Supreme Court No. 95620-1
COA No. 75546-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO LOPEZ-RAMIREZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Francisco Lopez-Ramirez requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v.Lopez-Ramirez, No. 75546-3-I, filed February 12, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The state and federal constitutions guarantee a criminal defendant the right to be tried by an impartial jury drawn from a cross-section of the community. The record below established a systematic underrepresentation of distinct minority groups in Seattle juries which is aggravated by local practices. Should this Court grant review to address the important constitutional question of whether Mr. Lopez-Ramirez was denied his constitutional right to a jury venire drawn from a fair cross-section of the community? RAP 13.4(b)(3), (4).

2. Where the government fails to preserve materially exculpatory evidence, criminal charges against a defendant must be dismissed. Video evidence of another person who was identified by the complainant as the perpetrator of the conduct alleged in Count 2 was lost or destroyed and unavailable to Mr. Lopez-Ramirez in his defense

at trial. Should this Court grant review and hold the trial court erred in failing to dismiss Count 2 where the State failed to retain this crucial exculpatory evidence? RAP 13.4(b)(1), (4).

3. The statute required the State to prove beyond a reasonable doubt that Mr. Lopez-Ramirez's conduct was "intentionally" "open and obscene." The State's evidence supporting count 1 showed Mr. Lopez-Ramirez deliberately tried to cover himself. Was the evidence therefore insufficient to sustain the conviction?

C. STATEMENT OF THE CASE

On the morning of February 3, 2016, Saki Yoshimoto, a student at Seattle Central College, was studying at a desk in the library. RP 365-68. A man sat down next to her at the same table. RP 369. After some time, Ms. Yoshimoto realized "he was showing his private part and down to his zipper." RP 369-72. She quickly went to tell a librarian who called security. RP 373.

Campus public safety officer Joel Workinger responded. When he contacted Ms. Yoshimoto, she identified Jimmy Bellinger as the perpetrator. RP 270-74, 281-85. She told the security officer she was 100% certain. RP 376-83, 387. The police arrived and arrested Mr. Bellinger based on Ms. Yoshimoto's identification. RP 330-31, 335.

Mr. Bellinger acknowledged he was not a student and had been in the bathroom before being contacted by security. RP 340-41.

The director of public safety at the college, Elman McClain, retrieved security camera video from the library and turned it over to the police. RP 286-88. In reviewing the video, Mr. McClain observed Mr. Bellinger walking between the stacks and said he seemed suspicious because he was not obviously studying. RP 304-06.

Later that afternoon, Yolonda Matthews was studying in the Seattle Central College library when she observed Mr. Lopez-Ramirez seated nearby. RP 448-50. After about fifteen minutes, she saw his penis and noticed he was masturbating. RP 450-54, 463, 466-67. Ms. Matthews testified Mr. Lopez-Ramirez had a book and was trying to cover himself. RP 467. She got up and reported the incident to the librarian. RP 460.

Public safety officer Timothy Choi responded. RP 250-52. He contacted Mr. Lopez-Ramirez, and testified "I saw that his hand was moving underneath the folder or magazine." RP 252. When the officer removed the magazine, he "saw his hand on his penis." RP 252. A police officer responded and arrested Mr. Lopez-Ramirez. RP 337-38.

The following day, Mr. McClain noticed "some questionable things on the morning tape" leading him to believe Ms. Yoshimoto could have been mistaken in her identification. RP 301. Seattle Police Officer Marty Malone returned to the college on February 8 and viewed the video. RP 335-36. Officer Malone testified the video showed that Mr. Bellinger walked by the table but did not sit down. RP 336. Officer Malone received a USB with the video evidence. Id.

Seattle Police Detective David Sullivan testified he came on the case in April and reviewed the evidence and discovered significant portions of the video were missing. RP 313-16, 327-29.

Mr. Lopez-Ramirez was charged with two counts of felony indecent exposure.[1] CP 1-7, 198-99. Count 1 pertained to the second incident involving Ms. Matthews. CP 6, 198. Count 2 pertained to the earlier incident involving Ms. Yoshimoto. CP 6-7, 198-99. The State further alleged Mr. Lopez-Ramirez acted for the purpose of sexual gratification under RCW 9.94A.835. Id.

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[1] Mr. Lopez-Ramirez stipulated that he had two prior convictions for indecent exposure. CP 287; RP 445; Exhibit 13.

Mr. Lopez-Ramirez moved to dismiss Count 2 based on the loss of crucial video evidence of Mr. Bellinger during the morning incident. RP 5, 30-48. The court denied the motion. RP 67, 352, 444, 481.

