufficient to support both alternative means of committing a felony violation of a no-contact order. He argues that "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." Brief of Appellant at 6 (citing State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)).

We agree and "strongly urge" counsel and trial courts to "heed [the state supreme court's] notice that an instruction regarding jury unanimity on the alternative method is preferable." Ortega-Martinez, 124 Wn.2d at 717, n.2 (citing Whitney 108 Wn.2d at 511. An instruction would "eliminate potential problems which may arise when one of the alternatives is not supported by substantial evidence, . . ." Id. However we conclude that such an instruction was not required in this case. Because sufficient evidence supports a finding that Armstrong committed a felony violation of a no-contact order by either means, we find no violation of his right to jury unanimity.[1]

Armstrong next argues that his due process rights were violated because the State failed to preserve evidence that was potentially exculpatory. He had been told that there was security videotape footage that depicted the bus stop and the events that took place, but it was never obtained. The State acknowledges that the police did not obtain any surveillance video recordings, but argues that Armstrong cannot demonstrate that such video would have any exculpatory value, or that their failure to obtain it was in bad faith.

[1] Armstrong acknowledges the supreme court precedent, most recently Owens, 180 Wn.2d 90, which holds that express unanimity is not required when the evidence is sufficient to support each alleged alternative means of committing the crime. Reply Brief at 11-12. But he contends that because the cases that so hold are "both incorrect and harmful," we should disregard them. Id. at 12-13. We decline the invitation. We are bound to follow our Supreme Court's precedents and have no authority to ignore or overrule them. 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

The Fourteenth Amendment requires that criminal prosecutions conform to prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). The prosecution has a duty to disclose "material exculpatory evidence" to the defense and a related duty to preserve such evidence for use by the defense. Id. The failure do so is a violation of due process which necessitates the dismissal of criminal charges. Id.

"Material exculpatory evidence" is that which possesses both an exculpatory value that was apparent before it was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Id. at 475. If evidence is only "potentially useful," however, a defendant must show bad faith on the part of the police. Id. at 477. Potentially useful evidence is that "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011).

Here, the store clerk testified that the outside cameras "basically ... cover just the gas pumps." He testified that "[y]ou may see a slight view, low view shot, of maybe the bus stop, a small piece of the sidewalk. But that's it." VRP (7/30/14) at 47. The only reasonable inference from this uncontradicted testimony is that even if the video had been retained it would likely have revealed little about what took place at the bus stop. Based on this record, we cannot say

the video is materially exculpatory and conclude that, at best, it would be only potentially useful to the defense.

Armstrong acknowledges that he has the burden to show that the failure to preserve potentially useful evidence was "improperly motivated." Br. of Appellant at 19, (quoting Wittenbarger, 124 Wn.2d at 478. Armstrong argues that "bad faith" in this context requires some showing of "connivance." United States v. Loud Hawk, 628 F.2d 1139, 1146 (9th Cir.1979) overruled on other grounds by United States v. W. R. Grace, 526 F,3d 489 (9th Cir. 2008)). He first argues that the failure to collect the videotape was an act of bad faith because the police made representations about its existence, its evidentiary value, and their intention to use it to challenge Armstrong's account of the events. He acknowledges that the police have no duty to assist the defendant in obtaining exculpatory evidence, but he argues that they have a duty to not misrepresent the availability of evidence in a way that would cause the defendant to not seek to prove his case by other means.

The State admitted that it used a ruse, but argues that its failure to follow up and investigate did not constitute bad faith. The State argues that it was mere oversight. We agree. Armstrong's bad faith argument is based on the fact that he was led to believe that the police had a videotape when they did not, not that it was intentionally destroyed. The officers testified that they were unaware of whether there actually was footage of the incident at the bus shelter, even though they referred to it when questioning Armstrong after hearing another officer mention it. The testifying officers assumed that it was the responsibility of another

to collect it. Without a showing that the State intentionally destroyed the evidence or made an effort to conceal it from Armstrong, the failure to obtain the video recording was not a violation of due process. As in Youngblood, where a biological sample was not properly refrigerated, this oversight "can at worst be described as negligent." 488 U.S. at 58.