Mr. Lopez-Ramirez also moved for relief from systematic underrepresentation of minorities in the King County jury pools. RP 5, 72- 87. The trial court found the evidence did not establish that the process by which King County summonsed potential jurors resulted in systematic exclusion of black jurors. RP 88, 93, 223.

The jury found Lopez-Ramirez guilty as charged of both counts, and found the offenses were committed with sexual motivation. CP 295-98. The Court of Appeals affirmed. Appendix.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to address the important constitutional question of whether Mr. Lopez-Ramirez was denied his constitutional right to a jury venire drawn from a fair cross-section of the community.

Prior to trial Mr. Lopez-Ramirez moved for a jury drawn from a jury pool that fairly represented the population of King County and did not exclude any distinctive groups of King County residents. CP 74-170. The motion was based on the research of Professor Katherine Beckett, PhD, a professor of sociology at the University of Washington

who analyzed data from juror surveys from January through April 2015. CP 76, 115-29. Professor Beckett's study showed that potential jurors identifying as African-American or Black, American Indian or Alaskan Native, Asian, Pacific Islander or multiracial, are all underrepresented in the jury pool as compared to their representation in the jury eligible population. CP 76, 122-26. Mr. Lopez-Ramirez proposed several ways to overcome this underrepresentation, but failing those argued his trial should not proceed. CP 106. Given this showing that certain groups were underrepresented in the jury pool, the court erred in denying the motion.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant the right to be tried by "an impartial jury drawn from a cross-section of the community." Berghuis v. Smith, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010). Washington Constitution Article I, section 21 guarantees that "[t]he right of trial by jury shall remain inviolate." Article I, section 22 promises that an accused shall have the right to "a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed."

The core of this right is "the selection of a petit jury from a representative cross-section of the community." Taylor v. Louisiana, 419 U.S. 522, 528, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). It is essential that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Duren v. Missouri, 439 U.S. 357, 363-64, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). A jury must be "drawn from sources reflecting a cross section of the community." Berghuis, 539 U.S.at 319.

To establish that the fair cross-section requirement has been violated, a party must show that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. Duren, 439 U.S. at 364; State v. Cienfuegos, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001).

The burden then shifts to the State to justify the jury selection processes underlying the underrepresentation, i.e., the State must

demonstrate that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process." Duren, 439 U.S. 367-68; In re Pers. Restraint of Yates, 177 Wn.2d 1, 19, 296 P.3d 872 (2013).

There is systematic underrepresentation in Seattle juries which is aggravated by local practices. Professor Beckett's report established that the jury pools in King County do not reflect a fair cross-section of the population of King County. CP 79, 122-26. The results of her analyses show that almost every minority group in King County is underrepresented in the jury venires, and that black or African-American jurors in particular are underrepresented. Id.

Under the second prong of the Duren test, a statistical comparison between the jury pool and the jury eligible population illustrates the systematic underrepresentation. Berghuis, 559 U.S. at 329; United States v. Hernandez-Estrada, 749 F.3d 1154 (9th Cir. 2014) (outlining various tests to gauge the disparity). Professor Beckett used a comparative disparity test to assess the degree of underrepresentation of black jurors. CP 81-82, 118-26. Comparing the survey results in both the Seattle and Kent courthouses, Professor

Beckett found black jurors were underrepresented by a 35.5% comparative disparity. CP 82, 124.

Other courts found similar comparative disparities established the second element of the Duren test. See, e.g., United States v. Garcia-Dorantes, 801 F.3d 584 (6th Cir. 2015) (3.45% and 1.66% absolute disparities and 42% and 27.64% comparative disparities for African-Americans and Hispanics were sufficient); Azania v. State, 778 N.E.2d 1253 (Ind. 2002) (absolute disparity of 4.1% and comparative disparity of 48.2%); United States v. Osorio, 801 F.Supp. 966 (D. Conn. 1992); United States v. Rogers, 73 F.3d 774 (8th Cir. 1996).

The underrepresentation of black jurors in venires appears to be the result of systematic exclusion in the jury selection process. CP 88-95. The court does not effectively summons people who live in poorer, more mobile zip codes with more minority residents. The result is to favor of selecting the wealthier residents of King County who live in the areas with the highest concentration of white jurors.