Next, Armstrong argues that the police failed to follow their own routine procedures for collecting evidence. Compliance with departmental destruction policies is evidence of good faith. See, e.g., United States v. Barton. 995 F.2d 931, 935-36 (9th Cir.1993); United States v. Heffington, 952 F.2d 275, 280–81 (9th Cir.1991). But, contrary to Armstrong's argument, "the destruction of evidence ... in violation of explicit policy and procedures ... [does] not ipso facto establish bad faith." Groth, 163 Wn. App. at 559–60 (citing United States v. Montgomery, 676 F.Supp.2d 1218, 1245 (D.Kan.2009)).

Here, there was no evidence in the record that the police had routine procedures or policies for collecting evidence that included gathering or preserving surveillance video footage. The store clerk testified that he had previously seen police go upstairs to view videos with employees or store management. The fact that the officers did not view or obtain the video in this incident is not indicative of a failure to follow routine procedures, nor would it give rise to an inference of bad faith.

Finally, Armstrong argues that the court should reverse because of the unfairness of being led to believe that the video evidence would be available to exonerate him. While his frustration may be understandable, Armstrong's

reliance on the officers' representations does not amount to bad faith or a violation of due process.

Statement of Additional Grounds

Armstrong submits a statement of additional grounds (SAG) under RAP 10.10, where he first raises a number of issues related to the evidence presented at trial. We limit our review of issues raised in a statement of additional grounds to those that inform the court of the nature and occurrence of the alleged errors. RAP 10.10(c). We do not address issues involving facts or evidence not in the record, as those are properly brought in a personal restraint petition and not a statement of additional grounds. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

Armstrong argues that the recording of the 911 call had been tampered with and that there were discrepancies in the statements made by the store clerk about whether he chased Karavan. He claims that certain police reports were withheld and others were inaccurate with regard to any in-store chases. Armstrong also argues that Karavan had motive to cause a violation in order to take part in the victim compensation program offered by the prosecuting attorney. Finally, he raises as grounds for reversal the fact that a corrections facility guard opened Armstrong's mail containing his attorney's brief. None of these issues, if proven, would have any relevance to the charges against Armstrong, nor would they negate any element of the offense. To the extent that these issues involve facts or evidence not in the record, they would be properly brought in a personal restraint petition.

Armstrong argues ineffective assistance of counsel and purposeful prejudicing of his defense in retaliation for his request for new counsel. In order to prevail on a claim of ineffective assistance, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first prong of the Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The second prong requires the defendant to show there is a reasonable probability that, but for counsel's conduct of errors, the results of the proceeding would have been different. Id. There is a strong presumption of effective assistance. In re Detention of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Armstrong refers to counsel's failure to object to the State's characterization of his conduct as "'chasing,'" and omission of the details of Armstrong's head wound. SAG at 3. He also claims that his attorney asked questions that damaged his case, in particular when he asked Karavan how many times Armstrong allegedly hit her. This court will not find ineffective assistance of counsel if the challenged actions of counsel go to the theory of the case. State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Armstrong fails

to show that these statements and omissions were not part of a legitimate trial strategy.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Appelwick, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 72331-6-I
Respondent,	)	
	)	
v.	)	ORDER DENYING MOTION TO RECONSIDER
	)	
DENNIS ARMSTRONG,	)	
	)	
Appellant.	)	

Appellant Dennis Armstrong filed a motion to reconsider the trial court's decision dated August 18, 2014. A majority of the panel has determined the motion should be denied.

IT IS HEREBY ORDERED the motion to reconsider is denied.

Dated this 27th day of April, 2016.

Spearman, C.J.

Presiding Judge

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 APR 27 AM 10: 14

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72331-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 10, 2016