Underrepresentation is "systematic" if it is "inherent" in the jury selection mechanism that is used or if it results from a rule or practice over which the court has control. Duren, 439 U.S. at 366. "[T]here is no need to prove intent to discriminate" in order to meet the third part

of the Duren analysis. Cienfuegos, 144 Wn.2d at 232 (citing Taylor, 419 U.S. at 528-29). "Under Duren, 'systematic exclusion' can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation." United States v. Weaver, 267 F.3d 231, 244 (3rd Cir. 2001).

The consistency with which black jurors are underrepresented in Seattle jury venires establishes the systematic nature of the exclusion described in Duren. In Duren, underrepresentation of women in the venire was found to be systematic because the jury system made it very easy for women who were summonsed to exempt themselves from service at different points in the process. 439 U.S. at 361-62, 367.

The constitution and RCW chapter 2.36 allocate responsibility for summoning a jury pool drawn from a fair cross section of the community to the courts. The response of the courts has served to aggravate the disparity, however, because it is clear that overrepresentation of the higher responding zip codes is now "inherent" in the superior court's method of summonsing jurors. CP 88-94. Rather than take steps to increase responses from underrepresented areas of the county, the court has elected to send out more summonses to obtain enough jurors for the court's needs. CP 94. This results in

oversampling of those zip codes that traditionally have higher response rates and under sampling of lower responding zip codes.

The deliberate choices that predictably result in systematic underrepresentation of minority residents of King County in jury venires violates the constitutional mandate to provide juries from a fair cross-section of the community. CP 94-95. This disparity is aggravated by King County Local General Rule (LGR) 18 which divides the county into separate jury districts because it furthers the systematic underrepresentation of black jurors in trials in the Seattle courthouse. CP 95-99. Pursuant to LGR 18, the county is divided by zip codes into the "Seattle Jury Assignment Area" and the "Kent Jury Assignment Area." Venires for each courthouse are drawn exclusively from their respective jury assignment areas. The Kent Jury Assignment area contains a much higher percentage of the African-American population within King County. The result is systematic underrepresentation on Seattle jury venires. CP 95.

The practice of drawing juries exclusively from the Seattle Jury Assignment Area cannot be squared with the fair cross-section requirement. Furthermore, the Seattle and Kent jury assignment areas are no longer "very similar in terms of race and ethnicity" as was

presumed in State v. Lanciloti, 165 Wn.2d 661, 665, 201 P.3d 323 (2009). See CP 96 (African-Americans and other minorities have moved from the Seattle area to South King County due to economic and other factors. See, e.g., M. Mayo and L. Turnbull, Shifting Population Changes Face of South King County, Seattle Times, February 23, 2011.

The efficiency of summonsing jurors cannot be achieved at the expense of a fair cross-section of the community when summonsing jurors. Cf. Taylor v. Louisiana, 419 U.S. at 535 (holding administrative convenience is not a justification for allowing underrepresentation of a distinct group in the jury venire). Courts in other states have held that a fair cross section analysis is implicated when a county is divided into jury districts such that the jury pools are no longer proportionate. CP 98.

Mr. Lopez-Ramirez was prejudiced by the underrepresentation. When the selection process excludes a distinct group of the population from jury service, "the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . [the group's] exclusion deprives the jury of a perspective on human events that may have

unsuspected importance in any case that may be presented." Peters v. Kiff, 407 U.S. 493, 503-04, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972) (citing Ballard v. United States, 329 U.S. 187, 193-94, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (footnote omitted) (rejecting notion that jurors of different genders are "fungible")).

Mr. Lopez-Ramirez proposed several alternatives which might remedy the systematic underrepresentation of these distinct groups including sending another randomly selected summons to a potential juror from the same zip code when a summons is returned as undeliverable. CP 104. The current potential juror rolls which are drawn from voter registration, and driver license and identification card rolls, could be supplemented with lists including individuals who are receiving unemployment and welfare benefits. See, e.g., Conn. Gen Stat. § 51-222a(a)(c) (including recipients of unemployment compensation). The courts could follow up with jurors who do not respond by invoking the power of RCW 2.36.170 making it a misdemeanor to intentionally fail to respond to a summons. Courts could also provide resources for jurors whose employment and personal obligations make it harder to respond to the call for jury service

including increasing the daily compensation and providing child care or reimbursing travel costs.

In the absence of these reasonable steps to ensure the jury venire does not clearly and systematically underrepresent these distinct groups in the community, the process is constitutionally flawed and violates the Sixth and Fourteenth Amendments as well as the guarantees of Article I, sections 21 and 22. Mr. Lopez-Ramirez's conviction must, therefore, be reversed.

2. The trial court erred in failing to dismiss Count 2 where the State failed to retain material exculpatory evidence.

Prior to trial, Mr. Lopez-Ramirez moved to dismiss Count 2, the morning incident, based on the State's failure to retain video evidence of the man, Mr. Bellinger, identified by Ms. Yoshimoto, who she alleged committed the crime. CP 8-48. Mr. McClain had made a copy of the video and provided it on a USB to Officer Malone on February 8. CP 27, 29, 37. When the USB given to Officer Malone was retrieved from the evidence unit and examined by Detective Sullivan in April, however, he discovered that there were "no files that contained any viewable data." CP 294. Detective Sullivan explained that he did not determine "if there were corrupted files on the drive, or if the files

themselves were simply missing." Id. When Detective Sullivan went back to the college to obtain another copy of the video, Mr. McClain determined that no other copy had been retained. CP 294. It appeared that the video was lost when it did not get protected for some reason and was overwritten after 90 days. CP 30. Only Mr. McClain and Officer Malone ever saw the missing video. Id.

Mr. McClain described in a pre-trial interview that he observed the video of the earlier incident and characterized Mr. Bellinger's conduct as "suspicious." CP 10, 30. Mr. McClain described how Mr. Bellinger "walked down a book row, picked up a stool, moved the stool down-further down the book rows, sit down on the stool." CP 31. He said there were a couple of students sitting at a study table nearby and he presumed Mr. Bellinger was "peepin' on 'em or doin' somethin' weird." CP 31.

In light of Ms. Yoshimoto's definitive identification of Mr. Bellinger as the man who had exposed himself to her, the loss of the video indicating Mr. Lopez-Ramirez was not the perpetrator was critical. CP 12.

Due Process ensures the right to have material evidence preserved for use by the defendant at trial. The right to due process

demands fundamental fairness and a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); U.S. Const. amend. XIV.

Defendants have a right to have material evidence preserved for use at trial. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); State v. Wright, 87 Wn.2d 783, 557 P.2d 1 (1976). If the government fails to preserve materially exculpatory evidence, criminal charges against a defendant must be dismissed. State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996).

Evidence is materially exculpatory if (1) it possesses an exculpatory value that was apparent before the evidence was destroyed; and (2) the evidence would be unobtainable by other reasonably available means. Wittenbarger, 124 Wn.2d at 475; State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987).

The lost video of Mr. Bellinger was materially exculpatory and could not be replaced. Based on McClain's observations of the video before it was lost we know that Mr. Bellinger was acting suspiciously. CP 30-31. He may have been "peeping" on other students; he was certainly seen near the complainant and was subsequently identified by

her with uncommon certainty. CP 14, 31. The importance of the missing video in conveying these facts to the jury was beyond question.

Mr. Lopez-Ramirez's ability to obtain a fair trial, confront the witnesses and present a defense was severely compromised by the loss of the video evidence. The witnesses' ability to recall and testify was not an adequate substitute and Mr. Lopez-Ramirez's ability to effectively meet that evidence was substantially limited.

Mr. Lopez-Ramirez's case is similar to State v. Boyd, 29 Wn. App. 584, 629 P.2d 930 (1981), where the Court of Appeals reversed and dismissed the charges because the defendant made a request for preservation of audio recordings of police transmissions from the time of the alleged acts of attempting to elude a police officer, but they were not preserved. The recordings would have shown specific facts which could have exonerated the defendant. 29 Wn. App. at 590.

Similarly, the charges were dismissed in State v. Burden, 104 Wn. App. 507, 510-12, 17 P.3d 1211 (2001), where evidence was lost inadvertently by the clerk's office where the case was tried. A jacket central to the unwitting possession defense and other items of clothing needed to corroborate the defense were missing.

Here, count 2 should have been similarly dismissed.

3. The evidence was insufficient to sustain the conviction for count 1 because the State did not prove Mr. Lopez-Ramirez's conduct was "intentionally" "open and obscene."

To prove the crime of indecent exposure, the State was required to prove Mr. Lopez-Ramirez intentionally made an "open and obscene exposure" of his person, "knowing that such conduct [wa]s likely to cause reasonable affront or alarm." RCW 9A.88.010(1).

Due process required the State to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. Evidence is sufficient when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The indecent exposure statute does not define the phrase "any open and obscene exposure of his or her person." State v. Vars, 157 Wn. App. 482, 490, 237 P.3d (2010). The term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term. Id. at 491. Since at least 1966, Washington common law has defined this phrase as "a lascivious

exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." Id. (citing State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966)).

The State was required to prove not only that Lopez-Ramirez intended the act, but also that he intended the exposure to be open. State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 181 Wn.2d 1024 (2014).

The evidence failed to establish intentionally open and obscene conduct where the testimony established Mr. Lopez-Ramirez endeavored to cover himself. Yolonda Matthews initially saw Mr. Lopez-Ramirez and reported him to the library staff. RP 448-49. Although Ms. Matthews indicated Mr. Lopez-Ramirez's penis was exposed, she acknowledged that he had a book and was trying to cover himself. RP 455, 467. In fact, Ms. Matthews did not notice Mr. Lopez-Ramirez masturbating for approximately 15 minutes. RP 463.

Public safety officer Timothy Choi testified that when he approached Mr. Lopez-Ramirez, "I saw that his hand was moving underneath the fold or magazine." RP 252. It was not until Officer Choir removed the magazine that he saw Mr. Lopez-Ramirez had "his

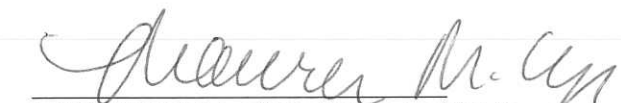
hand on his penis." RP 252. Officer Choi then asked Mr. Lopez-Ramirez to stand up, apparently resulting in the potential further, though unintentional, exposure of his penis. RP 253-54; Exhibits 2-7.

Because the evidence was insufficient to establish Mr. Lopez-Ramirez intentionally engaged in an open and obscene exposure of his person, this Court should grant review and reverse the conviction in Count 1 and remand with directions to dismiss the charge.

E. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted this 14th day of March, 2018.



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. FRANCISCO LOPEZ-RAMIREZ, Appellant.	No. 75546-3-I UNPUBLISHED OPINION FILED: February 12, 2018

VERELLEN, C.J. — Francisco Lopez-Ramirez was arrested and charged with two counts of indecent exposure at a Seattle college campus. Before trial, the security footage for one of the counts was inadvertently erased, but two witnesses testified about the contents of the missing video, which purportedly showed another suspect. Because Lopez-Ramirez does not establish the missing video was material exculpatory evidence and cannot prove the State acted in bad faith, the trial court properly denied his motion to dismiss based on destruction of evidence.

Lopez-Ramirez moved for a jury drawn from a fair cross section of the community, arguing black residents in King County were underrepresented in jury venires. Because Lopez-Ramirez does not establish the representation is not fair and reasonable in relation to the number of black residents in the community and

that the alleged underrepresentation is a result of systematic exclusion, the trial court properly denied his motion and proposed remedy.

And, contrary to his contention, sufficient evidence supported his conviction on count I.

We affirm.

FACTS

The State charged Francisco Lopez-Ramirez by amended information with two counts of indecent exposure based on two incidents on February 3, 2016 at the Seattle Central Community College library. Count I occurred around 4:00 p.m. and involved victim Y.M. Count II occurred around 11:00 a.m. and involved victim S.Y. Police arrested Lopez-Ramirez after the second incident (count I), and count II was added once officers realized he was responsible for the earlier offense.

Count II – 11:00 a.m. Incident

Lopez-Ramirez approached S.Y. in the college library. He sat down at the same table as S.Y. and waved and smiled at her in order to get her attention. S.Y. noticed his zipper was pulled down, his genitals were exposed, and he was masturbating with his hand. S.Y. initially tried to ignore him, but then she quickly gathered her belongings and reported him to the library staff. A still photograph showing the location where S.Y. had been sitting was introduced at trial.

Joel Workinger, a campus security officer, responded and spoke to S.Y., who was upset, shy, and reserved. Workinger and S.Y. returned to the area

where the incident took place. S.Y. noticed J.B. in the book rows about 15 to 20 feet from where she had been sitting and told the security officer that he was the offender. She did not come closer to identify J.B. because she was upset and wanted to leave the area. J.B. was arrested based on S.Y.'s positive identification.

Count I – 4:00 p.m. Incident

Later that afternoon, Y.M. sat down in the same library to study and saw Lopez-Ramirez exposing himself. Two surveillance videos, Exhibits 1 and 8, captured his conduct. Exhibit 1 shows him from the front and side, and Exhibit 8 shows him from behind, together with Y.M. and two other women sitting near her.

Exhibit 8 shows Lopez-Ramirez lingering in the entryway to the bathroom, peeking out occasionally or leaving the area when people enter and exit. He eventually sits down in a chair near Y.M.'s table. He gets up a few times to take books from a cart, sits back down, and specifically moves his body to the right so that his groin area faces Y.M. and the two other women sitting nearby. The video shows Y.M. getting up, briefly talking with the other women, then walking away to report Lopez-Ramirez's activities.

Exhibit 1 shows the same sequence of events from the front and side. It shows Lopez-Ramirez moving his hand up and down in his groin area, staring toward Y.M. and two other women. The video shows him continuing this behavior until the security officer approached him. In photographs taken from the security footage, Lopez-Ramirez's penis is exposed.

The following day, college public security director Elman McClain compared the footage from the 4:00 p.m. incident to the video from the 11:00 a.m. incident. He observed S.Y. reporting the 11:00 a.m. incident to library staff, traced her footsteps backward on the video, and noticed Lopez-Ramirez seated next to her just before she reported the incident. He saw J.B. walk past S.Y. but did not show him sitting down near her. McClain immediately called the police to inform them that S.Y. might have misidentified J.B.. J.B. was released, and Lopez-Ramirez was charged with count II.

Lopez-Ramirez had been convicted twice for indecent exposure in 2013, and stipulated to these offenses at trial. A jury convicted Lopez-Ramirez on both counts of indecent exposure. Lopez-Ramirez appeals.

ANALYSIS

I. Preservation of Evidence

After campus security and police realized J.B. had been wrongly identified, Officer Malone of the Seattle Police Department requested a copy of all surveillance videos. The college security officer provided a USB storage device with the videos. The campus security recording system automatically overwrites recordings after 90 days. Approximately 96 days later, Officer Malone realized the videos had failed to record on the storage device. Officer Malone asked for a second copy of the videos, but the college was only able to turn over the videos of count I, the 4:00 p.m. incident, not the video regarding count II because police had

not initially asked the college to retain it. Only McClain and Officer Malone saw the video related to count II.

Lopez-Ramirez argues the trial court should have dismissed count II because the State failed to retain material exculpatory evidence, and thus violated his due process rights.

The constitutional right to due process demands fundamental fairness and a meaningful opportunity to present a complete defense.[1] "'To comport with due process, 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.'"[2] Defendants have a right to have material evidence preserved for use at trial.[3]

"The government's failure to preserve *material* exculpatory evidence requires dismissal."[4] Material evidence is "evidence which possesses 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

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[1] State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

[2] State v. Armstrong, 188 Wn.2d 333, 344, 394 P.3d 373 (2017) (quoting id. at 475).

[3] Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); see Wittenbarger, 124 Wn.2d at 475 (observing that the United States Supreme Court has been unwilling to impose on police "'an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution'") (quoting Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

[4] State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996) (emphasis added).

reasonably available means.'"[5] Where the dispute concerns *potentially useful evidence*, rather than *material exculpatory evidence*, the defendant must show bad faith on the part of the police.[6]

Lopez-Ramirez contends the video of J.B. was materially exculpatory and could not be replaced. We disagree.

Here, Exhibit 8 showed Lopez-Ramirez committing count I, Y.M. testified that the video was accurate, and it showed the defendant sitting near her. As to count II, S.Y. maintained that the man who exposed himself also sat near her. McClain and Officer Malone testified that the lost video showed J.B. walking by S.Y., but did not show him sitting near her. There was no suggestion that the video showed J.B. committing any crime that could be offered to contradict the evidence ultimately presented at trial.[7]

Lopez-Ramirez relies on State v. Boyd, but in that case,

> [t]he first trial ended with the jury unable to reach a verdict. At both trials, there was a substantial dispute as to whether police arrested the correct individual. The jury was confronted with two divergent lines of testimony. There was no tangible or physical evidence directly supporting either version of events.[8]

The dispute as to S.Y.'s initial identification of J.B. was quickly resolved once campus security personnel reviewed the video footage. S.Y.'s description of

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[5] Id. at 279-80 (quoting Wittenbarger, 124 Wn.2d at 475).

[6] Id. at 280.

[7] See id. ("Also, as the trial court correctly concluded, there was no evidence that any [DNA] retest results would have been exculpatory.").

[8] 29 Wn. App. 584, 590, 629 P.2d 930 (1981).

the suspect's behavior matched Y.M.'s, and the surveillance video produced at trial showing Lopez-Ramirez's behavior strengthened this connection. Unlike in Boyd, the jury here was confronted with a streamlined version of events from the victims, campus security, and law enforcement, and the jury considered evidence showing Lopez-Ramirez was the individual who committed both crimes.

Lopez-Ramirez also suggests State v. Burden is instructive.[9] That case involved a retrial after the first jury could not reach a resolution. Before the second trial, the clerk's office lost the jacket the defendant wore when he was arrested for possessing cocaine. The lost evidence in Burden was "a key piece of evidence."[10] Burden's theory was that the coat did not belong to him and that he did not know drugs were in the pocket.[11] Division Two of this court noted the fit and appearance of the coat were important factors at trial, specifically "[t]he fit of the coat and the name in it raised issues of ownership."[12] The State argued the "tight fit" of the coat proved Burden could feel the paper bag of drugs in the jacket, but admitted the coat had a name in it that was not Burden's.[13] There was also no testimony offered at the first trial regarding "some of the specifics about the coat," because it was physically present as an exhibit.[14] The court agreed with the trial court's

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[9] 104 Wn. App. 507, 17 P.3d 1211 (2001).

[10] Id. at 512.

[11] Id.

[12] Id. at 512-13.

[13] Id. at 513.

[14] Id.

determination that a substitute coat would "raise credibility issues that would prejudice" the defendant, concluding the coat was material exculpatory evidence and thus not merely "potentially useful."[15] Unlike Burden, the missing video in this case merely placed J.B. at the library walking past S.Y. rather than sitting near her.

Lopez-Ramirez does not establish the missing evidence was material exculpatory evidence and does not offer compelling arguments that the evidence was lost as a result of bad faith.

We conclude the absence of the security footage for count II did not violate Lopez-Ramirez's due process rights.

II. Fair Cross Section Requirement

Before trial, Lopez-Ramirez filed a motion to form a jury venire from a fair cross section of the community. Lopez-Ramirez's counsel relied upon a 20-day study by a University of Washington professor purporting to show a racial disparity in representation on jury panels. He requested that he be provided demographic information about potential jurors in the jury assembly room so he could fashion a jury based on ethnic makeup. Counsel suggested after the selected jurors were brought to the courtroom, the parties and the court should conduct their "own little census as to who actually shows up and how they look based on how comfortable

[15] Burden, 104 Wn. App. at 514.

we are doing that, trying to subjectively guess on the folks cultural or ethnic background."[16] The court denied the motion in an oral ruling:

> The statistics apparently show that when compared to the number of eligible black citizens in the community the underrepresentation of black jurors may not be unreasonable even assuming there is underrepresentation. This evidence does not establish that the process by which King County summons citizens and potential jurors is a result of a systematic exclusion of black jurors, therefore the defense motion on this record must be denied.[17]

The court also ruled Lopez-Ramirez's proposed remedy was improper for several reasons.

Lopez-Ramirez argues the trial court erred in denying his motion. We disagree.

Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has a right to "a jury drawn from a fair cross section of the community."[18] "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[19] But defendants are not entitled to "a jury of any particular composition,"[20] and a jury selection process is

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[16] Report of Proceedings (June 6, 2016) at 73.

[17] Id. at 88-89.

[18] Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

[19] Id. at 530.

[20] Id. at 538.

adequate "so long as it may be fairly said that the jury lists or panels are representative of the community."[21]

To establish a violation of the fair cross section requirement, a defendant must show that "(1) the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[22]

In Washington, juries are selected according to requirements of statutes and court rules.[23] Our legislature has a "history of revising the methods for compiling the jury lists in an effort to make the pool of eligible jurors more inclusive and representative."[24] Washington's methods of creating a jury list are broader and more inclusive than required by law.[25] In 2005 and 2009, our legislature undertook considerable efforts to expand the category of eligible voters,[26] such as allowing jurors to report to the courthouse closest to their residence and restoring voting rights to convicted felons, thus making them eligible to serve as jurors.

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[21] Id.

[22] Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

[23] RCW 2.36.054-.065; GR 18.

[24] State v. Lanciloti, 165 Wn.2d 661, 668-69, 201 P.3d 323 (2009).

[25] State v. Cienfuegos, 144 Wn.2d 222, 232, 25 P.3d 2011 (2001).

[26] See Lanciloti, 185 Wn.2d at 664; LAWS OF 2009, ch. 325.

It is undisputed that black residents are a distinctive group in the community, but Lopez-Ramirez does not establish underrepresentation and systematic exclusion.[27]

The challenger must prove "that the representation of the group in venires is not fair and reasonable *in relation to the number of such persons in the community.*"[28] Our Supreme Court has emphasized that merely showing underrepresentation is insufficient.[29] Courts have recognized each method of measuring whether a distinctive group in the jury pool is fair and reasonable has its flaws.[30]

The absolute disparity method examines the difference between the percentage of the distinctive group in the community and the percentage of that group in the jury pool.[31] Our Supreme Court has used the absolute disparity method and held that a level of underrepresentation greater than that claimed by Lopez-Ramirez was insufficient to support a constitutional violation.[32]

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[27] In re Pers. Restraint of Yates, 177 Wn.2d 1, 20, 296 P.3d 872 (2013).

[28] Duren, 439 U.S. at 364 (emphasis added).

[29] Yates, 177 Wn.2d at 20-21.

[30] People v. Smith, 463 Mich. 199, 204, 615 N.W.2d 1 (2000).

[31] United States v. Hernandez-Estrada, 749 F.3d 1154, 1160 (9th Cir.), cert. denied, 135 S. Ct. 709, 190 L. Ed. 2d 445 (2014).

[32] Lopez-Ramirez contends the black resident share of the adult population in the Seattle jury assignment area is 4.14 percent, but the black resident share of the jury pool by persons answering the survey during the 20 days was 2.29 percent. In State v. Hilliard, 89 Wn.2d 430, 442, 573 P.2d 22 (1977), the court held that a level of underrepresentation greater than that at issue in this case was insufficient to support a constitutionally significant disparity. In that case, the black

Lopez-Ramirez suggests the comparative disparity method would be more appropriate here, but courts have recognized this method overstates the underrepresentation when used with groups that are a small percentage of the community's population.[33] It is undisputed that the black population in King County is relatively small and, according to the data presented by Lopez-Ramirez, the comparative disparity for black residents in the Seattle jury assignments is 35.5 percent. In dealing with similar population sizes, courts have rejected constitutional claims involving disparities equal to or higher than that offered by Lopez-Ramirez.[34] Lopez-Ramirez does not establish that the underrepresentation is constitutionally unfair or unreasonable in relation to the size of the black population in the community.

Lopez-Ramirez also contends the underrepresentation is the result of systematic exclusion in the jury selection process. Specifically, that the "court does not effectively summons people who live in poorer, more mobile zip codes with more minority residents."[35]

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resident population constituted 1.3 percent of the jury pool and 4 percent of the county's population.

[33] Hernandez-Estrada, 749 F.3d at 1162; United States v. Weaver, 267 F.3d 231, 242 (3rd Cir. 2001) ("When comparative disparity has been used, it has been emphasized that the significance of the figure is directly proportional to the size of the group relative to the general population, and thus is most useful when dealing with a group that comprises a large percentage of the population.").

[34] Weaver, 267 F.3d at 243; United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006); United States v. Chanthadara, 230 F.3d 1237, 1257 (10th Cir. 2000); People v. Ramos, 15 Cal. 4th 1133, 1159, 938 P.2d 950 (1997).

[35] Appellant's Br. at 17.

A mere showing of underrepresentation does not establish systematic exclusion of the group in the jury selection process.[36] Systematic exclusion requires blatantly different treatment of underrepresented groups.[37]

Lopez-Ramirez cites cases from other states and federal authority, but they are not compelling in this setting. In view of the Washington legislature and King County's efforts to expand minority participation in jury selection, Lopez-Ramirez fails to establish systematic exclusion.

Lopez-Ramirez's fair cross section challenge fails.

III. Sufficiency of the Evidence

Lopez-Ramirez argues there was insufficient evidence to show his conduct as to count I was intentionally open and obscene, as required by RCW 9A.88.010. He relies largely on evidence that he attempted to conceal himself.

Under the sufficiency of the evidence test, we examine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilty beyond a reasonable doubt."[38] All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.[39]

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[36] Duren, 439 U.S. at 366.

[37] See id. ('Such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn in Jackson County.").

[38] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[39] Id.

RCW 9A.88.010(1) provides, in relevant part:

> A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.

"Open" in this setting requires an act "such that the common sense of society would regard the specific act performed as indecent and improper."[40]

Here, the security video shows Lopez-Ramirez intentionally exposing his genitals to Y.M. and two other women. Although he shielded his genitals from individuals walking by, he positioned his body and pelvis so that Y.M. and the two other women would be able to see, and Y.M. did see. The "common sense of society" would regard Lopez-Ramirez's behavior as indecent and improper.

We conclude a rational trier of fact could have found Lopez-Ramirez guilty beyond a reasonable doubt.

We affirm.

WE CONCUR:

[40] State v. Eisenshank, 10 Wn. App. 921, 924, 521 P.2d 239 (1974).

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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. 75546-3-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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